Docket: 2010-898(IT)G

BETWEEN:

BRUCE ELLIOTT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *Larry Dysert* (2010-899(IT)G) and *Todd Pickett* (2010-900(IT)G) on March 12, 13 and 14, 2012 at Edmonton, Alberta.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Kurt G. Wintermute
Counsel for the Respondent:	Mark Heseltine

JUDGMENT

The appeal from the assessments made under the *Income Tax Act* with respect to the Appellant's 2005 and 2006 taxation years is allowed, with costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment, in accordance with the Reasons for Judgment attached hereto.

Signed at Ottawa, Canada this 21st day of February 2013.

"Patrick Boyle"

Boyle J

Docket: 2010-899(IT)G

BETWEEN:

LARRY DYSERT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *Bruce Elliott* (2010-898(IT)G) and *Todd Pickett* (2010-900(IT)G) on March 12, 13 and 14, 2012 at Edmonton, Alberta.

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Signed at Ottawa, Canada this 21st day of February 2013.

"Patrick Boyle"

Boyle J.

Docket: 2010-900(IT)G

BETWEEN:

TODD PICKETT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *Bruce Elliott* (2010-898(IT)G) and *Larry Dysert* (2010-899(IT)G) on March 12, 13 and 14, 2012 at Edmonton, Alberta.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Kurt G. Wintermute
Counsel for the Respondent:	Mark Heseltine

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Boyle J.

Citation: 2013 TCC 57
Date: 20130221
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AND BETWEEN:

LARRY DYSERT,

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and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2010-900(IT)G

AND BETWEEN:

TODD PICKETT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The three taxpayers, Mr. Dysert, Mr. Elliott and Mr. Pickett, are American citizens who have been assessed Canadian income tax on their revenues from providing professional consulting services to Syncrude Canada Ltd. ("Syncrude") in Edmonton and Fort McMurray, Alberta, in 2005 and 2006 pursuant to a two-year

contract (later extended to four years) between Syncrude and their US professional firm.[1]

[2] It is the taxpayers' position that during the years in question, they were not residents of Canada nor deemed to be residents of Canada. It is their further position that, in any event, the so called "tie-breaker rules" in Article IV of the *Canada-United States Income Tax Convention* (the "Treaty") would deem them to be residents of the United States (the "US"), not Canadian residents, with the result that they would be non-residents of Canada for purposes of the Canadian *Income Tax Act* ("*ITA*"). The taxpayers' position with respect to the Treaty's tie-breaker rules is that in the years in question (i) the taxpayers' Edmonton apartments were not permanent homes, or (ii) that their centres of vital interests were in the US because their personal and economic relations were closer to the US, or (iii) that their habitual abodes were in the US.

[3] It is the Respondent's position that the taxpayers were (i) resident in Canada, or deemed to be resident in Canada as sojourners, and (ii) under the tie-breaker rules in the Treaty, deemed to be Canadian residents by virtue of them (a) having permanent homes in the years in Edmonton as well as in the US, and (b) either having closer personal and economic relations to Canada (centre of vital interests) or having their habitual abodes in Canada in the years in question.[2]

[4] Shortly before the week of trial, the Respondent abandoned the argument in its replies that the taxpayers' US limited partnership, Conquest Consulting Group ("CCG"), carried on business in Canada through a fixed base. Thus, I do not need to address the issue of whether the presence and activities of the taxpayers in Canada as

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[1] The Appellants' 2004 years were not reassessed.

[2] I should make two observations about the Respondent's position. First, factual residence and deemed residence by virtue of sojourning are alternative and inconsistent arguments. It appears impossible from the Reply, the Reassessments and the Confirmations to discern which is their primary argument and which is their alternative. Had this case needed to be decided based upon onus and burden (which it does not) this may have proved problematic for the Respondent. Second, notwithstanding that the Respondent maintains that the Appellants were taxable under the *ITA* as Canadian residents, for some unexplained reason, the CRA did not reassess them on their worldwide income. This strongly suggests they were assessed as carrying on business in Canada through a permanent establishment or fixed base and not as Canadian residents at all - but for the fact they were assessed on their gross Canada revenues. This may also have hindered the Respondent had this case needed to be decided on onus or burden.

active partners of CCG constituted a fixed base or permanent establishment for treaty purposes.[3]

I. Facts

[5] The three appeals were heard together on common evidence over a period of three days. Each of the taxpayers testified. Their Canadian accountant was also called as a witness. The Respondent did not call any witnesses. All of the witnesses testified in a wholly credible fashion and were not challenged on credibility. There is no material disagreement regarding the facts.

[6] Each of the three taxpayers are certified cost and estimating professionals with lengthy and very successful careers in the cost engineering field at major international companies, including Fluor Engineering, Eastman Kodak and Intel. They are long-time acquaintances and colleagues, two of them having worked together early in their careers at Fluor and all three of them at Eastman Kodak. Prior to undertaking work at Syncrude in 2004, all of their professional careers had been entirely in the US.

[7] Cost engineering as a professional service consists of a number of related activities including cost estimating, project planning and scheduling, project control and management, as well as other areas such as dispute resolution. In the business world, it is particularly important in the context of large projects and mega-projects. Professional accreditation and education of cost management professionals is organized by AACE International, Inc., the Association for the Advancement of Cost Engineering International ("AACE"). AACE's certifications are independently accredited by the Council of Engineering and Scientific Specialty Boards, the same council that accredits, among other things, the Professional Engineer or P. Eng. designation in Canada. Eastman Kodak was an early leader in the field and in the late 1980s and early 1990s had one of the world's leading project estimating and management departments. Each of the taxpayers has held significant roles at AACE on boards and panels.

[8] Each of the taxpayers was born in the US and have been US citizens throughout their lives. With the exception of the years 2004 through 2008 during which they provided services to Syncrude, they had each lived their entire lives only

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[3] Based upon the extensive evidence before this Court, it appears that I would have been bound to follow and apply the Federal Court of Appeal's decision in *Dudney v. The Queen*, 2000 DTC 6169 (FCA), [2000] 2 C.T.C. 56 (FCA).

in the US. By 2004, they each had married and had children. They had each acquired substantial family homes in the US. All of their adult children and their families lived in the US, often nearby, their dependent children lived at home or, if away at college, called their parents' homes home. Their extended families, siblings and parents, et cetera, also all lived in the US. They had the personal effects one would expect of mid-to-late career successful professionals: multiple cars, a motorcycle, a motor home, acreage with horses, dog kennels for eight English Mastiff show dogs, art, recreational and exercise equipment, et cetera. They also had the financial assets one would expect, including significant retirement and other investment accounts with major US financial institutions. All of these remained sited in the US throughout.

