Docket: 2008-1278(IT)G

BETWEEN:

RONALD H. LINGLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on May 27, 2009, at Vancouver, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Joel A. Nitikman
Counsel for the Respondent:	Nadine Taylor Pickering

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* with respect to the 2004 and 2005 taxation years are dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Summerside, Prince Edward Island, this 9th day of September 2009.

"Diane Campbell"

Campbell J.

Citation: 2009 TCC 435
Date: 20090909
Docket: 2008-1278(IT)G

BETWEEN:

RONALD H. LINGLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] In computing income for the 2004 and 2005 taxation years, the Appellant filed his income tax returns as a non-resident of Canada, reporting self-employment business income which he earned doing consulting work for Ontario Power Generation Inc. ("OPGI"). The Appellant filed returns in both Canada and the United States for these taxation years but in his Canadian returns he claimed equivalent amounts as treaty deductions pursuant to the *Canada-United States Income Tax Convention (1980)*, as amended (the "*Treaty*").

[2] The Minister of National Revenue (the "Minister") assessed the Appellant for the entire 2004 taxation year and for the period January 1, 2005 to September 14, 2005 (the "period") on the basis that he was a resident of Canada because his habitual abode was in Canada during this period and not the United States. The Appellant was therefore required to pay income tax on his business income which he earned in these taxation years.

[3] The facts are not materially in dispute. The parties filed a Statement of Agreed Facts and Issue, which I have attached to my Reasons as Schedule "A". The Appellant was born in the United States and was a citizen of that country

during the relevant period. He worked as a lead planner in a supervisory capacity for OPGI at its nuclear plant in Pickering, Ontario beginning in 2000. Initially he was employed as an employee but during the relevant period under appeal he was hired as an independent contractor. Throughout this period, the Appellant had a United States residence (the "Ransom House") in Illinois and a Canadian residence (the "Ajax House") in Ontario. The Appellant's spouse and children resided at the Ransom House. The Appellant returned to the Ransom House approximately one weekend per month. The Appellant and his spouse separated in 2004 and the house was sold in 2006. Calendars attached to the Statement of Agreed Facts and Issue detail the number of days during the relevant period which the Appellant spent in Canada (321 days in 2004 and 233 days during the period January 1, 2005 to September 14, 2005) and in the United States (45 days in 2004 and 24 days during the period January 1, 2005 to September 14, 2005).

[4] The parties have agreed that, at all times during this period, the Appellant was "liable to tax" in both the United States and Canada within the meaning of Article IV(1) of the *Treaty*. The relevant portion of that Article provides:

> 1. For the purposes of this Convention, the term "resident" of a Contracting State means any person that, under the laws of that State, is liable to tax therein by reason of that person's domicile, residence, citizenship, place of management, place of incorporation or any other criterion of a similar nature, …

The Appellant is "liable to tax" in the United States because of his citizenship in that country but he is also "liable to tax" in Canada because of his residence here under Canada's domestic definition of residency. In these circumstances the Appellant was a dual treaty resident.

[5] Pursuant to subsection 250(5) of the *Income Tax Act* (the "*Act*"), where a taxpayer is a dual treaty resident, if he is "tie-broken" into the other country under the *Treaty*, then the taxpayer is deemed not to be a resident of Canada, during the period. Subsection 250(5) states:

> 250(5) Notwithstanding any other provision of this Act (other than paragraph 126(1.1)(*a*)), a person is deemed not to be resident in Canada at a time if, at that time, the person would, but for this subsection and any tax treaty, be resident in Canada for the purposes of this Act but is, under a tax treaty with another country, resident in the other country and not resident in Canada.

[6] The issue therefore is whether the Appellant was a resident in Canada during this period for the purposes of the *Act* and his residence will be determined according to the "tie-breaker" rules found in Article IV(2) of the *Treaty*.

[7] The tie-breaker rules state:

> 2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
>
> (a) he 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 States or in neither State, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (centre of vital interests);
>
> (b) if the Contracting State in which he has his centre of vital interests cannot be determined, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;
>
> (c) if he has an habitual abode in both States or in neither State, he shall be deemed to be a resident of the Contracting State of which he is a citizen; and
>
> (d) if he is a citizen of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

[8] With respect to these "tie-breaker" rules, the parties agreed that the Appellant had a "permanent home" in both Canada and the United States during this period; that it was not possible to determine in which country the Appellant had his "centre of vital interests"; and that he had an "habitual abode" in Canada.

[9] The Appellant's position is that he also had an habitual abode in the United States as well as Canada and as a result of the tie-breaker rules he will be deemed to be a resident of the United States because he is a citizen of that country and not of Canada. The Respondent's position is that the Appellant did not have an habitual abode in the United States and because his habitual abode is in Canada, he will be deemed to be a resident of Canada, making his business income taxable in Canada during this period.

[10] The narrow issue therefore in this appeal is whether the Appellant under the tie-breaker rules also had an habitual abode in the United States as well as one in Canada. If the Ransom House is the Appellant's habitual abode in the United States during this period, then he will be tie-broken into that country pursuant to

Article IV(2)(c) of the *Treaty* because of his U.S. citizenship. However, if Ransom House is not an habitual abode, then he will be deemed to be a resident of Canada pursuant to Article IV(2)(b).

