February 21, 2014

IGA-AIG@fin.gc.ca
Tax Policy Branch
Department of Finance
140 O’Connor Street
Ottawa, Ontario
K1A 0G5

***Submission re Canada’s Intergovernmental Agreement with the USA re FATCA***

Dear Government Officials, Department of Finance,

I have previously corresponded regarding negotiations that the Government of Canada was conducting with the USA re the FATCA intergovernmental agreement. As you know, I am very disappointed that Canada was not the leader in saying No to this extra-territorial tax law coming across the Canadian border to make our financial institutions data collectors to identify and turn over to the Canada Revenue Agency, who will then turn over to the US IRS, private financial information of ‘US Persons in Canada’.

My then-husband (now deceased) and I came to Canada in 1969 and became Canadian citizens in March of 1975. We had two children born in Canada before we took Canadian citizenship. Unknowingly, both automatically became US citizens. They were not registered with the US. They would be among those considered “Accidental Americans” – the others born in the US to Canadian (or other nationality) parents but who returned to their parents’ country in their childhood, some days after their birth in the US. My husband and I after we took Canadian citizenship, and were at the time warned that by doing so we would lose our US citizenship, lived the rest of our lives as Canadians. We did not consider ourselves ‘Americans in Canada’. We considered ourselves and our children Canadians in Canada and lived our lives as such. Like the vast majority of US Persons Abroad, we – and, as I now realize, most of my Canadian government representatives – knew nothing of US citizenship-based taxation. We didn’t file US tax and reporting returns, however always filed our Canadian tax returns.

My daughter has officially renounced her US citizenship, as have I. We have certified our requisite number of years US tax and reporting compliance with IRS Form 8854 and we have Certificates of Loss of Nationality to show our local CANADIAN “foreign financial institutions” when they start a search for US Persons in Canada. My son, though, like any other person with a developmental disability who would not understand the concept of “citizenship”, cannot renounce his never-acknowledged, never registered US citizenship even though he never lived in the US, never had any benefit from the US and will never have any benefit from US citizenship as his family, his support system is in Canada, not the US. I, as a parent, a guardian or a trustee, do not have the right to renounce that extraneous US citizenship for my son, even with a court order. The information from a Washington, DC immigration/nationality lawyer that I engaged to confirm my son’s US status and give possibilities for his renunciation is that my children were US citizens from the moment of their births. And, straight from the US Department of State:

**DOS persons he talked with on an informal basis have “sympathy” for such cases. However, the developmentally disabled person will have to have FULL understanding of what he’s doing; if any question of lack of comprehension and grasping meaning and importance of ramifications, they could NOT approve such a case. From DOS point of view, US citizenship is precious and they have therefore established fundamental requirements for “compelling reason”. Even though there is the risk that a person’s financial resources could run out before his/her life was over, they will never approve a renunciation for financial / economic reasons. DOS has NEVER had such a renunciation case approved due to “compelling circumstances”. Bottom line: “compelling reason” in their regulations is not helpful to my son’s case. I could sue – persons he talked with at DOS are SURE no one would ever win such a case as the courts view the discretionary action that DOS has would take precedence.**

In pondering the advice at <http://blogs.angloinfo.com/us-tax/2014/02/17/help-i-want-to-expatriate-but-they-wont-let-me-part-ii/> (from the author, Virginia La Torre Jeker J.D.:

**“Parent or Guardian (or Trustee) – What Should You Do?**

US tax planning in the kinds of cases discussed is ever critical. If the individual cannot expatriate currently, it is very important to structure his affairs to minimize any US tax bite during the time he remains a US citizen and in planning for a future expatriation. \*\*\*\*\*\*If the individual is under a permanent mental incapacity such that renunciation will never be possible, then proper planning of US tax matters becomes even more critical. **A well-meaning parent or guardian may often look to trust structures to ensure the continued care of the child or mentally challenged individual. However, setting up a “foreign” (non-US) trust for such an individual may well be the worst action to take from a US tax planning perspective! The stakes are high. Get proper advice.**\*\*\*\*\*\*”