[9] They also had personal and social involvement in their US home communities as one might expect, such as long-time friends and long-standing involvement with local charities, local theatre, et cetera. They held positions on AACE International, a US entity. At least one had very good personal friends in other parts of the US from the times he lived and worked in other states.

[10] In short, they were "all American", well established in and only in the US in their personal lives and professional careers. Nothing in their lives was in any way related to Canada before their work in Alberta began.

[11] In late 2003, Syncrude was in need of enhancing its project estimating and project control management capabilities. It was preparing to commence another major upgrader facility/project in Fort McMurray. Its previous upgrader project came in late and significantly over estimated costs - in the 100% range, measured in billions of dollars. Syncrude was not satisfied with the assessment and ranking of its estimating capabilities by Independent Project Analysis ("IPA"), a benchmarking firm for businesses undertaking projects. Syncrude and IPA were planning a mapping session for March 2004 to identify its gaps and needed enhancements, and to plan how they were to be resolved and addressed.

[12] In 2004, Mr. Elliott was still the long-time head of Eastman Kodak's world wide Capital Estimating Department, a group he had started and built up. However, Eastman Kodak's fortunes by then had been in decline for some time. His group, which had 23 estimators a decade previous, had been pared back to 8 by 2004, but he and his team were still regarded as leaders in the sector. Eastman Kodak's decline led to attempted headhunting of the group's members on a regular basis. Mr. Dysert had left the group in early 2003 and became lead estimator at Intel in Oregon.

[13] In November, 2003, Syncrude had IPA contact Mr. Elliott to see if he would be interested in the opportunity to work with Syncrude to improve its estimating and project control capabilities. To this point, he had never heard of Syncrude, although he recognized many of its corporate owners/participants/venturers. He left it that they should speak again after the November/December US Thanksgiving/Christmas holiday period had ended.

[14] A Syncrude officer called him during the second week of January 2004 to invite him to Fort McMurray in early February to discuss Syncrude's situation further. He went to Fort McMurray for one and one-half days in early February. Syncrude discussed its interest in enhancing its estimating and project control capabilities. Mr. Elliott was only interested in the estimating aspect. Syncrude's project management of the Fort McMurray upgrader project was some form of joint venture between Syncrude and Colt Engineering, an engineering consulting firm, functioning as a department of Syncrude under the name CoSyn. CoSyn was headed by Mr. Elliott's contact at Syncrude and its offices were in Edmonton. After the one and one-half days of Fort McMurray meetings, Mr. Elliott went to meet more of the CoSyn team at its Edmonton offices. Mr. Elliott was invited to participate in Syncrude's March mapping session to be facilitated by IPA that would be addressing Syncrude's concerns. He suggested that Mr. Dysert and Mr. Pickett should come to that session as well. This suggestion was well received as they were well-known individuals in the cost engineering sector.

[15] This led to renewed discussion among the three Appellants of establishing their own professional consulting firm. They attended the Alberta March mapping session together.

[16] Following their return to the US, they received an information packet from Syncrude outlining the work that it wanted the Appellants' firm to do. CCG submitted a proposal and draft contracts were sent back and forth. Among other things CCG scaled back both the scope and duration of the work Syncrude wanted them to perform. The contract included a provision requiring Syncrude to bear their costs of returning to their US homes upon completion of the work.

[17] The Appellants established CCG as their professional firm in 2004. It was originally established as a US limited liability company ("LLC"), but converted into a US limited liability partnership ("LLP") upon the advice of their US advisors in order to be certain CCG itself qualified for Treaty benefits. CCG's business office, records and bank accounts et cetera were all located in the US. All of the management, business, financial, contract negotiation, and client development work

of CCG was done by the Appellants throughout while they were in the US. Syncrude made payments to CCG under the contract in the US. CCG had other very significant clients generating very significant professional fees from projects around the world during the period in question. Since the three Appellants were committed to working primarily on the Syncrude contract, they had CCG recruit other professional estimators to work for it to complete most of this other work in the years in question. The Appellants would take care of other CCG work when home on home visits under the Syncrude contract or by returning to the US during the course of their Syncrude work for CCG related business travel.

[18] The Appellants arrived in Edmonton in April and May 2004. They arrived with only their suitcases and briefcases. They obtained their initial Canadian work permits at the Edmonton airport. The first to arrive rented a car for a short period. They checked into a local hotel for short periods to settle into their Syncrude work and to find appropriate long-term accommodation. This involved leaving virtually all of their assets in the US. They each leased modest 2 bedroom apartments in the same complex. They negotiated leases that allowed them to leave on much abridged notice in the event their local work ended during the term (this was required by Syncrude under the terms of the housing allowance). They equipped their apartments as men staying alone could be expected to, a bed from The Brick, sparse modest furnishings from IKEA, a work desk or table, and a good-sized television. When they completed their work for Syncrude in 2008, 90% of their Canadian furnishings went to Goodwill or the trash and only their clothes, books and technical manuals, and filing cabinets returned home to the US with them.

[19] They each leased Toyotas from the same dealer. They maintained their US drivers' licences and did not seek to obtain Alberta licences. AAA coverage was maintained and CAA coverage was not sought.

[20] They maintained their cell phones with their US carriers. They had land lines in their apartments as these were required to allow guests' entry through the building's front door. There was insignificant use of the land lines.

[21] The Appellants maintained all of their US health and life insurance. They obtained the provincial health insurance coverage that Alberta makes generally available to otherwise out-of-province workers in such temporary work circumstances, and which Syncrude made all such workers aware of. At least one of the Appellants arranged for US insurance which would cover the cost of air ambulance back to a US hospital if he was hospitalized while in Canada.

[22] The Appellants left all of their US banking, financial, investment, pensions, and retirement savings in place. The only financial arrangements by them in Canada were a single checking account each used for day-to-day living expenses in Canada.

[23] During the term of their Syncrude work the Appellants each took home visits to the US, generally monthly as provided in the Syncrude contract. In addition, they would schedule time off from their Syncrude commitments for other CCG business to be completed in the US.

[24] There were only a very few visits to Alberta by their family members and for very short periods of time. These were typically for such things as visiting Banff, skiing the Rockies and attending the Stampede, although there was reference to a five day stay in Edmonton in January.

[25] It is not disputed that the Appellants were physically present in Canada for more than 183 days in 2005 and 2006.

[26] These arrangements all continued in place unchanged in all material respects throughout. The initial Syncrude contract was extended for a further two year period. During the negotiation of the extension, the Appellants insisted on certain further key changes to the scope of work, reporting arrangements and length of renewal term, including keeping it shorter than Syncrude wanted.