[11] A definition of "habitual abode" has not been provided in the *Treaty* so a review of the caselaw in this area must first be addressed. The leading case concerning the proper approach to the interpretation of an international tax convention is the Supreme Court of Canada decision in *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802. At paragraph 22, Iacobucci J. stated:

> 22 In interpreting a treaty, the paramount goal is to find the meaning of the words in question. This process involves looking to the language used and the intentions of the parties. …

Therefore, in determining the meaning to be given to the expression "habitual abode", it is necessary to examine both the meaning of the words as well as the intention of the parties drafting the treaty. Iacobucci J. at paragraphs 43-44 and 54-55 went on to explain:

> 43 Reviewing the intentions of the drafters of a taxation convention is a very important element in delineating the scope of the application of that treaty. As noted by Addy J. in *J. N. Gladden Estate v. The Queen*, [1985] 1 C.T.C. 163 (F.C.T.D.), at pp. 166-67:
>
> > Contrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties. A literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated in so far as the particular item under consideration is concerned. [Emphasis added.]
>
> […]
>
> 44 Clearly, the purpose of the Convention has significant relevance to how its provisions are to be interpreted. I agree with the intervener Government of the United States' submission that, in ascertaining these goals and intentions, a court may refer to extrinsic materials which form part of the legal context (these include accepted model conventions and official commentaries thereon) without the need first to find an ambiguity before turning to such materials.
>
> […]
>
> 54 I now turn to another set of extrinsic materials, other international taxation conventions and general models thereof, in order to help illustrate and illuminate

> the intentions of the parties to the *Canada-United States Income Tax Convention (1980)*. Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (Can. T.S. 1980 No. 37) indicate that reference may be made to these types of extrinsic materials when interpreting international documents such as taxation conventions; see also *Hunter Douglas Ltd. v. The Queen*, 79 D.T.C. 5340, (F.C.T.D.), at pp. 5344-45, and *Thiel v. Federal Commissioner of Taxation*, 90 A.T.C. 4717 (H.C. Aust.), at p. 4722.
>
> 55 Of high persuasive value in terms of defining the parameters of the *Canada-United States Income Tax Convention (1980)* is the OECD *Model Double Taxation Convention on Income and on Capital* (1963, re-enacted in 1977): Arnold and Edgar, eds., *Materials on Canadian Income Tax* (9th ed. 1990), at p. 208. As noted by the Court of Appeal, it served as the basis for the *Canada-United States Income Tax Convention (1980)* and also has world-wide recognition as a basic document of reference in the negotiation, application and interpretation of multilateral or bilateral tax conventions. …

These remarks make it clear that reference may be made to extrinsic materials when a court is called upon to interpret provisions of a treaty. Clearly both the OECD Model Tax Convention on Income and on Capital (the "OECD Model") and the pertinent Commentaries are relevant to the interpretation of the *Treaty*.

[12] In the recent decision of the Federal Court of Appeal in *Prévost Car Inc. v. The Queen*, 2009 FCA 57, 2009 D.T.C. 5053, Décary J. at paragraph 10 also confirmed that the Commentaries on the provisions of the OECD Model are relevant to treaty interpretation:

> [10] The worldwide recognition of the provisions of the Model Convention and their incorporation into a majority of bilateral conventions have made the Commentaries on the provisions of the OECD Model a widely-accepted guide to the interpretation and application of the provisions of existing bilateral conventions (see *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802; Klaus Vogel, "*Klaus Vogel on Double Taxation Conventions*" 3rd ed. (The Hague: Kluwer Law International, 1997) at 43. …

[13] I was referred to four cases which dealt with the meaning of "habitual abode". In *Allchin v. The Queen*, 2005 TCC 476, 2005 D.T.C. 603, Bell J. dealt with the issue of whether a taxpayer, under the "tie-breaking" rules in the same *Treaty* as in the present appeal, was a resident of the United States or Canada. He concluded that the taxpayer had a permanent residence in "both or neither" of Canada and the United States and that she had a centre of vital interests in both countries. In deciding that these tests were not conclusive, he moved on to a consideration of "habitual abode". In deciding that the taxpayer had an habitual

abode in the United States, he ignored the OECD Commentary discussion to the Model Convention concerning habitual abode. He determined that the Commentary was not useful to his analysis because of the slight difference in ordering between the tie-breaker rules contained in the *Treaty* and those in the Model Convention concerning the circumstances where an individual does not have a permanent home in either State. If an individual has a permanent home in both or neither of the countries, the *Treaty* tie-breaker rules next rely on the "centre of vital interests" test while under the Model Convention, if an individual has a permanent home in neither country, then the tie-breaker rules skip the "centre of vital interests" test and go directly to the use of the "habitual abode" test. Because of this distinction, Bell J. instead utilized the dictionary definition of the words "habitual" and "abode" and concluded at paragraph 54 of the decision that:

> [54] The combination of evidence describing the nature of the Appellant's lifestyle and activities in the U.S. and the information contained in the foregoing chart make it clear that during the years in question her habitual abode was in the U.S. …

It is apparent from his conclusion concerning habitual abode that he not only considered the number of days spent in each country but also the taxpayer's "lifestyle and activities". However, the decision does not provide clarification as to the precise factors, beyond the number of days spent in each country, that were considered relevant to the analysis of habitual abode. Nevertheless, what can be gleaned from *Allchin* is that consistently spending each weekend with one's family in the same rented premises over the course of a year – approximately 100 days – is insufficient to establish an habitual abode.

