Date: 20071018

Docket: T-2206-06

Citation: 2007 FC 1071

BETWEEN:

HUGH WILLIAM PERRY, IN HIS CAPACITY OF TRUSTEE OF THE 2005 ROBERT JULIEN FAMILY DELAWARE DYNASTY TRUST

Applicant

and

CANADA (THE MINISTER OF NATIONAL REVENUE)
and
CANADA REVENUE AGENCY

Respondents

REASONS FOR ORDER

GIBSON J.

INTRODUCTION AND BACKGROUND

[1] By letter dated the 23rd of February, 2005, counsel for the Applicant wrote to the Canada Revenue Agency, Director, Competent Authority Services Division, International Tax Directorate, Compliance Programs Branch. Counsel requested that the residence of the 2005 Robert Julien Family Delaware Dynasty Trust (the "Applicant Trust") be settled in accordance with paragraph 4 of *Article IV* of the *Convention Between Canada and The United States of America With Respect to Taxes on Income and on Capital*[1] signed on the

[1] Schedule 1 to the *Canada-United States Tax Convention Act, 1984*, S.C. 1984, c. 20 (the "*Convention Act*").

26th of September, 1980, as amended by the protocols signed on the 14th of June, 1983[2], the 28th of March, 1984[3], the 17th of March, 1995[4] and the 29th of July, 1997[5] (the "*Convention*"). For ease of reference, a copy of the substance of that letter is attached as Annex A.

[2] Paragraph 4 of *Article IV* of the *Convention* reads as follows:

Where by reason of the provisions of paragraph 1 an estate, trust or other person (other than an individual or a company) is a resident of both Contracting States, the competent authorities of the States shall by mutual agreement endeavour to settle the question and to determine the mode of application of the Convention to such person.	Lorsque, selon les dispositions du paragraphe 1, une succession, une fiducie ou une autre personne (autre qu'une personne physique ou une société) est un résident des deux États contractants les autorités compétentes des États contractants s'efforcent d'un commun accord de trancher la question et de déterminer les modalités d'application de la Convention à ladite personne.

[3] By letter dated the 17th of June, 2005, the Canada Revenue Agency (the "CRA") responded to the request on behalf of the Applicant and concluded:

> …we are not able to proceed with your request. However, in the event that income, profit or gains of the Trust become subject to taxation in both the United States and Canada, we would be prepared to consider a request for relief from any resulting double taxation.

Once again, for ease of reference, the substance of the CRA letter is attached as Annex B.

[4] There is no evidence before the Court that the Applicant Trust or its counsel pursued the request further, directly with the CRA. Rather, counsel turned to the United States Internal Revenue Service (the "IRS") and requested, as it was entitled to do under the

[2] Schedule II to the *Convention Act*.
[3] Schedule III to the *Convention Act*.
[4] Schedule IV to the *Convention Act*; S.C. 1985, s. 3.
[5] Schedule V to the *Convention Act*, S.C. 1997, c. 38 schedule v.

Convention, that the IRS pursue the settlement of the residence of the Applicant Trust with the CRA. The IRS raised the issue with the CRA. A transcript of notes taken at a CRA/IRS meeting in Washington, District of Columbia, on the 11th of July, 2006, more than twelve (12) months after the exchange of correspondence between counsel for the Applicant and the CRA that is referred to above, reflects a discussion of the issue. An extract from that transcript appears as Annex C to these reasons.

[5] Three (3) points are worthy of note in the extract from the transcript: first, the discussion took place in the context of the "proposed section 94 of the *Income Tax Act*", not section 94 of the same *Act* as it read at the time of the discussion and as it continues to read today[6]; second, a representative of CRA undertook to the IRS representatives to "…seek further policy guidance on the issue"; and third, CRA proposed to seek that guidance from the Canadian Department of Finance, not within its own resources, notwithstanding the fact that CRA is, by delegation, the designated representative of Canada, the "competent authority", for the purposes of bi-lateral discussions under the *Convention*.

