The Canadian "Visitor" to the United States of America (Revised 2024)

by William J Anhorn K.C. ICD.D

About the Author:

William J. Anhorn was born and raised in Medicine Hat, Alberta and graduated with a Bachelor of Arts degree (Political Science) from the University of Calgary and a Bachelor of Laws degree from the University of Alberta. He returned to his hometown of Medicine Hat in 1976 and practiced law for over 35 years as a senior partner with the law firm of Pritchard and Company. He retired in 2012 and he and his wife Joan Elaine Anhorn (Medlicott), a retired teacher, continue to reside there.

Always having had a keen interest in writing and more recently genealogy, he has researched and written a series of articles on his own family and his extended family (Medlicott/McIvor) and their family history.

He is also passionate about history including the history of Medicine Hat and has researched and written several articles in relation to the history of his "hometown". He currently is a member of the Medicine Hat Genealogical Society and the Medicine Hat and District Historical Society. He is Past Chairman of the Historical and Heritage Resource Management Committee of the Medicine Hat Exhibition and Stampede Company.

He is a frequent contributor to the Alberta Genealogical Society newsletter, Relatively Speaking

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Preface:

As a frequent visitor to the United States, it is not uncommon when visiting with fellow Canadian “snowbirds” down south, for the topic to arise (particularly at “Happy Hour ") about the “rules” relating to our extended visit to the United States, and the potential pitfalls for failure to comply with these so-called “rules”.

More often than not, one hears about someone's misadventure in dealing with the American border patrol authorities, and the "things" that should be done in order to preserve one's right to re-enter the U.S. and to avoid having to pay American taxes. The advice at times appears conflicting, and to say the least, confusing.

This is my effort to bring some clarity to the situation.

American Immigration Law for Canadian Visitors

The starting point for any discussion involves an understanding of the basic principles regarding immigration law for Canadian visitors. The U.S. government department responsible for immigration is the Department of Homeland Security. There are three agencies within the Department of Homeland Security- U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Service (ICE) and the U.S. Customs and Border Protection Service (CBP).

The initial questions posed by the U.S. Customs and Border Protection officers (CBP) at the U.S. point of entry to an individual seeking entry into “his” country are simple but consistent for a reason.

Whether you are traveling by train, plane or automobile, the enquiry is two-fold (if you are not a U.S. resident). **What is your country of origin (citizenship)? What is the purpose of your trip?**

Generally, a citizen from **ANY** foreign country, who wishes to enter the United States[1] must obtain a visa, either a non-immigrant visa for a temporary stay (visitor visa) or an immigrant visa for permanent residence in the U.S.

For our discussion, there are 3 types of non-immigrant visas for persons, who wish to enter the United States for a temporary stay or visit:
-B-1-business purposes;
-B-2-tourism pleasure or visiting;
-B-1/B-2- a combination of both.

There is however, an important exception to this general rule. Citizens of Canada traveling to the United States **do not** require an actual visitor visa with the exception of:

a) certain types of individuals (ie foreign diplomat or fiancée);

b) persons who are otherwise inadmissible under U.S. immigration law to enter the United States (for example, persons who have been convicted of certain types of criminal offenses in Canada) or

c) persons who have previously violated the terms of their immigration status in the United States.

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[1] Foreign visitors coming to the United States for tourism or business purposes (B-1 or B-2 visa category) for 90 days or less from certain qualified countries may be eligible to travel without a visa if they meet the Visa Waiver Program (VWP) requirements. Currently, 38 countries participate in the VWP. For a list of the participating countries and additional information regarding the program, visit https://www.cpb.gov>travel>visa-waiver

Hence, the first question.

What is your country of origin or citizenship?

As a Canadian, there is however, no automatic right of entry and the onus is upon the individual seeking to cross the border that they are eligible to enter into the United States of America.

From the standpoint of the CBP officer, the next issue to be determined is whether or not the person is intending to stay permanently in the United States or make the U.S. their primary place of residence or conversely, for our purposes, is the entry simply intended to be for a temporary legitimate purpose.(ie an extended visit or short vacation).

