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International Estate Administration for Canadian Executors

By James Bowden | 9 December 2021

The administration of an estate can be a complex and intimidating process at the best of times. If the estate in question has international components to it, the complexity increases and professional guidance will almost certainly be essential. This article will provide an overview of some of the issues that arise in the context of estate administration with international elements, from the perspective of a Canadian executor or a Canadian beneficiary.

There are a number of things that can make an estate administration "international". These include: foreign assets that form part of the estate; the existence of foreign beneficiaries; the non-Canadian domicile[1] of the deceased at the time of death or at the time of making his/her will; a foreign executor; or some combination of the foregoing. When an estate has one or more of these characteristics, there are certain questions that need to be addressed. The remainder of this article will be guided by these key questions and answers.

What laws apply to the estate?

As a starting point, movables in an estate are governed by the laws of domicile at the time of death, and immovables (real property and certain intangible assets) are governed by the laws of the place in which they are located. The practical application of this concept can be much more complex than it appears at first blush, particularly if there is a will that was executed during an earlier stage of life when the deceased may have been domiciled elsewhere, or if the will only addresses part of the estate assets (partial intestacy), or where outcomes based on the laws of one country must be enforced in another country which may have its own administrative or substantive requirements. The issue of which country's laws apply is very important, as it determines the scheme of distribution (on intestacy) or how the will will be applied

The Author

James Bowden
Managing Director - Toronto
jbowden@afridi-angell.com
Tel: +1 416 601 6815

James is an experienced transactional and corporate and commercial practitioner, having trained in both Ontario and with Afridi & Angell in Dubai for many years. He has developed significant expertise in a number of specialisations, most notably commercial advisory and transactional work, onshore and offshore trusts structures, asset protection, and tax and estate planning. James spearheaded the firm's initiative to establish its Toronto office (Afridi & Angell Professional Corporation), which he now heads, taking advantage of the firm's many Canadian ties and bringing the Afridi & Angell service standard to Canadian clientele. James is a member of the Ontario bar and received his L.L.B., from Queens University, Canada, in 2004.

[1] The term "domicile" is not always the same as "residence", although they usually are the same. Domicile requires a higher level of permanence, where one has their permanent home. For many people the answer is obvious, but for recent immigrants or emigrants of Canada, or for people with significant residential ties in multiple countries, the determination of domicile can require further analysis.

and how it may be challenged (if there is a will). This includes spousal or dependant relief claims and other challenges to a will or intestate distribution. For example, if the deceased was found to be domiciled outside of Canada at the time of death, the Canadian (provincial) laws that give preferential rights to spouses and dependents would not apply. The issue of domicile and determining whose laws apply is therefore central and must be considered as a first step. Note that a Canadian court may still agree to take jurisdiction and issue a grant of probate for the estate even if the deceased was not domiciled in Canada, but whether this would be appropriate is a case by case decision based largely on where the deceased's assets are located (more on issues of probate and asset location below). The issue of which laws apply to which aspects of an international estate can be difficult and do not always have perfect solutions, particularly when the laws of multiple countries need to work together. The cooperative efforts of professional advisors in all relevant countries is usually a necessity in order to agree on how to achieve the best practical outcomes.

Where should you apply for probate?

Where to apply for the "original grant" of probate will be driven largely by which assets in the estate require probate in order to enable the executor to deal with them, and where those assets are located. Assets that require probate are usually assets that are subject to a third party's control or consent, like bank accounts (the bank), land (land registry), public company shares (the company or the relevant exchange). As such, once an inventory of assets and their locations has been taken, inquiries should be made with the foreign third parties and authorities in order to confirm their particular requirements. Those requirements will be one of the following: a certified copy of the will; a fully attested copy of the will (possibly translated)[2]; a grant of probate in the jurisdiction of domicile; or, the original grant of probate submitted to the local courts to obtain a local court endorsement to enable local parties to rely on it; a local ancillary grant of probate (i.e., a fresh probate application in the local courts). Which of these documents will be required in each instance will need to be confirmed with each relevant asset registry or authority. Note that assets that do not require probate in Canada may require it in other jurisdictions. If there is foreign real property to deal with, local probate will almost certainly be required (either re-sealing an original grant or issuing an ancillary grant locally). Probate fees may therefore apply in more than one jurisdiction as well.

In most cases, obtaining the original grant of probate in the place of the deceased's domicile at the time of death is advisable as that is normally where the majority of matters requiring administration emanate from.

In general, even if probate is not strictly required, it is often advisable for an executor to obtain a grant of probate anyway as it offers protection against claims against the executor. In the context of an international estate administration this should be a material consideration for any executor.

Are there special tax issues with an international estate?

From the perspective of a Canadian executor that needs to distribute assets to foreign heirs, there are some additional tax compliance requirements. Most importantly there is an obligation on the executor to withhold what is known as Part XIII withholding tax (referring to Part XIII of the Income Tax Act) of 25 percent, or less if reduced by a tax treaty between Canada and the other country. If the distribution of assets consists of Canadian real property or amounts derived from it, the executor may also need to obtain a special clearance certificate from the CRA before making the distribution (a section 116 clearance certificate). Note this is different from the clearance certificate that the executor should

[2] The attestation process typically consists of notarization in the place of origin, attestation by the Ministry of Foreign Affairs or equivalent, then finally attestation (or legalization) by the consulate or embassy of the country in which the document will be used. This can be an onerous process for those unaccustomed to it. Consideration should be given to the translation requirements in the local jurisdiction, which may include the necessity to use only licensed translators in that jurisdiction. It is usually more efficient to have the translation done in the foreign jurisdiction.

obtain from the CRA to protect him/herself from liability for tax in respect of estate distributions in any event, even domestically[3].

