Docket: 2010-1756(IT)G

BETWEEN:

DENIS HAMEL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 9, 2011, at Québec, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the appellant: André Lareau

Counsel for the respondent: Marielle Thériault

JUDGMENT

The appeal from the assessment made pursuant to the *Income Tax Act* for the 2007 taxation year is allowed with costs and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment; it will be taken into consideration that the appellant ceased being a resident of Canada on January 13, 2007, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 24th day of August 2011.

"Alain Tardif"

Tardif J.

Translation certified true
on this 7th day of November 2011.

François Brunet, Revisor

Citation: 2011 TCC 357
Date: 20110824
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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from an assessment based on the assumption that the appellant was a resident of Canada during the 2007 taxation year and subsequent years. The issue was presented in the Reply to the Notice of Appeal as follows:

> [TRANSLATION]
> Did the appellant cease to be a resident of Canada on January 13, 2007?

[2] To issue and confirm the assessment presently under appeal, the respondent relied on the following presumptions of fact:

> [TRANSLATION]
> (a) The appellant left Canada in January 2007 to work in Qatar under a contract of employment with an American company (Rust Resources Inc.) **(no reply)**
>
> (b) The appellant did not obtain a resident's permit in Qatar. **(denied)**
>
> (c) The appellant obtained a work permit in Qatar, valid until August 13, 2010. **(admitted)**
>
> (d) After his work permit expired, the appellant had to leave Qatar. **(admitted)**
>
> (e) In December 2007, the appellant obtained a driver's licence in Qatar, valid until December 11, 2012. **(admitted)**

(f) The appellant kept a bank account, a credit card and investments (RRSP and others) in Canada. **(admitted)**

(g) The appellant held a Canadian passport. **(admitted)**

(h) The appellant has two sons of full age who remained in Canada and whom he visited in 2007 and 2008. **(admitted)**

(i) In 2007, the appellant returned to Canada four times for around two weeks each time. **(admitted)**

(j) In 2008, the appellant came back to Canada three times. **(admitted)**

(k) The appellant filed his income tax return for the 2007 taxation year as a resident of Canada. **(admitted)**

(l) At no time relevant to the case, did the appellant become a resident of a country other than Canada. **(denied)**

[3] The facts listed in these paragraphs were all admitted, except for paragraph (a), to which the appellant did not reply, and paragraphs (b) and (l), which were denied.

[4] The evidence consisted mainly of the appellant's testimony. His son also testified.

[5] The appellant gave a lengthy testimony and provided many details about his career, his family, one of his sons' many health problems, and issues with his wife, which led to a divorce in early 2008.

[6] Because of the appellant's skills, he had a very good reputation, earned by working for companies in the paper, electricity and nuclear energy industries. These companies handled very dangerous products, and operated laboratories that manufactured peroxide, among other things.

[7] I find, on the preponderance of evidence, that the appellant's departure from Canada was not spontaneous, impulsive or motivated only by the lure of profit.

[8] The appellant had a very good reputation, and it is easy to say that he had no problem finding good, well-paying jobs in Canada. Indeed, he was sought out. He often lived far from his family, in particular in Montreal when his family lived in the Trois-Rivières region; moreover, he also had a very long stay in China, and had always dreamed of leaving Canada for good.

[9] He hesitated mainly because of the health problems of one of his sons. At one point, his son told him he had to think of himself and live his dream with no regrets.

[10] The appellant stated that after his son had encouraged him to fulfil his dream of leaving Canada, there was no longer anything holding him back. He commenced a process that would lead to a definitive break; he gave his share of the residence to his wife, whom he divorced in early 2008.

[11] He disposed of his property without exception, other than two accounts in a caisse populaire, which he used to carry out his transactions. His driver's licence was suspended and he did not renew it; he did this many months before leaving for Qatar.

[12] He returned for short stays in Canada only to see his two sons—one of whom had serious health problems—his mother and a few friends.