[14] In the second Canadian decision referred to me of *Yoon v. The Queen*, 2005 TCC 366, 2005 D.T.C. 1109, O'Connor J. found that the taxpayer was not a resident in Canada under the common law. Although the tie-breaker provisions in the Canada-Korean Tax Convention were considered, this part of his analysis is *obiter*. Since there was no distinction between the OECD Model and the *Treaty* at issue in *Yoon*, O'Connor J. distinguished *Allchin* on that basis and found the Commentary to be relevant. At paragraphs 39 to 41 he determined the issue of habitual residence on the basis of where the Appellant stayed more frequently:

> [39] Paragraph 17 of the OECD Commentary to Article IV states:
>
> 17. In the first situation, the case where the individual has a permanent home available to him in both States, the fact of having an habitual abode in one State rather than in the other appears therefore as the circumstance which, in case of

> doubt as to where the individual has his centre of vital interests, tips the balance towards the State where *he stays more frequently*. For this purpose regard must be had to stays made by the individual not only at the permanent home in the State in question but also at any other place in the same State.
>
> [Emphasis Added]
>
> [40] Aside from *Allchin*, *supra*, there are no Canadian cases that consider the meaning of habitual abode. However, in the American case of *Podd v. Commissioner*, (1998) Tax Ct. Memo LEXIS 414, Wells, J. of the United States Tax Court confirms the meaning of habitual abode enunciated in the OECD Commentary.
>
> Accordingly, where doubt exists as to an individual's "center of vital interests", the balance is tipped in favour of the country where the individual stays more frequently.
>
> [41] The evidence shows that Mrs. Yoon spent more time in Korea than in Canada in 2001. Therefore, her habitual abode was in Korea and not Canada. …

Since the Appellant spent 224 days in Korea and 135 days in Canada, O'Connor J. would have found that she had an habitual abode in Korea and not in Canada.

[15] In the United States Tax Court decision in *Stephen D. Podd, et al. v. Commissioner*, 76 T.C.M. (CCH) 906, Wells J. dismissed a motion by the taxpayer to reconsider a finding that he was a United States resident on the basis that no Canadian law had been introduced on the residency issue. Consequently, the subsequent consideration by Wells J. of the tie-breaker rules contained in the *Treaty* constituted *obiter* just as it had in *Yoon*. Although it is *obiter*, Wells J. stated the following at page 910:

> Accordingly, where doubt exists as to an individual's "[centre] of vital interest", the commentary tips the balance in favour of the country where the individual stays most frequently. During 1990, petitioner spent only 120 days in Montreal; he spent the remainder of the year in the United States, including 160 days in Florida and 50 days in South Carolina. Because petitioner spent more time in the United States than in Canada during 1990, it appears that petitioner had a habitual abode in the United States. On the basis of the analysis above, we think that, even if we had applied the Canada Convention in the instant case, petitioners would not have established that petitioner was a Canadian, as opposed to a U.S., resident for tax purposes during 1990.
> (Emphasis added.)

[16] The final case, *Dr. Rajnikant R. Bhatt vs. Commissioner Of Income-Tax*, [1996] 222 ITR 562, is of little assistance as no analysis was undertaken respecting the meaning of "habitual abode", although the applicant's residence turned on where he had an habitual abode. It is not clear from the decision what other factors, besides number of days spent in each State, were considered in reaching a decision on this issue.

[17] With the exception of *Allchin*, these decisions support the general relevance of the Commentaries to treaty interpretation. Although Bell J. in *Allchin* concluded that the relevance of the Commentaries to the interpretation of habitual abode was not useful given the differences between the *Treaty* provisions and the OECD Model provisions, the recent Federal Court of Appeal decision in *Prévost Car* in unequivocal language gives support to the use of Commentaries on the provisions of the OECD Model as useful guidelines in interpreting and applying the provisions of existing bilateral conventions.

[18] Since the early 1960s, the Organization for Economic Cooperation and Development (the "OECD") has published "Model" income tax treaties which may be used by countries as a basis to draft their actual treaties. Commentaries are also published pertaining to the OECD Models, which are meant to assist in explaining the terms of each Model income tax treaty. The 1980 *Treaty* in the present appeal is similar to the 1977 OECD Model Treaty. The OECD Commentary contains statements pertinent to the interpretation of habitual abode in Article IV(2)(b) of the *Treaty*. However, due to the slight difference in wording between the *Treaty* and the Model, the Appellant and Respondent have adopted opposing positions on the relevancy of the Commentary in interpreting Article IV(2)(c) of the *Treaty*.

