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FATCA FACT FINDING FORUM

15 December 2012

Toronto, Canada

Part 5 of 9

**Allison Christians
FATCA and International Tax Law**

**Transcript Prepared By:
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“Liberty and Justice for all US Persons Abroad”
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John Richardson: OK, next speaker. A couple of months ago, yes a couple of months ago, I was in Montreal and I walked into a law school class for the first time in well over 30 years. I didn't realize I was walking into a law school class but it was a McGill tax class run by Professor Allison Christians who holds the rather esteemed H. Heward Stikeman Chair in the
10 Law of Taxation at the McGill Law School. And, I was so impressed with what was going on and when I learned that this thing was being organized, I thought, ...and I was trying to put together, my God, who could do better than Allison Christians. And to my delight, she has accepted our invitation to speak today. Join me in a warm welcoming Allison Christians.

15 **Professor Christians:** Well, I think you're wrong. I think there are plenty of people who would be better than me here right now because I'm coming to this a little late to the program.

So, just start with a little personal information because if you hear I'm from Montréal, you
20 already think I'm from another country. I understand that. But, I was born here in Toronto. And, I grew up in London, Ontario. And then I went to the States on a student visa. And then I got married. And, I have two children, and I have two dual citizen children, the poor dears. And when McGill was looking for a tax law professor, I looked at my husband and I said if McGill doesn't bring me back to Canada, we're now committing to living in the
25 United States for the rest of our lives, and I'm afraid I can't do it. Can we go to Canada, back for me, to for him? And, he, completely ignorant of the entire ramifications of this, agreed, and so here we are.

I'm trained in Law in the United States. I've been a Professor of Tax Law in the United
30 States for it's now 10 years. Before that, I practiced International Tax Law in New York. You can look up my name; google me you'll find all kinds of little threads all over the place. The one who takes photographs of babies, not me – different Allison.

So, I'm a US Tax Law professor who's now transplanted into Canada, aware of FATCA
35 when it was passed in the HIRE Act. And you know, the US, Congress, the Jobs Act, the HIRE Act, the Jobs Incentive Act, they are all apple-pie names, with the poison on the bottom crust, right? They are all the same; they all act the same way. And, so you're never surprised. But what happens as you proceed down the path of understanding, you realize the mountain you will have to climb to understand each particular piece of legislation and you
40 sort of delay the inevitable climb by circling around the base of the mountain. That's been me, circling around the base of the mountain of FATCA, saying yes, this doesn't sound right; oh, they're some issues here; oh, that's complicated; what does that mean?; and how does this work? And, it was only actually when I started blogging earlier this year and I just happened to put a few things on my blog about FATCA, saying hmm, what's going on?, but I
45 get it – I get what the US is trying to do. In other words, my initial reaction was to be sympathetic to the idea, the package. And the package here is the US, Canada, the UK,

Holland, France and Spain – we all have the same problem and that is a disappearing tax base. The tax base is disappearing into the ether through international planning. We all have this problem where the most capable of contributing to society, those of our most wealthy,
50 asset rich individuals and companies are escaping their tax obligations. This is a common theme and it's reasonable because we all know that there are tax havens and we all know there are shady businesses deals and we all know now just how deep that goes, HSBC and so on.

55 So, the story that forms the context for thinking about FATCA is one I think we could all agree with and why I think most Americans who look at this are sympathetic. They're saying, wow, the world is engaged in the wealth, the wealthy people of the world are engaged in tax evasion. They're running all over the world with stateless income and no state can control it because every state is subject to the whims of the other states and as long
60 as there are tax havens, then none of us can control our taxpayers; so we've got to strike back.

Now back about 10 years ago, the OECD started looking at this and looked at information exchange and state to state cooperation as a means of reigning back the rampant capital loss;
65 all still seems reasonable. Yes, we don't want to introduce income tax systems where only working class people pay. We don't want to have tax systems that rest fully on working classes who earn all their income from wages and spend it all on consumption and we get them coming and going. You get them coming when they get that income from the wages we withhold. And, we get them going, tax them again on those same wages when they spend
70 – a consumption tax, right, a VAT, value added tax, GST, right. You're all familiar with this. So am I now. So we don't want an income system that hollows out the top and lets them run around the world with no restraints and necessarily leaves out the bottom because they don't have any resources and dumps all of the cost of society and liberty and dignity on the working class. Still with me? Sounds reasonable. We've got to catch those flagrant tax
75 cheats.

But law lumps. When law goes after those flagrant tax cheats, they write some words down and they try to go after those tax cheats. And it's in this context, in this lane of the pool. But that law pulls everything in the pool into that lane, and that's where we are, I think, in
80 Canada. That's what we're seeing here; at least that's the impression I'm getting from you and from those who have on my blog begun to interact with me and educate me as to why I ought to be much more interested in FATCA – for personal reasons, not really, but for intellectual reasons, for honesty and the academic enterprise reasons. That is, if I want to call myself an international tax lawyer and I'm someone who is well versed in US international
85 tax law and here I am in Canada, who is better than me to see this and talk about this in terms of justice, in terms of rights, right?

But, also in terms of remedies. What do we expect from our state; what can we expect from our state; who is our state? Right, OK. So, in that context again, I started thinking about
90 FATCA as, OK, well, they're just trying to trap that top and no one, I think, is unsympathetic with that as a goal. But that also muddies our message when we're in the other lane, that is now FATCA doesn't just and in fact almost doesn't touch the top.

What it does is pull in absolutely everybody, right, that's 'foreign'. Not just elite, but foreign
95 to the US, meaning in a foreign place. So let's just take a look now. When I first wrote my remarks and I'll come to this if you like, but I'll talk to you about possible international law challenges and lay out four places where I think we can go. But, I think before I can go there, now I realize after hearing the conversation we've already had, that we need to just back up a little bit and make sure we understand who the constituents here are and what our
100 legal issues are. OK?

I have this so unfortunate view of the FATCA crowd, that you are all very well aware of what's going on and in fact I have found that within the Isaac Brock Society, within the
105 FATCA community, they know much more than me about this law and have known much more than me, so I have become accustomed to thinking I'm the one that knows the least in the room. So I don't need to explain this to you; you already know this. But just, at the risk of explaining something to you that you already know, I think it's just worth thinking about this.