[13] During these short stays, the appellant rented a car, stayed at a hotel and split his time between Montréal, Trois-Rivières and Québec.

[14] Through the years, this and other courts have heard many cases in which the issue was the country or place of residence of a physical person. In spite of a rich case law, there is still no magic formula that leads to a definitive answer.

[15] Many decisions have, however, explained the appropriate reasoning to come to a conclusion on the issue.

[16] I feel it is useful to reproduce certain excerpts from these decisions; *Thomson v. M.N.R.*, [1946] S.C.R. 209 is a key decision on the determination of the place of residence of a person who has left Canada.[1]

[17] In *Guo v. Canada*, 2004 FCA 390, the Federal Court of Appeal stated, at paragraph 2, that "[t]he determination of a person's residence is a complex question which requires the judge to weigh many factors." And, "[i]t is clear that residence is not simply a matter of a person's status under the Immigration Act, R.S.C. 1985, c. I-2, though a person's status may be some evidence of residence."

[18] In *Thomson*, *supra*, we learn that the issue is determining the place the taxpayer regularly, normally or customarily lives in his usual mode of life. The degree to which a person in mind and fact settles into a place and maintains and centralizes his ordinary mode of living, including social relations, interests and

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[1] See Paul Lefebvre's article, "*Le pouvoir d'imposition du Canada : la résidence et l'arrêt Thomson 60 ans plus tard*", (2006) 54 : 3 Revue fiscale canadienne 781-801.

conveniences must be examined. Rand J. made the following comments at pages 224 and 225:

> The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.
>
> The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the per-con concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.
>
> For the purposes of income tax legislation, it must be assumed that every person has at all times a residence. It is not necessary to this that he should have a home or a particular place of abode or even a shelter. He may sleep in' the open. It is important only to ascertain the spatial bounds within which he spends his life or to which his ordered or customary living is related. Ordinary residence can best be appreciated by considering its antithesis, occasional or casual or deviatory residence. The latter would seem clearly to be not only temporary in time and exceptional in circumstance, but also accompanied by a sense of transitoriness and of return.
>
> But in the different situations of so-called "permanent residence", "temporary residence", "ordinary residence", "principal residence" and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited. On the lower level, the expressions involving residence should be distinguished, as I think they are in ordinary speech, from the field of "stay" or "visit".

Reeder **factors**

[19] In *The Queen v. Reeder*, [1975] C.T.C. 256 (F.C.T.D.) the Federal Court set out the factors the Court must consider when determining a person's residence. In *Gaudreau v. The Queen*, 2004 TCC 840, affirmed in 2005 FCA 388, Lamarre J. restated these factors:

24 Accordingly, as suggested by counsel for the appellant, the question is to determine where, during the period at issue, the appellant, in his settled routine of life, regularly, normally or customarily lived. One must examine the degree to which the appellant in mind and fact settled into, maintained or centralized his ordinary mode of living, with its accessories in social relations, interests and conveniences, at or in the place in question.

25 This is mainly a question of fact. In The Queen v. Reeder, 75 DTC 5160 (F.C.T.D.), referred to by the appellant, the court listed some factors considered to be material in determining the question of fiscal residence, at page 5163:

> ... While the list does not purport to be exhaustive, material factors include:
>
> a. past and present habits of life;
>
> b. regularity and length of visits in the jurisdiction asserting residence;
>
> c. ties within that jurisdiction;
>
> d. ties elsewhere;
>
> e. permanence or otherwise of purposes of stay abroad.
>
> The matter of ties within the jurisdiction asserting residence and elsewhere runs the gamut of an individual's connections and commitments: property and investment, employment, family, business, cultural and social are examples, again not purporting to be exhaustive. Not all factors will necessarily be material to every case. They must be considered in the light of the basic premises that everyone must have a fiscal residence somewhere and that it is quite possible for an individual to be simultaneously resident in more than one place for tax purposes.

