John Richardson – CitizenshipSolutions.ca - Submission to: The House of Commons Standing Committee - **May 14, 2014,** in relation to its study **of Part 5 of Bill C-31**

Introduction: This submission is in relation to the proposed legislation to implement the Canada U.S. FATCA IGA signed on February 5, 2014. The specific legislation is: **The Canada–United States Enhanced Tax Information Exchange Agreement Implementation Act –** Part 5 of Bill C-31.

All of which is respectfully submitted:

John Richardson - http://www.citizenshipsolutions.ca – May 14, 2014

Further submissions on FATCA, U.S. citizenship-based taxation and how they interact:

Submissions to the U.S. Senate Finance Committee – On Citizenship-based taxation

Submission to the U.S. Senate Finance Committee on Citizenship-based Taxation – January 17, 2014

PFIC Taxation and Americans Abroad – February 6, 2014

Submissions to the Select Budget Committee of New Zealand – On FATCA

Paying Tribute to America – Submission to the New Zealand Budget Committee on a FATCA IGA – February 12, 2014

Further submission to the New Zealand Budget Committee on FATCA and the U.S. Exit Tax – February 27, 2014

Submission to the Canadian Department of Finance – On FATCA

Richardson Kish comments to the Department of Finance on Canada's proposed FATCA IGA – March 11, 2014

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All above submissions may be found at:

http://citizenshipsolutions.ca/who-i-am/richardson-submissions-on-citizenship-based-taxation-and-fatca/

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Introduction: This submission is in relation to the proposed legislation to implement the Canada U.S. FATCA IGA signed on February 5, 2014. The specific legislation is: **The Canada–United States Enhanced Tax Information Exchange Agreement Implementation Act –** Part 5 of Bill C-31.

Honourable Members of the Committee:

1. FATCA is a U.S. law enacted by the U.S. Congress in 2010. Interestingly, it is NOT a "stand alone" law. Rather it was added as a last minute addition, to the HIRE Act. FATCA was NOT related to the principal purpose of the HIRE Act ("Hiring Incentives to Restore Employment"). Furthermore, FATCA had been previously rejected as "stand alone" legislation. When it was added to the HIRE Act, it was neither debated nor considered. It was therefore "legislation by stealth". In addition, FATCA is a U.S. law of unprecedented "extra-territorial application". In its simplest terms, FATCA **commands other nations** (including Canada) to: **Obey the United States or be subjected to U.S. sanctions** which include a **30% deduction from payments in U.S. dollars that are payable to Canadian banks.** The obvious thinking of the architects of FATCA was: *"If we got em by the banks, their minds and hearts are sure to follow.* It is obvious that Canadian participation in FATCA means that Canada would cede significant control of its banking and financial system to the United States. If one can't control one's finances one can't control one's future. This is true for all persons, businesses and governments. By subjecting Canadian banks, on Canadian soil, to laws made in Washington, Canada will have ceded a large part of Canadian sovereignty and independence to the United States in general, and to the United States IRS ("Internal Revenue Service") in particular.

2. Bill C-31 comes from the Conservative Government, a government that (courtesy of the "first past the post principle") enjoys a "legal majority", but not a "moral majority" in Canada. Why not a "moral majority"? In the 2011 Federal election, only 18% of Canadians who were eligible to vote, voted for the sitting Conservative MPs. These figures are taken from the Elections Canada site, which provides information confirming, that the sitting government received 4.38 million votes from 24.25 million eligible voters in Canada. **To put it simply: 82% of eligible voters did NOT vote for those "sitting Conservative MPs" which compose the Conservative Government**. Yet the Conservative government is attempting to impose the U.S. FATCA law on Canada and Canadians.

3. All elected governments of Canada (whether minority, "legal majority" or "moral majority") are required to govern in the best interests of Canada and within the structures of the Constitution of Canada, which include the Charter of Rights ("Canadian Charter of Rights and Freedoms"). All Canadian laws are subject to the provisions of the Charter of Rights, which is the supreme law of the land. No elected Canadian government (including the

Conservative Government) has the right to adopt the laws of another country as the "supreme law of Canada".

4. Part 5 of Bill C-31 - **The Canada–United States Enhanced Tax Information Exchange Agreement Implementation Act –** has two purposes. The first purpose is to amend specific Canadian laws to comply with the U.S. FATCA law. The second purpose is to clarify that: if a Canadian law is inconsistent with FATCA, that the U.S. FATCA law will prevail. This is clearly stated in S. 4 of the **The Canada–United States Enhanced Tax Information Exchange Agreement Implementation Act.** To put it another way, Part 5 of Bill C-31 would effectively make Canada's Charter of Rights subordinate to FATCA. For example: The Canadian Charter of Rights prohibits discrimination based on national origin and citizenship. FATCA REQUIRES Canada to discriminate against U.S. citizens. Therefore, the "acid test" for discrimination **against ONLY THOSE Canadians who are "deemed U.S. citizens"** becomes whether a law conflicts with FATCA and not whether it conflicts with the Charter. Canadians who are NOT "deemed U.S. persons" have the protection of the Charter. Canadians who ARE "deemed U.S. persons" do NOT have the protection of the Charter – their rights as Canadian citizens have been "FATCAed Away". Bill C-31 (if the constitutionality is upheld) mandates that FATCA replace Canada's Charter as the "supreme law of Canada" in relation to those Canadian citizens that the U.S. wishes to claim as their property. Canadian citizens resident in Canada have the rights and obligations of all Canadian citizens and are NOT (as has been suggested) "U.S. property temporarily stored in Canada!" If they are not really Canadians or if they don't really live in Canada, then why are they paying tax in Canada?

