

**NOTE:** The following are notes of an information session in the context of a live discussion. The discussion was for the sole purpose of identifying possible issues which may or may not apply to your situation. This is not legal advice.

## **SOLVING PROBLEM OF U.S. CITIZENSHIP**

February 8, 2104, London Ontario  
Synopsis

Many people have been stunned recently to learn they were required to file tax returns with United States Internal Revenue Service (IRS). In fact, some did not even know they are considered to be U.S. citizens.

They are now so horrified that they are filing those tax returns, and coming into tax compliance, so they are in a position to relinquish U.S. citizenship. .

For many U.S. citizens abroad who are not up-to-date on their U.S. taxes, their primary motivation for coming into tax compliance is so they are in a position to relinquish U.S. citizenship."

That is the situation facing many Canadians who were born in the United States or who have other distant connections to United States.

The two countries in the world with citizenship-based taxation are Eritrea and the United States. Eritrea has already had a run-in with the Canadian government over attempts to collect taxes in Canada. The Government of Canada expressed its displeasure with Eritrea attempting to collect taxes on Eritreans in Canada. Yet, the Government of Canada has agreed to FATCA. FATCA is legislation which will assist the United States to collect taxes on "U.S. persons" in Canada.

Eritrea attempts to tax its citizens living outside Eritrea by forcing them to pay 2% of their income. John noted the complexity of the U.S. tax rules, reporting requirements and compliance costs, often greatly exceed 2% of income. Therefore, the U.S. "makes Eritrea (in comparison to the U.S.) look good."

### **CITIZENSHIP, RELINQU.S.HING, RENUNCIATION**

#### **Differing Situations**

John gave an overview of citizenship.

Under the Fourteenth Amendment of the United States Constitution which says those "born or naturalized in the United States are U.S. citizens" except the children of diplomats born in United States.

Through the presentation and discussion, it was apparent that situations vary greatly. Rules that apply to one person may be different than rules that apply to another because of the complexity of differences between them and the time that they committed a relinquishing act.

"The bottom line is you have to check the law at the time the act took place."

#### **Court Decisions, Changing Laws**

The Fourteenth Amendment of the U.S. Constitution says those born or naturalized in United States are U.S. citizens except children of diplomats born in U.S.

Other groups of U.S. citizens were made citizens by U.S. Congress.

In Canada and most other countries, who is a citizen is defined by statute, not by constitutions.

#### A U.S. CITIZEN BY BIRTH, A CANADIAN CITIZEN BY CHOICE (NOT SO FAST)

People who arrived in Canada during the Vietnam era and became Canadian citizens may have been told if they became Canadian citizens, they would lose U.S. citizenship, “absolutely, positively...For a very long time, the United States was attacking people saying they were going to take their citizenship from them.”

In the past, John helped people retain U.S. citizenship who became Canadians. Many may now regret that.

Questions were raised about individuals who were born in United States to Canadian parents, but came to Canada with their families as babies or small children. John confirmed this group is considered to be U.S. citizens unless they have performed an expatriating act under S. 349 of the INA. That may include working for the Canadian or a provincial government or anything else described in S. 349 of the INA which has changed over the years. Again, each situation would be determined based on the set of facts as those facts bear on the law that existed at the time. The law of expatriation has evolved over time.

One person said her family was told if she voted in a foreign election after the age of 18, she would lose her American citizenship. That may have been the law at the time, but it may have changed later due to a court decision. John recommended she determine what law was in effect when she turned 18.

For people born in Canada to one or two parents who were American citizens, John stressed they should get a professional opinion of what their citizenship is. “I would never, never, never under any circumstances advise someone to simply swallow hook line and sinker, well my father was American, therefore I am American for a number of reasons.:

**First**, it is not that simple that a parent can transfer American citizenship. For example, there are laws describing how long the parent must have lived in the United States.

**Second**, there is a presumption that countries have the right to make laws for and that apply within their countries, but their jurisdiction and sovereignty usually end at their borders.” So, if someone is born outside the U.S. that raises the question whether the U.S. gets the right to determine whether that person is a U.S. citizen. How can the U.S. deem people born outside the U.S. to be U.S. citizens?