[20] Lamarre J. then cited Rip J. in *Snow v. The Queen*, 2004 TCC 381:

30 As Rip J. said in his recent decision in *Snow v. Canada*, [2004] T.C.J. No. 267 (Q.L.), at paragraph 18:

> 18 A person may be resident of more than one country for tax purposes. The nature of a person's life and the frequency he or she comes to Canada are important matters to consider in determining one's residence. The words "ordinarily resident" in s.s. 250(3) refer to the place where, in the person's settled routine of life, the person normally or customarily lives. The intention of a taxpayer, while obviously relevant in determining the "settled routine" of a taxpayer's life, is not determinative. A person's temporary absence from Canada does not necessarily lead to a loss of Canadian residence if a family household remains in Canada, or possibly even if close personal and business ties are maintained in Canada.

> …
>
> 32 It is clear from the employment agreement that the appellant was given an assignment in Egypt for which he was even paid an expatriation premium for the duration thereof. The agreement provided for air transportation back and forth between the appellant's home location and his work location. The appellant kept all his assets in Canada and before leaving Canada made all the necessary arrangements to have someone look after those assets. His purpose in accepting the contract in Egypt was not to give up his ties with Canada but mainly to earn a living. The appellant agreed to go there on a contractual basis and did not sever his attachments to, or his links with, Canada. The appellant did not in mind and fact abandon his general mode of life in Canada. As a matter of fact, the house in Timmins was available at all times as a place in which he could customarily live. To use the words of Rand J. in the *Thomson* case, he and his wife maintained their ordinary mode of living, with its accessories in social relations, interests and conveniences, in Canada. If I may distinguish the present case from the *Boston* case, the duration of the contract here was a lot shorter and the appellant did not demonstrate that he became active in the community in which he lived in Egypt. He was only there to do his work. Finally, the *Boston* case was considered but not followed in the *McFadyen* case, which was affirmed by the Federal Court of Appeal.

[21] In *Mahmood v. The Queen*, 2009 TCC89, the Court concluded that a resident of Guyana who came to Canada regularly but was not a permanent resident was a non-resident, even though he seemed to operate a business in Canada.

[22] In *Filipek v. The Queen*, 2008 TCC 351, Miller J. summarized the significant residence concepts at paragraph 2:

> 2 Case law has provided some considerable guidance as to what the Court is to consider in determining residence. The *Income Tax Act* itself stipulates in subsection 250(3) that a person resident in Canada includes a person who was at the relevant time ordinarily resident in Canada. There are many judicial pronouncements on the meaning of ordinarily resident (see for example *Thomson v. Minister of National Revenue*, *Her Majesty the Queen v. Reeder,* and *Reed v. The Minister of National Revenue*). What do these cases tell us?
>
> (i) Every person has a residence.
>
> (ii) A person may have more than one residence and can be simultaneously resident in more than one place for tax purposes.
>
> (iii) Residence is determined by ascertaining the spatial bounds within which an individual spends his life or where in the settled routine of his life he regularly, normally and continuously lives.

> (iv) Factors to consider in determining residency are connections in Canada regarding property, investments, employment, family, business, cultural, social – a non-exhaustive list.

Interpretation Bulletin IT-221R3

Severing ties with the country

[23] The courts have established that residents of Canada must generally sever their ties with the country to become non-residents. Further to the former Canada Revenue Agency policy, a taxpayer who leaves Canada must intend on staying abroad for a period of at least two years to be considered a non-resident.[2] In *Peel v. Canada*, [1995] 2 C.T.C. 2888 (TCC), the Tax Court of Canada held that the two-year rule was not sound legally. Since 2002, this "rule" no longer appears in Bulletin IT-221R3.[3]

Significant and secondary ties

[24] The new Bulletin IT-221R3 (2002) states that the following are "significant" in determining residence status:

> (*a*) dwelling place (or places),
>
> (*b*) spouse or common-law partner,
>
> (*c*) dependants.