[19] The Appellant argues that even if the conclusion of Bell J. respecting the Commentary in *Allchin* is wrong and the Commentary is relevant, it contains nothing that would define an habitual abode as the place where the taxpayer "stays more frequently". The Commentary on Article IV(2) does not contain a test requiring a comparison between the frequency of stays in Canada and the United States.

[20] The relevant paragraphs, 16 to 20 from the Commentary on Article IV(2) of the OECD Model, provide:

> 16. Subparagraph *b*) establishes a secondary criterion for two quite distinct and different situations:

> *a)* the case where the individual has a permanent home available to him in both Contracting States and it is not possible to determine in which one he has his centre of vital interests;
> *b)* the case where the individual has a permanent home available to him in neither Contracting State.
>
> Preference is given to the Contracting State where the individual has an habitual abode.
>
> 17. In the first situation, the case where the individual has a permanent home available to him in both States, the fact of having an habitual abode in one State rather than in the other appears therefore as the circumstance which, in case of doubt as to where the individual has his centre of vital interests, tips the balance towards the State where he stays more frequently. For this purpose regard must be had to stays made by the individual not only at the permanent home in the State in question but also at any other place in the same State.
>
> 18. The second situation is the case of an individual who has a permanent home available to him in neither Contracting State, as for example, a person going from one hotel to another. In this case also all stays made in a State must be considered without it being necessary to ascertain the reasons for them.
>
> 19. In stipulating that in the two situations which it contemplates preference is given to the Contracting State where the individual has an habitual abode, subparagraph *b)* does not specify over what length of time the comparison must be made. The comparison must cover a sufficient length of time for it to be possible to determine whether the residence in each of the two States is habitual and to determine also the intervals at which the stays take place.
>
> 20. Where, in the two situations referred to in subparagraph *b)* the individual has an habitual abode in both Contracting States or in neither, preference is given to the State of which he is a national. If, in these cases still, the individual is a national of both Contracting States or of neither of them, subparagraph *d)* assigns to the competent authorities the duty of resolving the difficulty by mutual agreement according to the procedure established in Article 25.

[21] The Respondent contends that the Commentary, particularly paragraph 17, makes it clear that an individual will have an habitual abode in the State where one "stays more frequently". By applying this test set out in the Commentary and considering the total of the Appellant's stays in Canada and the United States, the Appellant's habitual abode, according to the Respondent, is in Canada because that is where the Appellant "stays more frequently".

[22] However, a careful review of the relevant paragraphs of the Commentary does not support the Respondent's narrow interpretation of these provisions.

Paragraph 16 of the Commentary explains that habitual abode is the secondary criterion that will determine a taxpayer's residence where the initial analysis respecting permanent home and centre of vital interests remains inconclusive. Paragraph 17 explains that habitual abode will determine one's residence where an individual has permanent homes available in both States but has an habitual abode in one State but not in the other. Where this occurs, the individual will stay more frequently in the place where he has his sole habitual abode. This paragraph clarifies that frequency of stay is relevant to the determination of whether an individual has an habitual abode in a given State. However, it is clear that this paragraph does not go so far as to suggest that frequency of stay or counting the number of stays in each State is the determining or sole factor to be considered.

[23] Paragraph 19 of the Commentary, in my view, is more relevant in interpreting the meaning of "habitual abode". This provision specifies that "The comparison must cover a sufficient length of time for it to be possible to determine whether the residence in each of the two States is habitual". [Emphasis added].

[24] The analysis respecting habitual abode, offered by John F. Avery Jones *et al*., in the article entitled "Dual Residence of Individuals: The Meaning of the Expressions in the OECD Model Convention", [1981] British Tax Review 15, supports the foregoing approach. At page 113 of this article, it states:

> Turning now to the third test of the State in which the taxpayer has an habitual abode, there are two relevant meanings of the noun "abode" in English, either a place such as a house, or a more abstract concept of residing, an example of the latter being:
>
> > "May never glorious sun reflex his beams
> > Upon the country where you make abode".
>
> Neither usage is common although the *Oxford English Dictionary* does not describe either as obsolete. The use of the adjective "habitual" shows clearly that the latter use is intended because it is meaningless to refer to an habitual house. The French official text is much clearer: *où elle séjourne de façon habituelle*, literally meaning where one habitually stays. …

This article is particularly instructive where at page 116 it states:

> According to the OECD Model, the correct way of applying the test is to ask of each State whether the taxpayer has an habitual abode there, just as one asks whether he has a permanent home. The commentary on the other hand suggests that it is a test more in the nature of the State with which his personal and economic relations

> are closer, that is to say it is a comparative test: in which State is his abode more habitual? This is probably an unintended result of the commentary which goes on to say: "The comparison must cover a sufficient length of time for it to be possible to determine *whether the residence in each of the two states is habitual*… The passage to which we have added italics is, it is submitted, the correct test to be applied under paragraph *(b)*, and the reference to it being a comparison is misleading. This interpretation is also supported by the fact that the OECD Model goes on to deal with the position of the taxpayer having an habitual abode in both States; if the test merely involved a comparison of the time spent in each State this could occur only when the time spent in each was identical or nearly so, which does not seem likely to have been the intention. It seems that by using the expression "habitual," what is meant is whether living in each State is normal. …
> (Emphasis added.)

