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FATCA FACT FINDING FORUM

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Part 3 of 9

Abby Deshman
FATCA Privacy Rights Issues

Transcript Prepared By:
The Isaac Brock Society
“Liberty and Justice for all US Persons Abroad”
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5 **Abby Deshman:** Thank you very much. It's a pleasure to be here. My first caveat, I did go
to NYU. I did take the LLM. I have never taken a legal tax course in my life. I can barely
fill out my own taxes so this is why I asked Jon to do such a fabulous intro. I'm a lawyer
with the Canadian Civil Liberties Association. We have been around since 1964, fighting for
fundamental rights and freedoms. This is the first time a tax issue has come across my desk.
10 I think it is **absolutely** vital that we're here on this file, and I'll tell you why.

But, before I get into it, I do want say that I have a really personal connection with this issue.
I am one of the US Persons. I will out myself. I don't know where this video recording is
going. It's OK. I was not born in the US; I did not live in the US until I went to school there
15 for a year. My parents are both from the States. They came to Canada in the 70's. They
didn't like what was going on in the US. They never moved back to the United States but,
like good dutiful parents that filled out all the forms for their children, when I was very small
they filled out a US Citizen Born Abroad form for me, so now I am a US Citizen. I have
never made use of my US citizenship. I do not have a passport. I did not have a social
20 security number until I went to the States for education and now this issue. I've heard of it
before outside of my job from my mother who stopped filing tax forms many, many years
ago since she found she was spending thousands of dollars and never owed a cent, became
extremely concerned, extremely concerned that we were going to lose our house, that she had
to maybe get into compliance, talked to a tax lawyer, said 'what do I do?'. Said, it's going to
25 cost you tens and tens and tens of thousands of dollars to try to rectify this problem. Still
does not know what to do. So I approached this issue, it was a really personal issue for me,
and then I got a call at my desk one day and someone said 'Where's the Canadian Civil
Liberties Association on FATCA and the FBAR and all of these things?'. And I started to
think about it and it took me awhile but I've come around to say this is absolutely a civil
30 liberties issue.

So today I'm going to talk to you. This was a great summary. I'm going to highlight a few of the things that Jon mentioned that raised specific privacy concerns. The equality arguments are really interesting. They're a bit complicated and we can get into. I'm not a, I do privacy; I'm not an equality expert. We can talk about that if there's a bit of an interest. 5 Frankly, I'd need to do more research to be a real expert on it.

So, I'm going to highlight some of the privacy concerns in these regulations. I'm going to highlight why CCLA is particularly concerned about them; how this fits into a larger narrative because this is not just an issue in the taxation area. There are other files in our 10 office right now that raise these kinds of issues that I think this taps into a larger narrative of what's happening between Canada and the US and on the international scene that's really important to recognize. And, then finally, what are we doing about it; what can you do about it; why do I think this is actually an issue that can get a lot of grassroots traction, more than some of the other issues on my desk have actually a hope of getting the government's ear and 15 maybe making some important progress.

So, first, what in these regulations raises privacy concerns? So much, so much. So, if you look at how broad these regulations are, we've got to define what US Persons are. US Persons: definitely citizens, former green card holders. People who spend time in the United 20 States, most of them will not know they are a US Person. If the banks are required to report on this, what does that actually look like for Canadians walking into a bank, opening a bank account, trying to get banking services? What does that mandate Canadian banks, what information does that mandate them to collect about Canadians? Now, in Canada we have privacy laws that are pretty good, better than many other jurisdictions. Definitely could use 25 improvement. But our privacy laws say you are only allowed to collect from your customers what is reasonably necessary for your business. Right now they do not need to know when you open a bank account how many months you spent in the US last year, have you ever worked in the US, do you have a property in the US, do you get US income. They don't

need to know that. There's..., and it's actually required based on really simple identification, you're a resident of Canada, you can open a bank account. It's a really essential part of living in this society we live in. Try to live without a bank account or any of the financial institutions, because it's broader than just banks.

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It's extremely difficult, so when we're talking about privacy, if you just look at this it could mandate, and this is just part of what I'll get to later, could mandate a really searching inquiry by the banks to try to figure out if you're a US Person. What they need to know could be extremely broad even if they don't need to ask all these questions. So there's some suggestion now because the Canadian government is negotiating an information exchange agreement with the US. Don't know what that will look like. Don't know what the Canadian government is going to try to get in this. Don't know if they're actually seriously entering these negotiations. But the agreements that are posted as template agreements now say, 'well banks, we understand, we aren't going to make you search into your customers' lives. But, if there is something on the record, if there's a bank that has a customer where an address is in the US, if you get payments from the US, we're going to ask the customer, require them to sort of whether or not they are a US Person and then if there is something that's inconsistent with that and the information you already hold, that's going to be caught up and you're going to have to disclose that'.

