The Isaac Brock Society
Liberty and justice for all United States persons abroad
IsaacBrockSociety.ca

Maple Sandbox
A gathering place for people fighting FATCA, FBAR and US citizenship-based taxation
MapleSandbox.ca

November 12, 2013

Terry Campbell,
President,
Canadian Bankers Association,
199 Bay Street, 30th Floor
Toronto, Ontario
M5L 1G2

Dear Mr. Campbell,

As citizens and residents of Canada, we are strongly opposed to the Canadian Bankers Association's (CBA) recently-stated advocacy for an intergovernmental agreement (IGA) that would allow the government of the United States – through the Foreign Account Tax Compliance Act – to impose its tax laws in Canada.

Such an agreement would represent a gross violation of Canadian sovereignty and would violate the rights of Canadian citizens and residents under the Charter of Rights and Freedoms, the Canadian Human Rights Act, the Personal Information Protection and Electronic Documents Act, and other legal guarantees. The CBA's claim that an IGA would mitigate these violations in any meaningful way is illusory.

There are an estimated one million people in Canada who have, one way or another, connections to the U.S. that would place them, through FATCA, on the U.S. Internal Revenue Service's radar screen. Add in family members, who are also caught up in this net, and the one million gets closer to four million – that's nearly 12% of the Canadian population!

We implore the CBA to use its considerable influence and resources to insist that the Canadian Government categorically reject Washington's demands and to lobby for FATCA's repeal by the American Congress. We are writing now because within the past few weeks, CBA officials have confirmed that despite your valid and well-known concerns about FATCA, they now believe that Canadian banks have no choice but to comply, and that an IGA is the best way to facilitate compliance.

This has been spelled out publicly in two items posted on the website of the Isaac Brock Society (IBS) on October 18 and 19, 2013. We note especially the following excerpts (the full texts of the CBA postings appear at the end of this letter for your reference):

From the October 18 posting on IBS:

"The CBA and banks in Canada have been standing up for bank customers and voicing concerns with FATCA for a number of years. . . . We also went to Washington to meet with IRS and U.S. Treasury officials and Canadian Embassy officials. Last year, the CBA also made a presentation in Washington at public hearings before Treasury and the IRS and our president spoke out against FATCA in speeches in Calgary and Vancouver as well.

"We submitted an opinion piece with our concerns about FATCA to the Washington Post and the Wall Street Journal. It did not get published.

"Unfortunately and despite worldwide efforts, U.S. officials have no intention of repealing FATCA. So, governments around the world have decided that developing bilateral intergovernmental agreements (IGAs) with the U.S. is the best way to ensure that the domestic rights of their citizens are respected while still sharing relevant taxpayer information bilaterally. Once the Canada/U.S. IGA is finalized, it will be reflected in Canadian tax law and financial institutions will have to abide by these requirements.

"We believe this is the best approach and support the government's actions because the alternative would potentially expose Canadians to punitive U.S. withholding taxes on income from their investments, including retirement income."

From the October 19 posting on IBS:

"We agree with your opposition to FATCA as we have said all along. We have raised those concerns on numerous occasions with the U.S. Treasury, the IRS and other U.S. officials in both public and private meetings.

"The U.S. government is not going to repeal FATCA and the Canadian government is negotiating an IGA with the U.S.

"We have made our concerns about FATCA known to the Canadian government, but it is now up to them to negotiate an IGA that will hopefully address your concerns and ours and balance out Canadian law and rights with the requirements of FATCA. We have no control over the negotiations or the content of the IGA and neither do the banks or other financial institutions.

"[T]he financial services industry has not capitulated and we are not enthusiastic about an IGA. Our concerns about FATCA have not changed but the reality is that an IGA is coming."

In view of those statements, we believe the following three points summarize the CBA's position on an IGA:

1. **FATCA repeal is impossible:** The CBA claims that it as well as others in the financial services industry have exhausted all options to get rid of FATCA. Therefore, compliance with FATCA is unavoidable.
2. **An IGA is inevitable:** Because of FATCA's inevitability, an IGA to impose FATCA on Canada is considered by the CBA to be the "least bad" option. The IGA is being negotiated between the Canadian Government and the U.S. Treasury Department, and also can be considered inevitable.
3. **An IGA is acceptable to Canadians:** The CBA considers an IGA to be the best option to protect Canadian citizens and residents ("balance out Canadian law and rights with the requirements of FATCA").

