Docket: 2011-2358(IT)I

BETWEEN:

BELINDA J. SNOW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 22, 2012 at Edmonton, Alberta

Before: The Honourable Justice J.M. Woods

Appearances:

For the Appellant:	The appellant herself
Counsel for the Respondent:	Robert Drummond

JUDGMENT

The appeal with respect to determinations made by the Minister of National Revenue under the *Income Tax Act* for the 2005, 2006, 2007 and 2008 base taxation years is allowed, and the determinations are referred back to the Minister for reconsideration and redetermination on the basis that the appellant was a resident of Canada only during the 2005 and 2006 base taxation years. Each party shall bear their own costs.

Signed at Toronto, Ontario this 9th day of March 2012.

"J. M. Woods"

Woods J.

Citation: 2012 TCC 78
Date: 20120309
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BETWEEN:

BELINDA J. SNOW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] In 2003, Belinda Snow left Canada with her husband, Mark Lewis, and their two children so that Dr. Lewis could pursue studies at the masters level at the University of Otago in New Zealand. The family returned to Canada in 2011 after Dr. Lewis had obtained a doctorate at the same university. He now practices in Alberta in his area of study, clinical neuropsychology.

[2] During Ms. Snow's absence from Canada, she received child benefits from the government of Canada in respect of three children. The benefits included the child tax benefit and the goods and services tax credit that are provided for in the *Income Tax Act*. In 2010, the Minister of National Revenue determined that Ms. Snow was not entitled to these benefits on the basis that she was not a resident of Canada while the family was in New Zealand.

[3] Ms. Snow appeals these determinations relating to the 2005, 2006 and 2007 base taxation years for the child tax benefit and the 2005, 2007 and 2008 base taxation years for the goods and services tax credit.

[4] For clarity, the amended notice of appeal refers to two other benefits, the child disability benefit (CDB) and the national child benefit supplement (NCBS). As clarified in written submissions received from the respondent following the hearing, these amounts do not have to be considered separately because they are part of the child tax benefit in section 122.61 of the *Act*.

Factual background

[5] Ms. Snow first came to Canada from New Zealand as a child. She grew up here and married a Canadian.

[6] Just prior to the family's departure from Canada, they lived in the basement of the home belonging to Ms. Snow's parents in Chilliwack, British Columbia. Dr. Lewis was completing undergraduate studies at that time.

[7] Following his undergraduate degree, Dr. Lewis was accepted into a masters program at the University of Otago. In 2003, the family left for New Zealand for that specific purpose. From the outset, they planned to eventually settle back in Canada where their roots were.

[8] After being in New Zealand three years, Dr. Lewis obtained his masters degree and decided to pursue doctoral studies at the same university in the specialized field of clinical neuropsychology. He achieved a PhD after a further five years.

[9] Ms. Snow and her husband had two children before they went to New Zealand and a third child while they were there.

[10] All the family's significant roots were in Canada (friends and family) and they always planned to return to Canada after Dr. Lewis completed his studies. In actuality, the family did return immediately after Dr. Lewis' studies were finished in May 2011. He obtained a position in Alberta working in his field of study.

[11] Prior to 2003, the family had relatively few household possessions while they lived in the basement of the home belonging to Ms. Snow's parents. They went to New Zealand only with what they could pack in suitcases.

[12] In New Zealand, Ms. Snow worked on a very occasional basis. Dr. Lewis did not work until the last two years of his doctoral program.

[13] While the family was in New Zealand, they lived in several different accommodations. Ms. Snow testified that they lived a rather spartan existence because they did not want to acquire more possessions than necessary in order to simplify the move back to Canada. I accept this testimony.

[14] The family did not visit Canada during their eight-year stay in New Zealand. Mrs. Snow testified that her parents visited them often as the parents had business interests in New Zealand.

Analysis

[15] Ms. Snow submits that she remained a Canadian resident for purposes of the *Act* during the base taxation years mentioned above, namely 2005, 2006, 2007 and 2008.

[16] The legal principles to be applied in a case such as this were described by Bowman C.J. in *Laurin v The Queen*, 2006 TCC 634, 2007 DTC 236 (aff'd 2008 FCA 58, 2008 DTC 6175). At paragraph 24 of that decision, reference is made to comments by Rand J. in *Thomson v MNR*, [1946] SCR 209, which explain the difference between residence and sojourning.

