CANADIAN RESIDENTS LEAVING CANADA

Recent Jurisprudence and Lessons to be Learned

Introduction

Four recent tax cases have dealt with Canadian residents claiming to be non-residents of Canada. They were:

Bujnowski - Held to be a resident of Canada by the Tax Court of Canada ("TCC")

Mulja - Held to be a resident of Canada by the TCC

Guo - Held to be a resident of Canada by the TCC. Decision confirmed by the Federal Court of Appeal ("FCA")

Allchin - Initially held to be a resident of Canada by the TCC. Her appeal to the FCA was allowed, and the matter was referred back to the TCC for redetermination. On redetermination, she was held to be a US resident and not a resident of Canada.

Some Dos and Don'ts

My review of the four cases listed above, which are discussed in some detail below, has resulted in the following list of "Do's and Don'ts" to be considered when a Canadian resident leaves Canada and claims non-residency for tax purposes thereafter. They are based on comments by the various Courts in rendering judgment, many of which I mention specifically in the case summaries which follow.

One caveat: no-one will be able to make a "perfect" move from Canada. The object is to do everything possible to make a watertight case for non-residence, which will convince the Canada Revenue Authority ("CRA") to abandon any idea of taking the matter to the Tax Court.

Dos

- Make it clear that, at the time of departure, you have no intention of returning to Canada – your departure is intended to be permanent. Make a clean break from Canada. A later change of mind, for good reasons, should not be a problem.

- Take your family with you (spouse and dependent children), absent compelling personal reasons.

- Become a resident of some other jurisdiction for tax purposes, and be prepared to prove it, preferably with official documentation and (if appropriate) certified translations. Pay tax in your new country of residence (if tax is due) and file your tax returns there as a resident.

- Open bank accounts and obtain credit cards in your new country of residence, as well as "offshore" accounts, if appropriate.

- Dispose of any motor vehicles you own in Canada. The TCC seems to place great emphasis on this.

- Apply for citizenship of your new country of residence. Even if you are not yet eligible, keep the letter of rejection.

- Remove most or all of your personal possessions from Canada. Close Canadian safety deposit boxes.

- Maximise social and economic ties in your new country of residence – join clubs, professional organisations, etc.

- Take out a driver's licence in your new country of residence.

- Take professional advice before deciding to appeal to the Tax Court. Do not represent yourself before the Court – remember the saying "A man who is his own lawyer has a fool for his client". This applies to both genders!

Don’ts

- After departure, don’t file a Canadian tax return in respect of non-Canadian income. If you file a Canadian tax return, e.g. in respect of Canadian rental income, provide your address outside Canada.

- Don’t retain your provincial health plan cover. Cancel it by letter. Keep a copy.

- Don’t keep any Canadian credit cards. If you retain a Canadian bank account (one only!), be prepared to provide good reasons, such as alimony payments or other Canadian liabilities.

- Don’t keep a Canadian telephone number or a Canadian mailing address. Destroy all stationary and business cards with a Canadian address.

- Don’t renew your Canadian driver’s licence.

- Don’t complete Form NR73 without taking professional advice. It is a voluntary form, so don’t submit it to the CRA, absent compelling reasons.

- Don’t apply for Canadian tax benefits after you leave Canada.

- Try to avoid using Canadian medical or dental services after you leave Canada.

- Limit your return trips to Canada. Absent compelling personal reasons, I suggest a maximum of 90 days per annum in Canada for several years after departure. I prefer a 30 day maximum stay each year for the first couple of years.

Tax Treaties

See whether there is a comprehensive tax treaty between Canada and your new country of residence. If so:

- Ensure that you are a resident of your "new" country in accordance with the terms of Article 4(1) of the relevant treaty. See Appendix C for Article 4(1) of the OECD Model Convention. Most tax treaties have an Article 4(1) broadly similar to the OECD Model.

- Consider whether the CRA will argue that you are not a dual resident after your move, but have remained resident in Canada.

- Try to ensure that you do not have a "permanent home" in Canada after you leave, and that you have a permanent home in your new country of residence.

- A sale or gift of your Canadian home to a family member who remains in Canada may be viewed negatively by the CRA, arguing that it remains your permanent home in Canada. If you stay at your former home during subsequent visits to Canada, you are likely to lose the argument.

Bujnowski

The decision in this case, Bujnowski v. R.[1], was brought down by the TCC on March 31, 2005. Mr. Bujnowski appeared in person, without a lawyer.

The case related to a claim for a foreign tax credit, which was conceded by the tax authorities during the hearing, after Mr. Bujnowski produced the relevant documentation. However, the hearing dealt almost exclusively with the question of Mr. Bujnowski's residence.