II. Law

The relevant provisions of the *ITA* are in sections 2, 248 and 250 and set out below:

Tax payable by persons resident in Canada **2.** (1) An income tax shall be paid, as	Impôt payable par les personnes résidant au Canada **2.** (1) Un impôt sur le revenu doit être

required by this Act, on the taxable income for each taxation year of every person resident in Canada at any time in the year.	payé, ainsi qu'il est prévu par la présente loi, pour chaque année d'imposition, sur le revenu imposable de toute personne résidant au Canada à un moment donné au cours de l'année.
[…]	[…]
248(1) Definitions – In this Act,	248. **(1) Définitions --** Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
"non-resident" means not resident in Canada	**«non-résident»** Qui ne réside pas au Canada.
[…]	[…]
250(1) Person deemed resident -- For the purposes of this Act, a person shall, subject to subsection (2), be deemed to have been resident in Canada throughout a taxation year if the person	**250(1) Personne réputée résider au Canada --** Pour l'application de la présente loi, une personne est réputée, sous réserve du paragraphe (2), avoir résidé au Canada tout au long d'une année d'imposition si :
(a) sojourned in Canada in the year for a period of, or periods the total of which is, 183 days or more;	a) elle a séjourné au Canada au cours de l'année pendant une période ou des périodes dont l'ensemble est de 183 jours ou plus;
[…]	[…]
(3) Ordinarily resident -- In this Act, a reference to a person resident in Canada includes a person who was at the relevant time ordinarily resident in Canada.	**(3) Résident habituel --** Dans la présente loi, la mention d'une personne résidant au Canada vise aussi une personne qui, au moment considéré, résidait habituellement au Canada.
[…]	**[…]**
(5) Deemed non-resident [by treaty] -- 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	**(5) Personne réputée non-résidente [en vertu d'un traité fiscal] --** Malgré les autres dispositions de la présente loi (sauf l'alinéa 126(1.1)a)), une personne est réputée ne pas résider au Canada à un moment donné dans le cas où, à ce moment, si ce n'était le présent paragraphe ou tout traité fiscal, elle résiderait au Canada pour l'application

country and not resident in Canada.	de la présente loi alors que, en vertu d'un traité fiscal conclu avec un autre pays, elle réside dans ce pays et non au Canada.

The relevant provisions of the Treaty are set out in Article IV:

CONVENTION BETWEEN CANADA AND THE UNITED STATES OF AMERICA **WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL** **ARTICLE IV** **Residence** 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 […] 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	CONVENTION ENTRE LE CANADA ET LES ÉTATS-UNIS D'AMERIQUE **EN MATIERE D'IMPOTS SUR LE REVENU ET SUR LA FORTUNE** **ARTICLE IV** **Résidence** 1. Au sens de la présente Convention, le terme « résident » d'un État contractant désigne toute personne qui, en vertu de la législation de cet État, est assujettie à l'impôt dans cet État en raison de son domicile, de sa résidence, de sa citoyenneté, de son siège de direction, de son lieu de constitution ou de tout autre critère de nature analogue […] 2. Lorsque, selon les dispositions du paragraphe 1, une personne physique est un résident des deux États contractants, sa situation est réglée de la manière suivante: a) Cette personne est considérée comme un résident de l'État contractant où elle dispose d'un foyer d'habitation permanent; si elle dispose d'un foyer d'habitation permanent dans les deux États ou ne dispose d'un tel foyer dans aucun des États, elle est considérée comme un résident de l'État contractant avec lequel ses liens personnels et économiques sont les plus étroits

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.	(centre des intérêts vitaux); 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; c) Si cette personne séjourne de façon habituelle dans les deux États ou si elle ne séjourne de façon habituelle dans aucun des États, elle est considérée comme un résident de l'État contractant dont elle possède la citoyenneté; et d) Si cette personne possède la citoyenneté des deux États ou si elle ne possède la citoyenneté d'aucun d'eux, les autorités compétentes des États contractants tranchent la question d'un commun accord.

III. The Analytical Matrix or Grid to Determine the Appellants' Residence

A. The first issue to be decided is whether the Appellants were resident in Canada for purposes of the *ITA*. This question potentially has two components:

(i) were they factually resident here as that term has been interpreted for purposes of the *ITA*; and

(ii) if they were not factually resident in Canada, are they deemed to have been resident in Canada under paragraph 250(1)(a) of the *ITA* applicable to those who sojourn in Canada for 183 days or more in a given year.

B. If the Appellants were not resident in Canada in the years in question, the entire analysis ends there and the Appellants are successful.

C. If the Appellants are found to have been resident in Canada for purposes of the *ITA*, the analysis must then turn to the Treaty and in particular to Article IV. A finding that they are taxable under the *ITA* based upon their being resident or being deemed to be resident in Canada will make them residents of Canada for purposes of the Treaty by virtue of paragraph 1 of Article IV. However, Article IV continues with

its so called "tie-breaker rules" if a person is a resident of both treaty countries. It is conceded in this case that the Appellants are each residents of the US for purposes of paragraph 1 of Article IV of the Treaty. Therefore, the application of the tie-breaker rules in paragraph 2 of Article IV of the Treaty will need to be considered and applied.

(i) The hierarchy of the paragraph 2 tie-breaker rules begins by deeming a dual resident to be a resident of the country in which he had a "permanent home available to him". It is conceded that each Appellant had a permanent home available to him in the US. The first issue to be decided under the Treaty is whether the Appellants also had permanent homes available to them in Canada. If their Alberta living arrangements did not constitute permanent homes, they will be deemed to be residents of the US, and not Canada, for purposes of the Treaty and the Treaty analysis will end there.

(ii) If their Alberta living arrangements are found to have also been permanent homes available to them, then paragraph 2(a) requires the Court to next determine whether their "centres of vital interest", being the country with which their "personal and economic relations were closer", can be determined. If it can be determined they will be deemed to have been residents of that country, and not the other country, and the Treaty analysis will end there.

(iii) If their centres of vital interest cannot be determined, the Court must determine whether they had an "habitual abode" in either or both countries. If they had an habitual abode in one country and not in the other, they will be deemed to have been residents of the former country, and not the latter, and the Treaty analysis will end there.

(iv) If they had "habitual abodes" in both Canada and in the US, or in neither country, the Appellants will be deemed to have been residents of the US, and not residents of Canada, for purposes of the Treaty by virtue of their sole US citizenship and no further inquiry need be made.

D. If the Appellants are determined by the tie-breaker rules under "C" above to have been residents of Canada for purposes of the Treaty, after having first been found under "A" above to have been resident in Canada for purposes of the *ITA*, the result is they remain properly taxable as Canadian residents under the *ITA* and the Appellants are unsuccessful.