110 You and I are not necessarily affected by FATCA on the front end, that is it's not at the beginning of all things our job to file the forms, to become compliant, right? OK? You and I are impacted in our, I think, access to banking services. And to understand how that works, let's just think a little bit about how this statute is put together. So, FATCA is complex and I'm going to over-simplify and probably get a few things wrong and we'll have to come back
115 and fix those things at some future date, but again we're at the cusp of a historic movement so it's OK to be a little bit – yeah.

So, FATCA is going to say if you're a foreign financial institution (is there chalk?; I'm a professor, I can't, you know ...). So here's our first acronym, if you're one of those –
120 an FFI, what's that – that's a bank, private equity fund, a hedge fund, a trust account holder, any number of entities that controls funds for others. If you're one of these, then what we want you to do, IRS, we want you to enter into an agreement with us. OK? The agreement is going to be something like a PFFI agreement of participating foreign financial investments and in this agreement, you will agree to do this. That's Level 1.

125 So, seek waivers, if not, from all of your identified US accounts. We saw how that's done on that last video. We can come back to the legal problems, there are many, with that. But, you decide who might be, could be, possibly be a US account. Put that red stamp on there, right – could be treated as, doesn't matter if it actually is a US Person, only just if you think you

130 have reason to believe that it is, put the stamp on it. Ask everyone with one of those to sign a
waiver of their rights to their financial privacy in your institution. If they will not sign it,
close the account. Now if you sign the waiver, when you sign the waiver, you're doing two
things: 1) you're agreeing to give your bank any information it asks of you; and 2) you're
agreeing your bank can disclose that to the IRS. Not to your government, not to the CRA, to
135 the IRS. We're going to come back to that distinction in a minute.

So you're going to give your info. You've agreed to give it, whatever they ask of you for
now until forever – **anything** they ask you – what colour underwear are you wearing – you
have to tell them. Am I exaggerating? Not by the language of the statute. It says 'anything
140 the Secretary asks'. They will ask you and you will turn it over and once one of the PFFI's is
signed by your financial institution, they're agreeing that they will give the IRS whatever
else it asks, from now until forever. So, it's not a closed agreement. In fact, we don't have
any to look at, but the idea is, once signed, the Secretary has carte blanche to ask the financial
institution for **anything** and they will go to you and ask you for that and you said you'd give
145 it; you've agreed.

Now if you say you'll give it and then you don't give it, you become recalcitrant – this is
how you become a recalcitrant holder. That is, you only become one of these things if the
financial institution has signed the agreement, the PFFI agreement, and you've agreed to give
150 the information and then you don't. Punishment? 30% withholding tax. On what? Any US
source cash flow. Now, this means interest, dividends, blah, blah, blah.

But, here's an interesting piece of legislative craftiness, creativity. If you own property in the
US and it's capital property, let's say you paid \$1,000 for it and you go to sell it for \$800,
155 gain or loss? Loss. However you have \$800 of cash from a US source which is subject to
30% withholding. Right, am I...? There's a US expert in the room, so please tell me, so... If
you say you'll give your info but you don't, you're a recalcitrant account holder from the
bank's point of view, they must withhold on you. And, let's just step back, wait a minute,
but how... It means that anyone that pays the bank, and this is your point before, US
160 denominated funds, is a withholding agent for US purposes from now, from 2010? forward.
It means that currently, right now, that is status of the law right now.

They're not enforcing FATCA yet, but the fact is you have a statute on the books which
identifies in which category the withholding agent on withholdable payments of the whole
165 world, any payment to your financial institution from any other payer, the US can go to that
other payer and say you have to trace – you're going to give TD \$100. Well, where's TD
going to put that money? Does TD have any of those guys (recalcitrants). Because if TD has
any of those guys (recalcitrants), we, the payer to TD has to take \$30 and give it to the IRS.

170 And, I don't know, I guess somebody somewhere in the line can apply for a refund. But,
who? Right? So, there's a tracing; we call that the pass-through payment, that's where you

see the pass-through payment. OK. So now, we have a PFFI; you give your info to the bank, your bank and you give consent to your bank to disclose it which it would otherwise not be able to do under PIPEDA (that's where we were before).

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OK. What if your bank says no PFFI -- then all payments to the bank are subject to a 30%. So, it's sign the PFFI, or all payments...do you it would remember the *Pirates of the Caribbean*? I shouldn't give you that, more red meat, but I will. In the *Pirates of the Caribbean*, he says 'you can surrender now and most of you will die or you can put up a fight, and all of you will die.' So that's where we are. He said it better than me in the movie but anyway. It's a great film.

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The PFFI, let's just think about this. Even if I'm TD and I sign the PFFI, it doesn't mean I'm exempt from withholding. By no means am I exempt from withholding. I have an annual, in fact three-year requirement, to keep checking, to make sure I don't have any of these recalcitrant account holders. Keep checking and make sure I've identified all my US account holders, and even if I am compliant (PFFI compliant), I still have a 30% withholding tax with respect to all those recalcitrant taxpayers. So, it's building in a withholding succession from the initial source of the payment through any intermediary that might eventually, somehow possibly, get to someone who could be, doesn't necessarily have to be, in fact, but could be a US Person.

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Now when I first saw this and pieced through it, I thought something is just not.. this can't be how this is. But, in fact it is; so now, we can get out of it. There's a 'get out of jail free card' here. It's very simple. Here's your get out of jail free card. If you're a country, if you're a state, that is Canada, in the case of TD or BMO, what are the other three – RBC, Scotiabank, CIBC. (We had this Desjardin in Quebec. It's different, OK.)

