Docket: 2007-4938(IT)G

BETWEEN:

NEIL MCFADYEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on May 8, 2008, at Toronto, Ontario.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Andrew Miller

ORDER

Upon motion made by counsel for the respondent for an order quashing the Amended Notice of Appeal, or in the alternative an order striking certain paragraphs of the Amended Notice of Appeal, or in the further alternative an order granting the respondent an extension of 60 days within which to file a Reply to the Amended Notice of Appeal, and an order granting the respondent its costs on the motion;

Upon reading the affidavits of the appellant, Sheridan Gardner and Craig Harvey, filed;

And upon hearing what was alleged by the parties;

The motion is granted as follows:

All allegations of fact, argument and other provisions of the 2007 Amended Notice of Appeal, in particular, and without limiting the generality, paragraphs 59-64, 70-77, 79, 81-86, 88, 89, 91-99, 101-107, 109-141, 143-159, 162-167, 169, 249-251, the last sentence of paragraph 252, subparagraph (d)(vi) and subparagraph (f) of paragraph 253, are struck from the 2007 Amended Notice of Appeal, save and except for provisions relating only and directly to the issue of the calculation of interest, statutory provisions upon which the appellant relies in advancing the interest issue, the reasons he intends to submit in support of the interest issue and the relief he seeks on the interest issue, as referred to in subparagraph K of paragraph 170 of the 2007 Amended Notice of Appeal, which provisions shall not be struck from the 2007 Amended Notice of Appeal.

The appellant shall file a Further Amended Notice of Appeal raising only the issue of the calculation of interest that he wishes to appeal, such Further Amended Notice of Appeal to be filed within 90 days of this order.

Respondent shall have 60 days from receipt of the Further Amended Notice of Appeal to file a Reply to the Further Notice of Appeal.

Costs of this motion shall be awarded to the respondent.

Signed at Ottawa, Canada, this 31st day of July 2008.

Rip C.J.

Citation: 2008 TCC 441
Date: 20080731
Docket: 2007-4938(IT)G

BETWEEN:

NEIL MCFADYEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Rip, C.J.

[1] The respondent, Her Majesty The Queen, has made an application for an order quashing the Amended Notice of Appeal or, in the alternative, for an order striking out the following paragraphs from the Amended Notice of Appeal: 59-64, 70-77, 79, 81-86, 88, 89, 91-99, 101-107, 109-141, 143-159, 162-167, 169, subparagraph K of 170, 249-251, the last sentence of paragraph 252, subparagraph (d)(vi) and subparagraph (f) of paragraph 253. These paragraphs are set out in Appendix I to these reasons.

[2] On December 17, 2007, Mr. Neil Barry McFadyen, the appellant, amended his Notice of Appeal from assessments for 1993, 1994 and 1995 taxation years, notices of which are dated March 6, 2006 ("2006 reassessments"). The issue in the appeals is whether, in those taxation years, the appellant was resident in Canada.

[3] The appellant, on or about May 10, 1999, filed an Amended Notice of Appeal ("1999 Amended Notice of Appeal") to this Court from reassessments of income tax for 1993, 1994 and 1995, notices of which were dated December 16, 1996 ("1996 reassessments") on the basis he was not a resident of Canada or Ontario during these years. The appellant's spouse at the time had accepted a position as an employee of the Canadian Government at the Canadian Embassy in Tokyo, Japan. The appellant terminated his employment in Canada and in 1992 the appellant, his wife and child moved to Japan. The appellant apparently performed services in Japan for the

Canadian Embassy in 1993 and 1994 both as an employee and as an independent contractor. In 1994 and 1995 the appellant also was employed by a securities firm in Tokyo. In his 1999 Amended Notice of Appeal he stated the issues to be decided were as follows:

> 46. Was the Appellant a factual resident of Canada or ordinarily resident in Canada in 1993, 1994 and up to September 1995?
>
> 47. Was the Appellant a deemed resident of Canada in 1993, 1994 and up to September 1995, as a result of his spouse being an officer or servant of Canada and his being resident in Canada in any previous year, pursuant to the provisions of ss. 250(1)(e) of the ITA?
>
> 48. Whether the Appellant was a resident of Japan, as that term is used in the Canada/Japan Income Tax Convention, such that income derived by him is taxable only in Japan, pursuant to the provisions of Articles 14, 15 and 18 of the Canada/Japan Income Tax Convention.
>
> 49. Whether, if the Appellant was a deemed resident of Canada pursuant to the provisions of ss. 250(1)(e) of the ITA, those provisions are of no force and effect because they are contrary to the provisions of the *Charter of Rights and Freedoms*, s. 15, in that they deprive the Appellant of the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on marital status.

[4] The appeals from the 1996 reassessments were heard by Garon C.J..[1] He held that Mr. McFadyen, on all of the facts submitted, was a factual resident of Canada during 1993, 1994 and 1995 and was thus ordinarily resident in Canada within the meaning of subsection 259(3) of the *Income Tax Act* ("*Act*"). Also, Garon C.J. held that the appellant was subject to the deeming provision contained in former paragraph 250(1)(*e*) of the *Act* with respect to embassy staff and that the provision was not contrary to subsection 15(1) of the *Canadian Charter of Rights*. Mr. McFadyen filed an appeal to the Federal Court of Appeal; the appeal was allowed only to the extent that, in assessing, the Minister of National Revenue ("Minister") was to credit tax paid to Japan.[2] Application for leave to the Supreme Court of Canada was denied. In 2003 Mr. McFadyen was reassessed pursuant to the judgment of the Federal Court of Appeal.[3]

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1 [2000] 4 C.T.C. 2573, 2000 DTC 2473.

2 2002 FCA 496, 2003 DTC 5015, [2003] 2 C.T.C. 28.

3 See paragraphs 10, 11 and 12 of these reasons for a description of documents relating to various matters giving rise to this application.

[5] In the meantime, Mr. McFadyen's spouse, Sheridan Gardner, who was employed in the Canadian Embassy was having her own tax problems with her status as resident with respect to federal and Ontario assessments. Finally, the Ontario Ministry of Finance agreed that she was not a resident of Ontario in the years in appeal and the Ministry of Finance consented to judgment allowing her appeal. Also, the Ontario tax authority acknowledged that Mr. McFadyen was not a resident of Ontario at the times and, as a result, the Canada Revenue Agency ("CRA"), the current tax authority, issued the Ontario 2006 reassessments to Mr. McFadyen.

[6] After objecting to the 2006 reassessments, Mr. McFadyen filed a Notice of Appeal, followed by an Amended Notice of Appeal, dated August 29, 2007 ("2007 Amended Notice of Appeal"), from the 2006 reassessments. Mr. McFadyen recognizes 11 issues for appeal. These issues are set out in Annex II to these reasons. The main thrust of his 2007 Amended Notice of Appeal is that he was not resident of Canada during the years in appeal, the same issue as in the 1996 Amended Notice of Appeal.

[7] The grounds for the respondent's motion are the following:

a) the appeals with respect to the appellant's 1993, 1994 and 1995 taxation years are *res judicata*, scandalous, frivolous or vexatious, or an abuse of process;

b) in the alternative, the March 6, 2006 reassessments with respect to the appellant's 1993, 1994 and 1995 taxation years were nil assessments;

c) in the further alternative, the appeals are moot because even if the appellant were to be successful, the income tax refunds would remain with the CRA, as pre-bankruptcy income tax refunds vest in the trustee for distribution to the creditors and the appellant declared bankruptcy in 2003, with the CRA holding 98% of the unsecured debt;

d) in the further alternative:

I. paragraphs 59-64, 70-77, 79, 81-86, 88, 89, 91-99, 101-107, 109-141, 143-159, and 162-167 do not plead material facts;

II. paragraph 169, subparagraph K of 170; 249-251, the last sentence of 252, subparagraph (d)(vi) of 253 and subparagraph (f) of 253 are not within the Court's jurisdiction.

[8] The respondent relies on the following statutory provisions:

e) sections 53 and 44(1)(b) of the *Tax Court of Canada Rules (General Procedure)*;

f) subsections 152(1), 152(3.1), 152(4), 165(1), 165(1.1), 169(1), 169(2) and 171(1) of the *Income Tax Act*;

g) section 12 of the *Tax Court of Canada Act*;

h) sections 41(11), 67 and 71 of the *Bankruptcy and Insolvency Act*.

[9] The respondent produced an affidavit of Craig Harvey, a program officer who was previously an appeals officer with the CRA and its predecessor organizations. Mr. Harvey stated that he has personal knowledge of the matters he deposed to and that he has examined the tax authority's records relating to Mr. McFadyen's 1993, 1994 and 1995 taxation years.

[10] Attached to Mr. Harvey's affidavit are numerous documents, including a copy of the appellant's 1999 Amended Notice of Appeal; a copy of the respondent's Amended Reply to the Amended Notice of Appeal; a copy of Reasons for Judgment of Garon C.J. dismissing the appeals; a copy of the appellant's Notice of Appeal to the Federal Court of Appeal; a copy of the Reasons for Judgment of the Federal Court of Appeal allowing the appellant's appeal only in respect to allowing the appellant a foreign tax credit with respect to Japanese tax withheld from his 1994 and 1995 income, and a concession the respondent says the Minister made with respect to the appellant's salary for 1993, but otherwise dismissing the appeals; a copy of internal CRA memorandum instructing the tax authority to reassess the appellant in accordance with the reasons of the Federal Court of Appeal; a copy of the appellant's application for leave to appeal to the Supreme Court of Canada and a copy of the judgment of the Supreme Court of Canada dismissing the application; a copy of the appellant's motion record requesting the Chief Justice of Canada to reconsider the dismissal of the application for leave to appeal to the Supreme Court of Canada and a copy of a letter dated July 10, 2003 from the Registrar of the Supreme Court of Canada advising the appellant that his motion was rejected; copies of documents relating to the appellant's bankruptcy; copies of documents relating to reassessments for tax for 1993, 1994 and 1995 pursuant to the *Ontario Income Tax Act*; and correspondence between Mr. McFadyen and officers of the CRA.

[11] Mr. McFadyen also filed an affidavit raising "some additional facts to those in my Amended Notice of Appeal [ ] support that *res judicata* and/or issue estoppel should not apply and in the event that they do apply special circumstances that I believe warrant them not to apply." Attached to his affidavit are documents that

include copies of internal government documents, notes and/or correspondence with various government agencies or departments, including the tax authority; notices of reassessment, dated December 16, 1996, for 1993, 1994 and 1995; Notices of Reassessment, dated March 18, 2003, with respect to 1993, 1994 and 1995 taxation years as well as explanations of changes from prior reassessments; notices of the 2006 reassessments and explanations of changes from prior assessments; 1999 Amended Reply to the Notice of Appeal; formal judgment of the Federal Court of Appeal with respect to applications for judicial review of decisions of the Canadian Human Rights Commission; correspondence between Hon. John Manley and the Executive Assistant to the Minister; Chapter 3 of the 2007 Report of the Auditor General with respect to Human Resources Management – Foreign Affairs and International Trade Canada; and transcript of evidence of the House of Commons Standing Committee on Public Accounts, April 15, 2008.

[12] Also produced by Mr. McFadyen was an affidavit of Sheridan Gardner, his former spouse, to whom he was married in 1993, 1994 and 1995. Ms. Gardner was assessed federal and Ontario income tax for 1993 and 1994 on the basis that she was a "factual resident" in Ontario during these years. She objected to the assessments which were confirmed; she appealed the assessments to this Court. She states that on September 14, 2000 the respondent "made a motion in which the Tax Court of Canada held that I was a deemed resident and the Tax Court did not have jurisdiction to decide my Ontario residency status." Apparently the federal tax authority at the time did not provide Ms. Gardner with the correct information regarding her appeal rights concerning the provincial assessments. The Ontario Ministry of Finance advised her on November 28, 2000 that the provincial assessments had not been confirmed. Ms. Gardner had the right at the time to appeal her Ontario assessments to the Ontario Superior Court of Justice. By Notice dated June 29, 2001 the Canada Customs and Revenue Agency confirmed the Ontario assessments and informed Ms. Gardner of her right to appeal to the Ontario Court.

[13] On February 18, 2005 Lalonde J. of the Ontario Superior Court of Justice approved a consent allowing Ms. Gardner's appeals for 1993 and 1994 on the basis that she was not resident in Ontario during 1993 and 1994. And, as stated earlier, it was on this basis that Ontario agreed that Mr. McFadyen also was not a resident of Ontario in 1993, 1994 and 1995 and his provincial assessments were reduced to nil.

a) The Notices of Reassessment issued in 1996 to Mr. McFadyen described the reassessments as follows:

	Net Federal Tax	Net Provincial Tax	Total Interest Adjustment

1993	$ 6,512.23	$3,667.08	$ 104.50 dr.
1994	$29,299.27	$18,991.56	$7,789.04 dr.
1995[4]	$18,040.25	$11,131.10	$1,743.17 dr.

b) Notices of Reassessment issued on March 18, 2003 described the reassessments made in accordance with the judgment of the Federal Court of Appeal as follows:

	Net Federal Tax	Net Provincial Tax	Total Interest Adjustment
1993	$ 4,223.88	$ 2,378.49	$3,857.94 cr.
1994	$28,274.23	$18,991.56	$1,121.57 cr.
1995	$13,308.80	$11,131.10	$3,818.02 cr.

c) The Notices of Reassessment issued in 2006 described the reassessments as follows:

	Net Federal Tax	Net Provincial Tax	Total Interest Adjustment
1993	$ 4,223.88	Nil	$ 3,260.62 cr.
1994	$28,274.23	Nil	$11,210.70 cr.
1995	$13,308.80	Nil	$ 4,988.80 cr.

