Docket: 2010-2851(IT)I

BETWEEN:

MATTHEW J. VEGH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 23, 2011, at Hamilton, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	John Grant Arnold H. Bornstein

JUDGMENT

The appeal from the redetermination made under the *Income Tax Act* with respect to the 2002 through 2007 base taxation years for the Canada Child Tax Benefit is dismissed in accordance with the reasons for judgment attached hereto.

Signed at Ottawa, Canada, this 23rd day of March 2012.

"Patrick Boyle"

Boyle J.

Citation: 2012 TCC 95
Date: 20120323
Docket: 2010-2851(IT)I

BETWEEN:

MATTHEW J. VEGH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] Mr. Vegh is a Canadian citizen who is appealing the Minister of National Revenue's decision that he was not entitled the Canada Child Tax Benefit ("CCTB") for his two sons during the period he and his family lived in China because he was not a resident of Canada during that period as required by the CCTB provisions.

[2] It is Mr. Vegh's position that he was a factual resident of Canada during the period he was in China. This included the 2002 through 2007 base taxation years which are the subject of this appeal.

[3] There had earlier also been an issue of whether Mr. Vegh was the children's primary caregiver given the female presumptive provision in the CCTB provisions at subsection 122.6(*g*) of the *Income Tax Act* (the "*Act*"). It had been the initial position of the Canada Revenue Agency ("CRA") that, because his wife and the children's mother was not a resident of Canada and could not be an eligible individual for purposes of the CCTB, she was therefore unable to waive this presumption in favour of Mr. Vegh. The CRA has since abandoned this incorrect position generally and has also dropped it as a reason for not giving Mr. Vegh the CCTBs in dispute.

[4] Mr. Vegh also raised a constitutional argument that Article 4 of the Canada-China Income Tax Agreement (the "Canada-China Tax Treaty") dealing

with tie-breaker rules for dual residents — those resident of both Canada and China — was discriminatory contrary to the Canadian *Charter of Rights and Freedoms* (the "*Charter*"). He also raised a *Charter* argument regarding the interpretation and application of section 122.6. Mr. Vegh served the appropriate parties with the requisite notices of these two constitutional questions. None of the federal or provincial Crowns responded expressing an interest in participating in our hearing.

[5] At trial, Mr. Vegh raised a further *Charter* argument that the common-law jurisprudence applicable to determinations of residence, a largely undefined term in the *Act*, was itself discriminatory contrary to the *Charter* to the extent the jurisprudence required a consideration of his family relationships and characteristics. The required notice of this separate constitutional question had not been served. Rather than adjourn this hearing under our Court's *Informal Procedure* to allow notice to be served, the hearing was permitted to proceed and arguments were made. Written submissions were received on this point from both parties after the hearing. In this manner, the Court can first decide if Mr. Vegh has made out an arguable or *prima facie* case of prohibited *Charter* discrimination. If the Court is persuaded that he has, the Court can reconvene the hearing, permit Mr. Vegh to serve notice, and if any of the federal or provincial Crowns wish to be heard, they can be heard in a resumed hearing. If Mr. Vegh does not satisfy the Court that he can make out an arguable or *prima facie* case of prohibited *Charter* discrimination, no notices are required, no continuation of the hearing is required, and the Court can dismiss this part of his claim.

[6] Mr. Vegh also has human rights complaints pending before the Human Rights Tribunal of Ontario and the Canadian Human Rights Commission alleging discrimination relating to the administration of the CCTB in his case. This Court has no jurisdiction to consider or deal with those complaints.