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Anyway, you can get out of the PFFI if your government will sign an IGA, which is called an intergovernmental agreement, which is being packaged as if it was just another information exchange agreed to in the Treaty you already have. OK, just come with me on the fiction on this, OK? You cannot get an IGA with the US unless you already have a Treaty because the whole point is that the right to share information is emanating not from the IGA and not from FATCA, but from the Treaty. The law that gives the right to the United States to compel information from other countries has to come from somewhere. You can't just get it. We have to consent. The other state has to consent. Right? Now the IRS is saying, well we can do this PFFI because that's voluntary consent to, yeah, by every person in the chain to give up whatever right they had to state protection. And what we're saying is we'll give you another right – your state can give it up for you. Ah. So, here's how your state gives it up for you. They sign this intergovernmental arrangement which reads with all kinds of fancy whereas clauses, and therefore clauses. But it starts out saying, naming the Treaty, so in the case of US – Canada, the US-Canada Treaty signed in 1980, what was it, I can't remember, and updated through blah, blah, blah, right? Pursuant to Article 26, Exchange of

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Information, now, therefore, come all ye who will listen here, now, therefore, Canada, CRA,
215 under existing rule, namely PIPEDA, will ask for the information the US wants itself.

Instead of asking your financial institution to get it from you, CRA will get it from you. In
other words, there exists in PIPEDA (I mentioned this before so I'll just repeat), you have
low financial privacy when it comes to CRA, you know this. You have to report; you have to
220 give them your whereabouts and your wherefores. You practically have to tell them how
much more your weigh this year than you did last year. You waive a lot of your privacy
rights in that statute. It doesn't protect those privacy rights. Low financial rights, but only
vis-à-vis the CRA, Canada Revenue Agency.

Even the Canada Revenue Agency has restrictions about how they can use your tax
225 information against you in other legal context. Right, they can't just...let's, oh, look through
your, it looks like maybe you're engaged in some sort of fraud. Let's go after you under
some other... It's not that straightforward and we can talk about that and there's people that
are much more expert than me to explain what the CRA can and cannot do with your
information. But, let's assume a low threshold of privacy for CRA. They can take what they
230 want from you.

However, you have a higher right or expectation of privacy with respect to third parties.
Right? So, PIPEDA prevents disclosure, that is the baseline of PIPEDA is to say to your
bank when it collects information from you – your name, your address, how old you are, how
235 many children you have, how many accounts you have and account numbers they give you –
they're not allowed to disclose that to anyone under PIPEDA, except for the CRA. Now we
have the Financial Crimes Network, these other... OK. So, PIPEDA is giving you financial
privacy against all other comers, that is your bank's not supposed to sell it to YouTube and
they can't give it to the newspaper to publish on the front page. But they can now give it to
240 the IRS if the Canadian government agrees to get it from you. Right? Through the IGA.

Now, I think... here's where I'll try to pick up from where I had originally started with this
conversation, which was to sort of start with that conceptual baseline, assuming that we all
had that knowledge. Now, let's think about this. I missed it when you put up your hands,
245 how many duals in the room, can you put up your hands again? OK, former dual is bad
enough, right? And is anyone like me a single citizenship but other resident, permanent
green card. I'm the only green card holder, OK. So, I'm just trying to get a sense of the
constituency because one thing I always keep in mind and one thing I'm really curious about
is whose benefit is this – obviously the Big Four. That's the big constituency that all of you
250 will be working against because any way they can extract money from you... You know
what I mean about the Big Four, right? The accountants. Anyway, they can extract money
from you, so much the better. That's like a jobs plan. That's what we really mean by the
HIRE Plan or the Jobs Act. What we really mean is how can we extract more from...

255 Yeah. OK, so here's a couple premises for you. The first premise is this. If we're starting to think about, OK, this sounds bad and it's ugly and, geez, can the US just kind of roll in with a steam roller and do that? Well, yeah, political, economy-wise, absolutely they can. They're huge and you can't live in the world without the US. Very difficult unless you're China, knock on wood. If China goes a certain way, then maybe we have an easier way, but we've
260 already been betrayed. Canada has been betrayed by her own, well I shouldn't say this on film, by her own mother country, by the Queen herself, right? Because the UK has already entered into an IGA, making precedent, making us look bad. Somehow we're fostering, we're hiding, fugitives if we're not doing the same thing. This is a bad place to be. Worse, a couple of weeks ago, Mexico. So 2/3 of NAFTA is on board. Are we going to hold the line?
265 OK, so here's the premise. We want to start thinking about what, where are the challenges?

I think that's where you started, what you asked me to look at is how do we think -- is there a pushback? Is there a pushback on it? So, the premise, there are a couple of premises here. The premise that FATCA requires requirements on providers of banking and financial
270 services to Americans living abroad that are first, inconsistent with domestic laws and, second, more onerous than those imposed on US financial institutions. Right? So there's sort of two ways, I think, two ways to frame this but actually now I think there's three after the conversation we've already had. I was speaking more, this is very difficult, this is very typical, was thinking about it more from the US perspective. Isn't that ironic, right? That's
275 what happens when you study in US, you think of everything from the US perspective. You forget to think, oh, well maybe there's a challenge under Canadian law here. OK, you've taken care of that for me though. Thank you very much. From the US perspective, there are two frames.

280 One is that the US is violating Canada's autonomy. I won't say sovereignty, right, because there's a lot of baggage bound up in that term that won't resonate when you push forward. OK, legally. So if you talk about violating sovereignty, I understand; I know it's a popular way to talk about it and it's fine, go ahead and we can talk about that. But I think when you sort of dig into what expectations there are, we're really talking about autonomy of nations,
285 right, to create their own laws and be safe from intrusion. And, when you talk to international law scholars about sovereignty, they will say sovereignty is a binary concept. Either you're an independent state or you're not. You can't give it away; you can't sell it. I think there's a lot of contestation in that topic and I'd rather just leave that aside and get right to the heart of it which is autonomy. That is, is Canada going to be allowed to have its own
290 banking law or not? It could be a question of sovereignty, but it's certainly a question of autonomy. OK, so that's the first frame.

And the other frame is the US could be violating Americans' geographic mobility, stopping Americans from leaving, sort of trapping the American in the state. Wherever you go, you're
295 hounded by this and I think that there's some sense that you've talked about that, OK.

So question for me as a lawyer, thinking in the terms of legal ways forward, do either of those ways lead us to a viable legal cause? And, I think the answer is ‘Yes, but don’t get your hopes up’. This is anything but easy. So I think for us the challenge is to, first, work through these premises – are they real?

