The Navigator

RBC WEALTH MANAGEMENT SERVICES

Moving from Canada to the U.S.

Before you pack your bags consider the tax and estate planning issues

There are various reasons why many Canadians consider moving to the U.S., including enticing employment prospects, retirement destinations, potentially lower taxes and sunny weather.

This article summarizes some of the tax and estate planning issues to consider before you decide to pack your bags and leave Canada. Some of the questions it will help you answer are:

- What are the tax implications of ceasing Canadian residency?
- What should I do with my registered and non-registered accounts in Canada?
- Is my Canadian Will and power of attorney valid in the U.S.?

For the purposes of this article, we have assumed that you are not a U.S. citizen or green-card holder. This article does not address any personal U.S. state tax or other planning implications. It is important that you and your family consult your own lawyer, accountant or other professional advisor when planning to implement any strategy or idea contained herein. In many cases, this will mean consulting one or more professional advisors with cross-border planning experience and expertise who can properly advise you in respect of both Canadian and U.S. planning issues.

Ceasing Canadian residency

The Canada Revenue Agency (CRA) taxes Canadian residents on worldwide income and non-Canadian residents only on certain types of income derived from Canadian sources (e.g. Canadian dividends, Canadian employment income and sale of real estate in Canada). Canadian residency should not be confused with Canadian citizenship.

Generally, Canadian citizenship has no bearing on your liability for Canadian tax. Therefore, Canadian citizens moving to the U.S. are not considered to remain residents of Canada for tax purposes simply because they have Canadian citizenship.

Often, the goal of many Canadians moving to the U.S. is to become a non-resident of Canada to avoid paying Canadian tax on their worldwide income. The Canadian Income Tax Act (the "Act") does not specifically define the term residence. Instead, residency is determined based on relevant facts and circumstances, which must support that sufficient ties to Canada have been severed. Generally, to become a non-resident of Canada, you must sever most if not all of your primary residential ties

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with Canada. Severing primary residential ties with Canada generally involves the following:

- Disposing of or renting your personal residence in Canada to non-related individuals and establishing a permanent home in another country; and
- Having your spouse and dependants leave Canada with you or soon after.

In addition to primary residential ties, certain secondary residential ties should be severed. Severing secondary residential ties with Canada involves disposing of personal property and breaking social ties in Canada and acquiring or establishing these in the U.S. These ties are collectively evaluated (i.e. no single secondary residential tie is sufficient in and of itself to result in a determination that an individual is resident in Canada). Therefore, provided you have severed primary residential ties to Canada, it is possible to maintain certain secondary ties to Canada such as maintaining a bank account, investment account or credit card.

To become a non-resident of Canada, you must sever most if not all of your primary residential ties with Canada.

The CRA has indicated that the date you become a non-resident of Canada is the **latest** of:

- The date you physically leave Canada;
- The date your spouse and dependants leave Canada; or
- The date you become a resident of the new country you are immigrating to.

Final Canadian part-year resident tax return

If you depart Canada and become a non-resident part way through the calendar year, you must file a resident Canadian tax return reporting your worldwide income for the portion of the year that you were resident in Canada. This return is often referred to as a part-year tax return. For example, if you cease Canadian residency on November 1, 2011, you will be required to file a part-year 2011 Canadian tax return to report your worldwide income from January 1, 2011 to November 1, 2011.

Certain personal tax credits such as the basic personal amount and spousal amount will be pro-rated based on the number of days that you were a resident of Canada.

The deadline to file your part-year Canadian tax return and tax liability is April 30 of the following year. If you or your spouse are self employed, the filing deadline is extended to June 15 of the following year; however, the tax liability is still due by April 30 of the following year.

To avoid double taxation, the new protocol under the Canada-U.S. Income Tax Treaty (the "Treaty") allows you to elect a step-up in the cost basis of the assets subject to deemed disposition at the time of ceasing Canadian residency.

Deemed dispositions

One of the major drawbacks of ceasing Canadian residency is that you are deemed to dispose of your non-registered assets (with certain exceptions) on the date you officially become a non-resident of Canada for tax purposes. The deemed disposition rules require that you report the capital gain/loss equal to the fair market value of your assets minus your adjusted cost base on the date you cease Canadian residency. The increase in tax liability that may result from the requirement to include this deemed disposition on your tax return is often referred to as departure tax.

