BRIEF REGARDING:
BILL C31 – Part 5
Specifically: legislation enabling *The Canada–United States Enhanced Tax Information Exchange Agreement* / aka "*Canada – U.S. Foreign Account Tax Compliance Act Intergovernmental Agreement"* (FATCA IGA)
To: Canadian Parliament Finance Committee
From: Chris Bell, an individual Canadian citizen
Date: May 1, 2014

INTRODUCTION

On February 5, 2014, our government made history. It announced an agreement with a foreign state that systematically discriminates against an entire class of Canadian citizens, based upon their place of birth. It did so due to coercive threats of financial withholding, and with no defined reciprocal benefit for Canada. Under the terms of the *Canada–United States Enhanced Tax Information Exchange Agreement*, Canada agreed to institutionalize discrimination against Canadian citizens of U.S. birth – essentially because the U.S. demanded it.

This agreement and its enabling legislation is essentially an Intergovernmental Agreement (IGA) enabling the U.S. Foreign Account Tax Compliance Act (FATCA) to have force of law in Canada. Much has been written on the history of this over-reaching and essentially unfeasible U.S. law. Briefly stated, FATCA was hastily conceived legislation concealed within a U.S. law regarding incentives to hire veterans, and passed by U.S. lawmakers without meaningful debate or consideration for consequence. It soon emerged that FATCA was unfeasible due to significant conflicts of law with other countries' human rights codes and privacy laws. So the U.S. strove to coerce foreign states to form Intergovernmental Agreements (IGA's) and change their own laws to enable FATCA in foreign jurisdictions.

Under FATCA, local Canadian financial accounts held by Canadians who are considered so-called "U.S. persons" are (according to the U.S.) illicit undeclared offshore accounts, unless they are reported in exhaustive detail to the U.S. government. Because of its large population of so-called "U.S. persons", almost all of who have some kind of bank or financial accounts, Canada is in the absurd position of likely being the world capital of so-called "illicit and undeclared foreign accounts held offshore by U.S. persons".

As an individual Canadian citizen, resident of Canada, and constituent of the Federal Government, I strongly oppose the FATCA IGA enabling legislation in Bill C31.
I urge our lawmakers to amend this legislation to exempt Canadian citizens and permanent residents from its discriminatory and harmful effects.

A HUMAN RIGHTS CRISIS IN CANADA

Capitulation to FATCA is an affront to the dignity of hundreds of thousands of Canadian citizens of U.S. national origin and violates their Charter right to equal treatment under Canadian law. The implications are far-reaching: for the first time in Canada's history, our government decrees that Canadian citizens of one particular national origin will be denied equal protection under law, and will be subject to harmful discriminatory treatment in lawful local Canadian banking and financial matters, based upon place of birth.

The legislation enabling FATCA in Canada creates a second-class tier of Canadian citizens: any Canadian with a U.S. place of birth. The concept of FATCA – specifically discriminatory treatment and loss of privacy in banking and finance based upon "indicia of U.S. birthplace" – is unlawful in Canada under the Charter and Human Rights laws. Only the act of Parliament before the committee significantly changing Canada's laws can enable FATCA here.

The FATCA enabling legislation creates two classes of Canadian citizens and residents. The first class: those who have a right to private banking information, and a right to not be discriminated against because of their national origin. The second class: Canadian citizens and permanent residents, who are also so-called "U.S. Persons", lose these rights. And the definition of Canadians in that second class is made according to the laws of a foreign state.

Those discriminated against include many long-term Canadian citizens who do not consider themselves "dual citizens." According to U.S. law, they relinquished their U.S. citizenship by swearing the Canadian citizenship oath, only to be considered repatriated ex post facto by FATCA. It also impacts Canadians who were born in the U.S. while their parents were visiting, or through cross-border hospital arrangements, and even the Canadian-born children of U.S.-born Canadians. All these Canadians will have their citizenship rights devaluated under FATCA. Canada's estimated 600,000+ so-called "U.S.-persons" are a significant constituency – this issue will directly harm a significant percentage of Canada's population.

MISUSE OF THE EXISTING TAX TREATY

Our government intends to wrap this collapse of sovereign integrity within the legal fabric of the long-standing Canada-U.S. Tax Treaty. It is unlikely that the Treaty's drafters envisioned its being used to systematically compromise the privacy and financial integrity of hundreds of thousands of Canadians' lawful and local financial accounts containing assets earned and invested solely in Canada. At the core of Bill C31's FATCA-enabling legislation is a provision to supersede all other Canadian laws that conflict with FATCA's heretofore unlawfully discriminatory effects. Again I doubt the original intention of the existing Canada – U.S. Tax Treaty was to enable foreign law to prevail over Canadian law in this obvious conflict of laws. Under the FATCA enabling legislation, U.S. born Canadians will be exempt from the protection and redress of existing Access to Banking and Human Rights laws wherever these have the temerity to conflict with the foreign U.S. law FATCA.

A CASE AGAINST FATCA IN CANADA

There are many good reasons to oppose the FATCA enabling legislation that will embody the dysfunctional law of a foreign state into Canadian law. As a Canadian citizen and taxpayer, I claim that implementing this one-sided agreement with a foreign state violates the Canadian Charter of Rights and Freedoms. I further claim that its effects on the economy and social fabric of Canada are far-reaching, unforeseeable, deleterious and irresponsible. I limit my claim to a single argument based upon FATCA's effect on a single Canadian citizen – "*Border Baby*" – who due to medical necessity had the misfortune to be born in a nearby U.S. hospital, and is now considered a so-called "U.S. person" under FATCA and thus will have their rights as a Canadian citizen abridged due solely to place of birth.