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The first one is there’s an inconsistency with domestic law. I think we’ve already seen PIPEDA is at issue here and I think we could say without a doubt there is a clear inconsistency with domestic law. That is not in question, I think. And, I think that’s so uncontroversial that we ought to just be saying that. Constantly – this is inconsistent with domestic law, this is inconsistent. That is, FATCA is asking financial institutions to break the law in their home countries and, if they won’t break the law, the remedy is not give services to residents of that country, Canadian citizens who are resident in Canada. So, either you’ve got to waive your right under a law that gives you rights in Canada or you’ve got to give up your account. And FATCA is imposing that, let’s call it a Morton’s Fork, a place

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where there is some giving up of something. Right? That is imposed, not by Canada but by the US and it’s not imposed on you, Canadian citizens, but on Canadian financial institutions. Right? So you are not being given that choice at the front end. It’s being given to financial institutions – they can choose not to sign the PFFI or not – that’s their choice, the financial institutions. Not your choice; you can’t choose that. Once they choose that PFFI agreement, now they give you the choice: waive or close. Third option: waive and then don’t give them the information then pay the 30% as the recalcitrant holder. So clear inconsistency with domestic law and I think first is to win the public battle of rhetoric.

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Now I talk like a law professor and clearly inconsistency with domestic law is not a good message, not a good package, so we have to work on that ... that’s your job, right? If you’re trying to create some sort of public understanding of an issue, there needs to be a package for that, a language package, you know, a marketing campaign. Think about what does that mean? If you want to say violation of sovereignty, go ahead but consider violation has four syllables; sovereignty has three; most people don’t know what either one of those mean.

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So we need a better package, just a rhetorical way to talk about what I think is well documented and what we know is inconsistency with law. It’s written into the IGA’s themselves that the reason for entering into the IGA is the inconsistency – that’s the term they use, that what we’re asking you to do is inconsistent with domestic law. Therefore, you need an IGA to fix it. It’s in the IGA itself the US is acknowledging we have an inconsistency and nudging Canada to fix it, not themselves, Canada, and all the rest of the countries. So, if there is a way to think about, just rhetorically, how you package that, that’s, I think, a step forward. Not a legal step forward, but that is a win, in the public mind to start bringing... So the room has 3,000 people in it, saying ‘what is this outrageous thing that I have to take three hours just to understand, let alone to understand what to do about it? Clear inconsistency with domestic law; needs some rhetoric.

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Premise two – more onerous than for US companies. Well, there's a little problem with that
340 and that is in the Revenue Code, it says that your financial institution can elect to be treated
like a US company, which is worse for you but it means there's parity. Parity, that is there's
no discrimination here. IRS can say with a straight face 'hey, we're treating everyone in the
whole world just like US companies; you can just elect to be treated as a US company'. It's
right there in 1471 and B.1.c, -- there's a lot in there. 1471.B.1. c something, something. I
345 think what we can say though, is, start to say, wait a minute, Canadians citizens, Canadian
citizens who are also US citizens have a double burden here. American citizens living in the
States with Canadian citizenship do not have that. So, I set up in my mind kind of a just for
impact case, just you know kind of noodling it through. What you need is an American
citizen with a dual living in the States and a dual living in Canada. And the dual living in
350 Canada has two countries, both doing the same thing. And the one living in the States only
has one because Canada doesn't do this to Canadian citizens abroad. So, it's just one way of
looking at it. Well, OK, superficially it looks egalitarian, looks equal treatment and so on,
but is there a way to kind of see? So, you sort of think about case studies, stories and start to
tease out some sort of inequity and injustice that is being perpetuated through a statute that
355 looks facially neutral. OK.

So, those premises are troubling. So, where are the challenges? OK. So, I thought the first
challenge that occurred to me was international law but the more I thought about it, I actually
thought, now wait a minute, couldn't a US citizen mount a Constitutional challenge in the US
360 of FATCA violating the US Constitution, but on what basis? Right. So, we would need a
US Constitutional scholar to kind of think about what rights you have to mobility, to
geographic mobility, to leave, to come back. I don't know, there's ... it's pretty tenuous I
think. But I'll say this, I doubt any American Constitutional scholar has ever looked at
FATCA, has ever even asked themselves, 'what is this statute doing to Americans who go
365 out. Right. So, restriction of freedom of movement – well, it's not a right in the US I don't
think. It is in the EU but we don't have any 'four freedoms' in the States. We don't have
any freedoms in the States, so I don't know; it's sort of something I've been thinking about,
just so we've got to brainstorm a little bit and think about what could there be that could be
for Constitutional challenge. Good grief. Americans challenge the IRS all the time on
370 Constitutional grounds. Mostly it's baseless. Maybe we can give them something to work
with. Give those people who are like, arrrgh, let's give them something to work with.
They're always looking for some kind of Constitutional challenge and they're usually way
off in left field, you know walking around in crop circles, you know, talking to themselves.
Let's give them something meaty here. I don't know. Just thinking about people who are
375 already active to an over-reaching government and navigating the state/citizen relationship.
Right? What can a state do to me; what rights do I have, vis-à-vis my connection to the
society? OK.

380 The problem of course is the US is obviously conservative in so many ways but certainly
when it comes to Constitutional interpretation. So, I think it would be difficult, but it creates
a pressure point, Right? So many times litigation is not about winning; it's not about having a
great case. It's about public, you know, publicity. It's about rhetoric in the public sphere.
It's about activating people's imagination. To think, oh, a wrong's being done. This is
serious. And, to get more people to sort of see it that way. And, I can tell you, living in the
385 States for 25 years, nothing Americans like better than a Constitutional law challenge. They
don't care about taxes, many of them. They're just...they just don't enough to care about the
technical details, but a Constitutional challenge in terms of like legal, academics, policy
folks, if you get people activated. Is there anything here, you know. Maybe there's a way to
activate some imagination, even though I think ultimately it will go nowhere, probably. But
390 maybe someone smarter than me can come up with something here. I don't know.

