Docket: 2007-355(IT)I

BETWEEN:

C. RAYMOND PERSAUD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 26, 2007, at Fredericton, New Brunswick.

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant:	Roger Haineault
Counsel for the Respondent:	Carole Benoit

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2005 taxation year is allowed in part and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to claim moving expenses of $2,198.68 in computing his income for the 2005 taxation year.

Signed at Toronto, Ontario, this 15th day of August 2007.

"Wyman W. Webb"

Webb J.

Citation: 2007TCC474
Date: 20070815
Docket: 2007-355(IT)I

BETWEEN:

C. RAYMOND PERSAUD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal relates to a claim for moving expenses by the Appellant in 2005. The claim relates to travel from Quispamsis, New Brunswick to Fort McMurray, Alberta and then from Fort McMurray to Quispamsis in the same year. In particular the issue related to the claim for moving expenses is whether the Appellant ordinarily resided in Fort McMurray in 2005.

[2] The Appellant is a journeyman electrician. He was unemployed in 2005. The union posted a job opening for a position for a journeyman electrician in Fort McMurray. The Appellant did not have a lot of time to respond but chose to apply for the position in Fort McMurray.

[3] The Appellant incurred $1,099.34 in expenses in travelling on May 9, 2005 to work in Fort McMurray. The Appellant worked at the position in Fort McMurray until some time in August. The Appellant indicated that he took most of his personal items with him including his casual clothes, work clothes, winter jacket, tools, cell phone, clock radio, CD and tape player. He originally went to Fort McMurray with a view to possibly relocating there permanently. Prior to moving to New Brunswick in 1989 the Appellant and his family had lived in Saskatchewan for 22 years. Therefore the Appellant was familiar with relocating from one part of the country to another. As well the Appellant's son was stationed in Cold Lake, Alberta and his daughter lived in Calgary, Alberta.

[4] The Appellant's wife did not relocate with him but stayed in Quispamsis in their home. The Appellant did not return to Quispamsis until September of 2005 when he returned to accept another job. He had discovered that the job in Fort McMurray was not going to (and did not) last as long as he had originally thought that it would.

[5] The Appellant did not have receipts for the expenses incurred in relocating from Fort McMurray to Quispamsis in September 2005 but did agree that the amount incurred should be the same as was incurred in relocating from Quispamsis to Fort McMurray. The amount that he had claimed on his tax return was $5,229. However the total amount that the Appellant now agrees should have been claimed is two times $1,099.34 or $2,198.68.

[6] The total amount that the Appellant earned in Fort McMurray exceeded the expenses submitted of $1,099.34 in relation to the relocation to Fort McMurray and the total amount that the Appellant earned from his job in New Brunswick upon his return also exceeded the amount now claimed in relation to the relocation to Quispamsis.

[7] The issue in this case is whether the Appellant ordinarily resided in Fort McMurray for the time that he was there.

[8] The Supreme Court of Canada in *Thomson v. M.N.R.*, 1945 CarswellNat 23, [1946] C.T.C. 51, dealt with the definition of "ordinarily resident". Justice Rand of the Supreme Court of Canada made the following comments:

> 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.

[9] In the same decision Justice Estey of the Supreme Court of Canada made the following comments:

> 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 differences. 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.

[10] It is clear that the expression “ordinarily resident” is imprecise and is not entirely based on the length of a visit or stay.

[11] In *Cavalier v. R.*, 2001 CarswellNat 2374, [2002] 1 C.T.C. 2001, Justice Bowie made the following comments on the *Thomson* case:

> One thing is clear from *Thomson*, however; the meaning of the expression ordinarily resident is far from certain.

[12] and further at paragraph 22:

> 22. I conclude from these cases that in order to be “ordinarily resident” a taxpayer need not have formed the intention to remain permanently, or for any particular length of time, at the new place of residence. Nor need he move all his household effects, or be accompanied by the members of his immediate family.

[13] Therefore the fact that the Appellant’s spouse remained in Quispamsis and that his furniture and other belongings remained in Quispamsis is not determinative of the issue.