E. If the Appellants are determined by the tie-breaker rules under "C" above to have been residents of the US for purposes of the Treaty, then subsection 250(5) deems them not to be resident in Canada for purposes of the *ITA* and the Appellants are successful.

IV. Analysis

A. Were the Appellants Factually Resident in Canada under the *ITA*?

[27] The determination of whether one is or is not resident in Canada, including ordinarily resident in Canada, is a question of fact highly dependent upon the person's particular circumstances. Further, the terms resident and ordinarily resident are not defined in the *ITA*, either by bright line tests or otherwise. There are a number of leading and oft-quoted cases dealing with the meaning to be given to the terms resident and ordinarily resident and some are quoted from, below. In addition to those which give general definitions of resident and ordinarily resident and/or identify the relevant factual criteria to be considered, discussed below are also several cases that apply those legal considerations to the facts of particular taxpayers wherein there are similarities in the facts of those cases to those involving the Appellants in this case or in which the Court had to address similar issues.

[28] The leading Canadian authority on the meaning of ordinarily resident is the Supreme Court of Canada decision in *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209. In *Thomson* the following paragraphs address the issue of factual residence:

> **Rand, J.**
>
> 47 The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.
>
> 48 The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

49 For the purposes of income tax legislation, it must be assumed that every person has at all times a residence. It is not necessary to this that he should have a home or a particular place of abode or even a shelter. He may sleep in the open. It is important only to ascertain the spatial bounds within which he spends his life or to which his ordered or customary living is related. Ordinary residence can best be appreciated by considering its antithesis, occasional or casual or deviatory residence. The latter would seem clearly to be not only temporary in time and exceptional in circumstance, but also accompanied by a sense of transitoriness and of return.

50 But in the different situations of so-called "permanent residence", "temporary residence", "ordinary residence", "principal residence" and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited. On the lower level, the expressions involving residence should be distinguished, as I think they are in ordinary speech, from the field of "stay" or "visit".

Estey, J.

71 A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question. Even in this statute under section 9(b) the time of 183 days does not determine whether the party sojourns or not but merely determines whether the tax shall be payable or not by one who sojourns.

Kerwin, J.

2 There is no definition in the Act of "resident" or "ordinarily resident" but they should receive the meaning ascribed to them by common usage. When one is considering a Revenue Act, it is true to state, I think, as it is put in the Standard Dictionary, that the words "reside" and "residence" are somewhat stately and not to be used indiscriminately for "live", "house" or "home". The Shorter Oxford English Dictionary gives the meaning of "reside" as being "To dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place". By the same authority "ordinarily" means "1. In conformity with rule; as a

> matter of regular occurrence. 2. In most cases, usually, commonly. 3. To the usual extent. 4. As is normal or usual". On the other hand, the meaning of the word "sojourn" is given as "to make a temporary stay in a place; to remain or reside for a time".

[29] In *The Queen v. Kenneth F. Reeder*, 75 DTC 5160, Mahoney, J. of the Federal Court, Trial Division wrote:

> 13 While the Defendant here is far removed from the jet set, including any possible imputation of a preconceived effort to avoid taxation, the factors which have been found in those cases to be material in determining the pure question of fact of fiscal residence are as valid in his case as in theirs. While the list does not purport to be exhaustive, material factors include:
>
> (a) past and present habits of life;
>
> (b) regularity and length of visits in the jurisdiction asserting residence;
>
> (c) ties within that jurisdiction;
>
> (d) ties elsewhere;
>
> (e) permanence or otherwise of purposes of stay abroad.

[30] In *Gaudreau v. The Queen*, 2005 DTC 66, Lamarre J. wrote:

> 33 I adopt the reasoning of Mahoney, J. in the *Reeder* case, at page 5163:
>
> > The Defendant was at a stage in life when he was highly mobile. He was able, willing, even eager, to travel. In that, he was not atypical of his contemporaries and the relevant factors must be considered in that context. It is not contested that he was, before March 29, 1972 and has, since December 1, 1972, been resident in Canada. Throughout, his ties of whatever description have all been with Canada, save only those ties, undertaken during the term of his absence, which were necessary to permit him and his family to enjoy an acceptable and expected lifestyle while in France. That absence was temporary even though, strictly speaking, indeterminate in length. The ties in France were temporarily undertaken and abandoned on his return to Canada.

> I am satisfied that had the Defendant been asked, while in France, where he regularly, normally or customarily lived, Canada must have been the answer. I find that the Defendant was resident in Canada throughout all of 1972.

34 In my view, the same can be said here. Throughout his sojourn in Egypt, the appellant's ties were all with Canada, save only those ties, undertaken during the term of his absence, which were necessary to permit him and his wife to enjoy an acceptable and expected lifestyle while in Egypt. As a matter of fact, the ties in Egypt were temporarily undertaken and abandoned on his return to Canada. As Rip, J. stated in the above cited passage from *Snow*, supra, a person's temporary absence from Canada does not necessarily lead to a loss of Canadian residence when close personal and economic ties are maintained in Canada. I therefore conclude that the appellant was ordinarily resident in Canada during the years at issue.

Other aspects of the *Gaudreau* decision were considered by the Federal Court of Appeal and upheld at 2005 FCA 388.

[31] In *Mahmood v. The Queen*, 2009 TCC 89, Hogan, J. wrote, in considering some similar overlapping factual considerations:

[60] The evidence does show that the Appellant had some ties to Canada in the years in question. His mother lived in a condominium which he owned. He stayed in the condominium when he came to Canada. One of his sons also lived there, along with his sister, who stayed there from time to time. The Appellant used the Canadian financial system to deposit funds, exchange currency and ultimately pay the foreign suppliers of his business. He attended the local mosque near the condo that he owned in Canada. He had a car available to him that was parked at the condo. He went on camping trips with friends and visited Niagara Falls at least seven times.

[61] In my view, these facts are not sufficient to make the Appellant a resident of Canada for the purposes of the *Act*. The condominium, while owned by the Appellant, was really his mother’s home and not his own. His mother has lived there the entire time. The Appellant lives at the family home in Guyana with his wife and his three children.

[62] The Appellant’s Canadian activities are similar to the activities of other non-residents carrying on business in Canada. One can be a non-resident of Canada and own real estate in Canada at the same time. Section 116 of the *Act* and Part XIII deal with these cases. The former provision applies when a non-resident sells property and the latter when a non-resident collects, among other things, rental income.

> [63] In the event that I am wrong and Canada is the Appellant's home in the same way Guyana is, I find that the tiebreaker rule in paragraph 4(2)(*a*) of the Convention makes him a resident of Guyana for the purposes of the *Act*. The Appellant's family and economic interests are more closely tied to Guyana than to Canada.