I. Facts

[7] Mr. Vegh was born in Canada in 1970 and has always been a Canadian citizen. Until he was 30, he had spent his entire life living in Southern Ontario cities and towns and had only left Canada for vacations. Until then he was clearly a resident of Canada. In May of 2000, he left Canada to teach English in China. He had an initial 11-month contract. I am not satisfied on the evidence that Mr. Vegh left Canada in 2000 with any specific or settled intention to return to Canada. There was no suggestion that he foresaw or planned any particular personal, business or work developments in his life. I find that when he left, he had no evident intention of

returning to Canada. When he left he was single and unattached. He had been living for two years in his stepfather's home where he had a basement bedroom and had bathroom privileges. His self-employed business ventures had failed, he had declared bankruptcy. He did not own any property in Canada. He did not own any home furnishings. When he left, he kept his Canadian citizenship and Canadian passport. He did not give up his Ontario driver licence nor close his Canadian bank account.

[8] Before proposing to and marrying his wife, a Chinese citizen and resident not connected in any way to Canada, in the spring of 2002, Mr. Vegh lived in China and earned his living in China, returning to Canada once for a vacation in early 2001 for about three weeks at the end of his initial term. He proposed to his wife in China in early 2002 and they married in Canada while here with his wife and her mother for about a month.

[9] Mr. Vegh did not file Canadian tax returns after leaving Canada until 2006, when he filed for 2004 and 2005. He filed Canadian tax returns again in 2008 and 2009 for the remaining years in issue. There is no evidence he filed Canadian tax returns for 2000 and 2001.

[10] What Mr. Vegh did in China and on what basis remains somewhat unclear. His testimony and the documentary evidence remain somewhat inconsistent. When he first went to China, it was to teach English as a second language ("ESL"). Apparently, he was on a work visa, at least in 2002. Thereafter he was on a visitor visa and worked from home, caring for his children after they were born. For at least much of this period, he and his wife and children lived in her parents' home. He wrote, he published a book, and he had some internet-based business activities all of which was done by him in China.

[11] In 2001, he earned a certificate to teach ESL based upon having completed 500 hours of internship, which I take to mean he was teaching ESL for the institution.

[12] He also described some promise or expectation of the ability to earn an Executive MBA while in China. I do not accept that he was ever undertaking any real course of studies in China or that he ever intended to. This appears to be a transparent attempt to look more like the taxpayer in *Perlman*[1] to seek advantage. He does not describe studies, only teaching, in his Notice of Appeal and other documents prepared before the *Perlman* decision. This was to no avail in any event, as the nature

[1] *Perlman v. The Queen*, 2010 TCC 658, 2011 DTC 1045 [*Perlman*].

of the studies Mr. Vegh described bore no relationship to the educational pursuits and career plan of Mr. Perlman.

[13] Mr. Vegh testified that he only did his ESL teaching work until 2002. From 2003 on, he said he was on a visitor visa writing and teaching online, and that after 2003, he did not work in China except for his writing and his web-based activities. However, with his 2007 tax return filed in 2008, he attached a letter confirming that he was employed as an English teacher on salary for the period from February 2003 through September 30, 2008. His unsuccessful attempts to provide a rational, much less reasonable explanation, other than dishonesty on some level, for this glaring inconsistency raises serious concerns about his overall credibility on key issues. This, combined with his considerable vagueness and inconsistencies about when he was working in China for money, whether he was studying, how and when he received payments in China, and the liberties taken with his online teacher bio for a school he now says he did not really teach at, cause me to be very cautious about accepting any of his testimony that is not supported with consistent, credible, corroborating evidence.

[14] Mr. Vegh's Canadian bank account was used very little after leaving Canada for China. There was little money in it. It was used in 2003 and 2007 for some transactions such as permitting his parents to send small cash gifts. Since 2003 he has been able to access it in China via ATMs.

[15] Mr. Vegh had a Chinese bank account in 2002 and 2003 for depositing his pay from his teaching work in China. For 2004 on he says he was paid in cash. It is not clear how he was paid in 2000 and 2001 or whether he had a Chinese bank account in those years. There is no evidence he used his Canadian bank account for this purpose.

[16] Throughout Mr. Vegh and his family had doctors in China and went to hospitals in China as needed. Mr. Vegh said he continued to have a family doctor in Ontario although there was no evidence he ever attended that doctor during the relevant period or was a listed patient for provincial health plan purposes of the doctor or his clinic.

