

Docket: 2004-1682(IT)G

BETWEEN:

NEIL FILIPEK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on March 25, 26, 27 and 28, 2008,  
at Vancouver, British Columbia

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant: Frances M. Viele and  
Pam Owen-LaFrance  
Counsel for the Respondent: Ernest Wheeler and Steven Leckie

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**JUDGMENT**

The appeals from the assessments made under the *Income Tax Act* for the 1996, 1997, 1998 and 1999 taxation years are dismissed, with costs.

Signed at Ottawa, Canada, this 16<sup>th</sup> day of June 2008.

“Campbell J. Miller”

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C. Miller J.

Citation: 2008 TCC 351  
Date: 20080616  
Docket: 2004-1682(IT)G

BETWEEN:

NEIL FILIPEK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Miller J.

[1] Mr. Filipek is a pilot for Air Canada. He maintains that for the taxation years 1996, 1997 and 1998 and for the first month of 1999 (the “relevant period”) he was a non-resident of Canada for income tax purposes. The Respondent assessed Mr. Filipek as a resident of Canada, not on the basis of any deemed residence as a result of sojourning in Canada, but on the basis he ordinarily resided in Canada throughout the relevant period. Cases on residence are entirely fact-driven and Mr. Filipek’s circumstances are certainly unique to him. The parties made it clear at the outset that the only issue before me is the determination of Mr. Filipek’s Canadian residency status. If I determined he was a non-resident, then I was not to proceed to calculate the amount, if any, of income taxable in Canada, as Mr. Filipek would then be one of many pilots who are collectively in the throes of attempting to settle that issue with the Government.

[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*<sup>1</sup>, *Her Majesty the Queen v. Reeder*<sup>2</sup>, and *Reed v. The Minister of National Revenue*<sup>3</sup>). 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.

[3] The difficulty with a pilot such as Mr. Filipek is that there does not appear to be any “settled routine” in his life – it is decidedly unsettled. Yet from his hectic, itinerant existence, I find there were two centres of stability where he regularly returned: the Vancouver area and the Turks and Caicos.

[4] The question before me is not whether the Turks and Caicos constitutes residence, but whether Canada does, so I must pay particular attention to his activities in the Vancouver area.

[5] What are Mr. Filipek’s unique circumstances? I will review them in the context of the following factors:

- (i) the circumstances of leaving Canada;
- (ii) lifestyle, including employment, businesses, hobbies, friends, financial ties, vacations, and the amount of time spent in different jurisdictions; and
- (iii) family ties.

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<sup>1</sup> 2 DTC 812 (S.C.C.).

<sup>2</sup> 75 DTC 5160 (F.C.T.D.).

<sup>3</sup> 89 DTC 34 (T.C.C.).

### Circumstances of Leaving Canada

[6] Mr. Filipek has been flying for Air Canada since 1974. In the 1980s he applied to both Canadian Pacific and Singapore Airlines as he wanted to, as he put it, go non-resident. He considered living in Hawaii. In 1979, he and his parents (primarily his parents), bought a significant property on the Big Island of Hawaii. He contributed around \$50,000 towards the \$2.5 million purchase price of the property. From 1985 to 1992, he was involved in litigation with the Northland Bank, in connection with the financing of this property, resulting ultimately in losing the property. This evidently soured Mr. Filipek on Hawaii.

[7] Mr. Filipek and his wife Janice were married in 1984 at the Hawaii property. After 1992, they explored several possible warmer locations as potential residences. Mr. Filipek had applied for U.S. citizenship in 1991, though was unsuccessful. Janice was upset when she found out he had done this, since with her parents in Vancouver, she became more rooted to Vancouver. Indeed, in 1994, Janice bought a townhouse in Richmond, British Columbia. Mr. Filipek was not put on title, though was a guarantor of the mortgage and made monthly payments. He was unhappy with this development.

[8] At this stage, Mr. Filipek and his wife's relationship was deteriorating. She was unhappy with the Hawaii financial fiasco, especially since her parents, the Ruhl, had lent a considerable amount of money to help Mr. Filipek's family, and Janice Filipek did not see her family recouping those loans.

[9] Another Air Canada pilot suggested that Mr. Filipek look at Turks and Caicos as a possible residence. He did, and he fell in love with it. Mr. Filipek testified that in 1994, he took Janice to the Turks and Caicos: she did not share his love of the place. Interestingly, she testified that she did not go to the Turks and Caicos until 1996 after she and Mr. Filipek had separated. This is one of many discrepancies in their testimony.