*So, more money for proper professional advice since the country in which my son was born, Canada, will or can do nothing to protect him? In fact the Government of Canada just waived my son’s rights in signing an IGA with the US. (And the rights of others like my son; and the rights of other persons who may have a “mental incapacity” like someone with age-related dementia.) The person with “Mental Incompetency Issues” is even lesser than the second-class Canadian citizenship that all other ‘US Persons in Canada’ now have with the US IGA, compared to “all other Canadians, no matter where their ‘national origin’ or the ‘national origin’ of their parent(s).*

**\*\*\*OR, am I to assume that the advice is I SHOULD NOT Hold a Canadian Registered Disability Savings Plan (RDSP) for my son? Besides an RDSP not being a good investment for a US Person, he doesn’t deserve to have the benefit of such a plan — it is not for those the Government of Canada now deems a ‘second-class citizen’ by virtue of an arbitrary, unregistered NATIONAL ORIGIN by birth to a US Person IN CANADA, because I was still a US citizen at the time. Swallow hard and cash in the RDSP, turning back to the Government of Canada the bonds and grants they contributed to the RDSP and on which I have already paid income tax to the US. Too bad about the amount I paid to a US accounting firm to correctly report to the US my son’s RDSP on my behalf. How can one so-called US Person in Canada have made so many mistakes in life planning 101 in trying to best provide for my son when I am no longer alive?**

*…do I just do nothing and \*\*\*HOPE\*\*\* that \*\*\*they\*\*\* (whoever* ***they*** *is: local CANADIAN “foreign financial institutions” or the Canada Revenue Agency or the US Treasury or IRS [ who has the information on my son in my FBARs (Foreign Bank Account Reports) ] will not take action? It makes no sense to register my son with the US and the abyss of cost of administration of compliance of a US citizenship never registered / never asked for (the only purpose for which would be the ability to renounce, which he can’t). It’s a circular conundrum.*

*\*\*\*\*\*\*\*\*\*\*\*\**

**Andrew Grossman**, *US Dept of State (retired), author of Conflicts in Cross-Border Enforcement of Tax Claims, comment,* which makes me think / try harder for a solution for this “injustice” for my son (others like him with a ‘mental incapacity’) AND those other “Accidental Americans” born in the US only by “accident of where their parent(s) happened to be when they were born — another country than their real home country.

**His points:**

(1) There is a “rebuttable presumption of alienage” (non-acquisition of US nationality) in the case of persons born abroad, at least in non-criminal cases. **The State Department allows its consular offices abroad to issue reports of birth abroad of a citizen only up to age 5, after which all cases must be referred to Washington.** <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200302535> Especially in cases of doubtful qualifying residence (or for non-marital children, mother’s unbroken presence) in the United States, this presumption may be useful. The IRS after all has no status to bring an action to establish nationality. (There is substantial case law on “doubtful nationality” cases, many of which have been collected in the Gordon, Mailman, Yale-Loehr & Wada Immigration Law treatise.)

(2) While International Law reserves to each state to the right to determine who are its nationals, it does not compel recognition of that nationality by other states in exorbitant cases. **The concept of “dominant nationality” widely accepted before WW II fell into disuse as dual nationality became common (partly because of gender equality)** (viz. the 1992 Micheletti case of the ECJ); **but the paramount national interests of other countries whose “ordre public” might violated by US PFIC and citizen-tax rules just might revalidate it.** ***Provisions of tax treaties notwithstanding (“For the purposes of this Convention, the term ‘resident’ of a Contracting State means any person that, under the laws of that State, is liable to tax therein by reason of that person’s domicile, residence, citizenship”).***

(3) The State Department’s views on loss and renunciation of nationality are here: http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/renunciation-of-citizenship.html These are not unqualified statements of law but rather agency interpretation. **Statistics alone suggest that large numbers of persons who may be counted as its nationals abroad have disregarded their status and obligations. Many lack the means and sophistication to be compliant. Some forego CLNs and rely on pre-1980 expatriation or on their own interpretation of the expatriation statute. *In the sad cases of mentally-incompetent individuals disadvantaged (i.e., for PFIC and tax reasons obstructed for benefiting from foreign tax-sparing allowances and trusts) some rely on the points in paragraph (2) above.***

(4) That said, **Big Data and new tools** (the TECS database of passports, green cards, visas, travel reservations and border crossing) **and the occasional use of “ne exeat republica” injunctions puts at risk those who, like Ronald Anderson, once thought they could visit the USA undetected** http://uniset.ca/other/news/wp\_ronaldanderson.html