Hence the second question.

What is the purpose of your trip?

If the purpose of the entry into the U.S. is determined to be for a temporary legitimate purpose (ie visiting, tourism or pleasure), then the visitor is allowed entry into the United States for a maximum of approximately 180 days or 6 months. But to better understand the “rules”, the Canadian visitor should be guided firstly by a basic understanding of the immigration law principles, and not necessarily by days or numbers.[2]

For the Canadian, who presents himself at U.S. port of entry, whether at a border crossing or airport, the question facing the CBP officer is whether the person is a bona fide visitor with a **primary residence** in Canada, and is not a person attempting to enter the U.S. to begin or resume permanent residency or seek or continue employment.

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[2] Joyce, Daniel “Debunking the Snowbird-30 day Rule” www.jdsupra.com

The frequency and duration of previous visits may be a factor, but it is not necessarily conclusive of one's eligibility to enter or re-enter the United States as a visitor.

The issue is whether the Canadian seeking entry has **abandoned** Canada as their primary place of residence, and has or intends to become a de facto resident of the United States or is entering the U.S. for the purposes for obtaining or seeking employment. The issue of **primary residence** becomes more complex when the "visitor" owns real property in the United States.

The "180 Day Rule" and the "Snowbird-30 Day Rule"

The "180 Day Rule" in reality, relates to the 6 month time frame or one half of a calendar year(which in more exact terms is 183 days), which is the **maximum period** of time that a legitimate Canadian visitor is allowed to remain in the United States.

Generally, a foreign national of another country other than Canada is typically issued a visitor's visa, which indicates a specific or specified date, when they must leave or depart from the United States. This is referred to as a specified departure date. Canadians enjoy the luxury of being, in essence, on an "honor" system, where no formal visa is issued (electronic or otherwise) and, at least in theory, the onus is strictly on the Canadian visitor to calculate or determine their specified departure date. Most recently, however, with the agreement between Canada and the U.S. to share detailed passport information, the CBP officer now has the information readily available to determine whether the Canadian visitor has "overstayed". A person is in violation of the immigration laws of the United States, if he or she does not depart the United States before the expiration of the 6 month time period in the case of Canadians or the specified date in the visa in the case of foreign nationals, and is at risk of being arrested and deported, and being ineligible for future re-entry.

The common sense approach is to avoid being in the U.S. for a continuous period of more than 6 months or more precisely, 183 days.

Aggregate time periods in excess of 6 months do not necessarily violate any immigration law but as pointed out earlier, may create more scrutiny at the port of entry by the CBP officer as he assesses whether or not he or she is a **legitimate** visitor. For the Canadian, who makes frequent trips back and forth across the border or the business traveler, some advance planning may be in order, including record keeping that easily identifies the number, nature and duration of prior trips in order to satisfy (or hopefully pacify) any overzealous CBP officer.

This leads to the topic of the so-called "**Snowbird-30 day Rule**" which inevitably creeps into the "Happy Hour" discussion, and which continues to be a topic of discussion in the Canadian Snowbird Association newsletter.

The typical "Snowbirds" are retirees, and either own vacation property in the U.S. or rent property for an extended period of time over the winter months. For the "Snowbird", who has enjoyed an extended visit to the U.S., the issue becomes a relatively simple one. Having returned to Canada, how long must he or she remain in Canada in order to "reset" the clock for a further 183 day visit? It has been suggested that returning to Canada for a brief period of time may not qualify to reset the clock.

This has given rise to the so-called "**Snowbird-30 day Rule".**

This "rule" suggests incorrectly, that in order to reset the clock for a further extended visit, the minimum period required to be back in Canada is 30 days.

Thirty days may be a convenient starting point for consideration but it is **NOT** based upon any statute, regulation or interpretation bulletin issued by the INS.

What length of time then, is sufficient to reset the clock?

The rules relating to eligibility and length of stay are governed by the INS-the U.S. Immigration and Naturalization Service. **There is no specific regulation or law that specifies that 30 days or any lesser or greater period will be appropriate for this purpose**. It could be fewer or more than 30 days depending on the circumstances of each individual case.

