

# Some ramifications of appointing an executor who is a non-resident of Canada

As you engage in the estate planning process, an important decision that you will need to make is who the executor<sup>1</sup> of your estate will be.

After you pass away, the executor will have the task of administering your estate. Examples of what that role entails include taking an inventory of and securing your assets, making investment decisions, filing tax returns and following the instructions that you have set out in your Will. In other words, your executor will be the person who controls and manages the assets that you leave behind upon death, and who will have the legal obligation of carrying out your estate plan.

When evaluating who is best suited to be executor of your estate, you will need to consider such factors as the person's competence, availability, trustworthiness, age, health and location. In terms of this last factor, it is often easier, less costly and more time efficient for an executor who is geographically close to perform the role. What many people are not aware of though is that the geographical location of the executor's residency can also have legal and tax implications regarding a Canadian estate if the executor resides outside of Canada.

## Tax implications

### (a) Canadian tax implications

Under Canadian tax law, an estate is considered to be a trust. The tax residency of a trust is a question of fact, based primarily on where the "central management and control" of it takes place. As a result, the estate of a deceased Canadian may risk being characterized as non-resident if it is managed and controlled by an executor who is a non-resident.

In general, an individual is a Canadian resident if Canada is the place where, in the settled routine of life, the individual ordinarily lives<sup>2</sup>. Depending on the facts, an individual who lives outside of Canada but who has maintained residential ties in Canada (e.g. a home that is available for the individual to occupy, a spouse or dependant,

significant social ties, etc.) may still be considered to be a resident of Canada for tax purposes<sup>3</sup>.

If one or more persons were appointed and are acting as executors, the residency of the executor who exercises the most control may be determinative.

If no one executor exercises more control, the residency of the majority of the executors may apply. In other situations, Canada Revenue Agency may consider factors such as where the estate assets are located, where the legal rights relating to the estate assets are enforceable, and who has control over the estate assets, including the potential influence of others (such as beneficiaries) over the decision-making powers and responsibilities of the trust.

The Canadian tax implications of an estate<sup>4</sup> being or becoming a non-resident of Canada can include:

- the estate being deemed to have disposed of its assets at fair market value upon becoming non-resident and being subject to any resulting capital gains tax
- the estate possibly losing the enhanced tax treatment for capital gains and Canadian source dividends, which could have otherwise flowed through to Canadian resident beneficiaries
- Canadian withholding tax being imposed on Canadian-source income earned by the estate.

### (b) Foreign tax implications

The other side of the coin is that the foreign country where the executor resides may subject the estate to its tax laws, rules and regulations, possibly in addition to the estate being subject to Canadian tax. In situations where an estate is subject to tax in two or more jurisdictions, tax conventions and foreign tax credits may be available to reduce the overall tax burden.

### Bonding requirements

Certain provinces<sup>5</sup> require an out-of-province executor to provide a bond or other security, in order to protect the estate and the beneficiaries. A bond is usually obtained from an insurance company for a fee. The process of obtaining a bond can be difficult and time consuming.

In certain situations, the Court may be petitioned to reduce or eliminate the bond requirement. However, the Court may be more reluctant to grant such a petition if there are two or more executors who are non-residents of Canada.

### Investment limitations

Non-resident executors may be restricted from providing investment instructions regarding Canadian investment accounts that belong to the estate.

### Reporting requirements

Since the non-resident executor's home country can view the executor as controlling foreign assets, it may subject the executor to reporting requirements and substantial penalties if the executor fails to comply. For example, a U.S. resident who is acting as executor of a Canadian estate may be required to file various U.S. reporting forms. Since such forms can be difficult and time consuming to complete, the executor may need to obtain professional assistance in order to ensure compliance.



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<sup>1</sup>An executor is referred to as a "liquidator" in Quebec.

<sup>2</sup>There are also circumstances in which an individual (or a trust) may be deemed to be a Canadian resident.

<sup>3</sup>If an individual is unsure about his or her residency for tax purposes, it is recommended that the individual consult with a tax lawyer or tax accountant for guidance.

<sup>4</sup>For the purposes of this article, "estate" will include any trusts created by the Will.

<sup>5</sup>For example in Ontario, if an executor is not a resident of Ontario or a Commonwealth country, the executor is required to obtain a bond.