[17] Mr. Vegh's sons were born in China in 2003 and 2007. They are Canadian citizens and have Canadian passports. The sons' Chinese registrations were cancelled when they left China in October 2008. He and his wife and children returned to Canada for a three to four-week visit in August 2006. They returned again as a family in October 2008, once his wife had Canadian landed immigrant status. They lived in a rented home in Southern Ontario for a period; however they have since returned to

China to live for personal and financial reasons. It is not disputed in this proceeding that Mr. Vegh was a Canadian resident in October 2008 and in the period thereafter that is relevant to this proceeding.

[18] While living in China, all of the employment and business activities and ventures from which Mr. Vegh earned his living and supported his family were carried on in China where he chose to live with little Canadian connection whatsoever.

[19] While living in China, Mr. Vegh volunteered as editor and columnist at a Chinese weekly English newspaper. He also volunteered with the Canada China Business Council in China.

[20] Mr. Vegh's web-based Middle Kingdom Studios used local Chinese artists who worked for him in this publishing, illustration, comic and graphic arts venture.

[21] While living in China, Mr. Vegh pursued human rights complaints in Canada, followed Canadian hate speech developments, wrote to the Prime Minister and a Member of Parliament. He wrote at least one letter to the editor of a Canadian newspaper. He deposited the book he wrote, illustrated and published while in China, his first, with the Library of Canada and it was assigned a Canadian ISBN number. Mr. Vegh's web-based activities were said to be hosted in Canada and his website address was registered to him showing his stepfather's Burlington address. He said his basement room with bathroom privileges was still available to him while he was in China and still had some of his personal effects in it. The company through which he registered his middlekingdomstudios.com domain name was said by him to be Canadian. This was not evident from the supporting document tendered. The 2011 Middle Kingdom Studios home page snapshot he entered in evidence announces it is, or will be, "coming to North America", which suggests it did not have a real Canadian presence as late as 2011.

[22] There was no evidence of his wife's Canadian immigration process apart from the fact that she became a landed immigrant, according to him, in October 2008. Specifically, there was no evidence of unusual or unanticipated delays or denials which extended the period for her beyond what would be reasonably expected to apply to any citizen of China or a comparable country who is married to a Canadian citizen.

[23] There was no evidence tendered that Canadian men or women who marry foreign nationals are historically disadvantaged or stereotyped in any manner, nor that their children or foreign national spouses are.

II. Law on Residence

[24] "The legal test of residence has a substantial factual component": per Sharlow J.A. in *The Queen v. Laurin*, 2008 FCA 58, 2008 DTC 6175. "It has frequently been pointed out that the decision as to the place or places in which a person is resident must turn on the facts of the particular case": per Cartwright J. in *Beament v. Minister of National Revenue*, [1952] 2 S.C.R. 486, 52 DTC 1183, and quoted by Bowman C.J. in *Laurin v. The Queen*, 2006 TCC 634, 2007 DTC 236.

[25] The concept of residence is not defined in the *Act*. Subsection 250(3) provides that a reference in the *Act* to a person's residence in Canada includes a person who was at the relevant time ordinarily resident in Canada. The concept of ordinarily resident is not defined in the *Act*.

[26] There have been numerous court cases grappling with the meaning to be given to the terms "resident" and "ordinarily resident", identifying relevant factual criteria to be considered and applying those legal considerations to the facts of particular taxpayers.

[27] The oft-referred to decisions of the Supreme Court of Canada are those of *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209, and *Beament*. The concepts were discussed by the former Chief Justice of this Court in *Laurin* which was upheld by the Federal Court of Appeal. In *Laurin*, Bowman C.J. referred to the oft-quoted passage of Mahoney J. of the Federal Court on residence in *The Queen v. Reeder*, 75 DTC 5160.