[25] Where there are two official versions of a treaty in two languages, the Vienna Convention on the Law of Treaties (Can. T.S. 1980 No. 37), Art. 33(4), allows a comparison of the texts in order to adopt "…the meaning which best reconciles the texts having regard to the object and purpose of the treaty…". In the French version of the *Treaty*, Article IV(2)(b) provides:

> (b) Si l'État contractant où cette personne a le centre de ses intérêts vitaux ne peut pas être déterminé, elle est considérée comme un résident de l'État contractant où elle séjourne de façon habituelle;
> (Emphasis added.)

[26] The French version when translated literally means "where one stays in an habitual way". This version largely removes any ambiguity that may be present in the English version.

[27] The word "habitual" is described in the Canadian Oxford Dictionary (2nd ed. 2004) as "done constantly or as a habit" or "regular, continual, usual". Black's Law Dictionary (5th ed. 1979) defines "habitual" as "customary, usual, of the nature of a habit". The Appellant argues that any interpretation to be given to the term "habitual" should not require an element of frequency. At paragraph 5.9 of the Appellant's written Argument, he stated:

> The concept of "habitual" does not have any sort of "frequency test" attached to it. Depending on the circumstances, a taxpayer may stay at an abode "habitually" if he stays there once a week, once a month or once a year.

[28] I agree that the interpretation of habitual abode embodies more than simply a determination of which State an individual "stayed more frequently". However, I

do not agree that "frequency" is irrelevant to an interpretation of habitual abode. Paragraphs 9 and 10 of the Commentary to Article IV(2) illustrate the context in which the tie-breaker rules are to be considered:

> 9. This paragraph relates to the case where, under the provisions of paragraph 1, an individual is a resident of both Contracting States.
>
> 10. To solve this conflict special rules must be established which give the attachment to one State a preference over the attachment to the other State. As far as possible, the preference criterion must be of such a nature that there can be no question but that the person concerned will satisfy it in one State only, and at the same time it must reflect such an attachment that it is felt to be natural that the right to tax devolves upon that particular State. …
> (Emphasis added.)

This Commentary is equally applicable to the tie-breaker rules in Article IV(2) of the *Treaty*. It follows logically that if an individual stays in one State consistently and repeatedly one day every year, although in one sense those stays are in the nature of a habit or of a customary nature, those stays would not reflect such an attachment to that State that it would be natural for the right to tax to devolve upon that particular State, where the tests for permanent home and centre of vital interests were inconclusive. This approach would align closely with the objects and purposes of the provisions in the *Treaty* which in part are meant to resolve cases of potential double taxation.

[29] Article 31(1) of the Vienna Convention on the Law of Treaties provides the following approach to be used when interpreting a treaty:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. [Emphasis added.]

This accords with the decision of the Supreme Court of Canada in *Crown Forest* which emphasized the necessity of looking at the language used in the provision together with the parties' intention in drafting those provisions.

[30] It follows that the proper approach to determining whether the Appellant had an habitual abode in the United States is to enquire whether he resided there habitually, in the sense that he regularly, customarily or usually lived in the United States. Paragraphs 27 to 32 of the Agreed Statement of Facts and Issue contain pertinent statements which assist in the determination of whether the Appellant

"normally lived" in the United States. It was agreed between the parties that the Appellant "consistently and repeatedly returned to his home in Canada for the majority of the days in this period." In the settled routine of his life "he regularly, normally and customarily lived in Canada." He "did not have any other contracts clients or business in the USA." In addition, he spent only 69 days out of 623 days in the relevant period at his home in the United States. It is interesting that these agreed statements explicitly state that the Appellant "normally … lived in Canada" – which answers the definition that the Avery Jones article suggested for the expression "habitual". The Appellant's stays at the Ransom House were in the nature of periodic visits with his "normal" place of residence being in Canada throughout the period. He did not have an habitual abode in the United States for the purposes of the *Treaty* because he did not regularly, customarily or normally live in the United States. Considering all the facts before me, his connections with the United States were weak when compared to his settled routine in Canada. Accordingly, the Appellant was a resident in Canada during this period and as such he is taxable on his business income earned as a consultant.

[31] The appeals are therefore dismissed with costs.

Signed at Summerside, Prince Edward Island this 9th day of September 2009.

"Diane Campbell"

Campbell J.

Schedule "A"

2008-1278(IT)G
TAX COURT OF CANADA
IN RE: THE INCOME TAX ACT

BETWEEN:

RONALD H. LINGLE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

STATEMENT OF AGREED FACTS AND ISSUE

The parties hereby agree that for purposes only of this Appeal and any Appeal therefrom or any other proceeding taken in this matter, the facts set out herein are true. The parties also agree that the documents attached hereto in the Tabs referred to below are true copies of the documents they represent, were signed by the persons who purported to have signed them, and were signed on the dates they were purportedly signed. Either party may adduce other evidence or documents not inconsistent with this Statement of Agreed Facts. All statutory references are to the Income Tax Act, RSC 1985 (5th Supp.), c. 1 (the "Act") as it read for the Appellant's 2004 and 2005 taxation years.