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And, even that is so concerning and here's why. We're seeing all kinds of areas where there is enormous information sharing going on between Canada and other countries. And we know, from past instances, that when information is shared across borders, it loses all kinds of protection. So obviously the most, the gold star example of how bad things can get is Maher Arar. Right? That was directly a consequence of Canada, Canadian officials, improperly without the right caveats, sharing information with the US which then led directly to his extradition and torture. So this is what information sharing can do. It's not the same class of information sharing, so some people have said 'well yes, those are national security

secrets. You actually think that sharing the banking information is going to lead to torture', you know.

What is the actual privacy implication in sharing this information? Maybe your name, maybe an address you had in the US, maybe your bank account information but we know, and it's largely from whistle blowers in the United States, that the United States is extremely interested in collecting information from all kinds of sources. They have enormous information databases; they have enormous surveillance programs; they have warrant lists access to all kinds of communication coming from inside and outside the US and it's not because each of these emails, each of these small pieces of information is incredibly important to them. It's because when you collect all the data, when you collect who you're talking to, when you're talking to, what bank accounts you have, how long did you spend in the US last year, how long did you spend in other countries, where did you go to school, where were you born. When you collate all that information, it allows for an analysis and it allows for analysis by security agents; it allows for analysis by government agents and it's this meta data that allows people to build these profiles about millions of individuals.

This is what is happening in the United States right now. It's not happening in Canada, yet, but if you pay attention to the dialogue over internet access, lawful access, Bill C-30, accessing our personal information, trying to figure out who we're communicating with while trying to keep track of all this information. Is the Canadian government interested in all these kinds of databases and these kinds of profiles? Absolutely. And if the US is going to do it for us, why do we need to have strong laws in Canada? Right? If the US is going to intercept all of our communications, the Canadian government doesn't need to have warrant list access. They can just ask for that information from the US. And if we have increased information sharing, that gets much easier. So, all of these international information sharing, little bits and pieces here and there are extremely concerning. And, the fundamental question for us, always, whenever we hear that a company, the government wants to collect, retain and

disclose personal information, is 'why?'. Why do you want to do this? You know, there can be perfectly legitimate reasons for people to collect, retain and disclose personal information. There can be really important reasons to do that.

5 But, the truth is for this particular part of it, there is no good reason. And, I take the Canadian government's own statements on how many tax evaders there are in Canada. We are not a tax haven, right? This is not a rational policy based on a real problem that we need to solve in government. And maybe, you know, giving up some of our privacy is a reasonable thing to do? No, no, no. That's not what this is about, right? There is no reason
10 that the US government needs all this information on Canadians and there is absolutely no reason that the Canadian government should acquiesce and give all of this information over. So, I think there are enormous privacy concerns and we do have privacy legislation that would protect us. One of the requirements of the regulations themselves that anyone who is asked for this information sign a consent form so that they waive their privacy rights.
15 Usually privacy is based on consent so you can consent to disclose your personal information. We've seen this in other contexts, though if you actually look at whether that is voluntary informed consent, I do not think so. Try living without a bank account. You're not going to be able to do it, right? So, there's going to be, if this goes forward, legal battles about the meaning of consent, about is this really necessary, about the very specific minute
20 details. And, there's a couple of various ways that you could think about this, but in the abstract it's extremely hard to engage in those details in this analysis because this is a moving target.

So, if you look at the regulations, and there is a great paper that I read, written about, you
25 know, are these regulations enforceable in Canada, do people need to be worried, so you write and you do all that legal analysis and then they start to negotiate an intergovernmental agreement and then you're into a completely different analysis and you could do it based on what they think they're doing with the model agreements but then they change the terms. So,

it's just a moving target. I don't have a solid legal analysis of all the ways that this could be challenged, but from a policy perspective, just looking it outside the law, serious privacy concerns with absolutely no public policy rationale that I can understand.

5 So, this is absolutely a civil liberties issue. How does it tap into larger narratives that we're seeing elsewhere? So, if you've been listening to a lot of the joint announcements that have been coming out outside the tax regulation field between Canada and the US, you're going to hear things like Beyond The Border Initiative, The Security Perimeter. Just the other day, they released an announcement that they are going to have an Integrated Law Enforcement,
10 Immigration Identification agreement; they're going to be collecting biometrics from specified people, from specified countries and sharing that between a core group of international partners. These are so opaque. All of these agreements are being negotiated by the executive, with other executive branches outside of Parliament.

15 It is incredibly difficult to figure out what's in them, what are the safeguards for our privacy, what are the safeguards against discrimination? And, the real fear is that what we're going to see (Canada is not a big player in these agreements, right?), what we're going to see is not that our rights are protected in the context of these agreements. What we're going to see is a downgrade of our domestic rights to match the lowest common denominator. So, this is
20 already happening in some areas. There are already some really concrete examples of situations where our rights in Canada have been downgraded because of demands on cooperation and lower rights in the United States specifically, so there are cases from the 90's that CCLA litigated about random drug testing in the workplace.

