The "30 Day Rule" for Canadian Visitors to the US (Revised 20 June 2013)

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At +KeatsConnelly we often hear this question:

"How long do I have to stay outside the US before I can return as a visitor?"

The technically correct and completely useless answer is: "It depends." Practically speaking, 98% of Canadians can spend autumn in the Sun Belt, celebrate the holidays in Canada, and then return to the Sun Belt—and can plan on doing this every year. A basic understanding of the US admission rules and proper use of a Border Kit (as described by +Robert Keats in +The Border Guide 10th Edition) will better ensure smooth sailing. [6/20/2013 revision: CBP is beginning to issue Canadian visitors the I-94 admission card at the time of entry. The card will have an expiration date. Bearer of the card must depart the US by that date. Maximum period granted on an I-94 card will be six months minus one day. Overstaying the period of stay granted by CBP may result in a three or ten year bar from the US. See my blog post on this recent development. I have amended this blog post to reflect the new policy.]

Admitted for 180 days—Canadians admitted in "Visitor for Pleasure" or B-2 status without a B-2 visa in hand are deemed to be admitted for 180 days under current US Customs and Border Protection (CBP) interpretation of the rules. Canadians who routinely summer in Canada (from April-ish through October-ish) should not be concerned about counting days. No one at CBP is counting days that closely, so you should not either. CBP is unlikely to limit a Canadian's next visit, simply because the Canadian spent a little more than 180 days in the US last time or spent a total of a little more than 180 of the last 365 days in the US.

Another 180 days and another—Canadians can get into trouble if they routinely spend substantially more than 180/365 days in the US (e.g., 240 days). Typically these Canadians will leave
the US for a few days or weeks and then return as visitors, thinking that they have "reset the counter" to 0/180 days. Increasingly, CBP is electing to enforce the so-called 30 Day Rule in these cases: if a visitor leaves the US and then applies for readmission after 30 days or less, the original stay is deemed to continue to run without interruption (i.e., the visitor does not get a new 180 day period of stay). This 30 Day Rule is consistent with the limitation imposed on non-Canadian visitors to the US who may make brief trips to Canada or Mexico. As a result of the 30 Day Rule, CBP may decide to limit a visitor's stay to a period of less than 180 days and issue the visitor an I-94 admission card with an "Admitted until ___" stamp on it.

Every request for admission stands on its own facts: on each visitor's prior immigration history, the circumstances of the planned visit, and any other factor that CBP thinks is material. Remaining outside the US for six months typically will allow a Canadian visitor to enter the US for another 180 day period. An absence of 120, 90, or even 45 days also may suffice if there are other facts in the Canadian visitor's favor. Presenting the CBP officer with personal documents from a Border Kit, to show strong Canadian ties, will strengthen your position.

Notice that these immigration rules involve the number of days in a rolling 365 day period. Visitor admissions have little or nothing to do with the January-December calendar. [6/20/2013 revision: That may change if the Congress approves the proposal for a 240 day extended stay for retired Canadians--that proposal is for 240 days in the calendar year.]

The Calendar  Now let us shift focus for a moment... The January-December calendar year is important to visitors but for reasons unrelated to the immigration rules. The calendar is used to determine whether visitors trigger TAX residency by spending too much time in the US: add all US days this year, 1/3 of the US days last year, and 1/6th of the US days in the year before that (i.e., the Substantial Presence Test). US residency is established when the total is 183 or more days.

That's right! CBP is admitting visitors for 180 days and IRS is drawing the line at about 120 days annually. CBP and IRS don't talk much, do they?

Fortunately, Canadian visitors typically can ignore the IRS Substantial Presence Test and the 120 day annual limitation if they EITHER:

a) spend less than 183 days physically present in the US each calendar year and annually file IRS form 8840, the "Closer Connection"form. The 8840 is a declaration that under the terms of the Canada-US tax treaty, the filer would be considered a tax resident of Canada regardless of the number of days spent in the US; OR

b) spend 183 days or more in the US and file a US tax return but take a treaty position on the return (i.e., assert a closer connection to Canada). [6/20/2013 revision: If the visitor receives a time limited I-94 card, forget this option.]

The Bottom Line

Canadians visiting the US routinely from April through October, with a good Border Kit in hand and filing an 8840 annually, should have very few issues at the port-of-entry.
Canadians who occasionally stay well beyond 180/365 days may also avoid problems with a Border Kit and a competent cross-border tax professional to file a US tax return and make the appropriate treaty election.

Canadians who routinely spend more than 180/365 days in the US will run afoul of CBP sooner or later and have their US visits strictly limited. These individuals should explore other US immigration options. The green card and the long term nonimmigrant E-2 Treaty Investor visa are popular. As always, when exploring immigration options with an immigration attorney, consult with a cross-border planner who can assess the tax and other financial implications of your immigration options.

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