**Third**, John thinks this is a huge issue under international law.” How can the U.S. deem people born outside its borders to be citizens? He thinks the best U.S. law can say is that the U.S. will, under U.S. law, grant U.S. citizenship to a person born outside US because of a parent’s connection to the U.S. In other words – those born outside the U.S. may be able to “opt in” to U.S. citizenship.

#### **CITIZENSHIP WARRIORS**

First person to fight loss of U.S. citizenship was in the 1960s when a U.S. citizen voted in an election in Poland. He managed to get his case to the U.S. Supreme Court, which is hard to do. He won his case with the Supreme Court finding the Constitution provides that government cannot strip, those “born or naturalized in the U.S.” of their U.S. citizenship without their consent.

John reread that decision last June and read Congress cannot do anything that involves “forcible destruction of citizenship.”

In response to a question from John, many attendees confirmed they feel they are being forced to renounce because of the current situation with CBT.

*John thinks “forcible destruction of citizenship” is going to become THE argument on this issue.*

## **EXPATRIATING ACTS**

The Immigration and Nationality Act says if you said if you commit some expatriating acts, i.e. becoming a citizen of another country or working for a foreign government, you will lose your U.S. citizenship, as long as it is done voluntarily AND WITH THE INTENTION OF RELINQUISHING U.S. CITIZENSHIP. The requirement of “with the intention of relinquishing U.S. citizenship” was added by statute in 1986. Prior to 1986, the statute did NOT require the “intention to relinquish U.S. citizenship”. So, for people who became Canadian citizens in the 1970s ...

In the 1970s many people became Canadian citizens under a legal framework that said if you became a Canadian citizen, you lost your U.S. citizenship regardless of your intention.

For those who became a Canadian citizen before 1986, the position you are taking is that you lost your U.S. citizenship. The reason you are taking that position was according to U.S. laws at the time:

Loss of U.S. citizenship was mandatory as long as the relinquishing act was performed voluntarily.

It was not until December 14, 1986, the relevant law, S. 349 of the INA was changed in accordance with a Supreme Court decision that relinquishing acts performed voluntarily, did not result in automatic loss of U.S. citizenship.

John said many people confuse renunciation and relinquishment. He explained there is only relinquishment. Renunciation is just one form of relinquishment.

Renunciation is just one of form of relinquishment under the relevant section of the law which is s. 349 of the INA. The law says that if you voluntarily perform one of the acts in S. 349 with the intention of relinquishing U.S. citizenship you will have relinquished citizenship. (Now here is the confusion). Those who wishing to relinquish can do so by performing any relinquishing act (including becoming a naturalized citizen of Canada) or by renouncing United States citizenship. Those who wish to divest themselves of U.S. citizenship, who have not, performed any other relinquishing act, will make the obvious choice, that is to relinquish U.S. citizenship by renouncing U.S. citizenship.

U.S. Department of State took the position after 1986 that those who had lost their citizenship earlier because of a law that was determined to be unconstitutional, “were offered the opportunity to be U.S. citizens if they want, but that doesn’t mean you have to take it and I wouldn’t.”

Citizenship-based taxation has been a long-standing law in the United States, but in 1996, new rules of taxation were put in place for people who relinquished U.S. citizenship.

“In all probability, if you are able to show a relinquishment prior to 1996,” you will not have tax obligations to the U.S. government. (Note that the question of whether you have tax obligations to the U.S. government is different from whether you have an obligation to tell the IRS you have relinquished U.S. citizenship.)

In addition, Lynne pointed out another lawyer has advised the year 2004 is important for dates of relinquishment because the IRS did not require anyone to report relinquishment until that year. John agreed that 2004 is the year that marked the beginning of a requirement that those “relinquishing U.S. citizenship” were required to report that relinquishment to the IRS.

John stresses the distinction needs to be kept clear between.

1. The existence of a tax on expatriation; (the requirement to pay tax was changed in 1996, 2004 and finally culminating in the Exit Tax of 2008) and

2. A requirement to notify the IRS in order to end the liability for U.S. tax. The requirement to notify the IRS began in 2004. In fact, the reason for the 2004 amendments was to force people to settle up with the IRS and pay any tax owing.

John suggested people go to his website [citizenshipsolutions.ca](http://citizenshipsolutions.ca) and click on relinquishment (<http://citizenshipsolutions.ca/are-you-a-u-s-citizen/relinquishing-us-citizenship/>) for more information.