25 Drug testing randomly in the workplace, briefly, are just discriminatory if they are done on a random basis. They don't measure actual impairment; they catch all kinds of people no matter whether you took the drugs, no matter if you are a fit worker. They have a serious impact with very little help towards the actual safety of the workplace. So, litigated those

cases, privacy concerns, human rights concerns, and won at the Court of Appeal of Ontario. In the US, they drug test all kinds of people, left, right and center. They drug test teachers; they drug test all truck drivers; they drug test a huge swath of their population. Now, all of the Canadian truck drivers who want to cross the border and drive in the US need to be drug
5 tested in order to be able to have the licensing to cross into the US, so all of a sudden, the human rights protections that we established, that we fought for, that we won are being eaten away by the necessity of cooperation across borders. And the way that human rights work is that if it's an actual job requirement and maybe that you drive in the US is an actual job requirement, then your employer is going to be able to demand what you actually, some of
10 these tests, right? So one really clear example, all of a sudden drug tests, maybe not so clearly discriminatory in all workplaces.

Another example that is happening right now so (I always forget this acronym) their International Traffic and Arms Regulation provisions in the United States. So what are
15 these? These are things provisions that apply to people from certain countries. If you're born in a certain country, and there's a long list of countries and you can imagine the countries that might be on this list, right?, it's a pretty standard list that's extensive and standard, you need to get specialized security clearance from the United States to work on a long list of contracts. So, this includes military procurement contracts, helicopters, cars,
20 armoured vehicles, tanks, things like this. All kinds of companies in Canada that are working on these contracts in order to get these contracts need to put their workers through this high security clearance, based solely on where they were born. It doesn't matter how long you've been in Canada, how long you've been a good worker, whether you have a criminal record, whether there is any hint that you have ever been involved in illegal activity, how much
25 security clearance you might have in Canada, none of that matters. If you were born in a certain country, you have to go through this heightened security clearance from the United States, not once – every single time a new contract is signed. So right now in Canada, we have people who every few months are being sent home from their job to sit and wait until

another security clearance comes through. And, this has been happening for over eight years. There's one man who's been sitting home at eight months at a time sometimes, perfect employee you know – twenty year employee, engineer, nothing in this person's history except that he was born outside of Canada in a certain country. Sometimes he has to come to
5 work and wear a big red tag around his neck to make sure he can't walk down certain aisles where workers are working on these contracts. Talk about discrimination, right? But if you look at whether it's a bona fide job occupational requirement, right, this is a US contract, they're imposing this upon this company, what is this company supposed to do? Our human rights protections get downgraded. We're litigating it but it's the same thing as the truckers,
10 right? It's a downgrade of our protections that we fought hard to establish based on international cooperation and the United States which doesn't have the same protections.

So, when we look to the privacy context and we look to all these international information sharing agreements, we know that people have been tortured in the United States; we know
15 that that information is used; we know that the privacy protections, particularly for non-American citizens, are lower; are we confident that all of our privacy protections will remain intact? Even domestically, within Canada, once the Canadian government starts to sign all these agreements, absolutely not.

20 Could we very well see if the Canadian government signs this agreement, a change in the banking regulations, a change in the privacy laws to make sure that whatever they agree is now a compliance with Canadian regulations and Canadian laws? Absolutely, and that will have an impact on all of us. So, I think because it is happening in these larger narratives, because this issue has such wide, broad implications for so many Canadians who really have
25 nothing to with the United States, because it will mean a change in our domestic rights, our domestic protection, it's absolutely a civil liberties issue.

And, so I'm really glad to be here today. It's terrifying to listen to personally, on a personal level; I think I should renounce my US citizenship that I never asked for and never used, never wanted and now would absolutely like to get rid of.

5 So, what can we do; what are we doing? So CCLA has written a letter to the Department of the Treasury about this specific intergovernmental agreement that they are thinking about signing. Usually when I write to the government, when I look for government statements on issues I'm working on, there is not a lot of helpful government rhetoric, there's not a lot of helpful government statements out there. In this case, the Canadian government is on record
10 saying there is no need for this in Canada. That's a really strong tool. The banks I don't imagine they want this. I've seen their submissions to the US ~~Parliament~~ Treasury. It's extremely costly for them. So you have a government onside; you have banking commercial industry onside; and we should have millions of Canadians onside if they actually, even if they don't care about the larger privacy concerns, the policy concerns that I'm really driven
15 by in my job, they should absolutely care about the implications for themselves for their children, for anyone who might want to go and spend a year in school in the US, they should absolutely be.