[32] Similarly relevant are the decisions of Paris, J. involving international work assignments in *McFadyen v. The Queen*, 2000 DTC 2473 and in *Johnson v. The Queen*, 2007 DTC 1022.

[33] Based upon the facts presented as summarized above, and the meanings given to the terms resident and ordinarily resident, I find that none of the Appellants were resident or ordinarily resident in Canada in the circumstances. They continued to have and maintain their extremely deep and extensive family, personal, business and financial ties to the US. They did not give up any of their ties to the US, except their physical presence while needed in Edmonton to fulfill their Syncrude obligations. Further, they virtually only took on such ties to Canada as were reasonably needed to fulfill the CCG business contract with Syncrude in an economically reasonable and commonsensical, practical manner such as (i) rented apartments with early termination provisions (ii) locally leased cars (iii) modest furnishings most all of which were donated to neighbourhood charitable thrift shops before leaving Canada; and (iv) single local chequing account used for local living expenses. They never intended to remain in Canada beyond the period of the Syncrude contract which, while renewed once, was intentionally kept to definite terms by the Appellants.

[34] A determination of residence depends upon and requires consideration of the overall particular facts of the individual involved.[4] The fact that, from all outward appearances, the Appellants might each appear to other Edmontonians to live there in the same manner as others, is simply not the test. Similarly, the fact that a middle aged professional may be expected to have a more settled way of life and very different past habits of life than young university graduates moving out of their parents' homes and starting one of their first jobs does not mean I should ignore any such factual differences where they exist (though different factors may be given different weight in different cases).

B. Were the Appellants Deemed to be Resident in Canada under the *ITA*?

[35] Paragraph 250(1)(a) of the *ITA* provides that persons will be deemed to be resident in Canada for purposes of the *Act* if they sojourn in Canada for 183 days or

[4] As does a determination of centre of vital interests.

more in a year. The word sojourn is not defined in the *ITA* however its meaning for purposes of the *ITA* has been addressed by Canadian courts as set out below.

[36] It appears clear from the Supreme Court of Canada's comments in *Thomson* (especially in paragraphs 2, 49 and 71 quoted above) that to sojourn generally means to temporarily stay, visit, reside or remain, in a place for a time. The nature of sojourning is an unusual intermittent stay, and is marked by a sense of transitoriness and of return to one's usual, ordinary residence.

[37] In *Dixon v. The Queen*, 2001 FCA 216, the Federal Court of Appeal wrote:

> 6 The Supreme Court of Canada, many years ago, defined the word sojourn in the case of *Thomson v. Minister of National Revenue* (1946) 2 DTC 812 at 813 as follows:
>
> > A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he usually [sic], casually, or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question.
>
> While this statement may well be an *obiter dictum*, this definition of sojourn has withstood the test of time.
>
> 7 In their book *Principles of Canadian Income Tax Law*, 2nd ed. (Scarborough, Ont.: Carswell, 1997) at 120, Professors Hogg & Magee explain the word sojourn as follows:
>
> > The term "sojourn" means something less than residence. A sojourner is a person who is physically present in Canada, but on a more transient basis than a resident. A sojourner lacks the settled home in Canada which would make him or her a resident. A person who is a resident of another country and who comes to Canada on a vacation or business trip would be an example of a sojourner. In most cases, of course, a sojourner would stay in Canada for only a short period of time, but if the sojourner stays for a period of 183 days, or for several periods totalling 183 days, then the effect of s. 250(1)(a) is to tax the sojourner as if he or she were a resident for the whole year. The rationale is no doubt that a

> person spending so much time in Canada has a stake in the in the country which is not markedly different from that of a resident, and which entails a contribution to the financing of the government. There is also the administrative convenience that s. 250(1)(a) will eliminate some of the argumentation over whether a person is a resident or not.
>
> Unhappily for Mr. Dixon, he did not sojourn in Canada upon his return, but began to reside here, taking himself out of the deeming provision, section 250.

The Federal Court of Appeal upheld the Tax Court of Canada's decision in *Dixon* which had also relied upon the *Thomson* definition of sojourn.

[38] The example of a person on a business trip remains in the current edition of Professor Hogg's book.

[39] Professor Krishna, in his text "Fundamentals of Income Tax Law", refers to the *Thomson* concepts of unusually, casually or intermittently visiting or staying and states that this implies a temporary stay in a place as opposed to ordinary residence.[5]
[40] In the text "International Taxation in Canada"[6] it is written: "A sojourner is someone who is physically present in Canada, but does not regard Canada "home" or intend to remain in Canada."

[41] In the Canada Tax Service[7] the commentary includes: "A "sojourn" (meaning "a temporary stay as of a traveller in a foreign land" (Webster), in Canada, is quite different from a period of "residence" in Canada …".

[42] Counsel for the Appellants relied upon *R&L Food Distributors Ltd. v. MNR*, 77 DTC 411 for the proposition that a US resident travelling to Canada each day to work in Canada and returning to the US each night is not sojourning. I accept that and agree that a day trip or a series of regular day trips is not a sojourn. However, there is a great factual gulf between a daily border town commuter and living in Edmonton.

[43] On the facts of this case, where the Appellants stayed in Edmonton for several years for purposes of their work, staying in their own rented apartments kept

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[5] Carswell 2009 at page 87.

[6] 2nd edition, Jinyan Li, Arthur Cockfield and J. Scott Wilkie, at page 75.

[7] McCarthy Tétrault, Carswell at page 250-109.

available throughout their stay, driving their own cars leased by them to be available throughout their stay, working, shopping, sleeping and carrying on like any ordinary Canadian on most days of the year, the Court is satisfied that the Appellants were sojourning in Canada when they were here. This clearly meets the intermittent, temporary visit or stay parts of the meaning given to sojourn set out by the Supreme Court of Canada in *Thomson* and relied upon by the Federal Court of Appeal in *Dixon* as the time tested definition of the term. A business trip is one of the specific examples set out by Professors Hogg and McGee of sojourning. It is frankly difficult to imagine a more clear example of the concept of sojourning or a more appropriate result under the *ITA*.

[44] There is no dispute that the Appellants were living in Canada for 183 days or more each year on this basis, regardless of how travel days are counted.

[45] Each of the Appellants is deemed to have been resident in Canada for purposes of the *ITA* in each of the years in question.

C. Did the Appellants have permanent homes available to them in Canada for purposes of the Treaty?

[46] Since the Appellants were residents of both Canada and the US for purposes of the Treaty, the tie-breaker rules of the Treaty must now be considered and applied.