The notes of explanation of the changes to income tax state that "Your Ontario taxes payable have been reduced to $0.00".

[14] It is clear that the 2006 reassessments were only in respect of assessments issued pursuant to the *Ontario Income Tax Act* and not the *Income Tax Act* of Canada. The federal tax assessments for 1993, 1994 and 1995 issued in 2006 are identical with those issued in 2003. It may well be that the Notices of Assessments were different from the notices issued in 2003 in that the Ontario 2006 income tax reassessments were reduced to nil but a notice of assessment or reassessment is not an assessment or reassessment; it only informs the taxpayer of amounts of tax, interest and penalty, if any, assessed under the federal *Income Tax Act* and the relevant provincial *Income Tax Act* as well as assessment of contributions for *Canada Pension Plan* and the *Employment Insurance Act*. In the appeals at bar, no change has been made in the 2006 reassessments of federal income tax from those assessed in 2003. And it is the federal income tax that Mr. McFadyen is purporting to appeal.

[15] The appellant has no right of appeal for taxes assessed to the Tax Court of Canada as a result of the 2006 reassessments. The right to appeal is granted by

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[4] Another Notice of Reassessment for 1995, also issued on December 16, 1996, reported nil federal and provincial tax.

subsection 169(1) of the *Act*. As I infer in the preceding paragraph, the right of appeal arises in respect of an assessment, not a notice of assessment. The distinction between the two was highlighted by Thorson, P. in *Pure Spring Co. v. M.N.R.*:[5]

> The assessment is different from the notice of assessment; the one is an operation, the other a piece of paper. The nature of the assessment operation was clearly stated by the Chief Justice of Australia, Isaacs A.C.J., in *Federal Commissioner of Taxation v. Clarke* (1927) 40 C.L.R. 246 at p. 277:
>
> > "An assessment is only the ascertainment and fixation of liability,"
>
> . . .
>
> It is the opinion as formed, and not the material on which it was based, that is one of the circumstances relevant to the assessment. The assessment, as I see it, is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.

[16] An assessment occurs when the Minister determines a taxpayer's liability to pay tax. The receipt of a notice of assessment is not the same as being assessed. An assessment is something more than merely a notice that it has been made.

[17] The 2006 Notices of Reassessment accomplished two objectives. Firstly, the appellant's provincial tax liability for the years in issue was reduced to nil. An assessment of provincial tax liability pursuant to a provincial statute does not give rise to a right to appeal federal tax.

[18] The appellant also appears to have been assessed for interest on his federal taxes that had accrued since the Notice of Reassessment issued in 2003. The appellant contends that the assessment of interest on federal tax reopens the entire federal assessment to appeal. I cannot agree.

[19] Subsection 152(1) of the *Act* provides for the Minister to assess tax for the year as well as interest and penalties. An assessment of interest is distinct from an assessment of tax, it is the result of a tax assessment.

[20] Subsection 152(4) provides that a taxpayer may not be assessed beyond the "normal reassessment period," as defined in subsection 152(3.1) of the *Act*. Considering that reassessments for 1993, 1994 and 1995 had been issued in 1996, it

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5 [1946] C.T.C. 169 (Ex. Ct.) at page 198.

is obvious that the 2006 Notices of Reassessment were issued beyond the "normal reassessment period." Even if the Minister had wanted to reassess the appellant for federal taxes, thus granting the appellant a right of appeal, the Minister was statute barred from doing so.

[21] The appellant was reassessed in 2003 in accordance with the judgment of the Federal Court of Appeal. As the 2003 reassessments of the appellant's tax liability were issued pursuant to an order of a court, subsection 169(2) of the *Act* would have applied to those appeals. Subsection 169(2) precludes an appeal from an assessment based on a court order, except on matters relating to the assessment that were not finally determined by the Court. If the appellant had objected to the 2003 Notices of Assessment, subsection 169(2) would have precluded him from raising any issue raised in the current appeals. This raises the following question: why should the 2006 Notices of Assessment, which only update the amount of interest payable on the federal tax liability, grant the appellant a greater right of appeal than did the 2003 reassessments? The answer is that they do not.

[22] The parties raised the issue of *res judicata* and I shall deal with it. There are two branches to the doctrine of *res judicata*: cause of action estoppel and issue estoppel. The distinction between the two branches of *res judicata* was set out by Dickson J., as he then was, in *Angle v. M.N.R.*,[6] as follows:

> . . . The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction . . . The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation* [(1921), 29 C.L.R. 537], at p. 561:
>
> > I fully recognize the distinction between the doctrine of res judicata where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

[23] The parties to this motion have argued the applicability of issue estoppel to this case. Based upon the view expressed in *Angle*,[7] it appears that cause of action estoppel is the more appropriate doctrine to apply to these facts. The appellant seeks

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6 [1975] 2 S.C.R. 248 at page 254.

7 See also the *dicta* from *Arnold v. NatWest Bank Plc.*, [1991] 2 A.C. 93 (H.L.(E.)) at pages 104-5.

to relitigate his assessed liability to pay income tax on his worldwide income for the taxation years 1993, 1994, and 1995. It is the same set of facts and the same assessment of taxes (subject to the adjustments ordered by the Federal Court of Appeal) as in the earlier litigation. It seems clear that the cause of action the appellant seeks to put forward currently is the same cause of action as was litigated before Garon, C.J.. Therefore, I consider that cause of action estoppel is the doctrine applicable on this motion.

[24] The classic statement of the doctrine of cause of action estoppel is found in *Henderson v. Henderson.*[8] In holding that a default judgment out of England prevented the raising of new defenses in a proceeding in England, Wigram V.C. stated the rule as follows, at page 319:

> In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[25] *Henderson* not only forecloses the relitigation of issues that have been conclusively decided by a court of competent jurisdiction. It also enunciates what has been referred to as the "might or ought" principle[9] - matters that properly should have been part of the original litigation but that a party failed to argue cannot be raised in subsequent litigation.[10]

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8 (1843) 3 Hare 100, Vol. LXVII, English Reports (containing Hare, Vol. 2 to 6) 313.

9 See Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham: LexisNexis Canada Inc., 2004) at page 127.

10 I note that other decisions of the Tax Court of Canada have used the principle of *res judicata* to preclude an appellant from making new arguments to attack an assessment that has previously been litigated. See, for example, *Modlivco Inc. v. Canada*, [1995] 2 C.T.C. 2880 (T.C.C.) and *Ahmad v. R.*, [2004] 2 C.T.C. 2766 (T.C.C. [Informal Procedure]).

[26] The requirements to establish cause of action estoppel are well settled in Canadian law. The case of *Bjarnarson v. Manitoba*[11] sets out four requirements, relying on the leading decision of the Supreme Court of Canada:

> The Supreme Court of Canada in the case of Town of Grandview v. Doering (1975), 61 D.L.R. (3d) 455, identified four criteria that must be present before the doctrine of cause of action estoppel would apply:
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> > 1. There must be a final decision of a court of competent jurisdiction in the prior action;
> >
> > 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [mutuality];
> >
> > 3. The cause of action in the prior action must not be separate and distinct; and
> >
> > 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[27] The decision of Garon C.J. was a final decision of a court of competent jurisdiction and the same parties in that prior litigation are now before this Court. As discussed above, the appeal of the same assessment of tax liability for the same taxation years constitutes the same cause of action. Finally, all issues put forth in the 2007 Amended Notice of Appeal (with one exception to be discussed later) were either argued or, with the exercise of reasonable diligence, could have been argued in the earlier appeal. Therefore, the requirements for the application of cause of action estoppel have been met.

[28] Cause of action estoppel appears to be the proper basis for deciding this motion. However, as the parties directed this Court's attention to authorities dealing with issue estoppel, I will briefly consider the applicability of that branch of *res judicata*.

[29] The leading case on issue estoppel in Canada is *Angle, supra*. Dickson, J., as he then was, writing for a majority of the Supreme Court, cited *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2),*[12] for three requirements to apply issue estoppel:

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[11] (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 45 D.L.R. (4th) 766 (Man. C.A.).

[12] [1967] 1 A.C. 853 at page 935.

> . . . (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[30] Dickson, J. referred to *Spens v. I.R.C.*,[13] to impose a fourth requirement to the doctrine's application:

> ... whether the determination on which it is sought to found the estoppel is 'so fundamental to the substantive decision that the latter *cannot stand* without the former. Nothing less than this will do'.

[31] As previously mentioned, when considering cause of action estoppel it is clear that the previous judicial decision was final and that the same parties to the previous litigation are parties to the current proceeding.

[32] This issue of whether the same questions have been decided in the previous litigation deserves some comment. The appellant seeks to raise new issues in this appeal that he did not raise in the proceeding before Garon, C.J.. This seems to indicate that issue estoppel would not now preclude him from addressing these issues in the current proceeding. However, several Canadian courts have adopted the "might or ought" principle's application to issue estoppel as well as cause of action estoppel. Indeed, the Federal Court of Appeal in *Apotex Inc. v. Merck & Co. (C.A.)*,[14] did just that. The position of the common law may continue to evolve in this respect. The decision in *Apotex* is a decision of the Supreme Court of Canada and is of the highest authority. The "might or ought" principle applies to issue estoppel to prevent new issues from being raised now that should have been raised in the previous litigation.

[33] The Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*,[15] firmly established that there is a judicial discretion whether to apply issue estoppel when the requirements of that doctrine have been met. Similarly, judicial discretion seems to exist with respect to cause of action estoppel.[16]

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13 [1970] 3 All. E.R. 295 at page 301.

14 [2003] 1 F.C. 242.

15 [2001] 2 S.C.R. 460 at page 481.

16 The Ontario Court of Appeal in *Toronto (City) v. Canadian Union of Public Employees, Local 79* (2001), 55 O.R. (3d) 541 (C.A.) stated that the same flexibility as in *Danyluk*, *supra* applies to cause of action estoppel. The Supreme Court of Canada, in deciding the appeal on the basis of abuse of process by relitigation, did not disturb the Ontario Court of Appeal's comments regarding *res judicata*.

[34] In *Danyluk*, *supra*, the Supreme Court of Canada relied on its previous decision in *General Motors of Canada Ltd. v. Naken*,[17] for the proposition that judicial discretion should have a limited application when reviewing previous decisions made by a court. The scope for applying discretion in this case should be very limited.

[35] The appellant seeks to rely on *Withler v. Canada (Attorney General)*,[18] for the proposition that the party seeking to apply *res judicata* has the onus of establishing that judicial discretion should not be applied. I think this interpretation is a misreading of *Withler* and is contradicted by *Gebreselassie v. VCR Active Media Ltd.*[19] The appellant bears the onus of establishing that the limited discretion ought to be applied.

[36] The appellant cites *Withler* for the proposition that *res judicata* should not be applied if it will inflict a serious injustice. I accept that view. There can be no doubt that the appellant has experienced serious personal consequences from the previous litigation, including a personal bankruptcy. However, these serious personal consequences cannot be equated with serious injustice. This is not a situation where the appellant has experienced a lack of due process, despite his arguments to the contrary. The appellant has not drawn my attention to any evidence that a serious injustice would arise by the application of *res judicata* and, thus, I will not exercise my discretion in the appellant's favour.

[37] Given that either cause of action estoppel or issue estoppel apply to preclude relitigation in this case, I am asked to determine whether special circumstances exist to suspend the application of those doctrines. The application of special circumstances also flows from the decision in *Henderson, supra*.

[38] The appellant submits that there is new evidence *viz*. a consent decision of the Ontario Superior Court that warrants a rehearing of this matter. With regards to new evidence, Donald J. Lange, *The Doctrine of Res Judicata in Canada*,[20] summarizes the special circumstance of new evidence nicely:

> . . . Where fraud is not involved, the common law position with respect to new evidence is very clear. For new evidence to preclude the operation of issue estoppel or cause of action estoppel resulting from an entered judgment, the new

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17 [1983] 1 S.C.R. 72 at page 101.

18 (2002), 3 B.C.L.R. (4th) 365 (S.C.).

19 [2007] O.J. No. 4165 (Ont. S.C.J.).

20 2nd ed. (Markham: LexisNexis Canada Inc., 2004) at pages 264-65.

> evidence must be practically conclusive of the matter. The incontrovertible nature of the new evidence is at the heart of the test. It must be virtually impossible to controvert the new evidence.
>
> [Footnote omitted.]