So, it's really an education challenge. It was an education challenge for me, trying to
20 understand what this was, and getting the word out. So, I think it is incredibly important that you are here, that you go back and that you talk about this, so we keep the pressure on. There is no domestic win for the government in passing these regulations, right? There's no domestic constituency that's going say, yeah, this is a really good idea. So when no domestic constituency, and we're the ones who elect the politicians, is going to be fighting
25 for this, it really becomes an opportunity for the citizens, for people who are within Canada, to make their voice known and try and make our democratic government work on our behalf. So, I do think this is an issue where the government has listened to people in the past; they

could listen to people in the future. We don't always bow to US demands. They have stood up in the past.

We will continue to advocate this. If and when agreements are signed or actual law comes into place, we'll definitely also be looking at the Constitution, privacy legislation, complaints, legal challenges. It's just extremely difficult to pin stuff down in the absence of any firm text and to be honest it's complicated. So, we will be continuing to move forward on this. And, I invite you to write to the Department of the Treasury. They are soliciting submissions. They will be listening to Canadians. They've listened to people in the past so I think this is a political democratic fight. It's great you're all here.

So let me make sure I'm getting ... it's the Department of Finance, I'm sorry. And, I have copies. I have extra copies of our letter and you're welcome to come down and take them, as well as steal whatever you want from them. Yeah, you want me to read the letter. OK, great.

To whom it may concern:

Re: Negotiation of an information exchange agreement with the United States

I am writing to register the Canadian Civil Liberties Association's (CCLA) concerns regarding the privacy and human rights consequences that are implicated by the proposed information exchange agreement between Canada and the United States.

The Canadian Civil Liberties Association is a national, non-profit, non-partisan organization with thousands of supporters drawn from all walks of life. The CCLA was constituted in 1964 to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. The CCLA's major objectives include the promotion and legal

protection of individual freedom and dignity against unreasonable invasion by public authority, and the availability of robust and effective accountability mechanisms for democratic institutions.

5 *Canadian's privacy and the serious consequences of international information-sharing have long been priority issues for our organization. International information-sharing can result in significant privacy and rights violations; one not need look farther than the extensive Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar to find an example of the dire consequences that can flow from a loss of informational control. In the context of the proposed Canada-U.S. Security Perimeter and increased law enforcement cooperation between the two countries, CCLA is urging that commitments to privacy be respected and not lead to domestic rights violations.*

10 *It is our understanding that, pursuant to the United States Foreign Account Tax Compliance Act (FATCA), the U.S. is interested in obtaining the personal and financial details of all "US Persons" that hold accounts with "foreign financial institutions." The scope of information that the US government is seeking under FATCA is alarmingly broad. "Foreign financial institutions" is defined in the U.S. Internal Revenue Code as any foreign entity that,*

(A) accepts deposits in the ordinary course of a banking or similar business,

(B) as a substantial portion of its business, holds financial assets for the account of others, or

25 *(C) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities (as defined in section 475(c) (2) without regard to the last sentence thereof), partnership interests,*

commodities (as defined in section 475(e)(2)), or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities.

This definition is expansive enough to include “all chartered Canadian banks, stock-brokers, and virtually any entity engaged in the financial sector in Canada – ‘everyone from financial advisors to pension funds.’ ” This very broad category of institutions and individuals is required to report on most “US Persons” holding accounts – a category of individuals that, with some exceptions, is drawn from federal income tax definition. This would encompass not only U.S. citizens, but also many former green-card holders that have permanently left the United States or even individuals who have spent a substantial amount of time in the U.S. over a number of years. Finally, the information the U.S. government is seeking on all these individuals includes the person’s name, address, account number, account balance, gross receipts and payments from the account and their US taxpayer identifying number. The proposed financial penalties envisioned for individuals and financial institutions that do not comply with this regime are significant.

CCLA appreciates that the IRS’ Model FATCA Agreement, and the agreement being negotiated currently with the United States, may envision modifications of these reporting requirements. Our starting point, however, is that Canadians’ privacy should not be invaded without an objectively compelling purpose. And, as Minister Flaherty has already publicly stated,

...put frankly, Canada is not a tax haven. People do not flock to Canada to avoid paying taxes. In addition, we have existing ways of addressing these issues with the United States through our Bilateral Tax Information Exchange Agreement. As I said, we share the same goal of fighting tax evasion and we already have a system that works.

To rigidly impose FATCA on our citizens and financial institutions would not accomplish anything except waste resources on all sides.

(Abby Deshman: This is something, I'd write as well. He puts it better. I like that he's said it.)

This should be the Canadian government's starting point as well. Privacy-invasive collection and disclosure of personal information should only be done when necessary. Under the Canadian government's own assessment, that threshold has not been met in this case.

The CCLA therefore urges the Canadian government to stand up for its citizens and residents and resist invasive, unnecessary, foreign-imposed violations of individual privacy. Given that negotiations with significant privacy consequences are ongoing, we suggest that at a minimum the Privacy Commissioner of Canada be fully involved in the discussions.

Sincerely,

Nathalie Des Rosiers

General Counsel, Canadian Civil Liberties Association

So, that's our letter.