I. FACTS

(a) Background

1. The Appellant was born on January 25, 1950.

2. The Appellant was born in the United States of America ("USA").

3. The Appellant was a citizen of the USA throughout his 2004 taxation year and from January 1 – September 14, 2005 (collectively, the "Period").

4. The Appellant was not a citizen of Canada at any time in the Period.

(b) The Appellant's Work at the Plant

5. At all relevant times the Appellant had expertise as a "planner", that is, in taking engineering documents and using them to create a procedure on how to install, test and operate the equipment described in the documents.

6. At all relevant times Ontario Power Generation Inc. ("OPGI") was an Ontario corporation whose principal business was the generation and sale of electricity in Ontario. It had a nuclear plant (the "Plant") at Pickering, Ontario.

7. At all relevant times Stone & Webster was a USA engineering company (which may have changed its name to Field Services Inc.).

8. At all relevant times Framatome Blakey Staffing Solutions Inc. ("Framatome") was an Ontario company in the business of supplying workers to various projects.

9. In 2000 the Appellant was contacted by Stone & Webster to act as a supervisor for a planning department to be set up to refurbish part of the Plant.

10. The Appellant worked as a lead planner in a supervisory capacity at the Plant from 2000 to June 2002. That work was done as an employee.

11. From June 2002 to May 2003 the Appellant did not work at the Plant.

12. In 2003 Framatome contacted the Appellant to return to the Plant as a planner. He worked there from June 2003 to September 14, 2005 as a planner but not in a supervisory capacity. That work was done as an independent contractor. The contracts with Framatome were addressed to the Appellant at 2961 North 13th Road, Ransom, Illinois, USA (the "Ransom Home").

13. On June 6, 2003 the Appellant was issued a work permit by Canada which permitted him to work at the Plant until June 6, 2004 and which restricted the nature of his work and the location of his work as stated on the permit. In 2004 the Appellant was issued a second work permit which expired in 2005 and which contained the same restrictions as the first. Both work permits were addressed to the Appellant at 41 Tragunna Lane, Ajax, Ontario (the "Ajax Home").

14. The Appellant ceased providing services at the Plant on or about September 14, 2005 and left Canada at that time.

15. From 2000 through 2005, when the Appellant was working in Canada, he worked full-time at OPGI, eight to ten hours per day, never exceeding 60 hours per week.

(c) The Appellant's Homes During the Period

16. Throughout the Period the Ajax Home was rented from its landlord by a female co-worker of the Appellant's (the "Girlfriend"), with whom he had a personal relationship. The Appellant had no sublease or other formal lease agreement with his Girlfriend or the landlord.

17. Beginning in May 2003, through 2004, and until September 14, 2005, the Appellant was in a relationship with his Girlfriend and they shared the same bedroom at the Ajax Home.

18. The Appellant married Ms. Linda Sampson (the "Spouse") on April 25, 1970 in the USA.

19. In March, 1991 the Appellant purchased the Ransom Home, either by himself or jointly with his Spouse.

20. The Appellant and his Spouse have six children: Brett, Eric, Marc, Julie, Amy and Ashley, born in 1972, 1977, 1978, 1980, 1986 and 1987, respectively.

21. During the Period, only two of the Appellant's six children, Amy and Ashley, lived with Linda. Brett, Eric, Marc and Julie were either married, at school or on their own, in the USA.

22. In 2004 the Appellant's Spouse required hip surgery and moved out of the Ransom Home to an apartment in Morris, Illinois. At that time Eric and his girlfriend moved back to the Ransom Home and stayed there until the Ransom Home was sold in 2006.

23. The Appellant's Spouse did not return to the Ransom Home to reside there after her hip surgery was complete. The Appellant and his Spouse separated in July 2004 and were divorced on October 19, 2005.

24. The Appellant did not stay at the Ransom Home after leaving Canada on September 14, 2005. He went to and stayed in Homestead, Florida.

(d) Invoices and Days Spent in Canada and the USA During the Period

25. Throughout the Period, the Appellant invoiced Framatome on a weekly basis (the "Invoices") for the work that he did for Framatome. The Invoices used the Ransom Home address.

26. The Appellant's Invoices:

(a) covered all seven days for each week of the Period;

(b) stated that the per diem rates are $80/day in Canada and $55/day out of the country; and

(c) the Appellant was paid according to his Invoices, in respect of the days each week that the Appellant stated that he was present in Canada and the days that he stated he was out of Canada.

27. As detailed in the attached calendars for 2004 and 2005 at Tab 1 hereto, the number of days on which the Appellant was present only in Canada (based on the days billed for being in Canada on his Invoices less two days in August 2005) were as follows:

(a) 321 days in 2004;

(b) 233 days during the period January 1 to September 14, 2005; and

(c) he was paid $80/day for these days in Canada.