> [24] At paragraph 47, Rand, J. continues:
>
> > 47. 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.
> >
> > 48. 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 person 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.
> >
> > 49. 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.
>
> 50. But in the different situation 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 expression involving residence should be distinguished, as I think they are in ordinary speech, from the field of "stay" or "visit".

[17] Ms. Snow and her husband provided detailed evidence which clearly establishes that they left Canada only so that Dr. Lewis could pursue advanced studies at a university in New Zealand and that they always intended to settle in Canada after that time. I also accept Dr. Lewis' testimony that, at the time the family left Canada, he only contemplated doing a masters degree in New Zealand which normally lasts about two years.

[18] I readily accept that Ms. Snow intended to return to Canada after Dr. Lewis completed his studies. However, she kept very few residential ties to Canada during her stay in New Zealand. The real question is whether the family's stay in New Zealand had a sense of transitoriness, as Rand J. described in *Thomson*.

[19] If Ms. Snow did not establish residence in New Zealand by having a customary mode of living there, as described in *Thomson*, then she would retain her residence in Canada even though she was not physically here.

[20] If Ms. Snow had been away from Canada for only a couple of years, I would have concluded that her stay in New Zealand had the sense of transitoriness described in *Thomson*. She would have been properly described as a visitor in New Zealand. Her ordinary residence would have remained in Canada.

[21] The problem, though, is that Dr. Lewis' studies lasted eight years. The difficulty I have with Ms. Snow's position is that I am not satisfied that her presence in New Zealand remained transitory throughout this period. At some point, the family likely settled into an ordinary mode of living in New Zealand.

[22] In the circumstances of this case, I will accept that Ms. Snow's stay in New Zealand was transitory during the period when Dr. Lewis pursued a masters degree. The period was of sufficiently short duration that the family could properly be

described as visitors during this period. Accordingly, Ms. Snow remained a Canadian resident during this period.

[23] When Dr. Lewis took up his doctoral studies, however, I am not satisfied that Ms. Snow's stay remained transitory. This longer term commitment, coming after the family was in New Zealand for three years, suggests that the family was likely settled into life in New Zealand as their customary mode of living. Ms. Snow had few residential connections to Canada at this point and ceased to be a Canadian resident at that time.

[24] The evidence does not reveal precisely when Dr. Lewis committed to the doctoral program. In the absence of better evidence, I will assume that it occurred at the end of 2006 and that Ms. Snow's residence in Canada ceased at that time.

[25] Finally, I would comment concerning a decision relied on by Ms. Snow, *Perlman v The Queen*, 2010 TCC 658, 2011 DTC 1045. In that case, the taxpayer was found to be a resident of Canada during a period in which he was studying abroad. The period of study was more than 16 years, which was much longer than in the case at bar.

[26] Determining the residence of an individual for tax purposes is a particularly fact driven exercise. There are many factual differences between Mr. Perlman's circumstances and Ms. Snow's. Moreover, what is particularly significant about the *Perlman* decision is that the conclusion turned on the burden of proof.

[27] At paragraph 39 of *Perlman*, Justice Boyle states:

> [39] While this is a difficult case, I am left in the position that on the evidence before the Court, all of which was put in by or through the appellant, the Crown has been unable to discharge the burden upon it to satisfy the Court on a balance of probabilities that Mr. Perlman was not a resident of Canada in the relevant period. For that reason, the appeal is allowed, with costs.

[28] The Crown had the burden in *Perlman* because the Minister had not relied on the residence issue when making its original decision. In this case, the Minister did rely on residence at the determination stage. Ms. Snow therefore bears the usual burden of proof to establish a *prima facie* case.

[29] In this case, Ms. Snow has not shown that her customary mode of living was not in New Zealand during 2007 and 2008, or that she retained sufficient residential ties in Canada to continue to be a resident of Canada for purposes of the *Act*.

[30] In the result, the appeal will be allowed, and the determinations will be referred back to the Minister of National Revenue for reconsideration and redetermination on the basis that Ms. Snow was a resident of Canada only during the 2005 and 2006 base taxation years.

[31] In light of the mixed success, each party shall bear their own costs.

Signed at Toronto, Ontario this 9th day of March 2012.

"J. M. Woods"

Woods J.

CITATION:	2012 TCC 78
COURT FILE NO.:	2011-2358(IT)I
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REASONS FOR JUDGMENT BY:	The Honourable Justice J.M. Woods
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APPEARANCES:

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