Abby Deshman: Yes. (Question, not audible.) Oh yes, absolutely.

(Question, not audible.)

Abby Deshman: Yeah, that's a good idea and I will, I'll make sure our letter gets to them as well.

(Question, not audible.)

Abby Deshman: So, it's not technically part of a bigger package. There are many other
5 pieces of information-sharing being negotiated or being contemplated. So, that can be
anything from cross-border law enforcement which is a piece of legislation that was passed
through the House this summer that allows US police officers to operate as officers in
Canada to the immigration treaty that was just negotiated and signed but will presumably
need implementing legislation as well to regulatory harmonization and to etc, etc., etc. They
10 are all different pieces. The Security Perimeter and Beyond The Border Working Group are
taking on a lot of those pieces. FATCA isn't under that, but I absolutely see it in the same
vein. Yup. Any other, any questions? Anything else? OK.

Jon Richardson: When people are asking questions, if it's possible to speak into the
15 microphone because this is an attempt to kind of put together a record of the day.

Peter Dunn: I just wanted to thank you for what you had to say. I wrote a blog article on
that about a year ago in which I maintained that the need to know is not satisfied and you
have said it in much more eloquent terms why that is the case. Thank you.

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Commenter: Anybody can throw rocks, but I was hoping that the experts here would at
least have, as you've provided us a specific destination for those rocks. But, I think at the
same time, I'm hoping that our submission as a result of this will include some very specific
things which the government should be doing. So, my question would be what specific
25 should be done and that in your case and to avoid saying the same thing for the other
presenters, I would hope that you could throw as many rocks as you want, but tell us how to,
what the Federal Government should be against FATCA. Thank you.

Abby Deshman: So, I think there is flexibility built into the regulations. The US Government can exempt, maybe those who have read these regulations more than I have, but my reading is that the US Government has the ability to exempt financial institutions, to exempt large swathes of what's already covered. I would be looking for a complete exemption for people living within Canada.

Well, so if I'm asking the Canadian Government what do I think, do I think any privacy invasion is justified in this context? No. So, if my privacy should not be invaded, if there's no good reason for me to give over this information and I don't think there is, I want the government to stand up for my privacy rights and say, no you don't need this information, US. Exempt us. We're a major trading partner. The consequences for our citizens, for our residents are enormous. The costs are going to be enormous and we want an exemption from the legislation. If you want to negotiate it with other countries, you can despite the craziness of US tax regime.

So, that would be my, that's my starting point for this, especially since it's so opaque. It's really, really hard to come up with specific recommendations when you don't even know what's being proposed or how it's going to impact. It's just really hard. So, when we were writing this letter, there is no justification for any of this privacy violation. We should be exempt from this. We are not a tax haven and we should not be treated as a tax haven and people who have accounts with Canadian financial institutions should not be required to report all this information.

(Commenter: inaudible)

Abby Deshman: They're in negotiations right now. Who knows what this model agreement will look like? (Inaudible comment.) You do, oh. There we go, maybe we'll learn later what this might look like. So, not all information-sharing is bad. We're not absolutists. Not all

privacy violations are unjustified. Maybe there's very good information that Canada can report on individuals who are specifically flagged under Canadian regulations as possibly tax evaders and those specific... Right, right, I already do that. So, I mean, but those are the kinds of things that would we be standing up here today if that's what was proposed? No. 5 So, there could be, you know, a useful information exchange agreement that's negotiated between Canada and the US. Right. But... (repeat it for the record)

Professor Christians: The agreement on information sharing that currently exists between the US and Canada is the strongest one in the world. It is automatic information exchange. 10 There's no other way to put it. There's not an easier way to say that. So, I think what you're saying is put words in their mouth. Reject the IGA. Do not sign an IGA. Do not sign, if you're a financial institution, do not sign a PFFI. And, wait for the US to actually withhold and then start suing. Right, but you cannot agree to something. As soon as you agree, you just gave up everything that you just explained. It is critical. Not to step on your...

15 **Abby Deshman:** Yeah, yeah, no, I'm not an expert in the information-sharing in the taxation area. It may be that there is nothing else that we could reasonably do in order to share information on any reasonable basis that we're not already doing. I mean if that's the case, if there is no extra agreement, then absolutely, there should be no extra agreement at all. So 20 our demand to the Canadian government is, you know, if there is no rationale to put this in place, do not violate Canadians privacy rights, which maybe means don't sign any agreement with the United States.

Questioner: Can you just clarify what banks are allowed to get from people at this point. I 25 think, I've never had any the experience of filling out a form that asked where I was born. I've never had any US money going into a Canadian account so how could they find me?