But the following are secondary ties:

> (*a*) personal property in Canada (such as furniture, clothing, automobiles and recreational vehicles),
>
> (*b*) social ties with Canada (such as memberships in Canadian recreational and religious organizations),
>
> (*c*) economic ties with Canada (such as employment, bank accounts, RRSPs, credit cards and securities accounts),
>
> (*d*) landed immigrant status or work permits in Canada,

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[2] See former Bulletin IT-221R2, *Determination of an Individual's Residence Status*, at paragraph 4.

[3] Interpretation Bulletin IT-221R3, *Determination of an Individual's Residence Status* (2002), is reproduced in Schedule A.

(e) provincial medical insurance coverage,

(f) a Canadian driver's licence,

(g) a vehicle registered in Canada,

(h) a seasonal dwelling place or leased dwelling place in Canada,

(i) a Canadian passport, and

(j) memberships in a Canadian union or professional organization.

[25] The other residential ties, generally of "limited importance" except when taken together with others, include a Canadian mailing address, a safety deposit box, business cards, a phone number and subscriptions to Canadian newspapers and magazines.

Recent cases

[26] In *Perlman v. The Queen*, 2010 TCC 658, Boyle J. held that if a taxpayer did not sever his ties with Canada, studying abroad, even for 16 years, was of no relevance.

[27] In *Snow*, *supra*, Rip J. found that the residential ties were not severed because:

> 19 In the case at bar the taxpayer took an assignment for a two-year period in Belize. She may not have believed that she would return to Canada once the assignment terminated. She maintained a home in Vancouver where her son and his family resided. All of her banking and other financial interests were in Canada. Her pension cheques were paid to her Canadian bank account. Her mail continued to be sent to her in Vancouver. Simply, she did not trust the Belize banking or postal systems and had no intention to reside on any permanent basis in Belize. She felt the comfort of having these matters remain in Canada.
>
> 20 In Belize Mrs. Snow lived in a "quite modest" apartment that included two bedrooms and "basic furnishings". She remarked that she "could not live in Belize" for an extended time.

[28] In *Revah v. The Queen*, 2004 TCC 312, Rip J. concluded that the ties had been sufficiently severed for the taxpayer to become a non-resident:

> 28 In this case, the appellant was resident in the United States and spent time in Montreal only to visit his family once or twice a year. In his testimony,

> however, the appellant did not indicate the duration of his visits to Canada in the 1993 and 1994 taxation years. The appellant did not have a residence in Canada. In effect, the appellant cut the great majority of his ties with Canada. He has two bank accounts in Canada and they contain the sums he accumulated as pension and RRSP benefits. He made charitable donations to organizations located in Canada. The fact that the appellant had several links with Canada did not make the appellant a Canadian resident indefinitely. The links that Mr. Revah had with the United States were even more substantial than those he had with Canada. He usually lived in the United States, which is where most of his property was located. In 1992, the appellant intended to leave Canada permanently and he actually left this country.
>
> 29 The appellant was not therefore resident in Canada during the 1993 and 1994 taxation years. The appeal is allowed with costs.

[29] In *Barton v. The Queen*, 2007 TCC 222, Lamarre J. concluded that the taxpayer still had family, social relations, interests and conveniences in Canada:

> 20 I am of the view that the appellant maintained his ordinary mode of living, with his family and social relations, interests and conveniences, in Canada. His children and his wife were all living in Canada; he had a home available to him in Canada; and he came back very often, despite the long drive, in order to live, as far as possible, a normal family life. His habits of life continued to be centered on Canada. As soon as he found an opportunity to work in Canada, he accepted it, although this meant leaving a secure employment in the USA. Apart from his retirement plan in the USA, most of his savings were in Canada. He never gave up his Canadian health card or his Canadian driver's licence. He maintained close personal and economic ties with Canada throughout. I therefore find that the appellant never ceased to reside in Canada during the period at issue. The same conclusion by this Court in a similar situation was accepted by the Federal Court of Appeal in *Gaudreau v. The Queen*, 2005 FCA 388.