### **Relinquishment and Renunciation**

John explained renunciation is one form of relinquishment of U.S. citizenship, along with others listed above.

John believes people have the right to renounce U.S. citizenship. It is important people are clear they are not renouncing for tax purposes. He was contacted recently by a woman age 25 who went to Montreal Consulate to renounce U.S. citizenship and they refused to allow her to do so because they felt she somehow lacked the intention to be able to renounce (based on age, emotional state, giving up something to valuable ...)

To renounce or formally advise U.S. of past relinquishments, John suggests people seek some professional advice. The application must be made at a U.S. Consulate. Ultimately, Certificates of Loss of Nationality (CLN) are issued by U.S. Department of State in Washington D.C.

### **THE CERTIFICATE OF LOSS OF NATIONALTY (“CLN”)**

Under the terms of the FATCA IGA, if someone does not have a CLN, they may give a justifiable reason of why they don't have a CLN. But, if you can get one easily, John recommends one as proof to both financial institutions and IRS that you are not a U.S. person.

Lynne suggested if people want to relinquish, it is important to do it when one is in good health. U.S. Consulates will not allow anyone whom it determines lacks “mental capacity” to renounce or confirm an earlier relinquishment. They will also not allow anyone with power of attorney to do it on the person's behalf. This has caused problems for people who became Canadian citizens decades ago who now have Alzheimer's or dementia. Families have sold homes to pay for nursing homes, but cannot renounce or relinquish on the person's behalf.

In another situation, a woman who served as a Canadian Justice of the Peace after becoming a Canadian citizen in the late 1970s with the intent of relinquishing U.S. citizenship is now elderly in her 80s and is in assisted living. Her daughter has reported a ten hour trip to a U.S. Consulate could be life-threatening because the woman is in very frail health.

John agreed those situations are “a reason to deal with this sooner, rather than later.”

“If you're going to renounce, you want a CLN,” John said.

Because of many issues, John believes **“U.S. citizenship is probably the most dangerous, toxic citizenship in the world today.”**

### **Canadian Citizenship Files – What happened when you became a Canadian citizen?**

Lynne shared her personal determination not to go to a U.S. Consulate, but reported her oath of citizenship to Canada contained an oath renouncing other citizenship. She has a signed copy of that renunciation, witnessed by a Canadian citizenship official. That was obtained through Access to Information at Citizenship and Immigration Canada.

Anyone who became a naturalized Canadian citizen can request information from his or her citizenship file for a fee of \$5.00 (<http://www.cic.gc.ca/english/department/atip/form-imm5563.asp>). She advised that

anyone who became a Canadian citizen prior to April 1973 was required to sign an oath renouncing any other citizenship.

Depending on when citizenship took place, information may have been stored on microfiche. That may make it hard to read, but it is legible.

#### **PERSONAL EFFECTS OF U.S. CITIZENSHIP ON U.S. CITIZENS ABROAD:**

John fully recognized the emotional toll this issue is taking on many people. For those already dealing with health, marital or other personal issues, “this is the straw that breaks the camel’s back.” He sees a clear relationship between these issues and exacerbation of existing health problems.

He stressed “Your life, your health, your family is so, so much important than any of this stuff. If you focus on this in a way that jeopardizes the things that make life worthwhile, you’re going to let these people win – absolutely destroy your life.”

“The only way they’re going to win is if you allow them to win. If you give them that power over your thoughts. It’s easy to say, but if you make an effort and you say that enough times, you can distance yourself enough from this in order to be able to do that.”

He encouraged people to become informed and make decisions, but not let these issues overtake their lives.

There is a difference between making a decision and having a reaction to a situation.

“Forget them. They do not have the power to do that unless you give it to them.”

#### **CROSSING U.S. BORDER – IS THIS REALLY A PROBLEM?**

In response to concerns raised about crossing the border into the U.S., John stressed “I have not heard any evidence at all of anybody actually being denied entry to the country” over this issue.

What do we know primarily about America? They want your money. If they don’t let you in, they won’t get it.”

Under U.S. law, John explained you are required to enter United States as a U.S. citizen with a U.S. passport and to leave with a U.S. passport, but he has not heard of any problems of Canadians entering U.S. with a Canadian passport with a U.S. place of birth.