Once you become a U.S. resident, if you sell assets subject to deemed disposition upon leaving Canada, the original cost basis will be used to determine the capital gain or loss that is subject to tax in the U.S., and thus, you may be subject to double taxation. To avoid double taxation, the new protocol under the Canada-U.S. Income Tax Treaty (the "Treaty"), which came into law on March 12, 2009, allows you to elect a step-up in the cost basis of the assets subject to deemed disposition at the time of ceasing Canadian residency. In other words, for U.S. tax purposes, you can make an election to dispose and reacquire these assets at the time of ceasing Canadian residency and before U.S. residency.

There are certain types of property that are exempt from the Canadian deemed disposition rules, including:

- Canadian real estate
- Assets in registered plans (RRSP, RRIF, RESP, registered pension plan, etc.)
- Assets in a TFSA
- Employee stock options
- Interest in life insurance policies other than segregated funds
- If you were a resident of Canada for five years or less during any 10-year period: assets that you either owned before you became a Canadian resident or inherited after you became a Canadian resident provided you do not dispose of these assets before your Canadian residency ended

Note that shares you own in a Canadian Controlled Private Corporation (CCPC) are subject to the deemed disposition rules. Furthermore, when a corporation that was controlled by Canadian residents is now controlled by non-residents of Canada there are tax implications. For example, the corporation loses its CCPC status and will not qualify for certain benefits such as the small business deduction. You should discuss the tax implications for your CCPC with your accountant if you are leaving Canada and you are the controlling shareholder of your CCPC.

If the fair market value of all the property you own on the day you cease Canadian residency is greater than $25,000, you must include a listing of your worldwide property holdings on CRA Form T1161 — List of Properties by an Emigrant of Canada when you file your part-year Canadian tax return. The total fair market value calculation includes property such as shares (including both public and private), bonds, debentures, promissory notes, treasury bills, interests in trusts, interests in partnerships, business property (including inventory), real property (including your home), personal-use property and security options. However, the calculation excludes any personal-use property such as clothing, household goods and cars valued at less than $10,000, registered plan assets and cash.

If you will be subject to deemed disposition tax, it is possible to defer paying this tax until the assets are actually disposed of, provided an election is filed and adequate security is posted with the CRA.

Sale of Canadian real estate after leaving Canada

Will you continue to own Canadian real estate? Keep in mind that although real estate located in Canada is not subject to the deemed disposition rules, when non-residents eventually sell their property, they will be subject to a 25% Canadian non-resident withholding tax on the gross proceeds of the sale. However, if you advise the CRA of the sale in advance or within 10 days of the sale, the CRA may provide approval to levy the 25% Canadian non-resident withholding tax on the *capital gain* as opposed to the gross proceeds of the sale. If the property qualified as your principal residence during the time you were a resident of Canada, it may be possible to request that the CRA reduce the withholding amount by the portion of the capital gain that would be excluded by the principal residence exemption.

The sale of Canadian real estate requires the filing of a non-resident Canadian income tax return to report the taxable capital gain or loss on the sale. Any overpayment of withholding tax will be refunded and any underpayment of tax must be paid by April 30 of the year following the sale.

The sale of your Canadian real estate is also subject to tax in the U.S. However, you may be able to claim a foreign tax credit on your U.S. tax return to reduce or eliminate double taxation.

When you are planning to sell real estate located in Canada, you should discuss the options to reduce the Canadian withholding tax with your tax advisor in advance of the sale.

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Canadian stock options

Many individuals mistakenly believe that if they exercise employee stock options as a non-resident of Canada, they will avoid liability for Canadian tax. However, this may not be the case if the employee stock options were granted while you were a Canadian resident. Stock options may be subject to Canadian tax, even if you are a Canadian non-resident at the time of exercise. You will be required to file a Canadian non-resident tax return to report the stock option benefit. If you are a resident of the U.S. when the stock option is exercised, you may also be subject to U.S. income tax.