[14] In *Calvano v. R.*, 2004 CarswellNat 730, 2004 TCC 227, Justice C. Miller made the following comments:

> 23 ... Whether a residence is intended to be temporary or permanent does not determine whether the residence constitutes "ordinarily resident." Simply because someone chooses to live somewhere temporarily, it does not automatically follow that they cannot be ordinarily resident there. Put in positive terms, one can be ordinarily resident on a temporary basis. The concept of "ordinarily resident" has more to do with the settled, ordinary routine of life than the permanence of the arrangement.
>
> 24 I agree with Justice Bowie's conclusion in the case of *Cavalier v.R.* where he stated at paragraph 22:
>
> > I conclude from these cases that in order to be "ordinarily resident" a taxpayer need not have formed the intention to remain permanently, or for any particular length of time, at the new place of residence. ...
>
> Having said that, the length of stay in Coquitlam is one of a number of factors to consider in determining whether Mr. Calvano was ordinarily resident in Coquitlam.

[15] As noted by Justice C. Miller the length of stay at a particular location is a factor that should be taken into account in determining whether a person is ordinarily resident in that location. There are, however, situations where time would not be relevant. For example if an individual were to sell his or her house in one location and, together with all the persons residing at that house, move with their possessions to a new location to start work at a new job, then the time spent at the new location would not be a factor as the individual clearly would have ceased to reside in the former location as he or she would have severed their residential ties with that location.

[16] However, in cases where the individual has not severed his or her residential ties with a particular location, then the time spent in the new location is a factor that should be taken into account in determining whether or not that individual is ordinarily resident in the new location as the longer the person is in the new location the more likely it is that his or her settled, ordinary routine of life is in the new location. In *MacDonald v. Her Majesty the Queen*, 2007TCC250, the individual travelled to Alberta twice. On the first trip he was unable to find any work and on the second trip he only worked for six weeks. In this particular case the Appellant stayed significantly longer in Fort McMurray than did Mr. MacDonald. As well in this

particular case the Appellant also opened a bank account at the Credit Union in Fort McMurray and Mr. MacDonald did not open a bank account in Fort McMurray.

[17] The Appellant did not obtain an Alberta driver's licence nor did he apply for provincial health coverage in the province of Alberta. How significant is the failure to obtain an Alberta driver's licence or to apply for provincial health coverage in Alberta in determining whether the Appellant ordinarily resides in Alberta?

[18] The *Motor Vehicle Administration Act*, R.S.A. 2000, c. M-23, of the province of Alberta provides in part as follows:

> 5(1) No person shall drive a motor vehicle on a highway unless that person is the holder of an operator's licence.
>
> ...
>
> (3) If a person is the holder of a valid licence or permit issued to that person in a jurisdiction outside Alberta authorizing that person to operate a motor vehicle of the type or class being operated by that person, then that person is exempt from subsection (1) if that person does not remain in Alberta for more than 3 months.
>
> (4) Subsection (1) does not apply to a person, not being resident in Canada, who
>
> (a) holds an international driver's licence issued outside Canada, and
>
> (b) does not remain in Alberta for more than 12 consecutive months.
>
> (5) Subsection (1) does not apply to a student as defined in the regulations if the student is authorized by the laws of that person's place of residence to operate a motor vehicle of the type or class being operated by that person.
>
> (6) A person who contravenes
>
> (a) subsection (1) is guilty of an offence and liable to the penalty provided for under section 101(1) ...
>
> (7) In a prosecution for a contravention of subsection (1), the onus is on the accused to show that the accused holds a subsisting operator's licence.
>
> ...
>
> 10(1) Except as otherwise provided in this Act, a person who is guilty of an offence under this Act or the regulations for which a penalty is not otherwise provided is liable to a fine of not more than $500 and in default of payment to

> imprisonment for a term not exceeding 6 months or to imprisonment for a term not exceeding 6 months without the option of a fine.

[19] An operator's licence is defined in subsection 1(n) of the *Motor Vehicle Administration Act* as

> "operator's licence" means a licence to operate a motor vehicle issued pursuant to this Act.