[47] As described above this requires that the Court in this case first determine whether the Appellants' living arrangements in Canada constituted permanent homes available to them. It is conceded and clear that they had permanent homes available to them in the US for Treaty purposes.

Treaty Interpretation

[48] The *Vienna Convention on the Law of Treaties* provides that a treaty is to 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. It also authorizes regard to subsequent practice in the application of the treaty in certain circumstances and for certain purposes, as well as the use of other supplementary means of interpretation when the interpretation of the treaty otherwise leads to a result which is manifestly absurd or unreasonable.

[49] As noted expressly by the Supreme Court of Canada and the Federal Court of Appeal, the required approach to the interpretation of tax treaties is significantly different than that applicable to interpreting tax legislation. (At times it seems some

tax lawyers, accountants and academics choose to overlook or forget this when it is inconvenient.)

[50] In *The Queen v. Crown Forest Industries Limited, et al.*, 95 DTC 5389, the Supreme Court of Canada had occasion to consider Article IV of the US Treaty. The Court began from the premise that:

> 29 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. …

[51] The Court went on to quote approvingly from Addy, J. in *Gladden Estate v. The Queen*, 85 DTC 5188, wherein he wrote at page 5191:

> 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 insofar as the particular item under consideration is concerned.

[52] Both the *Vienna Convention* and the Supreme Court of Canada in *Crown Forest* confirm that "literalism has no role to play in the interpretation of treaties": *Coblentz v. The Queen*, 96 DTC 6531 (FCA).

[53] In *Crown Forest* the Supreme Court of Canada also held that, in ascertaining the purposes of a treaty article, a Court may refer to extrinsic materials which form part of the legal context, including model conventions and official commentaries thereon, without the need to first find an ambiguity before turning to such materials.

[54] The preamble to the Treaty between Canada and the US sets out its purposes of reducing or eliminating double taxation of income earned by a resident of one country from sources in the other country, and of preventing tax avoidance or evasion. In *Crown Forest* the Supreme Court of Canada held that the purposes of the Treaty also included the promotion of international trade between Canada and the US and the mitigation of administrative complexities arising from having to comply with two uncoordinated taxation systems.

[55] There is no evidence or suggestion of any risk of double non-taxation or evasion in this case on these facts. It is the avoidance of double taxation by allocating the right to tax between the two countries that is engaged in this case.

[56] In *The Queen v. Prévost Car Inc.*, 2009 FCA 57, 2009 DTC 5053, the Federal Court of Appeal wrote:

> 10 The worldwide recognition of the provisions of the [OECD] 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, [95 DTC 5389] [1995] 2 S.C.R. 802; Klaus Vogel, "*Klaus Vogel on Double Taxation Conventions*" 3rd ed. (The Hague: Kluwer Law International, 1997) at 43. In the case at bar, Article 10(2) of the Tax Treaty is mirrored on Article 10(2) of the Model Convention.
>
> 11 The same may be said with respect to later commentaries, when they represent a fair interpretation of the words of the Model Convention and do not conflict with Commentaries in existence at the time a specific treaty was entered and when, of course, neither treaty partner has registered an objection to the new Commentaries. For example, in the introduction to the Income and Capital Model Convention and Commentary (2003), the OECD invites its members to interpret their bilateral treaties in accordance with the Commentaries "as modified from time to time" (par. 3) and "in the spirit of the revised Commentaries" (par. 33). The Introduction goes on, at par. 35, to note that changes to the Commentaries are not relevant "where the provisions ... are different in substance from the amended Articles" and, at par. 36, that "many amendments are intended to simply clarify, not change, the meaning of the Articles or the Commentaries".

[57] The United States issued a Technical Explanation of the Treaty, to which Canadian authorities generally subscribe. The US Technical Explanation does not provide any relevant comments on the tie-breaker rules.

[58] Article IV of the OECD Model Convention corresponds to Article IV of the Treaty. The OECD Commentaries to Article IV include:

> 4. Conventions for the avoidance of double taxation do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as "resident" and, consequently, is fully liable to tax in that State. They do not lay down standards which the provisions of the domestic laws on "residence" have to fulfil in order that claims for full tax liability can be accepted between the Contracting States. In this respect the States take their stand entirely on the domestic laws.
>
> 5. This manifests itself quite clearly in the cases where there is no conflict at all between two residences, but where the conflict exists only between residence and source or situs. But the same view applies in conflicts between two residences. The special point in these cases is only that no solution of the conflict can be arrived at by reference to the concept of residence adopted in the domestic laws of the States

concerned. In these cases special provisions must be established in the Convention to determine which of the two concepts of residence is to be given preference.

6. An example will elucidate the case. An individual has his permanent home in State A, where his wife and children live. He has had a stay of more than six months in State B and according to the legislation of the latter State he is, in consequence of the length of the stay, taxed as being a resident of that State. Thus, both States claim that he is fully liable to tax. This conflict has to be solved by the Convention.

7. In this particular case the Article (under paragraph 2) gives preference to the claim of State A. This does not, however, imply that the Article lays down special rules on "residence" and that the domestic laws of State B are ignored because they are incompatible with such rules. The fact is quite simply that in the case of such a conflict a choice must necessarily be made between the two claims, and it is on this point that the Article proposes special rules.

[…]

9. This paragraph [2] 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. The facts to which the special rules will apply are those existing during the period when the residence of the taxpayer affects tax liability, which may be less than an entire taxable period. For example, in one calendar year an individual is a resident of State A under that State's tax laws from 1 January to 31 March, then moves to State B. Because the individual resides in State B for more than 183 days, the individual is treated by the tax laws of State B as a State B resident for the entire year. Applying the special rules to the period 1 January to 31 March, the individual was a resident of State A. Therefore, both State A and State B should treat the individual as a State A resident for that period, and as a State B resident from 1 April to 31 December.

11. The Article gives preference to the Contracting State in which the individual has a permanent home available to him. This criterion will frequently be sufficient to solve the conflict, e.g. where the individual has a permanent home in one Contracting State and has only made a stay of some length in the other Contracting State.

12. Subparagraph *a*) means, therefore, that in the application of the Convention (that is, where there is a conflict between the laws of the two States) it is considered

> that the residence is that place where the individual owns or possesses a home; this home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that they stay is intended to be of short duration.
>
> 13. As regards the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room). But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all time continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.).
>
> 14. If the individual has a permanent home in both Contracting States, paragraph 2 gives preference to the State with which the personal and economic relations of the individual are closer, this being understood as the centre of vital interests. In the cases where the residence cannot be determined by reference to this rule, paragraph 2 provides as subsidiary criteria, first, habitual abode and then nationality. If the individual is a national of both States or of neither of them, the question shall be solved by mutual agreement between the States concerned according to the procedure laid down in Article 25.
>
> 15. If the individual has a permanent home in both Contracting States, it is necessary to look at the facts in order to ascertain with which of the two States his personal and economic relations are closer. Thus, regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc. The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.