[28] In the published Supreme Court Report version of the *Thomson* decision, there is, as was then the practice, a summary of the law on residence as argued by the successful respondent's counsel. To my mind, it is for purposes of this case a good summary of the meaning of residence and ordinary residence that can be distilled from *Thomson* and it is consistent with the many cases since then. It reads:

> In accordance with the test in *Thomson v. Minister of National Revenue*, the question whether a person resides or ordinarily resides at a place is one of fact. Amongst the facts to be considered is the original and continuing status of the person and the

> general mode of his life. Continual and uninterrupted physical presence is clearly not necessary and absence for a large part of a particular tax period does not prevent a person being resident and much less ordinarily resident. Where a person is absent the question of whether his absence interrupts his ordinary residence depends on the nature and purpose of his absence—whether it is to abandon his residence or is extraordinary, exceptional, temporary or accompanied by a sense of transitoriness or of return. Storage of personal belongings, maintenance of banking arrangements, the presence of an abode to which the person is free to come even though he has no proprietary interest, and the existence of family ties are all significant as indicating a retention of residence. Finally, the whole of the person's course of conduct with respect to his absence, including his conduct in returning, may be looked at to determine whether his absence resulted in his ceasing to be resident.

[29] A summary of the significant factors to be considered and their relevance is set out in *Reeder* as follows:

> 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.

III. Analysis and Conclusions

A. *Residence under the Act*

[30] It is the taxpayer's position that his situation is largely similar to that of the taxpayer in *Perlman*. I am unable to agree. First, I found Mr. Perlman to be credible in his testimony whereas I have concluded that I have reservations about the credibility of Mr. Vegh as described and for the reasons summarized above. Second, Mr. Perlman had a clear educational program plan for his entire period outside Canada. He had a self-contained apartment available to him and his family, and used by him and his family virtually exclusively, in Canada throughout the period he was

studying outside Canada. It was furnished with his furnishings, and his belongings were stored there. He had clear, standing employment opportunities available to him in Canada once he completed his studies outside Canada. It was always intended by Mr. Perlman that he would return to Canada once he had completed his education. Mr. Perlman consistently filed Canadian tax returns as a Canadian resident reporting his worldwide income. Mr. Vegh's facts stand in stark contrast in these respects. I would also note the Crown had the onus and burden of proof in *Perlman* and that case was decided on the basis of the Crown not discharging that burden.

[31] Having considered the factors described above relevant to a determination of factual residence, I must conclude that Mr. Vegh ceased to be a resident of Canada when he first left Canada as a single person leaving little behind in Canada with no demonstrated intention to return, and leaving few maintained connections to Canada of a personal, social, or economic nature. His non-resident status cannot be considered to have changed during the period up until his marriage, or perhaps his engagement shortly before his marriage, nearly two years later in 2002. This is because there had been no material change in the relevant circumstances and considerations to that time since he first left Canada. I find that on a proper application of the meaning of residence, Mr. Vegh ceased to be a resident when he left Canada and continued to be a non-resident of Canada up until his marriage in 2002.

[32] The next question to be addressed is therefore whether the changes in his circumstances following his marriage in 2002 were such that they could constitute a resumption of Canadian residence by Mr. Vegh. I am not at all satisfied that they could. Following his marriage, he had two sons born in China and he continued to live in China. He continued to earn his living virtually entirely from his activities in China. His volunteer activities continued to be in China. He had Chinese doctors, hospitals and driver licences. He returned to Canada only for brief holidays with his family. His contacts and involvement with Canada described in paragraph 21 above were modest, if not minimal for a Canadian expatriate living abroad. Apart from presumably pursuing Canadian landed immigrant status for his wife, for which there was very little evidence, little if anything was done for the purpose of returning to Canada to live and work. It is not clear that his letters to the Prime Minister, the Member of Parliament and perhaps his letter to the editor were not in pursuit of his CCTB dispute. Clearly his human rights complaints in Canada were only about this dispute. The fact that his business ventures may have had some involvement with Canada does not change the fact that his activities pursuing those businesses were carried out on a daily basis in China with little if any apparent Canadian linkage, and with Chinese workers. These do not demonstrate a sufficient connection of

Mr. Vegh's personal status and the general mode of his life to establish that he became a Canadian resident once again. Following his marriage, Mr. Vegh's settled routine of life continued to confirm that he regularly, normally and customarily lived in China with his wife and sons.