Mr. Bujnowski is a Canadian citizen. He was hired by a US company in January 2001. His employment was terminated on October 1, 2001 and he returned to Canada a month later. He filed Form NR73 twice with the Canada Revenue Agency ("CRA"), both times after his return to Canada. There is no indication of why he filed this voluntary form even once. I might guess that it was at the request of the CRA. Mr. Bujnowski's responses in the two filings were said to be "fairly consistent".

The Court noted the following undisputed facts, as set out in Forms NR73:

- His wife remained in Canada while Mr. Bujnowski was working in the US, living in the house they owned jointly.

- Mr. Bujnowski had ties to Canada while he was working in the US:

    - Furnishings, appliances, utensils and personal possessions remained in Canada

    - He retained his Ontario driver's licence and kept vehicles in Ontario which were registered there

    - He had a valid Canadian passport and intended to renew it on expiry

    - He maintained a joint Canadian bank account with his wife and used Canadian credit cards while working in the US

    - He kept his Canadian telephone service and listing for both personal and business use

    - He made frequent return visits to Canada while working in the US

    - He answered "yes" to the question in Form NR73 about whether he intended to return to Canada, adding "working in the U.S.A. until retirement or work unavailability due to lack of jobs in Canada"

[1] [2005] 1 CTC 2831

Bujowski, cont'd.

Mr. Bujnowski claimed that he was considered a US resident for US tax purposes, and paid US tax on his employment income, since he was not exempt under the Canada/US Tax Convention. He claimed to be a "deemed non-resident of Canada" for the ten months ended October 31, 2001. He relied on subsection 250(5) of the Canadian Income Tax Act (see Appendix A).

He referred to the "tiebreaker rules" in paragraph 2 of Article IV of the Canada/US Tax Convention (see Appendix B) and claimed that, since he had a "permanent home" in both countries, he relied on the "centre of vital interests" test. He asserted that his economic ties were stronger with the US because that was his sole source of income and that his wife was often with him in the US – pretty weak arguments!

In reply, counsel for the Crown submitted that Mr. Bujnowski was a factual resident of Canada because:

- He failed to establish that he had made a 'clean break' from Canada
- There was no indication that he did not intend to return to Canada
- He failed the tiebreaker test (see above), because he had no permanent home in the US and his personal economic ties with Canada were much closer than his ties to the US
- He had no US passport, no US citizenship, nor was he seeking US citizenship, and had no family home there.

The Court held that Mr. Bujnowski's residential ties with Canada were most significant. Points specifically noted in this context were that:

- His wife remained in Canada in the residence they owned, looking for employment in Canada
- He did not contemplate selling the Canadian residence and provided no evidence that he had considered purchasing a US residence
- He retained personal property in Canada as well as social and economic ties with Canada
- He retained his Canadian passport and continued membership in Canadian professional organisations

The Court concluded that Mr. Bujnowski was a factual resident of Canada without referring to the question of dual residence, or discussing the points raised by Mr. Bujnowski concerning Article IV of the Canada/US Tax Convention.

Mr. Bujnowski had a very weak case, so the decision is not surprising.

Mulja

This case, Mulja v. R.[2], decided on January 31, 2005, was also primarily concerned with a foreign tax credit. However, one issue to be decided was whether Mr. Mulja was resident in Canada for tax purposes during part of 1998.

The TCC had little difficulty in deciding that he was resident in Canada. Some of the facts which led to this conclusion were:

- His wife owned and occupied a home in Canada during that time. Mr. Mulja assumed the mortgage on the home when it was purchased.

- He filed a Canadian tax return for 1998, indicating that he was a Canadian resident. He had filed his 1977 Canadian tax return as a returning Canadian resident.

- He owned an automobile in Canada and had a British Columbia driver's license.

- He and his family were insured from July 1977 under the British Columbia Medical Plan, which is only open to residents of the province.

- He maintained a Canadian bank account and credit card.

It is clear from the facts set out above that Mr. Mulja was correctly held by the Court to be a resident of Canada during 1998.

[2] [2005] 1 CTC 2899

Guo

This case was first heard before the TCC in November 2002[3]. Ms. Guo's appeal was dismissed. She appealed the decision to the FCA, which gave judgment on November 9, 2004[4]. The plaintiff lost again.

Ms. Guo, born in China, was a permanent resident of Canada. She went to the US on June 1, 1999 and returned on July 19, 2000. While in the US, she was an exchange visitor research scholar at a US university. Her husband, mother and daughter remained in Canada, and she visited them about every three months during her stay in the US.

