

# Update on the European Succession Regulation - What Every Canadian with EU Connections Needs to Know

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It's been over three years since the European Succession Regulation (the "Regulation") came into effect. It seems timely to check the pulse and see what impact it is having on estate planning and administration.

The Regulation came into effect on August 17, 2015 and applies to all European Union member states with the exception of the U.K., Ireland, and Denmark, each of which decided to opt out.

Although it is a EU regulation, it can have significant impact on Canadians with ties to EU member states. That's why it is important to understand how it operates and can be beneficially applied for Canadians doing their estate planning.

As a brief overview, the Regulation tries to harmonize the law to govern succession on death so that one law will apply - generally the law of the deceased's "last habitual residence". It does not cover tax or family law, and is restricted in scope to passing assets on death.

If a person has a nationality different from their place of last habitual residence, they have the option to choose the law of their nationality to apply to their succession.

In a federal country such as Canada, the Regulation provides that if succession matters are not governed at the national level, the choice to be made is the jurisdiction with which a person has the closest connection. In Canada, succession matters are governed by each province or territory. Choice of law requires choosing the laws of Canada, and the law of the province or territory with which a person has the closest connection.

For Canadians with a vacation property abroad, such



as in France, Italy, Portugal or Spain, it is important to take these considerations into account in estate planning. These jurisdictions do not allow for testamentary freedom on death. You cannot, in general, leave all of your assets just to your spouse if you have children, and instead there is a mandatory scheme of distribution in favour of spouse and children, called forced heirship.

To avoid this result, a Canadian with a vacation home in one of those countries can choose the law of the province or territory they have the closest connection with to apply. Likewise, a Canadian living in a EU member state and habitually resident there can choose the law of

the Canadian province or territory they have the closest connection with, so that the local law of the EU member state will not apply.

Slowly, on a practical level, practitioners including lawyers and notaries in EU member states are coming to terms with the intricacies and every day application of the Regulation, and the body of professional literature and education on the topic is evolving and growing.

A recent case of notoriety involving the Regulation concerns the estate of celebrity French rock singer Johnny Hallyday, a French citizen who died in December, 2017 leaving two children from a former marriage. Johnny left his estate to his fourth wife and two adopted children under his California will. His French children from a prior marriage are asserting that he was habitually resident in France at his death, and therefore French succession law should apply under which they would be entitled to a forced share of his large estate. They recently obtained a French court order freezing his estate's French assets. His widow takes the position that at his death he was habitually resident in California, and that California law should be referred to to determine succession to his property. The case will be interesting in terms of determination of his habitual residence. Surprisingly, the Regulation contains no definition for this term, which is one of the criticisms that has been made of it.

For anyone who believes they may be impacted by the Regulation, it is important to get proper legal advice. With growing mobility of people and assets, when it comes to estate planning, it can no longer be done in a domestic vacuum.

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