[30] In *Hauser v. The Queen*, 2005 TCC 492, affirmed 2006 FCA 216, Rip J. concluded that an Air Canada pilot did not truly "divorce" from Canada after he moved to the Bahamas, for the following reasons stated at paragraph 58:

> Canada was a magnet that attracted the Hausers. After they set up residence in the Bahamas both of Mr. and Mrs. Hauser, and particularly Mr. Hauser, continued to have a presence in Canada. Mr. Hauser spent over a third of a year in Canada in each year. Air Canada required Mr. Hauser to be in Canada to fly airplanes; he reported to work at Pearson Airport and other airports in Canada. Most of his flights left from and returned to Pearson; much of his training was at Pearson. Pearson Airport was part of the routine of life. Mr. Hauser's presence in Canada during the years in appeal was not occasional, casual, deviatory, intermittent or transitory. He was in Canada in great part because he had to be, to earn a living.

[31] In *Yoon v. The Queen*, 2005 TCC 366, O'Connor J. found that the taxpayer had closer ties to Korea, even though her husband still lived in Canada. The tie-breaker rules in the tax convention between Canada and Korea state that in case of doubt as to a person's "centre of vital interests," that person is deemed to be a resident of the country in which he stays more frequently. O'Connor J. found that:

> 41 The evidence shows that Mrs. Yoon spent more time in Korea than in Canada in 2001. Therefore, her habitual abode was in Korea and not Canada. If her centre of vital interests cannot be determined, then this tie-breaker definitely provides that Mrs. Yoon was a resident of Korea in 2001.

[32] In *Laurin v. The Queen*, 2006 TCC 634, affirmed 2008 FCA 58, Chief Justice Bowman (as he was then) concluded that the taxpayer, an Air Canada pilot, became a resident of the Turks and Caicos Islands. He stated:

> 32 …For one thing, he did [sever his residential ties with Canada]. He broke up with his girlfriend, he got rid of his house, his car, his licence and his health insurance. When he came to Canada he stayed with friends but it was at their sufferance. Moreover, to say that one has not severed residential ties with a country is not tantamount to saying that one is resident there. Residual friendships and employment connections do not create residency...

[33] In *Johnson v. The Queen*, 2007 TCC 288,[4] Paris J. concluded that the appellant had not severed his residential ties to Canada when he went to work in the United Arab Emirates with his wife under a three-month contract because he maintained his ties to Canada, in particular his houses, which he rented, his RRSPs, his driver's licence, his credit cards and his investments composed of Canadian shares. He stated:

> 42 Although the Appellant stated that he intended to work in the UAE for at least 5 years, the assignment was only set up for a three year term and was ended at the earliest possible date, after two years and three months. It is also material that the assignment provided that at the conclusion of the assignment Mitel was required to bring the Appellant and his spouse back to Canada, and was obligated to make best efforts to find a position for the Appellant in its Canadian operations.
>
> 43 Throughout the time the Appellant and his spouse were in the UAE, they retained ownership their house on Parkmount Crescent, which had been their family home for 20 years. Even after accepting the UAE assignment, the Appellant and his spouse purchased a second house in Ottawa, which they designated as their principal residence.
>
> …

[4] This decision is reproduced in Schedule B.

47 Further ties that the Appellant maintained with Canada in this case included his RRSPs, his Ontario driver's license some Canadian credit cards and investments in Canadian stocks.

48 While I agree with counsel for the appellant that the Appellant's employment by a Canadian employer is not sufficient in itself to create residency, the terms and conditions of that employment are relevant. In this case, Mitel was obliged to return the Appellant and his spouse to Canada at the end of the assignment and was also obliged to try to find an equivalent position for the Appellant within Mitel's Canadian operations.