Permanent Home

[59] This Court had occasion to consider whether a US resident had a permanent home available to him in Canada for purposes of the Treaty in *Wolf v. The Queen*, 2000 DTC 2595. In that case Lamarre, J. found that Mr. Wolf had permanent homes available to him in both countries in factual circumstances described as follows:

> [10] The appellant testified that he rented out his condo in Florida with all his furniture when he came to Canada in 1990. Thirty days' notice was required to terminate the lease (Exhibit A-10). He had mandated a rental agent in Florida to

> make the rental arrangements. He came in Canada with his clothing, his stereo and his video equipment. During the years at issue, he rented a room in Dollard-des-Ormeaux (Quebec) for $375 per month. He did not have a private entrance, nor did he have a private telephone line. He always kept his American insurance for his car which was registered in the United States. His health and property insurance were taken out in the United States. He kept open all his American bank accounts and opened one in Canada for the direct deposit of his pay cheques. He wired all his savings to his American bank accounts. He dealt with a stockbroker in the United States. He never requested the status of landed immigrant in Canada nor Canadian citizenship. He travelled with his American passport. He owned a few American credit cards, and one Canadian MasterCard for his spending here in Canada, and he belonged to clubs and professional associations in the United States but none in Canada.

[60] Lamarre, J. went on to conclude that Mr. Wolf had permanent homes in both Canada and the US but was a resident of the US on the basis of his centre of vital interests being more in the US than in Canada. In the Federal Court of Appeal, *Wolf v. The Queen*, 2002 FCA 96, her conclusion on his US residence status was not challenged.

[61] Similarly, I find that the Appellants' Edmonton apartments rented by them for a duration intended to correspond to the length of their being in Edmonton, continuously available to them throughout that period, appropriately furnished by them for that purpose with parking arrangements for their cars, incorporating places to sleep, cook, relax, entertain and work, clearly constituted permanent homes for this purpose.

[62] This is very different than the example given in paragraph 6 of the OECD Commentary as in that case the individual described has a permanent home in one country where his family lives and he merely stays more than 6 months in the other country. This is clear from paragraph 11 of the Commentary.

[63] The concept of permanent home is discussed in paragraphs 12 and 13 of the OECD Commentary. For purposes of the Appellants' situation, the concept of permanence of the home means having the dwelling available during all times continuously as opposed to occasionally during the relevant period.

[64] This decision is not inconsistent with the parenthetical reference to business travel in paragraph 13 of the OECD Commentary. That reference is made in the context of giving an example of where one might need to occasionally stay where the reason for it, such as business travel, is necessarily of short duration. That is simply not the case on these taxpayers' facts.

[65] Neither the jurisprudence nor the OECD Commentary suggest one should not look at a taxpayer's circumstances in the years in issue in the context of his or her overall circumstances in the surrounding periods of years. What is expressly described in the third sentence of paragraph 10 of the OECD Commentary is looking at shorter periods within the year in issue when the particular circumstances warrant. (This thought may have been engaged had the Appellants' 2004 years been reassessed on the basis they were resident in Canada throughout 2004 by virtue of sojourning after April or May).

[66] Each of the Appellants in this case had permanent homes available to him in each of Canada and the US throughout the relevant portions.

D. In which Country were the Appellants' Centres of Vital Interests?

[67] Article IV(2)(a) provides that a person who has a permanent home available to him in each of Canada and the US will be deemed to be a resident of the country with which his personal and economic relations are closer. The country with which the personal and economic relations are closer is defined as the taxpayer's centre of vital interests. Clearly a taxpayer can not have more than one centre of vital interests for this purpose (given the use of the word "closer"), even though on particular facts it may not be ascertainable. As stated by the Federal Court of Appeal in *Trieste v. The Queen*:[8]

> 6 … The test to be applied under the Convention is one of fact: in which, if any, state does the individual have closer personal and economic relations?

There is no other singular determinative test or way to phrase the question. In this Court in *Trieste*, the trial judge was unable to determine the country with which the taxpayer had closer personal and economic relations and therefore carried on to look at the taxpayer's habitual abode. In that case, the taxpayer was found to also have a permanent home in Canada. An important distinction from the taxpayers' facts in this case is that in *Trieste*, the taxpayer purchased two different homes in Canada, his wife periodically lived with him in Canada and they acquired the first condominium jointly. The trial judge in *Trieste* considered the purchase of the two Canadian condominiums to be significant in distinguishing the *Trieste* facts from her decision of first instance in *Gaudreau*.

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[8] 2012 TCC 91; 2012 FCA 320.

[68] In this Court at first instance, the Tax Court Judge in *Gaudreau*, in considering where the taxpayer's centre of vital interests lay, considered paragraph 15 of the OECD Commentary and went on to write:

> 38 Thus, if a person who has a home in one state sets up a second in the other state while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first state.
>
> 39 Here, it is true that the appellant said that he had worked abroad for a number of years during his career, but it is my understanding that it was in circumstances similar to those that took him to Egypt. He and his wife always kept their house and all their possessions in Canada. Their family always lived in Canada. It is my perception that they never intended to give up their economic and personal relations with Canada. In fact, the appellant did not really maintain any economic relations with Egypt apart from those he needed to have in order to meet his day-to-day living expenses. He rented an apartment there on a yearly basis, kept a bank account solely for his needs over there, did not purchase a car, and obtained his driver's licence simply so as to be able to commute to work in Egypt. That the appellant agreed to work in Egypt on an approximately four-year contract does not alter the fact that his centre of vital interests remained in Canada.
>
> 40 I therefore conclude, considering all the facts, that the appellant's centre of vital interests was closer to Canada than Egypt during the years 1996, 1998 and 1999.

Lamarre, J.'s decision in *Gaudreau* was upheld on her application of the tie-breaker rules by the Federal Court of Appeal unanimously with brief oral reasons.