Abby Deshman: So, maybe others are better placed to answer that question because I just don't know specifically under the law what specific pieces, it's in the paper, so I could look it up if you come up afterwards, But, right now, they are limited by privacy legislation and (do you want to answer that). They will be limited by privacy legislation to what they actually need in order to open a bank account and it would be very minimal. They have no reason to ask right now as our law is. They have no reason to ask where you were born, what citizen of a country, and you have to be a resident of Canada I believe. But, there would be no reason for them to ask that and, in fact under privacy legislation, they would not be allowed to ask for extra personal information beyond what they reasonably need for their business requirements.

Professor Christians: So just to add to that, Canada has 'know your customer / anti-money laundering' regulation so every bank is supposed to now who opens an account. Right, so they ask you for information. They will ask you for an address. OK, they have your address, right? Then they give you an account number. Now under PIPEDA, however you say that here, PIPEDA is your privacy protection. Right, that's what you look to, to say what can Canada do with the information, with my private information, and the answer is that PIPEDA authorizes the banks to give your financial information, which could include your name, your social insurance number, your account number and include money you get into your account, you know income in your account, to the Canadian Revenue Agency. But as against all others, no. So, if your bank for example was to send me a letter about your account, you would sue the bank under PIPEDA for violation of your privacy and you would be entitled to damages against the bank for disclosing it to me. So, the answer is then, under FATCA, your bank is going to bring you a form and say, waive your rights to PIPEDA. And, if you don't, closing your account. No, that's the trick. That's right. It's already happening I understand on an informal basis. Right.

(You're supposed to be on mike.)

Jon Richardson: OK, this is a really incredibly important point for people here today to understand. This has not yet begun in Canada. But, US Persons in Europe, especially Switzerland, are in a position where they've been long-time customers of banks. These are 5 people who live in Switzerland and are just trying to live their lives the way you and I do. It is not possible to live a life without a credit card, without a bank account, etc., etc. And they are simply being told 'Enough is enough. Out.'. OK, on an administrative level they don't want to deal with US citizens because of the cost and because of the fear thing. But, in this particular case, if FATCA becomes a reality in Canada, in the way the US is proposing, what 10 that will mean will be if a bank determines that somebody is a US Person, could, could, could be a US Person, they will then be given this form and asked to waive their rights. If they do not, FATCA requires, requires the bank to close the account. So, essentially, one effect of this is to create a whole class of people who will be permanently disabled from normal day-to-day living, and that's leaving aside the issues of retirement planning and saving that I 15 alluded to earlier. So, I mean this is an issue. I read a very interesting book awhile ago by James Dale Davis(?). He's a historian, and what he said in the book was that usually people don't realize a major historical shift 'til 200 years later, or a hundred years later, and then they come back and they point to the day. I would suggest to you that this legislation which the US is trying to force on the rest of the world is of such magnitude that if it is a successful 20 that a hundred years from now, people are going to be looking at FATCA as a major shift in the way people live and a major shift in the way the world operates.

Now, today it's hard to get any interest in this topic at all. Do we have any members of the Liberal Party here today? I guess not. How about the NDP? Nope. How about the current, 25 how about the Conservative Party that's the government? Nope. How about the Green Party? Nope. Only one political party has seen to be fit to be here today, and I am going to do a plug, an unexpected plug, because it's very important that people recognize not only the astuteness and the courageousness of the Progressive Canadian Party taking this issue on

front and center. John F. Kennedy for his thesis wrote something called ‘Why England Slept’ which was based on a book called ‘Why England Slept at World War II’ in other words not paying attention to the threat of the Germans. Somebody could write a book today called ‘Why the World is Sleeping’. Believe me, there’s got to be a wake-up call on this.

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Professor Christians: So, that’s the question though for privacy rights in Canada, that is, can there be a challenge mounted to a foreign government asking Canadian institutions to require waivers or close accounts? Is there any, I’m just trying to work out whether there is legal adjudication, you know what I’m saying? Yeah. A basis for adjudication of that – it’s not voluntary; it’s either you waive or your account is closed. Is there not some sort of privacy related cause of action?

Abby Deshman: I mean, so here’s the difficulty, and we’ve litigated this idea. It’s based on consent, right? So, what they’re saying is, the way they get around the privacy laws is they say, ‘well, you consented, you signed this paper and you consented to give up your private information that otherwise would have been protected. We’ve litigated this in other contexts and specifically in the police record check context, so what happens to many, many, many, many people in Canada is they go, they apply for a job, they finally are offered the job, and the employer says, oh, by the way, you just need to go down to the police station and do a police background check. You get to the police station and the police say ‘we can’t release your private information unless you consent – you have to sign on the dotted line and then the person says well, I want the job, so they sign and then they have to bring that private information back to the employer or the volunteer agency or social service agency or anything like that. So far our courts have said, ‘that’s not consent’. Said that’s not consent when you have something so fundamentally important to you as a job, a bank account, something that is not optional to live in our society, this is not a person who is freely giving up their private information. Had a really bad decision from the courts that said, yes, it is

consent and that person did consent to give up their privacy rights. So, we continue to push against this. For us, it's notification and acknowledgement of notification, but just because I'm notified doesn't mean that I consent to something. I have no choice in the situation here, no effective choice. So, we do continue to fight in the courts. To date in the cases that have been raised, it's not gone well.