It is up to the CBP officer at the point of entry to assess whether the return trip to Canada both in terms of duration and purpose was sufficient to effectively terminate the previous visit and allow the re-entry to be treated as a new fresh visit.

The shorter the duration of the return period, the more likely that the CBP officer will ignore the legal significance of the departure and return date, but view the re-entry as a continuation of the purpose and activity associated with the original trip or visit. As pointed out earlier, the amount of time spent annually and the frequency of visits over time may raise some questions about someone's status as a "visitor", resulting in more scrutiny about the nature of the proposed new visit and raise a question about the person's **permanent residence or primary ties to Canada**.

This could result in a limitation on the length of the new visit or in extreme cases, a refusal of entry.

This becomes increasingly problematic for those who own property in the United States. Although clearly not determinative, it is another factor that may be taken into account on assessing the penultimate issue.

For a more detailed analysis, see my recently revised article, "A Further Debunking of the Snowbird-30 Day Rule".

INS vs IRS

The second part or further aspect of the **“180 day Rule”** for Canadian visitors to the U.S. relates to the IRS (or the Internal Revenue Service) and the potential for visiting Canadians to be subject to U.S. federal taxes. To be clear, the INS (U.S. Immigration and Naturalization Service) and the IRS are separate and distinct government agencies and operate under separate and distinct legislation. Any similarity in relation to the “rules”, is in my opinion, by sheer coincidence as opposed to design.

Too much time spent in the United States by a Canadian visitor without taking specific precautions could result in the person being deemed to be **a resident of the U.S. for federal tax purposes.**

In this situation, the unsuspecting Canadian may by law be required to file a U.S tax return, and report all worldwide income, even if there is no earned income in the United States, and even though he or she has filed his or her own tax return in Canada.

The IRS uses a “Substantial Presence Test” to determine whether in any given tax year someone is a resident of the U.S. for federal tax purposes. The “Substantial Presence Test” is a mathematical formula based solely on the number of days an individual is physically present in the United States. The test is applied and a determination made in each calendar year, which coincides with the tax year in both Canada and the U.S.

In order to be classified as a U.S. resident for tax purposes, the following criteria must be met:

a) An individual must be physically present in the United States for 31 days in the current calendar year; **and** the sum of the physical days in the U.S. in the current and the two prior calendar years using the following formula must be 183 days or more;

This is called the “substantial presence” or SP number and is calculated as follows:

i) All the days in the current calendar year (“a”), plus
ii) One third of the days in the immediately preceding year (“x”), plus
iii) One sixth of the days in the second preceding year (“y”)

The simple formula is “a” plus ⅓ of “x” plus ⅙ of “y” = the SP number.

As an example, here was my personal “substantial presence” or SP number for the 2015 calendar year:

Number of days in the U.S. in 2015=115
Number of days in the U.S. in 2014=57
Number of days in the U.S. in 2013=18

STEP 1: Question: Did I spend more than 31 days in the current calendar year (2015)? Answer: Yes

STEP 2: Therefore, “a” plus 1/3 of “x” plus 1/6 of “y” equals my SP number

(a) 115
(x) 19 [.33 X 57]
(y) 3 [.16 X 18]

My SP number for the 2015 U.S. tax year was 137 [115 + 19 + 3]

Therefore, as my SP number was less than 183, I did not meet the “substantial presence test” for the 2015 tax year and therefore had no concerns about being deemed a U.S. resident for tax purposes.

However, in 2016 I traveled to the U.S. on many several different occasions and the number of days in the United States that year totaled 138.

As a result, my SP number for 2016 was 185, calculated using the 2 step process outlined above as follows:

STEP 1: Question: Did I spend more than 31 days in the 2016 calendar year?
Answer: yes- 138 days

2016=138 days
2015=115 days
2014=57 days

STEP 2: Using the same formula as above:

(a) 138
(b) 38 [.33 X 115]
(c) 9 [.16 X 57]

Total of a+b+c= 185

Therefore, my SP number for 2016 was 185, which exceeds the 183 day maximum allowed under the **U.S. taxation law.** As a consequence, my wife and I could technically be deemed to be "de facto" U.S. residents for **tax purposes** even though we are Canadian citizens, own no property in the U.S. and consider Canada to be our permanent home.

