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December 12, 2012

Department of Finance Canada
17th Floor, East Tower
140 O'Connor Street
Ottawa, Canada
K1A 0G5

Attention: Mr. Kevin Shoom

**Re: Negotiation of Information Exchange Agreement Regarding FATCA**
**Re: Canadian Charter of Rights and Freedoms**

Dear Sirs/Madams:

***Purpose of letter***

This letter is intended to respond to the Department of Finance media release of November 8, 2012. That release invited public comment on the ongoing negotiations between Canada and the United States concerning an Inter-Governmental Agreement ("IGA") to give effect to certain provisions of the so-called "Foreign Account Tax Compliance Act" or "FATCA", enacted by the United States in 2010. It is my understanding that the Government plans to introduce legislation giving effect to an IGA if and when such an agreement is concluded with the United States.

***My credentials***

I am a Professor Emeritus and former Dean of the Osgoode Hall Law School, and I have written, taught and practised in the area of constitutional law for over 40 years. I am the author of Canada's only comprehensive treatise on constitutional law, and have often appeared as counsel in constitutional cases in the Supreme Court of Canada, most recently representing the Government of Canada in the National Securities Regulator Reference. I have also taught Canadian income tax law. Since 2003, I have been the Scholar in Residence at Blake, Cassels & Graydon LLP ("Blakes") in Toronto, but I have not been retained by the firm or any of its clients to write this letter, which I am writing voluntarily on my own initiative and on my own behalf, and not on behalf of any other person or organization.

***Relevant Charter of Rights Provisions***

There are many aspects of FATCA and any related IGA that present significant conflict-of-laws, privacy, human rights, federal-provincial and other issues. While each of these issues is important, I do not intend to address them in this letter. My focus here is to offer my opinion that legislation enacted to give effect to an IGA, if not drafted sufficiently narrowly, is bound to violate s.15(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter").

Section 15(1) of the Charter provides:

> ***15.*** *(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

Note that the prohibited grounds of discrimination include "national or ethnic origin", and the Supreme Court has held that citizenship is an "analogous ground" also prohibited by s. 15(1) (*Andrews v. Law Society of B.C.* [1989] 1 S.C.R. 143).

It is possible that any legislation to give effect to an IGA would also conflict with s. 7 of the Charter (which protects "liberty") and s. 8 (which protects privacy ("unreasonable search or seizure")), but I confine my comments here to s. 15, the guarantee that is most clearly implicated by the U.S. proposals. The point of this letter is to urge the Government not to agree to an IGA which would call for federal legislation that would offend s. 15 of the Charter.

***Procedures to Identify "U.S. Persons"***

The U.S. has published two forms of "Model" IGA, which essentially reflect the starting point for negotiations, at least from the perspective of the U.S. It is my understanding that once a definitive IGA is agreed to, the Government will draft legislation to be tabled in Parliament requiring financial institutions to give effect to the provisions of the IGA, even where those provisions conflict with other laws, such as federal statutes dealing with privacy, data protection and human rights matters. Some financial institutions are regulated provincially, and there will be a constitutional question about whether they can be regulated at all by the Parliament of Canada. That is another constitutional question that I leave for another day.

To the extent that any implementing legislation adopts provisions similar to those found in the Model IGA, in my opinion, the legislation would violate s.15 of the Charter.

The source of this problem is the fact that the Model IGA requires financial institutions to treat people differently based on such innate characteristics as place of birth or citizenship. For example, under Section II.B of Annex I to the Model IGA, financial institutions are obliged to review their records for pre-existing accounts to determine whether any of their account holders has certain U.S. *indicia*, including U.S. citizenship or a U.S. birth place. If, based on its records, the financial institution concludes that an account holder has U.S. citizenship (irrespective of whether the account holder agrees that he/she actually has such citizenship), the financial institution is required to treat that account as a U.S. "reportable account" and to report it as such to the Canada Revenue Agency ("CRA"), which must then automatically forward information about the account to the U.S. Internal Revenue Service ("IRS"). The information that must be reported to the IRS would identify the individual by name, and would include the individual's address, date of birth, account balance, interest accrued on the account and other personal information. The individual may well be a citizen and resident of Canada, and may have

absolutely no economic connection to the U.S. Indeed the connection to the United States may be very tenuous indeed. For example, the individual could be the Canadian-born child of a U.S. citizen, or the child of Canadian citizens who happened to be born in the United States because his/her parents were there temporarily.

If, based on its records, the financial institution concludes that an account holder has a U.S. birth place, the holder must be treated as if he/she had U.S. citizenship (and must report the information described above) unless the holder provides, among other things, a Canadian or other non-U.S. passport and either a "certificate of loss of nationality" issued by the Department of State or a "reasonable explanation" regarding the holder's "renunciation" of U.S. citizenship. No guidance is provided as to what is meant by a "reasonable explanation". Many Canadian resident individuals in this category will be citizens of Canada who may consider themselves non-citizens of the U.S., and may also have absolutely no economic connection to the U.S.