[20] It should be noted that in order to operate a motor vehicle on a highway in the province of Alberta, subject to subsections 3, 4 and 5, a person must hold a licence issued by the province of Alberta. The exception, which allows individuals who are residents of Canada and who are not students to drive in the province of Alberta with a licence issued by another province, applies so long as the person does not remain in Alberta for more than three months. It is not based on the person becoming a resident of Alberta. In this particular case as well it should be noted that the Appellant did not bring his motor vehicle with him and he indicated that he simply did not need a driver's licence because he was not driving in the province of Alberta. Failing to obtain an Alberta driver's licence would not make him a resident of New Brunswick but could result in him having committed an offence under the *Motor Vehicle Administration Act* of the province of Alberta if the Appellant would have driven in Alberta with a New Brunswick licence after he had been there for more three months.

[21] Subsection 3(1) of the *Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-20 provides as follows:

> The Minister shall, in accordance with this Act and the regulations, administer and operate on a non-profit basis a plan to provide benefits for basic health services to all residents of Alberta.

[22] A "resident" or "resident of Alberta" is defined in subsection 1(x) as follows:

> "resident" or "resident of Alberta" means a person lawfully entitled to be or to remain in Canada, who makes the person's home and is ordinarily present in Alberta and any other person deemed by the regulations to be a resident, but does not include a tourist, transient or visitor to Alberta.

It should be noted that the language in this section is slightly different from the *Income Tax Act* in that it applies to a person who makes the person's home and is ordinarily "present" in Alberta.

[23] It would also include a person who is deemed by the regulations to be a resident.

[24] The Appellant in this case felt that he was still covered by the province of New Brunswick. The *Medical Services Payment Act*, R.S.N.B. 1973, c. M-7 of the province of New Brunswick provides that the provincial authority shall establish a medical services plan.

[25] Subsection 3(4) of the *General Regulation - Medical Services Payment Act*, *N.B. Reg. 84-20* provides in part as follows:

> **3**(2) Except as otherwise provided in the Act and this Regulation, a beneficiary is eligible to have payment made on his or her behalf or to receive an amount computed in accordance with this Regulation for entitled services received
>
> *(a)* within the Province,
>
> *(b)* outside the Province, or
>
> *(c)* while temporarily absent from the Province
>
> by that person or any dependents.
>
> …
>
> 3(4) For the purposes of this section, a person is "temporarily absent from the Province" where that person is absent from New Brunswick
>
> (*a*) for the purpose of a vacation, visit or business engagement but not where the period of absence exceeds 182 days in a twelve month period, or
>
> *(b)* for the express purpose of furthering an education in a province or country where that person is not eligible to receive reimbursement or have payment made on his or her behalf for or with respect to entitled services under the medical services plan, if any, of that province or country and who is not gainfully employed outside the Province except during vacation periods but not where the period of absence exceeds twelve consecutive months.
>
> …
>
> 3(7) A beneficiary who leaves the Province ceases to be a beneficiary for purposes of coverage by the Medicare Branch,
>
> (*a*) in the case of an individual who in the opinion of the Director has ceased to be a resident of the Province and has established a

> residence elsewhere in Canada upon the first day of the third month following the month of arrival at the new residence,
>
> (*b*) in the case of any other beneficiary who in the opinion of the Director leaves the Province to establish residence elsewhere in Canada, subject to section 3, twelve months after the date of departure, and,
>
> (*c*) in the case of an individual who in the opinion of the Director has ceased to be a resident of the Province and has established residence elsewhere than in Canada upon the date that person left Canada.

[26] It should be noted that paragraph 3(4)(a) of the *General Regulation - Medical Services Payment Act* does provide for coverage while a person is temporarily absent from the province and the concept of temporary absence does include absence for a "business engagement". Whether a business engagement will include temporary employment at a location in another province is a matter for the courts of the Province of New Brunswick to determine. It should also be noted that a person ceases to be a beneficiary under subsection 3(7) if, in the opinion of the Director, that person has ceased to be resident in New Brunswick. There was no evidence in this case whether the Director had formed this opinion in relation to the Appellant.