There is no foundation to any of these positions, as we outline below:

1. FATCA repeal is impossible:

It is not!

The United States does not have a parliamentary system of government. "U.S. officials" at IRS and the Treasury Department (i.e., the Executive Branch) are mandated to implement and enforce legislation passed by Congress. They can't repeal it. Nonetheless, as the CBA stated:

"We also went to Washington to meet with IRS and U.S. Treasury officials and Canadian Embassy officials. Last year, the CBA also made a presentation in Washington at public hearings before Treasury and the IRS."

Beseeching the 'enforcers' of legislation is not the way you get changes from the 'creators' of the legislation. Meetings with these officials are not just useless, they may be counter-productive. We understand representatives of the CBA have made limited efforts to convince some U.S. Senators and Congressmen of Canadian banks' concerns. U.S. legislators, unfortunately, care about their own constituents, not foreign banks' headaches (even if they are caused by a U.S. law).

A rejected Op-Ed is not an example of CBA due diligence. Submitting an op-ed piece to major U.S. publications is laudable, but rejection should not have stopped the effort. The CBA has the resources to run a full page ad and/or resubmit to Canadian Media sources. Why wasn't that done?

Despite CBA's claims, there has been no worldwide effort against FATCA. Instead of pretending to have tried to secure FATCA's repeal and failed, the CBA and its member banks should now direct funds to supporting a strategic and professional Washington-based effort.

FATCA's glaring weaknesses can be easily exposed through standard lobbying and public relations techniques. Perhaps begin with the questionable authority of the IGAs under U.S. law.

(Even though they are signed by the State Department, they are not Treaties and will not be presented to the Senate for 'advice and consent'.) Treasury delays and timeline failures for reaching a critical mass of IGAs signed add another weak point. IGAs are essential for FATCA to be a success from a U.S perspective. This provides opportunity for real pushback.

Then there is reciprocity – FATCA's Achilles heel. It is the carrot they promise, but cannot deliver, given the political realities and opposition in Congress. Treasury will never be allowed to impose a domestic FATCA (DATCA) on all U.S. financial institutions (USFIs) to meet the reciprocity promises. You could exploit that very effectively, but you have done little.

The CBA and its members have the resources to do far more. Rick Waugh, Chief Executive Officer of the Bank of Nova Scotia, recently revealed that his institution has spent nearly $100 million for FATCA compliance. ("Electronic spying 'a big issue' for banks, Scotia CEO Waugh says," *Financial Post*, October 23, 2013).

Leaving aside the insoluble data vulnerability and information security problems banks are encountering (compounded by the ongoing scandal of U.S. electronic spying which creates enormous loss of trust in U.S. assurances), FATCA creates massive costs that will be passed on by your member banks to ALL Canadian consumers.

CBA's members are pouring money into preparation for FATCA compliance, implementing procedures that are illegal under current Canadian law. You are pouring all your money into compliance solutions, sold to you by the FATCA Compliance Complex, (FCC) and nothing, as a hedge, on a serious lobby effort to undo this monster! We don't get it! Without some serious expenditure on the other side of the bet, you are placing all your eggs in one basket thus risking everything on one outcome.

To clearly illustrate the risk you take by capitulating, consider the tremendous liability you will visit on your own employees should FATCA implementation go through via an IGA. Each financial institution is required to designate a Responsible Officer whose job is to ensure full compliance with FATCA. Under U.S. law (read the fine print in the FATCA regulations) those Responsible Officers could be subject to imprisonment of up to 3 years, or fined up to $250,000 (and your institution also fined up to $500,000), or both, together with cost of prosecution (not to mention having to pay the cost of legal defence). How likely are any of your employees to apply for the RO job, once they are aware of this aspect of the job description? How will your banking customers view this vulnerability?

2. An IGA is inevitable:

It is not!

