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Chair

Mr. James Rajotte

Standing Committee on Finance

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● (1530)

[*English*]

The Chair (Mr. James Rajotte (Edmonton—Leduc, CPC)): I call to order meeting number 34 of the Standing Committee on Finance. The orders of the day, pursuant to the order of reference of Tuesday, April 8, 2014, are that we resume our study of Bill C-31, An Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures.

We want to welcome our guests here this afternoon for this bill. We have first of all, as an individual, Professor Allison Christians from McGill University. Welcome to the committee. We also have from Credit Union Central of Canada, the director of financial sector policy, Monsieur Marc-André Pigeon. From Moodys Gartner Tax Law LLP, we have Mr. Roy Berg, director of U.S. tax law. Welcome. And from Toronto, we have by video conference the president and CEO of the Investment Industry Association of Canada, Mr. Ian Russell.

Mr. Russell, can you hear me okay?

Mr. Ian Russell (President and Chief Executive Officer, Investment Industry Association of Canada): I can hear you fine, Mr. Chair.

The Chair: Okay. Welcome to the committee.

Each of you will have five minutes maximum for an opening presentation. Then we'll begin with members' questions.

We'll begin with Professor Christians, please.

Prof. Allison Christians (Professor, H. Heward Stikeman Chair in Tax Law, McGill University, As an Individual): Thank you, Mr. Chair.

Thank you so much for inviting me to speak to the committee regarding the portion of Bill C-31 that enacts FATCA in Canada.

While tax law professors are generally not known for brevity, I hope to be succinct and clear in conveying two points to this committee. First, Canada generally does not and should not furnish information to foreign countries on Canadian citizens living in Canada, or assist countries in gathering any information in aid of tax administration, except according to very specific standards to which they formally agree. In that regard, the agreement before you falls short, as it's not clear that both sides are agreeing to the same thing, nor that these standards are respected when they subject many Canadian citizens to foreign financial jeopardy, and even criminal liability.

Secondly, Canadian officials may not furnish information to other countries except under very specific terms. Thus the lack of clarity in Bill C-31 may expose Canadian officials to liability as well.

I'm going to try to explain these two points in simple terms and therefore I'm going to risk oversimplification and I apologize for that. I'm more than happy to explain the complex legal concepts formally should you have any questions for me. Please let me state at the outset that I fully understand the purpose of this law. We must ensure the integrity of the global tax system. Canada's government has demonstrated its commitment to cracking down on tax evasion by working to exchange relevant tax information with other countries. That's a goal we all want to work toward, yet there are important limits on this practice. We are working here with one of the world's most important treaties, important because of the close connections and shared economic interests of Canada and the United States.

There are long-standing limitations on how we and how countries generally react to the revenue and penal laws of other countries. We call these limitations the "revenue rule". The revenue rule says that Canada won't lend assistance to the U.S. to collect U.S. debts of people who were Canadian citizens when the debts arose. Period, full stop, no qualifications. To amplify this point, Canada does not assist in tax collection in any case unless the U.S. tax claim has been finally determined after a full measure of due process. Put this another way, we have a long history of not assisting or allowing other countries to engage in revenue collection activities in Canada for their own tax purposes.The U.S. has a very similar, if not stricter position.

But FATCA, as reflected in the bill before us today, tells us to ferret out our own citizens as likely U.S. tax debtors and present them and their financial resources to our most important treaty partner in an agreement of dubious status that may not even be a tax treaty. The bill suggests that this will be done in furtherance of the existing tax treaty. It goes significantly further. It forces us to ask ourselves how we can open our citizens and their money to the U.S., yet claims this does not constitute lending assistance. Canada must protect Canadians, and that is what the lending assistance rule and the limits on information disclosure do. They assert that the U.S. should have no enforceable tax claim that should be assisted by Canada on Canadians.

We need to make clear we won't take part in any enforcement in any form of assistance, whether it be in information or collection when ·it comes to Canadian citizens. I believe that is the spirit in which the government has accepted the terms of FATCA in the bill before the committee today, but this spirit must be reflected in the law. We cannot use a phrase like "information gathering" to blind ourselves to what is really occurring. Information sharing is not the end, it is the beginning. Our information exchange must also comply with Canadian law concerning when Canadian tax officials may divulge confidential taxpayer information. The law is not ambiguous: an official may disclose protected taxpayer information when we have agreed to do so under a tax treaty or other listed international agreement and not otherwise.

FATCA as implemented in Bill C-31 is not a tax treaty in U.S. law, nor is it a protocol to our tax treaty. Indeed, I am not sure what it is and I am not alone. Lawsuits have been initiated in the U.S. on this point and the issue is far from resolved.

● (1535)

The fact is that with this agreement, the U.S. will be the only nation with which Canada has both a tax treaty and a separate tax information exchange agreement, making the relationship between these two documents all the more confusing. So, what is this document when the two parties don't have a common view? If we do not know for certain, we may be in for a rude awakening in the context of civil or even criminal litigation.

There also appears to be a false impression that there is urgency in this matter, yet the U.S. has a list of countries it will "deem" to have an agreement like this in place, and Canada was the very first country on that list and it was there before we signed an agreement. Even if we weren't on the list, the U.S. Treasury recently announced another 18-month grace period, so we have the time to get this right. Let us not act in haste and repent at leisure.

I thank you for the opportunity to make these remarks today.

The Chair: Thank you. Thank you very much for your presentation.

We'll now hear from Credit Union Central of Canada, please.

[*Translation*]

Mr. Marc-André Pigeon (Director, Financial Sector Policy, Credit Union Central of Canada): Thank you Mr. Chair and honourable members of the committee for this opportunity to share with you our thoughts on Part V of Bill C-31.

As you know, Part V implements an intergovernmental agreement on FATCA, or the Foreign Account Tax Compliance Act.

[*English*]

Before addressing our views on this agreement allow me to begin by making a few preliminary remarks regarding the role of my organization, Canadian Central and, more generally, the credit union system in Canada.

Canadian Central is a national trade association for its owners, the provincial credit union centrals. Through them we provide services to about 330 affiliated credit unions across Canada. These credit unions currently operate in more than 1,700 branches, serve 5.3 million members, hold $160 billion in assets and employ about 27,000 people.

Credit unions in Canada come in all shapes and sizes, as you probably know. Our smallest credit unions such as iNova Credit Union in Halifax, Nova Scotia has less than $30 million in assets and only 10 employees. Our biggest credit unions, such as Vancity in British Columbia, has just under $20 billion assets and employs thousands of people.

But even our biggest credit unions are small next to the country's biggest banks which are at least 20 times bigger than Vancity, for example. This disparity means that new regulations like FATCA can pose a real challenge to all credit unions big and small alike. While the government is to be congratulated on signing an agreement that mitigates some of the regulatory burden of FATCA, we have some concerns.

Our major concern at this point is that the unavoidable regulatory burden imposed by FATCA may, in the near future, be compounded by the OECD's efforts to create a single, unified standard for automatic exchange of financial account information. Specifically, we worry that credit unions will end up with two different tax compliance regimes. We'll have an intergovernmental agreement on FATCA that includes some exemptions for smaller financial institutions like credit unions and we'll have the OECD requirements which, to date, do not contemplate any such exemptions and, though modelled on FATCA, appear to require significantly greater reporting. For that reason we're encouraging the federal government to hold strong to the view expressed in a recent declaration which it signed, that the OECD's multilateral approach “not impose undue business and administrative costs”.

For us, that means including small institution exemption thresholds, harmonizing the OECD rules with FATCA, and not having to file the same information—or worse yet, different information—with two different organizations.

The second issue we want to discuss has to do with regulatory burden more generally. Last year we conducted a survey of affiliated credit unions to gauge the impact of regulatory burden on the system. We found that small credit unions, those with fewer than 23 employees, like iNova Credit Union, for example, devoted fully 21% of their staff time to dealing with regulatory matters, whereas bigger credit unions, like Vancity with more than 100 employees or thousands of employees, only averaged about 4% of their full-time staff on compliance issues.

These results show that regulatory burden, like that imposed by FATCA, disproportionately harms smaller financial institutions and hurt their ability to compete, even with some of the exemptions and thresholds embedded in the intergovernmental agreement.

Our survey also found that the number one regulatory burden for credit unions comes from federal rules around anti-money laundering and terrorist financing. To date, the federal government has resisted applying its red tape reduction strategy to these regulations because apparently the rules do not affect small businesses. The fact is, however, that credit unions are the small businesses in the financial service sector and we are affected.

So, we're asking that the federal government revisit these rules to help offset the FATCA regulatory compliance burden faced by credit unions. We believe this request is consistent with the federal government's one-for-one regulatory burden initiative which is designed to offset new regulations which the elimination of older ones.

● (1540)

[*Translation*]

To conclude, we wish to thank the committee for the opportunity to participate in its review of Bill C-31, and Part V in particular.

Our general view is that the federal government has made the best of a bad situation in negotiating its intergovernmental agreement on FATCA. We are asking that it continue to be sensitive to the needs of smaller financial institutions in the negotiations with its OECD partners, and that it more diligently apply its red tape reduction approach to the anti-money laundering and terrorist financing rules.

I look forward to your questions.

The Chair: Thank you very much for your presentation.

[*English*]

Next we'll hear from Mr. Berg, please.

Mr. Roy Berg (Director, US Tax Law, Moodys Gartner Tax Law LLP): Good afternoon, Mr. Chairman and members of the committee.

My name is Roy Berg. I'm a U.S. tax lawyer with Moodys Gartner. I was born, raised, and educated in the U.S. I practised in the U.S. for 17 years in tax law before immigrating to Canada three years ago. Therefore, I think there are very few individuals who have more personally and professionally vested in this issue than I do.

On March 9, 2014 our office submitted extensive analysis and commentary to the Department of Finance regarding our concerns about the draft legislation, and on April 10 we submitted a brief on these concerns to the committee. I will be happy to elaborate on any of the materials we have submitted, as they're quite detailed and quite specific.

Before I summarize our comments on the draft legislation, however, I want to emphasize that we do agree with the Minister of Finance that entering into the IGA with the U.S. was beneficial to Canada. Had Canada not entered into the IGA, Canadian financial institutions would have faced the unenviable dilemma of either complying with Canadian law and risking FATCA's 30% withholding tax or complying with FATCA and risking violating Canadian law.

Unfortunately, as FATCA is drafted and the IGAs are designed, there is no middle ground. Those are simply the facts. Life under the IGA is better than life without the IGA. As Senator Patrick Moynihan of the U.S. said, “everyone is entitled to his own opinion, but not his own facts”.

The committee is likely going to be aware of rather jingoistic hyperbolic rhetoric admonishing Finance for ceding Canadian power, ceding sovereignty, and also encouraging Canada to stand up to FATCA. As the committee hears such comments, we encourage it to remember that FATCA is U.S. law, and the way it's designed, it's enforced not by the IRS, not by the Treasury, but by the markets themselves. In that, it is like a sales tax. The withholding obligation is on the person making the payments.

While the IGA is unquestionably beneficial to Canadians, the legislation before you requires refinement, specifically in the manner in which a financial institution is defined under the legislation. The definition is actually much more narrow in the legislation than in the IGA, the intergovernmental agreement.

The Department of Finance disagrees with that assertion. The Department of Finance believes that the definition of financial institution under the legislation is consistent with that in the IGA. However, in our briefs and in our submissions to Finance, we go through the legal analysis to support our position.

One thing I believe the Department of Finance does not disagree on is that the definition of financial institution is more narrow in the regulations and the implementing legislation of other FATCA partners. Therefore, the definition of financial institution for certain Canadian financial institutions will be different under Canadian domestic law from what it will be under U.S. domestic law, for example.

This difference will likely lead to unintended and unnecessary withholding of certain Canadian trusts that otherwise have no U.S. connections at all, for example, a spousal trust created at death, where the spouse, the beneficiaries, and the trustees have no U.S. connections whatsoever, and the only connection would be a U.S. bank account.

In that case, under Canadian domestic law, that trust would be defined as a non-financial foreign entity, whereas in the U.S., it will be defined as a foreign financial institution. Payments coming out of the U.S. to that Canadian trust will be subject to withholding, because under U.S. law, when there's a discordance between the stated classification of the entity and the classification of the entity under U.S. law, there is mandatory withholding.

● (1545)

That's all.

The Chair: Thank you very much, Mr. Berg, for your presentation.

We'll now got to Mr. Russell please, for your opening statement.

Mr. Ian Russell: Thank you, Mr. Chairman.

My name is Ian Russell. I'm president and CEO of the Investment Industry Association of Canada. I am pleased to appear before the finance committee this afternoon to make the case for the passage of part 5 of Bill C-31.

This legislative package includes important provisions related to compliance with U.S. FATCA legislation. It is the product of almost five years of extensive consultation between the Canadian securities industry, other institutions in the Canadian financial sector, and the Canadian and U.S. tax authorities.

This legislation will greatly facilitate Canadian financial institutions and their clients' compliance with the sweeping provisions of the U.S. FATCA legislation. The Investment Industry Association of Canada urges members of the committee to recommend approval of this legislation expeditiously.

No one doubts that the FATCA legislation is an aggressive policy approach to force compulsory U.S. tax reporting by U.S. citizens resident outside of the United States, effectively exerting extra-territorial reach to meet its policy objectives.

This approach, however, is not without precedent. In the last five years since the 2008 financial crisis, the Canadian securities industry has experienced similar aggressive tactics in the reform of securities regulations that have taken place under the G20 directives. Both U.S. and European securities regulators have imposed new regulations with little regard for coordinating these efforts for more harmonized cross-border rules. The extraterritorial application of these regulations has resulted in much duplication and complexity, raising costs and inefficiencies for foreign institutions dealing in the U.S. capital markets. The regulatory burden has not been mitigated through measures such as regulatory recognition of respective jurisdictions.

The United States and the EU can engage in these aggressive tactics to force compliance with their own rules, recognizing that compliance is the condition for needed access to U.S. and European capital markets by Canadian investors and their financial institutions. U.S. regulators, in effect, use the size and importance of their capital markets as leverage to force compliance with their own aggressive rules, engaging in extraterritorial rule-making.

FATCA follows this same aggressive practice. The failure to comply with U.S. tax reporting rules would have serious consequence for Canadian institutions and their clients. Canadian investors would be subject to the full 30% withholding at source on U.S. investments. Moreover, Canadian financial institutions would be required to disclose the financial information of their FATCA affected U.S. clients, or otherwise risk penalties and sanctions that could seriously interfere with their U.S. financial business. All major Canadian financial institutions, banks, and insurance companies have built a significant presence in U.S. capital markets. This offshore business is increasingly important to the overall growth of these institutions and their underlying profitability and shareholder returns.

The Investment Industry Association of Canada has taken a leading role in coordinating with other institutions and in consultations with the U.S. Treasury and the Internal Revenue Service, as well as the Canadian tax authorities, to develop an acceptable framework of exemptions from the reporting obligations, phased-in reporting rules, and an overarching intergovernmental agreement that builds on the existing Canadian-U.S. information sharing tax protocol. This comprehensive framework is designed to achieve an effective and cost-efficient tax reporting mechanism under FATCA legislation, one that treats Canadians fairly; avoids inconvenience to innocent tax-paying Canadians by eliminating provisions requiring account closure and punitive U.S. withholding tax; focuses efforts on tax avoidance schemes; and respects privacy considerations.

● (1550)

The Chair: You have one minute, Mr. Russell.

Mr. Ian Russell: We believe that this package of legislation embeds the best possible tax reporting framework for Canadian investors and their financial institutions, and should be passed expeditiously.

Thank you, Mr. Chair.

The Chair: Thank you very much for your presentation.

We'll begin members' questions, five-minute rounds for members.

We'll start with Mr. Rankin.

Mr. Murray Rankin (Victoria, NDP): Thank you, Chair.

Thank you witnesses, one and all. I'm sorry that I've only got five minutes, so forgive me if I go rather quickly.

I'd like to address my questions to Professor Christians. Thank you for your scholarship on this issue. You mentioned in your remarks that the intergovernmental agreement may not even be a treaty. How does FATCA and the IGA from existing tax-sharing agreements that Canada has with the United States?

Prof. Allison Christians: Canada has a tax treaty with the United States that goes back several decades. There is tax information exchange under it. Since 2008, I believe, or 2009, Canada has had a series of tax information exchange agreements it has signed with countries that do not have tax systems like ours.

This agreement is not like either one of those. It's something else, and I'm not sure what it is.

Mr. Murray Rankin: What are the consequences, then?

Prof. Allison Christians: What are the consequences of not having a tax treaty? In section 241 of the Income Tax Act, disclosing confidential taxpayer information would not be authorized.

Mr. Murray Rankin: Right, okay.

The Conservative government keeps saying that they're not assisting with U.S. tax collection. It seems to us rather absurd when you consider that they'll be systematically gathering information and spending millions of Canadians' tax dollars to send this information to the IRS.

Would you agree that they are in fact assisting, and what are the implications of doing so if they are?

Prof. Allison Christians: It seems to me, Mr. Rankin, to strain credulity to say that rounding up Canadian citizens and putting them in a pen and telling the United States that their money is here and here they are for the taking does not constitute lending assistance.

Mr. Murray Rankin: Right.

Prof. Allison Christians: The mutual assistance on administration in tax matters calls information exchange a form of assistance. It is one of two forms of assistance.

Mr. Murray Rankin: Okay.

You may know that the official opposition, the NDP, has asked that the intergovernmental agreement provisions of Bill C-31 be withdrawn from the bill for further study.

You made reference just now in your remarks to the U.S. Treasury just announcing an 18-month grace period. In fact, Mr. Berg just mentioned continuing concerns with such things as spousal trusts.

I'd like you to comment on how real the threat is of a withholding tax if our financial institutions didn't comply right away, and whether there really is such a need for haste?

Prof. Allison Christians: There is no urgency. There never has been any urgency, in my mind, because Canada has been the only country on the list since before the IGAs were even conceived by the United States. The United States has used our exchange regime with them as a carrot with the rest of the world. They have not given us anything new. We were on the list. We were the only country on the list.

They conceived of the list, and added other countries to it because we had this regime.

The United States would have to go to the pretty dramatic step of taking us off a list that we've been on since 1996, far before FATCA, and long before IGAs. Nothing would shock me, really, but it would surprise me if they would go to that diplomatic step of taking us off a list we've been on under a separate agreement.

● (1555)

Mr. Murray Rankin: Thank you.

I think you said during your remarks just now that we should say that we won't do any information collection or enforcement if it concerns Canadian citizens, by which I think you meant to say including those Canadian citizens who might also be “U.S. persons”. Is that what you meant to say?

Prof. Allison Christians: That is correct. That is what the revenue role is. That is the common law in Canada. You will find that principle in the U.S. tax treaty. You will find that principle in the mutual assistance tax treaty. You will find that in principles of public international law. Nothing should have changed. This agreement could be seen in conjunction with that. That's a simple fix that I would be very happy to speak to you about how to make that happen.

Mr. Murray Rankin: Okay, and you think it can be done? The amendment would be to carve out those people who happen to be Canadian citizens—

Prof. Allison Christians: No, that's one—

Mr. Murray Rankin: But there are other ways in which this drafting can be done, in other words.

Prof. Allison Christians: One option is to argue about who should be defined in what law.

The other is to invoke an established precedent, an established rule that we have, which is about what the CRA will do, not what the Canadian financial institutions will do—they will do what FATCA says—but what the CRA will commit to doing vis-à-vis the IRS.

The Chair: You have 20 seconds.

Mr. Murray Rankin: I think you also said in your remarks that there could be potential legal liability for those Canadians, and CRA for example, who share information abroad without due protection.

Prof. Allison Christians: There is no authorization in the act then there is no reason that I can see why you would not be risking potential liability.

Mr. Murray Rankin: Thank you, Professor Christians.

The Chair: Thank you, Mr. Rankin.

We'll go to Mr. Saxton, please.

Mr. Andrew Saxton (North Vancouver, CPC): Thank you, Chair.

Thanks to our witnesses for being here today, or being on video as the case may be.

My first question is for Ian Russell, president and CEO of the Investment Industry Association of Canada. Mr. Russell, due to the fact that FATCA was going to come into force regardless if there were an IGA or not....

I understand that the U.S. made several concessions for Canadians that they have not done for other countries, in part because of the intense negotiating work by the late Minister of Finance. This includes exempting a large number of accounts from FATCA, including registered retirement savings plans, registered retirement income funds, registered disability savings plans, and tax-free savings accounts.

Do you agree that these exemptions will help to protect the financial information of U.S.-Canadian dual citizens?

Mr. Ian Russell: Yes I do. I think that the intergovernmental agreement and the efforts that the Canadian government made to obtain the most effective tax gathering mechanism possible within the constraints of the FATCA legislation is a credit to a lot of people. I certainly would give a lot of credit to the Minister of Finance to provide the carve-out you talked about, to provide phased-in reporting, to provide clemency provisions for financial institutions to get onboard, and also to provide for this overarching agreement that facilitates a way to provide this information and not abridge the privacy laws.

Mr. Andrew Saxton: Thank you.

My next question is for Mr. Pigeon.

Mr. Pigeon, under the original FATCA legislation, all credit unions would have been subject to reporting requirements. Thanks to the IGA, smaller credit unions, those with assets of less than $175 million, will no longer be subject to FATCA. In fact, they will be exempted.

How will this benefit these institutions and their customers?

Mr. Marc-André Pigeon: Thank you for the question.

We've spoken to our members, and it does benefit a fair number of them. Potentially upwards of 60% of our members could benefit from this exemption. It will really be up to them if they want to take advantage of this or not.

In terms of the benefits, clearly one major benefit for our smaller credit unions is of course the regulatory burden challenge that this would pose otherwise. I mentioned earlier that I know of a credit union with 10 employees. They're already taxed to the limit by CRA rules, FINTRAC rules, and every time they do something to meet those standards, it means taking something away from their members, some community service, some kind of benefit that they could provide otherwise. So it's a major advantage in that sense.

There is one challenge potentially related to that exemption, which is that we might see some people targeting those smaller institutions to move their moneys there. That could be a bit of a challenge from an asset liability management perspective. You've suddenly got a flow of funds that you have to invest and ensure that there's a nice spread between those two things. Overall, we're quite happy with that exemption as well as the local client-based institutions exemptions as well.

Thank you.

● (1600)

Mr. Andrew Saxton: Okay. Thank you.

Now, when Darren Hannah, a top CBA official, was before a Senate committee last week, he said:

> Clearly there's a lot at stake, so from our perspective, it's very important that the intergovernmental agreement be brought into effect in order to avoid the consequences that would otherwise befall us.... [T]he economic consequences of non compliance would dwarf any economic cost associated with compliance.... Unfortunately, despite worldwide efforts by the CBA and others, U.S. officials have no intention of repealing FATCA; and simply ignoring FATCA is not an option.

Can you explain what he meant by that?

Mr. Marc-André Pigeon: It's a bit challenging perhaps to put myself in his shoes, but I think we would probably express similar views. We have an international trade association called the World Council of Credit Unions that similarly has been lobbying internationally the U.S. and others to try to stop this from happening. I think we've come to the perspective where we feel it's going to happen, and we will respect the rules. We're quite pleased with the exemptions that we've received. We feel this is the best of a bad lot.

Mr. Andrew Saxton: Thank you very much. Thank you, Chair.

The Chair: Thank you, Mr. Saxton.

Mr. Brison, please, for five minutes.

Hon. Scott Brison (Kings—Hants, Lib.): Thank you very much.

Mr. Russell, Ian, it's good to have you back before the committee. In a news release responding to FATCA, your organization suggested that registered savings accounts like RESPs and RDSPs are exempt from the scope of FATCA. These accounts are deemed non-reportable in the IGA.

Just to be clear, individuals are still required to report them to the IRS if they are one of the million dual citizens, Canada-U.S. citizens. I just want to make that clear. Individuals still have to report, are obligated to the U.S. authorities to report any earnings, within or those accounts ultimately.

Mr. Ian Russell: Yes, you're right, Mr. Brison. There is an exemption for those registered accounts under the FATCA legislation, but those individuals who are dual citizens will have to register with the IRS. Their financial details, their income, and their investment income would be reported on their U.S. tax returns.

Hon. Scott Brison: It wouldn't just be their investment income on the contributions they have made, but their income derived from the Canadian taxpayer-funded contributions to those accounts would also be considered taxable income by the IRS.

Mr. Ian Russell: I think you're probably right on that, Mr. Brison, maybe under U.S. tax law.

Hon. Scott Brison: Do you feel it important to communicate that message to Canadians, such that Canadian-U.S. dual citizens don't somehow feel they don't have to report this? I think there's a risk in the government's communication, and if I may say so respectfully, your organization's communication that in fact these accounts are non-reportable, when in fact the only exemption is for the financial institutions to not to report to the IRS.

Mr. Ian Russell: Yes. I'm not sure how the IRS or the U.S. tax authorities would actually treat the income in those registered accounts for tax purposes.

Hon. Scott Brison: We have concerns that earnings from RESPs, and RDSPs, and contributions made by the Canadian taxpayer to those accounts were not intended to go into the U.S. treasury. Those contributions from the Canadian government were supposed to help people get an education, or help people with disabilities.

● (1605)

Mr. Ian Russell: The only point I would add to that, though, is that issue you raised is not really a FATCA issue. It's an issue that would apply to any dual citizen in Canada who is in fact filing a U.S. tax return.

Hon. Scott Brison: It's one that could have been on the table and negotiated as part of a discussion on the IGA. That could have been one of the exemptions, a specific exemption to protect Canadian account holders of those registered accounts, and we're concerned that this negotiation or this concession was not demanded or ultimately attained.

Mr. Berg, the government argues that the IGA is the best way to prevent Canadian financial institutions from being subject to FATCA's non-compliance penalties. What is preventing private trusts and private holding companies from being in the definition of financial institutions?

Mr. Roy Berg: Right now that's the biggest issue that we have with the draft legislation. Under the draft legislation, private trusts, private holding companies, are not Canadian financial institutions. They're not FIs. And for those type of entities that have purely Canadian affairs, that's going to be just fine. But when those entities have U.S. accounts or U.S. affairs, or they have an interest in a U.S. REIT or limited partnership, that's where we're going to have the problem. That's where there's going to be withholding on payments to those type of entities, because although it's a non-financial institution under Canadian domestic law, the U.S. withholding agent has to follow U.S. law, and under U.S. law it's something different. When there's a discordance in classification, the withholding agent is obligated to withhold.

The Chair: Thank you.

Thank you, Mr. Brison.

We'll go to Mr. Allen, please.

Mr. Mike Allen (Tobique—Mactaquac, CPC): Thank you very much, Mr. Chair.

Thank you to our witnesses.

Mr. Berg, I'd like to start with you.

I know that one of the comments made, which I think you quoted, is that the U.K. realized some of the risk of this. It was about some of the inconsistent definitions in the IGAs that you were concerned about in your testimony. I think we're at some 24, and counting, IGAs now.

Mr. Roy Berg: It changes every day.

Mr. Mike Allen: It changes every day, so we might even be higher than that now.

You commented that the U.K. realized this risk early on and has taken the lead in developing domestic legislation to avoid the result. Specifically, it realized how this would cause increased compliance costs and uncertainty in the marketplace. Can you comment on just how the U.K. actually tried to do that?

I ask because, as you pointed out, we're into a he said-she said situation. You said your thing and the government lawyers have said another. So I'd just like to get your opinion on that.

Mr. Roy Berg: Yes, exactly. Who's right?

We know that you're just doing the legal analysis. We've come up with a different answer than the Department of Finance has. It doesn't mean that the Department of Finance is wrong, but if we look to other jurisdictions such as the U.K. and how they've dealt with this, we see that the U.K. has taken a much different approach. Their definition of financial institution, specifically as it relates to private trust, is very, very close to the definition that we find in the Treasury regulations.

There have been a number of U.S. treasury department officials who have come out and officially stated that they know model 1 IGAs are dependent upon domestic law for implementation. Canada has a model 1 IGA. But we expect domestic legislation to very closely follow the Treasury regulations, and that's what the U.K. has done.

Canada has not followed the lead or the analysis set forth in the Treasury regulations. One Treasury official even said that there should be very little daylight between domestic legislation and the Treasury regulations as they relate to these various definitions.

● (1610)

Mr. Mike Allen: So the U.K. actually tried to mirror that as best they could—

Mr. Roy Berg: And so the U.K. mirrored the definitions found in the regs.

Mr. Mike Allen: Okay. Mr. Pigeon, I'd like to go to you.

A number of your members, obviously, would not be exempt under the $175 million, so there is going to be something there. I appreciate the comments that have been made today, that life under the IGA is better than not, and that it is beneficial to Canada. So I do appreciate that.

By having the IGA in place, and the certainty of an IGA, there's going to be cost to the financial institutions of actually having to comply with this and there would have been costs to the financial institutions of having to comply with FATCA, as opposed to with the IGA.

So what are you seeing in your financial institutions with respect to the cost to comply with this? Is it better under the IGA or is it relatively the same? Because you're going to have to pick this information up out of the accounts.

And the second part of that would be, do you have the U.S. indicia that you're going to be able to pick up from these accounts in the first pass?

Mr. Marc-André Pigeon: Right. Thank you for the question.

Right now I'd say our major challenges relate to staffing, just having the personnel devoted to this IGA implementation, and updating databases to capture the indicia that you mentioned. Probably a lot of the credit unions have most of that, but some of them don't, especially the smaller ones. They may have to do some updating there—and that, by the way, will probably compel or force some mergers. This is one of the other challenges we face in the credit union system: the regulatory burden is compelling smaller credit unions to merge to handle these kinds of challenges.

In terms of the counter-factual, it's hard to say because up until the IGA I know that there was a lot of uncertainty about where it would actually land, and I think that uncertainty was probably the biggest concern we had coming up to the IGA. It was just not knowing how things would play out. So now we have a bit of certainty. I think people can plan for that and do the investments they need to meet the requirements.

Mr. Mike Allen: Thank you, Chair. I won't press my luck with you.

The Chair: Thanks, Mr. Allen.

[*Translation*]

Mr. Caron, go ahead for five minutes.

Mr. Guy Caron (Rimouski-Neigette—Témiscouata—Les Basques, NDP): Thank you very much, Mr. Chair.

Ms. Christians, we have discussed with the officials the matter of the bill's constitutionality when it comes to intergovernmental agreements. They told us that they kept the Privacy Commissioner abreast throughout the process of drafting the bill, but they didn't say what she thought about it.

A brief we received from you essentially states that FATCA and, by extension, the agreement, transform certain entities into information collectors for the

[*English*]

Internal Revenue Service.

[*Translation*]

I would like to hear where you stand when it comes to the bill's constitutionality or lack thereof in terms of privacy.

[*English*]

Prof. Allison Christians: Thank you for the question.

The constitutionality of this is an issue of expertise that really goes beyond my pay grade. There are privacy and discrimination concerns raised.

I'd like to just state, however, that we should remember that we do not have an anti-discrimination provision in the IGA. So absent an IGA, there would have been nothing to stop a Canadian institution from deciding not to implement or comply FATCA, but instead to become non-compliant, and thereby have choices that they do not have because of the IGA. The IGA says Canada will make all institutions comply with FATCA whether they want to or not. So a choice has been taken away, whether that was a good choice or not. No cost-benefit analysis was done on any of those.

So we could ask about discrimination and privacy. Those are important questions, but I think we should also be asking where the analysis is of what the cost benefit has been, and whether this is legally acceptable, not just under the constitution but under the Income Tax Act.

[*Translation*]

Mr. Guy Caron: I will come back to you later, Ms. Christians, as I now have a question for Mr. Pigeon.

Last week or two weeks ago, we also learned that a major Canadian bank had estimated its cost of complying with the agreement at about $100 million.

Have you estimated what the cost would be for your network members to comply with the new legislation so that the agreement could be implemented?

Mr. Marc-André Pigeon: Thank you for the question.

Unfortunately, we have not conducted such an assessment. However, I can briefly repeat what I said earlier.

In our case, the costs are mostly related to staffing and database updates. Additional costs will arise later on because, every year, we have to check the accounts to ensure no significant changes have occurred that would place someone on either side of the law.

There are also costs stemming from a potential loss of clientele. We are already hearing some related stories and anecdotes from our members. They are telling us that clients are saying they can no longer do business with them. We cannot provide you with an overall figure because we don't have a harmonized system like banks do. Our members are independent entities, and that somewhat complicates matters.

● (1615)

Mr. Guy Caron: I will now ask Mr. Berg a question, but I would also like Ms. Christians and Mr. Pigeon to comment afterwards.

Mr. Berg, the argument used by the government to convince us to finally implement the agreement is that we would have FATCA anyway and, therefore, the current intergovernmental agreement should be adopted as is.

Do you feel this argument is logical and acceptable, or should the government be able to explore certain modifications before confirming the agreement?

[*English*]

Mr. Roy Berg: That's a very good point, and thank you for your question.

Several jurisdictions have asked the U.S. to enter into memoranda of understanding where there are questions as to interpretation of the IGA. The reason that you would enter into the memorandum of understanding is precisely that issue. There is the possibility, and there is precedent for this, of getting a ruling, or an understanding, if you will, by reaching out in that regard.

[*Translation*]

Mr. Guy Caron: I don't have much time left.

Ms. Christians, should we go with FATCA or the agreement? Are there any other options?

[*English*]

The Chair: You have 30 seconds.

Prof. Allison Christians: It's a false dichotomy. Is it this or that, or neither of them? It is not a question of whether we have to deal with FATCA. FATCA is U.S. law. The question is, what will Canada undertake to lend assistance to the United States? That is a different question. We can solve that problem. We can invoke laws that stand.

Obviously, an MOU is one way to do that, as Mr. Berg has suggested; that is, to state the understandings. Now, if you look at the implementation act, you see that certain things have been put in there that don't need to be in there. For example, the inconsistency part does not need to be in this agreement. It's in the tax treaty. Why is it in this agreement? You don't need that here. We've added that. Why are we undertaking to do things that we don't need to do?

You say, what do we have to do here—?

The Chair: Thank you.

Prof. Allison Christians: What are we undertaking, as a government? That's the question we need to ask.

The Chair: Thank you.

I'll just remind members to ensure that they allow enough time for witnesses to answer.

I'll go to Mr. Adler, please.

Mr. Mark Adler (York Centre, CPC): Thank you, Mr. Chair.

Thank you, witnesses, for being here this afternoon.

I do have some questions, and I want to start with Mr. Berg, if I may.

The U.S. government is flipping over the sofa cushions looking for ever dime, aren't they?

Mr. Roy Berg: It seems that they are doing that.

Mr. Mark Adler: Yes, and that's really the purpose behind FATCA—one of the purposes.

Mr. Roy Berg: It is an information grab, I would say.

When we look at the actual tax dollars collected from U.S. citizens residing abroad, the IRS came out with statistics two years ago that said only 6% of any returns filed from abroad ever owe any U.S. tax. This is not a big tax grab; it's a compliance and a data grab.

Mr. Mark Adler: How much would you say it is, about 800 million or so? That's some of the estimates—

Mr. Roy Berg: Is that 800 million U.S. citizens residing in Canada?

Mr. Mark Adler: No, $800 million in revenue for the treasury. That's some of the estimates kicking around.

Mr. Roy Berg: I don't have that figure, I'm sorry.

Mr. Mark Adler: Okay.

Mr. Roy Berg: But only 6% owe any U.S. tax.

Mr. Mark Adler: Okay.

In terms of interpretation of the rules, there were some problems before FATCA with the IGA. The CRA was not interpreting the rules to the satisfaction of or in accordance with the agreement, and then came FATCA.

Is there a more stringent regime in place? By that I mean: these are the definitions; these are the rules that need to be applied, and there's not going to be any room for maneuvering, as there was under the IGA.

Mr. Roy Berg: The IGA, in fact, has its own set of rules. But as I said before, your treasury is aware that model 1 IGAs require domestic law to implement. So there is the potential for some deviation from existing definitions.

● (1620)

Mr. Mark Adler: Some people see it as an invasion of privacy. Some people see it as a tax grab. In the event that Canada does not.... We've signed the agreement, but, say, some banks don't comply. What are the repercussions?

Mr. Roy Berg: If some banks don't comply, then under FATCA, they would be non-participating financial institutions, and there would be a 30% withholding tax on them. And that's a withholding tax and not a withholding-against tax. It is a tax. You don't get it back.

Under the IGA, Canadian financial institutions only slip into that non-participating classification after 18 months of continuous notification by CRA that they're not compliant, and they need to get compliant. So there's a very big window to get things in order.

Mr. Mark Adler: Okay, so in terms, then, of consistency and predictability, and given the fact that Canadian banks are now some of the most liquid in the world, is it not in the Canadian banks' interest to clearly be a participant?

Mr. Roy Berg: It is in the Canadian banks' best interest to be a participating financial institution, that's correct.

Mr. Mark Adler: Okay.

Now, Ms. Christians, could you rebut to some of things Mr. Berg has said? Do you have any difficulties with what he said just now?

Prof. Allison Christians: I don't disagree with Mr. Berg. He's absolutely right that the banks have a choice, and they have to make their own choice as to whether or not they're going to fulfill the obligations placed upon them.

I'm talking about something different. I'm talking about what the Government of Canada and the Government of the United States have agreed to in a tax treaty. This is not that. I'm not sure what it is. The Government of Canada has 95 tax treaties. I can't find one that's ever been passed in the form of an omnibus budget bill. So I don't really know what it is. That's my question. What is this? In what sense does this obligate the Canadian government? If we don't really understand that, then I think we run a risk of finding out later.

Mr. Mark Adler: So is your difficulty, then, that it's in the budget bill? Or is your difficulty with the fact that you don't know, you can't define what it is?

Prof. Allison Christians: Well, section 241 of the—

Mr. Mark Adler: What's your difficulty here?

Prof. Allison Christians: The difficulty is that the Income Tax Act is very clear in the manner and circumstances under which a person can furnish confidential taxpayer information. The circumstances under which they can do that is under a tax treaty or a listed international agreement. So that is a procedural point that is muddied.

And the second part of that is that the tax treaty we have is built on a very strong, centuries-long foundation: public international law and common law on the revenue rule. This accord, or whatever it is, appears to not have considered that. It's just something to think about and something to consider, whether the Government of Canada has a relationship with the United States that would counter that—

The Chair: Thank you. Sorry for interrupting, we do have other members.

Mr. Adler, you're over your time.

So we're going to Mr. Cullen, please.

Mr. Nathan Cullen (Skeena—Bulkley Valley, NDP): Thank you, Chair.

Thank you to our witnesses.

I want to pull back from the 50,000-foot level for a moment.

Under this agreement, who defines who is caught up by FATCA? Who decides who's in and who's out? Whose information will be sent to the IRS? Who decides? Is it Canada? Is it the IRS? Is it the CRA? Is it the bank?

Mr. Berg, maybe you can start us off.

Mr. Roy Berg: First of all, the seminal question is, are you a financial institution or not? If you're a financial institution under Canadian law, then you're obligated to do certain things. Those certain things include figuring out who your U.S. citizen depositors are.

Mr. Nathan Cullen: Is that the current situation, or is that newly created under this IGA?

Mr. Roy Berg: That is under the IGA and also under the treasury regulations.

Mr. Nathan Cullen: So if you're a financial institution, you determine whose information is going to be passed on to the CRA.

Mr. Roy Berg: You find out, yes, whether you had indicia of U.S. citizenship or U.S. personhood, and once that decision has been made, then there is a reporting to CRA.

Mr. Nathan Cullen: In your understanding, is that person the one who is subject to their information being passed on to the CRA, then eventually the IRS? Are they notified under this agreement?

Mr. Roy Berg: My understanding is that there is no obligation for notification under the legislation. I don't believe there was any notification requirement under the Canadian guidance notes. There is no notification obligation either in the IGA or under the Treasury rules.

● (1625)

Mr. Nathan Cullen: Could you understand how somebody reading about this agreement, trying to understand whether it impacts them or their children, might want that amendment to be made in the agreement that we signed with the United States, to say, "Your financial institution deems you to be subject to this U.S. law and your financial information is about to be passed south of the border." As everybody admits, financial information is incredibly personal and important.

Would that be an amendment that your group or you as an individual would see as reasonable?

Mr. Roy Berg: I think that is very reasonable. If I were in that position, which I am, I would want that passed along. But I think the place for that is in the domestic legislation, not in the IGA itself.

Mr. Nathan Cullen: Excuse me, in Canadian domestic or U.S. domestic legislation?

Mr. Roy Berg: I'm sorry, it should be in Canadian domestic legislation.

Mr. Nathan Cullen: So this is something for the Canadian government.

I want to get Ms. Christians and her views on this aspect of who deems who is American, because in your case, Mr. Berg, it's relatively obvious that you have dealings across the border. We're hearing from constituents who may have been born in Canada, but by U.S. definition are American citizens, completely unaware. That's why the notification piece is becoming important to us, if people are being swept up unintentionally.

My last question—this is simply for a yes or no response—does the U.S. consider Canada a tax haven?

Mr. Roy Berg: I don't believe they do.

Mr. Nathan Cullen: So the aspect of Canada being a place where people go to avoid tax to the U.S. Treasury is not something that's entertained here.

Mr. Roy Berg: Probably not, but it could become a magnet for tax cheaters and avoiders.

Mr. Nathan Cullen: I could have been prompting. If only wishing made it so.

Ms. Christians, could you comment?

Prof. Allison Christians: Does the U.S. consider Canada a tax haven? Maybe not now, but when we prove to them that we have hundreds of thousands of Canadians whom they believe are U.S. persons who are tax evaders, will they not change their focus and look at us very hard after that?

Mr. Nathan Cullen: You've made some strong statements about this here today.

Understanding who a Canadian is and who an American is, is at the heart of whether the U.S. deems their incomes and their properties to be taxable. Again, we're hearing of people born in Canada but to American parents, or people who have left for 20 or 30 years and under U.S. law have run for political office, which by U.S. law says you're no longer an American. Is America the only country or one of only two that taxes by citizenship?

Prof. Allison Christians: It is not our job, I don't think, to change the U.S. law. We cannot change the law. What we can do is decide what we as a government are willing to do with respect to our citizens.

Mr. Nathan Cullen: Thank you.

What everyone's generally saying is this is terrible but we have to do something, so this is something. Most of the banking institutions say they hate this law but they need something in its place, and in the absence of something I guess this will do.

Prof. Allison Christians: Yes, you have this law. You also have the law, which is called the revenue rule, that says that Canada will not lend assistance to any other country in their tax rules, and constructively that must mean that we do not hand people over, put them in a pen, put a spotlight on them and show the U.S. where they are and say come and get them. That can't be consistent with the revenue rule, which is law, too. And it's U.S. law, too.

Mr. Nathan Cullen: Do you understand which one supercedes the other?

Prof. Allison Christians: That is a question that I think—

Mr. Nathan Cullen: The courts will have to settle.

Prof. Allison Christians: The courts will have to decide, and they will decide it. There is litigation, though, on both sides of the border on this and I think they will decide that. But I think we also have time. We have time to study these issues. I would love to have time to think about that and give a better answer.

Mr. Nathan Cullen: Thank you, Chair.

The Chair: Thank you, Mr. Cullen.

Colleagues, we're bumping up against time to change the panels.

Mr. Van Kesteren, I'll give you maybe one question, then we'll wrap up. Is that okay? I'm sorry for that.

Mr. Dave Van Kesteren (Chatham-Kent—Essex, CPC): Sure.

I guess there are a number of things I wanted to ask, but the question remains. Under U.S. law, citizens are obligated to surrender this information, are they not, Mr. Berg?

Mr. Roy Berg: Yes, that's correct.

Mr. Dave Van Kesteren: In essence, that's not going to change. Whether or not we accept that fact, it's still going to be U.S. law that these people who have U.S. citizenship have to surrender their information.

Mr. Roy Berg: That is correct.

Mr. Dave Van Kesteren: Mr. Chair, I have more questions.

The Chair: I'm sorry about that, Mr. Van Kesteren.

I want to thank our witnesses on our first panel for being here and responding to our questions. If you have anything further to submit to the committee, please do so through the clerk. For instance, Mr. Berg, if you have any amendments further to your submissions, please do that through the clerk as well.

Colleagues, we'll suspend for a couple of minutes, and then we'll bring our second panel forward.

Thank you.

● (1625)

(Pause)

● (1635)

The Chair: I call back to order meeting number 34 of the Standing Committee on Finance. We are continuing our consideration of Bill C-31, An Act to implement certain provisions of the budget.

Colleagues, we have five witnesses for our second panel. We have Professor Cockfield as an individual from Queen's University. Welcome back to the committee. We have from the Investment Funds Institute of Canada, Mr. Ralf Hensel, general counsel. Welcome. We have the president of the Portfolio Management Association of Canada, Ms. Katie Walmsley. Welcome back to the committee as well. We have from London, Ontario, presenting as an individual, Ms. Lynne Swanson. Welcome, from London. By video conference, from New York, as an individual, we have Mr. Max Reed, an attorney. Welcome.

Thank you for joining us this afternoon. You each have a maximum of five minutes for an opening statement.

We'll begin with Professor Cockfield, please.

Prof. Arthur Cockfield (Professor, Faculty of Law, Queen's University, As an Individual): Thank you, Chair.

Sir and mesdames, thank you for this opportunity, once again, to appear before your committee. I'm a professor at Queen's University Law School, where most of my teaching and research focuses on tax law.

I did want to note up front that I have had the privilege of appearing before this committee on three separate occasions and have critiqued FATCA, the subject matter of today's discussion, in the past, although I hope to tease out some of these critiques in greater detail today.

Before I launch into a one-minute spiel on my opening comments, I'd like to say that these comments draw from two published reports. One is my co-authored submission to the Department of Finance, dated March 10, 2014, co-authored with professor Allison Christians.

The second is a commissioned report to the Office of the Privacy Commissioner of Canada, called "FATCA and the Erosion of Canadian Taxpayer Privacy", and my outline sets out the websites where you can get those documents. My comments will focus on FATCA and how it affects Canadian privacy laws and interests.

I know you've heard from a lot of witnesses so I'll be quite brief. What do we know about FATCA? It was enacted in the U.S. in 2010. It contains a significant economic sanction if we don't play ball. It's my understanding that our government, for the most part, has entered into the intergovernmental agreement to avoid the imposition of this punitive economic sanction.

What's different between FATCA and the current regime? In fact, Canada and the United States already share more tax information with each other than they do with any other country in the world. We have automatic information exchange in place under the Canada–U.S. tax treaty. However FATCA is really a sea change in this cross-border tax information relationship in two key ways.

One, it targets different people. Under our current regime, it focuses on temporary residents in each country. Here, we have a focus by the United States on permanent residents in Canada—of course, U.S. citizens, dual citizens, joint account holders with U.S. persons, and so on. This is what, I think, upset our former and late finance minister Jim Flaherty, who was one of the globe's most vocal critics of FATCA when it was initially legislated by the Americans.

The second real change is the type of information we're thinking about sending across the border. Currently, we track so-called cross-border portfolio income, interest, dividends, and so on. Here, the Americans want us to hand over account information, including deposits and withdrawals. Under current Canadian domestic law, banks do not provide that to the CRA. They only provide income information that's needed to assess a taxpayer's tax liability. This is very personal information and very sensitive information that Canada has never shared with any foreign country previously.

So, now we're going to be sharing it. We're not sure how many Canucks are going to be involved, but certainly the number is in the hundred of thousands. Thousands of Canadian businesses will also be implicated in this new regime. For instance, if you are a U.S citizen who has signing authority over an account, then that account information will go south of the border. A U.S. person who substantially owns a Canadian business will now have a foreign government looking at that account information. It could, in my view, harm cross-border competition, frustrate cross-border mobility. I believe it violates the NAFTA agreement. I've written a book on the topic of NAFTA tax law and policy, and it's my opinion that FATCA, again, violates certain provisions within NAFTA.

What are we getting in return for this privacy giveaway? Well, as far as I can see—

● (1640)

The Chair: You have one minute.

Prof. Arthur Cockfield: —it's nothing. We're not getting anything other than the relief of the threatened economic sanctions. The Americans, in the intergovernmental agreement, give us vague assertions of reciprocity, but they will never come through. U.S. lawmakers and U.S. citizens will never accept the evisceration of their privacy rights and their privacy laws, which of course is what they're asking of you.

My main recommendation is to amend Bill C-31 so that the legislation is in place, is implemented, but only affects temporary residents of Canada—U.S. citizens who are here temporarily and not permanently. I believe this will be in compliance with the American demands and that hence there will not be any economic sanction.

Thank you.

The Chair: Thank you for your presentation.

We'll now hear from Mr. Hensel, please.

Mr. Ralf Hensel (General Counsel, Corporate Secretary and Director of Policy, Investment Funds Institute of Canada): Good afternoon.

As you've heard, I am Ralf Hensel, general counsel, corporate secretary, and director of policy at the Investment Funds Institute of Canada. I thank the committee for inviting IFIC to participate in its consideration of Bill C-31 and I'm privileged to be its representative here today.

IFIC is the trade association representing the Canadian mutual funds industry. The fund managers, fund distributors, and service providers to the Canadian industry all contribute to IFIC's work. Canadians currently entrust more than $1 trillion of their assets in mutual funds. The industry takes its responsibilities to these investors very seriously.

IFIC's interest is in Bill C-31's implementing legislation for the intergovernmental agreement between Canada and the United States concerning FATCA. Recognizing that non-compliance with FATCA is not a realistic option, we have advocated for requirements that impose the least possible burden and cost on mutual fund investors specifically and on the industry generally.

As you are aware, the U.S. imposes income tax based on U.S. citizenship regardless of jurisdiction of residence. As such, FATCA applies to U.S. citizens resident in Canada. We support the federal government's work and negotiations with the U.S. that have led to completion of the IGA on this initiative.

We believe the IGA is essential. It minimizes impact by reducing the number of Canadian investors who will be impacted by FATCA, the number of accounts that will be reported to the Internal Revenue Service, and the amount of administration and re-documentation that will be required.

The IGA will also significantly reduce the costs to implement FATCA, costs that are ultimately borne by investors. In fact, without the IGA, Canadian investors may have their access to U.S. financial assets, held either directly or through mutual funds, significantly curtailed or have the rates of return on such assets significantly reduced.

Let me elaborate.

Under the IGA, all of RRSPs, RRIFs, PRPPs, registered pension plans—you've heard the list—all the way to TFSAs are exempted from any documentation or reporting requirements under FATCA. The benefits to fund investors are clear: millions of mutual fund accounts will be exempt from FATCA reporting. Investors will not be asked to provide any additional information to document or demonstrate their non-U.S. taxpayer status in any such accounts.

Without the IGA, Canadian financial institutions would each need to sign an agreement with the IRS that would prevent them from opening or maintaining accounts for investors who do not provide sufficient information about their U.S. taxpayer status. The IGA eliminates any need to refuse or to open new accounts or to close existing accounts.

FATCA requires tax information on U.S. investors to be sent directly to the IRS. If to do so would breach domestic privacy laws, the regulations require the financial institution to obtain from every impacted investor a waiver or consent allowing the institution to send their tax information to the IRS. We believe this is a virtual impossibility.

Financial institutions would eventually be required to close the account of every investor not willing to provide a waiver. Under the IGA, the information will be sent to the Canada Revenue Agency, which will forward it to the IRS under established intergovernmental protocols.

Canadian financial institutions that cannot comply with FATCA requirements would be subject to a 30% withholding tax on any U.S.-source income. This would significantly reduce the returns of all investors in Canadian funds that hold securities generating such income.

The IGA for practical purposes removes the threat of withholding taxes, since reporting will be taking place. Without the IGA, investor accounts would need to be re-documented every few years at substantial inconvenience and cost. Under the IGA, an investor need only fill in the form once. It remains valid unless the investor's status changes.

Finally, the IGA gives the Canadian government and the CRA authority to set the rules for FATCA implementation in Canada. With industry, rules have been developed consistent with FATCA principles but tailored to reduce the scope of impact for Canadian investors. For example, mirroring well-established industry practices used to comply with anti-money laundering identification—

● (1645)

The Chair: You have one minute.

Mr. Ralf Hensel: —and reporting requirements should result in an efficient process, with reduced administrative burden and costs. This benefits both investors and those who must administer FATCA.

I wish to leave no doubt that even with the IGA and the implementation regime established by the legislation, the impact on the industry and its investors remains very significant. However, as I've noted, FATCA compliance without the benefit of the IGA would multiply that impact and cost many times over.

I thank you for your time and look forward to your questions.

The Chair: Thank you for your presentation.

We'll now go to Ms. Walmsley, please, for your presentation.

Ms. Katie Walmsley (President, Portfolio Management Association of Canada): Thank you, Mr. Chair.

Good afternoon, everyone. My name is Katie Walmsley. I am the president of the Portfolio Management Association of Canada. I also have joining with me today in the audience Mr. Paul Harris, who is chair of PMAC's board of directors and managing partner of Avenue Investment Management.

PMAC represents more than 180 investment firms across Canada, which in total manage assets of more than $800 billion and more than $1 trillion including mutual fund assets. PMAC members manage investment portfolios for private individuals, foundations, universities, and pension plans.

For FATCA purposes, portfolio managers are considered to be an "investment entity" under the FATCA rules, as they provide individual and collective portfolio management services. Portfolio managers also fall within the definition of "financial institution" under the Canadian legislation.

Our recommendation this afternoon is that portfolio managers should fall under the "deemed compliant" foreign financial institution exemption, thereby exempting portfolio managers from the registration and reporting requirements under FATCA.

Currently, given the narrow scope of the exemptions included in annex II of the Canada-U.S. intergovernmental agreement, it appears that portfolio managers in Canada will need to register with the IRS and report on their client accounts to the CRA in order to be FATCA-compliant. This is because in Canada portfolio managers have been included in the definition of "financial accounts". As a result, they cannot avail themselves of the deemed compliant foreign financial institution exemption and therefore must register with the IRS and report on their client accounts.

There are two key reasons for our recommendation opposing both this registration requirement and reporting requirement.

First of all, custodians are the most appropriate financial institutions to report on portfolio-managed client accounts. Portfolio managers do not maintain custody of the assets for their clients; these client accounts are in actual fact maintained by a third-party custodian. The custodian has reporting responsibilities for these accounts by virtue of holding the legal title to the assets in the accounts. Custodians are already reporting on the portfolio client accounts for other tax reporting purposes and act as qualified intermediaries for these purposes. If portfolio managers cannot avail themselves of the deemed compliant foreign financial institution exemption, reporting on client accounts will occur from both the portfolio manager and the custodian. We believe this duplication is a both unnecessary and avoidable result.

The current definition of "financial accounts" under the Canadian implementing legislation will cause unnecessary duplicative reporting. As per the definition of financial accounts, portfolio managers do not maintain these financial accounts—they do not hold the assets—and the reporting should only be required by the custodial institution, which is the entity that does maintain the financial accounts. To this end, we believe that portfolio managers should be carved out of the definition of financial accounts.

The second reason for this view is that there should be a consistent application of FATCA for portfolio managers across other jurisdictions around the world. We strongly believe that the treatment of portfolio managers under the Canada-U.S. IGA should be aligned with approaches taken in the U.S. and the U.K. The "certified deemed compliant financial institution" exemption is available for investment advisers in the U.S. and the U.K. but is not available to portfolio managers in Canada.

In the U.K., when the sole activity of an entity is to act as an investment adviser of its customers' investments and the investments are held with a custodian, the investment adviser will be regarded as a certified deemed compliant financial institution. No registration or reporting is required for these investment advisers in the U.K.

Similarly in the U.S., financial institutions that are financial institutions under FATCA solely by virtue of being investment entities, but which do not maintain financial accounts, are referred to as deemed compliant financial institutions. Again, no registration or reporting is required.

We submit that there should be alignment in the application of the rules. Canadian portfolio managers and their clients are being disadvantaged unnecessarily by the approach taken in Canada. Ultimately, Canadian investors will be at risk of over-reporting on their accounts, as their accounts will now be scrutinized and reported on to the CRA by both portfolio managers and custodians. In our view, this is a very inefficient and unnecessary application of the FATCA rules.

In summary, we submit that portfolio managers who do not have custody of client assets should not be included in the definition of "financial accounts", given that in the portfolio management context the financial account is maintained by the custodial institution. We believe that an approach similar to that taken in the U.K. or the U.S. would be more appropriate and that it ought to be made clear to portfolio managers not to maintain financial accounts for the purposes of FATCA reporting.

● (1650)

Investment entities in Canada, including portfolio managers, need clearly articulated rules and guidance. In all cases, it should be clear with whom the reporting responsibility lies in respect of financial accounts in order to ensure CRA receives reporting financial information on financial accounts from the appropriate source and from one single source.

Thank you.

The Chair: Thank you for your presentation.

We will now go to Ms. Swanson in London, please, for your five-minute opening statement.

Ms. Lynne Swanson (As an Individual): I come before you as the voice of one million Canadians. We are Canadians. Many have been Canadian citizens for life or for decades. We chose Canada. We expect Canada to now choose us and our rights over foreign bully demands.

Why do our most heinous criminals have more charter rights than I do, asked a Nova Scotia police officer of 33 years. He was born in Maine almost six decades ago when his New Brunswick mother was sent there to give birth. A Quebec woman who has been a Canadian citizen since birth says her ancestor who came to Canada in 1682 must be turning over in his grave at FATCA.

A widowed grandma in Vancouver was told by a U.S. consulate when she became a Canadian citizen in 1972 she was permanently and irrevocably relinquishing American citizenship. She insists, "my financial records are definitely none of the business of the IRS". An Ontario first nations husband and father is horrified his Canadian government will help the United States seize his family's private financial records because his wife was born there.

An Alberta woman reports her mother, who upheld Canadian laws for many years as a justice of the peace, is now medically and physically too frail to deal with FATCA stresses. They and one million other Canadians were betrayed by the FATCA intergovernmental agreement.

We were offended and insulted to hear the Minister of State for Finance call us American citizens abiding in Canada in the House of Commons. If Canada mandated financial institutions to seek Canadians born in China, India, Iran or Eritrea, the CRA to transmit private financial information to those nations, there would be outrage. Canadians born in the United States should have the same rights as all other Canadians. Canada should strongly defend those rights and not sacrifice them to a foreign country.

Two prominent Canadians described FATCA well. In 2011 and many times after that, the Finance Minister, the late Jim Flaherty, said:

> But FATCA has far-reaching extraterritorial implications. It would turn Canadian banks into extensions of the IRS and would raise significant privacy concerns for Canadians.

Terry Campbell, president of the Canadian Bankers Association, in 2012 said:

> FATCA is the poster child for the problem of extra-territoriality.... It threatens to erode Canadian sovereignty.

Those statements hold true now. Under threat of economic sanctions and penalties, Canada surrendered its sovereignty to a foreign power with the IGA. Canadians affected by FATCA were stunned last week when a member of this committee said "Congress has spoken". Canadians expect Parliament to speak for Canada. Canadians expect Parliament to uphold Canada's laws, rights, and Constitution. Anything less is an affront and betrayal to Canada and to Canadians.

FATCA is complex. I give you a simple solution. I urge you to adopt an amendment to the implementation act.

> Notwithstanding any other provision of this act or the agreement for all purposes related to the implementation of this act and the agreement, U.S. person and specified U.S. person shall not include any person who is a Canadian citizen or a legal permanent resident who is ordinarily resident in Canada.

I implore you, do the right thing. Stand up for Canada and for all Canadians.

● (1655)

The Chair: Thank you very much, Ms. Swanson.

We will now go to Mr. Reed in New York, please, for your opening statement.

Mr. Max Reed (Attorney, White and Case LLP, As an Individual): Good afternoon, can you hear me?

The Chair: I can hear you, yes. Please proceed.

Mr. Max Reed: Thank you very much for the invitation to be appear before you. I just want to say at the outset that my views are my own and are not associated with my employer.

I'm a Canadian-trained lawyer and I currently practice U.S. tax law at White&Case LLP, an international law firm based in New York City. I'm a co-author with Richard Pound of a book called *A Tax Guide for American Citizens in Canada*, which tries to explain in as plain a language as possible how the one million American citizens in Canada should comply with their U.S. tax reporting obligations.

So, what I want to talk to you about today are the tax compliance issues that FATCA exacerbates—and I wanted to pause here and say that because of these issues, because the U.S. has had citizen-based taxation for a very long time.... But FATCA makes these issues worse for approximately one million citizens of Canada. There are four issues that I want to go through.

The first, to be frank, is that FATCA frightens people. American citizens in Canada read articles in the newspaper saying that they all of a sudden have tax reporting requirements to the IRS, an institution most of them are unfamiliar with, and they don't know what to do. I get a reasonable number of emails, because of my work on this book, asking me what the potential liabilities are and asking for my help so some of these American citizens can comply with their reporting obligations. These people are scared and FATCA exacerbates their fear.

The second point is that by exacerbating their fear, FATCA and citizenship-based taxation is going to cost Canadians money. Imagine if you will that you are a U.S. citizen living in Canada and you have a salary of about $70,000. You're never going to owe the IRS money. You're not going to owe the U.S. government money, but you're going to have to fill out quite an extensive amount of paperwork in order to report your income to them. To hire H&R Block to do this—H&R Block being the most common franchised tax preparer in Canada—costs you at least $500 a year. That's at the lowest end for the simplest return.

For a specialist cross-border accountant, you're looking at a cost of $2,500 a year, and that's just for your current tax year. If you're like many of the U.S. citizens in Canada and you've never thought about this issue before reading about it in the newspapers, it's going to cost you thousands of dollars more to comply with your prior tax filing obligations and to file the form that instructs the IRS not to tax your RRSP and those sort of issues.

Because of the complexity of international tax law, it's very difficult for the average U.S. citizen in Canada to do this themselves. Let me give you just one example. Everyone in Canada is familiar with the tax-free savings account. Well, the U.S. government may or may not, because we just don't know, treat the tax-free savings account as something akin to a Cayman Islands trust. You can imagine the amount of paperwork that comes with disclosing your Cayman Islands trust. That paperwork may or may not apply, because we don't know yet, to the tax-free savings account as well. The tax-free savings account doesn't function the way it's supposed to. It doesn't protect your dividend or capital gains income that accrues on the money that's inside of it from U.S. tax. It basically renders the tax-free savings account expensive and useless.

Another aspect where FATCA and U.S. citizenship-based taxation is going cost the average Canadian more money—and this is all Canadians, not just these one million people—is that the compliance costs imposed on large financial institutions may be passed down to consumers.

Third, FATCA may, and we have seen elsewhere, impact the ability of U.S. citizens in Canada to access proper financial services. Members of the committee may be familiar with the story of—

● (1700)

The Chair: You have one minute, Mr. Reed.

Mr. Max Reed: Yes, thank you.

It has refused U.S. persons as customers. Some Swiss banks are the same. The government should include a non-discrimination clause in the IGA so that U.S. citizens cannot be disadvantaged from accessing financial services.

The solution to all of this, I think, is administrative. If the CRA and the Canadian government were to push the IRS to have simpler and clearer rules on things like tax-free savings accounts, RRSPs, Canadian mutual funds, then the compliance burden on U.S. citizens in Canada would be reduced.

So my suggestion to you here today is that FATCA is not going away. There's going to be an IGA, but the government can take steps to work with the IRS to translate common Canadian financial products better so that all of the million U.S. citizens in Canada have an easier time complying with the U.S. tax obligations, which are now much more important to them because of FATCA.

Thank you very much. I will be happy to answer your questions.

The Chair: Thank you very much for your presentation.

We will begin members' questions with Mr. Rankin.

Colleagues, since we have five witnesses here, if you can direct your question to a witness and indicate who it is, that would be helpful.

Mr. Murray Rankin: Thanks again to all of our witnesses for being here.

My first question is for Professor Cockfield. The constitutionality of FATCA and hence our IGA in Bill C-31 has been questioned by many constitutional lawyers, notably Peter Hogg, Joseph Arvay, and others.

The Minister of Finance told us that the minister and the Department of Justice are responsible to make sure our laws are constitutional, but he didn't really know what likelihood or what percentage of likelihood had been attributed to this agreement as to whether it would be constitutional.

You have also expressed concerns about the constitutionality of these provisions. I wonder if you could elaborate a little bit for us.

Prof. Arthur Cockfield: Thank you for the question.

Yes, I would agree with those constitutional law experts who suggest the IGA violates the charter, more specifically section 15, the prohibition against discrimination on the basis of national origin or citizenship. We're really creating two different regimes. On the one hand, if you're an American or a U.S.-Canadian citizen or you happen to be a loved one of one of those U.S. persons, you're subject to a totally different across border tax information reporting regime than other individuals.

Let me pick up on something two of the witnesses mentioned. This is really a gotcha penalty regime the Americans are imposing on these unfortunate roughly one million Canadians. In my opinion it does violate the Charter.

Mr. Murray Rankin: In your remarks just now you talked about the erosion of privacy. I wonder if you could talk a little bit more about your concerns in that regard.

Prof. Arthur Cockfield: Canada is protected at the federal level by a piece of legislation called PIPEDA, the Personal Information Protection Electronic Documents Act. It governs the information collection practices of all private businesses within Canada, including financial institutions such as Canadian banks.

There is a laundry list of provisions to protect our privacy rights. Financial information under PIPEDA is considered along with health information to be the most sensitive form of personal information. Banks must keep this confidential under all circumstances.

The IGA overrides that. That's just one example. It also overrides the Privacy Act, the access to basic banking services regulations, and many others.

Mr. Murray Rankin: You asked rhetorically just now what Canada gets out of this deal, and I think you said nothing or not very much.

When I asked that question of the officials from the tax policy in the Department of Finance who testified, all they could point to was the fact that we weren't going to be hit with economic sanctions. That was all they could say we get out of this deal.

Is that still your view?

● (1705)

Prof. Arthur Cockfield: It is my view. This is a very dangerous precedent.

Again, it's based on a model IGA. It's the same one the Americans use for Luxembourg and the Cayman Islands, and every tax haven in the world the Americans are trying to sign up. We have a unique cross-border relationship, more trade between our two countries than any other two countries in history, more permanent resident flows than any two other countries at least with respect to both our populations, so the deal is a bad deal for Canada in light of this unique relationship.

Mr. Murray Rankin: My next questions are for Ms. Swanson, and I want to thank you for your very spirited presentation today, Ms. Swanson.

I'd like to first ask you, again on the issue of privacy, government officials, the Minister of Finance, Conservative MPs tell us privacy concerns have been resolved through the intergovernmental agreement because information is going to be sent to the United States from our CRA not from the banks themselves.

Why isn't that acceptable to you and to your group?

Ms. Lynne Swanson: Quite frankly, involving the CRA does not resolve our privacy concerns. What the IGA does, and what the implementation act does is it's actually unprecedented, as I understand it in Canadian law, in that it for the first time singles out one group of Canadian citizens, and it prevails over all other Canadian laws for the benefit of a foreign nation.

The IGA may legally protect the banks under privacy laws, but it does not in any way address privacy concerns. Instead, sending the information to the CRA places us in a double jeopardy situation.

First, our private financial information is going to be much more comprehensive than any other Canadians have to submit. It includes our total assets, our account balances, all our transactions, our account numbers, other personal identifying information, and any other information the IRS demands.

The Chair: Okay.

Ms. Lynne Swanson: I think most Canadians would be outraged if that information were going to CRA. On top of that, the Privacy Commissioner has indicated that the CRA has privacy or identity theft issues.

The Chair: Thank you.

Mr. Murray Rankin: Thank you very much. I appreciate that we're out of time, but I really appreciate your presentation.

The Chair: Okay. Thank you, Mr. Rankin.

We'll go to Mr. Van Kesteren, please.

Mr. Dave Van Kesteren: Mr. Reed, again I want to ask this question. Under U.S. law, are U.S. citizens obligated to surrender the information sought by the IRS and provided for by FATCA presently?

Mr. Reed?

Mr. Max Reed: Yes. I thought I made that clear in my statement that the issue is not one of FATCA being—

Mr. Dave Van Kesteren: I only wanted to establish that.

Mr. Max Reed: Yes, that's correct.

Mr. Dave Van Kesteren: I want to ask you another question.

What are the chances of the U.S. government drawing up legislation that would explore and deal with the tax exemptions that you mentioned? Realistically.

Mr. Max Reed: I don't think it would be a legislative decision.

Mr. Dave Van Kesteren: Do you think—

Mr. Max Reed: For example, on the tax-free savings account, an administrative bulletin from the IRS might be likely—

Mr. Dave Van Kesteren: I'm sorry, Mr. Reed. I don't mean to interrupt, but I just need a quick answer to this because I have several—

The Chair: Because of the delay, you have to finish then let him finish. Otherwise it'll—

Mr. Dave Van Kesteren: All right, okay.

I guess my question is this. In order for that to take place, do you really think that U.S. legislators would take the time out to try to mete out those things that you're talking about? Is that a realistic expectation?

Mr. Max Reed: My answer is that it could be done by the IRS, and it is not a piece of legislation that would be required.

Mr. Dave Van Kesteren: Okay, thank you.

Mr. Max Reed: An amendment to the treaty would be—

Mr. Dave Van Kesteren: Okay. Thank you, sir.

Mr. Cockfield, you mentioned that under Canadian law, or under PIPEDA, you feel there would be a charter violation for access to information, but doesn't the CRA do the same thing when they ask Canadian citizens to give up information that they need as well?

Prof. Arthur Cockfield: I'm not sure what—

Mr. Dave Van Kesteren: You talked about the U.S. asking for information from U.S. citizens and you wondered about PIPEDA. I guess my question is, if the U.S. government is able to do that, doesn't the CRA also do that, in essence, with Canadians? Does it not ask for the same kind of information?

● (1710)

Prof. Arthur Cockfield: Certain information is collected by the CRA. Under domestic law, the banks have to send information, say on interest income, and they use that to calculate a Canadian taxpayer's tax liability, but the IGA changes that regime, as I mentioned in my opening remarks. Now, a foreign government will access—as Ms. Swanson also addressed—the total quantum of an account, as well as account withdrawals and deposits. Nowhere in Canadian law do we have that information shared with our government, so this is a big change.

Mr. Dave Van Kesteren: Thank you.

I want to go back to you, Mr. Reed. I don't know if you're familiar with what OECD is doing currently, a global study on tax evasion. We've done a lengthy study on tax evasion and profit shifting from large multinational corporations. We're going to have some cooperation, we're going to have some treaties that will lead to that work when it finally starts to formulate.

Can you explain the work that's being done by the OECD currently, and how it compares to FATCA, and provide examples of any precedence for signing tax information-sharing agreements in Canada?

Are you familiar with that work being done?

Mr. Max Reed: I am somewhat familiar with the work that the OECD is doing, and my understanding is that they are sort of using FATCA as a model for a series of what I understand to be bilateral agreements between different tax information-sharing agreements. So I am sort of familiar with that.

I would simply say that it's my personal view that FATCA as an information-reporting mechanism has its issues, as other people have discussed, but that's largely not my concern. My concern is what that does for the million U.S. citizens in Canada, because they're by-products of that. FATCA's not designed to get at them. They're sort of collateral damage, if you will. So I'm trying to figure out a way that we can make their compliance burden easier, because FATCA is probably not going away.

Mr. Dave Van Kesteren: Okay, thank you.

Chair, how much time do I have.

The Chair: You have about 30 seconds.

Mr. Dave Van Kesteren: Maybe I'll quickly ask Mr. Cockfield this question.

If we don't enter into these types of agreements—and I think this is actually setting a precedent—don't we risk becoming a Cayman Islands, in essence? I know that's a long stretch, but will we position ourselves as such if we—

The Chair: That's a big question.

Mr. Cockfield, could you briefly address that?

Prof. Arthur Cockfield: They're treating us as they're treating the Cayman Islands. I don't think we'll become the Cayman Islands.

One of the interesting features of the U.S. reform is there's absolutely zero evidence that the Canadian financial system is being used to assist Americans with offshore tax evasion. We're not the Cayman Islands. I can't see that ever happening in our country.

But one of the problems with this U.S. exceptionalist move is they're treating us as if we are the Cayman Islands, instead of their largest trading partner, with family members in the hundreds of thousands living in our country.

The Chair: Thank you.

Thank you, Mr. Van Kesteren.

Mr. Brison, please, for your round.

Hon. Scott Brison: Thank you.

To follow on Mr. Van Kesteren's questions, Mr. Cockfield, we are a NAFTA partner with the U.S. Our banking system is recognized to have some of the strongest governance in the world over our system of banking and our financial services sector. We are not a tax haven. We have a sound system of taxation that is open and transparent.

I agree with what you said earlier. We ought to have been able to leverage on these facts and our historic relationship with the U.S. to negotiate some exceptions. We were not targeted by FATCA, but we were caught in the FATCA web. For instance, when the Americans did Buy American...we were able to negotiate some exemptions.

The contributions made by the Canadian government to registered accounts, RDSPs and RESPs, are Canadian taxpayer-funded contributions to help Canadian families. The earnings on these contributions will be considered taxable earnings by the IRS. Would that have been one of the areas where we ought to have sought and attained an exemption from the U.S.?

● (1715)

Prof. Arthur Cockfield: Yes, I would agree with that. I have heard from some government officials that we were offered a concession in that these wouldn't be reportable accounts, retirement accounts. But, in fact, in the U.S. model 1 IGA, they're offering that exemption of retirement accounts to every single country that signs an IGA. So it's no special exemption for Canadians.

You're exactly right to worry that even though they're exempt, non-reportable, they're still subject to U.S. taxation. This has created a great deal of fear among many Canadian taxpayers.

Hon. Scott Brison: Thank you very much.

Mr. Reed, do you believe Canada-U.S. dual citizens are being made sufficiently aware of the consequences of the IGA for both of them? Are the Canadian and the U.S. governments doing enough to reach out to citizens to inform them of their reporting obligations?

Mr. Max Reed: I think the answer to the first question is no. I think that most people learn of their U.S. tax obligations from the newspaper. The United States has a very extensive consulate network in Canada, both a well-staffed embassy and a well-staffed consulate network outside of Ottawa. And I think one of the solutions to this could be that either the CRA or that U.S. consulate network could be encouraged to offer information seminars and do outreach so that people are aware of what their reporting obligations are and how to meet them.

Hon. Scott Brison: Ms. Swanson, when you became a Canadian citizen, did the U.S. consulate make it clear to you that you were still considered a U.S. person for tax purposes?

Ms. Lynne Swanson: No. In fact, the U.S. consulate did exactly the opposite.

My experience was the same as that of the grandma in Vancouver whom I mentioned. I called the U.S. consulate in 1973—so that was 41 years ago—and they told me clearly, firmly, and directly that I was permanently and irrevocably relinquishing U.S. citizenship.

I had no idea the Americans still considered me to be a U.S. citizen or a U.S. person until 2011, when a friend sent me an article that had appeared in the *Financial Post*, indicating that without my knowledge and consent, the U.S. Supreme Court had reinstated my citizenship in 1986.

The Chair: You have 30 seconds.

Ms. Lynne Swanson: If I could just say, as well, my Canadian citizenship certificate states that Lynne Swanson "is a Canadian citizen and, as such, is entitled to all the rights and privileges and bears all the responsibilities, obligations and duties of a Canadian subject."

For four decades I have met my responsibilities and obligations to Canada. I now expect Canada to meet my requirements, to uphold my rights in Canada and those of all other Canadians.

The Chair: Okay, thank you.

Thank you, Mr. Brison.

Colleagues, as you know, we have the bells ringing. We do have a bus to pick up members at about 5:35, so I'm recommending that we do perhaps three more rounds.

Is that okay with members?

And then we'll go to vote immediately after that.

Thank you.

I'm going to take the next round, as the chair, okay?

An hon. member: That's how it is!

The Chair: Order, order, order.

An hon. member: I want a recount.

The Chair: I want to start with Professor Cockfield.

Professor, I've appreciated your appearance before this committee in the past. I think if you were to ask the Canadian government and Canadian financial institutions, they would obviously prefer that FATCA did not exist. They would obviously prefer as well that the U.S. taxed its citizens based on residence and not on citizenship. We would all prefer that. I wish that were so, but it is not so. We seem to be linking in a bunch of issues. The fact is whether FATCA exists or not, the U.S. is still going to tax based on citizenship, not residency, until the American government changes that policy—which I believe it should. But until they change that policy....

I think both you and your colleague, who was on the previous panel, are saying there's a false dichotomy between complying with FATCA and implementing the IGA. You say there is another option that the government has. I just perhaps want you to respond. We had a tax lawyer on the previous panel, Mr. Roy Berg, who said:

> Had it not entered into the IGA, Canadian financial institutions would have faced the unenviable dilemma of either complying with Canadian law and risking FATCA's 30% withholding tax; or complying with FATCA and risk violating Canadian law.

Is that statement not correct?

● (1720)

Prof. Arthur Cockfield: Yes, that is correct.

The Chair: But if we follow your advice, which is to not implement the IGA and perhaps try to challenge it in NAFTA and other measures, or seek other ways and continue to put pressure on the U.S. not to follow through with implementation of FATCA, Canadian institutions would then have to provide information directly to the IRS, instead of through the IGA, which is providing information to the CRA. I recognize that those are probably the three scariest letters to people in both countries. However, as a Canadian, I would certainly prefer that dual citizens or U.S. citizens who are permanent residents in Canada provide that information to the CRA rather than to the IRS. Is that not a fair statement?

Prof. Arthur Cockfield: Well, no.... I mean it's certainly a fair statement, but it's slightly different, I think, from the first thing you put forward.

I'm suggesting, and I think my colleague, Professor Christians, is as well, that by entering into the IGA we are in compliance. That has bought us time. The July 1 withholding tax, as I understand it, as a matter of technical law, will not kick in because we've complied. We're a democracy, a sovereign country. We're investigating certain concerns surrounding the IGA, and it will be implemented at a later date. In fact, I think it could be implemented as of July 1, amended, possibly even unilaterally by Canada, especially in light of the fact that the Treasury Department has signed this, whereas Congress isn't implementing it.... This creates a whole host of problems that Professor Christians addressed. So there may be a legal or technical way to amend the IGA and avoid the economic sanction threatened by the Americans.

The Chair: So you're saying to sign the IGA—

Prof. Arthur Cockfield: We signed it.

The Chair: Signed it—but to take it out of the BIA. It seems to me that the reaction of the U.S. would be, "Well, you've signed the agreement, but you haven't in fact implemented it".

Prof. Arthur Cockfield: Well, then, perhaps our answer should be, “Why don't you implement it through your legislative process as well, and then once that's done we'll implement it?” The Americans, again, have promised reciprocity. There's very little chance, most experts suggest, of the U.S. Congress ever taking action. If they're serious and they want this bilateral agreement with Canada, then they ought to implement it in the same way they've altered treaties since 1936 with Canada.

The Chair: But going down that road, would the Canadian financial institutions not then provide the information to the IRS? You don't think they would have to?

Prof. Arthur Cockfield: No, I think that the Canadian government could negotiate at this point a delay of the whole process. Again, we're in compliance currently with U.S. demands. I understand that the government feels it's caught between a rock and a hard place, but there may be wiggle room to delay this to address the serious concern that so many Canadian have.

The Chair: I just have a minute left, but, Mr. Hensel, do you want to respond to that? You certainly pointed out the benefits in terms of the difference between allowing FATCA to be implemented versus the benefits of the IGA itself. What is your recommendation to the government with respect to perhaps going down the route that Professor Cockfield advises?

Mr. Ralf Hensel: It's a good question.

There are clearly a lot of issues to be resolved. The problem we've got is that for the last several years, as the negotiations on the IGA have been progressing, our members and financial institutions in Canada generally have been expending significant amounts of money to bring themselves into compliance on the assumption that there will be an IGA.

I think that an IGA based on certain.... The framework that is in there now, a delay or a.... It may be appropriate to do that. The real shame would be if all that money were wasted by something, if the IGA were completely thrown aside, or what have you. I know that's not what's on the table, but a significant amount of investment is already in the process now, and I think their goal has been to minimize the impact on Canadians overall.

The Chair: I appreciate that.

My time is up, so I will move to Mr. Cullen, please.

Mr. Nathan Cullen: Thank you very much.

Mr. Reed, you said something in your testimony today in response to a question about tax-free savings accounts under this agreement becoming perhaps expensive and useless. Could you expand a little bit on that? That is on the compliance side of things, I believe.

Mr. Max Reed: That is on the compliance side.

To be clear, that's not a cause of FATCA. That is a U.S. tax problem under the Internal Revenue Code, and the way that the Internal Revenue Code classifies tax-free savings accounts.

The only issue with FATCA is the amount of information being reported to the IRS by way of the CRA, and then the compliance issues that such information reporting generates for average Canadians. The issue I was talking about with the tax-free savings account sort of works as follows. In Canada, everyone knows that a tax-free savings account, if you own a mutual fund you get some dividends and that mutual fund dividend is not taxable, but in the United States that tax-free savings account for your U.S. tax purposes doesn't protect that mutual fund dividend. And then there is the issue of how that—

● (1725)

Mr. Nathan Cullen: Sorry, I'm going to interrupt you a bit because we're going to bump up against votes here.

I will go to Mr. Hensel for a moment.

One banking official said that this is a bad deal and a terrible situation.

One of the things we're looking to do at this committee—we shouldn't pretend this is a proper study of this 336-page omnibus bill. We're spending exactly 120 minutes on a component of this tax treaty, or maybe not a tax treaty.

In terms of trying to improve it and offer amendments, a suggestion was made to delineate who was caught up in this net. We have agreed that we are not a tax haven—and I don't think we're any threat to become a tax haven, and any suggestions of that are foolish, by the American or Canadian perception—but we could delineate who is actually being targeted and not allow Washington to do all of that designation. If a U.S. citizen is temporarily living in Canada, that is an obvious person the IRS is looking to get after.

As has been explained by our witness, Ms. Swanson, under this bill, somebody who was born in Canada, who by any definition would be Canadian, is going to have their information transferred to the IRS without their knowledge, or consent certainly, and who has for perhaps their entire lives deemed themselves to be Canadians. Should we seek out amendments to delineate more specifically, under our powers as legislators, who will actually be impacted and affected by this intergovernmental agreement?

Mr. Ralf Hensel: I think the determination of who is impacted is already a done deal. That's a decision that was made under U.S. tax law, which, unfortunately, taxes U.S. citizens based on citizenship, not on residence.

Mr. Nathan Cullen: But they are perhaps one of the most arcane definitions of citizenship.

We've talked about informing people, and I think there is a responsibility on the government's part, certainly having signed this deal and negotiated this deal, to tell Canadians who is going to be impacted. We had the minister here earlier, and on three occasions he said Canadians will not be impacted by this agreement.

Is that a fair thing to say?

Is a dual citizen a Canadian?

Mr. Ralf Hensel: I would argue that they are, yes.

Mr. Nathan Cullen: Okay. So if the purpose is to better inform the people who may be impacted by this bad deal from a terrible situation, is it right for the Finance Minister of Canada to suggest that if you are a dual citizen, Canadian-American, you are not impacted by this deal, that you are not a Canadian?

Mr. Ralf Hensel: It's difficult to answer that. I'm not sure exactly what he meant by Canadian. If he was narrowing it—

Mr. Nathan Cullen: We'll pull up the testimony because it was very explicit.

Mr. Cockfield, the question asked was, will Canadians be impacted by this deal? On three occasions, the Canadian finance minister said they will not.

Prof. Arthur Cockfield: That's simply not accurate. I mentioned dual citizens. As just one example, let's say an honourable member retires after years of good service to their country, and you take a six-month contract in New York City with a consulting service, let's say. It's a wonderful job opportunity. You're issued a green card, a work visa. You cross the border. But before you make that decision as a green card holder, when you return to Canada you'll be subject to this reporting regime. It's only a six-month contract.

Do you want, as Mr. Reed indicated, to hire an accountant, a U.S. lawyer, and so on, to get you into compliance? Even U.S. tax lawyers don't agree on how this works, but it may run for the next eight years. That's thousands of dollars every year. Just that one element is going to inhibit cross-border mobility.

The Chair: Thank you, and thank you, Mr. Cullen.

For a final round, we'll go to Mr. Adler, please.

Mr. Mark Adler: Why don't you go first—

The Chair: Oh, sorry, Mr. Allen.

Mr. Mike Allen: Thank you very much, Mr. Chair.

I just want to make one clarification to Ms. Swanson. I in fact am the one who stated that the U.S. Congress has spoken. I freely admit that. When I said that, we were in Washington and pressing the Treasury Department on this whole FATCA thing, and the response we got back from the U.S. Treasury person was, "Well, I'm sorry, Mr. Allen, but Congress has spoken".

We were somewhat mortified by her attitude as well, so I just want to say that this was the context of that comment.

● (1730)

Ms. Lynne Swanson: Could I just respond to that, briefly?

Mr. Mike Allen: Sure, quickly, if you could, because I don't have much time.

Ms. Lynne Swanson: We would like Finance Canada to go back to the U.S. treasury and say that Parliament has spoken, and Parliament is going to stand up for Canadians—Canadian citizens and Canadian residents.

Mr. Mike Allen: That's why we signed the IGA.

I would like to go to Mr. Reed with my next question. One of the sections of annex 1 of the BIA says the following, in terms of reporting:

> 4. Notwithstanding a finding of U.S. indicia under subparagraph B(1) of this section,

It then says:

> a) Where the Account Holder information unambiguously indicates a *U.S. place of birth*, the Reporting [FATCA Partner] Financial Institution obtains, or has previously reviewed and maintains a record of:
>
> (1) A self-certification that the Account Holder is neither a U.S. citizen nor a U.S. resident for tax purposes
>
> (2) A non-U.S. passport or other government-issued identification evidencing the Account Holder's citizenship or nationality
>
> (3) A copy of the Account Holder's Certificate of Loss of Nationality of the United States or a reasonable explanation of:

Are there ways, for instance, that a Canadian who may have been born in the State of Maine, for example, and was only born there by accident at birth, as their mother had to go there because it was the only hospital that was open—in respect of the filing in the U.S.—can get out from underneath this compliance reporting?

Mr. Max Reed: I would have to look at that a little bit more closely. I think that plays with the question of who is a U.S. person for U.S. tax purposes. My understanding of the definition in the Internal Revenue Code is that it's very, very broad. As Mr. Cockfield talked about, that includes people who have had green cards for a temporary assignment. So I'm just not sure. I'd have to take that back, and I could follow up with you on that, but I just don't know the answer to that off the top of my head.

Mr. Mike Allen: Yes, and that would be the filing on the FATCA side, but certainly on the filing of taxes, too.

Mr. Max Reed: And on the compliance side, I don't know, but I would suspect that, as I said, the definition of a U.S. person is very broad under the Internal Revenue Code.

The Chair: Okay, you've got two minutes, Mr. Adler.

Mr. Mark Adler: Thank you, Mr. Chair.

Mr. Cockfield, historically Americans have not come to Canada to pay lesser tax. Is that correct? Historically, it's the other way around, right? That's only kind of a recent phenomenon that Americans are relocating to Canada, wouldn't you say?

Prof. Arthur Cockfield: I wasn't even aware of that trend.

Mr. Mark Adler: Oh, okay, okay.

Prof. Arthur Cockfield: No, we're not a tax refugee place, Canada, no.

Mr. Mark Adler: The FATCA agreement didn't even pass Congress as a FATCA agreement. It passed as part of a jobs bill, so clearly some member of Congress wanted to fund something. He had a project he needed to fund, so he came up with this nice arrangement for himself. But having said that, there's not a whole heck of a lot we could do as a country, is there, in terms of influencing the U.S. legislative process—because that's what needs to be done at the end of the day, right?

Prof. Arthur Cockfield: Yes, at least in my view.

Again, I understand the chair's similar concerns, but I do believe that there should have been more political push-back. There could be a NAFTA tribunal challenge, other public international challenges under, say, WTO. I do respect the fact that the MPs did try to get some more concessions out of Treasury, but we either could have or still can do a better job at protecting Canadian interests.

Again, the problem is that we have the same deal that the Cayman Islands gets, and that's totally inappropriate.

Mr. Mark Adler: In essence—

The Chair: You have 30 seconds.

Mr. Mark Adler: —what we need to do is just smooth out some of the rough edges of the whole thing, because FATCA is here. It isn't going anywhere, right?

Prof. Arthur Cockfield: Right, and that's why I suggested that it could be implemented, but at least on a temporary basis, and only with respect to U.S. citizens who are temporarily resident in Canada, as Ms. Swanson said.

Mr. Mark Adler: The economic repercussions of not complying with FATCA are going to be onerous for us as a country, right?

Prof. Arthur Cockfield: Potentially, that's the case, yes.

The Chair: I apologize for ending this discussion. It was a very good one. I thank all of our panellists here in Ottawa, in London, Ontario, and in New York. Thank you so much for being with us here this afternoon.

Colleagues, you have about 13 minutes to get to the House to vote.

The meeting is adjourned.