49 I agree as well that the Appellant had no substantial ties with any location other than Canada and the UAE in 2001 and 2002, and that the Appellant's ties to the UAE were only temporary in nature. The properties in which the Appellant resided in the UAE were rented under one year leases, his vehicle was leased, his work assignment was for 36 months and he chose not to bring the bulk of his belongings with him. Although the Appellant said that he had joined certain clubs in the UAE, there was no evidence to suggest that the Appellant had paid any permanent membership fees to join these organisations

50 I agree with the Respondent that the Appellant's ties to the UAE were similar in nature to those established by the taxpayer in *Gaudreau v. The Queen* in Egypt, which were described by Lamarre, J. as ties undertaken during the term of the taxpayer's absence which were necessary to permit him and his wife to enjoy an acceptable and expected lifestyle while in Egypt and abandoned on his return to Canada. As in *Gaudreau*, the Appellant's ties to the UAE were abandoned completely upon his return to Canada.

51 The Appellant's ties to Canada were also similar in nature and extent to those maintained by the taxpayer in the case of *McFadyen v. The Queen*, 2000 DTC 2473 during three years the taxpayer lived in Japan. In *McFadyen*, the Court said:

> 103 I have concluded that the Appellant's ties with Canada during the three-year period were significant.
>
> 104 n my view of the evidence, the Appellant can be considered to have accompanied his spouse on a temporary, overseas posting. He returned to Canada on three occasions during his spouse's assignment to Japan. He maintained with his spouse two joint bank accounts in Canada, one was used for the mortgage in connection with one of their properties and the other was used for everything else including another mortgage. He owned two houses in Canada, one of which was later occupied as his home on his return to Canada after giving two months notice. He maintained at his own expense during the years in issue his professional membership in the Association of Professional Engineers in Ontario. The

> transitory nature of his posting in Japan is reflected by the storage of items of furniture, which were large and bulky, and appliances in Canada, the retaining of a safety deposit box and the maintaining of a registered retirement savings plan, a credit card, and a current Ontario driver's license. These ties were largely economical but in part personal.
>
> 105 The evidence supports the contention that the Appellant left Canada for Japan with the intention that he may not return and I accept his evidence that he made significant efforts not to return. However, the Appellant maintained the Canadian connections with Canada in case he did return. He did in fact return and resumed his ties to Canada.

52 As in the case before me, neither taxpayer in *Gaudreau* and *McFadyen,* returned to Canada frequently in the years in issue yet both were held to be ordinarily resident in Canada. As well the taxpayers in both cases were away from Canada over 3 years, longer than the Appellant in this case, and both cases, the finding that the taxpayers were ordinarily resident in Canada in the years they were absent from Canada was upheld by the Federal Court of Appeal.

[34] In *Mullen v. The Queen*, 2008 TCC 294, Sheridan J. concluded that, since the taxpayer had retained a house that was in his son's name, a bank account, and his Canadian medical insurance coverage, he did not sufficiently sever his residential ties. She noted that "ending one's residency in Canada is no simple thing":

17 From these decisions it can be seen that ending one’s residency in Canada is no simple thing. Like the unsuccessful taxpayers in *McFadyen* or *Johnson*, the Appellant also divested himself of his principal residence and vehicles; he intended to remain permanently employed outside of Canada; he made efforts to realize that intention; he organized his health insurance to have suitable coverage outside of Ontario; with the exception of 1998, he made only infrequent trips to Canada. These efforts in themselves fall short of establishing that he had severed his ties to Canada. In my view, they are further weakened by the additional facts set out below.

