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# **FATCA FACT FINDING FORUM**

**15 December 2012**

**Toronto, Ontario, Canada**

**Part 2 of 9**

**John Richardson  
Introduction to the Forum**

**Transcript Prepared By:  
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5           **MR. JOHN RICHARDSON:** 26 December 2012 Good morning. Absolutely fantastic. I actually well remember you sitting in Parliament on the 16<sup>th</sup> of April 1982. And, I was reading the *Globe and Mail* and at that time I remember there was actually great apprehension about the idea of the *Charter*. Certainly it was actually something that was very, very hard won in Canada. Without getting into this too deeply, certainly the Section 1  
10 is a testament to that. But, what I remember the most is that they said the *Charter of Rights*, those who were cynical about it, was the greatest make-work project for lawyers of all time.

Interestingly, we're here to talk about FATCA today, and as far as I'm aware this is the first public discussion of FATCA which has not been put on by a Big Four accounting firm or  
15 perhaps a law school faculty. But, what I'm struck by every time I see one of those presentations and to quote from one NYU law school, they referred to FATCA as the gift that just keeps on giving. And, there is no question that that is true for the legal community and the accounting.

20 We have a number of very, I think, well informed interesting speakers here today. The first speaker that you'll hear from in a few minutes will be from the Canadian Civil Liberties Union, a lawyer by the name of Abby Deshman. But prior to that, she has asked that the basic stage be set in the form of a bare bones, rudimentary understanding of what FATCA is, of what it is we're actually dealing with, why it's important, because I tell you that if you can  
25 confidently say in five to ten minutes that you understand it better from what I'm about to say, then either I've done a great job or you are an awesome audience, or both.

But, the beginning of it really is the concept of Citizen-Based Taxation. Now, Mr. Stevens referred to US Citizens in his opening remarks. And, as important as that is, and think often  
30 people do think of this term, think of this as something that is about US Citizens, I would like to modify that, amplify and perhaps correct a little bit. The term is actually US Persons. What does that mean? Well, the truth it means anyone the US says is a US Person, plain and

simple; and that, my friend, is part of the problem we'll get to as the day goes on. But, for the moment, here's what a US Person is. And, by the way, there's probably lawyers in the room – don't correct me. I'm doing the best I can for a general audience, OK?

5 But, it would include obviously, it would include US citizens, but it goes far more. Now remember, to include US citizens, dual citizenship is incredibly common. How many people in this room have dual citizenship? Look at that, very common. In a global world, possibly becoming the rule even rather than the exception. So the term 'US Citizens' the bottom line is nobody knows for sure how many US citizens there are in Canada. Nobody has ever  
10 challenged the figure of a million. But it is also reasonable to presume that the vast majority of those people are also Canadian citizens and have been for many years, many of whom even in fact have been born here and some of whom even don't know that they're defined by the US Government as US Persons.

15 Any snowbirds here? Well, that's because you're already gone probably, because if you were, the US Government would say to you that if you spend too much time in the US in any given year that you're also going to be a US Person. Imagine the shock of discovering that on your way back from Florida, reading the paper, and what that might mean.

20 Ever hear the phrase 'green card'? I don't know whether it really is green or not. (Answer) Awesome, apparently this so-called green card is off-white. But, what it is, is it's the thing that documents that you have a legal status of being a permanent resident of the US. And, that is something that by the way goes on longer than you might think it does. In fact, there are many people who are green card holders who have not lived in the United States for  
25 many years, because once you get a green card. Yeh, you can get rid of but it takes proactive, unpleasant work, probably a call to a lawyer and money to do it. There's another example of people who are subject to this who clearly do not live in the United States.