So, barring Constitutional challenge, which is outside of my bailiwick in any event, now let's
think about international law. I've got four; I've got four sources for you.

395 First, we should be talking very loudly and very strongly in strong terms about the tax treaty
override. Right. So the last time US overrode the US-Canada Tax Treaty, was when the US
adopted the Branch Profits Tax in 1986. Now, if I've just lost you all because you have no
idea of what that is and don't really care, that's fine, but here's what I'm going to tell you –
the outrage over that Tax Treaty override was such that it actually led to kind of some
400 concessions being dragged out of the US on the part of Canada when they re-did the Treaty
to make it not be overridden anymore. In other words, here's the thing. Many US law
seminar, a treaty in the US is equal to the law. Law of the Constitution, law in the books,
legislation, case law : equal, which means later in time rule, whichever one is most recent,
that's the law. Right? Just like a common law kind of precedent kind of thing. OK. So US
405 signs a treaty with Canada and says we're going to impose this level of kind of tax. We're
not going to impose tax on capital gains Canadian residents earned in the US. We're not
going to tax dividends of higher than 15%. We're not going to tax interest of less than 10%,
5%, whatever it is. Then if the US decides to put a new law on top and says no we're going
to change all that with the legislation – that legislation now applies instead of the Treaty.
410 Last in time, so in other words, the US (and again one of the few that can do this) can
unilaterally override a Treaty. They don't have to terminate the Treaty; they just write a new
law that negates it. They did with the Branch Profits Tax in 1986.

They're doing it with FATCA. There's not any question in my mind. And, the reason again,
415 see it in the statute because in the statute the PFFI (they ask you to waive your rights) but
they have to waive a right too. Guess which right they have to waive under the statute if
they're going to sign this agreement? Any, ANY rights under any US Treaty with Canada.
Right. That means NAFTA, the Double Tax Treaty and if they ever get the thing signed,
FFTA, Foreign Free Trade Act of the Americas. They'll never sign that thing, you know
420 that. It gives investor state arbitration, yeah, a door into pressure on the US. So, forget it.

It's not going to get signed. Watch, tomorrow they'll sign the thing. But anyway, it doesn't matter. The point is you, the PFFI, under the PFFI agreement, you waive any right under any US Treaty. I'm telling you; I looked at that twice. Really? It doesn't just say the Double Tax Treaty? No, any Treaty. So, you can't come back and say this treatment between US
425 and foreign..., you can't come back and say this looks like a subsidy to US financial institutions. And don't think that they don't see it. They're advertising to you to move all your accounts to the States to save yourselves from FATCA. Yeah. This is going on now – that is you have American trusts, account managers, mutual funds and advisors. If they haven't woken up, they'll tell you to take the money out of your RSP's, whatever is here, and
430 put it in the US. If you're an American abroad, don't have mutual funds in Canada, you can't own those here. You've got to own those in the States.

Yeah. So, don't think that we don't already see that so... But what you're saying as the financial institution, you're absolutely waiving your right to raise any kind of subsidy claim
435 under the WTO, any kind of NAFTA, any kind of tax treaty challenge. You don't have it any more once you sign that PFFI. So I think we can be talking very loudly about Tax Treaty override. That requirement to waive any rights under any US treaty is in 1471.C.3.c. I wrote that one down. And the IRS claims there is no override because again they're saying it's voluntary.

440 But the thing is there's no Treaty override, then why do you need a country to country IGA? You wouldn't need it if there wasn't a Treaty override. You just wouldn't. The competent authorities could just do what they are asking you to do. So, I think we're being sold a little bit of a bill of goods here and that there's sort of protest. 'Oh, there's no Treaty override,
445 there's no Treaty override.' Don't believe it. You heard it from me. There's a Treaty override because if there wasn't, they wouldn't write that into the statute, preventing you from bringing up any Treaty and they wouldn't write into the IGA the recognition that they've got to do this. Right? OK. So, I think it's there. I think it has been admitted through the precautions that have been made in the drafting I find it fascinating. In fact,
450 I've been sort of writing back and forth with one of my long-time blog readers, one of your folks, saying I wish I could have been in the room when they made, wrote that clause 'under any US Treaty' – what were they thinking to themselves? What were they saying? Why do we need that? Somebody verbalized the need to waive rights under all Treaties. So get this, that's not minor. I think. OK.

455 So, barring Constitutional challenge, first step I think is Tax Treaty override. It is happening, it is now; it is objectionable. Finance Minister should not agree to that. No competent authority agreements agreeing to that. No behind-closed door agreements, you know, agreeing we're not going to call it a Tax Treaty override. It's a Tax Treaty override. We
460 should be using that language because that is, in fact, internationally very much frowned upon. If anything is close to being as reprehensible to people as citizenship-based taxation, it's a US Tax Treaty override. People don't like it. Europe hates it. You make a deal and

then you just make a new law on one side. Right? People get exercised about that. They really hate it so let's give them some red meat – Tax Treaty override. Alright.

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So, that brings us to NAFTA. And that's why I say, much better people than me you could ask here. I think there are people who are experts on NAFTA. I am not; I am not one of them, but I feel like there are people who are looking at this. I know that there are people who are looking at it. One is Art Cockfield at Queen's University here in Toronto.

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Somebody we should watch. Right? Look and see how they construct that argument. I don't know what the legal, you know, how you put together a NAFTA argument. I know it's expensive. OK. We need to get more information. We need to be talking to people who mount those challenges because, again, like a Constitutional challenge, it doesn't have to prevail to prevail. Right. You don't have to win the case. You have to make it expensive

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for the other side. You have to raise public awareness that there's a big problem here.

Right? You get people exercised that the US signs agreements and then just does whatever the hell it wants. Right? You've got to get that message out. **No point in signing**

agreements with the US because they will turn around tomorrow and negate whatever you agreed to yesterday. Just tell you, they've got to give you something else now. Right?

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Let's get that message kind of into the public dialogue, into discourse. You might not win any court challenges on that, but you get that message out. Right. We know that. We all know...there's nothing new here, unfortunately. And, you might be fighting an uphill battle and none of us will get there but I think as a professor, an academic and someone who thinks about rights and justice, you can't stop and say well, it's not worth fighting because we're

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going to lose. You have to say, well, we keep advancing the ball one tiny little hair at a time; eventually somehow get there.