Professor Christians: So, just a follow-up to that. Are you also a human rights or charter rights ...

10 **Abby Deshman:** We do a lot of constitutional rights, yeah.

Professor Christians: So is there a right to banking in Canada, is there some sort of constitutional charter right to financial access?

15 **Abby Deshman:** Umm, not that I'm aware of, no, so the rights that I would think would be most implicated, so Section 8, *Search and Seizure*, you have a right to be free from unreasonable search and seizure. And, the *Charter* is always going to require Canadian government action if there is a piece of legislation that is passed but could be challenged under the *Charter*. So, that's one way that actually.

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Professor Christians: Let's think this through. Could we come up with a plaintiff who has been denied an account or has had an account closed because they wouldn't waive their privacy rights? So now you don't just have the person voluntarily consenting to give up their privacy but actually being denied a service if they won't give up that right. So, it's not like a
25 job which is... I don't think I have a right to a job, right? I don't think there's any particular right.

Abby Deshman: They've decided you don't.

Professor Christians: But if I have a right to banking or financial services, is there any kind of financial ... I don't know.

5**Abby Deshman:** We've also litigated in this -- do you have a right to a job, a right to employment? They say, no. The *Charter*, you don't. If you don't have the right to a job or a right to an employer. It's hard to ... but there may be case law on it, but it would probably be a similar argument.

10**Professor Christians:** Does anyone know, I think there is an articulated right to open an account in Canada for a resident, is there not? A privilege?

Abby Deshman: Then this is part of the concern is if it's not part of the *Charter*, then it's part of the *Constitution* this would be in banking statutes and regulations and part of my
15concern is that if they identify legal hurdles to the implementation of one of these, they'll just modify those legal hurdles and modify the statute is when they implement the agreement. Actually, one of the advocacy considerations that advocates or lawyers are going through this and should keep in mind is there's this idea of 'charter proofing legislation or challenge-proofing agreements'. And, it would seem most clearly in the anti-terrorism context where
20you had expert after expert after expert go before the government when they're proposing legislation saying this is unconstitutional and this is unconstitutional and this is unconstitutional. And what is the result -- they amend slightly to address those concerns and make it a much more difficult legal challenge in the courts. So one of the advocacy concerns on this ongoing dialogue is how much do you point out legal flaws so they can then amend
25those and eliminate those legal flaws when they push this through versus just say, 'No, don't do this'?

Professor Christians: Yep. If I was doing this from the rights angle, I'd be looking for a challenge based on my right to open a bank account. Because if that's being curtailed by a foreign jurisdiction, which is giving you either or, either you give up your rights to privacy or you give up your right to banking, that seems like a (inaudible, legal term?). There's no good choice there, so if one of those two is a fundamental right, it's a different ... In other words, I understand what you're saying, there's a precedent which is a negative precedent, it's a bad precedent – you can't do, be, asked to do, stand on your head to get a job but can you be asked to stand on your head to open a bank account? And, I just, as coming into Canada and trying to open a bank account, it has been clear to me that I have a right to open a bank account in Canada. I've seen this. I haven't paid attention to it because it's not on my radar, but I have seen this somehow.

Abby Deshman: I would ... Yes, totally, it is something definitely, definitely to look into and I would be surprised if that right stems from the Constitution.

Jon Richardson: Right, I think that is a very important question you raised, but I think perhaps to make the question a little more specific, I think the question should be 'is there a Constitutional right to open a bank account', which is different from legislative. And, the *Constitution* is always evolving and this is something that someone would want to argue for. But that would be, I would think, the right question to ask.

Commenter: Well, to follow up on that, it may not be a right to have a bank accounts, that's certainly not in the *Constitution*, but the right to function in the society and to access normal things that the society has, if that is so contingent on having bank accounts, then that becomes attached to a fundamental right.

Abby Deshman: Yes, absolutely and I think it's definitely, I mean you cannot function in Canadian society without some financial institution.

Professor Christians: The point is you're saying, 'Canada, you cannot give that up to another country with an agreement. You can't agree away our rights through international agreements.' Can they?

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Commenter: (microphone issue) OK, yeah, I'm an engineer; I should have been able to figure that out but I'm a bit long-sighted.

Yeah, I'm a civil engineer, but it seems to me if the current courts are interpreting the
10 legislation that exists in a particular way, which is clearly wrong, you have to change the
legislation. It's that simple; you have to change the legislation. Stop giving all this money to
the lawyers; change the legislation to make it consistent with what the Canadian public wants
to live under.