So who's a US citizen? Well, on the most basic level, it's defined by the Fourteenth Amendment of the Constitution of the United States, which says anybody born or naturalized in the United States is a US Citizen. It is possible to get rid of it, but that requires work as well. So what we're looking at ... Now the US tax system although in a more colloquial sense referred to as Citizenship-Based Taxation, is actually US Person-Based Taxation, regardless of where that defined US Person resides in the world, including by the way Canada. OK? Regardless of whether they have any remaining ties to the United States, property, anything; family, anything; it makes no difference. And, this is a concept that is really quite foreign to most people's idea of how taxation works because the truth of the matter is that there are only two countries at the present time in the world who tax people who live in other countries. OK?

Most countries, the overwhelming majority, tax, they say well, you live in the country, you you've got to pay the taxes because you've got services and its part of being in the community. The US says, No, if you're born in the US, if you're a US Person for any purpose, you have to pay taxes. Now, you might think, OK, well, what's the big deal? Well, leaving aside the fact that the US Internal Revenue Code and Regulations has 17,000 pages, is 10 times (you think that dealing with Revenue Canada is bad) is 10 times the page count in Canada, it's even worse because the US Persons are taxed in exactly the same way, with one irrelevant exception, exactly the same way as US Residents.

Now the US is a country that really doesn't like anything that they call 'foreign'. In fact, if you were actually to look at the Internal Revenue Code in the US, you would see that the word 'foreign' wherever the word 'foreign' is, the word 'penalty' is sure to follow. Now what this means is that a number of day-to-day activities that people in Canada and other countries engage in, which by the way are heavily promoted by government policy, things as unimportant in life as retirement planning for example, are in fact subject to US tax laws and are taxed in very, are not recognized, as tax-saving vehicles. Now I'm going to give you one

example. I could give you more but I just want to give you one example to demonstrate the point. As you know, the Government of Canada in 2009 introduced something called a TFSA, Tax-Free Savings Account. How many have heard of that? And, it is, I think this is very important to understand that this is part of what is considered to be desirable domestic Canadian policy to assist and encourage people to save for retirement. Agreed?

Well, let me tell you what that is from the point of the United States Government. First of all, it is not recognized as anything, but remember that US Persons are required to file tax returns accordingly to exactly the same laws that people in the United States are and because there are no TF(S)A's in the US, therefore there are no TFSA's anywhere in the world, but under US law for example, these are considered to be a 'foreign trust'. Now, so what you ask? Well, in the US tax system on the one hand there's the issue of how much tax is owing. But, there's another dimension to it, which is used which I think also, I suspect, to raise revenue and this has to do with the filing of information returns.

OK? So, in other words, it's OK to have a foreign trust, but what's not OK is to not report it to the IRS. Well, you might think, OK, so what, so let's, we'll call them up and drop them a line. Not so simple. Very complicated reporting requirements, very complicated forms. For those of you who are US tax geeks, you might recognize the Form 3520 for those who have been thinking about this. You say so what, give me the form, I'll fill it out. You will not be able to fill out this form without professional help, totalling thousands of dollars, if you can even find that kind of professional help in this country. And, the penalty for non-willful, \$10,000. How many think that's absolutely outrageous? You do? Well, you're not going to believe what I'm about to tell you next then. Because, it's a foreign trust and the one thing the US tax system is based on a system of complete distrust, they want verification from what is called the Trustee. Now in people talk that means if you have a TFSA at, say, the Toronto Dominion Bank, the Toronto Dominion Bank would be the Trustee and the Trustee, under US (imagine this, OK), under US law, the Trustee, the TD Bank, is required to file

with the IRS a form which essentially duplicates your form to essentially just validate that in fact you're telling them the truth. You think the TD Bank is going to do that; how many imagine they're going to do that? No, they're not.