[39] The rationale for the limited application of the special circumstance of new evidence was put forward in *Phosphate Sewage Co. v. Molleson*,[21] which was cited with approval by the Supreme Court in *Grandview v. Doering*,[22] read as follows:

> As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before. Now I do not stop to consider whether the fact here, if it had come under the description which is represented by the words *res noviter veniens in notitiam*, would have been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient which alone would not have been sufficient to give a right to relief which otherwise the parties were not entitled to.

[40] The determination by the Ontario Ministry of Finance of the appellant's provincial residency is not the type of conclusive evidence that will attract the sought after relief. Neither is the judgment of Lalonde J. since, among other things, it was a judgment on consent under a provincial statute. There is no basis to apply special circumstances to this case.

Interest

[41] In the 2007 Amended Notice of Appeal, subparagraph K of paragraph 170, a provision the respondent seeks to strike, the appellant raises the following issue:

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21 (1879), 4 App. Cas. 801 (H.L.).

22 [1976] 2 S.C.R. 621 at page 636.

> Whether the Minister incorrectly calculated the interest and refund adjustments for the 1993, 1994 and 1995 reassessments and/or applied them contrary to s. 68 of the *Bankruptcy and Insolvency Act*.

[42] The respondent contends that subparagraph 170 K of the 2007 Amended Notice of Appeal be struck for lack of jurisdiction. Subparagraph 170 K appears to include two matters affecting interest. The second part of the provision questions the application of any refund; this is a collections issue and is not a matter before me. However, the first part of subparagraph 170 K alleges that the Minister has incorrectly calculated the interest on the tax liability. This part should not be struck. The notices for 2006 reassessments do indicate interest accrued on federal tax unpaid. As there are new amounts of interest calculated and assessed, the appellant should be permitted to challenge the Minister's computation of interest. Furthermore, this is not the type of issue that reasonably could have been raised in previous litigation such that *res judicata* would apply.

[43] Therefore all allegations of fact, argument and other provisions of the 2007 Amended Notice of Appeal will be struck, save and except for provisions relating only and directly to the issue of the calculation of interest, statutory provisions upon which the appellant relies in advancing the interest issue and the reasons he intends to submit in support of the interest issue and the relief he seeks on the interest issue. In fact, all provisions relating to issues other than interest in the 2007 Amended Notice of Appeal are struck.

[44] To maintain the current Amended Notice of Appeal with almost all of its provisions struck may cause confusion to all. Therefore the appellant shall provide a Further Amended Notice of Appeal raising only the issue of the calculation of interest that he wishes to appeal, such Further Amended Notice of Appeal to be filed within 90 days of this order. The respondent shall have 60 days from receipt of the Further Amended Notice of Appeal to file a Reply to the Further Notice of Appeal. Costs of this application shall be awarded to the respondent.

Signed at Ottawa, Canada, this 31st day of July 2008.

"Gerald J. Rip"

Rip C.J.

Adjournment for Competent Authority Process

59. The Tax Court granted on consent with the Minister a six month adjournment to pursue the competent authority process.

60. The Minister did not initiate the competent authority process.

61. On November 2, 1998, the Appellant wrote to the Minister and later in December to Mike Quebec, Competent Authority, Director of International Tax Services Office asking that the competent authority process be carried out.

62. On December 16, 1998, Kal Malhotra of the CRA Appeals section, who confirmed the 1996 reassessments in 1997, responded to the Appellant's request for the mutual agreement process. The letter states the following:

> *"The Department did not contact the Japanese Competent Authority during the review of your Notices of Objection as you did not establish that your income has been taxed in both Japan and Canada and that you have been assessed contrary to the Canada-Japan Tax Convention."*
>
> *"The Canadian Competent Authority does not determine residency in a foreign country. Therefore, you will understand that any certificate of residency issued*

by the Japanese Authorities under their domestic laws has no bearing in determining residency in Canada."

"As a matter of policy, the Canadian Competent Authority will not accept a request while a Tax Court appeal is in progress."

63. On December 31, 1998, Mike Quebec responded to the Appellant's letter stating that:

"Given that your Notice of Objection against the assessments for the taxation years in question is pending before the Tax Court of Canada, it would be inappropriate for this office to intervene in this matter."

64. The Appellant obtained a legal opinion from Prof. Machimura, Professor of Law, Japan, dated June 21, 1999, to support the authenticity of the Japanese Certificate of Residency. The letter states:

"Japanese district tax offices issue routinely a certificate of residency (in Japanese, it is called "kyoju-syoumei") for the purpose to prevent international double taxation."

70. The Appellant was forced into bankruptcy in May, 2003, because of the outstanding debt of Ontario and federal tax, penalties and interest for the 1993, 1994 and 1995 taxation years. The bankruptcy trustee determined that the Appellant had zero surplus income. He was discharged in February, 2004.

71. A Letter to Neil McFadyen from Elections Canada, dated July 10, 2003, shows that the government of Canada considered that the Appellant's ordinary place of residence from August 12, 1992, was at 3-38 Akasaka 7-Chome, Minato-Ku, Tokyo Japan and remained unchanged until he returned to Canada. This contradicts the CRA's position that the Appellant was ordinarily resident in Canada.

72. Documents obtained in 2007 under the *Privacy Act* show that on July 11, 2003, Marc Leclair, Appeals Division, sent a formal request to the Canadian Competent Authority Division to carry out the mutual agreement process. The Canadian Competent Authority refused to carry out the request and noted on the Competent Authority File Report under the field "*Relief Provided: No Relief - Double Tax Incurred*". This decision was not previously made known to the Appellant.

73. In February, 2005, the Minister agreed that the Appellant's spouse was not resident in Ontario for 1993 and 1994 under the *Ontario Income Tax Act* and a consent Order respecting her appeal under that Act was issued by the Ontario Superior Court.

74. In January, 2006, the Appellant was notified by an appeals officer that his objection to the Ontario tax reassessments were going to be allowed in full and that he was not

resident in Ontario for any time during 1993, 1994 and up to September 12, 1995.

75. On February 4, 2006 the Appellant received a letter from Karen Tripp, Appeals Officer, CRA dated January 31, 2006. The letter states:

> *"We are prepared to resolve your objection in view of the settlement that was reached for Ms. Gardiner."*
>
> *"Although you were ordinarily resident in Canada for purposes of the Income Tax Act (Canada), we are prepared to accept that you were not a resident of Ontario for the purposes of the Income Tax Act (Ontario) for 1993, 1994, and up to September 12, 1995."*

76. On February 6, 2006, the Appellant called Karen Tripp and told her that he agreed that he was not resident in Ontario for that time period and she told him that his file would be sent for reassessment.

77. In allowing the objection the Minister of National Revenue determined that the Appellant did not have sufficient ties to be considered resident in Ontario for 1993, 1994 and up to September 12, 1995.

79. The Minister did not provide the Appellant with the assumptions of fact that were relied on to support the new reassessment as a "*factual resident* of Canada".

81. On September 26, 2007, the Minister consented to an Order of the Federal Court Trial Division to adjourn the Appellant's judicial reviews of his Canadian Human

Rights Complaints to allow the Minister time to consider his objection and to appeal to the Tax Court if necessary.

82. The Appeals Officer who dealt with the May 24, 2006, objection initially agreed to answer questions about the reassessments, but later refused, including refusing to identify the address or location at which the Appellant was allegedly "resident in Canada" while not resident in Ontario during the relevant period.

83. On November 18, 2006, the Appellant wrote to the Competent Authority and provided evidence of Japanese income tax law on residency from a translated Japanese Court ruling. The Competent Authority did not accept this as sufficient evidence that under Japanese law the Appellant was resident in Japan.

84. The internal notes to file (named CATS #51777) by Patrick Massicotte, Competent Authority Division, CRA, dated November 14, 2006, obtained by the Appellant under the *Privacy Act*, pages 3-5, indicate that even if the Appellant was to request the Competent Authority mutual agreement process from the Japanese Competent Authority, the Canadian Competent Authority would not vary in any way his tax liability.

85. In an email from Patrick Masscotte to Jim Wilson dated October 31, 2006, Masscotte states regarding the CRA policy in ITTA #19 about remittance based taxation in Japan., that "our understanding is that he is completely exempt from Japanese income tax because of his diplomatic status". Mr. Masscotte's email indicates that this is why the CASD will not get involved in any mutual agreement with the Japanese competent authority to resolve any dual residence.

86. In a responding internal email from Jim Wilson to Patrick Masscotte dated November 1, 2006, Mr. Wilson agrees with Mr. Masscotte's summary. Both Mr. Wilson and Mr. Masscotte ignored that fact that there is evidence of the Appellant paying Japanese tax and that Federal Court of Appeal held that he did pay Japanese tax and that the Minister pleaded in the Tax Court of Canada that Japan had the right to tax him.

88. The Notices of Confirmation did not include any assumptions of fact that were relied on to support the new reassessments as a "factual resident of Canada" while not resident in Ontario.

89. The "Report on an Objection" obtained by the Appellant on July 24, 2007 under the the *Privacy Act* states that:

> At para 2.1.2:
> ... *"The taxpayer filed a notice of objection to the reassessments objecting to his Ontario Residency Status. That objection was allowed in full and the taxpayer was determined to be not ordinarily resident in Ontario, however still ordinarily resident in Canada during the 1993, 1994 and 1995 taxation years."*...
>
> And at para 3.1
> ... *"The taxpayer argued that since he was considered to be not ordinarily resident in Ontario during the 1993, 1994 and 1995 taxation years, there are new facts that could change the previous court decisions. However, the fact that the taxpayer was not a resident of Ontario during the 1993, 1994 and 1995 taxation years does not change the ties he had to Canada when the previous court decisions were rendered."*...

Federal Budget Information

91. The 1988 Federal Budget Supplementary Information with respect to ss. 120(1) of the ITA (federal surtax for income not earned in a province) states:

> *Canadian residents living abroad and certain non-resident individuals now pay a special federal tax of 47% of the regular federal income tax. This provision ensures that the total income tax burden on these individuals is comparable to that paid by individuals living in Canada who are liable for provincial taxes as well as federal tax. To bring this special tax more in line with current provincial*

tax rates, it is proposed that the special federal tax be raised to 52%. The rate of 52% approximates the average prevailing rate of provincial income taxes.

92. The 1998 Budget Ways and Means Motion indicates that the intended interpretation for the residency status of a government employee and spouse posted abroad is that there are considered to have ceased to be factually resident in Canada:

Example

Louise is an employee of the Government of Canada who in 1996 was posted to the Canadian Embassy in Country X. Louise, her spouse David and their dependent child Celeste all moved to Country X, and **all ceased to be factually resident in Canada.** Under the existing rules, however, Louise, David and Celeste are all deemed to have remained resident in Canada.

93. The 2000 Federal Budget Annex 7 at page 238 with respect to "Reduction in Federal Surtax for Non-Residents" states that:

Individuals who have income which is considered to have been earned in Canada, but which is not considered to be earned in a province, pay a special federal surtax in addition to their regular tax. Individuals with such income include

- *deemed residents, such as members of the armed forces who reside outside of* ***Canada and therefore have no province of residence;***
- *Canadian residents with income from a permanent establishment in a foreign country; and*
- *Non-residents who have business or employment income taxable in Canada*

The federal surtax for non-residents, which is currently 52 per cent of basic federal tax, ensures that deemed residents and others with income not earned in a province face a total income tax burden roughly comparable to that of Canadian residents. The surtax, which was introduced in 1972, is calculated to approximate provincial taxes. The surtax percentage has been adjusted on several occasions since 1972 to reflect changes in average provincial tax rates.

In light of recent changes in provincial tax rates, the budget propose to reduce the federal surtax on income not earned in a province from 52 per cent of basic federal tax to 48 per cent.

This measure will apply for the 2000 and subsequent taxation years.

The Minister's Policies

94. The Minister's longstanding and customary policy of determining residence of

individuals living outside of Canada included a "2 year rule" (i.e., living outside of Canada for 2 or more years) was given substantial weight to others residing abroad who were assessed as non-residents or deemed residents for the same and previous taxation years, but was applied differently to the Appellant because of his marital status, i.e., being married to a government employee.

95. The Minister's Residency Determination Advisory (RDA) computer program in place at the time of the first reassessment in 1996 which was used to determine the residency of others with similar ties as non-residents or deemed residents for the same and previous taxation years would have indicated that the Appellant was not a "factual resident" as that term is used within the Minister's policy, but rather a deemed resident in Canada. However this policy was applied differently to the Appellant because of his marital status, i.e., being married to a government employee.

96. The Minister has tried to circumvent the intention of Parliament regarding the repeal of paragraph 250(1)(e) of the ITA by using s. 250(3) of the ITA in virtually the same manner by adopting a policy to apply great weight to whether the individual is a spouse of a government employee. The RDA program has been revised to make it virtually impossible for a spouse of a government employee posted abroad to not be a "factual resident", without appealing to the Ontario Court and the Tax Court, by adding ties such as having a Canadian passport.