So, that's Tax Treaty override. Say it over and over and over again. Say it with me, Tax Treaty override. Yeah. OK. We've got NAFTA, probably. I think we should be looking to

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experts to help build that case, just to look at it. I know it's probably going hopeless. Let's look at it anyway. Somebody creative out there is going to see something in there. Right.

The third one doesn't pertain to Canada so much but other free trade agreements. Right. So that creates investor/state dispute capacity. Now maybe we can't do that because Canada doesn't have free trade agreement, but the US has 23 free trade agreements. Let's lend our

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expertise to everybody that has a free trade agreement with the US and say we are going to help you use the FTA as a platform to challenge privacy intrusions. Right. So, de facto subsidies for US financial institutions, if that's in fact a case that can be made, that are being perpetuated through FATCA. Any, in other words, any line of attack. OK.

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The fourth one then and I think the worse and hardest but still I think has to be made is in international law, which of course doesn't exist. So that's our first problem. There'll be some people will talk about customary laws being violated, customary laws being challenged by the US moves with FATCA. OK, then the idea would be that with FATCA the US is violating sovereign entitlement to regulate in the territorial jurisdiction. Right. It doesn't

505 ring, but you understand what I'm saying. Now, THE idea again, just to simplify that further, is we're looking at the US is violating Canada's right to protect the privacy of its own people in their day-to-day financial activities. Canada has a right to protect that and the US is forcing Canada to abrogate that, hmm... duty. Well, we have to think about that. But, the US is forcing a wedge between a relationship, a social contract, if you will, that Canada
510 has signed with its own people as to privacy. And the US is superseding with its own rule on privacy. Now, this is, again, not a new argument. It has been made in other contexts and what we need is somebody who knows how to make that kind of argument help us make that argument for this tax rule. Right? See, I told you I'm not that helpful here. I don't know all those laws. Right OK.

515 So, the trouble is what I do know from international tax law, if there is any kind of customary international tax law, I have never seen it. I don't know what it is. People say residence-based taxation is a customary tax law. There is a professor in Michigan who says that. He says that's the customary law. Every country has agreed to it.

520 So, I have the unfortunate task of telling you that unfortunately almost every country reverts to citizenship taxation. They do this through Treaties. I want you to know this because I want see just a little taste of the complexity of thinking of this from an international law perspective. In Canada we have our own rules, sojourner, residents, ordinary resident, all of
525 our rules for deciding who is Canadian, who is us, who is our taxpayer? And the US has its own rules and Switzerland has their own rules and Norway and so on. Now look at the Treaty. Almost every Treaty, no, every Treaty is based on the OECD model or the US model, which is a derivation thereof, or the UN model which is an even more derived version, all based on this model. Treaties have tie-breaker rules if two countries both think of
530 the person as their resident. It's a tug of war. Mine, mine, mine, mine. How do we decide? Well, first we look at your centre of vital interests, for example. Where's your bank accounts? Oh, you have them in both? OK, well, where's your family. Oh, you have family in both. OK. Well, where do you spend more time? Equal. Still having a tug of war. What is your citizenship? Every country does it, which means we're all taxing on the basis of
535 citizenship. We're all guilty of it. Under Treaties, we acquiesce to that, we acquiesce to that as a tie breaker. Now there's all ways of thinking of that but the problem for mounting an international law challenge is if you could point to the place where we all do this and say: US, you just do it too much -- I think we're not going to go too far. Right? So what we need is to articulate what the US is doing, something other than citizenship-based taxation because
540 we're all doing that thing but we don't think of it as pernicious. We do think of what the US is doing as pernicious because it's intruding, right, in a really oddly everyday customary kind of way with, you know, grandmothers in Canada, for crying out loud. People all of a sudden whose mobility is restricted because of fear of reprisal, of having their homes taken away. I mean there's got to be a compelling case made.

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There may not be an international law case there, but I think it's worth at least understanding that you have these acquiescences that we've already made so in a way it's time to re-examine those acquiescences and say you know what, maybe you know we need to re-think the whole charade of cooperation here. Maybe we need to see the world the way the US sees
550 it. Information is a commodity and the US can afford it. They can buy it themselves unilaterally without your help, Canada, without the rest of the world's help. They will just go in and take it. And, if they're prepared to pay the cost to their capital markets of a 30% withholding tax, then that's what they're prepared to pay. In that world, we are not working together anymore.

555 So we get to that funny place where we start to wonder what are we getting? What does Canada get out of an IGA? Nothing. It says it's a reciprocal agreement. It is not. What does the PFFI get out of its agreement with the IRS, which I'm questioning what that is exactly. The IRS is just running around entering into agreements, with private industries in other
560 countries? Hmm, interesting. In any event, what does that private bank get? Nothing in return. There's no quid pro here. Right. It's just a pure extraction so I think if you start to see the world in that way, you start to question really why are we agreeing at all? To any of this?

565 Which is why my reaction to you, Abby, was 'No to the IGA. No'. And, 'No PFFI's. No'. And, challenge any bank that blithely signs away its own rights only to turn around and force you to sign away yours or close your account. Right? No to all of these and challenge all of these. Right.

570 Now, is this realistic? Absolutely not. Right. Because you know what happens? All the people who will be withheld upon lose in the meantime while we're all thinking about how to challenge and while we're all saying 'No to IGA', while I stand in an academic position and say, 'Canada should not sign an IGA'. Moreover, Canada should no longer sign **any** agreements with the United States, ever. Right, because they do this. You can stand there
575 and that's all very nice and very clean, a nice principled position, but it's not realistic -- because in the meantime, the US will do what it says it will do. It will withhold. It will extract 30% gross basis on sales proceeds, and it has given itself 120 days now to consider your refund request. I'm sure it will have no problem doubling that next year when they start piling up because they won't have enough persons for dealing with that so you can wait 20
580 years, 30 years for your refund which is ... and the meantime taxing you by having to hire US experts. There is a cost, an ongoing cost, to saying 'No' that we bear now, with the hopes that someday we won't have to pay that cost anymore. That is too much probably for me to ask of anyone. Nevertheless, I think that Jim Flaherty has been on record expressing, not just 'this seems a little odd' but expressing, I think, outrage is the right term for how he
585 has reacted to FATCA. For Canada to turn around and sign an IGA is about as about-face as you can go, that is about conflicted with that prior position as you can get. In other words, you could not be more submissive than that.