[33] Even if I were wrong in my conclusion that Mr. Vegh ceased to be a Canadian resident when he left Canada to teach in China, and accepted the argument that he left for a temporary absence to complete his 11-month teaching contract, and thus continued to be a Canadian resident during the period of that contract, I can only conclude nonetheless that by 2002, following his return from the Canadian holiday at the end of his initial term, Mr. Vegh could no longer be regarded to be only temporarily absent from Canada on a longer extended basis. From at least the beginning of 2002 through October 2008, he had taken up residence in China and ceased to have any settled plans to return to Canada or sufficient connecting factors to Canada during his time living in China to also be considered to be resident in Canada.

[34] I find that, applying the relevant common-law considerations and criteria applicable to the determinations of residence, Mr. Vegh was not a resident of Canada during the period 2002 through October 2008.

B. *Charter Discrimination*

[35] Mr. Vegh has argued that he is being discriminated against contrary to the *Charter* by virtue of the application to him in this case of (i) Article 4(2) of the Canada-China Tax Treaty, (ii) subsections 122.6(*f*), (*g*) and (*h*) of the *Act*, and (iii) the common-law meaning and considerations applicable to factual residence determinations and/or the use of residence in the CCTB provisions.

1. Canada-China Tax Treaty

[36] The Canada-China Tax Treaty, enacted in Canada by legislation, only applies to persons who are resident of one or both of Canada and China. Residence for this purpose is defined in the treaty as meaning essentially a liability to pay tax to that country on one's worldwide income. However the so-called tie-breaker rules for determining residence for treaty purposes under Article 4(2) of the Canada-China Tax Treaty only applies, as its tie-breaker name suggests, to persons who are otherwise resident of both countries for treaty purposes, that is persons who are obligated to pay tax on their worldwide income to both Canada and China. I have already determined that Mr. Vegh was not a factual resident of Canada during the

period in question, and therefore would not be subject to tax on his worldwide income under the Canadian *Income Tax Act* during that period. Hence, Article 4(2) simply does not apply to him. I would also note that, according to Mr. Vegh's testimony, he did not pay any tax in China while he was there on any of his income so it is not clear that he would be considered a resident of China for purposes of the treaty either. The application of Article 4(2) of the Canada-China Tax Treaty does not need to be applied to Mr. Vegh for this appeal to be decided. Therefore, it is not relevant to this proceeding to determine whether or not Article 4(2) constitutes discrimination prohibited by the *Charter* if it were applicable in other circumstances. It is not necessary for this to be decided in this case.

2. Section 122.6 CCTB Provisions

[37] To the extent I understand Mr. Vegh's *Charter* argument concerning subsections 122.6(*f*), (*g*) and (*h*) of the *Act*, he has focused upon the female presumptive rule included in subsection 122.6(*g*).

[38] As set out above, the CRA has accepted his wife's waiver of the presumptive rule in his favor and that rule need not be considered or applied to resolve Mr. Vegh's tax dispute. This Court need not decide in this proceeding whether the female presumptive rule constitutes *Charter* prohibited discrimination against male parents. This issue therefore does not require any further consideration in this hearing.

3. Common-law Meaning of Residence

[39] The Appellant is a self-represented litigant in an informal proceeding. He has not been able to very clearly articulate his *Charter* complaint about the judicially developed common law relating to the meaning of residence being discriminatory contrary to the *Charter*. It is not surprising that he has not framed his case, either as to evidence or argument, on the basis of the approach to *Charter* discrimination analysis mandated by the Supreme Court of Canada. I will nonetheless address the discrimination *Charter* arguments as put forward by the Appellant to the extent I understand them. I will do that in a less formal manner than would be expected had the *Charter* arguments been put in in a full and complete proper formal manner.