[10] Mr. Filipek made a decision. If he was going to move to the Turks and Caicos it was clear his marriage would not survive. He moved out of the townhouse in Richmond in November 1994. In December 1994, he and Janice signed a brief separation agreement, drawn up by Janice's father, Mr. Ruhl. Mr. Filipek was free to pursue his move.

[11] Mr. Filipek took the following steps in late 1994 and early 1995:

- (i) He contacted a Turks and Caicos lawyer and obtained a Turks and Caicos residency permit.
- (ii) He searched the island of Providenciales looking for property to rent or buy. He found a property to rent from his lawyer commencing in June 1995 and his lawyer also lived on the property.
- (iii) He sold his 1964 Land Rover, a vehicle in which he had prospected with his father. It was evident there was some considerable attachment to the Rover.
- (iv) He sold his father's gun collection.
- (v) He arranged for his father-in-law to take over the guarantee of the mortgage on the Richmond property.
- (vi) Later in 1995, he had his name removed from the title to his mother's home in Edmonton, though continued to make mortgage payments as the money had been borrowed to finance the Northland Bank litigation.
- (vii) He advised friends, family, his employer and the bank of his impending move.
- (viii) He removed his name off the phone listing in Richmond and changed all the utilities to Janice's name.
- (ix) He shipped his few possessions to a friend in Florida, and then on to the Turks and Caicos.
- (x) He cancelled his medical insurance and obtained insurance outside Canada, first in United States, then through the United Kingdom and finally, with an organization connected to American Express.
- (xi) He let his Canadian car insurance lapse.
- (xii) He obtained a post office box in Richmond, British Columbia, in Point Roberts, Washington, in Oregon and in the Turks and Caicos.

- (xiii) Later in 1995, he obtained a Turks and Caicos driver's licence, though he had also obtained an international driver's licence before leaving Canada.
- (xiv) He disposed of some investments though retained his RRSP, maintaining he made no contributions during the relevant period.
- (xv) He applied in the Turks and Caicos for an American Express credit card.
- (xvi) He applied for a Citibank credit card in the United States, but was unable to obtain one as he had no permanent address in the United States. He did open a Bank of America chequing account in Point Roberts, Washington.
- (xvii) He retained his CIBC chequing account in Canada for electronic deposits of his Air Canada salary.
- (xviii) He also retained a personal credit card with Canadian Imperial Bank of Commerce, using the post office box in Richmond, British Columbia.

[12] He took appropriate steps to establish residence in the Turks and Caicos. Whether these steps were sufficient to sever his residency status in Canada depends on his behaviour after taking these steps.

### Lifestyle

[13] It was difficult to get an accurate picture of Mr. Filipek's lifestyle, particularly when he was in the Vancouver/Point Roberts area, for a couple of reasons. Firstly, he was vague regarding how he spent his time in the area. Secondly, he changed his testimony on the third day of giving evidence to contradict his earlier testimony causing me to doubt his credibility generally.

[14] Mr. Filipek produced a monthly calendar covering the relevant period, indicating his whereabouts on a daily basis throughout that period. He also produced banking records showing numerous automatic teller cash withdrawals in the Vancouver area during the same period. His story is that his employment with Air Canada was centred in Vancouver; that was where he flew out of. But he claims that in coming in and out of Vancouver for employment purposes, he never actually

stayed in Vancouver but caught a bus, often through downtown, to Point Roberts in the United States where he would camp in a tent in the bush.

[15] Point Roberts is a peculiarity of geography and international relations. It is a peninsula just south of the Vancouver area that is a part of the State of Washington, yet to get to the rest of the State of Washington requires coming back into Canada and then returning south into the main part of the state. A brief review of any map of the area makes this quite clear.

