

February 22, 2014

The Honourable Jim Flaherty, Minister of Finance
The Honourable Kerry-Lynne D. Findlay, Minister of National Revenue
The Honourable Alice Wong, Minister of State (Seniors)

As a retired Canadian citizen, I have some questions about the recent intergovernmental agreement (IGA) between Canada and the US concerning the Canada Revenue Agency's implementation of the US Foreign Account Tax Compliance Act (FATCA) in Canada. There is a large group of senior Canadian citizens that one could refer to as ex-Americans. Considering the number of people involved, and the vulnerability of this segment of the population, I believe they deserve more than a standard form letter as an answer:

1. Will the American Internal Revenue Service be able to harass Canada's ex-American elderly Citizens?

Under the proposed FATCA intergovernmental agreement, tens of thousands, possibly hundreds of thousands, of elderly Canadian citizens may be at risk of finding themselves reported to the American Internal Revenue Service and of receiving notices of assessment and fines. This is a distinct possibility unless Canadian financial institutions receive clear directives and clarifications from the Canada Revenue Agency on how to handle their situation. And if the CRA does not make a concerted effort to inform these citizens of their rights, they may fall prey to so-called tax experts whose advice and fees, combined with US penalties, could cost them many thousands of dollars.

I am referring to those Canadians born in the US and who took Canadian citizenship as adults before 1986 and to those Canadians who were born to Canadian parents in the US, were registered as Canadians, reached adulthood in Canada before 1978 and did not go to the US Consulate to swear allegiance to the US.

They were told in no uncertain terms by US Consulates that **they would automatically lose their US citizenship**, but were rarely given a Certificate of Loss of Nationality. Now they may need to have such a certificate to prove they are not US persons under FATCA. They could obtain one through a US consulate after a complicated bureaucratic process. Not only is this time-consuming and stressful, but often requires travel that would be a hardship for many. But worst of all, there is a very big catch even if they should obtain a CLN. The certificate will indicate that they lost their citizenship way back when before 1986, but the IRS, referring to a 2004 law, says must file an income tax declaration for the five years previous to the day they request the certificate. And the consulate sends a copy of the certificate to the IRS. This led to an article in the **International tax journal** entitled "*The malevolent time machine*," which you may access here:

http://www.robertsandholland.com/siteFiles/News/03-05-13_Expats%20Live%20in%20Fear_MJM.pdf

Some interpret the 2004 law as not applying to those who relinquished before 1986, but the IRS has not accepted this interpretation. Can you picture an 85-year-old resident of a retirement home contesting this law in a Washington, D.C. court?

Canada Revenue Agency seems to mention this problem in its new FAQ on the FATCA intergovernmental agreement:

<http://www.cra-arc.gc.ca/tx/nrrsdnts/nhncdrprtng/fq-eng.html#q2-3>

This is the pertinent question on the site:

"17. Does the Agreement *require* Canadian financial institutions to report to the CRA on any individuals who were told that they relinquished their U.S. citizenship when they became Canadian citizens?"

The Agreement *does not require* Canadian financial institutions to report on any individuals who have relinquished their U.S. citizenship and are not residents of the U.S.

Individuals who have relinquished their U.S. citizenship may be asked by their financial institution for documentation to this effect."

The IGA itself also refers to a situation where an institution may accept "a reasonable explanation of the reason the Account Holder does not have such a certificate despite relinquishing U.S. citizenship."

The trouble is, the answer is not clear. Will the institutions be asking for a Certificate of Loss of Nationality from the US Department of State? Or will they be instructed by CRA to accept Canadian documentation, such as a citizenship certificate showing that the person became a Canadian before 1986 at a time when he or she automatically lost their US citizenship? Such Canadian documentation should be accepted as a reasonable explanation, and Canada's financial institutions should be so informed by CRA.

2. Will there be protection against witch hunts by overzealous banks?

Another vulnerability for these citizens is the lack of clarity caused by the frequent use of "**not required**" both in the IGA and the FAQ, when referring to the institutions' search for possible US persons among their account holders. This is the case for the CRA's FAQ questions cited in the previous question.

The same ambiguous language is used in the IGA when referring to account balance thresholds. For instance, under the section **Accounts *not required to be reviewed, identified, or reported***, in the IGA, which refers to accounts under \$50,000, this text appears:

"Accounts Not Required to Be Reviewed, Identified, or Reported. Unless the Reporting Canadian Financial Institution elects otherwise, either with respect to all Preexisting Individual Accounts or, separately, with respect to any clearly identified group of such accounts, where the implementing rules in Canada provide for such an election."

And again, in the CRA's FAQ, the following question:

"6. Will my financial institution be asking me if I was born in the U.S.?"

A financial institution complying with the Agreement will *not be required* to ask its account holders about their place of birth. "

Since "**not required**" is not the same as "**should not**", the language implies that financial institutions could report **all** accounts, regardless of the balance, and ask all account holders for their place of birth, if they so choose, ***unless the implementing rules and directives that the CRA sends to financial institutions protect elderly "suspected US persons" from institutions that might find it easier to behave in such a manner.***

Without meaning to be facetious, let's suppose that Parliament were to adopt a law on euthanasia. If someone were to ask whether grandchildren will be allowed to have their grandparents put down in order to inherit sooner, we would not expect as an answer:

“Grandchildren will *not be required* to have their grandparents euthanized.” Grandma would not be reassured.

3. Will CRA be more proactive in informing Canadian citizens that CRA will not collect for IRS?

Another essential step towards protecting these elderly citizens is to actively inform them of their rights. The FAQ on the Department of Finance website, as well as occasional articles in newspapers and a letter sent to various correspondents by Minister Flaherty confirm that CRA will not collect for IRS from Canadian citizens on liabilities incurred while they are residents of Canada. However, this information is conspicuously missing from the FAQ on the CRA's website which is the first place most Canadians would look for information.

The CRA is the only agency capable of communicating with practically every Canadian citizen. They should publish this information not only on their website, but on the forms for income tax filing, both printed and electronic, as well as on their electronic filing site.

I am hoping that both you and the people working for you, will feel compassion for these Canadian citizens who have spent their lives working in and paying taxes to Canada, and who in no way deserve to be thrown into such a desperately depressing situation.