(5) Ronald Anderson was a Vietnam war era Army deserter. Such people relied on sympathetic foreign governments (which often gave them residency and eventually naturalized-citizen status). Other cases highlight the policy conflicts that dual nationals encounter. **FATCA and other aggressive foreign assertion of jurisdiction by the USG may be acceptable when they relate to US residents. How conflicts will be resolved when dual- (and multi-) national individuals are targeted within their other country of nationality remains to be seen.**

(6) Most countries of the world have permutations of “nationality”, sometimes based primarily on ethnic or cultural priorities. The USA rather has something else: English Common Law “allegiance”, as in “Pledge of” and in “Ligeance of the King”. **For Americans expatriation has typically had within it a whiff of apostasy.** (The US still has “grades” of citizen, with 14th Amendment citizens born in the 50 states compared with territory-born citizens and foreign-born “jus sanguinis” citizens (and beyond that pre-1924 Indian Citizenship Act Native American protégés, pre-Cable Act women, American Samoa “noncitizen nationals” and a few other anomalies.)) **This may explain a certain lack of sympathy for Americans abroad faced with the kind of conundrum you have written about.**

(7) **The US often holds other countries to a higher standard than it holds itself in international-law matters,** the Nicaragua case before the ICJ being only one example. Although other countries have “expatriation taxes” (France, Denmark, Canada…) and Eritrea (and until 1999 the Philippines) have levied tax on their diaspora, the main conflict has been in military conscription. Some countries (Greece, for example, except with respect to its Muslims and ethnic Slavs) have had no provision for loss of nationality. **One might hope that a multiplication of cases of conflict between the USA and foreign nations will lead to a clarification and perhaps an alleviation of hardship in some cases of reluctant and “accidental” Americans.**

 \*\*\*\*\*\*\*\*\*\*\*\*\*

On another note, it preys on my mind every single day the number of people this round-up of US Persons will affect who DO NOT have financial resources for their own lives, that they think they are unaffected by this, who besides having very little in the way of finances, have very little in the way of financial / tax literacy. There have to be more than a fair share of these individuals / families out there. One has told me she is too poor for this to affect her. So, will that be true? You can’t get blood from a stone so these people should not worry about any of this? What will be their consequences; what will happen to the lives of these families who for whatever reason just don’t have money to get US professional legal / accounting advice and certainly do not have the expertise to handle it themselves? I don’t want to scare them. I can very well put myself into their shoes: there but for the grace of God could have I gone — much of my life a single parent with two children, one with developmental disability as well as concurrent medical problems (and me with my own medical issues). Believe me, I know the lucky breaks I’ve had to be able to be a contributing member of Canadian society (along with some very hard work and planning) and I thank all that is holy, that my path brought me to Canada — I would choose this as my country of citizenship over and over again. Had I stayed in the US, I am convinced my circumstances would have rendered me a ‘welfare mom’ with two small children to raise. Do not my Canadian government, Department of Finance, representatives think that this, aside from my own family’s problems, could be huge in the number of US Person Canadians so affected?

Again, I submit,

Government of Canada announcement re IGA (intergovernmental agreement re Foreign Account Tax Compliance Act (FATCA) signed with the US) refers to “exemptions for Canadian registered – it is confirmed to me that, as I thought, these are only exemptions for the banks – they do not have to turn those accounts over to CRA. A US Person for tax purposes still has every US tax and reporting requirement they always did.  The US considers the Canadian registered accounts, including the RDSP, “foreign trusts”.

This summer, major portions of the controversial *US Foreign Account Tax Compliance Act* come into effect. What will it mean for Canada? Professor Allison Christians of McGill University talks international tax, individual privacy, and national sovereignty. <http://directory.libsyn.com/episode/index/show/mljpodcast/id/2687838>

This is my post about what I sent to my Canadian government representatives: <http://isaacbrocksociety.ca/2014/02/15/my-plea-for-clarification-on-the-rdsp-and-other-canadian-registered-savings-plans-are-these-now-for-purchse-only-to-canadians-who-are-not-us-defined-us-persons-in-canada/#more-26193>

 (Comparison with Canada: “Experts” reportedly estimate that FATCA could cost Canada $200 million.  But Bank of Nova Scotia already has spent $100 million all by itself; the Big Five alone will spend at least $500 million.  Canadian consumers will pour billions of dollars into the pockets of compliance “experts” – consulting, law, accounting, and software firms – who see FATCA as a goldmine.)