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[6] Since sometime before the date of counsel's letter to the CRA that is referred to in paragraph [1] of the text of these reasons and that is in part reproduced in Annex A, successive governments have proposed to repeal and replace section 94 of the *Income Tax Act*. The latest proposal is reflected in Bill C-33 entitled:

An Act to amend the Income Tax Act, including amendments in relation to foreign investment entities and non-resident trusts, and to provide for the bijural expression of the provisions of that Act.	Loi modifiant la Loi de l'impôt sur le revenu, notamment en ce qui concerne les entités de placement étrangères et les fiducies non-résidentes ainsi que l'expression bijuridique de certaines dispositions de cette loi, et des lois connexes.

which received First Reading on the 22nd of November, 2006. That Bill "died on the Order Paper" with the recent prorogation of the First Session of the Thirty-ninth Parliament.

[6] The IRS reported to counsel for the Applicant Trust in a letter dated the 15th of November, 2006. In essence, it reported that the CRA refused to endeavour, or further endeavour, to settle the residence of the Applicant Trust in accordance with the *Convention*. Once again, for ease of reference, the substance of the reply to Applicant's counsel from the IRS is attached as Annex D.

[7] Counsel for the Applicant Trust treated the response from the IRS as the first notification to the Applicant Trust of a decision of the CRA responding definitively to counsel's request in the letter of the 23rd of February, 2005, earlier referred to. On the basis of this "definitive" response, this application for judicial review followed seeking the following relief:

> **…**
> **The purpose of the Application is the following:**
>
> 1. An order setting aside the decision of the Minister of National Revenue by its representative the Canada Revenue Agency ("CRA") dated July 11, 2006, whereby the Applicant's request that the residence of The 2005 Robert Julien Family Delaware Dynasty Trust (the "Trust") be settled in accordance with paragraph 4 of Article IV of the *Convention Between Canada and The United States of America With Respect to Taxes on Income and on Capital Signed on September 26, 1980, as Amended by the Protocols Signed on June 14, 1983, March 28, 1984, March 17, 1995 and July 29, 1997* (the "Convention"), was formally refused;
>
> 2. An order (writ of *mandamus*) that the Minister of National Revenue or its representative, the CRA, endeavour to settle the residence of the Trust with the U.S. Secretary of Treasury or his delegate, the Internal Revenue Service, in accordance with paragraph 4 of Article IV of the Convention.
>
> 3. Subsidiarily, any other relief in the same nature so as to oblige the Respondents to comply with paragraph 4 of Article IV of the Convention.
>
> 4. A declaration that the judgment is executory notwithstanding appeal.
>
> **THE WHOLE WITH COSTS.**
>
> **…**

[8] The Application was heard at the premises of the Court in Montreal on the 30th of August, 2007. Decision was reserved. These are the reasons for a decision issued this day.

THE PARTIES

[9] The Applicant is briefly described in the style of cause of this application. The "Trust Agreement", once again briefly, but I am satisfied sufficiently, is described in the letter the substance of which appears as Annex A to these reasons.

[10] The Minister of National Revenue is the responsible Minister for the purposes of implementation of the *Convention Act*, and is also responsible for the CRA.

[11] CRA, formerly the Canada Customs and Revenue Agency, is responsible for "…supporting the administration and enforcement…" of the *Income Tax Act*[7] and, by delegation from the Minister of National Revenue, is the "competent authority" for the purposes of the *Convention*.

THE ISSUES

[12] Counsel for the Applicant Trust, in his Memorandum of Fact and Law, succinctly described the issues on this application for judicial review in the following terms:

(a) whether *mandamus* lies against the Respondents on the facts of this case; and

(b) whether an order should be issued to set aside the decision.

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[7] See: *Canada Customs and Revenue Agency Act*, S.C. 1999 c. 17, as amended.

[13] Counsel for the Respondents added the following issue: "Whether the Applicant [Trust] is time-barred from attacking the decision of the Canadian Competent Authority [CRA] not to settle the question of the [Applicant] Trust's residency with the United States' Competent Authority."

[14] Counsel for the Respondents rephrased the "*mandamus*" issue as whether *mandamus* can issue against the Respondents to oblige them to further endeavour to settle the residency of the Applicant Trust with the United States' Competent Authority in accordance with paragraph 4 of Article IV of the *Convention*.