Previously, Canada and the U.S. had different views on the taxation of stock option benefits, which could lead to double taxation. However, the new protocol under the Treaty provides relief from double taxation for employees who worked in both countries. Each country is now limited to taxing only the portion of the benefit that accumulated while the employee's principal place of employment was in that country. To calculate, divide the number of days the employee's employment was in the country during the period between the date of grant and the date of exercise by the total number of days in that period. Taxation of employee stock options can be complex, and you should consult with a qualified cross-border tax advisor.

Non-registered accounts held in Canada

If you are moving to the U.S., you should contact your RBC® advisor to discuss the status of your accounts, including any trading restrictions and documentation requirements. For example, a U.S. resident investing through an investment account located in Canada must supply appropriate taxpayer identification information (i.e. fill out IRS Form W-9) to satisfy the U.S. Qualified Intermediary (QI) rules. When QI documentation is complete, there is generally no U.S. withholding tax required on U.S. source income.

Canadian mutual funds held in non-registered accounts

Due to Canadian securities law, Canadian mutual fund companies will not sell their domestic mutual funds to residents in the U.S. If you already own Canadian-based mutual funds before you leave Canada, Canadian mutual fund companies will not generally require you to dispose of them and may allow only reinvestment of distributions. However, certain fund companies may require that you redeem your mutual fund. Even if you are not required to redeem your mutual funds, you will be subject to a deemed disposition for Canadian tax purposes. Refer to the previous "Deemed dispositions" section.

Most Canadian-based mutual funds are considered Passive Foreign Investment Companies (PFICs) for U.S. tax purposes. PFICs are basically non-U.S. corporations where the majority of the income earned or assets owned by these corporations are passive (e.g. cash, bonds, stocks). There are harsh U.S. tax rules for U.S. residents that invest in PFICs.

The PFIC rules are complex. In general, U.S. persons owning shares of a PFIC may be subject to U.S. tax at top marginal rates instead of regular marginal tax rates or lower rates for long term capital gains, plus an interest charge in many cases, on certain distributions from and capital gains on the sale of PFIC stock. For example, when a Canadian mutual fund is sold for a capital gain, the gain is pro-rated over the holding period, and the capital gain attributed to prior years is taxed as income at the top U.S. marginal tax rate for that year. So the lower capital gains tax rate (maximum 15% if held for more than one year) is lost for U.S. tax purposes. In addition, a late interest charge is applied for the prior year's U.S. tax that should have been paid, and the capital gain attributed to the current year is also considered to be ordinary income taxed at regular marginal U.S. tax rates. Depending on your situation, it may be possible that some of this U.S. tax (but possibly not the interest) can be taken as a foreign tax credit on your Canadian tax return to minimize the PFIC tax burden.

For the 2011 tax year and onwards IRS Form 8621 Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund must be filed annually. The IRS is revising the current form 8621 and will provide additional guidance regarding the implementation of the new filing requirements. The increase in reporting may result in additional fees paid to have accountants prepare the tax filings.

> Although the investment income earned in a TFSA is tax-free for Canadian tax purposes, "this tax free status" does not apply to U.S. residents.

You may be able to avoid the PFIC tax regime by holding Canadian-based mutual funds and other PFICs in registered accounts such as your RRSP or RRIF. However, there is no certainty as to whether the requirement to file an annual IRS Form 8621 will be extended to PFICs in registered accounts.

The PFIC rules may be avoided in non-registered accounts by investing in individual stocks or bonds. Alternatively, if you desire pooled fund type investments, you can invest in iShares, which are exchange-traded funds (ETFs) trading on the NYSE and are generally not considered PFICs (although you should verify that the U.S. ETF is set up as a U.S. domestic entity). Note that the iShares trading on the TSX are structured as Canadian-based mutual funds and therefore are likely considered PFICs. Speak to your tax advisor regarding the investment merits of individual stocks/bonds vs. mutual funds and ETFs.

Canadian-based income trusts or REITS that carry on an active business may also escape the PFIC rules; however, you should consult with a qualified tax advisor for confirmation.

There are other strategies to minimize the impact of the PFIC rules. In some limited cases there are two elections that may be made called the "Qualified Electing Fund" ("QEF") or the Mark-to-Market election, however, as the information required to file for QEF is not typically part of most mutual fund reporting, this information may be difficult to obtain. Also, if the mutual fund does not trade on an exchange the Mark-to-Market election cannot be made.