Factors considered by the Court included:

- She applied for a returning resident permit when she came back to Canada.
- She had a vehicle registered in her name in Canada and a (joint) Canadian bank account, to which she sent money earned in the US.
- She had continuing social ties in Canada.
- She applied for the Canadian Child Tax Benefit credit and held a provincial health card. She kept a Canadian mailing address, which was indicated on one of her Canadian tax returns.
- She paid no income tax in the US. The judge noted that "She was described as a non-resident of the United States".

Ms. Guo's evidence was that she would only have abandoned Canada if she and her family could have moved to the US, which was not possible. The Court noted that she always intended to return to Canada, and that she wanted to protect her right to do so.

The Court was satisfied that what Ms. Guo had in the US was "a stay". At all times she intended to come back to Canada. "She intended to remain an ordinary resident of Canada and that is what she did."

The FCA reviewed the evidence and the judge's reasons. One quotation from their judgement is interesting:

> "It is clear that residence is not simply a matter of a person's status under the *Immigration Act*,… though a person's status may be some evidence of residence."

[3] [2003] 2 CTC 2745
[4] [2005] 1 CTC 126

The appeal was dismissed.

Ms. Guo appeared without counsel in both appeals. One wonders whether advice from a competent tax adviser would have persuaded her not to take the matter to court and not to appeal the decision of the TCC. The unfavourable decisions were predictable.

Allchin

This dispute was first heard by the TCC, which rendered judgment in July 2003[5]. The taxpayer appealed to the FCA, which brought down its judgement on May 27, 2004[6]. The FCA set aside the TCC decision and referred it back to the TCC for redetermination. At the re-hearing on November 30, 2004[7] the TCC determined that she was a US resident, and that she was not taxable in Canada.

Ms. Allchin was a registered nurse, employed in Canada. In 1991, she decided to look for employment in the US. She enrolled at a US school for further education.

In 1992 she found a job in the US and switched to a different employer in 1996. She claimed that she ceased to be a Canadian resident in 1992, while the CRA determined that she remained a Canadian resident for the 1993, 1994 and 1995 taxation years.

The Court noted that Ms. Allchin had the following connections to Canada in the three years under review:

- She was born in Canada and is a Canadian citizen.
- She married a Canadian citizen, residing in Canada, who had some US business interests.
- She supported her two children living in the family home in Canada.
- She retained coverage under the Ontario Medical Plan (OHIP) until November, 1996, and kept her Ontario driver's license until May 1995.
- She continued to use her Canada-based family doctor and dentist.
- In March 1995, her husband signed an affidavit that she was a resident of Canada in connection with the purchase of a home in Canada registered in their joint names.
- She sent substantial funds to her husband in Canada, which were deposited in his Canadian bank account.
- She visited her family in Canada regularly and frequently.

[5] [2003] 4 CTC 2702
[6] [2004] 4 CTC 1
[7] [2005] 2 CTC 2701

Allchin, cont'd.

The following connections to the US in the same period were noted by the Court:

- She worked in the US, and her job required travel in the US.

- While Ms. Allchin claimed that she had a "residence" in the US at all relevant times, the Court noted that for part of the period she occupied a room in a cousin's home, with no evidence of any rent being paid. For another period she lived in the back room of a friend's condominium, without paying rent. She said that she lived on her boat for part of the time. A lease she signed with the marina gave her address as the family home in Canada.

- She held a US green card. This was a key consideration in the appeal, see below. She tried to move her family to the US, but abandoned the idea in 1997.

- She had US bank accounts, and credit cards with a US address.

The TCC held that Ms. Allchin's lack of permanency in her US connections meant that she did not sever her ties with Canada in the three year period. Reference was also made to her continued connections with Canada, as itemized above.

The Court added that:

> "… since I have determined that the Appellant was not a resident of the United States in the 1993, 1994 and 1995 taxation years the tie breaking provision contained in the Canada – U.S. Tax Treaty do not apply in this situation".

The matter was referred back to the Minister on the basis that Ms. Allchin was a resident of Canada for the three years.

Ms. Allchin appealed the decision of the TCC. The FCA brought down judgment on May 27, 2004.

In an unanimous judgment, the FCA allowed the appeal, holding that the Tax Court Judge made a legal error in failing to consider that Ms. Allchin might be a dual resident. The Tax Court Judge should have considered whether she was also resident in the US for the purposes of the Canada/US Tax Convention.

The FCA stated that the Judge erroneously ignored the fact that, as a green card holder, Ms. Allchin was required to pay tax in the US. Green card status brought her into the definition of "Resident of a Contracting State" in Article IV(1) (see Appendix B). The "legal error" was the Judge's "failure to conduct the analysis provided by the Treaty".

