

TAX COURT OF CANADA

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Court Number 2006-407(IT)I

BETWEEN:

RICHARD DRAKE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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EXCERPT (RULING)

May 31, 2007

Held at the Courts Administration Service  
Calgary, Alberta

Volume 1

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TAKEN BEFORE:

The Honourable Mr. Justice Rip



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0004

04 JUSTICE RIP: Okay. It's your turn.

05 MR. DRAKE: I guess when you go on

06 these jobs, you're always expecting for a

07 long-term employment --

08 JUSTICE RIP: Beg your pardon?

09 MR. DRAKE: You're always expected

10 to have a long-term employment, good terms with

11 the company, and maybe work for that company.

12 So whenever I go to these jobs, sometimes they

13 only end up being --

14 JUSTICE RIP: When have you had a

15 long-term employment for about a couple of

16 years?

17 MR. DRAKE: Like, recently? Yeah,

18 just --

19 JUSTICE RIP: In 2001, 2000.

20 MR. DRAKE: The long-term is --

21 JUSTICE RIP: No. 2001, 2002, did you

22 have any long-term employment.

23 MR. DRAKE: 2001 I started the

24 Boston long-term employment.

25 JUSTICE RIP: Beg your pardon?

0005

01 MR. DRAKE: The Boston, that was

02 my --

03 JUSTICE RIP: What was it? How long

04 was it?

05 MR. DRAKE: Ten months, but it could

06 have been longer, but the visas couldn't be

07 issued.

08 JUSTICE RIP: Now, Boston. And where

09 were you going, from Boston to where?

10 MR. DRAKE: Well, I got laid off,

11 and that's when I went to Bechtel.

12 JUSTICE RIP: That's where -- the

13 government's consenting to the Boston.

14 MR. DRAKE: Yeah.

15 JUSTICE RIP: They're consenting to

16 that.

17 MR. DRAKE: Oh, yeah. I'm just

18 saying that -- she's saying that I've never

19 permanently had a --

20 JUSTICE RIP: Well, you need a

21 residency; you've got to acquire a residence.

22 MR. DRAKE: Yeah.

23 JUSTICE RIP: When I say "acquire,"

24 you don't have to buy, but you have to live --

25 you have to set up a residence.

0006

01 MR. DRAKE: Yeah, well, that would  
02 be the next step, but then when you get laid  
03 off, you don't have a choice.

04 JUSTICE RIP: That's the problem.

05 MR. DRAKE: That's the problem. But  
06 what do you do, right? You know, I'm just  
07 saying that if I -- you know, I'm claiming --  
08 for me, if I'm claiming 35 cents a kilometre,  
09 you know, gas is taxed probably at 35 cents a  
10 kilometre, you're not losing out; I'm bringing  
11 in new income into the country, and I'm being  
12 penalized.

13 JUSTICE RIP: What does the act --  
14 find me somewhere in the Income Tax Act that I  
15 can allow it to you.

16 MR. DRAKE: The moving expense?

17 JUSTICE RIP: Anything.

18 MR. DRAKE: Just I know moving  
19 expenses, I'm allowed to move from -- like she  
20 said, it says in there you can't go from Canada  
21 to the US, but I can do moving expenses  
22 within -- a move within one country, like, in  
23 the same -- a move from, like, say, Boston and  
24 New York would be considered allowable.  
25 Anything going -- if I was going to Fluor --

0007

01 when I was laid off at Ohio and I worked for a  
02 Canadian company, well, I should be allowed  
03 that move.

04 JUSTICE RIP: You should be, but  
05 you're not.

06 MR. DRAKE: Yeah.

07 JUSTICE RIP: The act doesn't permit  
08 you to. You have to show me that the act  
09 permits it. Not what should be --

10 MR. DRAKE: Yeah.

11 JUSTICE RIP: -- but what actually is.  
12 I've got to follow the laws, not -- what the  
13 law is is not necessarily fair --

14 MR. DRAKE: Yeah. Yeah.

15 JUSTICE RIP: -- or not necessarily in  
16 common sense.

17 MR. DRAKE: Well, when I phoned the  
18 revenue agencies, they're like, As long as  
19 it's -- that's what I do, right? I do what  
20 they say, right?

21 JUSTICE RIP: Well, maybe you  
22 shouldn't be doing that.

23 MR. DRAKE: Yeah, well, they  
24 shouldn't be doing that, but . . .

25 Also for my expenses, if

0008

01 I work for Fluor Canada and I get a job test  
02 there and I worked for -- in Edmonton, like  
03 Boilermakers is in Edmonton, I reported there,  
04 I just had a T2200. As a company they filled  
05 it out.