15 **Professor Christians:** And, I'll just add to that, I think the most pernicious part of this is
that you don't have to be a US Person to lose your right to bank in Canada. You only have to
have an indicia of possible US Personhood which means if you were born in the US, you
could be a US Person, your account is subject to closure even if you are not in fact. And
there is no way to litigate this? There's no way to protest? There's no forum to go to your
20 bank and say, 'wait, wait, wait – don't close my account'? You can't do it. They've tied
their own hands. They will close your account on suspicion that you might be a US Person
and that includes, I think, you should look at the indicia list. You'd be quite surprised to see
how broad that is. And when you figure that that cannot be adjudicated, that is, that means
there's no means of remedying a bad categorization. If someone makes a mistake and thinks
25 you're a US person, there's no way to fix that problem.

Abby Deshman: And, this is so reminiscent of so many other similar battles. You think
about it – US no-fly lists, it's exactly the same thing. When we harmonized our

transportation safety regulations, we take on US no-fly list requirements. The number of people they have on that no-fly list is astounding. The lack of proof that they have, that these people are actually risks to public safety – alarming. And, no meaningful due-process protection to try and get your name off that list. It is a black box and if you are on it, you will not be flying over or into US territory.

Professor Christians: This is that same black box?

Abby Dushman: Yes, exactly. It's the same kind of thing and a complete downgrade of legal protections to really low standards internationally to harmonize our regulatory systems.

Jon Richardson: One of the things I think this comment raises that I suspect is of interest to some people who may be here today is that once they determine you are a US Person, that's it – you're a US Person, well one of the issues for Canadians is that there are a very, very large number of people who came from the United States, became Canadian citizens at a time when the oath they had to take to become a Canadian citizen says, it is called a renunciatory oath, meaning they renounced their citizenship, at least in words, prior to 1986. Prior to 1986, the US statute did not include the words 'with the intention of relinquishing US citizenship'. Now part of the problem here is that these people were born in the US and therefore there's a huge potential that they are forever deemed to be caught in the black box, or I would say prison if you will, of US citizenship even though they are no longer US citizens. And this is, I understand, a gigantic problem for a lot of people in this area. And, just sort of anecdotally, I was in Europe in the summer, in Europe, booking a plane ticket from Amsterdam to Paris and I had to fill out information for the US online. I mean it was absolutely unbelievable.

Questioner: Yes, that was my question, is prior to 1986 or '94 I think the US came out and said that anyone who renounced, not, sorry not renounced, but became a Canadian citizen,

automatically, as though it was a gift, re-attained their US citizenship unless they went and said that they did not want to retain it.

Jon Richardson: I think I can answer that... This is extremely...US citizenship law is 5
incredibly complex and this is a fear that a lot of people have that somehow the US
automatically reinstated citizenship. My reading of this, and I think if you kind of look at the
flow of this, is that is entirely false and I think it is important to realize that. The US, after
having kicked you out of the political community, meaning you're no longer a US citizen,
which they have a long history of using citizenship ... Well, that's right – during the 60's and
1070's, people were punished and the way that they punished was 'we're kicking you out of the
country; you're no longer a citizen'. Now there is a series of court cases which essentially
the Supreme Court eventually held that because of the Fourteenth Amendment which I
referred to earlier, there is no way that somebody can be stripped of their US citizenship
without their consent. Now what happened was that as a result of these cases, in 1986 the US
15law was changed to include the words that in order to lose your citizenship by becoming a
dual citizen, you had to specifically intend to lose your US citizenship. They cannot come
back and just reinstate you as a US citizen. What they did do was give you the opportunity,
had you been stripped of your citizenship, by virtue of having performed an expatriating act
of which the most common would be for people in Canada was to become a Canadian
20citizen. They would give you the opportunity to get it back if you wanted. OK, and then in
some cases, yes there were tax issues, OK? But, actually they were relatively benign to do
that. So, obviously, none of this is legal advice, OK, but if you're concerned with that, I
would get some good legal advice and I expect that's what you would be told.

25**Abby Dushman:** OK, anything else before I leave this mic?

Question: So, if we go to a bank and they want us to sign a document stating that, to give up
our rights, we say, no – what happens to the money?

Professor Christians: In your account? (Yes) That's a very nice question. They'll close the account, immediately, close the account. (And what happens to the money?) Well, I'm sure they'll write you a cheque, no problem. (Oh, they would?) I have no idea. (I like that I'll receive a cheque in the mail.) Yeh, I don't know. Worse, worse, it only gets worse the further you look into it; it only gets worse.

Comment: I understand that there's another category, rather than close the account or whatever, there's what's called the recalcitrant account holder.

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Professor Christians: So, I can explain that when I get up to make my remarks. I was not anticipating explaining all that, but I will explain all that.

Abby Deshman: OK, I think I'm done with my area of expertise.

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Jon Richardson: Let's thank her very much. That was an awesome presentation. Thank you very, very much.

20 THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT
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Carol Tapanila
The Isaac Brock Society
28 December 2012