Section III of Annex I to the Model IGA similarly requires financial institutions opening new accounts to determine which of their prospective account holders has U.S. citizenship, and, in the case of any person identified as a U.S. citizen, to report the above noted information regarding his/her account to the CRA, in which case CRA would then be required to automatically forward that information to the IRS.

When the IRS obtains information on so-called U.S. "reportable accounts", it is reasonable to expect that the IRS will then pursue the account holders for taxes and penalties, and that it may even pursue criminal prosecution where it believes the individuals have evaded U.S. citizenship-based tax obligations. Many of these people are Canadian residents and Canadian citizens, often with no economic connection to the United States, no knowledge that they had tax obligations to the U.S., and no knowledge of retroactive changes to U.S. citizenship law that may have bestowed an unwanted citizenship on them.

There is no mechanism in the Model IGA whereby individuals who are suspected to be U.S. citizens would even know that their personal information was provided to the IRS, and thus there may be no opportunity to provide additional information or take other steps in order to prevent the transmission of this information from Canada. (These are infringements of liberty and privacy that I simply report as policy issues, although they may well be infringements of ss. 7 and 8 of the Charter, as mentioned above.)

I do not propose in this letter to enumerate the many objections that may be made to the imposition of these procedures (there are indeed many significant problems for both financial institutions and their customers), but instead will comment only on the potential Charter section 15 problems with any legislation that authorizes these procedures.

***Application of Charter***

In my opinion, the procedures mandated by the Model IGA are discriminatory in a way that would not withstand Charter scrutiny. These procedures effectively treat individuals differently, and adversely, based on an immutable personal characteristic, specifically citizenship (whether or not acknowledged or desired by the individual) or place of birth. If Parliament were to enact legislation authorizing and permitting this type of differential and adverse treatment, the legislation would contravene the equality protections in section 15 of the Charter. As I explained above, s. 15 prohibits discrimination based on "national or ethnic origin", and has been interpreted as prohibiting discrimination based on citizenship. To impose on financial institutions the duty to report to CRA (en route to the IRS) the names, addresses, place of birth and date of birth and details of the bank accounts of account-holders identified only by their place of birth in

or citizenship of the United States, and all under the implicit threat of taxes, penalties or prosecutions by the IRS, seems to me to be a clear case of discrimination in contravention of s. 15.

It is true that s. 15, like the other Charter guarantees, is subject to s. 1, which makes Charter guarantees subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". But any argument attempting to use s.1 to justify the limitations on the equality rights would be extremely weak. The objective of ensuring compliance with U.S. tax laws is probably not important enough to justify breaches of the Canadian Charter, and, even if it was important enough, the measures contemplated are grossly disproportionate to the objective, affecting as they would do as many as perhaps a million law-abiding Canadian citizens or residents who have a place of birth or citizenship in the U.S. Canada is not a tax haven, and these people are here for reasons that have nothing to do with reducing the taxes they have to pay. If some of them are found to have been avoiding U.S. taxes, that could hardly justify a Canadian law imposing such intrusive measures affecting so many people distinguished only by place of birth or citizenship.

For these reasons, I would urge the Government not to negotiate an IGA that is based on the measures proposed in the U.S. Model IGA. The answer to the American government is surely a compelling one: the legislation needed to implement your IGA would be contrary to our Charter. If the Government has any doubt about my view of the constitutional situation, I would urge the Government to seek an opinion from the constitutional section of the Department of Justice. I am confident that they will agree with me.

***Preferable Approach***

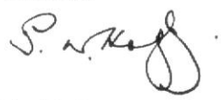
A preferable approach would be to limit the collection of information by financial institutions to the information already collected, and already provided under the existing tax treaty. That information focuses on residence. In other words, any IGA should modify the due diligence procedures specified in the Model IGA by stipulating that any account held by a person who is a resident of Canada for Canadian tax purposes would not be treated as a U.S. reportable account. Only accounts held by U.S. residents would be identified as U.S. reportable accounts. Such modified procedures would still permit the IRS to identify accounts of U.S. residents, thereby ensuring that any income from those accounts is reported by those individuals for U.S. tax purposes.

Any legislation enacting an IGA with this more limited focus would be more consistent with existing data collection practices of Canadian financial institutions, less disruptive of existing practices, and more protective of equality rights. Section 15 does not prohibit discrimination based on place of residence, and legislation based on existing practices would be much less likely to be vulnerable to a Charter challenge.

* * *

I hope these comments are of assistance, and would be pleased to discuss the contents of this letter with you. If it would be helpful, I would be pleased to come to Ottawa for a meeting. I can be reached at the email address or the telephone number at the head of this letter.

Yours truly,



Peter W. Hogg

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