5. The apparent admiration of the Conservative Government for imposing U.S. law on Canada extends beyond the substance of FATCA. It includes the very means of enabling the law. In the same way that, FATCA was U.S. "legislation by stealth", the Conservative Government proposes to enact - **The Canada–United States Enhanced Tax Information Exchange Agreement Implementation Act –** as "legislation by stealth". (It is buried in an "omnibus BUDGET bill.) FATCA is unrelated to the Budget and matters of finance. FATCA does bear on Canadian sovereignty, Canadian citizenship, Canadian values and consistency with Canada's constitution including the Charter of Rights. **To put it simply: The FATCA debate is a debate about Canada's future.**

6. At the very least, **The Canada–United States Enhanced Tax Information Exchange Agreement Implementation Act,** must be divorced from Bill C-31(no "legislation by stealth") and must become a "stand alone" bill. Furthermore, if any government has the authority to make Canada subject to U.S. law, this important legislation must be debated in an open way, with sufficient time for debate, and be subject to a "free vote" (the Conservative caucus must NOT be required to vote along party lines) in the House.

7. Although FATCA will impact all of Canada and all Canadians, it is specifically directed at those Canadians who the U.S. (in its sole discretion) defines as "U.S. persons" in general and "U.S. citizens" in particular. The U.S. Constitution automatically confers U.S.

citizenship on those born in the U.S. For the purposes of FATCA, the definition of "U.S. person" is based on the legal 14th amendment – immutable characteristic - test of how one acquires the legal status of being a U.S. citizen. It is NOT based on a broader understanding that "citizenship" requires some voluntary connection to the U.S. Place of birth in an "immutable" characteristic. Nobody chooses where they are born. They do choose where they want to live and where they want to be a citizen.

8. For most Canadian citizens resident in Canada, their only connection to the U.S. is one of birth. They don't consider themselves to be U.S. citizens. They make no income in the U.S. They have no assets in the U.S. They have no immediate family in the U.S. They have no voluntary or other connection to the U.S.

9. Under U.S. law, the consequence of being a "U.S. citizen" is that no matter where you live, you are required to pay tax to the U.S. for life. These taxes are calculated based on the same rules that apply to U.S. residents. Therefore, under U.S. law, Canadian citizens who are resident in Canada and who are deemed under FATCA to be "U.S. persons", are required under U.S. law to pay U.S. taxes on all income earned in Canada and anywhere else in the world. In addition, they are required (under the threat of draconian penalties) to file information returns reporting their lives and finances to the U.S. government.

10. Many "U.S. person" Canadians, who own a home or attempt retirement planning would owe tax to the U.S. This is because of the fundamental conflict between Canadian and U.S. tax laws. The U.S. punishes anything that (from a U.S. perspective) is considered to be "foreign" and involves "tax deferral". All Canadian retirement planning is (from a U.S. perspective) "foreign" and is based on "tax deferral". Examples of popular Canadian "institutions" that are punished under U.S. tax laws include: the principal residence, TFSA, RESP,RDSP, RRSP (unless specific reporting requirements are satisfied) and Canadian Controlled Private Corporations. The U.S. suspicion of "all things foreign" even extends into a marriage between a U.S. citizen and non-U.S. citizen spouse. The end result is that those Canadians, who are considered to be "U.S. persons" will find it difficult to be both U.S. tax compliant and engage themselves in effective retirement planning.

11. It is therefore reasonable to assume that those Canadians who are "U.S. tax compliant" are denied the same retirement planning opportunities that are available to those Canadians without the "U.S. taint". Yet, it is public policy in Canada to encourage individual responsibility and retirement planning.

12. It is easy to dismiss these concerns as applying to only the one million Canadian citizens who are "deemed U.S. persons". These "deemed U.S. persons" often have spouses and are part of larger families. The presence of the "deemed U.S. person" in the family unit will make it harder for the family to save and invest. Therefore, it is reasonable to assume that "U.S. personhood" would negatively affect more Canadians than the one million who have the "U.S. taint".