[16] Mr. Filipek's calendar, presented in examination-in-chief, suggested approximately 60 to 70 days a year were in the Vancouver/Point Roberts area, presumably camping just across the border in the United States. I harbour some serious doubts about whether this is entirely accurate for the following reasons. First, throughout his time in the Vancouver area, Mr. Filipek's banking records show a great number of the ATM withdrawals mentioned earlier, at a variety of Vancouver locations. Why, I ask, does he go from the airport north into downtown to make withdrawals in Canadian dollars to then go south back past the airport across the border into Point Roberts. For two days on the stand, he was adamant that he made considerable withdrawals at various ATMs in Vancouver during the relevant period, even though in cross-examination it was pointed out that some of these withdrawals took place at times that his calendar suggested he was out of the country. His response was that his calendar for the three-year period, which he had tendered into evidence, was wrong, and indeed the next day he provided me with an amended calendar. Again he was adamant his estranged wife was not withdrawing funds. On the third day, he asked to make a statement and he informed me that it was possible that his wife had kept a bank card and might have been withdrawing funds from his account. Not surprisingly, later that day, his wife testified to exactly that – yes, she withdrew about \$1,000 a month in small withdrawals on Mr. Filipek's card during their separation, but she presumed that he would not notice, and she felt some entitlement to that money.

[17] On presenting his revised calendar, Mr. Filipek added "BC" to an additional 40 to 50 days in 1996 and 1997, though less in 1998, bringing his time in the Vancouver area to well over 100 days a year. Even considering that Mrs. Filipek made a number of withdrawals, the suggested routine of going into downtown and then out to camp in Point Roberts is unusual. The claim was given some credence, however, by correspondence from a business associate remarking on Mr. Filipek's camping arrangement. It is the time spent camping that worries me. There were a few invoices of purchases in Point Roberts, but some were unusual. For example, a

purchase of 48 rolls of toilet paper for someone who only camped a few days, purportedly, at a time, and then stored his tent and camping equipment under a cedar and a rock outcropping. I just find this suspect. It is more likely such purchases may have been for his in-laws just across the border on the Canadian side.

[18] What did Mr. Filipek do with his time while in Point Roberts? Clearly, he was in Vancouver a good part of the time, even discounting the many cash withdrawals of his estranged wife, there were still numerous withdrawals that would put him in Vancouver. What he was doing is just not clear. He claims that in Point Roberts he would go to the library and occasionally to the marina for a shower. I do not feel I have heard the complete story of his life in the Vancouver/Point Roberts area.

[19] When he was not in the Vancouver area, he was flying internationally for Air Canada, vacationing outside Canada, spending time in the Northwest United States gambling, or living in the Turks and Caicos. Based on the revised calendar which he provided, he averaged approximately 190 days a year flying, travelling or vacationing, 55 days in the Turks and Caicos and 100 plus days in the Vancouver/Point Roberts area. Time spent in a place is only one factor and must be viewed in context of the social, business, cultural and other ties connecting the individual to the place where the time is spent. Regrettably, I have been left with a very fuzzy picture of the 100 days in the Vancouver/Point Roberts area. Camping in a tent in the bush just over the border, within walking distance of the in-laws (on the Canadian side), does not constitute any settled way of life that could possibly lead to a conclusion he was resident in the United States. That question is not before me however.

[20] Mr. Filipek's time in the Turks and Caicos amounted to an average of just under two months a year. My impression of his time there was one of a social, holiday-like environment. He clearly enjoyed the benefits of the warmer climate. Whether he had sufficient ties to the Turks and Caicos to constitute that place as his residence is not for me to determine. As mentioned earlier, an individual may have two residences. My impression of the Turks and Caicos was that for Mr. Filipek it was a place of rest and relaxation and social engagements with an element of some business activity which I find has been exaggerated. I turn to that next.

[21] Mr. Filipek described several business ventures which he attempted to get going while in Turks and Caicos. None of these yielded any income to Mr. Filipek.

- (i) Supermarket in the Turks and Caicos - Mr. Filipek indicated he spent three hours a week for three years attempting to put business associates



in contact with one another to purchase an IGA supermarket. One of the associates was the lawyer, Mr. C. Papachristou, who was Mr. Filipek's landlord and, indeed, lived on the same property that Mr. Filipek rented. Mr. Filipek provided two letters, one in November 1996 from a Mr. Nelson, a potential buyer, and one in March 1997 from Mr. Papachristou's colleague, that no further information regarding the supermarket is available. A fax from Mr. Krieg, another potential associate, in March 1997 also sought information on the supermarket. This suggests to me that this project went nowhere. I find Mr. Filipek's estimate of three hours per week for a three-year period is simply not credible.