5 Well, the problem is this. Two problems. The first is, your tax return if you're living in the US is due April 15<sup>th</sup>. For people outside the US, it's June 15<sup>th</sup> and you can get an extension until October (OK, if you don't owe them any money. We'll get to that – I see you've had some problems here – I'll be interested in hearing later.). If this form is not filed by March 15<sup>th</sup>, which by the way is well before the due date of your tax return, then you, not the TD  
10 Bank, you are subject to another \$10,000 penalty. OK? Now, I'm going to just continue the discussion of the forms and the penalties in a specific way, but what you need to understand, and for the purpose of this whole discussion today, is that when we're dealing with the US tax system, we have taxes, which you understand. I mean there's nobody in Canada who could not understand taxes. How many think they are high? Oh, you don't? OK, but what  
15 you don't understand and what's left out of this discussion is the information returns which are actually the bigger problem, a) because nobody knows about them and b) because I guarantee you, and I'm going to stand by this word (I would rarely use the word, guarantee) that nobody except a person who does not own anything except the shirt on their back could afford to file a US tax return for under about \$3,000, and I don't care who you are. If you  
20 have anything, OK, if you have anything, it's going to be much more and I know somebody personally who filed a US tax return in 2011 that was almost 200 pages of information returns. Very middle class person as far as I can see unless there's some stash that he hasn't told me about, in which case I don't think he'd be telling to the US government either. But my point is that we are dealing with a tax system of enormous complexity. I've heard it  
25 referred to when it's applied to US Persons abroad as simply nothing more than a tax and penalty club.

Now this is important to understand FATCA, moving back to the main event. The purpose of FATCA, and what I'd like to do is show you a one-minute clip, of sort of the philosophical origin of it and here we go again. We have a surprise guest speaker today. How many recognize him? Before he was a President, well the year he pretended to be a Senator while she was running for President, he did co-sponsor with Senator Carl Levin, something called the *Stop Tax Haven Abuse Act*. In any case, this is from a White House press conference in 2009. It's actually 10 minutes; I want to show you just one minute of this and I want to show this to you because what this really is, it predates what FATCA became. OK? It provides the philosophical justification of this, if you will. OK, so, here we go:

10 President Obama: *Now for years we've talked about stopping Americans from illegally hiding their money overseas and getting tough with the financial institutions that let them get away with it. The Treasury Department and the IRS, under Secretary Geithner's leadership and Commissioner Shulman's, are already taking far-reaching steps to catch overseas tax cheats. But, they need more support. And,*  
15 *that's why I'm asking Congress to pass some common sense measures. One of these measures would let the IRS know how much income Americans are generating in overseas accounts by requiring overseas banks to provide 1099's for their American clients, just like Americans have to do for their bank accounts here in this country. If financial institutions won't cooperate with us, we will assume that they are sheltering*  
20 *money in tax havens and act accordingly. And to ensure that IRS has the tools it needs to enforce our laws, we're seeking to hire nearly 800 more IRS agents to detect and pursue American tax evaders abroad.*

I know I've heard enough; have you? This is real. At the start of the press conference there, 25 there were three people standing there. President Obama was introduced by Timothy Geithner, who you may know is the Treasury Secretary of the US. Yes (well, that comes from you, not from me. OK, notorious tax evader. Usually I hear him referred to as a tax cheat, but OK, alright, I'll take that.) OK, and Douglas Schulman who is the IRS

Commissioner. OK, so this is sort of a three-part presentation. Now, in that one minute clip, it would seem to me that the mindset of the US government is that there is a pretty clear association with bank accounts outside the US and tax cheats. How many would agree with that? I mean there's really no other way to interpret it. I mean it's absolutely astounding.

5 It's absolutely astounding. Well, that was in 2009. Now, on to FATCA.

FATCA is not a statute by itself. It stands for, by the way, *Foreign Account Tax Compliance Act*. Other people have put together different acronyms for it. We'll leave that aside for the moment. It is not a separate piece of legislation. It was part of a massive piece of legislation  
10 which was signed into law in March of 2010, called the *HIRE Act*. Now, basically the *HIRE Act* was, well, an attempt to promote jobs and things like that and perhaps as a noble purpose. Now the rumour is that it was actually sort of slipped in at the last minute. Like all legislation, it is hugely complex. I think it is entirely reasonable to believe that most members of Congress didn't even know what they were signing, you know. And if they did  
15 know what they were signing, I find it very difficult to believe that any, any rational person would sign that without seeing what the implications were. In a very real sense it reminds me of *Obamacare* which was signed into law, you know, without a lot of people reading it. I mean Congress men and women frankly admitting that it was too long to read and Nancy Pelosi famously saying, 'well, it's important we sign it into law so the American people can  
20 see what's in it'. I kid you not. I won't show you that video because it's a bit off topic. But, all of this, I'm not making any of this up. Bottom line is that in fairness, in fairness, to members of Congress, I don't believe they knew what they were signing. Now, in its simplest terms and this is the challenge that I was talking to Professor Christians outside in the hall, this is the challenge to actually explain what in God's name this is other than a  
25 permanent revenue source for the legal and accounting community. Now, as Mr. Stevens points out, the first thing FATCA is is a law that is designed to apply extra-territorially. Now, in people talk, that means on the same way that the US is sending drones into sovereign airspace once a week, they're also sending their laws into sovereign countries. In



this case, this law has two distinct components to it without getting into too much the detail about either one. The first is it applies to, I'm just going to say, the Canadian banks although more is involved. That's because everyone can visualize a bank, the Canadian banks. Now here's what it's telling the Canadian banks. It's telling the Canadian banks, you know what, 5 OK, here's what we're asking you to do. We're asking you to take proactive steps, at your expense, to root through your databases and determine and identify anybody who's using your bank to meet **OUR** definition of US Persons. And that, by the way, includes your friends, neighbours, and I suspect maybe some of the people in this room. OK?

10 Now, it's like I explain this to people I know in the US and they look at me as if I'm out of my mind. I'm used to that by the way. And, the obvious question is 'You're kidding. Why in God's name would anybody do that?' Well, here's why. Because what the law says that if you do not, not only do you have to do it, but you have to enter an agreement specifically with the IRS, Internal Revenue Service, who has been delegated the authority for this like so 15 many things. Amazingly, you know you heard President Obama say they'd hired 800 IRS agents on this offshore thing. Well, you know the second motivation for hiring a number of new IRS agents in the US – *Obamacare!* You know, I mean, it's amazing, the US gets public healthcare, the first thing they do is go out and hire a bunch of new IRS agents to enforce it. Unbelievable.

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But, if you don't enter into this agreement with the IRS, what they are saying is, now listen to me carefully because I think this is put far too charitably in the media, **ANY PAYMENT IN US DOLLARS GOING TO YOUR CANADIAN BANK** (notice, I'm not talking about profits. Right, am I right on that?) **FROM ANYWHERE** (glad to have your vote on that. It's 25 interesting, because I think people undershoot the mark, you agree) **ANY PAYMENT**, are you ready, **WE'RE GOING TO DEDUCT 30%**. Now let's just imagine... And, by the way, this is to the bank **IRRESPECTIVE OF THE ACCOUNT HOLDER**. Alright, are you getting what I'm saying? So in other words, OK, again, I'm going to put this again, **IF THE BANK**

DOES NOT SIGN THE AGREEMENT WITH THE IRS, ANY PAYMENT IN US DOLLARS, REGARDLESS OF THE REASON AND REGARDLESS OF WHO THE ULTIMATE PAYEE, IS GOING TO BE SUBJECT TO A 30% COURTESY DEDUCTION. Can you get the money back? Probably, you know if you want to go to the trouble of filing.

Now in the press release which the Canadian Progressive Party put out, I think I saw the word “extortion” in that – did I see that in the press release? I thought so. Right? So in other words, it’s not clear to me that this is really a voluntary agreement. It reminds me, I think of a little bit of a scene from the Godfather I, something about your brains or your signature on the contract. Alright, or something like that. But, this is incredibly serious and it’s incredibly serious for reasons that go well beyond, OK, just the sort of issue of sovereignty. Now, we’re talking about identifying these so-called US Persons. Later today, I’m going to show you another video, a bank training video, on how to find these people, and I promise you, you will be shocked. You will be shocked. OK, this is on a par, OK, with the things that perhaps were going on in the 30’s in another part of the world. OK?

Now, in a moment we’re going to hear about, I think, some of the very obvious privacy issues, OK, in a moment, we’re going to hear about that.

OK, but you know I want to ask you a simple question. How many of you think it’s a good idea to let the IRS tell Canada how it should run its banking system? Nobody? Oh, that’s surprising. What’s that? OK. Now, the second prong to FATCA is this. Alright, you know when the US goes up to war, I mean it really goes to war. You’ve got the War on Drugs. We’ve got the War on Terror. We’ve got, now, the War on Offshore Tax Evasion. And, by the way, how many of you when you look in the mirror in the morning, see a tax evader? Very hard to be such a person, I think, in a country like this with such a) high tax rates, and b) easy ways to track money. Not that I know any money launderers anyway. I don’t for the

record, but I would be very surprised if one of them decided to open an account over here at the TD Bank. OK, very surprised.

In any case, now, remember that US Persons and the obligation to file these tax returns and these forms. OK, the second prong of FATCA is, you guessed it, another form (8938). OK, another form for US Persons to file. Now this is a form that is incredibly intrusive and to put it very simply, it spells the end of financial privacy. What it is in effect is a form with a clear both full purpose and effect is to register each and every asset that you have under the sun. Once registered, my prediction down the road, what's to prevent outright confiscation? But in any case, this is a requirement of registration. By the way, do you think there is a penalty for not doing this? What do you think – yes or no? You're right, there is. What's the default penalty for not filing a form? \$10,000, good, but it's worse because if within 30 days of having been notified you haven't filed the form, it's now \$50,000.

Now this particular form has a cousin, OK, which is called the FBAR (Foreign Bank Account Report), which we're not here to talk about FBAR today but those of you here today recently learned and have met Mr. FBAR will recognize him as one very nasty piece of work with the potential to more than bankrupt you. So this is what's going on.

Now, final thing before I turn this over to Abby is it's one thing to think of this in some theoretical way, one thing to think of it as this affects US citizens over here for a couple years. It doesn't. Not only does it affect Canadian citizens but I want to make a point that assuming the correctness of one million so-called US Persons in Canada, it is far more significant than that because US Persons often have spouses who are not US Persons or members of families who are not US Persons and when these fines are levelled you make no mistake, make NO mistake, they are moving the direction of levying these fines and they're being very public about it. This not only will have a disastrous effect and an attack on a family of Canadians and this includes far more than just US Persons.

But, in addition to that what it does, assuming these taxes and fines are paid, is a way of the US Government putting their hand into Canada and simply bringing it back full of Canadian dollars that were not earned in the US, have no association with the US or anything remotely close. And, there's a word for that in the dictionary, I think it begins with the letter "T" I think. Any thoughts on what that word might be? Answer, theft. Alright, if you buy into this.

We've got a great list of speakers here today to take you through the in's and out's of that. And, the first one we have today is Abby Deshman who is with the Canadian Civil Liberties Association who very recently wrote a letter I believe it was to the Department of Finance and to nobody in particular, I think, but to the Department of Finance, I think complaining about this, to put it charitably. Abby is a graduate of the University of Toronto, also a graduate of the University of Toronto Law School, an LLM in International Law from NYU. By the way, the Graduate Tax Program at NYU is where you find, including I think, Professor Christians who is also a graduate of LLM Tax Program at NYU, which as far as I can see is a virtual monopoly on what's going on this area. But, in any case, let me turn you over to Abby. Abby, thank you so much.

THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT  
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