[27] In any event, the issue would still be whether the failure to apply for provincial health care coverage in the new location would change the issue of whether the settled, ordinary routine of life of the Appellant was in Alberta or New Brunswick. It would appear that a person can still have a settled, ordinary routine of life without having changed their provincial medical coverage. Simply applying for health coverage with the province of Alberta would not make the Appellant resident in Alberta but if he ceased to be resident in New Brunswick in the opinion of the Director under the Medicare program in New Brunswick, he would have ceased to have been covered by New Brunswick's Medicare plan as provided in subsection 3(7) of the *Regulation - Medical Services Payment Act* of the province of New Brunswick referred to above. Whether the Appellant would have been covered by the Medicare plan for the province of New Brunswick is a matter that the appropriate authorities with that plan would have had to determine if the Appellant would have required medical treatment while in the Province of Alberta.

[28] The representative for the Appellant also raised the issue of the entitlement of students to claim moving expenses. The definition of "eligible relocation" applies not only to individuals who relocate for work but also to students who relocate to attend,

on a full time basis, a university, college or other educational institution. Subsection 62(2) of the *Income Tax Act* modifies the definition of eligible relocation in relation to students but it only modifies paragraph (b) of the definition of eligible relocation and does not change paragraph (c). In other words, students are only eligible to claim moving expenses if they ordinarily reside at their new accommodations while attending the educational institution. The change that is made to the definition of eligible relocation for students is to change the word "both" in paragraph (b) to "either or both". As a result the definition of "the new residence" remains the same i.e. it is the residence at which the taxpayer ordinarily resided after the relocation and the distance requirements are still the same in paragraph (c). As a result, for students, the question will still be whether they ordinarily reside at the new residence.

[29] Therefore parliament must have intended that students who leave home to attend university on a full-time basis would be considered to be ordinarily resident at the university (or other location) even though the accommodation at which they reside would only be temporary and they would be returning home at the completion of the term or year. Since the definition of "the new residence" is the same for workers and students (i.e. the place at which such person ordinarily resides), Parliament must have intended that either workers or students could be ordinarily resident at temporary accommodations. This is also consistent with the finding of Justice Bowie in C*avalier* where the taxpayer lived in a residence at the College.

[30] In this case the Appellant resided in the accommodations provided by his employer in Fort McMurray for more than three months. The accommodations were described as being similar to a university residence. He worked in Fort McMurray, he opened a bank account in Fort McMurray and for the time that he was there the settled, ordinary routine of his life was in Fort McMurray. He would also visit his children who were living in Cold Lake, Alberta and Calgary, Alberta. A four month period was sufficient for Justice Bowie to find that the taxpayer in *Cavalier* had moved to Fort McMurray and I find that in this case the Appellant was ordinarily resident in Fort McMurray and hence is entitled to claim the moving expenses related to his relocation from Quispamsis to Fort McMurray and from Fort McMurray to Quispamsis.

[31] If the Appellant did not ordinarily reside in Fort McMurray for the time that he was there then the finding would have to be that he ordinarily resided in Quispamsis during this time but it seems to me that it is difficult to say that the settled, ordinary routine of the Appellant's life was in Quispamsis for the period from May to September when he was not in Quispamsis at all during this time. In this situation,

this is simply too long a period of absence to be considered to still be ordinarily resident in Quispamsis during this time.

[32] The Respondent had also noted that the amount that was claimed in the tax return was significantly in excess of the amount established during the hearing as expenses that were incurred. However this is also similar to the *Cavalier* case where Justice Bowie noted that the claims related to the taxpayer in that case were also "considerably inflated". As in *Cavalier* this does not affect the right of the Appellant to claim moving expenses but only affects the amount that may actually be claimed.

[33] Therefore the appeal is allowed in part and the Appellant is entitled to claim moving expenses of $2,198.68 in computing his income for the 2005 taxation year.

Signed at Toronto, Ontario, this 15th day of August 2007.

"Wyman W. Webb"

Webb J.

CITATION:	2007TCC474
COURT FILE NO.:	2007-355(IT)I
STYLE OF CAUSE:	C. RAYMOND PERSAUD AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Fredericton, New Brunswick
DATE OF HEARING:	July 26, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	August 15, 2007

APPEARANCES:

Agent for the Appellant:	Roger Haineault
Counsel for the Respondent:	Carole Benoit

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

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