13. It is also important to recognize that U.S. taxation of "deemed U.S. persons" in Canada, will result in a transfer of productive Canadian capital to the U.S. **Here is one (of many) simple examples.** Most Canadians view their principal residence as an important investment. This is largely true because under Canada's laws the principal residence is a "tax free" capital gain. The capital gain on a principal residence is taxable under U.S. laws (imposing a U.S. tax where none is payable in Canada). In addition, the capital gain, is likely also subject to the new 3.8% Obamacare surtax (an example of double taxation in both Canada and the U.S.). This is one example of how the application of U.S. tax laws to Canadian citizens resident in Canada, will inevitably result in the transfer of productive Canadian capital to the United States. **To put it simply: U.S. taxation of "deemed U.S. citizens" in Canada is actually a permanent tax on the Canadian economy.**

14. As part of the "FATCA debate", it has been said that: "The United States has the sovereign right to tax its citizens". The United States **does** have the "sovereign right to tax its citizens" who are resident in the United States. The United States does NOT have the right to impose taxes on other nations. (See *Cook v. Tait* a decision of the US Supreme Court.)The impact of the U.S. taxing residents of Canada is that the U.S. is able to drain Canada's capital base (think of the principal residence example). Therefore, to impose U.S. taxes on Canadian residents, is to impose a direct tax on Canada itself. **Is there a reason why Canada should be "paying tribute to the United States"?**

15. By participating in FATCA, the Conservative Government is, at the expense of Canada, for the benefit of the United States, locating "deemed U.S. persons" in Canada and then (via the CRA) turning them over to the IRS for "tax processing". What are the likely consequences of IRS "tax processing" for Canada and for those Canadians directly affected?

16. **First:** At a bare minimum, once located, those "deemed U.S. persons" will be required to file U.S. taxes on a "going forward basis". But, those Canadians who own a home, a CCPC, TFSAs, PFICs, or mutual funds, will (under U.S. law) possibly be subject to significant taxes and penalties. In addition, the U.S. imposes significant penalties for the failure to file a plethora of "information returns".

17. **Second:** Once located, the IRS may take the position that those "deemed U.S. persons" who have not been U.S. tax compliant must pay fines and penalties for failure to file past U.S. tax returns. In some cases, "the clean up of the past" will result in "the bankrupting of the future". The U.S. has NOT offered a "general amnesty" for people to come into U.S. tax compliance.

18. **Third:** The costs of U.S. tax compliance must also be considered. These costs are very significant (equivalent to a "small car" as one tax practitioner commented) and beyond the level that a "middle class" family can afford.

19. **Fourth:** What about renouncing U.S. citizenship? This is expensive and complicated. The U.S. imposes an "Exit Tax" on "covered expatriates" who renounce U.S. citizenship. One will be deemed to be a "covered expatriate" if one fails any one of the: (1) income test, (2) asset test (net worth more than 2 million dollars) or (3) tax compliance test (failure to have filed 5 years of U.S. tax returns). Most "deemed U.S. persons" are NOT U.S. tax compliant. Many "deemed U.S. persons" who own homes in large urban centres, will meet the 2 million dollar test. Therefore, they will be subject to the Exit Tax. The reality is that they may have to sell their Canadian assets to pay a U.S. Exit Tax in return for "freeing themselves" from the "taint of U.S. personhood".

20. **Fifth:** The Conservative Government is attempting, through omnibus bill C-31 to cede much of Canada's sovereignty to the U.S. Furthermore, it is agreeing at Canada's expense, to assist the U.S. in identifying "deemed U.S. persons". Once located**, the existence of these "deemed U.S. persons" will be used to siphon Canadian capital to the U.S.**

21. At the end of the day, Canada must lead the world in refusing any participation in FATCA. At a bare minimum - **The Canada–United States Enhanced Tax Information Exchange Agreement Implementation Act –** must be divorced from an omnibus bill and subjected to a "free vote" in the House of Commons.

22. At a bare minimum, any agreement with the U.S. in relation to FATCA, must exclude from the "FATCA roundup", Canadian citizens who are resident in Canada.

23. At a bare minimum, any agreement with the U.S. in relation to FATCA, must include provisions that Canadian citizens resident in Canada can: (1) come into U.S. tax compliance without any threats of penalties and/or (2) can renounce any U.S. citizenship they may have without the threat of the Exit Tax and the requirement of 5 years of U.S. tax compliance.

24. In conclusion: Leaving aside the theory. The immediate purpose of the FATCA IGA and Bill C-31 Part 5, is to impose on the Government of Canada, a legal obligation, at the expense of Canadians, to locate people who the U.S. (in it's sole discretion) defines as "U.S. persons" (property perhaps?) and impose a U.S. tax regime on them which will subject them to double taxation, disable them from financial planning and possibly bankrupt them. Why? Well, because they were born in the U.S. The victims of the "FATCA roundup" primarily include Canadian citizens who are resident in Canada with no economic connection to the United States. This includes, (but is not limited to) Canadians who were born in the United States and returned to Canada in a matter of days. Even if these people are technically U.S. citizens, they have no connection to the U.S. that could justify U.S. taxation. **It's time for the Government of Canada to treat Canadian citizens resident in Canada as ONLY Canadian citizens.**