[15] I would expand and rephrase the issues before the Court in the following terms:

first, and this issue was not contested by either party, the Court's jurisdiction to entertain this application;

secondly, is this application for judicial review time-barred by reason of the fact that the CRA's letter of the 17th of June, 2005 to counsel for the Applicant Trust constituted the "decision" of the Respondents relating to the request on behalf of the Applicant Trust contained in counsel's letter of the 23rd of February, 2005;

thirdly, is the response from the IRS, the substance of which is reproduced in Annex D, notice of a reviewable decision or, alternatively is the application for judicial review premature in that, in substance, it seeks review of the application to the Applicant Trust of a proposed law rather than a law that is of full force and effect;

fourthly, what is the appropriate standard of review with regard to the "decision" sought to be reviewed;

fifthly, whether, against the appropriate standard of review, the decision under review should be set aside;

and, finally, if the decision under review should be set aside, is the remedy of *mandamus* open to the Applicant Trust.

[16] Both the Applicant and the Respondents have requested costs and that issue will also be briefly dealt with.

ANALYSIS

1) Jurisdiction

[17] As earlier indicated in these reasons, neither counsel before the Court contested the jurisdiction of the Court on this matter but, in turn, neither counsel cited authority to support the Court's jurisdiction. Out of an abundance of caution, and in particular having regard to the cautionary note sounded by the Supreme Court of Canada in *Canada v. Addison & Leyen Ltd.*[8], I consider it important to briefly address the issue. At paragraphs 10 and 11 of its brief reasons in *Canada v. Addison & Leyen Ltd.*, the Court wrote:

> The Minister is granted the discretion to reassess a taxpayer at any time. This does not mean that the exercise of this discretion is never reviewable. However, in light of the words "at any time" used by Parliament in s. 160 *ITA*, the length of the delay before a decision on assessing a taxpayer is made does not suffice as a ground for judicial review, except, perhaps, inasmuch as it allows for a remedy like mandamus to prod the Minister to act with due diligence once a notice of objection has been filed. Moreover, in the case at bar, the allegations of fact in the statement of claim do not disclose any reason why it would have been impossible to deal with the tax liability issues relating to either the underlying tax assessment against York or the assessments against the respondents through the regular appeal process.
>
> Reviewing courts should be very cautious in authorizing judicial review in such circumstances. The integrity and efficacy of the system of tax

[8] [2007] S.C.J. No. 33, [2007] S.C.C. 33, July 12, 2007.

> assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.
>
> [emphasis added]

[18] This is not a review of the Minister's discretion to reassess a taxpayer "at any time". Rather, it is an application for judicial review of, as counsel for the Applicant Trust would argue, an obligation of the Minister to seek settlement of the residence of a trust such as the Applicant Trust and further to seek the remedy of *mandamus* against the Minister for "failure" to fulfil that obligation once a request is made. As such, I am satisfied that this application is closer to the issue that came before this Court and the Federal Court of Appeal in *LJP Sales Agency Inc. v. Canada (Minister of National Revenue – M.N.R.)*[9]. For this Court, my colleague Justice MacTavish, after citing section 18.5 of the *Federal Courts Act*[10] wrote at paragraphs 33 to 37 of her reasons:

> Having given the Minister's argument careful consideration, I am satisfied that this Court does in fact have jurisdiction to entertain LJP's application.
>
> The purpose behind section 18.5 is to prevent a multiplicity of proceedings. As a consequence, judicial review is precluded where there already exists a statutory right of appeal to the Tax Court, or another such body.
>
> It is true that an application for judicial review of the decision of the Minister to assess or confirm a person's tax liability is beyond the jurisdiction of this Court, because the assessment of that liability may be appealed to the Tax Court: *Addison & Leyen Ltd. et al.*, … .
>
> However, it must be recalled that what LJP is seeking in this case is not to appeal an income tax assessment to this Court, but rather an order of *mandamus*, requiring that the Minister exercise his statutory duty. In this regard, LJP asserts that the Minister incorrectly refused to exercise his jurisdiction, erred in law or otherwise acted in a manner contrary to law. Such relief is not available to LJP in the Tax Court.

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[9] [2006] F.C.J. No. 939, 2006 FC 735, June 12, 2006; affirmed, 2007 F.C.J. No. 403, 2007 FCA 114, March 20, 2007.

[10] R.S.C. 1985, c. F-7.

> I am therefore satisfied that, to the extent that LJP's application seeks an order compelling the Minister to perform a statutory duty, the application is one that is properly brought in this Court. Whether or not such a duty in fact exists in the circumstances of this case is another question altogether.
> …

I am satisfied that the same might be said here, with perhaps even greater emphasis given to the fact that no assessment has, to the date of hearing of this matter, issued against the Applicant Trust and, at the date of the Respondents' reply that is extracted in Annex B to these reasons, was even in contemplation. I quote very briefly from the last paragraph that appears in Schedule B:

> However, in the event that income, profit or gains of the Trust become subject to taxation in both the United States and Canada, we would be prepared to consider a request for relief from any resulting double taxation.