28. As detailed in Tab 1, the number of days on which the Appellant was present only in the USA (based on the days billed for being outside Canada on his Invoices plus two days in August 2005) were as follows:

(a) 45 days in 2004;

(b) 24 days during the 257 day period from January 1 to September 14, 2005; and

(c) he was paid $55/day for these days outside Canada.

29. The Appellant consistently and repeatedly returned to his home in Canada in the majority of days during the Period.

30. During the Period, in the settled routine of the Appellant's life, he regularly, normally and customarily lived in Canada.

31. During the Period, the Appellant did not have any other contracts, clients or business in the USA, but he was contacted by third parties outside of Canada looking to retain him.

32. During the Period, the Appellant returned to the Ransom Home approximately one weekend a month, and specifically on the days set out in the Invoices, with two additional days in August 2005, as summarized on the calendars (Tab 1).

33. The distance from the Ajax Home to the Ransom Home is approximately 600 miles and took about 10 hours to drive.

34. Throughout the 2000-2005 period, while the Appellant was working at the Plant and specifically during the Period, the Appellant had personal property at the Ransom Home including a boat and a trailer, and he had personal property at the Ajax Home.

35. Throughout the Period the Appellant was registered in Canada for Goods and Services Tax ("GST"). He charged Framatome GST on his accounts and remitted GST to Canada.

36. The Appellant's three GST returns filed during the Period list the following addresses, respectively: his Ransom Home; no address; and for the period January 1, 2005 to December 31, 2005, 23 Staci Lane, Webster, New York.

(e) The Treaty

37. At all times during the Period, the Appellant was "liable to tax" in the USA by reason of his citizenship there, within the meaning of Article IV(1) of the 1980 Canada-USA Income Tax Convention (the "Treaty").

38. At all times during the Period, the Appellant was "liable to tax" in Canada by reason of his residence there, within the meaning of Article IV(1) of the Treaty.

39. Throughout the Period the Appellant had "permanent homes" (within the meaning of Article IV(2)(a) of the Treaty) in both Canada and the USA, being the Ajax Home and the Ransom Home.

40. Throughout the Period the Appellant had vital interests in both Canada and the USA and it is not possible to determine in which country he had his "centre of vital interests" (within the meaning of Articles IV(2)(a) and IV(2)(b) of the Treaty) during the Period.

41. Throughout the Period the Appellant's Ajax Home was an "habitual abode" (within the meaning of Articles IV(2)(b) and IV(2)(c) of the Treaty).

(f) The Reassessments

42. The Appellant filed both Canadian and USA income tax returns for his 2004 and 2005 taxation years. His 2004 Canadian return listed the USA address and his 2005 Canadian return listed the Canadian address.

43. In computing his income for Canadian purposes for the 2004 and 2005 taxation years, the Appellant filed as a non-resident of Canada, reporting self-employed business income of $209,286 and $145,572, respectively, and claiming equivalent amounts as treaty deductions pursuant to the Treaty.

44. By Notices of Assessment dated March 13, 2006 and December 3, 2007 for the Appellant's 2004 and 2005 taxation years, respectively, the Minister of National Revenue (the "Minister") assessed the Appellant on the basis that he was a resident of Canada in those years.

45. The Appellant filed Notices of Objection to the March 13, 2006 and December 3, 2007 assessments within 90 days of those dates. The Minister confirmed the assessments by Notices of Confirmation dated November 9, 2007 and March 20, 2008, respectively.

II. ISSUE

46. Was the Ransom Home an "habitual abode" of the Appellant's during the Period, so that the Appellant was "tie-broken" into the USA under Article IV(2)(c) of the Treaty, and hence tie-broken out of Canada for the Period under subsection 250(5) of the Act?

Dated May 25th, 2009.

Her Majesty the Queen

Per: *"Nadine Taylor Pickering"*
Nadine Taylor Pickering, counsel

Ronald H. Lingle

Per: *"Joel Nitikman"*
Joel Nitikman, counsel

Ronald H. Lingle v. Her Majesty The Queen
Tax Court of Canada Appeal No. 2008-1278(IT)G

Days in and out of Canada According to Invoices

in Canada
out of Canada

2004

- 321 days in Canada
- 45 days out of Canada

JANUARY

S	M	T	W	T	F	S
				1	2	3
4	5	6	(7) 7	8	9	10
11	12	13	(7)14	15	16	17
18	19	20	(7)21	22	23	24
25	26	27	(5)28	(2) 29	30	31

FEBRUARY

S	M	T	W	T	F	S
1	2	3	(7) 4	5	6	7
8	9	10	(7)11	12	13	14
15	16	17	(4)18	19	20	21
22	23	24	(7)25	(3) 26	27	28
29						

MARCH

S	M	T	W	T	F	S
	1	2	(7) 3	4	5	6
7	8	9	(7)10	11	12	13
14	15	16	(7)17	18	19	20
21	22	23	(7)24	25	26	27
28	29	30	(7)31			

APRIL

S	M	T	W	T	F	S
				1	2	3
4	5	6	(4) 7	(3) 8	9	10
11	12	13	(5)14	(2) 15	16	17
18	19	20	(7)21	22	23	24
25	26	27	(7)28	29	30	

MAY

S	M	T	W	T	F	S
						1
2	3	4	(7) 5	6	7	8
9	10	11	(4)12	(3) 13	14	15
16	17	18	(7)19	20	21	22
23	24	25	(7)26	27	28	29
30	31					

JUNE

S	M	T	W	T	F	S
		1	(7) 2	3	4	5
6	7	8	(7) 9	10	11	12
13	14	15	(7)16	17	18	19
20	21	22	(7)23	24	25	26
27	28	29	(2)30	(5)		