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That's all I have.

590 **John Richardson:** Before any questions, and I want to get to questions. That was the most fantastic presentation that I've heard on FATCA and I was trying to think of a word and the only thing I can come up with is 'simply incredible.' Thank you very much.

Let's open this up to questions for a few minutes and then keep this going. Over here.

Al Gullon: There seems to be a bit of an inconsistency between #1 and #2 in that ... The #1
595 says that NAFTA overrides international agreements...treaties, whatever, but NAFTA is a treaty.

Professor Christians: No, no, no. FATCA, in other words, FATCA being later in time. Not NAFTA but the Double Tax Convention, the Double Tax Treaty.

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Al Gullon: But, NAFTA is a treaty.

Professor Christians: Yes, exactly. So, does FATCA override NAFTA? Possible. I don't know. I'm not a NAFTA expert enough to know.

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Al Gullon: But, what I'm saying is I think this international override. The NAFTA isn't going to be helped. You can't argue. You're breaking this paragraph in NAFATA if they're going to turn around and say, well, sorry, FATCA overrides this.

610 **Professor Christians:** Right, right. So, that's a very good point and I don't know how to resolve that. Right. I don't know how anybody brings a case of a violation of NAFTA when what we're talking about is a change in the law. Right. Like, I just don't know. Right? I'm not an expert on NAFTA. But, what I'm telling you is the Tax Treaty, the Double Tax Convention between the US and Canada has very prescribed numbers about what they will
615 withhold but, notwithstanding the Treaty, they will withhold 30%. That's a Treaty override, plain and simple. Could it also be a NAFTA override? Yes, it could be. I just don't know. But I'm happy to tell you, say it is. Let them say it's not. Right? Make the claim. Call it a Treaty override and demand an accounting from the government that it's not. Right?

Al Gullon: Yeah, well. It seems like maybe it's time to turn to the cannons of 1812.

620 **Professor Christians:** Hmm, I've heard that before. No, I don't think. You've got me on camera. No, I did not advocate for that.

Let me just say this about that. I think that one thing that often happens in public discourse is that we get overcome with emotion and start running away with ideas. This is like that. No
625 you don't need that. You don't need this to be like anything else. You only need to focus on what this is and I think it is evidentially so problematic that if you keep honing in on – we have a Tax Treaty override, we have privacy being overridden, we have an impossible choice between two rights – which one would we like to give up? The right to bank? Or the right to financial privacy? Which one do you want to give up? Because you don't get to keep one of

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630 those two. Right. If you say, you don't need to resort then to all this analogy of like other
horrific things. That's, I think, a pretty bad choice and I'm not sure why it's only 1,350
people asking why they're being asked to make that choice and why the Government of
Canada would make it for us. Right? I don't know the answer. Yeah.

635 **Peter Dunn:** You realize that probably over half of those hits were from the Isaac Brock
Society?

Professor Christians: Right, right. Which, I had never heard about before blogging this
year and now I've heard a lot from you folks.

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Peter Dunn: Because we had the video on our blog.

Professor Christians: Well movement starts slow. You know.

645 **Questioner:** I'm not sure who can answer this but one of my questions I've had about
implementation of these IGA's so it relieves the bank of some of the pressure of reporting.

Professor Christians: Well, no, it doesn't. They still have to do exactly what they would
have to do anyway, just to CRA instead of IRS. It just changes the..., just introduces an
650 intermediary. Yeah.

Questioner: This is what I'm trying to understand. I guess what the role is of the bank
directly and then of the CRA and in the back of my mind there have to be other government
agencies involved. If part of the IGA is to then disclose this information about, you know,
655 national origin, citizenship, where does that information come from?

Professor Christians: Right.

Questioner: CRA doesn't have that.

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Professor Christians: No.

Questioner: Do they?

665 **Professor Christians:** No. You'll be asked to give that.

Questioner: There's one thing that I've never heard anyone talk about. Which government
agencies are going to provide that information?

670 **Professor Christians:** That's the whole point. It's not an agency at all. It's the bank. I'm
going to show you what they'll ask you. What is considered indicia of US status? This is

what your bank, this is where we were going before and the bank is the arbiter here. It's a bad place. You talk about evidence. You saw in the video, you had to give evidence. Give evidence to your bank?

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Well, what's the burden of proof? Who's got the burden of proof? What switches the burden of proof? How high is the burden of proof? Reasonable? Probable? Beyond any reasonable doubt? I mean, come on. What are we talking about? Evidence is for... Right?

680 But let's just look at what at what the bank will ask you. Are you or have you ever been a US citizen or resident? Were you born in the United States? Do you have a US mailing address or permanent address? Do you use it for anything? Anything? Like for example, Canadians, do you buy stuff on Amazon.com in the US and get it sent to a post office box on the other side of the border? Don't admit to it. You're a US Person. Do you have an
685 account anywhere in the world where the only address is a PO box, in care of address or hold address. Do you have one of those? Do you have your passport in a box with a PO box? Do you save documents; do you have like your important, your marriage certificate and your children's birth certificates in a safety deposit box? In a PO box somewhere, anywhere in the world? You're a US account holder. Now look at this one. It is hard to express how
690 difficult this next one is – a power of attorney or signing authority granted to a person with a US address. Do you have a health care power of attorney where someone related to you is going to make decisions on your behalf and they live in the US? Guess what, you're a US account holder. So, if your mom lives in the States, your sister or your daughter. I don't know why they're all female, but you get the idea and you sign a Power OF Attorney giving
695 them power over you, this looks to me like *you're a US account holder*. Forget citizenship. Forget residence. We're talking about a Power of Attorney. It doesn't say specifically. Maybe there are specifics somewhere, I don't know. I haven't read the 400 pages of regs. Right? This is advice from... Well, you know who this is advice from. Big Four. They will help you through this. Right. OK. They have the details. Right. A Power of Attorney or
700 Signing Authority granted to a person with a US address, that is, guess what, a person, anyone has this indicia, could be that person. Right OK. Instructions to send payments – are you sending money to your kids who's going to college in the US? *US account*. Instruction to send payment to account in the US or any instructions received from the US. Do you have a credit card in the US that has an annual fee and do you have the fee for that paid out of your
705 Canadian bank account? *US account*. Do you see how it's a Venus fly trap – it snaps very quickly? OK. The question for compliance is who's going to ask you those questions? And I'm going to tell you that Deloitte or PwC, someone is going to come up with a handy little form and when you go in once a year, whatever, they'll send you your letter to say you know, our annual holiday greetings—and by the way, here's all the information we have on file for
710 you. If any of this is wrong, under penalty of perjury, you sign here and if we don't hear from you we'll assume it's all still true, thereby fulfilling our annual or tri-annual or whatever annual submission to the IRS. And it'll have on it Deloitte, PwC, Ernst & Young, one of them, have come up with a list and they'll write up you know, have you ever read a