For assets located in other jurisdictions, local advice will be required as to whether any tax liabilities or filing obligations are applicable in respect of such assets, such as estate tax (as in the United States) or transfer taxes or stamp duties or similar.

For a Canadian beneficiary that receives distributions from a foreign estate, there are generally no tax consequences of the receipt itself. However, an information return may still need to be filed with the CRA[4]. If the distribution results in the Canadian owning foreign assets worth CAD 100,000 or more, this will give rise to an additional filing requirement with the CRA[5]. Note that if a Canadian resident owns (or acquires by inheritance) any foreign asset that generates income, that income will be taxable in Canada and will need to be declared going forward.

It is worth pointing out an opportunity for tax planning when a foreign benefactor wishes to leave an inheritance for a Canadian resident. If the foreign benefactor is not a Canadian resident, and has not been a Canadian resident for the past 18 months prior to death[6], then they will be able to establish a trust in their will in a foreign jurisdiction (i.e., a low/no tax jurisdiction) using the inheritance. The Canadian beneficiary(ies) can receive distributions from the trust tax free, forever. The benefit of this structure is with respect to the income generated by the trust settlement, not the trust capital itself (which would not have been taxed in Canada in any event when transferred to the heirs). The income generated by the trust can be accumulated, capitalized, and paid out to Canadian beneficiaries as capital on an ongoing basis, attracting no tax.

What should you do to plan your international estate in advance?

Having a well-planned estate will make its administration much easier on your executors, and will help to ensure your wishes are in fact carried out in the way you intended and not thwarted by unforeseen legal or administrative obstacles. Some key elements of good planning that you may wish to consider are:

1. Keep your will(s) up to date as your assets grow or change in type, value or location, or your family (or other beneficiary) circumstances change, or as your country of residence changes. An out of date will can result in unnecessary and entirely avoidable difficulties and a distribution of your estate in a manner you did not intend.
2. Have multiple wills where appropriate on a country by country basis, or sometimes by asset type, so they can be probated and administered locally, or so that probate can be avoided for some assets. This can help to avoid the international attestation requirements, translation requirements, and international recognition or enforcement issues that can arise and which can be very time consuming. If multiple wills are used, be sure they are drafted in express contemplation of one another and do not operate to invalidate the other(s). Consider preparing an explanatory note to your executor regarding how the multiple wills are intended to operate, and what formalities are expected to be required to implement them so your executor does not need to struggle to work out your intentions.
3. Confirm whether you are subject to any forced heirship regime, as is the case for some EU nationals (e.g. Germany, France), and Middle Eastern nationals (e.g. Saudi Arabia, the UAE), and

[3] Such clearance certificates are required under section 159(2) of the Income Tax Act, as opposed to the section 116 clearance certificates for distributions of taxable Canadian property (mainly real property) to foreign beneficiaries.
[4] Form T1142 (Information Return in Respect of Distributions from and Indebtedness to a Non-Resident Trust).
[5] Form T1135 (Foreign Income Verification Statement).
[6] Note the same tax-efficient offshore trust structure can be used during the life of the benefactor too, but they must have been non-resident for at least 5 years rather than 18 months.

plan your estate with an awareness of which assets, if any, will be subject to the forced heirship regime. You can plan your will(s) accordingly so as to avoid a conflict between your wishes and what is required by law, or, you may be able to plan to effectively exclude some or all of your assets from the regime.

4. Keep a document that will be easily located by your heirs upon your death which sets out what documents you have prepared (i.e. your wills and any instructional memos) and where they can be located, and the lawyers or other professionals who were involved in their preparation or other estate planning.

5. Consider establishing a trust during your lifetime which can hold some of your assets in order to avoid the probate and estate administration issues that would otherwise arise. Since ownership of the assets will have passed to the trust already, the only administration that is necessary is to provide the trustees with proof of death, whereupon the trustees will deal with the trust assets in whatever manner is provided in the trust deed. This provides ease of administration, avoidance of probate (and probate fees), and immediate access to assets for your heirs (or limited or delayed or conditional access, according to what you had provided in the trust deed). The use of trusts can dramatically ease the burden on your estate administrators.

International estate administration can be daunting. The support of professionals who are experienced in dealing with international issues and who are part of a strong network of professionals in other jurisdictions is essential. If you require assistance or have any questions about domestic or international estate administration issues, please do not hesitate to reach out to us. ■

Afridi & Angell

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Afridi & Angell Professional Corporation, Afridi & Angell's Toronto office which was established in 2021, takes advantage of the firm's many Canadian ties and brings to our Canadian clients, and those with Canadian interests, the highest standards of advice and client service for which Afridi & Angell is known. Our Toronto office, which operates as a separate legal entity from Afridi & Angell's UAE offices, provides legal and advisory services in the following areas: corporate and commercial; mergers and acquisitions; tax planning and advisory; asset protection; private client and estate planning; anti-money laundering and anti-bribery compliance; IT outsourcing and contracting; consulting on Canada-UAE opportunities and cross-border legal issues.

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