The "Closer Connection" Rule or Exception

The designation of "U.S. resident" for federal tax purposes has nothing to do with your immigration status (visitor), country of origin, domicile or whether you carry a Canadian passport.

As a result, anyone who consistently visits the U.S. for around 180 days each year will likely over the course of 3 years be deemed to be U.S. resident for federal income tax purposes based upon this test.

It is here that the immigration law for the Canadian visitor and the U.S. tax laws intersect and cause a great deal of confusion.

Recognizing the negative implications of such a hard and fast rule and the economic benefit to the United States by Canadians visiting for extended periods of time and owning property, the IRS and Revenue Canada through the Internal Revenue Code and a U.S.-Canada Tax Treaty developed some exceptions to complicate things even more.

These are referred to the **“closer connection”** and **“tie-breaker”** rules that allow a person to avoid having to be taxed on his or her worldwide, even if they fall within the parameters of the “substantial presence” test by virtue of exceeding the number of days allowed under the formula.

For Canadians, the “closer connection” exception and the filing of an 8840 form annually, if required, is the preferred choice to avoid this tax pitfall.

However, to be eligible for the exception, the individual must be physically present in the U.S. for less than 183 days in the current calendar year, which is consistent with the maximum extended visitation period allowed under the immigration law. In addition, you must be considered to have a “tax home” in Canada.

In other words, you consider Canada to be your permanent place of residence and you file a tax return in Canada in relation to taxable income earned or received during the most recent tax or calendar year, and as such for tax purposes, you consider yourself to have **a closer connection** to Canada than the United States.

You can satisfy the closer connection requirement by completing the **8840** form and providing personal information and details that would demonstrate a closer connection to Canada than the U.S.

This would include such information as your permanent residence, location of family and personal belongings, jurisdiction where you vote or whether you hold a provincial driver's license etc. The 8840 form (Closer Connection Exception Statement for Aliens) must be filed with the IRS by June 15th in relation to the prior calendar year or tax year.

Accordingly, Canadians visiting the United States should endeavor to keep the number of days in the U.S. to 120 days or less on a consistent basis in any calendar year in order to avoid altogether this potential tax problem. This amount of time would also fall well within the maximum extended visitation period allowable for Canadians under the immigration law.

If this is not possible or practical, particularly for the Canadian who has invested in the real estate market and owns a second vacation home, then he or she should keep their presence in the U.S. for less than 183 days annually. Why?

Firstly, so that they can take advantage of the closer connection exception and be eligible to file as required the **8840** form under U.S. tax law and secondly, to remain onside with respect to the maximum extended visitation period allowed under the U.S. immigration law. It goes without saying for those "close to the line" that maintaining an up to date record of each visit to the U.S. including duration and purpose over at least a 3 year period would be prudent along with your own regular and ongoing "substantial presence" formula and SP number. There is even an app now which helps you keep track of your SP number called the Canadian Snowbirds US Stay Counter

The 8840 Form-Better Safe than Sorry

The 8840 form can be found on the IRS website. The form can be completed online but must be printed off and mailed to the IRS office identified on the website. There currently is no ability to file the form electronically. If you file an 8840 form with the IRS, a copy should be kept for future reference. These records should be brought with you each time you enter the United States of America. For the record, both my wife and I filed our own separate 8840 forms prior to June 15 2017 for the first time based on my 2016 SP number, just to be on the safe side and continue to do so, whenever our SP number exceeds 183.

“Happy Hour”

Hopefully, by having a basic understanding of U.S. immigration law and the implications of extended visitation from a tax perspective, and taking some simple precautions, you can avoid unwittingly being the topic of conversation at the next “Happy Hour”.

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*This is an updated version of an earlier article, which was previously published on my personal home page for this and some other articles which you find of interest go to:

http://wjanhorn.ca