JULY

S	M	T	W	T	F	S
				1	2	3
4	5	6	(7) 7	8	9	10
11	12	13	(7)14	15	16	17
18	19	20	(7)21	22	23	24
25	26	27	(7)28	29	30	31

AUGUST

S	M	T	W	T	F	S
1	2	3	(7) 4	5	6	7
8	9	10	(7)11	12	13	14
15	16	17	(7)18	19	20	21
22	23	24	(6)25	(1) 26	27	28
29	30	31				

SEPTEMBER

S	M	T	W	T	F	S
		(7)	1	2	3	4
5	6	7	(7) 8	9	10	11
12	13	14	(7)15	16	17	18
19	20	21	(7)22	23	24	25
26	27	28	(7)29	30		

OCTOBER

S	M	T	W	T	F	S
					1	2
3	4	5	6	(7) 7	8	9
10	11	12	(4)13	(3) 14	15	16
17	18	19	(5)20	(2) 21	22	23
24	25	26	(7)27	28	29	30
31						

NOVEMBER

S	M	T	W	T	F	S
	1	2	(7) 3	4	5	6
7	8	9	(7)10	11	12	13
14	15	16	(7)17	18	19	20
21	22	23	(5)24	(2) 25	26	27
28	29	30				

DECEMBER

S	M	T	W	T	F	S
			(4) 1	(3) 2	3	4
5	6	7	(4) 8	(3) 9	10	11
12	13	14	(7)15	16	17	18
19	20	21	(7)22	23	24	25
26	27	28	(1)29	(6) 30	31	

2005

- 233 days in Canada during period Jan 1 – Sept 19, 2008
- 24 days out of Canada during period Jan 1 – Sept 19,

JANUARY

S	M	T	W	T	F	S
						1
2	3	4	(5) 5	(2) 6	7	8
9	10	11	(7)12	13	14	15
16	17	18	(7)19	20	21	22
23	24	25	(7)26	27	28	29
30	31					

FEBRUARY

S	M	T	W	T	F	S
		1	(7) 2	3	4	5
6	7	8	(6) 9	(1) 10	11	12
13	14	15	(7)16	17	18	19
20	21	22	(5)23	(2) 24	25	26
27	28					

MARCH

S	M	T	W	T	F	S
		1	(7) 2	3	4	5
6	7	8	(7) 9	10	11	12
13	14	15	(7)16	17	18	19
20	21	22	(4)23	(3) 24	25	26
27	28	29	(7)30	31		

APRIL

S	M	T	W	T	F	S
					1	2
3	4	5	(7) 6	7	8	9
10	11	12	(4)13	(3) 14	15	16
17	18	19	(5)20	(2) 21	22	23
24	25	26	(7)27	28	29	30

MAY

S	M	T	W	T	F	S
1	2	3	(7) 4	5	6	7
8	9	10	(7)11	12	13	14
15	16	17	(5)18	(2) 19	20	21
22	23	24	(7)25	26	27	28
29	30	31				

JUNE

S	M	T	W	T	F	S
			(7) 1	2	3	4
5	6	7	(7) 8	9	10	11
12	13	14	(7)15	16	17	18
19	20	21	(5)22	(2) 23	24	25
26	27	28	(7)29	30		

JULY

S	M	T	W	T	F	S
					1	2
3	4	5	(6) 6	(1) 7	8	9
10	11	12	(7)13	14	15	16
17	18	19	(7)20	21	22	23
24	25	26	(5)27	(2) 28	29	30
31						

AUGUST

S	M	T	W	T	F	S
	1	2	(7) 3	4	5	6
7	8	9	(7)10	11	12	13
14	15	16	(7)17	18	19	20
21	22	23	(7)24	25	26	27
28	29	30	(5)31	(2)		

SEPTEMBER

S	M	T	W	T	F	S
				1	2	3
4	5	6	(5) 7	8	9	10
11	12	13	(2)14	(7) ~~15~~	~~16~~	~~17~~
~~18~~	~~19~~	~~20~~	~~21~~	~~22~~	~~23~~	~~24~~
~~25~~	~~26~~	~~27~~	~~28~~	~~29~~	~~30~~	

OCTOBER

S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

NOVEMBER

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

DECEMBER

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

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COURT FILE NO.:	2008-1278(IT)G
STYLE OF CAUSE:	Ronald H. Lingle and Her Majesty The Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 27, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	September 9 2009

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