The U.S. Treasury Department admits that it cannot compel FATCA enforcement on an extraterritorial basis without IGAs. As stated in the Fiscal Year 2014 Budget request sent up to Capitol Hill in April (*Analytical Perspectives* to the Fiscal Year 2014 Budget, page 202):
"In many cases, foreign law would prevent foreign financial institutions from complying with the FATCA provisions of the Hiring Incentives to Restore Employment Act of 2010 by reporting to the IRS information about U.S. accounts. Such legal impediments can be

addressed through intergovernmental agreements under which the foreign government agrees to provide the information required by FATCA to the IRS."

Among other statutes, this refers to the Charter and other protections in Canadian law. Without an IGA and modification of Canadian laws and Charter, Canadian banks cannot legally comply with FATCA, which would leave the U.S. Treasury Department with the choice of declaring economic war on America's biggest trading partner (the 30% withholding threat about which the CBA rightly complains) or backing down.

By advocating an IGA, the CBA relieves Treasury of this dilemma – and saves an otherwise doomed FATCA. The IGA's supposed "inevitability" becomes a self-fulfilling prophecy. Indeed, it is worse than that. The CBA would have us believe that the IGA is in the pipeline all by itself, that the CBA is just a passive bystander:

"We have no control over the negotiations or the content of the IGA and neither do the banks or other financial institutions. The financial services industry has not capitulated. and we are not enthusiastic about an IGA. Our concerns about FATCA have not changed but the reality is that an IGA is coming."

There would be no prospect of an IGA at all without the efforts of the CBA and other elements of the Canadian financial industry, notably the Investment Industry Association of Canada (IIAC). (To its credit, Credit Union Central of Canada is opposed to an IGA, though they are aware an IGA may be forced upon them through the efforts of the CBA, the "Big Five" banks, IIAC, and others.)

In short, it is unbecoming and disingenuous for the CBA to make the assertion that "the reality is that an IGA is coming" as though it were the result of some natural phenomenon, and unrelated to the CBA's own energetic efforts.

If there is an IGA imposed on Canadians, it will be in large part because your organization and your member banks pushed a reluctant Government to give you one. Let's not sugar coat it. An IGA is a FATCA bailout for you and your member banks, pure and simple. You may have "no control over the negotiations" but you certainly have influence, which you are using to your customers' detriment.

3. An IGA is acceptable to Canadians:

It is not!

The CBA is accurate in asserting that it has "no control over the content of the IGA and neither do the banks or other financial institutions." Neither does the Canadian Government. It is well known that the standard IGA text (model 1), including the Treasury Department's vague promises of reciprocity, is essentially set in stone, with only marginal changes permitted, notably with listing of FATCA-exempt entities on Annex II. This is not a negotiation with "give and take" allowing input from Canada.

In our view an IGA is a one way cram down, plain and simple, dressed up under the façade of politically acceptable language of "bilateralism" or "negotiations", and then sold by you as inevitable and acceptable to Canadians. It is neither.
A December 2012, five page letter from noted constitutional scholar Peter Hogg, former Dean of Osgoode Hall Law School, provided detailed analysis of FATCA's violations of Canadians' rights (as described and excerpted below):-

"FATCA compliance costs for the world's financial institutions are astronomical, and Canada's banks are hoping that the federal government will negotiate an intergovernmental agreement (IGA) with the Americans that would allow them to report data on U.S. citizens [Note: actually U.S. Persons] to Canada Revenue Agency, which in turn would send it to the IRS. The U.S., to facilitate this approach, has written a Model Agreement to be used as a template for these so called 'bilateral tax' agreements.

"But a major obstacle to all this is Canada's Charter of Rights and Freedoms, which prohibits (Section 15.1) discrimination based on several criteria, including 'national or ethnic origin.'

"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. 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."

Professor Hogg's letter goes on to point out that Section 1 of the Charter allows governments to impose reasonable limits to Charter provisions, but then argues:

"... any argument attempting to use Sec. 1 to justify 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 ... the measures contemplated (by the U.S.) are grossly disproportionate to the objective."

FATCA could affect four million Canadians, or 12% of the population: There are about one million people in Canada, the vast majority Canadian citizens, who have connections to the U.S. in one way or another, and who are claimed by the U.S. Government as "U.S Persons" subject to or impacted by U.S. tax laws, reporting requirements and penalties for failure. By the time family members, also affected by FATCA, are factored in, that one million number could get as high as 4 million people.

The "U.S. Person" concept is a very broad and complicated designation subject to change without notice and without Canadian input. It de-facto declares that U.S. personhood is supreme over Canadian residents even if they are Canadian citizens! In simple terms, U.S. citizenship (or U.S. personhood) trumps Canadian citizenship in Canada! It is not an 'international norm'. It is an imperial assertion! FATCA, resting on the unnatural foundation of U.S. dominion over U.S. persons, impacts this non-exclusive list:

- "Accidental" Americans -- born in Canada to parents who are (or were) U.S. citizens;
- Americans who left the U.S. decades ago and thought they automatically relinquished their U.S. citizenship when they became Canadians;
- Americans who have migrated to Canada and obtained Canadian dual citizenship status and reside in Canada;
- Canadians who are permanent residents while still retaining U.S Citizenship status;
- Border babies – people born to Canadian parents in the U.S. who came home as infants;
- Babies born to Americans while residing in Canada;
- Spouses of said U.S. Persons having joint accounts;
- Business partners with American U.S. Persons residing in Canada;
- U.S. green card holders who have returned to Canada to live;
- Canadian citizens and residents who have a "substantial presence" in United States, i.e. Canadian snowbirds;
- Companies/associations who have employees with 'U.S. personhood' who have signing authority on company bank accounts.

Despite the American requirements for the reporting of financial records of these individuals, the term "U.S. person" has no legal meaning in Canada.

Many of the same FATCA concerns voiced by Hogg (as referenced above) have been raised by others.
First was MP Elizabeth May of the Green Party.
Now, more recently by Murray Rankin, the Official Revenue Critic of the New Democratic Party (NDP) in a September 2013 letter to Finance Minister Jim Flaherty.
Then, the Leader of the Opposition, Tom Mulcair (NDP), later upped the ante in a letter to voters, endorsing Rankin's stand and even mentioning the dreaded "S"-word: "sovereignty"!
Even more pointedly, another Party joined the chorus. Liberal MP Ted Hsu addressed to the Government detailed questions about the FATCA IGA, to which the Government is obligated by law to answer in 45 days.
A few days later, Liberal MP Scott Brison also added a different set of FATCA questions to House of Commons Order and Notice papers which again will require a response.
These questions include disclosing "which specific individuals and groups did the Minister of Finance consult regarding any IGA, and on what dates." We look forward to examining the details of the CBA's and your member banks' consultations with the Finance Ministry.

Everyone is a FATCA critic, but some become witting or unwitting co-enablers

Mr. Campbell, it is well known that Minister Flaherty is no less a critic of FATCA than you are. However, it simply does not pass the test of credibility for the CBA to claim that an IGA would "hopefully address your concerns and ours and balance out Canadian law and rights with the requirements of FATCA."

To the contrary, if the CBA's efforts to get an IGA signed are successful, it would mean that all of the violations of the rights of Canadian citizens and residents of which Professor Hogg, Ms. May, Mr. Mulcair, Mr. Rankin, Mr. Hsu and Mr. Brison warn would be institutionalized in Canadian law.

In fact, as made clear in the U.S. Fiscal Year 2014 Budget request, removing existing protections and legitimizing their violation is a specific and intended goal of finalizing an IGA. Your support for a FATCA IGA guarantees the success of the U.S. mission.

FATCA's 30% withholding threat leaves no options?

We understand CBA's concern over the imposition of a 30% withholding penalty on U.S.-source transactions for any institution that does not toe the FATCA line. Such blackmail is almost unprecedented in modern history. And we know that this withholding threat is, in your opinion, a trump card held by the U.S. to make sure everyone falls into line.

But has it occurred to you that all it takes is one courageous nation to stand up to this kind of bullying to destroy FATCA altogether? The CBA thinks it has no choice, but consider this defining moment in Canadian political history and perhaps you'll reconsider:

Correction: *"You had an option, Sir."*

Those are the words, which Brian Mulroney thundered at John Turner in 1984, and changed Canadian history. Going into the leadership debate, the Liberals had a comfortable lead. Instead, Mr. Mulroney's Progressive Conservatives were elected with 211 seats, the largest in Canadian history:

MR. MULRONEY'S WORDS:

"You had an option, Sir. You could have said 'I'm not going to do it. This is wrong for Canadians and I'm not going to ask them to pay the price.'

"You had an option, Sir. You had an option to say 'No.' You chose to say 'Yes'.

"If I may say respectfully, that is not good enough for Canadians…That is an avowal of failure…"

"You had an option, Sir. You could have done better."

Mr. Campbell, you too have an option.

The CBA repeatedly has said that it is opposed to FATCA but must comply. To do so, the CBA is advocating an IGA which would allow – indeed, mandate! – that Canadian banks violate rights of Canadians based on one basic factor: their place of birth.

If we may say so respectfully, Mr. Campbell, that is not good enough for Canadians!

You have the option to say "NO" to FATCA.

If you say 'Yes" to an IGA, it is an avowal of failure.

"You have an option, sir. You could do better."

Please don't capitulate to U.S. demands!

There are small, weak countries in the world that, when confronted with threat of illegal reprisal by a powerful foreign state for not surrendering their sovereignty and abrogating their citizens' rights, have no choice but to capitulate.

Canada is not one of them. True, Canada is not so powerful as the United States. But neither is she small or weak.

The CBA states: "[T]he financial services industry has not capitulated and we are not enthusiastic about an IGA."

The U.S. Treasury Department does not demand Canada's enthusiasm, just Canada's obedience. An IGA is exactly the capitulation they demand.

Mr. Campbell, you have to do better:
Instead of urging the Government of Canada to accept an IGA that would impose U.S. law in Canada –

- **Please ask the Government to tell the U.S. they cannot impose FATCA on Canadian citizens, residents and financial institutions;**

- **Please ask the Government to demand that the U.S. follow 'international norms' of residency based taxation, and not try to impose its unique citizenship taxation and penalties on the Citizens and residents of Canada;**

- **Please tell the Government that it should not change Canadian laws to accommodate the demands of a foreign government;**

- **Please tell the Government that Canadian banks are committed to enforcing only Canadian laws on banking, privacy, and human rights, and that the Government has a duty to protect you from any American reprisal, with counter-reprisals if necessary.**

Instead of preparing to violate the legal rights of Canadian citizens and residents, the CBA and your member banks should insist that Canadian citizens and residents born in United States:

- Are not second class citizens and residents in their country of choice;

- Have the same rights to manage their finances with confidence and in privacy with their banks as all other Canadian customers;

- Should not fear closure of accounts for just being born in United States or simply because they will not consent to having their financial information divulged to a foreign government;

- Should not have to accept a two tier banking service, based on place of birth and without respect for the privacy of Canadian customers.

The CBA should belatedly begin a serious lobbying and media campaign to secure FATCA's repeal.

If the Canadian Government and Canadian citizens spoke with one voice and told the U.S a firm "No" on an IGA, and a firm "No" on FATCA enforcement in Canada, it would resound around the world. Other countries would be encouraged to stand up to the U.S. on FATCA, and the path to the repeal of this misguided law would be opened. Anything less is capitulation and sovereignty surrender to American imperial will.

To accept FATCA with or without an IGA, is an abrogation of all Canadian citizen Charter rights, freedoms and privileges! We earnestly and respectfully urge you "to do better," and thank you for your kind attention.

This letter is the collaborative effort of Canadians from coast to coast – most are active participants in both the Isaac Brock Society and Maple Sandbox blogs. Many are dual U.S. citizens, many are former U.S. citizens or former green card holders; but all have palpable fear about an impending betrayal of their financial privacy rights by their banks and by their government. They do not want their names revealed at this point because what they fear most is an unprincipled predatory financial attack by the U.S. helped by that Canadian betrayal.

For further information contact:

Lynne Swanson, maplesandbox at yahoo dot ca
Administrator, Maple Sandbox
Peter W. Dunn, petros at isaacbrocksociety dot ca
Administrator, Isaac Brock Society

APPENDICES

The Canadian Bankers Association says:

October 18, 2013 at 12:15 pm

Dear name withheld by request,

We are very aware of the concerns that you and many others have about FATCA and have corresponded in the past with followers of the Isaac Brock Society and Maple Sandbox. You should know that the banking industry in Canada and around the world shares your concerns.