06 JUSTICE RIP: The thing is, we're not  
07 concerned with that.

08 MR. DRAKE: Yeah. I just pretty  
09 much just gave you the information what I feel  
10 like --

11 JUSTICE RIP: Beg your pardon?

12 MR. DRAKE: Just the information  
13 that I provided with my moving expenses and  
14 employment expenses, it's your decision.

15 JUSTICE RIP: The problem is, sir, is  
16 they're not eligible expenses. An employee --  
17 first of all, to deduct an employee expense,  
18 you have to be an employee. And you did not  
19 become an employee of these companies until you  
20 are on the site. Is that not true?

21 MR. DRAKE: Yes, that's true.

22 JUSTICE RIP: So the expenses getting  
23 there, they're lost. They're somewhere in  
24 cyberspace, so to speak. They're nothings.

25 MR. DRAKE: Yeah.



0009

01 JUSTICE RIP: So they're not deducted.  
02 It's a problem. I feel for you. I feel for  
03 you because if you -- if there was evidence  
04 that, you know, and there isn't any, and I  
05 don't know how you would prove this, if you are  
06 an independent contractor, a person carrying on  
07 his own business is entitled to expenses that  
08 an employee is not. Whether it's fair or not,  
09 I'm not here to rule. But if you carry on a  
10 business on your own, you're allowed certain  
11 expenses that an employee's not.

12 MR. DRAKE: Yeah.

13 JUSTICE RIP: But I can't help that.

14 MR. DRAKE: I just think if you're  
15 moving to earn an income or start a new job --

16 JUSTICE RIP: But that is not -- it's  
17 a difference. Employment income is not an  
18 expense, is not -- it's -- you're restricted.  
19 The act states specifically, living expense as  
20 an employee, no way. It's Section 6.

21 MR. DRAKE: Mm-hmm. Just because I  
22 didn't hold the residence long enough --

23 JUSTICE RIP: Never mind residence. I  
24 didn't go into -- I questioned you on it, Did  
25 you set up a residence? The answer is --

0010

01 except in Boston, the answer is no.

02 MR. DRAKE: Yeah, well, it takes a  
03 little bit of time to set up a residence when  
04 you're --

05 JUSTICE RIP: But you have to do it.  
06 That's what the law says.

07 MR. DRAKE: Well, people get their  
08 mail sent to hotels, people in Canada that live  
09 in motels, and that's their residency.

10 JUSTICE RIP: They are living in  
11 hotels when they may have a residence somewhere  
12 else.

13 MR. DRAKE: They get their mail sent  
14 there, and you know, if someone's been living  
15 in a motel in Canada for the last five years,  
16 where do you consider them a resident? People  
17 sitting in camps up there, they've been up  
18 there for probably five or six years, or some  
19 have been up for 10, 15, 20 years, 30 years,  
20 and that's a residence. How do you tax the  
21 person.

22 JUSTICE RIP: That may be their  
23 residence, but when you are in a hotel on a  
24 short-term basis, that's not your residence.

25 MR. DRAKE: But the 15 days for --

0011

01 JUSTICE RIP: But that's if you set  
02 up -- assuming you set up a residence when  
03 you're going to a residence. So if you don't  
04 set up the residence, you don't get this moving  
05 expense.

06 MR. DRAKE: So if you set up the  
07 residence, just -- you know, it's just after  
08 the fact. You know, whatever happens after the  
09 15 days it shouldn't matter if --

10 JUSTICE RIP: It does matter. Quite  
11 so. It's very important.

12 MR. DRAKE: Yeah, but how does that  
13 benefit the system?

14 JUSTICE RIP: Because you are in the  
15 hotel because a residence may not be ready, may  
16 not be available.

17 MR. DRAKE: Yeah.  
18 Well, it's your  
19 decision. Whatever. If I . . .

20 (EXCERPT ENDS)

0012

01 JUSTICE RIP: Okay. What I'm going to  
02 do, sir, I'm going to give you what the Crown  
03 consented to. I'm going to give you an --  
04 the -- I'm going to have to -- as I say, I  
05 don't want to repeat myself again. But I think  
06 you understand we've gone through the appeal  
07 during the trial; we've gone through the --  
08 the -- the RRSP and the pension. I think you  
09 understand why you're not -- that's not  
10 available to you, because you had a contingent  
11 right in those years.

12 MR. DRAKE: Yeah.

13 JUSTICE RIP: Okay. Then -- and I  
14 told you -- and I told you to get in touch with  
15 your minister of finance, your member of  
16 parliament to try to get -- maybe they can give  
17 you permission regarding to this.