- (ii) A Conch Farm – Mr. Filipek provided a brochure for a conch farm in the Turks and Caicos, along with two letters between Mr. Krieg and the Select University Technologies Inc. in California that dealt with ceramic technology. Frankly it was not made clear to me how these two matters come together, though none of them made any mention of any involvement of Mr. Filipek. His role appears to have been to act as something of a broker putting investors and a business together. He maintained he spent five hours a week for three years on this project. Again, there is little to corroborate this time and effort. This does nothing to establish a customary or settled way of life outside Canada. Mr. Filipek's hours per week were estimated over the entire year, so presumably a good many of these hours were spent outside the Turks and Caicos - in Canada.
- (iii) The third business Mr. Filipek described was a combination bed and breakfast and a dive shop. He claims to have sought sites in Turks and Caicos and to have introduced U.S. contacts to the possibility, but ultimately decided the market was saturated with diving operations. Mr. Filipek tendered a two-page proposal along with some information of an existing dive shop. He suggested he spent five to ten hours per week for three years on this project. Again there is meagre support for such a considerable amount of time.
- (iv) Mr. Filipek's father was involved in the mining industry, an interest Mr. Filipek also developed. His friend, Mr. Bremner, developed a machine, a Hy-G that Mr. Filipek described as a sophisticated pan. Mr. Filipek said that he and Mr. Bremner would test concentrates in Point Roberts.

He estimated he spent five to ten hours a week in pursuing this mining interest. This business does not appear to connect Mr. Filipek to any one jurisdiction over another.

- (v) Finally, Mr. Filipek suggested he had some involvement with two other possible projects – a hydropower project in China and establishing a new airline in South Africa. He estimated he spent less than five hours a week throughout 1996 to 1998 on these projects.

[22] Mr. Filipek estimated he was working on these projects for 30 hours a week, presumably while in the Vancouver area and while travelling. The materials provided by him to prove that he was working 30 hours a week on these ventures fall far short in convincing me he had anything other than some peripheral contact with individuals who may have been more involved, and certainly was not spending that amount of time. The three businesses (supermarket, conch farm and a bed and breakfast) that had any tie with the Turks and Caicos go perhaps to establishing that Turks and Caicos may well have been a residence, but do not go to satisfy me he was not resident of Canada. Given the significant number of days he spent in the Vancouver/Point Roberts area, he must have done considerable work on these matters there. All to say, I put no weight on his business activities as a factor in determining his Canadian residence. What his explanations do, however, is further muddy an already murky picture of his lifestyle, and cast greater doubt on his credibility.

[23] With respect to his finances, Mr. Filipek's principal account remained with the CIBC. His pay went into that account and it appears he relied heavily on that account for cash withdrawals. Due to financial problems and his family's investment in Hawaii, his family needed to borrow money and Mr. Filipek made payments on the mortgage registered on his parents' home. They also borrowed funds from his in-laws and Mr. Filipek promised to make good on such borrowed funds to the Ruhls. As well, Mr. Filipek also relied on a Scotia Gold Card. These represent an ongoing financial tie to Canada.

[24] With respect to hobbies, Mr. Filipek enjoyed camping and gambling. He indicated he spent his time in Washington and Oregon gambling, but it was again unclear from his revised calendar how much time was spent at these locations pursuing that hobby.

### Family Ties

[25] The Filipeks had no children. The family ties to be considered are therefore Mr. Filipek's estranged wife, Janice, her parents the Ruhls, and his family. I have been satisfied from both Mr. Filipek's and Janice Filipek's testimony, corroborated to some extent by evidence of Mr. Rogerson, a lawyer and friend from the Turks and Caicos, and also by a fellow pilot, Mr. Kaluta, that Mr. and Mrs. Filipek were separated during the relevant period, though the separation was not permanent as they are now back together. There remains some doubt in my mind as to the terms of the separation. I raise this because of Mr. Filipek's testimony surrounding his many ATM withdrawals in the Vancouver area.

[26] There are three conclusions I could reach from the story of Mrs. Filipek's withdrawals from Mr. Filipek's account during the relevant period:

- (i) He really did not know, and she was simply stealing the money and she confessed this to him two days into the trial.
- (ii) He knew, but let her get away with it as he too may have felt she had some entitlement.
- (iii) He and Mrs. Filipek actively arranged for such access for her.

So, while normally a separated spouse remaining in Canada would not constitute such a significant family tie in Canada for purposes of determining residence, under these circumstances, I do not completely discount that tie.