This is what I comment / ask other Canadians:

* US-defined ‘US Persons’ in Canada will be much more than actual US citizens!
* Our Local CANADIAN what the US calls “foreign financial institutions” and our Canada Revenue Agency become arms of the US IRS.
* Are you OK for your Canadian bank asking you if there is any reason the US would consider you a US Person?  Should they ask Chinese, Vietnamese, South African, French / Canadians their national origin?  Should they also ask all of us our religion or our sexual orientation?
* Should your Canadian spouse / your child born in Canada / your child born in the US (by accident) but never resided there / your business partner / any company that you for which you have a “signing authority” be deemed “US Persons in Canada”?
* This will cost ALL Canadians.  Is this OK with you as a Canadian taxpayer?
* Is this OK with you to have the US funnel funds out of the Canadian Treasury?
* Is this OK with you to be paying the cost of implementation of this US Person round-up by our financial institutions?
* Should Canada remain a sovereign nation?
* Under the Canadian Charter of Rights and Freedoms, should ALL Canadians have the same rights?
* Is there now a tiered Canadian citizenship: those deemed ‘US Persons’ who are now second-class Canadians vs. first-class citizenship for ALL OTHER CANADIANS no matter their nation origin?

In January there was a blitz of Canadian media coverage, exposing that the misery FATCA would inflict on millions of Canadian citizens and residents is significant. Among the items worth noting:

[Canadian banks to be compelled to share clients' info with U.S.](http://www.cbc.ca/news/politics/canadian-banks-to-be-compelled-to-share-clients-info-with-u-s-1.2437975) (CBC News)
[FATCA under fire from tax experts & Canadian citizens](http://www.cbc.ca/thecurrent/episode/2013/11/13/fatca-under-fire-from-tax-experts-canadian-citizens/) (CBC Radio)
[U.S. tax law called ridiculous](http://www.cbc.ca/player/News/Canada/ID/2429871653/) (CBC News)
[U.S. FATCA tax law catches 'accidental Americans'](http://www.cbc.ca/player/News/ID/2429927085/) (CBC News)
[How will the new U.S. tax law affect Canadians?](http://www.ctvnews.ca/business/q-a-how-will-the-new-u-s-tax-law-affect-canadians-1.1638582) (CTV News)
[U.S. FATCA tax law catches unsuspecting Canadians in its crosshairs](http://www.cbc.ca/news/canada/u-s-fatca-tax-law-catches-unsuspecting-canadians-in-its-crosshairs-1.2493864) (CBC News), which includes my interview and over 2,100 comments.

There is so much more that I could say about other aspects, but I want to emphasize this segment of the US Person in Canada population that will be affected in such a perverse way that they are entrapped into servitude to the US for the rest of their lives. Canada has a responsibility to these people and their families. Many don’t have a voice to say this to you. I speak on my son’s, as well as their, behalf. I am tired and beaten; I don’t want other families to go through what I have endured and paid from my fully Canadian earned and taxed retirement savings.

I hope you are now better listening to those who will be affected by the unilateral US FATCA law which combines with US citizenship-based taxation, one that you must know comes with a false US reciprocity promise. It is shameful there was not the same conversation with US Persons in Canada as there was with the Canadian financial institutions and the Canadian Bankers Association.

US FATCA law should have from the start been aimed ONLY at those resident in the US sending their untaxed earnings offshore. None want to see that tax evasion.

Further, none of us want to see innocent people (whose only “crime” is ignorance of US citizenship-based taxation law) as collateral damage of US FATCA law. FATCA combined with US citizenship-based taxation law is a US cash cow, the means for theft from individuals, families and other countries around the world, countries who practice residence-based taxation law. Please don’t allow this. Please don’t be complicit in the US collateral damage to a large segment of Canada’s people. The Canadian Charter of Rights and Freedoms should be your power, otherwise just a sham.

Sincerely,

Carol Tapanila

Calgary, AB, Canada