A citizen's claim against the proposed FATCA IGA legislation: a most egregious case (1) and an argument pleading that case (2).

1) The Egregious Example

"*Border Baby*" is Canadian citizen born in U.S. hospital because their Canadian mother was referred there for high-risk pregnancy. This is a common practice in the Provence of New Brunswick, where mothers were referred to U.S. hospitals in Maine. "*Border Baby"*, born in a U.S. hospital to Canadian parents, is a Canadian citizen at birth under Canadian law. Now, the FATCA IGA victimizes this Canadian, even if they returned to Canada within days of being born, and have no U.S. economic activity or residential presence. This is because under FATCA's foreign law criteria, "*Border Baby"* is also a so-called "U.S. person" and life-long "U.S. tax resident."[1]

In ultimate effect, the FATCA IGA subjects this Canadian citizen to harmful discrimination and loss of financial privacy because they were born in a U.S. hospital due to medical need. Moreover, if they were born in any other foreign country they would not be subject to FATCA. Why should the Canadian citizen "*Border Baby"* be exempt from equality of treatment under Canadian law because their medically necessary foreign birth occurred in one particular country?

2) FATCA IGA Violates "*Border Baby's*" Rights as a Canadian Citizen
The FATCA IGA requires banks and other Canadian financial institutions to seek "unambiguous indication of a U.S. place of birth." in account holders' records and documentation to determine if an account holder is a so-called "U.S. person." Thus the "*Border Baby*" cited above is a so-called "U.S. person" or "U.S. tax resident" under the FATCA IGA and suffers a discriminatory and irreparable loss of privacy, even if they never left Canada since returning from their singular birth event abroad.

The definition of so-called "U.S.-person" or "U.S. tax residency" based upon a U.S. place of birth is "fruit of a poisonous tree" under Section 15 of the Charter.[2] and that poisonous tree is **national origin discrimination based upon place of birth.** [3]

It is remote and dubious to claim that a Canadian citizen who was born in the U.S. decades ago, and subsequently had no ties of residence or economic activity there, is somehow a "U.S. tax resident." This is a remote, unusual, dubious, and harmful claim, imposed solely by the laws of foreign state.

- It is remote because the definition of so-called "U.S.' person" is based solely on foreign law and imposes a foreign state's discriminatory definition upon certain citizens of Canada;
- It is unusual in that it deviates from the tax resident definition of Canada and every other nation excepting Eritrea;
- It is dubious because the claim is discriminatory and based solely upon birthplace or ancestry, as opposed to actual economic activity or residency; and
- The claim is harmful in that it degrades the privacy and dignity of thousands of Canadians affected who have not violated any Canadian law, solely due to their having a U.S. national origin or place of birth.

CONCLUSION
Henry Kissinger recently stated, *"The test of policy is how it ends – not how it begins"*. What will be the end result of the FATCA IGA? It will violate the fundamental equality rights of thousands of law-abiding Canadians and their families. It will cause harm and distress across the social fabric of Canadian society. The potential for harm is self-evident, the claims of the foreign law FATCA are unusual and dubious, and the violation of the Charter's equality protection is blatant. Any so-called reciprocal benefit to Canada is illusory and out-weighed by the violation of the fundamental right of all Canadians to equal treatment under law, regardless of national origin.

More serious is the surrender of sovereignty created by enshrining this obviously flawed foreign law into Canadian law, while treating Canada's hundreds of thousands of so-called "U.S. persons" as disposable collateral in appeasement of a foreign state's demands. Canada has a duty to defend its institutions and citizens from foreign extralegal and extraterritorial threats, not capitulate to them. If a test of policy is not how it begins but how it ends, how will this policy of appeasement affect Canada? **I urge our Members of Parliament, as stewards of Canadian sovereignty, to reject the FATCA IGA enabling legislation in Bill C31 – or to at least amend legislation shielding Canadian citizens and permanent residents from its discriminatory affect.**

References

1) Excerpt from:
DRAFT Guidance on Enhanced Financial Account Information Reporting – Part XVIII of the Income Tax Act / March 6. 2014

Unambiguous U.S. place of birth
8.25 Where the indicium found is an unambiguous indication of a U.S. place of birth then the account needs to be reported* unless the financial institution obtains or currently maintains a record of all of the following:

• a self-certification showing that the account holder is neither a U.S. resident for tax purposes nor a U.S. citizen;
• evidence of the account holder's citizenship in a country other than the U.S. (i.e., passport or other government-issued identification); and
• a copy of the account holder's Certificate of Loss of Nationality of the United States or a reasonable explanation of why:
- the account holder does not have such a certificate; or
- the account holder did not obtain U.S. citizenship at birth.
**(NB: The financial institution must pass the private financial account information of said account holder with a U.S. place of birth to the CRA, who will then send this information to the U.S. IRS)*

2) Excerpt from:
Canadian Charter of Rights and Freedoms
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

3) Excerpt from:
Submission to Department of Finance RE: Negotiation of Information Exchange Agreement Regarding FATCA and The Canadian Charter of Rights and Freedoms by Peter Hogg, CC, QC
December 12, 2012
Peter Hogg is a Professor Emeritus and former Dean of Osgood Hall Law School and Scholar in Residence at Blake, Cassels & Graydon LLP

"To the extent that any implementing legislation adopts provisions similar to those found in the Model IGA, in my opinion, the legislation would violate s. 15 of the Charter… The source of this problem is the fact that the Model IGA requires financial institutions to treat people differently based on such innate characteristics as place of birth or citizenship... The IGA that is being proposed would compel Canadian financial institutions to disclose the private financial information of their clients to the IRS. This would be... in clear violation of Section 15(1) of the Charter, which prohibits discrimination on the grounds of "national or ethnic origin".