“I think the passport issue is the last thing anything should be worried about.”

Lynne advised maplesandebbox.ca has a thread on Crossing U.S. border with a non-U.S. passport with U.S. place of birth. There has not been one problem reported there by Canadians. There was one issue of a woman in the UK who had recently renounced U.S. citizenship who was subjected to private questioning about why she did that.

## **CITIZENSHIP-BASED TAXATION – IT STARTS WITH CITIZENS BUT GOES MUCH FURTHER**

John explained American citizenship-based taxation extends beyond U.S. citizens to “U.S. persons” (citizens, Green Card Holders and those who spend too much time in the U.S.)

“But there’s more: Wherever they may live in the world.

“But there’s more: On any sorts of income whatsoever that they may receive

“And there’s more: They’re deemed as having received certain “investment income” earned by certain small business corporations – meaning they must pay tax on certain kinds of income they have not received

“And there’s more: You are treated under the U.S. Tax Code the way every U.S. resident is. The only difference is your whole life according to the U.S. Tax Code is offshore and none of theirs is.

“Therefore your whole life is penalized.

“And, there’s more: Because all of these foreign things carry obligations to file information returns” that “carry very severe penalties for not filing, generally starting at \$10,000 and more.

“That in itself is good reason to consider renouncing. No one can understand the forms.”

John was told by one U.S. tax lawyer there are 45 forms required from Americans abroad.

John described some of the forms. One is the Foreign Bank Account Report (FBAR), which now must be filed online under name. John understands there are significant problems related to the use of certain browsers with filing on line. **THERE ARE MANY MANY DIFFERENT FORMS.**

FATCA Form 8938 must be filed by people who meet certain asset thresholds. Most people who have attempted to plan for retirement will meet these thresholds.

The conventional wisdom in the tax community is that TFSAs, RESPS meet the definition of foreign trusts (and therefore are subject to specialized reporting requirements), although John does not personally agree that ALL of them do.

John said all Americans abroad are considered to be “presumptive liars,” so the IRS wants corroborating evidence of TFSA in the form of 3520A from the institution holding the TFSA. This must be filed by March 15, three months before tax return is due. Failure to do that subject you to a \$10,000 penalty.

John outlined a multitude of other forms. “They don’t call it Form Nation for nothing.”

John is “convinced the U.S. regards penalties as the same thing as taxes for the purpose or raising revenue.”

He encouraged people not to be upset, but said failure to file initially you can probably make a “reasonable cause” argument. The problem is once you’re in the tax system and you’ve filed these returns and forms, it’s very difficult to continue to make “reasonable cause” arguments.

Filing your taxes with IRS is not the end of your problems. It’s just the beginning of them.

He emphasized there are two types of Americans abroad with tax problems:

1. Those who file.
2. Those who don’t file.

No matter what, you’re going to have a problem. “When we talk about U.S. taxes, we’re talking about much more than taxes. It’s a whole information reporting regime, which is a huge problem.”

That problem is compounded by tax professionals who “charge obscene fees to fill out these forms.”

John believes there is a reasonable chance U.S. will move to residency based taxation. He recognizes many people don’t share his belief.

People attending were quoted amounts for complying from accountants ranging from \$300 to \$5000 per year. John suggested the costs would be significant because of the stage of life most attendees are at.

Most attendees didn’t know they were expected to file U.S. tax returns or did not even know they were “U.S. persons” until recently. John thinks most can become compliant without much difficulty.

He has found most Americans abroad DO want to be in compliance even if they don’t like the law.

### **RELINQUISHING U.S. CITIZENSHIP – PRIOR TO 2004 – NOTIFICATION OF IRS WAS NOT REQUIRED**

Those who relinquished citizenship prior to 2004 were subject to different and more favorable rules. The rules governing expatriations prior to 2004 were certainly not worse than they are now. There is some disagreement in the tax/legal community about exactly what rules apply and how they apply.

### **RELINQUISHING U.S. CITIZENSHIP – PRESENT DAY – NOTIFICATION OF IRS IS REQUIRED – THERE WILL BE TAX CONSEQUENCES**

For relinquishments after June 3, 2004, the failure to demonstrate five years of tax compliance will make one a “covered expatriate”. All relinquishments after June 3, 2004 require IRS notification which at the present time-the notification is Form 8854.

8854 determines if you are a Covered Expatriate or a Non-Covered Expat. Covered expats are subject to an Exit Tax. Plus, some Congressmen are trying to pass legislation that you will never be able to again enter the U.S. if you are a Covered Expat.

#### **Covered Expatriates**

Three ways to be a Covered Expat.

**First:** Tax Test: Average annual U.S. tax bill for last five years is approximately \$155,000.

**Second:** Asset Test: Net Worth is more than \$2 million (Homeowners in Toronto and Vancouver could easily reach that level of assets).

**Third:** Compliance Test: If you're not able to certify five years of tax compliance, then you're automatically covered.

### **CONSEQUENCES OF BEING A "COVERED EXPATRIATE"**

Problem with being a Covered Expatriate is there is a deemed sale or disposition of all of your property the day before you expatriate. Almost every homeowner in the City of Toronto would be considered a Covered Expatriate.

There are also profound implications for pension/retirement plans.

Under U.S. tax law, capital gains on sale of your principal residence are not tax free. Many Canadians consider their home part of their retirement planning. Therefore, U.S. citizens abroad are effectively deprived of many retirement planning opportunities.

Basically, all Canadian retirement planning programs are penalized under U.S. tax law.

There is a complex formula for calculating the Exit Tax, but if someone has a net worth of \$2.1 million, they may face an Exit Tax. But, if one has a net worth of A\$1.9 million then no exit tax is payable. "That demonstrates the absurdity of this."

John stressed this is why it's important to show five years of tax compliance. The failure to show five years of compliance makes you a "covered expatriate."

To come into tax compliance, John stresses people must be clear if they are coming into compliance to renounce or to do it to remain a U.S. citizen. "The answer to that question largely determines what we do and why we do it."

### **How To Become Compliant**

Before people decide what to do, they should determine what their U.S. tax return should look like.

### **WAYS TO COME INTO U.S. TAX COMPLIANCE**

#### **1. OVDP – NOT FOR YOU**

**"One thing you should absolutely not do is enter the Offshore Voluntary Disclosure Program" (OVDP)**

"What are you going to do if you think about" entering OVDP? "Call John. Does it matter what time of day? No. Because I am going to subject you to an interview to make sure you're entering that for the only reason that you should."

OVDP is "the program designed by the IRS to give a super good deal to drug launderers, thugs and criminals and rape anybody else including Americans abroad."

The reason people should not enter OVDP is because you will agree to pay back taxes and penalties, but to pay up to 27.5% of your net worth. In order to do that, most people will be forced to sell more assets, which will create more taxes owing. Bottom line, OVDP will bankrupt anybody who is not a drug launderer."

If anyone is a criminal, it's a good deal. John thinks most people have figured that out, but usually when John does a program like this, there are people in the room who entered the program earlier.

## **2. STREAMLINED**

Second way is a program called Streamlined, which is essentially a promise that if you come into the system with simple returns requiring three years or tax returns and six years of FBARs. John said FBARs are used to “fund raise around the world to inflict penalties on people who didn’t know anything about it.

John does not, (for the average person) support either OVDP or Streamlined. He agrees people should be predisposed to obeying the law, but stressed people can file without using either OVDP or Streamlined. The law requires you to file your tax and information returns. The law does not require you to enter OVDP or Streamlined.

Some tax professionals may encourage those programs. Some people at the break told John they had filed back returns directly. He does not know if that places them at greater or lesser risk for problems with IRS.

## **3. UST FILE YOUR TAX RETURNS – AFTER ALL, IT’S WHAT THE LAW REQUIRES**

You are not going to use OVDP. You are not required to use “streamlined”. You can just file the returns. Get advice.

### **Coming Into Compliance – Will you owe Taxes?**

John said many people have said Canadians would not likely owe taxes, but John has found very often they do. The reason for that US tax law is that U.S. tax law will give “very limited credit” for taxes paid to Canada.

Examples of where people could owe taxes would be capital gains on principal residence. Treatment of mutual funds “is beyond incredible.” Mutual funds are complicated and punitive. Anyone with mutual funds “should be a little more cautious” on how to deal with it.

If anyone has a Canadian Controlled Private Corporation, “you must get professional help on that.” Ask about the possibility of the corporation’s investment income being deemed to the shareholder. Also, there are very punitive fines for not filing certain returns that will impact taxes owing, way to come into compliance, etc. The U.S. Tax Code is specifically designed to punish that.

There is a foreign tax credit given for foreign earned income and certain types of investments, but other things receive no credit, i.e. capital gains principle residence, some certain types of investment income,

Nature of your taxes owing will have an impact on how to deal with coming into compliance.

U.S. persons living outside United States are also subject to “insidious” rules that govern the relationship between a U.S. citizen who has a non-U.S. citizen spouse.

### **THE IMPORTANCE OF NOT BEING A “COVERED EXPATRIATE”**

People want to avoid being a covered expatriate. That is why it is important to do five years of returns for anyone who relinquished after June 3, 2004 (and possibly before that date).

John strongly recommends anyone who is a covered expatriate should “absolutely” seek professional advice to expatriate from someone who specializes in expatriation. Even non-covered expatriates should consider such advice. You need to be very careful with expatriations!

## **U.S. CITIZENSHIP ABROAD**

“U.S. citizenship is absolutely incompatible with life if you are outside the U.S.,” John insisted.

## **U.S TAX COLLECTION AND THE CANADA REVENUE AGENCY (CRA)**

Lynne said she thought the information John would give on Canada Revenue Agency would be the most important people would hear that day.

John explained there is a Canada-U.S. Tax Treaty that may or may not change in the future.

Because the treaty does not obligate Canada Revenue Agency to collect a penalty ON INFORMATION RETURNS, **CRA will not assist IRS to collect FBAR penalties.**

Under the Tax Treaty, Canada Revenue Agency **will not assist the IRS to collect a tax levied on an American citizen living in Canada if that person were also a Canadian citizen at the time the tax liability arose.**

Plus, under the Revenue Rule, Canadian courts will not issue a judgment for the IRS. It is possible that rule could change in the future, but that is the current situation.

(Note that this does NOT mean that the taxes are NOT owed to the U.S. It just means that Canada will not help the U.S. collect the taxes.)

## **FATCA (Foreign Account Tax Compliance Act)**

There have been estimates of about 1 million people in Canada affected by FATCA. John thinks the number is far higher than that because of spouses and children. He estimates “up to 10% of the population of Canada could be directly affected.”

He thinks FATCA is “such a gross abuse of power,” there is no room for negotiating...What you’re negotiating is your very sovereignty.”

Lynne pointed out how much is proposed for submission to IRS under FATCA. It’s not just income on assets, but total assets, account balances, account numbers, transactions and other personal identifying information. She also said no other Canadian is required to have that information submitted to CRA to submit to another foreign government.

“It’s far worse than that,” insisted John. “FATCA allows them to redefine any time they want what the information is and any person who is affected.”

Yet, Lynne said, “The government is saying this is a great deal for Canada. It’s a great deal for the tax treaty to combat offshore tax treaty.”

Many people have been lobbying and pleading with the Canadian government to say No to FATCA. She “really believed that because Canada has a long-standing tax treaty with the United States in the core of my being that Canada was going to hold out and get an agreement that they would only provide this information on residents of the U.S. that have accounts in Canada. I experienced one of the greatest betrayals that I have ever experienced when the IGA was announced.”

“It’s far worse than” the information Lynne outlined. “FATCA allows (United States) to redefine any time they want what the information is and any person who is affected.”

One member of the audience has still not had a reply to a letter to Jim Flaherty he wrote in November. He said “FATCA was never up for negotiations with the United States to begin with because it’s being

enforced by the threat of sanctions...That's like negotiating with a terrorist and the Canadian government did just that.”

Lynne noted present Human Rights legislation prevents banks from asking where a person was born or about other citizenship. The proposed legislation will prevail over other federal laws, including banking, privacy and human rights laws. “I never thought I would see this day.”

She advised a few people have contacted prominent constitutional lawyer Joe Arvey. Information about that will be posted at Maple Sandbox and Isaac Brock Society. She gave her e-mail address through Maple Sandbox as [maplesandbox@yahoo.ca](mailto:maplesandbox@yahoo.ca) if people want to contact her directly.

Lynne also gave out business cards for Maple Sandbox and Isaac Brock Society.