97. The Minister's policy in the Department's Tax Operations Manual, TOM 4046.50(3)15, dated 2001 indicates that "*factual residents*", are "*taxed as if they never left Canada*" and are "*subject to provincial or territorial tax in the province or territory in which residential ties are maintained…*" and "*may be subject to treaty exemptions*".

98. An internal CCRA document EC0069, from Head Office, Rulings Division, N.M. Sheerin, dated July 12, 1978 to the Montreal District Office, Mr. A. Beshara, Group Supervisor, Payroll Audit on the subject of "residential status" states that:

In our opinion, provided the employee has disposed of his Canadian residence by sale or lease at the time of his departure for Saudi Arabia or has made a definite commitment to do so, as described in our previous memorandum to you dated February 14, 1978 concerning ...., he would generally be considered to have severed all residential ties with Canada and may therefore be granted non-resident status as of the date of his departure regardless of the fact his family will remain in Canada for a period of approximately two months.

99. The Minister's publicly stated policy on "significant residential ties" in s. 6 of IT-221R2 dated Feb 5, 1983 and s. 5 of IT-221R3 dated December 21, 2001 and newer revisions is as follows:

5. The residential ties of an individual that will almost always be significant residential ties for the purposes of determining residence status are the individual's

(a) Dwelling Place,
(b) Spouse or common-law partner, and
(c) Dependants

"6. ...may not consider the dwelling place to be a significant residential tie with Canada except when taken together with other residential ties"

"17. ...If the individual were to lease the dwelling place to a third party during the time between acquiring the dwelling place and residing there, then, unless the individual had other residential ties to Canada, the dwelling place would not be a significant residential tie with Canada during that period of time."

101. The Minister's publicly stated policy on the term "factual resident" in s. 19 of IT-221R3 dated December 21, 2001 and newer revisions is as follows:

"19. ...Among other things, an individual who is deemed to be resident in Canada under subsection 250(1) will not be resident in a particular province for provincial tax purposes, since he or she is not factually resident in Canada"

102. The newest version of IT-221R3 (dated October 4, 2002) found on the CRA website, http://www.cra-arc.gc.ca/E/pub/tp/it221r3-consolid/it221r3-consolid-e.html, has two additional paragraphs in section 1. These paragraphs state that the same policies set out in the bulletin to determine residence in Canada apply to the determination of provincial residency:

> Many of the comments in this bulletin apply to determinations of residence status for provincial, as well as federal, tax purposes. Generally, an individual is subject to provincial tax on his or her worldwide income from all sources if the individual is **resident** in a particular province **on December 31** of the particular taxation year. An individual is considered to be resident in the province where he or she has significant residential ties (see ¶s 4-9 for a discussion of residential ties).
>
> In some cases, an individual will be considered to be resident in more than one province on December 31 of a particular taxation year. This situation usually arises where an individual is physically residing in a province other than the province in which he or she ordinarily resides, on December 31 of the particular taxation year. For example, an individual might be away from his or her usual home for a considerable length of time on a temporary job posting or in the course of obtaining a post-secondary education. An individual who is resident in more than one province on December 31 of a particular taxation year will be considered to be **resident only in the province where he or she has the most significant residential ties**, for purposes of computing his or her provincial tax payable. Taxpayers who live inside Canada throughout the year requiring assistance in determining their province of residence for provincial tax purposes should contact their local Tax Services Office. Taxpayers who live outside Canada for all or part of the year who require assistance in making this determination should contact the International Tax Services Office (**see ¶ 27** for contact information).
>
> ***Bulletin Revisions***
>
> **¶s 3-29** have not been revised since the issuance of IT-221R3 on December 21, 2001.
>
> Two new paragraphs have been added to ¶ 1 to clarify the application of the criteria set out in the bulletin on the determination of provincial residence for provincial income tax purposes. Section 2607 of the *Regulations* has been added to the Reference Section of the bulletin as a result of the new discussion on individual resident in more than one province. [October 4, 2002]

103. The Foreign Service Handbook, March, 1990, published by External Affairs and International Trade Canada , (now the Department of Foreign Affairs) with input from Revenue Canada, provided to the Appellant, stated that "you are deemed to be a resident of Canada" and "in lieu of provincial income tax, there is a surtax … of the basic federal tax payable".

104. According to the CCRA's Tax Operation Manual 4046.(50)3 page 20 (TOM), "deemed residents" may be identified by having an address of Box 489 or Box 500 Ottawa, (postal codes K1N 8V5, K1N 8T7). All government employees posted abroad are provided with such addresses for use while at post for forwarding their

mail via diplomatic courier bags.

105. Another CCRA policy document number 9721366, Head Office Memo from the Rulings Directorate on the subject of "Residence status of airline pilots" states that:

PRINCIPAL ISSUES:
(1) Whether economic ties alone are sufficient to cause an individual to be resident in Canada; ...

POSITION:
(1) No, other ties must be considered also before an individual would be considered to be resident in Canada. ...

REASONS:
(1) Mere economic ties are not enough to determine residency. The Act clearly demonstrates that a non-resident individual could be employed in Canada. ...

106. The Minister's internal policy shown in a document described as "Memorandum from Rene Fleming, International Tax Directorate to All TSOs dated January 13, 1998", obtained under the *Access to Information Act* is as follows:

> *"The opinion indicates that more weight should be placed on the individual's permanent home, his family and social ties and personal property than economic ties. The principle to be drawn from this is that it is not necessary for an individual to sever all ties to Canada to become a non-resident of Canada, and in fact a number of ties may be maintained."*

107. The Minister's internal policy shown in a CRA internal Email from Rene Fleming, Director International Tax Office, dated November 17, 1998 shows that marital status is a "crucial" consideration in residency determination:

> *"We discussed marriage, separation and support of adult children. Generally, where the taxpayer is married, the residence of the spouse will be crucial. If the spouse continues to be resident in Canada, this will be a substantial factor in favor of the taxpayer continuing to be resident / not severing ties. If the spouse is a non-resident, obviously this will have the opposite effect."*

109. There is comparative data in the CRA electronic database showing that the Appellant was treated differently than other Canadians residing abroad not married to government employees with similar ties living outside of Canada for similar or lesser periods of time, who were assessed as non-residents or deemed residents.

110. It would be possible to extract data for persons having the Box 489 or Box 509 address from the CRA databases.

111. The CRA has developed "local identifier codes" for deemed and non-residents which may help identify such individuals.

112. The Appellant contacted John Cox of the CRA Statistics Division, Ottawa at (613)957-7423 on September 30, 2004, to obtain information about the CRA databases. He was told by John Cox that the main T1 database goes back 15-16 years and contains virtually all data from the T1 return and most of the additional schedules. This data would include address data, interest income, investment income, gross and net rental income, RRSP contributions.

113. The Minister considered these data to be "residential ties" with respect to the Appellant making him a "factual resident" before the Minister agreed that the Appellant was not resident in Ontario.

114. John Cox told the Appellant that data can be extracted from the main T1 database into an electronic file which can then be used for statistical analysis.

115. Based on the information provided by John Cox, similar "residential ties" of other taxpayers is available in the main T1 database.

116. Mr. Edward Doe, of 33 Farnham Cr., Ottawa, a longtime CIDA employee who was not married to a government employee swore an affidavit filed in the Federal Court Trial Division under file T-77-04, that during each of his four postings abroad that he maintained bank accounts, an Ontario drivers license, and owned a principal residence in Ottawa (rented out) and was assessed as deemed resident for each posting. In April, 1996, he filled out the Revenue Canada NR73 (Determination of Residence form) hoping to be assessed as an Ontario resident. In written replies, he was told that they had "not maintained significant residential ties with Canada" but that "in light of the purpose of your stay abroad, we consider you to be a deemed resident while you were living outside Canada".

117. Mr. Nigel Wills of 66 Cummings Crescent, Winnipeg, Manitoba was posted to Lesotho from August, 1994 to June, 1997 by a Canadian employer. He filled out the CRA NR73 before he left and was told he would be non-resident. He maintained some ties while he was abroad, i.e., rental property, bank account, RRSPs, passport, etc. He was assessed as a non-resident of Canada while he was abroad. He was audited after returning to Canada and threatened with reassessment but he was not reassessed. He has stated the following:

> *As I understand it, there is and has always been a refusal on their part to concede that you were a resident of Japan during your stay there and to apply the provisions of the Canada – Japan tax treaty. However, during a telephone call with Mr. Putz of the CCRA's Winnipeg Tax Office, on March 27th, and subsequently our discussions on April 2nd, CCRA made it quite clear that they considered me to be a resident of Lesotho during the period in question. Further, they said that if a tax treaty had existed between Canada and the Kingdom of Lesotho, we would have no dispute today, because the tiebreaker rules (the decision process found in all treaties) would simply be applied, to settle the residency issue. We questioned them on this a number of times and they were adamant in their position. Their present position is that because no treaty exists, and no simple tiebreaker rules can be applied, that they are free to make the determination based on other criteria, with regard to whether or not I was also at the same time a resident of Canada for tax purposes.*

Given the above facts I fail to understand why CCRA has taken an entirely different position with respect to your residency when our circumstances were almost identical. The only real difference was the employment and residency status while overseas, of our wives.

118. For the amount of income earned in each taxation year the rate of Japanese tax was lower than that imposed by Canada leaving the Appellant with a much lower take home pay than others who were not married to Canadian government employee doing work of equal value and earning similar incomes.

Repeal of 250(1)(e)

119. The 1961 Ways and Means Motion introducing paragraph 250(1)(e) (then paragraph 139(3)(d)), indicates the intended interpretation that when a spouse (wife) of a government employee is residing outside of Canada, she ceases to be a factual resident and would be deemed resident by the deeming provision:

That for 1961 and subsequent taxation years, where an individual residing outside Canada is deemed to be resident in Canada because he is an officer or servant of Canada or a province, his wife residing with him (if she was previously resident in Canada) or his dependant child shall also be deemed to resident in Canada.

120. Paragraph 250(1)(e) of the ITA, formerly paragraph 139(3)(d), was enacted in 1961 at which time spouses of government employees serving abroad were mostly women and did not work outside the home.

121. On August, 5 1997, the Honourable Hedy Fry, Secretary of State for the Status of Women, wrote to the Minister of Finance regarding the tax treatment of spouses of Canadian Public Servants posted abroad. The letter shows that Hedy Fry had identified the taxation of spouses of government employees as a women's issue that "affect women both as employees and as spouses of employees of the government of Canada" and that "There is concern that the tax implications of the situation could prevent women from accepting foreign postings which could enhance their careers". Ms. Hedy Fry's letter lead to the repeal of paragraph 250(1)(e) of the Income Tax Act in the February, 1998 budget.

122. On January 22, 1998 the Right Honourable Paul Martin, then Minister of Finance wrote to Ms. Gardner stating:

> *"Under the Income Tax Act, government employees and their spouses are deemed to be residents of Canada. ... The taxation of government employees and their spouses as residents of Canada is a longstanding practice that was introduced to the tax system at a time when it was less usual for both spouses in a family to be employed. Therefore, the fairness of Canada taxing a spouse's employment income was generally not an issue, and deeming the spouse to be a resident may have been viewed as desirable to minimize tax-planning opportunities. Times have changed, and taxing one spouse according to the other's status is clearly an issue now. Therefore, I have instructed my officials to review the applicable section of the legislation and to advise whether it has any continuing relevance."*

123. An internal Department of Finance Memo, from Brian Emewein, Director, Tax Legislative Division, dated November 17,1998 indicates that there were many spouses affected by paragraph 250(1)(e) of the ITA:

"The budget measure proposes to repeal the rule that deems many factually non-resident spouses of Canadian government employees to be resident in Canada"

124. Robin Maley, Tax Legislative Policy Division, Department of Finance told the Appellant shortly after the February 1998 budget that Finance viewed the repeal of paragraph 250(1)(e) and the introduction of 250(1)(g) and 250(5) as "closing a loophole" for spouses. With the new changes, if a spouse received an exemption due to a tax convention he/she would be deemed a non-resident of Canada and would have to pay non-resident withholding tax on any income earned in Canada.

125. The 1998 budget changes in fact created a more onerous tax burden for some spouses.

126. An internal Department of Finance Memo written by Robin Maley, dated July 13, 1998 states:

"First, I think he [Neil McFadyen] may be correct that the deeming rule might constitute discrimination on the basis of family status. Without getting into any analysis about the reasonableness of the limit in that event, I would question if the Department's policy position in 1993-1995 would have been different, had this particular issue been specifically considered at that time. Moreover, the reality is that McFadyen's personal circumstances were a factor leading to the budget proposal. It would be ironic if we viewed his circumstances as sufficiently compelling to change the law, but not to assist him."