[19] For the foregoing brief reasons, I conclude that this Court has jurisdiction to deal with this application for judicial review and *mandamus*.

2) Is this application for judicial review and *mandamus* time-barred?

[20] Counsel for the Respondents urged that this application for judicial review and *mandamus* is indeed time-barred as the CRA's letter of the 17th of June, 2005 (see Annex B) to counsel for the Applicant Trust constituted the decision of the Respondents relating to the request on behalf of the Applicant Trust contained in counsel's letter of the 23rd of February, 2005 (see Annex A). Counsel for the Respondents further urged that, while the Applicant Trust's determination to pursue the issue through the IRS was open to it, it did not constitute an alternative to seeking judicial review of the "decision letter" of the 17th of June, 2005, but rather was tantamount to nothing more than an indirect request to the Respondents to

"review" the decision of the 17th of June, 2005, and that a request for a review does not stop the clock running on the time for applying for judicial review.

[21] While not directly addressing the issue of a time-bar, counsel for the Applicant Trust urged that the CRA has systematically, knowingly, and categorically refused to endeavour to settle the Applicant Trust's residency with the IRS without justification and despite a formal request by the Applicant Trust and the existence of a clear public legal duty to do so under paragraph 4 of Article IV of the *Convention*.

[22] With great respect to counsel for the Applicant Trust and to the Applicant Trust itself, the existence of an alleged "clear public legal duty" does not arise for consideration unless an application for judicial review is brought in a timely manner. Subsection 18.1(2) of the *Federal Courts Act* reads as follows:

> **18.1** (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.
>
> [emphasis added]

> **18.1** (2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.
>
> [je souligne]

The CRA's letter of the 17th of June, 2005 constituted a clear and unequivocal communication of a decision of the CRA responding to the request contained in counsel's

letter of the 23rd of February, 2005. For ease of reference, that request was in the following terms:

> We hereby request that the residence of the Trust be settled in accordance with paragraph 4 of Article IV of the *Convention Between Canada and the United States of America With Respect to Taxes on Income and on Capital Signed on September 26…* .

[23] The response, in essence, was as follows: "Accordingly, we are not able to proceed with your request." That response was communicated to counsel for the Applicant Trust in the letter dated the 17th of June, 2005, and it was not urged before the Court that the response was not received within a few days following the date of the response.

[24] I am satisfied that this application for judicial review is time-barred. Despite the fact that my foregoing conclusion fully disposes of this application for judicial review, I will nonetheless go on to consider the third issue identified in my summary of the issues.

3) **Prematurity**

[25] As noted in paragraph 4 of these reasons, the consultation that took place between representatives of the CRA and representatives of the IRS, which is reflected in Annex C to these reasons, and in the letter from the IRS to counsel for the Applicant Trust that is extracted in Annex D, related to the residence of the Applicant Trust under the proposed new section 94 of the *Income Tax Act* and not under section 94 of the that *Act* as it reads today.

[26] It is trite law that it is not the role of this Court to pronounce on the circumstances of an individual or a trust, such as the Applicant Trust, under a proposal as to what the law may

some day be. Parliament is the master of its processes and conclusions. It is not for the Court to presume that Parliament will adopt, without amendment, proposed legislation put before it by the Government of the day[11]. This principle is even more rigid in its application where the Government of the day does not have legislation on the issue here under consideration before Parliament and might choose not to reintroduce the proposed section 94 of the *Income Tax Act* or, alternatively, to reintroduce it with amendments from the form that was previously before Parliament and which died on the Order Paper between the date on which this application for judicial review was heard and the date of these reasons.

[27] It follows that it is inappropriate for this Court to require, by *mandamus*, that a Minister of the Crown or officials acting on his or her behalf, endeavour to settle the residence of a trust under a provision of law that may, or may not, some day be adopted by Parliament.

[28] Thus, the application for judicial review before the Court, as framed, is not only "time-barred", it is premature in that it is not in respect of a "decision", if such there was in the summer of 2006, that this Court could properly entertain or grant *mandamus* upon.