Note that U.S. residents who own shares of a private Canadian active corporation or Canadian passive holding company are also potentially subject to the PFIC rules or the Controlled Foreign Corporation (CFC) rules. A discussion of the U.S. tax impact of these rules is beyond the scope of this article.

Speak to a qualified cross-border tax advisor for additional details and your U.S. tax reporting requirements.

Tax-Free Savings Account (TFSA)

If you become a non-resident of Canada, you are allowed to keep your TFSA. Assets in a TFSA are not subject to the deemed disposition rules. Earnings in the account or withdrawals made from the account will continue to be exempt from Canadian tax. However, no contributions will be allowed and no contribution room will accrue while you are a non-resident of Canada. Any withdrawals made during the period that you are a non-resident will be added to your unused TFSA contribution room in the following year, but will only be available if you re-establish residency in Canada. You can contribute to a TFSA up to the date that you become a non-resident of Canada.

Although the investment income earned in a TFSA is tax-free for Canadian tax purposes, "this tax free status" does not apply to U.S. residents. As a U.S. taxpayer you are required to file U.S. returns annually and any income earned in a TFSA during the year is taxable. Although Canadian taxation does not apply to these earnings, you may be subject to tax at the maximum U.S. Federal tax rate of 35% and also state tax. However, in certain circumstances, provided you have sufficient other investment income, such as Canadian dividend income, you may have incurred sufficient Canadian tax that you may be able to shelter the potential U.S. tax on income earned in your TFSA with foreign tax credits.

Since many TFSAs are set up as trusts, the U.S. will consider these TFSAs to be foreign trusts and may require additional U.S. tax reporting including filing US Form 3520-A, *Annual Information Return of Foreign Trust With a U.S. Owner* and U.S. Form 3520, *Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*. U.S. taxpayers should consult with their tax advisor to confirm whether this tax reporting applies to them and whether additional fees will be incurred to have these forms prepared. If Canadian mutual funds are held in the TFSA, the PFIC rules discussed earlier may also apply.

Where a U.S. taxpayer has sufficient foreign tax credits to eliminate or minimize U.S tax, it would appear that investing in a TFSA versus a non-registered account is still appropriate. However, a U.S. taxpayer must also consider whether any additional fees incurred to be tax compliant with the potential U.S. tax reporting discussed above will impact their return on investment and the appropriateness of investing in a TFSA.

Registered retirement plans

Canadian tax implications of RRSPs/RRIFs

Many individuals departing Canada are uncertain of the options available for their RRSPs/RRIFs. Can I keep my RRSP/RRIF intact or must I deregister it? Can I roll my RRSP/RRIF into a U.S. retirement plan?

A tax-free rollover of your RRSP/RRIF into a retirement plan in the U.S. is not permitted. Therefore, any transfer is considered a distribution under Canadian tax law and subject to Canadian non-resident withholding tax.

Contrary to popular belief, you are not required to deregister your RRSP/RRIF upon ceasing Canadian residency. You have the option to keep your RRSP/RRIF intact and have the income continue to grow tax-deferred for Canadian tax purposes.

Although you can continue to contribute to an RRSP once you are a non-resident (provided you have RRSP contribution room), it may not make sense to do so. For example, if you no longer have a Canadian tax return filing requirement in Canada, you will not be able to make use of the RRSP deduction as a result of the contribution to your RRSP. This RRSP contribution can be carried forward but can only be used in the future provided you re-establish residency in Canada.

In the year you cease to be a resident of Canada, you must make an RRSP contribution no later than 60 days after the end of the year to be able to claim an RRSP deduction on your part-year Canadian tax return.

Withdrawals from your RRSP as a non-resident of Canada and a resident of the U.S. will be subject to the Canadian non-resident withholding tax of 25%.

Due to the Treaty, withdrawals from your RRIF as a resident of the U.S. will be subject to a reduced Canadian non-resident withholding tax rate of 15%, provided the payments from your RRIF during a calendar year are **less than the greater of:**

- Twice the minimum withdrawal required for the year; or
- 10% of the fair market value of the RRIF at the beginning of the year.

The CRA deems the value of the RRIF at the beginning of the first year to equal the value of the RRSP at the time of conversion to a RRIF for non-residents only. This will allow the non-resident to receive the reduced treaty rate on RRIF withdrawals in the first year.

If you are moving to the U.S. and have Canadian registered plans, you should speak to your RBC advisor regarding any trading restrictions that may exist due to the change in your residency status. You should also contact your tax advisor to confirm the tax implications of future withdrawals from the RRSP/RRIF.

U.S. tax implications of RRSPs/RRIFs

Although Canadian non-residents continue to enjoy tax-deferred growth in their RRSPs/RRIFs for Canadian tax purposes until there is a withdrawal, a tax deferral is not automatic for U.S. tax purposes. Income earned in your RRSP/RRIF is taxable annually for U.S. tax purposes; however, the Treaty allows a U.S. person to make an election to defer the tax of the accrued income until a withdrawal is made. The election is filed annually and attached to your U.S. federal tax return using Form 8891 — U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans.

Note that various U.S. states are not bound by the provisions of the Treaty and may not accept the federal election. Therefore, income earned in your RRSP/RRIF may be taxable on an annual basis for U.S. state tax purposes.

If you make a withdrawal from your RRSP/RRIF as a U.S. resident, all or a portion of your RRSP/RRIF withdrawal may be subject to U.S. income tax. The amount of the RRSP/RRIF withdrawal subject to U.S. tax is normally based on a formula using the fair market value of your RRSP/RRIF immediately before the withdrawal compared to your cost base for U.S. purposes of your RRSP/RRIF assets at the time you become a U.S. resident. This U.S. tax formula is quite complex; therefore, professional tax assistance should be obtained.

Note that under certain circumstances, if you have large accrued gains in your RRSP/RRIF, you may consider selling and repurchasing these securities within your RRSP/RRIF before your move to the U.S. This sale and repurchase of securities in your RRSP/RRIF will not trigger a Canadian tax liability (may trigger service/commission fees), but it may increase the cost basis for U.S. tax purposes and therefore reduce your potential future RRSP/RRIF withdrawal subject to U.S. tax. You should consult a qualified tax advisor prior to implementing this strategy.

To reduce or avoid double taxation, any Canadian withholding tax on the RRSP/RRIF withdrawal may be claimed as a foreign tax credit on your U.S. tax return.

Locked-in registered plans (e.g. LIRA/LIF/LRIF etc.)

The Canadian and U.S. tax implications of locked-in registered plans are similar to the tax implications of non-locked-in registered plans. Your locked-in registered plan must generally remain a locked-in plan, even if you are a U.S. resident. However, you may be entitled to unlocking relief under the applicable federal or provincial pension legislation for non-residents, small locked-in plan balances, financial hardships or terminal illnesses.

Under federal and most provincial pension legislation, the requirement to convert a LIF to an annuity at the age of 80 has been eliminated. For New Brunswick LIFs, assets must be exhausted by age 90. However, for Newfoundland and Labrador LIFs, all funds remaining in the LIF must be transferred to a life annuity by the end of the year in which the planholder turns 80. If you have a plan regulated under Newfoundland and Labrador pension legislation, this may present a dilemma if you are in the U.S. at this time because Canadian insurance companies cannot sell annuities to a U.S.

resident. A solution for you may be to convert your LIF to an LRIF prior to age 80. An LRIF can continue past age 80; however, the LRIF maximums are based on a different formula than the LIF maximums.

You may be able to completely unlock your LIF if your locked in plan's legislation allow unlocking due to non-residency (e.g. B.C., Alberta, Manitoba, Ontario, Quebec). Federally regulated LIFs also allow unlocking due to non-residency. Note that New Brunswick allows unlocking due to non-residency as well; however, the unlocking will not apply to you if you are a non-resident individual who is also a Canadian citizen.

RESP

Under Canadian tax rules, you do not need to collapse an RESP when the beneficiary becomes a non-resident, however, no further contributions can be made to the plan. The income earned in the RESP continues to be tax deferred for Canadian tax purposes until withdrawals are made. The income in the RESP and the Canada Education Savings Grant (CESG) received in the RESP while the beneficiary was a resident of Canada may be paid to a beneficiary attending a qualified post-secondary educational institution outside of Canada, provided certain criteria are met.

For example, in order for CESG to be paid, the beneficiary must be a resident of Canada for tax purposes; otherwise, the payment may only include income earned and principal contributions.

For U.S. tax purposes, income earned in an RESP is not tax-deferred and the U.S. considers RESP's to be foreign trusts. The U.S. tax implications for RESPs depend mainly on the residency of the contributing person and the beneficiary. For example, if the contributor is a U.S. resident the income earned within the plan (excluding unrealized capital gains, but including CESG) is taxable to the contributor for U.S. tax purposes annually and when a withdrawal is made there is no taxation for U.S. purposes but there is taxation for Canadian purposes to the beneficiary. This creates a double taxation issue. If the contributor is not a U.S. resident but the beneficiary is a U.S. resident, the income earned within the plan is taxable to the child upon withdrawal at a special prescribed tax and an interest charge is calculated based on the accumulated income distributed from the plan.

Additional U.S. reporting discussed earlier in the section on TFSAs, including the requirement to file US Form 3520-A and U.S. Form 3520 will apply.

If Canadian mutual funds are held in the RESP, the PFIC rules discussed earlier may also apply. In many cases, depending on the tax implications, you may need to decide whether it makes sense to close the RESP or change the investments that are held inside it to ensure the PFIC rules do not apply before you become a U.S. resident. You should consult with your RBC advisor regarding any investment restrictions that may apply as a result of the non-resident status of the beneficiary.

If you are the subscriber of an RESP, you should confirm the U.S. tax treatment and reporting requirements with a qualified cross-border tax advisor. There are U.S.-based education savings plans that your qualified cross-border tax advisor can discuss with you.

Life insurance policies

If you leave Canada, any interest you hold in a life insurance policy is excluded from the deemed disposition rules. However, an interest in a segregated fund life insurance policy in Canada is not exempt — you will be deemed to have disposed of this policy at fair market value and will be taxed on any gain that results.

You should review your insurance needs as a result of your move to the U.S. and discuss the taxation of your Canadian insurance policy for U.S. tax purposes with a qualified cross-border tax accountant.

Home Buyer's Plan (HBP)/Life Long Learning Plan (LLP)

If you make an LLP or HBP withdrawal and then subsequently become a non-resident of Canada, your whole HBP or LLP balance will be payable. If you do not repay the outstanding balance by the required due date that applies to you, the unpaid amount must be included in calculating your tax liability for the year in which you became a non-resident.

Report of Foreign Banks and Financial Accounts (FBAR)

Both Canada and the U.S. impose certain requirements to disclose information on foreign assets. For example, a Canadian tax resident who at any time in the calendar year owned or held a beneficial interest in certain foreign property with the total cost of more than $100,000 is required to file form T1135 — Foreign Income Verification Statement.

In the U.S. if you are filing a resident U.S. tax return, you are required to file Form TD F90-22.1 — Report of Foreign Banks and Financial Accounts (FBAR) if the aggregate balance of your non-U.S. financial accounts exceeds US$10,000 at any time during the year. This includes amounts you hold in Canadian bank accounts, registered retirement plans, locked-in retirement plans and a TFSA.

If you make an LLP or HBP withdrawal and then subsequently become a non-resident of Canada, your whole HBP or LLP balance will be payable.

Qualifying for U.S. or Canadian social benefits

An agreement on social security between Canada and the U.S. came into force on August 1, 1984. This agreement may help you qualify for old age retirement and disability benefits from Canada and the U.S. if you contributed to both the Canada Pension Plan (CPP) and the pension program of the U.S., or if you lived in Canada or the U.S. The agreement may also help you qualify for survivor benefits from Canada and the U.S. if you are the widow, widower or child of a person who contributed to the pension programs of the two countries.

The social security legislation and the agreement are complex. You may qualify for a benefit from Canada or the U.S. or both. Under the agreement, each country will pay a benefit based solely on your periods of contribution or periods of residence under its pension program. If you want to apply for benefits from Canada or the U.S. under the agreement, or if you have questions, please call Human Resources and Skills Development Canada at 1-800-277-9914.

Wills and powers of attorney

Moving to the U.S. presents an excellent opportunity to review and update your estate planning arrangements such as your Will and power of attorney.

It is important to ensure that you have a valid Will as a result of your move to the U.S. that properly addresses your wishes.

Will

It is important to ensure that you have a valid Will as a result of your move to the U.S. that properly addresses your wishes. For a Canadian Will to be valid in U.S. probate court, the Will needs to be presented, properly signed and witnessed. If the provisions in your Will are unclear, missing, or if they violate U.S. law, the Will may still be valid, but the provisions may not be executable in the U.S. You should review your current choice of executors and trustees as these choices may no longer be recommended for tax and other reasons if you are moving to the U.S. You should have your Canadian Will reviewed by a U.S. professional legal advisor or have it replaced with a U.S. Will.

Power of attorney

It is important to ensure you have a valid power of attorney as a result of your move to the U.S. that properly outlines your wishes in managing your financial affairs in the event of your incapacity. With power of attorney documents being unique to most states, you may need to replace your Canadian power of attorney with properly drafted documents in the U.S. state you have moved to.

U.S. estate, generation-skipping transfer and gift tax

Canadian and U.S. estate and gift taxation regimes differ considerably. Canada does not impose gift taxes; however, if you gift appreciated assets, you may trigger a capital gain or loss on the disposition under capital gains rules in Canada's Income Tax Act. Canada's death tax system is an extension of its income tax system.

On death, Canadian residents (subject to certain rollover provisions) are deemed to have disposed of all property owned at the date of death for fair market value.

In the U.S. there is a U.S. gift tax, U.S. generation-skipping transfer tax and U.S. estate tax system. The application of U.S. estate tax to non-citizens of the U.S. varies as a non-citizen of the U.S. will fall into one of two categories for U.S. estate tax purposes: domiciliary and non-domiciliary. The U.S. imposes its estate tax on the domiciliaries' worldwide net estate, similar to the way it does a U.S. citizen. In contrast, the U.S. only imposes its estate tax on non-domiciliaries for property within the U.S. (U.S. situs property). The concept of domicile in the U.S., very generally, can be described as living in the U.S. with no present intent of later leaving (in other words, with the intent to remain indefinitely). In determining a person's intent for this purpose, the U.S. will scrutinize all the facts and circumstances. There are similar rules for the applicability of U.S. gift and generation-skipping transfer taxes.

U.S. estate, gift or generation-skipping transfer tax is imposed at flat or graduated rates as a result of death or gift. In 2001, legislation was enacted in the United States that gradually lowered the federal estate tax rates and increased the estate tax exemption amount until 2010 when U.S estate tax was abolished for deaths in that year. Then in 2010 legislation was enacted to retro-actively re-introduce estate tax in 2010 to 2012 with the ability for 2010 only to not have estate tax apply. There were also changes to gift tax and generation skipping transfer tax.

For 2011 and 2012 the maximum estate, gift tax and generation skipping transfer tax rates are set to a maximum of 35% and the estate tax, lifetime gift tax and generation skipping tax exemption amounts are set to U.S. $5 million (subject to inflation adjustment provisions for 2012). However, these rates and exemption amounts will expire in 2013 if no further legislation is introduced. If this takes place unfavorable rates and exemption amounts similar to those that existed in 2001 will be back, such as maximum rates increasing to 55% and exemption amounts reduced to U.S. $1 million.

To avoid the U.S. estate, generation-skipping transfer and gift tax regimes, there are simple strategies you can implement, such as gifting assets prior to your move, or more complex strategies, such as using a drop-off trust. A detailed discussion of U.S. gift, generation-skipping transfer and estate tax rules and strategies to avoid or reduce the tax impact are beyond the scope of this article. You should discuss your exposure to these taxes with a cross-border tax professional before your move so you can discuss the appropriate strategies for minimizing or avoiding them.

To avoid the U.S. estate, generation-skipping transfer and gift tax regimes, there are simple strategies you can implement, such as gifting assets prior to your move, or more complex strategies, such as using a drop-off trust.

Conclusion

If you are contemplating leaving Canada, we strongly encourage you to contact your RBC advisor as well as a cross-border tax or legal professional well in advance of your departure. They can discuss the various Canadian and U.S. income tax and estate planning issues that may apply to you and help you decide on the appropriate tax and estate planning strategies that can be implemented.

› Please contact us for more information.

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