Allchin, cont'd.

The Court referred to the (non-binding) Technical Explanation of Article IV(2), concerning the definition of residence. The Technical Explanation was prepared by the US Treasury Department and the Canadian Department of Finance confirmed their acceptance of its accuracy.

The Court quoted part of the Technical Explanation as follows:

> "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 arranged to have the dwelling available to him at all times 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 school, etc.)."

The FCA allowed the appeal, setting aside the TCC's decision and referring the matter back to a judge of the TCC for redetermination.

Ms. Allchin's appeal was re-heard by the TCA and judgement was rendered on April 8, 2005. She won her appeal!

The FCA's Reasons for Judgement had stated that:

> "The parties should be permitted to call additional evidence if they choose".

Consequently, at the re-hearing, Ms. Allchin produced additional evidence which was beneficial to her case. She was able to "clarify" her earlier evidence. To the extent that the earlier comments of the TCC judge were adverse, she was able to supplement her evidence. It is seldom possible for the appellant in a tax case to take advantage of a rehearing in this way. From my reading of the judgement, this helped her win her case.

The Court considered the Canada/US Tax Convention, the OECD Model Convention, the Commentary to the Model Convention, and CRA Interpretation Bulletin - (Consolidated) Determination of an Individual's Residence Status [8].

There was no consideration at this hearing of whether Ms. Allchin was a US resident, because that had already been determined by the FCA. The Court considered the tie-breaking rules in Article IV(2) of the Canada/US Tax Convention (see Appendix B). For this purpose, the Court prepared three charts for each of the years under appeal:

[8] IT-221R3

Allchin, cont'd.

1. The indicia in favour of and against the Appellant having a permanent home in each of the US and Canada.

2. The indicia of vital interests in Canada and the US.

3. Showing graphically the number of days spent by the Appellant in each of Canada and the US.

Beginning with the permanent home, the Court concluded that, on the evidence, "…the Appellant had a permanent home in both or neither of Canada and the U.S."

Turning to the second test, the centre of vital interests, the Court held that "…the Appellant had a centre of vital interests in both Canada and the U.S. … Her profession and work were in the U.S. Her family was in Canada." In this connection, the Judge noted that: "The Commentary on the Model is … less helpful since it is premised, so far as vital interests are concerned, upon the existence *only* of a permanent home in both States".

Next, the question of habitual abode. In her evidence at the first TCC hearing, Ms. Allchin gave evidence that she …"spent about 100 days in Canada in each of the three years in question". The Court accepted this (apparently) unsupported evidence – there is nothing to indicate that any supporting documentation was produced.

Chart #3 shows under the heading **Days in Canada** "100 (approx.)" for each of the three years under appeal, and "265 (approx)" under **Days in U.S**. The Court concluded that Ms. Allchin's habitual abode was in the US so, in accordance with the Treaty, she "…shall be deemed to be a resident of the Contracting State in which she has an habitual abode". The Court concluded: "Therefore she was not taxable in Canada…".

The appeal was allowed with costs to Ms. Allchin. Her persistence finally paid off! Perhaps she was lucky that, at the first hearing, counsel for the CRA did not question her evidence that she spent approximately 100 days in Canada in each year – he could not have had the foresight to know that it would become the critical factor in the final decision.

APPENDIX A

Subsection 250(5) of the Canadian Income Tax Act reads:

> Notwithstanding any other provision of the *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.

APPENDIX B

CANADA/US TAX CONVENTION

ARTICLE IV (1) and (2)

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, but in the case of an estate or trust, only to the extent that income derived by the estate or trust is liable to tax in that State, either in its hands or in the hands of its beneficiaries. For the purposes of this paragraph, an individual who is not a resident of Canada under this paragraph and who is a United States citizen or an alien admitted to the United States for permanent residence (a "green card" holder) is a resident of the United States only if the individual has a substantial presence, permanent home or habitual abode in the United States, and that individual's personal and economic relations are closer to the United States than to any third State. The term "resident" of a Contracting State is understood to include:

   (a) the Government of that State or a political subdivision or local authority thereof or any agency or instrumentality of any such government, subdivision or authority, and

   (b) (i) a trust, organization or other arrangement that is operated exclusively to administer or provide pension, retirement or employee benefits; and

   (ii) a not-for-profit organization that was constituted in that State and that is, by reason of its nature as such, generally exempt from income taxation in that 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.

APPENDIX C

OECD MODEL CONVENTION

ARTICLE 4

RESIDENT

1. For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.