127. An Email from Robin Maley to Robin Maley, Department of Finance dated May 29, 1998 obtained by the Appellant under the *Privacy Act* states:

> *"I advised that the deemed residency rule was appropriate when it was introduced, because at the time, it was less common for a family to have more than one wage-earner, and the deemed residency rule helped minimize income-splitting arrangements. Since it is more common for families to have two employed spouses, it is less appropriate to base one spouse's tax status on the employment status of the other."*
>
> *"We have acknowledged that there is little policy rationale for taxing the private employment income of spouses of Canadian government employees. We have also proposed to repeal the application of 115(2)(c). It seems unlikely that such a policy rationale existed in 1993 to 1995."*
>
> *"I think it would be clear that the application of the law, though harsh, would not support a Finance Remission Order."*

128. The Appellant's situation was one of those considered in the Department of Finance's recommendation to repeal paragraph 250(1)(e) of the ITA.

129. The Department of Finance, knowing the harsh consequences of CRA's application of paragraph 250(1)(e) of the ITA, deliberately chose a date of repeal with no retroactivity to benefit the Appellant and other spouses of government employees.

130. Had the Department of Finance been aware of the harsh consequences of paragraph 250(1)(e) of the ITA sooner it would have been repealed sooner.

131. On July 14, 1999 the Honourable Hedy Fry, Secretary of State for the Status of Women, wrote to the Minister of Finance regarding the tax treatment of spouses of

Canadian Public Servants, posted abroad. Her letter states:

> *"Aside from the personal situation, Ms. Gardner raises some important issues for the government to consider it its efforts to support women's economic autonomy and equal participation in the work force."*

132. After the formal repeal of paragraph 250(1)(e) of the ITA, the Right Honourable Paul Martin the Minister of Finance at the time sent a letter to the Secretary of State for Status of Women dated September 17, 1999 stating:

> *I am pleased to inform you that amendments were announced in the 1998 budget and subsequently received Royal Assent on June 17, 1999, with retroactive effect, to ensure that an individual's residence status is no longer affected by their spouse's status as an employee of the Government of Canada.*

No Justification of paragraph 250(1)(e)

133. The Department of Finance's position in the Appellant's human rights complaint with respect to paragraph 250(1)(e) of the ITA was that the rationale for taxing spouses of Canadian government employees living abroad is that "Residents are so taxed because they benefit most from government services for which taxes are imposed."

134. The Appellant did not benefit from the same government services as some one who is in-fact-resident in Canada.

135. Many benefits and services are not available because to spouses because they are not eligible and are not physically present. Services and benefits most spouses are unavailable to include:

a) cannot collect employment insurance;
b) cannot collect provincial workman's compensation if injured on the job;
c) cannot use provincial health insurance;
d) cannot join any Canadian unions, even as a LES;
e) cannot use Canada's public libraries;
f) cannot use Canada's schools and Universities;
g) cannot get a Divorce under provincial law;
h) cannot use Canada's public parks and recreational facilities;
i) cannot use Canada's public roads;
j) cannot rely on protection from Canada police and firefighters;

k) cannot reply on Canadian labour laws for minimum wage, overtime, vacation, maternity leave, sick leave;
l) cannot reply on Canadian laws with regard to vehicle safety;
m) cannot use the Canadian court system to sue someone in the other country for a wrongful act;
n) cannot rely on Canadian laws with respect to privacy rights;
o) cannot buy life, disability, car and home insurance from Canadian companies (which are regulated by Canadian law);
p) cannot reply on Canadian laws regarding food inspection, water quality etc.

Differential Treatment under the Canada-Japan Income Tax Convention

136. The Minister's publicly stated policy position with respect to remittance based tax countries as shown in **Income Tax Technical News No. 16, March 8, 1999 (at page 8) indicates that** non-permanent residents of Japan are still viewed as residents of Japan under Article 4 of the Canada-Japan Tax Convention.

137. Despite this publication the Minister has taken the position that the Appellant cannot be a resident of Japan under Article 4 of the Canada-Japan Tax Convention because of his *hypothetical* exemption from tax on income outside Japan due to his status as a spouse of a diplomatic agent pursuant to the Vienna Convention on Diplomatic Relations.

138. The Minister's interpretation Article 4 as the CCRA is that a spouse of Canadian government diplomat can never pass the test of being a resident of the host country under Article 4.

139. The Minister's internal policies on residency in the CRA's Tax Operation Manual TOM 4046.(50)dated February 2, 2001 are as follows:

On page 4046.(50)3.1 :

A deemed or factual resident is subject to tax on his/her world income, however certain amounts may be subject to an offsetting deduction under paragraph 110(1)(f) – Treaty Exemption. Canada has treaties with many countries, some of which permit certain types of income to be taxed in the home country only. (REFER to Note 3).

On page 4046.(50)3.3

(3) TREATY
A Tax Treaty or Convention alleviates the burden of double taxation on individuals who may otherwise have to pay tax on the same income in two countries. Treaties determine how much income such as employment, pension and scholarships income, etc., will be taxed. REFER to TOM 4046.(50) EXHIBIT A for a list of the treaties.

(4) PARAGRAPH 110(1)(f)
(A) Subparagraph 110(1)(f)(i) is the authority in the Income Tax Act which permits the deduction from taxable income of amounts exempt under a tax treaty or convention. A subparagraph 110(1)(f)(i) deduction can be applicable to any status of client (i.e., non-resident, immigrant, factual or deemed) where the specific treaty permits a deduction.

On page 4046.(50)3.4

(7) RESIDENCY TIE BREAKER
An individual can be resident in more than one place at the same time for tax purposes. Where a non-resident is present in Canada for 183 days or more, he/she is deemed to be a resident of Canada for that particular year pursuant to paragraph 250(1)(a), and is then taxable on his/her world income (Canadian and Foreign) for that particular year. In such circumstances, the deemed resident will be resident of two countries and liable to tax in both countries. For purposes of the treaty provisions, an individual must be a "RESIDENT" of a single country. The determination of a single residence fall under Article IV of the applicable tax convention or treaty. Under Article IV, four factors are taken into consideration progressively when applying the Residency Tie Breaker Rules. The individual may refer to Article IV and indicate residence in a single country based on the centre of vital interests, personal and economic ties, habitual abode or citizenship.

On page 4046.(50)3.10

(11) ASSESSMENT OF NON-RESIDENT RETURNS

FOR 1998 AND SUBSEQUENT YEARS: A former resident of Canada who receives a salary, wages or other remuneration from a resident of Canada will ONLY be taxed in Canada where the client is not subject to tax in the other country because of a tax treaty or international agreement with Canada.

FOR 1997 AND PRIOR YEARS: Individuals may claim to be non-taxable under subparagraph 115(2)(e)(i) on income from an office or employment when the

income is subject to income tax in a foreign country or paid for duties in connection with the selling of property, negotiating of contracts, or rendering of services (i.e. Bell Canada employee in Japan).

On page 4046.(50)3.17

(18) MISSIONARIES

(A) Missionaries are normally non-residents and not subject to Canadian income tax.

On page 4046.(50)3.19

(21) DEEMED RESIDENTS – PARAGRAPH 250(1)(b) to (f):
(A) An individual is deemed to be resident in Canada if the individual was, at any time in the year, a member of the Canadian Forces – paragraph 250(1)(b):
(a) Canadian Forces employees are not considered to be non-residents, even if they sever their ties to Canada, when they are posted outside Canada. They are deemed residents of Canada. They may be identified with a mailing address on their T1 returns of postal code K0K 3R0 or CFPO 5000, or 5052, 5056 and/or indicate "Other" on the province of or territory of residence line.
(B) An individual is deemed to be resident in Canada if the individual was, at any time in the year, an ambassador, minister, high commissioner, officer or servant of Canada, who was resident in Canada immediately prior to appointment, or received representation allowance in respect of the year – subparagraph 250(1)(c)(i) or

(C) An individual is deemed to be resident in Canada if the individual was, an agent-general, officer or servant of a province, who was resident in Canada if the individual was resident in Canada immediately prior to appointment, or received representation allowance in respect of the year – subparagraph 250(1)(c)(ii):
(a) Individuals may be identified as employees of the Department of Foreign Affairs serving abroad and identified with a mailing address of Box 489, or 500, Ottawa (postal code K1N 8V5, K1N 8T7). Individuals may indicate on province of residence line "Foreign Service". Individuals may be employees of a Crown Corporation, servants of Her Majesty, or members of the Federal or Provincial Public Service (i.e., T4 is issued by Supply and Services).

140. The Minister's internal policy in the CRA's Tax Operation Manual TOM 4046.(50)3.26 dated February 2, 2001 indicates that "locally engaged staff" are considered non-residents:

(24) LOCALLY ENGAGED EMPLOYEES
(A) A "locally engaged employee" is a non-resident of Canada who is employed by a Canadian government department or agency (i.e. employees from the country where a Canadian Embassy/Consulate is situated who work at the embassy such as a resident of Tokyo, Japan, who works at the Canadian embassy in Tokyo, Japan).

They may be identified by:

- *(a) CFPO Box mailing address in Canada with a letter explaining that they are locally engaged employees,*
- *(b) A T4 slip issued by the Department of External Affairs, a Canadian Embassy or Canadian High Commission, and*
- *(c) SIN in the 900 series, or no SIN, or*
- *(d) A regular Canadian SIN but the client is identified as a former Canadian resident who had severed their ties with Canada.*

(B) A tax treaty that Canada had with their country of residence MAY EXEMPT the income from tax in Canada. Refer to the specific tax treaty of the country for details.

141. A document described as "Document, written by Robin Maley, Department of Finance, not dated, Request Number P200000007 page 31" obtained by the Appellant under the Privacy Act indicates an different interpretation taken by the Minister under Article 18 of the *Canada-Japan Income Tax Convention*. The document indicates that the Department of Finance may agree that Article 18(1)(b)(ii) would make the Appellant taxable only in Japan for his work as a LES at the Canadian Embassy in Tokyo:

> *...In this case subparagraph 18(b)(ii) may provide McFadyn some relief. This provision provides that only Japan may tax the income, if McFadyn is a resident of Japan, and he did not establish that residency for the purposes of the employment...*

Historical and Pre-existing Disadvantage

143. The Department of Foreign Affairs has found that spouses have problems

trying to forge a career and fundamental benefits are lacking. The 1998 Human Resources Strategy For the Department of Foreign Affairs and International Trade Second Consultation Paper, reported that spousal employment is a problem and it ranked 3rd as the reasons for attrition of it's staff.

4.3.4.2 Spousal Employment Issue

The issue of spousal employment is not unique to DFAIT rotational employees. It is one that also exists for other "rotational" services such as the Canadian Forces and the RCMP. For a spouse of a rotational employee, the constant movement, and in many cases the lack of a reciprocal employment agreement with the country of posting make it difficult to forge a career. The problem in developing a career often affects employment opportunities for the spouse when the employee is assigned to a position in Canada as well. From an economic standpoint, most Canadian families rely on two incomes and, eventually, on two pensions (living standards must be adjusted where this is not the case).

The spousal employment issue has proven to be a particularly difficult one to resolve and, in fact, there is likely no totally satisfactory solution available. Extensive effort has been made over several decades by the department and the Foreign Service Community Association (FSCA) in exploring options to create spousal pensions, to enable spouses returning from post abroad to collect Employment Insurance and to compensate spouses for representational work abroad. Despite sincere good will, repeated efforts have failed to resolve the many complicated issues surrounding these three initiatives. In this document, we concentrate on other initiatives that will help spouses find work. Progress on these other initiatives will be swifter than on the spousal compensation and spousal pension issues, which are extremely complicated, expensive and may require legislative change.

144. The Department of Foreign Affairs 1999 Spousal Task Force Report findings state:

At the post, employment in the spouse/partner's field is frequently unavailable. If a position is available at the mission, it is probably outside the spouse's professional field. More than likely it is a contract position that will be short term, that carries no pension benefits, and is paid at the locally employed rate, which varies widely from mission to mission. Frequently that rate is below the Canadian minimum wage. If employment exists on the local market, there will be no portable pension benefits. However, the income is subject to Canadian taxation.

"Canadian spouses hired in full-time positions at missions are classified as Locally Engaged Staff. LES salaries are often one-third to one-half less than

equivalent positions in Canada. Many Canadian spouses possess superior skill sets and work experience compared to locally engaged nationals. Canada based supervisors of spouses expect Canadian standard job performance - despite significant salary inequities."

"As a professionally-motivated career woman I was very disappointed with the lack of support the Dept provided me especially in terms of securing employment opportunities in my new home and preparing me for cultural differences."

"Was employed at Cdn mission full time, but now work part-time at my own request because of low salary and no suitable increments or advancement."

"In fact positions should be paid the same throughout the world. Consider Government positions in Canada. If you are employed in a position, you get paid the same amount whether you live in Toronto or Charlottetown. Understanding the cost of living is different in each city. This should be similar to expats. They should be paid the same rate as they would be paid in Canada (for clerical/administrative job or officer level job) whether they live in Mexico, New Delhi or Hong Kong."

" Unavailability of jobs on posting makes you take lesser jobs."

"The major problem lies in securing employment on return to Canada."