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[11]See, for example, *Federation of Saskatchewan Indian Nations v. Canada* [2003] 2 C.N.L.R. 131 where my colleague Justice MacKay wrote at paragraph 22 of his reasons:

> Declarations of these sorts [of breach of fiduciary obligations and duties to protect the rights and privileges of the Plaintiffs] would be premature. They would ignore the fact that the bill in question, like any other proposed legislative action, has no legal effect until it is passed by Parliament, assented to by Her Majesty's representative, and if necessary by its terms proclaimed in force.

and my decision in *Treaty Seven First Nations v. Canada (Attorney General)* [2003] F.C.J. No. 464 (T.D.) (QL), March 20, 2003, where the Applicants sought to have a Bill quashed and an order of *mandamus* issued requiring the Crown to engage in consultation with them. The application was dismissed on the grounds that

[29] I will not consider further the issue of whether there was, through the communications reflected in Annex C and Annex D, in fact a decision of the Respondents.

CONCLUSION

[30] In light of my conclusions regarding jurisdiction of this Court, a time-bar in respect of the application for judicial review that is before the Court and in respect of prematurity, I need not and I will not go on to consider the further issues outlined in paragraph [15] of these reasons. This application for judicial review will be dismissed. Further, in light of my conclusions and the result, the Respondents are entitled to their costs, on the ordinary scale, as against the Applicant Trust.

COSTS

[31] In the ordinary course of litigation in this Court, costs follow the result, that is to say costs are payable by the unsuccessful party to the successful party. There are no circumstances arising in this matter that would justify a different result. The Respondents are entitled to their costs, calculated on the ordinary scale, payable by the Applicant Trust.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario
October 18, 2007.

Parliament was the master of its own processes, and that there was an alternative remedy available to the Applicants, through the Parliamentary consultation process.

ANNEX A
(paragraph [1])

…

We hereby request that the residence of the Trust be settled in accordance with paragraph 4 of Article IV of the *Convention Between Canada and The United States of America With Respect to Taxes on Income and on Capital Signed on September 26, 1980, as Amended by the Protocols Signed on June 14, 1983, March 28, 1984, March 17, 1995 and July 29, 1997* the "**Convention**").

The Trust is an irrevocable discretionary trust settled pursuant to a trust agreement dated February 1, 2005 among Mrs. Delia Moog as Grantor, Mr. Hugh William Perry as Initial Trustee and Christiana Bank & Trust Company as Initial Administrative Trustee (the "**Trust Agreement**"), a copy of which is attached for your review.

Because the Trust has just been formed, no identification number has yet been assigned by the Canada Revenue Agency or the Internal Revenue Service. There is obviously no pending objection or appeal in respect of the Trust.

Mrs. Moog is a resident of Canada and Mr. Perry is a resident of the United States. Cristiana Bank & Trust Company is a Delaware banking corporation.

Mrs. Moog settled the Trust with US$40,0000 and no other person has made a contribution to the Trust. She established the Trust primarily for the benefit of her nephew, Robert Julien, a resident of the United States. The beneficiaries of the Trust also include Mr. Julien's spouse and issue as well as entities in which Mr. Julien (or any of his issue) has an interest. Mr. Julien does not yet have any children and his spouse resides with him in the United States.

The Trust does not own any taxable Canadian property and does not carry on business in Canada. The Trust's income solely originates from sources within the United States. The Trust has no plan to own taxable Canadian property, to carry on business in Canada or to have any income from Canadian sources.

The Trust is a United States person within the meaning of section 7701(a)(30) of the *Internal Revenue Code* because a court within the United States is able to exercise primary supervision over the administration of the Trust pursuant to Section 8.1 of the Trust Agreement and a United States person (Mr. Perry) has the authority to control all substantial decisions of the Trust. As a United States person, the Trust is subject to tax in the United States on its worldwide income and is therefore a resident of the United States for the purposes of the Convention.

Although the Trust does not have any Canadian beneficiary, the Trust is likely deemed to be a person resident in Canada for certain purposes under subsection 94(1) of the *Income Tax Act* ("**ITA**") because the Trust acquired property from a Canadian resident

(Mrs. Moog) and persons resident in Canada not dealing at arm's length with Mrs. Moog might become beneficially interested in the Trust as a result of the exercise of the power of appointment in Section 5.1(kk) of the Trust Deed.