[69] In this Court at first instance in *Wolf*, Lamarre, J. as mentioned above, found that the Appellant had permanent homes in both countries and continued in paragraph 20:

> [20] I am of the view that the appellant had a permanent home available to him in both countries. Indeed, he had a place to stay in Canada and with only one month's notice he could return to his condo in Florida. However, I find that the appellant's centre of vital interests was more in the United States than in Canada. The appellant is not married, but still, all his family was in the United States. His bank accounts and savings and his stockbroker were all in the United States. Apart from one bank account and one credit card which he had here in Canada for his day-to-day living expenses, the appellant did not maintain any economic relations with Canada. He obtained his patent in the United States and wired all

> his savings to the United States. The United States was the country to which he returned with frequency and regularity. Although the appellant's place of work was in Canada, I do not think that this overrides the fact that his centre of vital interests remained in the United States. He came to Canada to work on a temporary basis because the job was here. His contract was in fact extended, but this does not mean however that his personal and economic relations were with Canada. His source of income was in Canada but there were no other ties to this country. In fact, the way he acted shows rather that it was never his intention to stay permanently in Canada or to have an habitual abode here. He never really settled in Canada. He spent all his free time with his family in the United States, took out all his insurance in the United States, was not insured here in Canada, and only kept here a pied-à-terre, a room in Dollard-des-Ormeaux (Quebec). He never requested landed immigrant status nor Canadian citizenship. He is an American citizen and has an American passport only. He declared his world income and paid his income tax in the United States for all the years in question. This is sufficient for me to be able to say that the appellant is deemed to be a resident of the United States within the meaning of paragraph 2 of article IV of the *Canada-U.S. Income Tax Convention*.

[70] As mentioned above, her conclusion on the taxpayer's US resident status was not challenged in the Federal Court of Appeal.

[71] This Court and the Federal Court of Appeal also had occasion to consider and review the application of the concept of centre of vital interests in the tie-breaker rules in the Treaty in *Bujnowski v. The Queen*, 2005 TCC 90, 2006 FCA 32. The reasons for both Courts are contained in the following passages from the Federal Court of Appeal's reasons:

> 6 The Tax Court judge set out the arguments of the parties as to the application and effect of the Convention, as well as the facts which he considered material to its operation. He set out his conclusions as para. 8 of his reasons, reproduced below:
>
> > [para8] Notwithstanding the Appellant's submissions to the contrary, the evidence before the Court leads clearly to the conclusion that his residential ties to Canada were most significant. Not only did the Appellant's wife remain in Canada in a residence which they owned, it is also a fact that she remained in order to find employment. There is no evidence before the Court to indicate that the Appellant had at any time contemplated the disposition of the dwelling nor is there any evidence to support his statement that he had been considering the purchase of a residence in Michigan. A number of other residential ties with Canada also tend to lead to a determination that the Appellant was factually resident in Canada while employed in the US. He retained, as previously indicated,

> personal property as well as social and economic ties in Canada such as a bank account, brokerage accounts and self- directed retirement accounts, etc. He also retained his Canadian passport and memberships in Canadian professional organizations. On the evidence before me, I have concluded that the Appellant was a factual resident of Canada and accordingly, the Minister's assessment was correct.
>
> 7 While this paragraph deals only with the Canadian elements of Mr. Bujnowksi's situation, when it is read in context it is clear that the judge is here stating his conclusions with respect to the various elements he considered in determining to which State the centre of Mr. Bujnowski's vital interests were closer. The judge's use of the term "factual resident" may suggest that he is applying the domestic test for residence found in *Thomson v. M.N.R.* [1944] C.T.C. 63 (Ex. Ct), but he used the same term elsewhere in his reasons in a context where it could only mean "resident of Canada for the purposes of the Convention."
>
> 8 I am satisfied that the judge recognized Mr. Bujnowski's dual residency in the 2001 tax year and that he applied the tie-breaker rule found at para. 4(2) of the Convention, as he ought to have. Despite Mr. Bujnowski's attempt to persuade us that the judge's conclusions are replete with factual errors, I am satisfied that they are grounded in the evidence before him and are free of any palpable and overriding error.

[72] It is clear that closer does not mean more numerous. It is a relative not a mechanical or arithmetic concept. Closeness requires that serious attention be focused upon the depth and nature of the personal and economic relations/ties. This finds express support in paragraph 15 of the OECD Commentary, especially with the example in the final sentence.

[73] In *Hertel v. Minister of National Revenue*, 93 DTC 721, Sobier, J. wrote:

> 14 In determining his centre of vital interests, it is not enough to simply weigh or count the number of factors or connections on each side. The depth of the roots of one's centre of vital interests is more important than their number.

This passage was cited with approval by O'Connor, J. of this Court in *Yoon v. The Queen*, 2005 TCC 366.

[74] It is clear that, on the facts of these cases, each of the Appellants' personal and economic relations were closer to the US than to Canada.[9] It can be observed that for each of the Appellants:

> (i) they lived only in the United States before coming to Canada for purposes of fulfilling the Syncrude business contract;
>
> (ii) they left Canada at the conclusion of their Syncrude work;
>
> (iii) they maintained all of their pre-existing ties to the United States throughout the relevant period that they were working on the Syncrude project in Canada. It was only their physical presence of being in Canada that was no longer entirely focused in the US;
>
> (iv) the only ties they established to Canada were those necessary for, or reasonably incidental to, the requirement that they physically be in Canada for the period they were working on the Syncrude project.

[75] Having decided that, on the facts before the Court, their centres of vital interests were in the US by virtue of each of their personal and economic relations being closer to the US for the years in question, these Appellants are deemed to be residents of the US and not residents of Canada for purposes of the Treaty.

[76] By virtue of the application of subsection 250(5) of the *ITA*, the factual finding that they were residents of the US for purposes of Canada's treaty with the US, deems them to not be resident in Canada in the years in question for *ITA* purposes. Subsection 250(5) applies notwithstanding any other provision of the *ITA*, including paragraph 250(1)(a) dealing with sojourners (or subsection 250(3) dealing with factual residents). The Appellants are therefore entitled to succeed in their appeals. They were not properly subject to tax assessed under Part I of the *ITA* which is imposed on persons who are resident in Canada.

E. Habitual Abodes

[77] Only if I had been unable to determine with which country the taxpayers' personal and economical relations were closer, as was the trial judge in *Trieste*,

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[9] I note that in argument, Counsel for the Respondent conceded that, in the three cases before the Court, the taxpayers' ties with Canada were certainly not as deep and certainly not as extensive as their ties with the US.

would I have had to carry on to consider whether the Appellants had habitual abodes in Canada or in the US or in both to complete the application of the tie-breaker rules.

V. Conclusion

[78] The Appellants are initially deemed by paragraph 250(1)(a) of the *ITA* to have been resident in Canada in 2005 and 2006 by virtue of having sojourned in Canada for 183 days or more. However, subsection 250(5) deems them not to have been resident in Canada nonetheless, by virtue of having been found to be residents of the US for the purposes of the Treaty.

[79] The taxpayers' appeals are allowed, with costs.

Signed at Ottawa, Canada this 21st day of February 2013.

"Patrick Boyle"

Boyle J.

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