"One issue that can't be quantified is the stress of having to carry out a job search every two to four years throughout a 30-35 year work life."

"Career breaks are difficult to justify for the third or fourth time; consequent 'slip' on the career ladder."

"Il est indispensable d'améliorer le sort des conjoints qui sont en mission en leur ouvrant plus de possibilités d'emploi à la mission. Il existe de nombreuses possibilités d'emploi à créer, mais le budget n'est pas là. La perte de revenu est énorme comparée au Canada surtout dans le cas d'un conjoint "professionnel" qui ne peut exercer à l'étranger".

"...I was without a Canadian work history, and my resume showed I transferred every few years. I went from senior management to secretary. But I needed finances to put my daughter through university - so I had no choice."

"Rotationality effectively undermines the ability of most diplomatic spouses to pursue a meaningful career. In an era in which most Canadian households depend on two incomes, this is a sacrifice which deserves some financial recognition from DFAIT."

"...our years abroad prevented us from saving, as one income meant [we earned] below average for a family of five. In our 50s we have little savings, a big mortgage, children in university, [and] thus still cannot save. Our peers in Ottawa are better off."

"Returning to Ottawa - impossible to find employment as a full-time teacher - must supply teach every time."

"A two year posting is not long enough to disrupt a career without compensation. Canadian families require 2/2 incomes to make ends meet."

"Couples, families are certainly at a disadvantage in the foreign services, not only during the working age, but as they carry that 'burden' after they've retired. Finding a job back in Ottawa is still very difficult. More attention and financial support (training, re-training is needed to help (keep) families together."
"Since we joined the department, I have found the lack of fulfilling job prospects discouraging and have been frustrated by the nature of the short-term rotational lifestyle. Although there are exceptions, it is a lifestyle that swallows up many of the spouses' personal and professional opportunities and makes little to no apologies."

"A chaque fois que je lis un guide de mission, je vois la mention: "aucune possibilité d'emploi pour les conjoints".

145. A report by the Department of Foreign Affairs regarding a 1999-2000 study on problems with employment insurance benefits for spouses obtained by an Access to Information Request A-2004-00360, disclose findings in the Executive Summary at page 66 of the ATIP request which state:

> *Several government departments, such as DFAIT, DND, CIC, SGC and CIDA regularly assign employees abroad with their dependents. In many cases, until immediately prior to the move from Canada, the dependent spouse (most often the wife) is working and contributing to the Employment Insurance plan. However, when that dependent returns to Canada after completion of the assignment abroad, she or he is not entitled to receive EI benefits while trying to return to the workforce.*
>
> *Currently, over 2000 employees are assigned abroad with an average posting of three years. Like most Canadian families, they rely to a great extent on two incomes to maintain a standard of living. Rotational life entails frequent moves, and moving imposes a variety of hardships. This lifestyle often means the inability to pursue a professional career, difficulty in building seniority or salary, and need for re-certification or training on return to Canada. Additionally, theses families are more likely to face*

retirement on only one pension, and a couple's largest investment, the principal residence, may sell at a low price due to a move during a depressed real estate market.

As the two-income family has rapidly become the norm in Canada, especially among younger employees, and with the extreme difficulty in finding spousal employment at most locations abroad, there is now a growing reluctance on the part of couples and families to accept overseas assignments. Accompanying a public servant on an assignment abroad often means that the spouse must quit her/his job in Canada without any assurances that employment will be available upon return. There is understandable reluctance on the part of couples to make that sacrifice. A growing number of foreign service employees are now opting to voluntarily separate for several years for the duration of the assignment abroad while the spouse remains employed in Canada. While that should remain a matter of personal choice we, as the employers, would prefer to have foreign service employees go on assignment with their spouses, especially to hardship locations, mainly because employees are happier and more productive when family separation is not an issue.

Spouses of government employees posted to the United States are eligible for employment insurance benefits under a reciprocal social benefit program. This program, however is restricted to the United States, and there are no known plans to extend it to other countries.

146. In April 2007 the Auditor General released a report describing historical and pre-existing disadvantages faced by spouses of government employees posted abroad. The report states:

Barriers to spousal employment are disincentives for working abroad

3.83 Another issue of particular and long-standing concern is spousal employment. As far back as 1981, the Royal Commission on Conditions of Foreign Service reported that the effect of the foreign service lifestyle on employees and families was the second most common reason for resignations. The demanding nature of the posting cycles, family stresses, and the lack of employment opportunities for spouses were reasons clearly influencing decisions to resign.

3.84 With the increase in two-income families, the issue of spousal employment has only become more acute. Staff members posted abroad often face the difficult choice of separation from their spouse or the loss of one family income, pension benefits, and the postponement or loss of the spouse's career. While there are additional amounts included in the FSD allowances when a staff member is

accompanied abroad, they are not designed to address the spousal employment issue. Spousal employment abroad may be difficult to obtain due to a number of barriers, such as language difficulties at each new post, local restrictions on work permits, and lack of recognition of professional qualifications. Following the loss of Canadian employment on departure, spouses are not eligible for employment insurance while looking for a job in the foreign country (except in the United States). The impact of these barriers can be significant for the family posted abroad, as well as for programs and service delivery at missions.

3.85 Departmental senior management recognizes this issue as a serious one. The Department has put in place some support programs and activities. It has surveyed what other countries do for their families posted abroad who face the same types of problems. Some of those countries have explored alternative solutions, such as a significant spousal allowance or reserved positions at missions for spouses.

3.86 It is important to note that the issues raised in this and the previous section of the audit may be shared by a number of other government departments and agencies who assign staff abroad.

147. Canada has signed reciprocal work agreements with some 50 other countries in which most stipulate that if the spouse of a foreign government employee works, he or she must give up certain diplomatic immunities and to pay tax as a resident on the income earned to the host country.

148. The model or template for these agreements contains the following statements:

For dependents who obtain employment under this arrangement and who have immunity from the jurisdiction of the receiving State in accordance with the Vienna Convention on Diplomatic Relations or any other applicable international agreement, immunity from civil and administrative jurisdiction with respect to all matters arising out of such employment is hereby irrevocably waived by the sending state.

Dependents obtaining employment under this arrangement will be required to pay income tax and social security deductions levied by the receiving State on any remuneration arising from such employment.

149. Not withstanding the new paragraph 250(1)(g) of the ITA, the Minister's current policy spouses who work and pay tax in host countries, face paying tax to two countries if assessed as "factual residents of Canada" due to their "ties to Canada" for which the Minister now places great weight the being the spouse of a

government employee.

150. Many of the host countries for posting of Canadian government employees including Japan, have lower tax rates for an average worker wage than Canada.

151. Post index data maintained by Statistics Canada and used by Treasury Board to calculate a tax free Foreign Service Directive benefit 55 – "salary equalization" for government employees posted abroad indicates that many posts including Japan, have higher costs of living than Ottawa.

152. The majority of spouses of government employees serving abroad, have been and continue to be mostly women and employment opportunities are limited.

153. The Appellant faced historical and pre-existing disadvantages similar to other spouses of government employees posted abroad. He had to take a risk in quitting his job with no guarantee he would find work in Tokyo. He was unable to collect employment insurance because he no longer resided in Canada, he had to take foreign language training to increase his chances of getting a job, he was unemployed for significant periods after leaving Canada and returning to Canada and could not collect employment insurance upon his return to Canada.

154. Had the Appellant been aware of that he would be retroactively reassessed for such a large amount of Canadian tax prior to leaving Japan he would not have returned to Canada as this would place too high a cost for him to freely return to Canada.

155. Had the Appellant known before leaving Canada in 1992 to live in Japan that he would not be able to cease to be taxed as a resident in Canada because of his marital status he either would not have gone, because this created too high of a cost for him to freely leave Canada to live in Japan, or, he would have sought a legal separation so his marital status could not be used to deny him the right to cease to be taxed by Canada in Japan.

156. On June 25, 2001 a letter from the office of the Honourable John Manley,

then Minister of Foreign Affairs, was sent to the Office of the Minister of National Revenue stating the position of the Department of Foreign Affairs in regard to the Vienna Convention on Diplomatic Relations as it applied to the Appellant:

> *"Mr. McFadyen claims that since his is a spouse of a government employee posted abroad, that the C.C.R.A.'s interpretation of the Vienna Convention on Diplomatic Relations eliminated his rights under the Canada-Japan Tax Convention rather than providing a protection. It is the position of the Department of Foreign Affairs that is not the intention of the Vienna Convention on Diplomatic Relations to eliminate rights of Canadian citizens under other laws of Canada."*

157. Statistics Canada has data that is reflective of the cost of living at a number of locations around the world, namely, the post index. This is used to calculate the amount of tax free payments to foreign service employees under PSD 55 to keep they purchasing power of the employee the same at post. This data is also used by companies who send employees abroad. Tokyo Japan has had the highest post index of all locations for over a decade, 300 to 310. Ottawa is rated 100.

158. The Appellant was subjected to a legal nightmare over his tax status for over 10 years in part because of the different statutes involved there was no single Court to resolve his issues and because the Minister refused to abide by the Canada-Japan Income Tax Convention and waited over 10 years to make a re-determination on the Appellant's residency status.

Dignity

159. The Appellant's dignity has been demeaned because he was treated in a manner that suggests he was less capable or less worthy of recognition or value as human being in his own right, of his freedom to choose his residence, of his desire for personal development, of his need to be self-sufficient, to pay his faith share of living expenses and as a member of Canadian society to participate on equal footing in the job market because of stereotypes and laws enacted when spouses of government employees serving abroad were mostly women and did not work outside the home.

Prima Facie Discrimination

162. The Appellant has been treated differently based on his marital status (i.e., spouse of a government employee with diplomatic status under the Vienna Convention on Diplomatic Relations) than thousands of other Canadians with similar ties to Canada who were not married to government employee that were able to cease to be "ordinarily resident" in Canada after ceasing to be resident in a province and who were recognized by the Minister as resident in other countries

while living abroad and/or were allowed exemptions under Canadian tax conventions. These individuals were also subject to a lesser burden of proof than the Appellant and were not forced into court to resolve their status.

163. Maureen McKenny, who reassessed the Appellant in December, 1996 made the following statement under oath in discovery that was read into the Tax Court Transcript at page 170 for the previous appeal which was never considered in the previous appeal:

> *Q. Right. And so the reason that Revenue Canada would not have applied to the competent authority in Mr. McFadyen's case, is in Revenue Canada's view, he could not be a resident of Japan under Article 4 of the Tax Treaty because his wife was a diplomatic agent, and therefore he was not subject to tax in Japan on his worldwide income.*
> *A. That's correct.*

164. After filing for a judicial review of his Canadian Human Rights Complaint in the Federal Court he received all the documents on his file from the Commission and found that the Investigator had left out an admissions of Maureen McKenny, the CRA official who initially reassessed him, made during an interview by the Investigator, that his marital had indeed been used. Department of Justice Lawyer Earnest Wheeler was a witness in the interview. The Investigator's Report did not report all these findings. The particulars are as follows:

> C alleges that other LES employees, not married to Canadian government employees, did not pay taxes to the Canadian government
>
> [Answer by McKenny:]
> Non residents request and get a waiver – they pay tax in Japan. **If you are deemed a resident of Canada, the waiver is denied.** The complainant was reassessed as a factual resident of Canada
>
> - *Was marital status one of the factors? If so why? BFJ?*
>
> [Answer by McKenny:]
> **Indirectly, marital status is a factor** – you can't have a waiver unless he has residency of Japan. Thompson case, CML which determines marital status as one of the factors. Not legislation, therefore, no BFJ. (sic)

Because the C was married to a govt employee, he could not be a resident of Japan. Certificate was looked at but was not necessary because of his ties to Canada.

- *The R concedes at page 2 under q. 3 that the treaty would have applied if the complainant had not been married*

- further, the C states at para above that you made a statement under oath that was read into the Tax Court record which is in the Court Transcript at pg 170 that the C could not be a resident of Japan under art. 4 of the treaty bec his spouse was a diplomatic agent, therefore he was not subject to tax in Japan on his worldwide income.

Is this true?

[Answer by McKenny:]
Yes, treaty would have applied if he was not married. If he was not married, Japan may have said that he was theirs for income tax purposes – then would have looked at the Competent Authority Rules. **Because he was married,** because of the Vienna Convention. See Eliza's notes. [Emphasis added].

Q12 is faxed letter [Feb. 17, 2003 fax: "Did the Rulings Division rely on the status of his spouse to deny him an exemption under the tax treaty? If so, why?"]

[Answer by McKenny:]
He was a factual resident of Canada **because of his residential ties and a spouse i[s] one of them.**

[bold emphasis added]

165. The Appellant also obtained a document described as "Document to Asira Shukuru from Eliza Erskine, CRA, dated February 19, 2003, Re: signed notes of meeting of January 19, 2003," that was not disclosed to him until April 1, 2004. This document indicates that Eliza Erskine who is a senior rulings officer has worked for the CCRA for 4 years was interviewed by the Canadian Human Rights Commission to explain CRA policy. The following statements by Erskine were documented and initialed as true by Erskine.