On October 30, 2003, a Notice of Ways and Means Motion to amend provisions of the ITA relating to the taxation of non-resident trusts and foreign investment entities (the "**Proposed Rules**") was tabled in the House of Commons. If and when the Proposed Rules come into force, they will retroactively apply to trust taxation years that begin after 2002. Because the Trust received a contribution of property from a Canadian resident (Mrs. Moog), the Trust would be deemed to be resident in Canada for certain purposes under subsection 94(3) of the Proposed Rules. In the technical notes to the Proposed Rules, the following comments are made in respect of subsection 94(3).

> "A trust to which subsection 94(3) applies is deemed to be resident in Canada throughout the year for the above purposes, including the computation of its income and its taxable income and section 2 of the Act. Section 2 imposes on every person resident in Canada at any time in a taxation year an obligation to pay an income tax on that person's taxable income for the year.
>
> Under paragraph 1 of the resident article in Canada's income tax treaties, a reference in such a treaty to a "resident of a Contracting State" means any person who, under the law of that State, is liable to taxation in that State by reason of the person's domicile, residence, place of management or any other criterion of a similar nature. A person, in this context, would generally include a trust because of the definition "person" in Canada's income tax treaties. Because a trust to which subsection 94(3) applies is deemed to be resident of Canada and is liable to tax in Canada on its worldwide income, it will be considered a resident of Canada under paragraph 1 of the resident article in Canada's income tax treaties, whether it is also considered to be resident, under the applicable treaty, in another country or not.
>
> A trust that is also resident of the other contracting state under a particular treaty would be a dual resident under the treaty. In the event of dual residency under an income tax treaty, the tie-breaker rules in the resident article applicable to individuals would not apply. The Canada Customs and Revenue Agency has expressed the view that in this context, the term "individual" is to be interpreted to mean natural person and not a trust. The Agency has indicated that this interpretation would generally prevail across most if not all of Canada's income tax treaties if the definition "person" in the particular treaty under consideration makes reference to both an "individual" and a "trust". Even if a trust were considered an individual for the purpose of an income tax treaty, it is clear from the context of the tie-breaker rule applicable to individuals that it is intended to apply only to natural persons. This is because expressions such as "personal home", "centre of vital interest" and "habitual abode" used in the tie-breaker rules have meaning only in reference to natural persons and would not be of use in clarifying the residence of a trust for the purpose of a treaty.
>
> In general, therefore, under the income tax treaty the competent authorities of each contracting state would have to enter into an agreement to determine in which state the trust would be resident for the purpose of the particular treaty. In the absence of such an agreement Canada would exercise its first right to tax. Canada would grant foreign tax credits for the other State's income taxes paid by the trust.

We do not necessarily agree with the position outlined above. Consequently, this request is made without prejudice to out client's right to have this matter judicially determined.

The first condition to the application of subsection 94(3) of the Proposed Rules is that the trust must be a non-resident of Canada [determined without reference to 94(3)] at the end of a particular taxation year. Since the basis of the application of subsection 94(3) is the non-residence of the Trust, it would be illogical to suggest that it is liable to tax in Canada by reason of Canadian residence. In fact, it is the exact opposite: the Trust would be liable to tax in Canada, not by reason of its residence, but by reason of its non-residence combined with the presence of a resident contributor. In other words, the deemed Canadian residence of the Trust for certain purposes would not be the cause of its Canadian tax liability but the consequence of its non-residence combined with the existence of a resident contributor.

Non-residence and resident contributor are clearly not criteria of "a similar nature" to those used for determining residence for the purposes of Article IV of the Convention. Justice Iacobucci, in Crown Forest[12], noted that the United States entered a specific reservation to Article 4(1) of the OECD Model Convention for the right to use "place of incorporation" as an indicator of residence.

While Canada also reserved the right to use "place of incorporation", it never reserved the right to use other special criteria, such as having a resident contributor (let alone acknowledged non-residence, which is the antithesis of residence). Canada never bargained with its treaty partners for the ability to tax entities of its treaty partners based on untraditional and novel criteria, *a fortiori* criteria that are extraneous to the subject entity (such as the residence of its contributors and beneficiaries). Therefore, subsection 94(3) of the Proposed Rules should have no bearing on the determination of residence under the Convention, because it is based on unrecognized criteria that are dissimilar to those enumerated in paragraph 1 of Article IV of the Convention.

Considering that all of the trustees and beneficiaries of the Trust are resident in the United States and that the Trust does not have any income from Canadian sources, we submit that the Canadian competent authority should agree to treat the Trust as a resident of the United States for the 2005 and following taxation years.

In our view, the Trust should not be subject to tax in Canada solely because it received property from a Canadian resident who is not and cannot become a beneficiary thereof.

Even if the Trust would be treated as a resident of Canada, its income would be exempt from tax in Canada under paragraph 2 of Article XXII of the Convention to the extent that such income is distributed to its beneficiaries.

The Trust would nevertheless like to have the ability to accumulate income that is not immediately needed by its beneficiaries. The accumulation of income in the Trust would not achieve any United States income tax reduction since all undistributed income would be fully taxable in the hands of the Trust. The sole advantage of accumulating

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[12] [1995] 2 C.T.C. 64 (SCC).

income in the Trust would be to prevent additional property from becoming part of a beneficiary's estate for United States estate tax and asset protection purposes.

In the light of the above, we see no ground on which Canada should insist on treating the trust as a resident of Canada. Doing so would not result in any additional tax revenue for Canada and would have as its sole consequences an increase in the beneficiaries' U.S. estate tax and creditors liability expose [sic] together with the imposition on the trustees of complex and time-consuming Canadian information and tax return reporting requirements.

The case at hand is clearly not the type of planning that the Department of Finance was attempting to curb when it introduced the Proposed Rules. Therefore, the relief sought would not contravene any tax policy objective.

…

ANNEX B
(paragraph [3])

…

We are writing in response to you letter of February 23, 2005, in which you requested competent authority assistance with respect to the determination of the residency of the Trust under Article IV(4) of the *Canada-United States Income Tax Convention, 1980* (the "Convention"). In this regard, you have advised that the Trust is considered a resident of the United States for the purposes of the Convention and that the Trust would be deemed to be a resident of Canada in the manner provided under proposed paragraph 94(3)(a) of *Income Tax Act* (Canada) (the "Act"). If proposed paragraph 94(3)(a) is enacted, the Trust is deemed to be a resident of Canada for the purposes of certain provisions of the Act for taxation years of the Trust beginning after 2002.

As discussed in our previous telephone conversations (Wilson/Gagnon, MacGillivrary/Gagnon), the Agency's position is that a trust that is deemed to be a resident of Canada in accordance with proposed paragraph 94(3)(a) of the Act will be considered a resident of Canada for the purposes of the Convention. In the event that such a trust is also a resident of the United States under United States domestic tax legislation, the Canadian competent authority will not settle the question of the trust's residency with the United States competent authority under Article IV(4) of the Convention so that the Convention could be applied to the trust on the basis that it was a resident of the United States and not a resident of Canada.

Accordingly, we are not able to proceed with your request. However, in the event that income, profit or gains of the Trust become subject to taxation in both the United States and Canada, we would be prepared to consider a request for relief from any resulting double taxation.

…

ANNEX C
(paragraph 4)

Issue : Non-resident trusts and proposed section 94 of the Income tax Act

- …
- Jim Wilson (CRA) explained Canada's position regarding section 94 trusts: the legislation is predicated on the fact that Canada considers the residence of the contributor a key factor in determining the residence of a trust. Jim explained that this is anti-avoidance legislation in Canada intended to circumvent the ease with which these arrangements can be used to avoid taxation in Canada, by accumulating income outside Canada and having those amounts paid out to a Canadian resident as capital at a later time, which would not be taxable in Canada. Giving up on the deemed resident status of these trusts would render this anti-avoidance legislation ineffective. We would not expect the US to make their anti-avoidance legislation ineffective. Canadian resident taxpayers setting up trust in other jurisdictions can avoid paying Canadian tax by not accumulating income in the offshore trust, i.e. paying out the income to non-Canadian beneficiaries every year, or by outright gifting the property to the intended beneficiaries. Finally, Canadian residents can always set up a Canadian resident trust to hold property in trust for the benefit of US residents.
- Elizabeth Karzon (IRS) asked if the CRA is willing to negotiate the residency question for dual resident trusts that are not s. 94 trusts.
- Jim Wilson confirmed the CRA would still be negotiating the dual residence question for trusts that are not s. 94 trusts, i.e. dual resident trusts under common law principles.
- Graham Clark (IRS) mentioned that the US rules dealing with grantor trusts to address avoidance issues associated with trusts and that the US/UK treaty has rules applicable when the US taxes the grantor while the UK taxes the trust; the FTC and sourcing rules are modified to resolve the problem created by taxing different persons. Graham suggested Canada could consider such an approach in the case of s. 94 trusts.
- More importantly, Graham asked why the trust in this case was caught by the rules in section 94. He adds that he has difficulty understanding how Canada can focus solely on the residence of the contributor to determine the residency of a trust. He points out that in this case several other factors suggest the trust should not be considered a resident of Canada, i.e. there are no Canadian beneficiaries in this case, all beneficiaries are adult US persons; there are no Canadian assets and although there is a Canadian contributor, he/she has legally given up all rights on the property contributed and it cannot revert back to the contributor. Graham added that he could understand Canada having concerns if the contributor somehow retained control over the contributed property, but in cases where the contributor and persons closely-related to the contributor (e.g. spouse, children, etc) no longer have any

control over the property, he would have expected Canada to recognize that fact and not maintain its right to tax the income derived from the contributed property.

- Jim Wilson mentioned that the legislation provides that a Canadian resident contributor is a sufficient connection to Canada to maintain Canada's right to tax the income derived from the contributed property. Jim added he was not in a position to question the legitimacy of such an approach but understood it may be difficult to see any avoidance schemes in the case where the only beneficiaries are adult residents of the US, although these facts can change in the future, particularly where the trustees have a power to appoint new beneficiaries that could be Canadian residents, as in this case. Nonetheless, Jim suggested we would seek further policy guidance from the Canadian Department of Finance before taking a final decision on this matter as it seemed reasonable to take another look at Canada's position where there is no apparent tax avoidance concerns and the income is fully taxed in the US.
- Ross Kauffman agreed to take the issue to the Dept.Finance and reply to the letter from the US competent authority regarding this case.
- Jim also confirmed that notwithstanding Canada's position on the residence of the trust, Canada would be willing to resolve any unexpected double tax situation and provide foreign tax credits to the trust where appropriate to do so.
- Calvin Watson (IRS) mentioned that this would not be satisfactory to the taxpayer and that the trust would prefer not being subject to any Canadian tax at all.
- Jim pointed out that the trust would only be subject to the rate differential between the US and Canadian tax rates.
- Calvin replied that the trust would still prefer not paying that differential.
- We agreed Ross would let our Dept.Finance know about these concerns and seek their policy guidance before writing back to them on this subject.

[emphasis added]

ANNEX D
(paragraph 6)

…

We conducted negotiations with representatives of the Canadian government on July 11, 2006. The Canadian officials, representatives of that government's competent authority under our treaty, took the position that the above trust was Canadian under the Income Tax Act of Canada because a Canadian resident provided property to the trust and because certain Canadian residents might in the future become beneficiaries of the trust. The Canadian officials further advised that a Canadian grantor alone would suffice under that nation's domestic law to deem this entity to be of Canadian residence.

Further, we were advised at this meeting that t he Canadian Ministry of Finance had specifically removed this case and all others like it; we assume cases under Section 94(1) and 94(3) of the income Tax Act (Canada), from competent authority negotiations. In other

words we are advised that his case will not be considered for resolution by the Canadian Competent Authority.

We objected to this position as inconsistent with the spirit and letter of our income tax treaty. We further related our views on this matter to our own Treasury Department which has ultimate responsibility for the negotiation and oversight of our income tax treaty network.

The Canadian representatives at the July 11, 2006, meeting promised a letter finalizing this case from their standpoint; however, to date we have received no such letter. We are advised through telephone contacts, the latest being of November 6, 2006, that the office of competent authority is in the process of clearing the above stated disposition as to this particular case with their Ministry of Finance through the efforts of the Legislative Policy Division. To date this clearance has not occurred; however, we are advised of no change in their intended disposition.

…

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2206-06
STYLE OF CAUSE:	HUGH WILLIAM PERRY, IN HIS CAPACITY OF TRUSTEE OF THE 2005 ROBERT JULIEN FAMILY DELAWARE DYNASTY TRUST Applicant and CANADAA (THE MINISTER OF NATIONAL REVENUE) and CANADA REVENUE AGENCY Respondents
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	August 30, 2007
REASONS FOR ORDER:	GIBSON J.
DATED:	October 18, 2007

APPEARANCES:

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