18 MR. DRAKE: Yeah, I'll -- I'll --

19 JUSTICE RIP: So do that. With  
20 respect to the moving expenses, you may even  
21 want to try that. Say, Look, in my situation,  
22 I'm falling through the cracks. And you may  
23 want to even discuss that with them at your --  
24 that you're going to various employment sites  
25 across North America, and you can't deduct it

0013

01 even. You may want to discuss that as well.

02 MR. DRAKE: Yeah.

03 JUSTICE RIP: Because as I said to  
04 you, and I just want to repeat to you, that's  
05 wholly discretionary to the Minister or to the  
06 government, and they may or may not allow you  
07 or give you the -- the remission. Okay?

08 So I'm going to allow  
09 you a deduction. And what year is that?  
10 That's in 2001, I understand, is that correct,  
11 the deduction, the Boston to New York via  
12 Newfoundland?

13 MS. CHARLTON: I believe that's 2002.

14 JUSTICE RIP: 2002.

15 Now, the other thing I  
16 want to bring out, in paragraph 9 of the reply,  
17 that -- that has been assessment establishing  
18 the increase in the union fees; is that  
19 correct? It's not something the Minister's  
20 conceding that hasn't been assessed?

21 MS. CHARLTON: I apologize.

22 JUSTICE RIP: Beg your pardon?

23 Because it's not clear, to be quite honest with  
24 you. It says -- okay, it says the Minister  
25 increased the deduction. Okay.

0014

01 MS. CHARLTON: The Minister allowed the  
02 \$3,787 that he asked for.

03 JUSTICE RIP: Okay. So I don't have  
04 to worry about that.

05 So for 2002 there'll be  
06 a deduction of 2,193.17 with respect to moving  
07 expenses.

08 And I want you -- you  
09 know, what's important, Mr. Drake, is the  
10 comments here of Chief Justice Bowman. Are --  
11 he's usually very sympathetic to taxpayers, as  
12 I hope to be. And in Jenner, in which he  
13 explained at the end -- and this Jenner is not  
14 all together different than you, going into  
15 various areas.

16 And Justice Bowman says  
17 (quoted as read):

18 "Mr. Jenner seeks to import into  
19 section 8 deductions that are  
20 analogous to the allowances that are  
21 specifically excluded by  
22 subsection 6(6). While such arguments  
23 by analogy may be philosophically  
24 attractive they do not fit within the  
25 accepted rules of statutory

0015

01 interpretation employed in construing  
02 the Income Tax Act. The taxation of  
03 employment income as well as the  
04 deduction of amounts spent in earning  
05 that income is spelt out in the Income  
06 Tax Act with great specificity. The  
07 cost of travel from Mr. Jenner's home  
08 in Sturgeon Falls to the various  
09 places where he was employed  
10 by...different employers as well as  
11 his living expenses when he was  
12 working at those work sites is simply  
13 not covered by section 8 of the Income  
14 Tax Act, even though in the broad  
15 sense one might say that the expenses  
16 were related to his employment."

17 You've found the same  
18 trap as he has. I'm using a "trap" not in any  
19 way, I'm just saying that it's an unfortunate  
20 situation he found himself in and you found  
21 yourself in.

22 MR. DRAKE: Yeah.

23 JUSTICE RIP: And what I would like to  
24 add to your expenses, I don't think I can. So  
25 I will dismiss 2001, and I will allow 2002 to

0016

01 meet your deduction of 2,193.17.

02 MR. DRAKE: That was for the moving  
03 expense.

04 JUSTICE RIP: For the moving  
05 expense.

06 MR. DRAKE: And that was  
07 two-thousand . . .

08 JUSTICE RIP: 193.17.

09 Other than that, I have  
10 a problem. I don't think I can --

11 MR. DRAKE: Yeah, well, that's --  
12 that's -- that will be all right. That's the  
13 first step, and then my RRSPs, you know, if it  
14 works out.

15 JUSTICE RIP: There's no guarantee.

16 MR. DRAKE: No, but it's the second  
17 step, right?

18 JUSTICE RIP: Beg your pardon?

19 MR. DRAKE: It's a second step.

20 JUSTICE RIP: It's a kick at the can.

21 MR. DRAKE: I found a few other  
22 things to -- I didn't bring up.

23 JUSTICE RIP: Thank you very much.

24 Sorry if I kept you.

25 THE REGISTRAR: Order. All rise.



17

0017

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The hearing is now

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concluded. The court is now closed for the day

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and will resume tomorrow at 9:30.

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(PROCEEDINGS ADJOURNED AT 3:41 P.M.)

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