> *"According to art. 18 of the Canada-Japan Treaty (CJT), if one is working for the Canadian government in Japan, under most circumstances, one is taxable in Canada on that employment income; but there is an exception if one is a resident of that country (Japan). **The exception applies if you did not go to Japan for that job.** If you just happen to be there and you are a resident of Japan, there is no reason for Canada to tax you."*

*"For an LES, Japan can tax employment income and **Canada cannot**."*

"The idea is that if you are resident in Japan for purposes of the CJT then any employment income you earn in Japan, even income from the Canadian government, should only be taxed by Japan."

"-CCRA decided that the complainant was only a resident of Canada and therefore it would not go to the tie breaker rule"

...

*"It is my understanding that the CCRA took this view on the basis that the Japanese tax authority appeared to exempt (or mostly exempt) the complainant from Japanese income tax **because he was the spouse** of a member of Canada's diplomatic staff in Japan"*

*"For tax policy perspective, the issue is the nexus to Canada – What is the indicia. Example: where you house is, **spouse**, dependants, family, social connections..."*

*"For purposes of a residence determination, a **spouse** is considered to be a strong social tie"*

"The spouse of a diplomat could be a non-resident if he or she severed all of his or her residential ties to Canada. But Canada is aware that most countries don't tax the spouses of Canadian diplomats."

"Marital status will usually determine whether you will be exempt from tax in the host state (it will depend on their laws but there is usually an exemption for spouses of diplomatic staff)"

"Family connection is still there under the new provision (250(1)(g)) – but under the old provision (250(1)(e)) some people went there with their spouses and severed ties and they were subject to double tax in the other country and Canada. So the old provision was too broad."

*"The whole thing ties into why the complainant was not a resident of Japan for the purposes of the CJT – he was not a resident of Japan under the CJT because he was not liable for tax in Japan. The complainant did not show the CCRA that he was generally liable to tax in Japan, **possibly because he was exempt from tax in Japan as the spouse of a diplomat.**"*

"Whether you are "liable to tax" is determined in accordance with the domestic tax law of the applicable country (i.e., "Canada or Japan as appropriate)."

"At the level of the CJT, the question is, Are you Taxable in Japan? If yes, then you move on to the tie breaker rule. But if the complainant was entirely or mostly exempt from tax in Japan (which is possible, depending on Japan's tax exemptions for spouses of diplomatic staff), then the CCRA wouldn't consider him to be "liable to tax" in Japan for the purposes of the CJT."

"I am not aware of any evidence that Japan has ever considered the complainant to be resident in Japan for purposes of the CJT such that there would be reason to involve the competent authorities."

"The CCRA did not evaluate the complainant's residential ties to Japan in the same way it evaluated his residential ties to Canada because ties to another country are generally not relevant to whether you are a Canadian Resident."

"Whether or not the complainant would be resident in Japan in accordance with Canadian criteria is irrelevant for Canadian tax purposes. It is also irrelevant for purposes of the CJT, since only Japan can determine whether the individual's residence status under Japanese law and even that does not determine whether the individual is "liable to tax" in Japan."

"Either way, the CCRA assumes that Canada's residency factors would be irrelevant for Japanese purposes, just as Japanese criteria would be irrelevant for purposes of applying Canadian law."

"In any event, paragraph 250(1)(e) has nothing to do with whether the complainant was a resident of Japan for purposes of the CJT. Even if paragraph 250(1)(e) did apply, the CCRA could not use it to evaluate the complainant's status as a resident of Japan. An individual could be a deemed resident under paragraph 250(1)(e), and a resident of Japan for purposes of the CJT. This would be a situation that the competent authorities would have to resolve, since there would be dual residence for purposes of the CJT."

166. The Appellant was made a test case, at great personal cost, for a determination of the tax status of similarly situated spouses of government employees posted abroad and subjected to an abusive legal process in the government's efforts to stop any payout to spouses who were adversely affected by paragraph 250(1)(e) of the ITA.

Grounds of National Origin

167. Eliza Erskine, CRA official, admitted the Canadian Human Rights

Commission that there is an exception to Canadian taxation of LES based on nationality under Article 18 of the *Canada-Japan Income Tax Convention Act*.

Retention of Refund Amounts

169. The Minister retained and applied tax and interest refund amounts from the reassessments to the previous federal debt without a section 68 application being made by the Appellant's bankruptcy trustee.

K. Whether the Minister incorrectly calculated the interest and refund adjustments for the 1993, 1994 and 1995 reassessments and/or applied them contrary to s. 68 of the *Bankruptcy and Insolvency Act*.

ISSUE K

249. The Minister retained the Appellants tax and interest refunds in a manner contrary to s. 68 of the *Bankruptcy and Insolvency Act (BIA)*.

250. The Supreme Court of Canada has held that tax refunds are wages, that fall under s. 68 of BIA. Section 68 is a complete code in respect to a bankrupt's wages. Marzetti v. Marzetti [1994] 2 S.C.R. 765. Accordingly the Minister had no legal right to retain the interest refunds.

251. Her Majesty in right of Ontario and Her Majesty in right of Canada are two distinct legal entities, set-off cannot be used by one for the other – no 3rd party set-off. The Minister has used Ontario credits to set-off federal debt. The Supreme Court of Canada has held in Husky Oil Operations Ltd. V. Minister of National Revenue [1995] 3 S.C.R. 453 at paragraph 61 that any legislation that has an effect of creating a preference is inapplicable in bankruptcy.

COSTS

252.

The Appellant should also be awarded his costs, on a full indemnity basis, in advance, for the previous Tax Court Appeal, his appeal to the Federal Court of Appeal and his application for leave to appeal to the Supreme Court.

IV RELIEF SOUGHT

253.

(d) an Order referring the above-noted reassessments back to the Minister for reconsideration and Reassessment on the basis that

(vi) in the alternative, the interest adjustments are contrary to s. 68 of the Bankruptcy and Insolvency Act;

(f) Costs on a full indemnity basis, in advance, for the prior Tax Court appeal, Federal Court of Appeal appeal and the Application for Leave to Appeal to the Supreme Court of Canada.

III STATUTORY PROVISION UPON WHICH THE APPELLANT RELIES AND THE REASONS HE INTENDS TO SUBMIT

ISSUE A

Basis for the Appeal

171. The reassessments dated March 6, 2006 make all the previous reassessments and Tax Court appeal a nullity and the Appellant has a right of appeal under s. 169(1) of the ITA.

172. The Minister's re-determination of the Appellant's residency status raises a new and contrary factual foundation that was not previously before the Tax Court of Canada and therefore the prior issues and the new issues could not have been justly determined.

173. In the alternative, the Courts have held that a decision should be rendered invalid if there is a breach of procedural fairness. The Supreme Court of Canada has held in Cardinal v. Director of Kent Institution [1985] 2 S.C.R. 643 at paragraph 24 that:

> *...the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.*

174. There was a breach of procedural fairness and an abuse of process in Minister not making a final determination of the Appellant's residency status which is inconsistent with its position in the initial Tax Court appeal, appeal to the Federal Court of Appeal and Application for Leave to Appeal to the Supreme Court of Canada which warrants a rehearing. Fairness dictates that the original result should not be binding in the new factual context.

175. The Appellant relies on paragraphs 1(a), (b) and 2(e) of the *Canadian Bill of Rights* that he should not be deprived of a fair hearing.

176. In the alternative another appeal can be made under s. 169(2) of the ITA because the issues that were not conclusively decided.

ISSUE B

Not a Resident of Canada under Article 4

177. Canada's right to tax income earned in Japan is governed by the *Canada-Japan Income Tax Convention Act*.

178. The burden of proof is on the Respondent to prove that it has the statutory right to tax the Appellant pursuant to the *Canada-Japan Income Tax Convention Act*.

179. The March 6, 2006 reassessments show that the Appellant was not liable for Canadian tax on a *comprehensive basis* as a resident of Canada with income not earned in a province. Accordingly the Appellant was not a resident of Canada under Article 4 of the *Canada-Japan Income Tax Convention* and Canada has no right to

tax the Appellant's income earned in Japan.

180. It is not enough for the Appellant to be taxable in Canada as deemed or fictional resident based on paragraph 250(1)(e) of the ITA (if it can be applied) to be considered a resident of Canada under Article 4 of the *Canada-Japan Income Tax Convention* because 250(1)(e) is based on martial status not residence and creates a fictional residency status which is beyond the intended scope of Article 4 and which fails the first tie-breaker rule.

ISSUE C

No Fixed Base of Operations

181. The Appellant was not liable for Canadian tax on his self-employment income earned in Japan because he did not have a *fixed base of operation* in Canada as that term is used in the Canada-Japan Income Tax Convention.

ISSUE D

Not a Factual Resident

182. The Appellant was not a factual resident of Canada or ordinarily resident at the relevant time in Canada, as that term is used in s. 250(3) of the ITA. He also relies on s. 118.91 of the ITA which allows him to be a non-resident for part of taxation year.

183. Section 250(3) of the ITA does not clearly and unambiguously indicate that the Appellant was resident in Canada.

184. The Minister applied s. 250(3) in an ambiguous and overly-broad manner.

185. Principles of statutory interpretation require that federal and provincial provisions dealing with the same subject matter, in this case regarding residence for tax purposes, must be read in a harmonious, and consistent manner to minimize the possibility of conflict and incoherence.

186. The Courts have held that where there is ambiguity in a taxpayer's status it

should be resolved in favour of the taxpayer.

187. Taxing provisions must be strictly construed by considering the grammatical and ordinary meaning the words.

188. The ordinary usage of the word "resident" in s. 2 and s. 250(3) of the ITA and s. 2 of the *Ontario Income Tax Act* is the adjective meaning. The Minister has incorrectly used the noun meaning to give a broader interpretation than Parliament intended.

189. The usage of the word "in" Canada rather then "of" Canada used in s. 250(3) was overlooked by the Minister to incorrectly give a broader interpretation than Parliament intended.

190. The residency status of a spouse also needs to be interpreted harmoniously with EI legislation and the reciprocal agreement with the US because if a spouse is only eligible to collect EI in the US if they cease to be resident in Canada.

191. For the Appellant to be considered ordinarily resident in Canada during the relevant period he would have had to have a residence of some sort in a province or territory, readily available for use by him for some appreciable amount of time during the taxation year. The fact he did not have such a residence readily available with accessories of living at any time and his small amount of time spent in Canada was on temporary trips living out of a suitcase is not conclusively convincing that Parliament intended such an individual to be considered resident in Canada under s. 250(3).

192. Since the Minister did not provide the Appellant with any assumptions of fact he was basis the March 6, 2006 reassessments the Minister has the burden of proof for all assumptions of fact he raises in this appeal.

Application of s. 250(3) Contrary to the *Canadian Human Rights Act*

193. In the alternative the Minister applied 250(3) in a manner which is a discriminatory practice, contrary to the *Canadian Human Rights Act (CHRA)*. The Supreme Court of Canada has held that in determinations involving the CHRA that *"The weight of judicial consideration also favours an approach that focuses on the harm suffered by the individual."*

194. The Appellant was deprived of his right under s. 2 of the CHRA to live in Japan with an opportunity equal with other individuals to make for himself the life that he was able and wished to have and to have his needs accommodated, consistent with his duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on marital status, family status or national origin.

195. The burden of proof for discrimination under the CHRA is less onerous than s. 15(1) of the *Charter*. Under the CHRA the Appellant need only show a prima facie case of discriminatory practice and then the burden of proof for justification under s. 15 of the CHRA is shifted to the Respondent.

196. There is evidence that establish a *prima facie* case of a discriminatory practice based on the prohibited grounds of marital status, and/or family status under the CHRA. Therefore, the burden of proof is shifted to the Respondent to justify the discrimination under s. 15 of the *Canadian Human Rights Act*.

197. There is *prima facie* evidence of systemic discrimination on the prohibited grounds of marital status, and/or family status, and sex (i.e, historically mostly women affected), in the tax treatment of spouses of government employees posted abroad which warrants an inquiry by the Canadian Human Rights Tribunal pursuant to the *Canadian Human Rights Act*.

198. Parliament intended that issues of system discrimination be heard by the Canadian Human Rights Tribunal so that the individuals are not burdened by the high cost of court proceedings for issues that affect more just a single individual.

199. The cost and time required for discoveries, the huge amount of evidence, and processing of the evidence, that is required for a full factual foundation in this case is not unlike large pay-equity cases that could never be shouldered by a single individual unable to afford legal counsel and warrant an inquiry by the Canadian Human Rights Tribunal.

200. Much of evidence needed for a system discriminatory inquiry is in the possession of the Respondent and is not available to the Appellant.

201. The Tax Court of Canada has the authority to grant to stay of proceedings for an inquiry by the Canadian Human Rights Tribunal.

202. In the event that this Court is unable to resolve the appeal without resorting to aspects of discrimination as issue it is the Appellant' position that an inquiry to a Canadian Human Rights Tribunal should be available to the Appellant.