715 credit card agreement, and they'll write up, you know have you ever read the back of your
credit card? Of course you haven't – it's in 2 point type and that's what this will look like –
boilerplate, iTunes agreement style, adhesion contract style, because it's not a contract.
Right? It's not a contract. There's no quid pro quo. It's not a contract. It's just you
submitting to the government under penalties of perjury, probably. So, they'll hand you this
720 form when you open the account and then for all that have an account, they'll just send you a
letter and say this is what we have on file and, fyi, we're giving it to the IRS, CRA, whoever
we feel like really. You waived your rights. And, if you disagree, you know, opt out, you
can just send us a letter and tell us. Otherwise, we'll just assume that everything is 'la la' and
here we go.

725 And most people, this is how devious this problem is, is that most people will not recognize
what is happening. They won't even know. They won't see it until it's done. And, it's
possible that people will live their whole lives and not know. I don't know. But what
happens, for most people maybe it doesn't really matter. It's not going to change their lives.
It's going to be some high profile case here and some high profile case there; some outrage
730 here, some outrage there. All of a sudden, you're on a no-fly list. Right.

So, in terms of compliance, I don't know how to say this, but bankers are not lawyers and
when you get that little form that you don't read, and you don't opt out, or they have you
click it when you go to, worse, they have you click it as new terms of service when you go to
735 use your online bank account. Can't you just see it? They put in there – 900 pages, are you
going to scroll to the bottom of the page, click, 'I Agree'. Did you read all that? Nobody
there. You agreed. You're a US account holder if we thought you might be. You have one
of these indicia, blah, blah, blah, blah – and you just click through to get to your chequing
account. Right? So, I think we're going to see some pretty creative, hey this is the age
740 where we just give all of our information out to everybody. What's new about this? We'll
give it to Facebook; why not to the IRS? Right? And, we can't; it's just too much to bear,
right?

Questioner: About the, like let's say there's a person who has a US place of birth. They
745 don't meet any of the other criteria.

Professor Christians: All you need is one. Any one.
Right.

750 **Questioner:** At the bottom it says having one of these indicia does not mean, whatever. But
that...

Professor Christians: Think of that from the banker's point of view. Are you going to
tangle with the IRS? Oh, they had one, but...
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Questioner: So, basically, do we have bankers making legal decisions? OK.

Professor Christians: Yeah. Or Compliance Officers – there’s going to be an industry for that.

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Questioner: In-house lawyers, maybe.

Professor Christians: Absolutely.

765 **Questioner:** These people; there’ll be lots of them who became citizens before 1986 or before ’94, who obviously have a US place of birth, do not consider themselves US citizens.

Professor Christians: Ignorance of the law is no excuse.

770 **Questioner:** ...and they cannot produce a Certificate of Loss of Nationality, which is what the banks probably would want to see.

Professor Christians: Who know what they’ll need to see?

775 **Questioner:** Then they’ll be either recalcitrant or they’re going to have their account closed.

Professor Christians: Right. They probably won’t be recalcitrant.

Questioner: There will be no grey areas?

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Professor Christians: No, exactly.

Questioner: OK, there’s nothing that says ‘I feel I’m not a US citizen.’ They will make that determination.

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Professor Christians: You know, we like in the tax law to call these objective factors. These are objective factors. You can’t just go around just self selecting in or out of these things when you feel. We don’t care how you feel. We have objective factors so it’s the rule of law. We’ve got to treat everybody the same. Yep.

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Questioner 2: I have a question about the intergovernmental agreement. So, are they; am I right in saying they’re starting to introduce self declarations and stuff as well? So, I think, when a read the Model Agreement from the IRS that there is some self declaration so they will be mandating that people, if they follow these model agreements, self declare whether or not they are a US Person. And, then if the banks already have indicia on their file... So the way that it’s currently structured in these model agreements is not necessarily that if they don’t have on file that you’re a US citizen, you were born in the US, they’re not necessarily

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mandated to inquire in detail whether you have any of this indicia but they will be demanding that you self certify as to whether or not you're a US Person and if that conflicts with any of
800 the information that they do have through their normal course of business, then you will be caught up into it. And, then of course if you have not accurately self declared, that's a really big deal and since self declaring in itself is very coercive. So this is part of it, right? It's in flux; it's a moving target so I'm so not clear what this will look like. When you go the bank, will you be required to in detail fill out these indicia or will you be required to sign
805 something and then you don't know what they have on you? Or anyway, so...

Professor Christians: I think it will be all of the above.

Questioner 2: Sorry, I have to leave.

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Professor Christians: Sorry – goodbye. Thank you.

John Richardson: Probably a good moment for a five-minute break and then we'll pick up with a guest speaker from Washington.

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THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT
OF THE PROCEEDINGS OF THE FATCA FACT FINDING FORUM
HELD AT TORONTO, CANADA, 15 DECEMBER 2012

820 Carol Tapanila

The Isaac Brock Society
28 December 2012

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