18 On March 2, 1998, the Appellant’s employment in China ceased. Retired or not, the fact is he did not obtain other employment in China or Thailand after that time. There was no foreign employment to diminish whatever links he may have had to Canada. He had bank accounts at various times in New York, Malaysia and Singapore. He never opened a bank account in Thailand, a deliberate choice based on his understanding of the attendant tax consequences. He also had a range of credit cards from various foreign banks. By contrast, no matter where he was in the world, he always maintained his Canadian bank account and his VISA credit card through the Royal Bank of Canada. I am not convinced by his assertion that this was just to take advantage of the “points” attached to the card. His entitlement to drive outside of Canada hinged on his

> proof of a valid Ontario driver's licence. He used rented vehicles in Thailand whereas in Canada, he purchased a used car for his use. Although he ultimately divested himself of that car, by transferring it to the family's holding company he maintained access to it. Although he acquired additional private health insurance while abroad, he never cancelled his Ontario medical insurance. Having had private coverage does little to enhance the Appellant's position as even the most occasional traveller is likely to obtain additional health insurance while outside Canada. While in China and Thailand, he and his spouse had only personal effects with them; following the sale of his principal residence, all items of any significance to them were housed in the Belleville dwelling.

[35] In *Filipek*, *supra*, Miller J. did not accept the Air Canada pilot's testimony and concluded that he did not cease being a resident of Canada for the following reasons, stated at paragraph 33:

> …I find his routine of life, as an Air Canada pilot working out of Vancouver, was indeed centred in Vancouver. His banking, his time spent in the area, his ongoing relationship with his in-laws, his financial commitments to them and his own family, combined with his evasive, contradictory evidence of what he was really doing while in Vancouver for well over 100 days each year cause me to conclude that any settled way of life was primarily in Vancouver. I recognize he does not have his own home or physical residence in Canada, and while that is troubling, it is not fatal to a finding that he can still be ordinarily resident in Canada. If such a physical space is required, I have no difficulty concluding that he had ready access to his in-laws' home, and did, in fact, rely on that access.

[36] In *Song v. The Queen*, No. 2008-733(IT)I, January 14, 2009 (TCC), affirmed 2009 FCA 278, application for leave to appeal dismissed, [2009] S.C.C.A. No. 492 (QL) (SCC), Paris J. found that the taxpayer's settled routine of life (namely her house, children, property and social ties) were in Japan, even though her husband lived in Canada.

> … It is true that her husband remained in Canada after April 3rd, 2006, and that his settled routine of living was here. While this is a significant tie to Canada, it is outweighed, in my view, by the permanence of the appellant's ties to Japan during the period. She had a year-round residence, and her children attended school and daycare there. Almost all of her children and her own belongings were in Japan, her economic ties were almost exclusively with Japan, and her social connections were either in Japan or China.
>
> By contrast, she did not maintain a home for herself and her children in Canada. Her husband lived in a two-bedroom townhouse that he shared with roommates, who were asked to leave to enable the appellant and the children to stay with her husband when they visited. On all of the evidence I find that the appellant's visits to Canada do not amount to her customarily or normally living in Canada in 2006 and 2007. She spent less than 10 percent of her time in Canada, between April 2006 and

> September 2008, and cannot have been said to have established any significant connections of her own to Canada apart from her husband's presence here.
>
> I do not accept that the appellant had stronger ties with Canada than Japan during the period in issue. While it is true that the appellant planned to leave Japan and come to live permanently in Canada, this was not planned to occur until 2008. In the meantime, her day-to-day routine was centered in Japan, carrying through with a course of studies commenced in or about 2001, and caring for her three children. Her trips to Canada were intermittent visits, approximately equal in number and duration to her husband's trips to Japan in those years. This was not sufficient to establish a residence in Canada for her.

[37] In *Bensouilah v. The Queen,* 2009 TCC 440,[5] the appellant, a resident of Saudi Arabia and Canada, worked in Saudi Arabia while his family remained in Canada. He kept his house in Canada. Angers J. found that the ties had not been severed.

[38] In *Denisov v. The Queen*, 2010 TCC 101, Angers J. found that the appellant resided in Canada, not Russia, because he did not show that, for the purposes of Article 4 of the tax treaty between Canada and Russia, he was subject to full Russian taxation, because his wife, his house and personal property were in Canada.

[39] In the present case, the evidence shows the tie with Canada was severed in January 2007. The evidence also showed that this break followed a lengthy period of reflection that started when the appellant first lived away from his family, when he worked in Montreal for around a year, and then during a long stay in China.

Analysis

[40] The respondent's main argument is that every person must have a residence. Presuming the appellant had not resided in Qatar, she found that he must necessarily have resided in Canada.

[41] After arriving at this conclusion, she relied on the following facts:

- The appellant came to Canada a few times.
- The appellant had two bank accounts in Canada, which he used to make all his payments, in particular for his credit cards, which were also issued in Canada.

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[5] This recent decision is reproduced in Schedule C and summarizes the principles established in the case law well.

- The appellant had some money in an RRSP.

- The appellant had no postal address in Qatar.

[42] As for the other elements, for example, not having a driver's licence, not having property such as furniture, clothing, accommodations or vehicles, and not having a health insurance card, the respondent claims that they have no impact one way or the other.

[43] The evidence clearly showed that the appellant's decision came after a lengthy period of reflection. It also showed that the appellant did not have any deep roots and did not hesitate to leave when his son, who was ill, let him go with no regrets.

[44] His relationship with his wife was so tense that they tolerated one another only because of their shared concern about their son who was ill.

[45] The appellant had a very good position. He did not want to run away from his responsibilities. He gave all his property and agreed to pay generous support payments before leaving; he has always complied with these commitments. He did not apply for a new driver's licence when his was suspended, even though the evidence showed it was important for him to be able to use a car if he wanted an international driver's license or even a driver's licence from the country in which he was living.

[46] He specifically gave up his health card in 2008.

[47] Regarding the beginning of the relevant period of the appeal, the beginning of 2007, it must be considered that a reasonable person would be careful. The appellant stated he could only get a work permit if a medical exam showed he was in good health, otherwise he had to return to his country of origin. The same can be said for the position, the duration of which generally depends on the employer, not the employee.

[48] In other words, there is, normally, a reasonable delay before a permanent break.

[49] This explains the time between the beginning of the period in question and the time the appellant gave up his health insurance.

[50] As for the argument that the appellant never had a residence in Qatar, I do not believe it is cogent, because the appellant was employed and had a residence. The appellant's strong interest in staying in Qatar was shown by the intensive courses he

took to get a driver's licence, when he could have travelled with coworkers, even though he had cancelled his Canadian driver's licence. When his employment ended in Qatar, the appellant returned to the country to see the people with whom he had worked and the work he had done.

[51] In particular, in view of the following facts, I find that, on the preponderance of the evidence, the appellant's position must be accepted:

- The family context was special and conducive to a permanent departure.
- The appellant left after disposing of all his own property.
- The appellant waived his right to obtain a new driver's licence a few months before leaving Canada.
- The appellant returned to Canada a few times for very short stays that were for the purpose of visiting his two sons, his mother and friends.
- After leaving Qatar upon the expiry of his work contract, the appellant returned to meet friends and business acquaintances, thereby showing he had been happy there.
- The break came after a long period of thorough reflection.
- The appellant has set out all the facts showing his intention to sever ties with this country permanently.
- Although the relevance of prior facts is limited, they tend to confirm that the appellant severed his ties with Canada in mid-January 2007.
- Lastly, I am of the view that the cases I have cited support my conclusion, as does Interpretation Bulletin IT-221R3.

[52] For these reasons, I conclude that the appellant ceased being a resident of Canada as of January 13, 2007; as a result, the appeal is allowed with costs in favour of the appellant.

Signed at Ottawa, Canada, this 24th day of August 2011.

"Tardif J.

Translation certified true
on this 7th day of November 2011.

François Brunet, Revisor

CITATION:	2011 TCC 357
COURT FILE NO.:	2010-1756(IT)G
STYLE OF CAUSE:	DENIS HAMEL v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	June 9, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Alain Tardif
DATE OF JUDGMENT:	August 24, 2011

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