

Free as a Snowbird? Maybe not

Canadians who spend substantial time in the United States should be aware of changes to how their stays are monitored.

BY BRIAN BURTON, FOR THE CALGARY HERALD JUNE 20, 2014

The days of carefree and careless commuting are over for Canadian snowbirds with second homes in the United States' sunbelt, says lawyer and tax specialist Roy Berg.

The rules haven't changed. They're as bewildering, contradictory and potentially punitive as ever — on both sides of the border, says Berg, of Moodys Gartner in Calgary.

What has changed, however, is the ability of Canadian and U.S. customs agents to routinely swap computerized information obtained from bar codes on the passports of each other's citizens, he explains.

"None of the rules or substantive tax or immigration regulations have changed," he says. "What's changed is that they can be enforced. Until this year, they (U.S. Customs) haven't really known how long you've been there."

In the past, it didn't take a genius to figure out that, with each country tracking only those entering its jurisdiction, neither had a truly reliable count on the number of days foreigners were spending in country — or the number of days citizens were away. Accordingly, Berg says, Canadians have habitually taken a fairly relaxed attitude to accounting for their time in the U.S.

All that changes June 30, with the adoption of the Entry/Exit Initiative agreed between the two nations. After that date a continuous computerized information exchange will make day counts on each traveller automatic.

If you have any doubts about how real this is, you can apply to check your own day count with the U.S. Department of Homeland Security at <https://i94.cbp.dhs.gov/i94/request.html>.

The automatic count means Canadians must be vigilant to avoid facing additional tax penalties or even arrests.

Berg says there are two U.S. day counts that matter — a three-year rolling total of 180 days and an annual 182-day count. The three-year rolling tally is called the "substantial presence test" and it flags anyone who stays in the U.S. for more than 120 days in any given year. Days in the current year are counted at full value. Days from the previous year are counted at one-third and days from two years ago are counted at one-sixth. So a tally for 2014 might look something like this:

Days in 2014 are $120 \times 1 = 120$;

Days in 2013 are $120/3 = 40$;

Days in 2012 are $120/6 = 20$;

so, Days for 2014 total 180.

For casual Canadian vacationers, the substantial presence test is unlikely to become an issue. But for Canadians with second homes in the sunbelt, it's a different matter. Retirees hiding out from Canada's brutal winter can regularly exceed the 120 days — meaning they will now be methodically flagged by the substantial presence test in a way they never were before. For them, there's a form called the Closer Connection Exemption Statement for Aliens (form 8840). By filling out the form, you

document that you have a closer connection to Canada and are not simply dodging U.S. taxes. Filling out this form every year enables you to stay in the U.S. a full 182 days without offending the U.S. Internal Revenue Service or Homeland Security.

The form isn't new, but it has suddenly become very important to actually fill it out, Berg says. Canadians who haven't bothered or haven't known about 8840 until now will be well advised to fill it out every year. And it's one filing per person, not one per household, he adds. (Forms can be obtained at <http://www.irs.gov/pub/irs-pdf/f8840.pdf>)

There's another wrinkle you should take into account, he adds. The IRS counts days within the calendar year, while Immigration/Homeland Security counts days in any 12-month period.

"You could be just fine for tax purposes but totally off-side for immigration purposes," Berg observes. And immigration law makes reference to "substantial departure" from the U.S., meaning a quick flight home and back may not be counted as time out of the U.S.

Consequences of offending U.S. immigration laws "can be quite dire," he adds.

"U.S. border guards have power to arrest," so uninformed Canadians on their way to their second home in Arizona or Florida could suddenly find themselves turned back at the border or even arrested if the border inspection point is on U.S. soil.

It all depends upon whether you're viewed as a resident under U.S. and/or Canadian law, Berg says.

People who violate the U.S. substantial presence test can be banned from entering the U.S. for three years on a first offence and for life on a second count, he says. The exception is if they file the 8840 form. And anyone unlawfully exceeding 365 days in the U.S. can be banned for 10 years on a first offence.

Those who stay more than 120 days in a calendar year and fail to file the Closer Connection form, or who exceed 182 days in a calendar year, risk becoming subject to U.S. tax on their worldwide income, though taxes paid in the U.S. are deductible from Canadian taxes owing.

If you inadvertently become a U.S. resident, you become taxable at death on your worldwide assets, meaning your heirs will be subject to U.S. estate tax.

If you exceed 182 days in a calendar year outside Canada, Canadian tax law says you are no longer a resident, you are deemed to have disposed of all your assets worldwide and become subject to capital gains tax on everything you own.

"Whether an individual is no longer a resident is a facts-and-circumstances test — but a big factor in that analysis is day count," Berg says.

And, of course, losing your residency also means you lose eligibility for provincial health-care coverage.

Finally, Berg notes, not all U.S. states align their tax laws with the federal government, so staying square with Uncle Sam doesn't mean you're off the hook for state taxes.

Buying and licensing a car in Hawaii, for instance, may get you the residents' rate for golf, but it could also very likely make you subject to Hawaiian state taxes. While Florida and Arizona use U.S. federal rules, California, Hawaii, Montana and North Dakota — all popular with Canadians — don't follow the U.S. federal tax code.