[27] I turn to the remaining family ties. Mrs. Filipek's parents, the Ruhls, were certainly a part of Mr. Filipek's life. They had lent the Filipek family money, which Mr. Filipek assured them, after his split with Janice, would be repaid. Mr. Filipek did not disclose until cross-examined that the Ruhls lived walking distance from the Canada-U.S. border near Point Roberts, Washington. He claims to have spent most of his time in the Vancouver area in Point Roberts. Regrettably, Mr. Ruhl's health didn't permit him to testify, and Mrs. Ruhl died the week before trial. Mr. Filipek testified that he visited them every couple of months but did not stay with them. He had his Air Canada uniform shipped to them.

[28] My impression was that Mr. Filipek was indeed quite close to his in-laws. I do not believe Mr. Filipek that all his time in the Vancouver/Point Roberts area was spent camping in Point Roberts on the United States side. I find it is more likely he spent considerable time with his in-laws, walking distance from the border.

[29] With respect to his own family, Mr. Filipek confirmed he spent little or no time with his brother. This was verified by his brother. He did however make payment on his mother's home in Edmonton, though my impression was that he did not spend much time visiting.

[30] With respect to family ties, I conclude that this is not a neutral factor, but shows some degree of ongoing connection to Canada.

### Summary

[31] The overall picture I am left with is of a pilot whose work routine was centred out of Vancouver. Wherever else he might go – Turks and Caicos, or gambling in the Northwest United States, he always returned to the Vancouver area for work purposes. He maintains that his routine in the Vancouver area was to camp in Point Roberts, yet his bank records, his calendar and his association with his in-laws and common sense suggests this is not entirely accurate. Mr. Filipek's counsel drew parallels between Mr. Filipek's situation and that of Mr. Laurin, an Air Canada pilot who was found by Chief Justice Bowman in *Laurin v. Her Majesty the Queen*<sup>4</sup> not to be resident in Canada. There are certainly some similarities, but there is a significant difference. Chief Justice Bowman stated, in noting inconsistencies in Mr. Laurin's testimony:

34 I do not regard these alleged discrepancies in the appellant's evidence as justifying rejection of his entire testimony. His testimony was supported by the credible testimony of the other witnesses. It is the responsibility of a trial judge to make findings of fact on the basis of all of the evidence and not fasten on a few contradictions as a justification for rejecting an appellant's case outright. In this case it would require rejecting all of the evidence which destroyed the central assumptions on which the assessments were based.

[32] That is not the case before me. Truth is a powerful concept: when you tell it, the future most often unfolds as you would like – when you don't, life can get messy. I do not believe all that Mr. Filipek told me. He outright admitted to misleading the Court on day one of his testimony, under the guise of not remembering. His calendar was fraught with errors he also acknowledged. His tale of regularly camping in Point Roberts is beyond belief – and was told in examination-in-chief without informing the Court that his in-laws lived within walking distance across the border. His emphasis on Turks and Caicos business ventures and particularly time spent on those

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<sup>4</sup> 2006TCC634.

ventures, I find is grossly exaggerated. What this all does to Mr. Filipek is cast serious doubt on the truth of any of his testimony. Frankly, in attempting to paint a positive picture of having gone non-resident, he entangled himself in a web of exaggerations, falsehoods and deception. This is regrettable. Had he simply told the truth, the truth may, I will not say definitely it would have, but it may have supported a finding of non-residence. But now Mr. Filipek has made it difficult, indeed impossible for me to discern the truth.

[33] The onus is on Mr. Filipek to demolish the Crown's assumptions. I find that the approach Mr. Filipek has taken in this case has dealt a death blow to successfully demolishing the assumptions. I find on balance that his time in the Vancouver area was primarily in Vancouver, and less in Point Roberts. 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.

[34] This has been an unusual case in that three days of testimony by Mr. Filipek had the opposite effect of clarifying his residency – it confused the issue to the point that he has been unable to demolish the Crown's assumptions that he had an established pattern of life in Canada, that he spent regular and frequent periods of time in Canada, and that at no time did he cease to be a resident of Canada. Mr. Filipek has truly been hoisted by his own petard. The appeal is dismissed, with costs.

Signed at Ottawa, Canada, this 16<sup>th</sup> day of June 2008.

“Campbell J. Miller”

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C. Miller J.

CITATION: 2008 TCC 351  
COURT FILE NO.: 2004-1682(IT)G  
STYLE OF CAUSE: NEIL FILIPEK AND HER MAJESTY  
THE QUEEN  
PLACE OF HEARING: Vancouver, British Columbia  
DATE OF HEARING: March 25, 26, 27 and 28, 2008  
REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller  
DATE OF JUDGMENT: June 16, 2008

APPEARANCES:

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