We have general information about our opposition to FATCA here: http://www.cba.ca/en/research-and-advocacy/47-regulatory-enviornment/598-foreign-account-tax-compliance-act

The CBA and banks in Canada have been standing up for bank customers and voicing concerns with FATCA for a number of years. We have raised our concerns with the IRS, the U.S. Treasury Department and the G7 both directly and through our membership in the International Banking Federation. You can find more information here:
http://www.ibfed.org/news/ibfed-writes-to-g7-on-fatca-12-4-11
http://www.ibfed.org/archived-news/ibfeds-recommendation-to-us-authorities-on-the-foreign-account-compliance-t
http://www.ibfed.org/archived-news/us-foreign-account-compliance-tax-act-fatca

We also went to Washington to meet with IRS and U.S. Treasury officials and Canadian Embassy officials. Last year, the CBA also made a presentation in Washington at public hearings before Treasury and the IRS and our president spoke out against FATCA in speeches in Calgary and Vancouver as well. Here are the links:
http://cba.ca/contents/files/presentations/pre_20120515_irsfatca_en.pdf
http://www.youtube.com/watch?v=3kVM2vV8jPU (Preview)
http://www.youtube.com/watch?v=wosK05ynMX4&feature=plcp

We submitted an opinion piece with our concerns about FATCA to the Washington Post and the Wall Street Journal. It did not get published.

In Ottawa, we have raised concerns with officials from the Department of Finance, the Minister of Finance and the U.S. Embassy. Finance Minister Jim Flaherty has supported our position and expressed his own concerns publicly and we appreciate the support from the Minister and his officials.

Unfortunately and despite worldwide efforts, U.S. officials have no intention of repealing FATCA. So, governments around the world have decided that developing bilateral intergovernmental agreements (IGAs) with the U.S. is the best way to ensure that the domestic rights of their citizens are respected while still sharing relevant taxpayer information bilaterally. Once the Canada/U.S. IGA is finalized, it will be reflected in Canadian tax law and financial institutions will have to abide by these requirements.

We believe this is the best approach and support the government's actions because the alternative would potentially expose Canadians to punitive U.S. withholding taxes on income from their investments, including retirement income. The IGA should avoid that and ensure that Canadian law is respected. Until the IGA is made public, we won't know exactly what the final requirements will be for financial institutions and their customers.

We hope this information is helpful.

Sincerely,

The Canadian Bankers Association

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The Canadian Bankers Association says:

October 19, 2013 at 11:12 am

We would like to address some of the comments made in this forum. We agree with your opposition to FATCA as we have said all along. We have raised those concerns on numerous occasions with the U.S. Treasury, the IRS and other U.S. officials in both public and private meetings. We have raised those concerns with the Canadian government and the Canadian embassy in Washington in public and private meetings. We are opposed to the extraterritoriality of FATCA as you are and we have said so publicly on many occasions.

However, the reality is we are past the point of whether Canadian financial institutions can choose to comply with FATCA or not. The U.S. government is not going to repeal FATCA and the Canadian government is negotiating an IGA with the U.S. According to public statements made by Finance Minister Jim Flaherty, the final IGA is coming soon, and once finalized, its requirements will be reflected in Canadian tax law. Canadian financial institutions will then be required to comply with whatever those requirements end up being under Canadian law.

We have made our concerns about FATCA known to the Canadian government, but it is now up to them to negotiate an IGA that will hopefully address your concerns and ours and balance out Canadian law and rights with the requirements of FATCA. We have no control over the negotiations or the content of the IGA and neither do the banks or other financial institutions.

To address some of @LynneBlaze's points raised here and on Twitter, the financial services industry has not capitulated and we are not enthusiastic about an IGA. Our concerns about FATCA have not changed but the reality is that an IGA is coming.

You have also asked if banks and other financial institutions will ask all customers where they were born and what would give them the legal authority to do so. The requirements are unclear right now but we are expecting the details to be outlined in the IGA.