[40] The common law reflected in Canadian jurisprudence, Canadian judge-made law, is Canadian law subject to the *Charter*. The appropriate *Charter* analysis may differ in some respects from that applicable to statutory law if only to the extent there is no issue of deference to Parliament. Any prohibited discrimination inherent in the

common law is prohibited unless it can be demonstrably justified in a free and democratic society in accordance with section 1 of the *Charter*.

[41] It is possible to characterize Mr. Vegh's argument as not being necessarily with respect to the jurisprudence relating to the meaning of residence, i.e. alleging *Charter* prohibited discrimination in the jurisprudence, but to view it as an allegation that the use of the term "resident" in the CCTB provisions of the *Act*, a term which has been defined or interpreted by the courts, constitutes a statutory breach of the section 15 discrimination provisions of the *Charter* by virtue of its use of a term which properly defined results in discrimination. It is not clear that in this case anything turns upon whether Mr. Vegh is challenging the common-law meaning of resident or the statutory requirement that he be resident. If a more thorough *Charter* analysis was required, these different characterizations of the complaint may result in a different approach to the section 1 *Charter* analysis.

[42] Residence considerations apply equally to everyone regardless of whether they are married, or to whom they are married, or if they have children, etc. Different individual factual circumstances may lead to different results after the residence factors are considered given that this necessarily arises upon an individualized assessment of a particular person's factual situation. It is less obvious that individualized assessments using a broad range of generally applicable criteria can lead to stereotyping and discrimination even though they may lead to different results in different factual circumstances. To the extent the common-law residence considerations look to the particular individual characteristics of one's spouse or other family member or family situation, it is similarly less obvious that this could discriminate by perpetuating prejudice, stereotyping or denying inherent worth or dignity.[2]

[43] Determinations of residence, or of non-residence, cannot be said to generally disadvantage a person. Depending upon an individual's particular facts, he or she may or may not be considered to be a resident. However being a resident is not necessarily always either beneficial or detrimental. Similarly, being non-resident will not necessarily be beneficial or detrimental. Depending upon a particular taxpayer's circumstances, some taxpayers may be advantaged by being considered a Canadian resident while others may be disadvantaged and prefer to be a non-resident of Canada. The nature of the interest affected by the determination is solely financial and cannot be predictably expected to be either beneficial or disadvantages.

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[2] The Federal Court of Appeal did not consider it obvious in *Reference re Marine Transportation Security Regulations (CA)*, 2009 FCA 234.

[44] Distinctions made on enumerated or analogous grounds may prove to be, upon examination, non-discriminatory.[3] That is the case here with respect to the CCTB requirement of residence and the common-law meaning of that term.

[45] I conclude that no *prima facie* section 15 discrimination case has been made by Mr. Vegh on any of his alleged grounds, that no section 1 analysis is therefore required, and there is no need to require Mr. Vegh to serve notice of his further constitutional question since I am not considering declaring either the use of the word "resident" in the CCTB statutory provisions, or the common-law meaning of residence according to Canadian jurisprudence, to be a breach of anyone's *Charter* rights in this case.

IV. Conclusion

[46] Having found first that the proper application of the meaning of the term "resident" to Mr. Vegh's particular individual circumstances results in him being considered not to be a resident of Canada for the period in question, and having decided that Mr. Vegh has not made a *prima facie* case that the considerations applicable to a common-law determination of the term "resident" and the use of that term in the CCTB provisions constitutes *Charter* prohibited discrimination, I am dismissing Mr. Vegh's appeal.

Signed at Ottawa, Canada, this 23rd day of March 2012.

"Patrick Boyle"

Boyle J.

[3] Per McLachlin J. in *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 132.

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COURT FILE NO.:	2010-2851(IT)I
STYLE OF CAUSE:	MATTHEW J. VEGH AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	March 23, 2012

APPEARANCES:

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For the Appellant:

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