Application of s. 250(3) Contrary to *Charter*

203. In the alternative the Minister applied s. 250(3) in manner that infringed the Appellant rights under s. 6, 7 and 15(1) of the *Charter of Rights and Freedoms*;

204. The application of a statutory provision (not the provision itself) cannot be justified under s. 1 of the *Charter*.

205. The Appellant relies on The *International Covenant on Civil and Political Rights Can. T.S. 1976 No. 47* which Canada became a party in 1976, which reads:

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. *Everyone shall be free to leave any country, including his own.*

206. The Appellant relies on The International Covenant on Economic, Social and Cultural Rights which reads:

Article 6

(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

207. These covenants form the basis of International Human Rights norms and re-enforce how the *Charter* and the CHRA should be interpreted and to safe-guard fundamental rights. If a person does not have the right to change their residence and earn a living they really have no rights at all. That was a right that one of the early Nuremberg Laws eliminated by disallowing Jews and those married to Jews to own businesses and to work in the government and later restricting where they could live, and imposing large exit taxes for those wanting to leave Germany.

208. The Supreme Court of Canada has held in Godbout v. Longueuil (City) [1997] 3 S.C.R. 844 at paragraph 68-69 that:

the right to decide where to establish one's home forms part of the irreducible sphere of personal autonomy protected by the liberty guarantee in s. 7.

209. The Appellant's freedom to leave Canada and establish his home in Japan and pursue his economic, social and cultural development was more than minimally impaired by a retroactive reassessment that placed too high a cost to him. Accordingly his mobility rights under s. 6(2) and his liberty rights under s. 7 of the *Charter* were infringed.

210. The Appellant's freedom to return to Canada and re-establish his home in Canada was more than minimally impaired by a retroactive reassessment that placed too high a cost to him for returning. Had he not returned he would not have been reassessed. Accordingly his mobility rights under s. 6(2) and his liberty rights under s. 7 of the *Charter* were infringed.

211. Marital status is an analogous ground of discrimination under s. 15(1) of the *Charter*. The scope of marital status includes being married to a particular individual, in the Appellant's case, a women who was a Canadian government employee posted abroad with diplomatic status.

212. The Appellant's right to equal treatment before and under the law with discrimination on the basis of marital status was infringed in manner that demeaned his dignity and his marriage contrary to s. 15(1) of the *Charter*.

213. If any of the Appellant's *Charter* rights have been infringed he is entitled to a remedy under s. 24(1) of the Charter.

ISSUE E

250(1)(e) Cannot Be Used As An Alternative Basis for Reassessment

214. Her Majesty the Queen as represented by the Department of Finance agreed with the Decision of the Canadian Human Rights Commission that dismissed the Appellant's complaint involving paragraph 250(1)(e) of the ITA on the basis that paragraph 250(1)(e) of the ITA was not applied to the Appellant. The Department of Finance did not seek a judicial review of that decision. Accordingly Her Majesty the Queen in the Right of Canada should be barred from relying on 250(1)(e) due to issue estoppel or abuse of process. The Respondent cannot claim there was no injustice to not applying 250(1)(e) in one proceeding and now claim an injustice if it is not applied in this proceeding. If the Respondent is allowed to do so the Appellant's judicial reviews should be immediately conceded by the Respondent.

215. The Minister cannot rely on s. 152(9) of the ITA to use paragraph 250(1)(e) of the ITA as an alternative basis of reassessment against the Appellant in the appeal because it is a retroactive provision and it would be procedurally unfair and prejudicial to the Appellant since it is the Minister that has caused the delays in this appeal.

216. The Minister cannot rely on s. 152(9) of the ITA to use paragraph 250(1)(e)

of the ITA as an alternative basis of reassessment against the Appellant because there is relevant comparative evidence with respect to his CHRA and Charter arguments against this provision that the taxpayer is no longer able to adduce and evidence that he cannot obtain from the respondent and it is not appropriate in the circumstances that the Court order the evidence to be adduced given the staleness of the evidence.

217. To allow the Minister to rely on s. 152(9) to use paragraph 250(1)(e) of the ITA as an alternative basis in contrary to the s. 12 of the *Interpretations Act* since it was not intended for 250(1)(e) to be used as alternative basis because it had already been repealed. To allow this would not be remedial or fair to the Appellant.

218. To allow the Minister to rely on s. 152(9) to use paragraph 250(1)(e) of the ITA because it was not part of the ITA for 1993, 1994 and 1995. If the Minister can be allowed to the use the 1999 version of the ITA then so should the Appellant, in which case paragraph 250(1)(e) was repealed.

ISSUE F

Exemption under Tax Convention

219. In the event the Appellant is found to be a resident of Canada under Article 4 of the Canada-Japan Income Tax Convention the Federal Court of Appeal has held that the Appellant's need not prove he was resident of Japan under the Convention by proving the law of Japan to have the tie-breaker rules applied, but he need only show that he *might* be a resident of Japan under Article 4.

220. The Appellant's certificate of residency issued by the Japanese tax office and his 1994 and 1995 tax documents showing he was taxed as a resident are *prima facie* evidence that he might be a resident of Japan under Article 4.

221. The Appellant was a non-permanent resident of Japan under Japanese law and subject to Japanese domestic income law:

Income Tax Act, Articles 2.1.3, 2.1.4, 2.1.5, 3.2
Income Tax Act Enforcement Ordinance, Articles 14.1, 15.1
Notification of Income Tax Act 2-1, 2-2, 2-4, 2-2

222. Article 4 of the Canada-Japan Income Tax Convention differs from the OECD model tax convention in that it does not require an individual to be liable for tax on income from all sources, in order to be consistent with Japan's remittance based tax system. The OECD commentaries also indicate an interpretation that an individual can a resident of a contracting state under Article 4 for part of a taxation year.

223. At all material times, the Appellant was a resident of Japan and not a resident of Canada. The *Canada/Japan Income Tax Convention Act, 1986*, S.C. 1986, c. 48, Part II ss. 9 and 10 provide that the Canada/Japan Income Tax Convention is declared to have the force of law in Canada and that in the event of any inconsistency between the provisions of the Convention and the provisions of any other law, the provisions of the Convention prevail to the extent of the inconsistency.

224. Articles 31 and 32 of The Vienna Convention on the Law of Treaties require that treaty interpretation be in good faith, fulfill the object and purpose, and achieve a reasonable result.

225. Articles 14 and 15 of the Canada/Japan Income Tax Convention provide that income derived by a resident of a Contracting State in respect of professional services shall be taxable only in that Contracting State unless the resident has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities, and that remuneration derived by a resident of a contracting state in respect of employment shall be taxable only in that Contracting State unless the employment is exercised in the other Contracting State.

226. Article 18 of the Income Tax Convention is a *complete code* that provides that remuneration paid by a Contracting State to an individual in respect of services rendered to that Contracting State are taxable only in the other Contracting State if the services are rendered in the other Contracting State and the individual is a

resident of the other Contracting State who, *inter alia*, did not become a resident of the other Contracting State solely for the purpose of rendering the services.

227. The protocol to the Canada/Japan Income Tax Convention, which is an integral part of the Convention by its own terms, provides that when an individual is a resident of both Contracting States, the question of residency shall be settled by applying the following rules:

(a) in the case of an individual,

(i) shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closest (centre of vital interests);

(ii) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;

(iii) if he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national;

228. At all times during the relevant period the Appellant's fixed base of operations was in Japan and not in Canada.

229. The Appellant was a resident of Japan at all material times.

230. The Appellant had a permanent home available to him in Japan.

231. At no time did the Appellant have a permanent home available to him in Canada.

232. The personal and economic relations of the Appellant, at all material times, were closest to Japan.

233. The habitual abode of the Appellant, at all material times, was Japan.

234. The Appellant did not become a resident of Japan solely for the purpose of rendering the services to the Canadian Embassy which were provided in 1993 and 1994.

235. Consequently, pursuant to the provisions of the *Canada/Japan Income Tax Convention Act, 1986*, s. 10, and the provisions of the Canada/Japan Income Tax Convention, the income of the Appellant earned in Japan in 1993, 1994 and 1995 was exempt from taxation in Canada.

236. Pursuant to the provisions of s. 81(1)(a) and s. 110(1)(f) of the ITA, if the Appellant was a resident of Canada during the relevant years, he was entitled to a deduction, for the purpose of computing his taxable income, for all his income earned in Japan.

237. If ss. 250(1)(c) of the ITA were to apply to render the Appellant a deemed resident of Canada, and deny him a deduction as set forth in the preceding paragraph, or if other provisions of the ITA were to subject him to taxation in Japan on income earned there, those provisions would be inconsistent with the provisions of the Canada/Japan Income Tax Convention which provide that the income earned by the Appellant while in Japan is not subject to taxation. Consequently, the provisions of the Canada/Japan Income Tax Convention prevail.

Application of the *Canada-Japan Income Tax Convention* Contrary to the CHRA

238. In the alternative the Minister interpreted and applied the *Canada-Japan Income Tax Convention* in a manner which is a discriminatory practice based on marital status, family status and national origin, contrary to the *Canadian Human Rights Act (CHRA)*.

239. The Appellant submits similar arguments made under Issue D concerning the CHRA.

Application of the *Canada-Japan Income Tax Convention* Contrary to the *Charter*

240. For the reasons described under Issue D the Appellants rights under s. 6(2), 7 and 15(1) have been infringed if the Appellant is denied an exemption of Canadian tax on all his income earned in Japan.

ISSUES G, H, I

250(3) and/or 250(1)(e), Tax Convention Provisions of No Force of Effect

241. In the alternative, if the Appellant was a resident of Canada pursuant to the provisions of s. 250(3) or paragraph 250(1)(e) of the ITA, and not entitled to an exemption from tax on his income earned in Japan under the Canada-Japan Income Tax Convention as a result of his spouse's activities, those provisions are of no force and effect because they deprive the Appellant of the right to equal protection and equal benefit of the without discrimination and, in particular, without discrimination based on marital/family status, contrary to the provisions of s. 15 of the *Charter of Rights and Freedoms* and infringe on the Appellant's rights under s. 6(2) and 7 of the *Charter of Rights and Freedoms*.

242. It is demeaning that paragraph 250(1)(e) of the ITA treats spouses differently and less favourably than children of government employees who earn more than the basis deduction amount pursuant to paragraph 250(1)(f) of the ITA.

243. Paragraph 250(1)(e) of the ITA cannot be justified under s. 1 of the *Charter* since Parliament has already determined it was inconsistent with Canada's tax conventions and it was no longer appropriate to tax someone based on their spousal status.

244. The Appellant asserts public interest standing to strike down paragraph

250(3) and/or 250(1)(e) or the ITA, and/or provisions of the Canada-Japan Income Tax Convention.

245. The Appellant's dignity has been demeaned because he was treated in a manner that suggests he was less capable or less worthy of recognition or value as human being in his own right and as a member of Canadian society to participate on equal footing in the job market because of stereotypes and laws enacted when spouses of government employees serving abroad were mostly women and did not work outside the home that result in adverse, unfair and unequal tax treatment.

ISSUE J

Overseas Employment Tax Credit

246. In the alternative, if the Appellant is resident in Canada then the Appellant is entitled to an Overseas Employment Tax Credit for his income not earned in a province, i.e., his self-employment/business earnings in Japan and for his earnings as a LES for the Canadian Embassy.

247. Section 122.3 of the *Income Tax Act* does not clearly and unambiguously indicate that a self-employed individual is not a specified employer. The Minister did not provide the Appellant with any legal precedents on this issue when asked.

248. The Canadian Embassy in Tokyo is a specified employer under s. 122.3 of the ITA.

ISSUE K

249. The Minister retained the Appellants tax and interest refunds in a manner contrary to s. 68 of the *Bankruptcy and Insolvency Act (BIA)*.

250. The Supreme Court of Canada has held that tax refunds are wages, that fall under s. 68 of BIA. Section 68 is a complete code in respect to a bankrupt's wages. Marzetti v. Marzetti [1994] 2 S.C.R. 765. Accordingly the Minister had no legal right to retain the interest refunds.

251. Her Majesty in right of Ontario and Her Majesty in right of Canada are two distinct legal entities, set-off cannot be used by one for the other – no 3rd party set-off. The Minister has used Ontario credits to set-off federal debt. The Supreme Court of Canada has held in Husky Oil Operations Ltd. V. Minister of National Revenue [1995] 3 S.C.R. 453 at paragraph 61 that any legislation that has an effect of creating a preference is inapplicable in bankruptcy.

COSTS

252. The Minister has prolonged, complicated and interfered with the Appellant's appeals in manner than warrants consideration to awarding costs to Appellant in any event of the cause. The Appellant should also be awarded his costs, on a full indemnity basis, in advance, for the previous Tax Court Appeal, his appeal to the Federal Court of Appeal and his application for leave to appeal to the Supreme Court.

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REASONS FOR ORDER BY:	The Honourable Gerald J. Rip, Chief Justice
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Andrew Miller

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada