

CURRENT INTERPROVINCIAL ISSUES

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Abstract

The author examines two important issues that are emerging as a result of the growth of interprovincial tax planning—provincial residence and the taxation of accounting and legal services in Manitoba, Saskatchewan, and British Columbia.

With respect to provincial residence, the author examines the law and provides practical assistance to the practitioner who wishes to properly advise his or her clients on changing their provincial residence. The similarities of dual provincial residence and residence for the purpose of international treaties are also examined.

With respect to the taxation of accounting and legal services in Manitoba, Saskatchewan, and British Columbia, the author brings to light a risk that many professionals who provide such services to clients in those three provinces may not be aware of. The present provincial sales tax systems, which tax certain professional services, may require clients who are provided with such services by professionals outside those three provinces to self-assess, or else face the expensive possibility of subsequent reassessments years later.

Keywords Accountants; lawyers; PST; residence; province; provincial taxes.

Residence: Why Move South When You Can "Move" to Alberta?

Because of the growing disparity in personal income tax rates among the provinces, more and more individuals are examining the possibility of changing their province of residence because of the tax savings that they can realize. Table 1 shows that the hottest new tax haven may not be somewhere close to the equator, but rather the province of Alberta.

There is only limited guidance on determining provincial residence, and most of that flows from the determination of a country of residence.¹ In my opinion, however, the issue of provincial residence will only increase in importance as more members of the Baby Boom generation, who will become more mobile | when the last of their children move out, decide to relocate to a Canadian "tax haven".

Table 1 Comparison of Federal and Provincial Tax Rates

Jurisdiction	Tax on income, top rate	Provincial surtax	2006 combined top marginal rates			
			Regular income	Eligible dividends ^a	Ineligible dividends ^b	Capital gains
<i>percent</i>						
Federal	29.00	—	—	—	—	—
British Columbia	14.70	—	43.70	18.47	31.58	21.85
Alberta	10.00	—	39.00	18.18	24.58	19.50
Saskatchewan	15.00	—	44.00	20.35	28.33	22.00
Manitoba	17.40	—	46.40	23.83	35.25	23.20
Ontario	11.16	20/36	46.41	25.09	31.34	23.21
Quebec	24.00	—	48.22	29.69	36.35	24.11
New Brunswick	17.84	—	46.84	23.02	37.26	23.42
Nova Scotia	17.50	10	48.25	28.35	33.06	24.13

Prince Edward Island Newfoundland &	16.70	10	47.37	24.44	31.61	23.69
Labrador	18.02	9	48.64	32.52	37.32	24.32
Yukon	12.76	5	42.40	17.23	30.49	21.20
Northwest Territories	14.05	—	43.05	18.25	29.65	21.53
Nunavut	11.50	—	40.50	22.24	28.96	20.25

Source: BDO Dunwoody LLP, "Tax Facts 2006," (online: <http://www.bdo.ca/library/publications/tax/documents/TaxFacts2006v.2006.12.10.pdf>).

It is necessary to ensure that a change in residence is executed properly so that the taxpayer avoids the significant tax, interest, and penalties that may be assessed if the Canada Revenue Agency (CRA), years later, determines that the former "expensive" province continued to be the province of residence. Furthermore, there is a risk of charges being laid under a provincial income tax act on the basis that provincial taxes were allegedly evaded by an individual claiming to be a resident of a less expensive province.²

Legislative Authority

In Manitoba, the legislative authority to tax the income of individuals flows from section 3(1) of the provincial income tax act:³

Individuals liable to pay tax

3(1) An individual must pay tax under this Part for a taxation year if he or she

- (a) was resident in Manitoba on the last day of the taxation year; or
- (b) was not resident in Manitoba on the last day of the taxation year but had Manitoba income [4] for the year. |

Similar provisions exist for all provinces and territories: British Columbia,⁵ Alberta,⁶ Saskatchewan,⁷ Ontario,⁸ Quebec,⁹ New Brunswick,¹⁰ Nova Scotia,¹¹ Prince Edward Island,¹² Newfoundland and Labrador,¹³ Yukon,¹⁴ Northwest Territories,¹⁵ and Nunavut.¹⁶

Determining Residence

Neither "resident" nor "residence" is defined in the Income Tax Act¹⁷ for the purposes of determining questions of provincial residence. Therefore, the first step is to look to *Interpretation Bulletin* IT-221R3¹⁸. Although the bulletin's primary purpose is to assist in the determination of a country of residence, it also refers to provincial residence:

Many of the comments in this bulletin apply to determinations of residence status for provincial, as well as federal, tax purposes. Generally, an individual is subject to provincial tax on his or her worldwide income from all sources if the individual is *resident* in a particular province *on December 31* [1 9] of the particular taxation year. An individual is considered to be resident in the province where he or she has significant residential ties (see paragraphs 4–4 for a discussion of residential ties).²⁰

The bulletin's comments on country of residence can be extrapolated to determining provincial residence:²¹

- 1) Residence "is 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." ²²

- 2) The residential ties of an individual that will almost always be considered significant and persuasive are the individual's
 - a) dwelling place (or places), ²³
 - b) spouse or common-law partner, and
 - c) dependants.
- 3) If an individual who leaves a province keeps a dwelling place in that province (whether owned or leased) available for his or her occupation, that dwelling place will be considered a significant residential tie with that province, particularly if the individual's spouse or common-law partner continues to reside at the dwelling place. ²⁴

The main determination to be made is the province in which the individual's usual activities of life take place. For example, where are the individual's family, friends, social organizations, financial obligations, and everyday assets ²⁵ located? As Estey J stated in *Thomson v. Minister of National Revenue*,

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. ²⁶

Interestingly, there is limited case law on provincial residence, ²⁷ perhaps because of an interesting quirk in the appeal process. The taxpayer, when disputing the province of residence with the CRA, files a notice of objection in the normal way; however, the subsequent appeal is directed not to the Tax Court of Canada but to the superior court of the province in which the CRA assesses or reassesses the taxpayer as a resident. ²⁸



In Manitoba, the provincial income tax act ²⁹ states that an appeal relating to a determination of an individual's residence for the purpose of that act must be filed with the Manitoba Court of Queen's Bench and is to be governed by that court's rules.

Similar provisions exist for all provinces and territories (except Quebec, which administers its own provincial personal income taxes): British Columbia, ³⁰ Alberta, ³¹ Saskatchewan, ³² Ontario, ³³ New Brunswick, ³⁴ Nova Scotia, ³⁵ Prince Edward Island, ³⁶ Newfoundland and Labrador, ³⁷ Yukon, ³⁸ Northwest Territories, ³⁹ and Nunavut. ⁴⁰ To date, however, there appear to be no reported decisions with respect to those provisions.

The only recent decision relating to provincial residence was issued by the Tax Court in *Turnbull v. R.*, ⁴¹ in which a taxpayer claimed deductions for expenses incurred in moving from Newfoundland to British Columbia in 1994. The court, in finding that the necessary change in residence had not occurred, noted that

- although the taxpayer's family joined him in Vancouver in 1994, they did not bring anything more than "usual travelling luggage";
- no furniture was moved from Newfoundland;
- the taxpayer's home in Newfoundland was not sold, and the taxpayer only rented an apartment in British Columbia and purchased secondhand furniture for the apartment;
- the taxpayer did not advise the Newfoundland government of his move;
- the taxpayer's wife continued to accept social assistance cheques from the government of Newfoundland; and
- after 1994, the taxpayer built a new house in Newfoundland. ⁴²

Because of the scarcity of case law with respect to provincial residence, we must turn to the case law on international residence, of which there is, thankfully, an abundance. |

In *Shao v. R.*, ⁴³ the taxpayer had left Vancouver for Seattle in 1997. She moved back to Vancouver in 2003 and claimed moving expenses. However, ITA subsection  [62\(1\)](#)  allowed such expenses only if the taxpayer was absent from Canada but still a resident of Canada. The court found that the taxpayer had given up her Canadian residence because she

- had worked full time in the United States for six years,
- gave up her apartment in Canada and purchased real estate in the United States,
- had a husband who lived with her in the United States,
- did not file tax returns or pay taxes to Canada after she left in 1997,
- registered her car in the United States,
- had her mail forwarded to the United States,
- had medical coverage in the United States,
- opened US bank accounts,
- obtained US credit cards and destroyed her Canadian credit cards, and
- developed friendships in the United States through her work and her church.

It was not enough that the taxpayer had retained some of her Canadian bank accounts and RRSPs, her professional licence, and her friends. The court found that the taxpayer's "settled and routine life was in the United States" because she "normally and regularly lived in the United States." ⁴⁴ The court, in its finding that the taxpayer had lost her Canadian residence, particularly focused on the severing of her ties with Canada.

As is discussed in more detail below, it is just as important to show the severing of residential ties to the old province as it is to show the creation of residential ties to the new province. ⁴⁵

The Practical Implications

It is clear to me that the CRA (on behalf of the provinces for which it collects provincial personal income taxes) closely monitors taxpayers' changes in filing of provincial residence, particularly when the change is from a higher-tax province to a lower-tax province. Given the CRA's apparent suspicion about changes in provincial residence, it is necessary that taxpayers who intend to change their provincial residence take significant actions that indicate a clear intention to sever their ties with one province and create new ties with another. These include, but may not be limited to, the following:

- purchasing residential property suitable for the individual and his or her entire family;

- disposing of all residential property in the old province (unless it is clearly vacation property); ⁴⁶
- ensuring that if the individual moves, his or her family members (children and spouse) also move; ⁴⁷
- spending more days in the new province than in the old province; ⁴⁸
- obtaining new employment, or, if the business remains in the old province, ensuring that the individual either has moved his or her portion of the operations into the new province or else has reduced the amount of time spent "on the ground" in the old province;
- moving personal property (such as furniture, clothing, automobiles, recreational vehicles, and other assets) ⁴⁹ from the old province to the new province; ⁵⁰
- moving personal property that one would normally not move on a temporary basis but that is clearly still important to the taxpayer (such as jewellery, photos, and mementos);
- changing memberships in social, community, religious, ⁵¹ and professional organizations; ⁵²
- notifying professional advisers of the change in residence (and, although I am loath to suggest it, retaining new professional advisers, such as lawyers and accountants, who are located in the new province);
- obtaining health-care coverage in the new province (discussed below) and consulting medical professionals in the new province;
- changing drivers' licences and vehicle insurance and registration; ⁵³
- advising banks, brokerages, credit card issuers, insurance companies, and other financial institutions of the change in address;
- redirecting all mail to the new province; and
- changing telephone listings.

Dual Residence

If the taxpayer is arguably resident in two provinces, then ITA regulation  [2607](#)  instructs that the principal place of residence be determined:

Where an individual was resident in more than one province on the last day of the taxation year, for the purposes of this Part, he shall be deemed to have resided on that day only in that province which may reasonably be regarded as his principal place of residence. ⁵⁴

As *Interpretation Bulletin*  IT-221R3  states:

In some cases, an individual will be considered to be resident in more than one province on December 31 of a particular taxation year. This situation usually arises where an individual is physically residing in a province other than the province in which he or she ordinarily resides, on December 31 of the particular taxation year. For example, an individual might be away from his or her usual home for a considerable length of time on a temporary job | posting or in the course of obtaining a post-secondary education. An individual who is resident in more than one province on December 31 of a particular taxation year will be considered to be resident *only* in the province where he or she has the *most significant residential ties*, for purposes of computing his or her provincial tax payable. ⁵⁵

Clearly, the "principal place of residence" will be the province with which the taxpayer has the greater residential ties. The CRA has confirmed this point in a technical interpretation:



The determination of the principal place of residence is a question of fact and all the facts and circumstances surrounding a particular situation have to be examined before a final determination can be made. Generally, the principal place of [residence] of a person is the province where the person ordinarily resides in a permanent home and with which he or she has closer social and economic ties. ⁵⁶

Some taxpayers appear to be under the mistaken impression that they need be physically present in a province only on December 31 in order to claim residence there. This issue was dealt with 30 years ago by the Tax Review Board decision in *Hoyt v. MNR*:

If one interprets "was a resident in" to mean "lived in" on the 31st day of December, 1974, then the appellant did not live in New Brunswick in this case. In such a case, if one took a holiday for a full day out of a province and that day were December 31, then that person was not a resident in the province which he left for that one day. I am of the view that unless someone is shown to be a resident on December 31st in a second place, having been immediately previously thereto a resident in another place, he is still resident in the former place when he is only absent from that place because of a holiday. A person, in my view, does not cease to be a resident in a province when he goes to another province or even another country just for a holiday, even though it be of a reasonably extensive duration. It is all the more so, when not only were the ties with that place not broken, but rather, he was required to return. ⁵⁷

This decision and others ⁵⁸ also stress the need to sever the residential ties in the old province, because there is a presumption that one retains one's original residence. This issue is especially important when some family members find work or carry on business in a new province while the remaining family members stay in the old province.

The CRA has provided some guidance in a technical interpretation. ⁵⁹ A taxpayer's wife and children lived in British Columbia while the taxpayer's permanent job and other day-to-day activities (including a permanent home) were in Alberta. The taxpayer only returned to British Columbia to visit; however, he and his spouse still considered themselves to be married. The CRA confirmed that the taxpayer was a dual resident of British Columbia (owing to the location of the major family tie) and of Alberta (owing to the location of a permanent home and employment). The interpretation concluded:

Section 2607 of the *Income Tax Regulations* ("Regulation [2607](#) ") provides that an individual who is resident in more than one province on the last day of the taxation year is deemed to have resided on that day only in that province "which may reasonably be regarded as his principal place of residence." The term "principal place of residence" is not defined in the *Income Tax Act* (the "Act") or Regulations, however, our interpretative position (as set out in [IT-221R3](#) ) is that determining "principal place of residence" is a matter of evaluating the strength and number of the residential ties to each province. The "principal place of residence" will be the province where the individual has the most significant residential ties. On the facts set out above, the taxpayer's "principal place of residence" is probably Alberta for purposes of the deeming rule in Regulation 2607. ⁶⁰

This approach is similar to that outlined in the tax treaties. However, as will be shown, the treaties normally focus first on whether a permanent home exists, and then on the other residence ties, while regulation [2607](#) (at least according to the limited guidance provided by the CRA) focuses on all residence ties collectively, and at the same time, to determine the principal place of residence.

The application of such a treaty provision occurred in *Gaudreau*.⁶¹ In that case, the taxpayer began working in Egypt in 1996 for the same employer he had worked for in Canada. While conceding that the taxpayer was a resident of Egypt for the years in issue, the minister argued that the taxpayer was also a resident of Canada because his personal and economic relations (that is, his centre of vital interests) were still in Canada. Therefore, it was argued, he was liable for tax in Canada pursuant to article 4(2) of the Canada-Egypt income tax convention.⁶²

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 State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);
 - (b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;
 - (c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national; |
 - (d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.⁶³

The Tax Court found that the taxpayer was ordinarily resident in Canada on the basis that he had left Canada only temporarily. The court looked to the following factors in support of this finding:

- the taxpayer's employment agreement in Egypt was for a definite period;
- the employment agreement provided that the employer would pay for transport so that the taxpayer could return to Canada for a visit;
- the taxpayer kept almost all of his assets in Canada;
- the taxpayer's salary was deposited into a Canadian bank account, and only a small amount of money was kept in an Egyptian bank account;
- the taxpayer and his wife's keepsakes and mementos from their travels remained in Canada;
- the taxpayer kept his Canadian credit cards and RRSPs;
- the taxpayer did not sell his home in Canada, and he arranged for it to be maintained while he was away;
- the taxpayer rented an apartment in Egypt; and
- the taxpayer did not socialize with others in Egypt.

Even though the taxpayer's wife moved with the taxpayer to Egypt, the court found that the taxpayer created only enough residential ties with Egypt to permit him and his wife to "enjoy an acceptable and expected lifestyle while in Egypt."⁶⁴

Since the taxpayer had permanent homes in both Egypt and Canada, the court had to determine

to which country his personal and economic relations (centre of vital interests) were more closely tied during the relevant period. The court looked to paragraph 15 of the commentary in the OECD model tax convention on article 4, which stated:

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. ⁶⁵

The court noted that although the taxpayer had two permanent homes, the one in Canada was in the country where he had always lived and worked and where his family ⁶⁶ and possessions were. Once again, the court focused on the following facts:

- the family home and possessions were kept in Canada;
- the taxpayer's economic connections with Egypt were limited to those necessary to meet his daily needs (he kept only a small bank account in Egypt and left most of his finances in Canada);
- the taxpayer rented an apartment, did not purchase a car, ⁶⁷ and obtained his driver's licence simply to be able to commute to work; and
- the employment agreement was not for an indefinite term.

On the basis of these factors, the court found that the appellant's centre of economic interests was closer to Canada than to Egypt.

The Federal Court of Appeal recently examined a somewhat similar situation (although not in the context of a tax treaty) in *Hauser v. Canada*. ⁶⁸ The taxpayer, an Air Canada pilot, moved with his new wife to the Bahamas. The taxpayer also

- cancelled his OHIP coverage;
- shipped his household goods, car, and boat to the Bahamas; and
- opened a bank account in the Bahamas.

Conversely,

- the taxpayer maintained a bank account in Ontario, ⁶⁹ where his Air Canada paycheque was deposited (the account was also used to pay personal expenses);
- the taxpayer spent Christmas in Canada;
- the taxpayer's wife spent the hurricane season in Canada;
- because of his job, the taxpayer was required to be in Toronto at least 24 hours prior to a flight and to be within 2 hours of Pearson International Airport when he was on reserve;
- the taxpayer, while on call, stayed at his mother-in-law's home in Ontario, where he kept some seasonal clothing, as well as with other friends and family in Ontario;
- the taxpayer's wife often joined him in Ontario when he was on call; and

- the taxpayer was present in Canada on the following number of days: 1997 (after his move to the Bahamas in July), 99; 1998, 215; 1999, 113; 2000, 184; and 2001, 142.

At trial, the Tax Court found the taxpayer to be a resident of Canada. ⁷⁰ The court confirmed that a taxpayer could have more than one residence. ⁷¹ Furthermore, the court clarified that the issue was not whether the taxpayer was a resident of the Bahamas, but rather whether he had severed his residence with Canada, which he had not. The Federal Court of appeal affirmed the Tax Court's decision.

These cases illustrate that simply showing that residence has been established in the new province is not sufficient. Further evidence must be available to show that residence in the old province has been terminated, or, at the very least, that the old province is no longer the principal place of residence as per regulation [2607](#) .

The Problem with Health Care

One of the biggest difficulties that advisers face in assisting clients with issues of residence is that a provincial health-care system may determine that a taxpayer is no longer a resident (and thus is no longer protected by the provincial health-care plan), even though the provincial finance department (through the CRA) still wants to collect provincial taxes. For example, to be eligible for health-care coverage in Manitoba, an individual must

- be a Canadian citizen or have immigration status as outlined in the Health Services Insurance Act, ⁷²
- establish a permanent residence in Manitoba, and
- reside (physically) in Manitoba six months in a calendar year. ⁷³

It is the last criterion that causes difficulty. A taxpayer may live outside Manitoba for more than six months, thereby losing health-care coverage, but may still have significant enough residential ties with Manitoba to be considered a resident for tax purposes.

Further confusion is created by the fact that the provinces are not consistent in their health-care eligibility requirements. For example, in Alberta, a person who is eligible for health-care coverage is a person who is

- legally entitled to be or to remain in Canada and makes his/her permanent home in Alberta;
- committed to being physically present in Alberta for at least 183 days in a 12 month period (NOTE: Periods of temporary absence will be counted as being physically present in Alberta). . . . ;
- not claiming residency or obtaining benefits under a claim of residency in another province, territory or country;
- any other person deemed by the regulations to be a resident not including a tourist, transient or visitor to Alberta. ⁷⁴

Therefore, an individual may be accepted by Alberta Health and Wellness as a resident of Alberta for the purposes of health-care eligibility, but he or she may still be found by the CRA to be a resident of Manitoba. This point can be difficult to explain to a client. |

Provincial Sales Taxes

Taxable Services: The Law

Accountants outside Manitoba or Saskatchewan who provide accounting services that are in any way related to Manitoba or Saskatchewan should be mindful of the respective provinces' sales taxes. The same is true for lawyers, including lawyers outside British Columbia who provide legal services that are in any way related to British Columbia.

Manitoba

Section 4(1) of the Manitoba Retail Sales Tax Act provides as follows:

Except as otherwise provided in this section and the regulations, the following services are taxable . . .

- (i) the following services, to the extent that they are provided in Manitoba—or *relate to Manitoba* in a manner prescribed by regulation—and are rendered after June 30, 2004:
 - (i) legal services,
 - (ii) accounting services.⁷⁵

The applicable regulation⁷⁶ defines both legal services and accounting services; further guidance is provided by Manitoba Finance's retail sales tax bulletins,⁷⁷ which clarify that most day-to-day legal and accounting services are taxable services, with certain exceptions.⁷⁸

Saskatchewan

Section 5(3) of the Saskatchewan Provincial Sales Tax Act⁷⁹ provides as follows:

Subject to subsections (19), (20) and (21), [8 0] every user of a taxable service [8 1] purchased at a retail sale in the province shall pay to Her Majesty the Queen for the raising of general revenue, at the time of making his purchase, a tax in respect of the use of such service, and such tax shall be computed at the rate of 5% of the value of the taxable service.

The applicable regulation⁸² defines legal services and accounting services; Saskatchewan Finance's provincial sales tax bulletins⁸³ clarify that most day-to-day legal and accounting services are taxable services, with certain exceptions.

British Columbia

Sections 46 and 47 of the British Columbia Social Service Tax Act⁸⁴ provide as follows:

Tax if legal services provided in British Columbia

46(1) If the purchaser or recipient of legal services provided in British Columbia resides, ordinarily resides or carries on business in British Columbia, | a tax on the provision of the legal services must be paid to the government by the purchaser at the rate of 7% of the purchase price.

(2) If neither the purchaser nor the recipient of legal services provided in British Columbia resides, ordinarily resides or carries on business in British Columbia, a tax on the provision of the legal services must be paid to the government by the purchaser at the rate of 7% of the purchase price if the legal services are *in relation to* one or more of the following:

- (a) real property situated in British Columbia;
- (b) tangible personal property, within the meaning of paragraph (a) of the definition of tangible personal property, that is ordinarily situated in British Columbia or that is to be delivered in British Columbia, or the contemplation of either of these;
- (c) the ownership, possession or use in British Columbia of property other than that referred to in paragraphs (a) and (b), or the right to use such property in British Columbia, or the contemplation of any of these;
- (d) a court or administrative proceeding in British Columbia or a possible such proceeding;
- (e) the incorporation or contemplated incorporation of a corporation under the *Business Corporations Act* or the *Society Act*, or the registration or contemplated registration of a corporation as an extraprovincial company under the *Business Corporations Act* or as an extraprovincial society under the *Society Act*;
- (f) any other matter that relates to British Columbia and is prescribed as being included for the purposes of this section.

Tax if legal services provided to British Columbia resident

47(1) A person who

- (a) resides, ordinarily resides or carries on business in British Columbia, and
- (b) is the purchaser of legal services provided outside British Columbia that *relate to British Columbia*

must pay a tax to the government in respect of the legal services, with the tax calculated as 7% of the purchase price of the legal services.

While there was some debate about the constitutionality of this tax, particularly with respect to tax collected in respect of legal services related to the determination of rights before courts or tribunals, ⁸⁵ on May 25, 2007, the Supreme Court of Canada, in *British Columbia (Attorney General) v. Christie*, ⁸⁶ ruled that the tax was constitutionally valid.

Taxable Services: The Practical Issues

Although these statutes affect most, if not all, practitioners in Manitoba, Saskatchewan, and British Columbia, practitioners outside those three provinces should be aware of the broad reach of the legislation, under which any legal services or portions thereof (as well as accounting services in Manitoba and Saskatchewan) that *relate to* the respective province may be taxed. ⁸⁷

Manitoba Finance has taken the position that any lawyer, accountant, or firm, whether resident in Manitoba or not, that provides legal or accounting services that relate to Manitoba is required, pursuant to the Retail Sales Tax Act, to register for retail sales tax purposes. ⁸⁸ This is surprising, given the fact that "vendor" ⁸⁹ is defined by the Manitoba act as follows:

"vendor" means a person who in the course of business

- (a) sells or leases tangible personal property, or offers or keeps tangible personal property for sale or lease, directly to a purchaser at a retail sale in the province, or
- (b) sells a taxable service, or offers a taxable service for sale, directly to a purchaser at a retail sale in the province,

and includes a person who

- (c) collects from a purchaser an amount paid as tax under this Act,
- (d) not being required to have an RST number, applies for and is issued an RST number

- otherwise than under subsection 5(6) (diplomat's RST number), or
- (e) is a direct seller or distributor authorized to use the alternate collection method described in section 21.

Although the definition does not specifically state "in the course of business *in Manitoba*,"⁹⁰ it is questionable whether Manitoba would have the constitutional authority to collect tax from accountants, lawyers, or firms not carrying on business in Manitoba, regardless of whether they are resident in Manitoba. This is because section 92(2) of the Constitution Act, 1867, reads as follows:

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, . . .

2. Direct Taxation *within the Province* in order to the raising of a Revenue for Provincial Purposes.⁹¹

The phrase "within the Province" has been interpreted to mean that provincial taxes can be imposed on non-residents only if they carry on business in the province or are employed in the province.⁹² This interpretation is supported by the Manitoba act, which clarifies the matter with respect to the provision of tangible personal property:

Interpretation of "retail sale in the province"

1(1.2) For the purposes of the definition "vendor" in subsection (1), a retail sale in the province includes a retail sale of tangible personal property by a seller *who does not otherwise carry on business in the province*, if

- (a) the property is acquired for use or consumption in the province;
- (b) the seller causes the property to be delivered in the province; |
- (c) the seller, directly or through an agent, solicits orders for tangible personal property from persons in the province, by advertising or by any other means; and
- (d) the seller accepts orders to purchase tangible personal property that originate in the province.⁹³

Furthermore, the Manitoba act provides for self-assessment by the client when a non-vendor provides the legal or accounting services:

Tax payable in other circumstances

2(4) A purchaser other than

- (a) a purchaser who purchases tangible personal property or a taxable service at a retail sale in the province from a vendor; or
- (b) a purchaser as defined in subsection 22.1(1) who has paid the tax in accordance with section 22.2;

shall without delay make a report to the minister containing such information as is prescribed in the regulations and shall pay the tax imposed by subsection (1) in the manner prescribed in the regulations.⁹⁴

The Saskatchewan act provides for this event in sections 5(10) and 5(10.1):

5(10) Every person residing, ordinarily resident or carrying on business in Saskatchewan who acquires, outside Saskatchewan, a taxable service, other than a taxable service

prescribed pursuant to subsection (10.4), for his or her own use or for the use of other persons at his or her expense, or on behalf of or as agent for a principal for use by the principal or other persons at his or her expense, shall, immediately after the taxable service is acquired, comply with:

- (a) subsection (10.1) if all of that taxable service relates to Saskatchewan in the manner prescribed in the regulations; or
- (b) subsection (10.2) if only a portion of that taxable service relates to Saskatchewan in the manner prescribed in the regulations.

5(10.1) A person required to comply with this subsection shall:

- (a) report the matter to the minister and forward to or produce for the minister the invoice, if any, and any other information required by the minister respecting the taxable service; and
- (b) pay tax computed at a rate of 7% of the value of the taxable service. [95](#)

Section 49 of the British Columbia act provides as follows:

When tax must be paid

49(1) Tax under this Division must be paid by the date on which the purchase price of the legal services is paid or payable, whichever is earlier.

(2) As an exception to subsection (1), if the person providing the legal services is not obliged to and does not collect the tax under this Division, | the purchaser must pay the tax by delivering it to the commissioner by the 15th day of the month following the month in which the tax is otherwise required to be paid by subsection (1).

(3) The purchase price for legal services is deemed to be payable when it is billed or otherwise charged to the purchaser. [96](#)

Taxable Services: The Pressing Concern

The most pressing concern arising from these provincial acts is the risk faced by the clients. If a lawyer, accountant, or firm fails to advise a client who is obtaining legal services that relate to Manitoba, Saskatchewan, or British Columbia, or accounting services that relate to Manitoba or Saskatchewan, to self-assess, the client may face a reassessment years later after audit. Manitoba Finance has stated the following:

How is RST paid when a Manitoba resident purchases legal services from an out-of-province lawyer that did not collect Manitoba RST? . . .

When a purchaser acquires legal services that relate to Manitoba from a lawyer that did not collect RST, the purchaser is responsible to self-assess RST on the purchase price of the legal services and remit the RST on their sales tax return. [97](#)

How is RST paid when a Manitoba resident purchases accounting services from an out-of-province accountant that did not collect Manitoba RST? . . .

When a purchaser acquires accounting services that relate to Manitoba from an accountant that did not collect RST, the purchaser is responsible to self-assess RST on the purchase price of the accounting services and remit the RST on their sales tax return.

[98](#)

Clients will be none too happy to discover that bills from their tax advisers have resulted, years later, in reassessments for tax, interest, and possible penalties because the tax advisers failed to know the relevant local tax law. |

1

For example, almost all of the case law on the subject deals with country of residence, but the principles are, for the most part, applicable to provincial residence.

2

Arguably, one would also be guilty of provincial tax evasion if one claimed to be a resident of a more "expensive" province without having sufficient residential ties to that province (as will be discussed below). However, I doubt that such a charge would ever be laid.

3

Manitoba, The Income Tax Act, CCSM, c. I10, as amended.

4

"Manitoba income" is defined in section 1(1) of the act as "the individual's income earned in the year in Manitoba, as determined under the federal regulations made for the purpose of the definition 'income earned in the year in a province' in subsection 120(4) of the federal Act." As Siân M. Matthews states in her paper, "Water Runs Downhill: Interprovincial Tax Planning," in *Report of Proceedings of the Fifty-Sixth Tax Conference, 2004 Conference Report* (Toronto: Canadian Tax Foundation, 2005), 25:1-50, at 25:13, "income from a business is allocated among relevant provinces on the basis of attribution of revenues and expenses to permanent establishments."



5

Income Tax Act, RSBC 1996, c. 215, as amended, section 2.



6

Alberta Personal Income Tax Act, RSA 2000, c. A-30, as amended, section 3.

7

The Income Tax Act 2000, SS 2000, c. I-2.01, as amended, section  [6](#)  .

8

Income Tax Act, RSO 1990, c. I.2, as amended, section  [2](#)  .



9

Taxation Act, RSQ, c. I-3, as amended, section 22.


10

New Brunswick Income Tax Act, SNB 2000, c. N-6.001, as amended, section 11.



11

Income Tax Act, RSNS 1989, c. 217, as amended, section  [5](#)  .



12

Income Tax Act, RSPEI 1988, c. I-1, as amended, section  [3](#)  .



13

Income Tax Act, 2000, SNL 2000, c. I-1.1, as amended, section  [6](#)  .

14

Income Tax Act, RSY 2002, c. 118, as amended, section  [3](#)  .



15

Income Tax Act, RSNWT 1988, c. I-1, as amended, section  [2](#)  .



16

Income Tax Act (Nunavut), RSNWT 1988, c.I-1, as amended, section 2.



17

See section  [250](#)  of the Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the ITA"), which defines and deems the country of residence in certain situations.



18

Interpretation Bulletin  IT-221R3  , "Determination of an Individual's Residence Status" (Consolidated).

19

This is from regulation  [2607](#)  of the Income Tax Regulations, CRC 1977, c. 945, as amended, which provides as follows:

20

 IT-221R3 , supra note 18, paragraph 1 (emphasis in original). Of course, when looking to an interpretation bulletin, one should keep in mind the general comments of the courts, which were summarized by the Federal Court of Appeal in *Brill et al. v. The Queen*, 96 DTC 6572, at 6575 (FCA), wherein Linden J stated:

21

The CRA, in document no. 2002-0139005, May 15, 2002, made the following comments with respect to this specific interpretation bulletin:

22

This is a direct quotation taken from the comments of Rand J in *Thomson v. Minister of National Revenue*, [1946] SCR 209, at 225. Alternatively, as Campbell J said in *Shao v. R*, 2006 TCC 78, the person's residence is where his or her "settled and routine life" is.

23

The importance of this factor was reiterated in *Gaudreau v. The Queen*, 2004 TCC 840; aff'd. 2005 FCA 388.

24

See also Bruce Sprague, "Taxation of Professional Athletes: Cross-Border Perspectives," Personal Tax Planning feature (2006), vol. 54, no. 2 *Canadian Tax Journal*, 477-506, at 479-80.

25

As I ask my clients, "In what province is your junk drawer?"

26

Supra note 22, at 231-32.

27

See, for example, the decisions of *Hoyt v. MNR*, 77 DTC 270 (TRB); *Park v. MNR*, 79 DTC 687 (TRB); and *Fortin v. R*, [1998] 4 CTC 2547 (TCC). These cases are discussed by Matthews, supra note 4.

28

The Federal Court of Appeal has confirmed in its decisions of *Gardner v. R*, 2001 FCA 401, and *The Queen v. Sutcliffe*, 2004 FCA 376, that the superior courts of each province, not the Tax Court, have the jurisdiction to hear appeals relating to the validity of an assessment of provincial income taxes (which, of course, includes a determination of provincial residence).

29

Supra note 3, sections 30 to 34.

30

Supra note 5, sections 42 to 46.

31

Supra note 6, sections 57 to 61.

32

Supra note 7, sections 98 to 104.

33

Supra note 8, sections 23 to 26.

34

Supra note 10, sections 84 to 90.

35

Supra note 11, sections 64 to 68.

36

Supra note 12, sections 56 to 60.

37

Supra note 13, sections 62 to 66.

38

Supra note 14, sections 35 to 39.

39

Supra note 15, sections 26 to 30.

40

Supra note 16, sections 26 to 30.

41

[1999] 1 CTC 2459 (TCC).

42

This factor shows that the courts can and will look outside the years in issue to assist in determining whether sufficient residential ties were created or cut.

43

Supra note 22.

44

Ibid., at paragraph 12

45

To put it another way, it is necessary for the taxpayer to show that the move to the new province is not of a temporary nature. See *Gaudreau*, supra note 23.

46

In my experience, the sale of residential property in the old province and the purchase of residential property in the new province is one of the key factors examined by the CRA. However, if a vacation property could arguably be used as a year-round residence, this does not necessarily assist the client.

47

One of the factors that the CRA examines is how a taxpayer files his or her marital status with the CRA. If a taxpayer files as married and his or her spouse files as a resident of another province, the CRA will closely examine the file. The problem for many taxpayers is that they do not realize the importance of this matter, or they are not even aware that they can select "separated" as their marital status even though no formal court action to end the relationship has occurred.

48

Although this will be impossible if the individual moves at the end of a year, later years will show an intention that the move was a change in residence if the subsequent day counts are much greater for the newer province. This issue becomes more difficult if the client winters in the United States and spends only a small number of days in any province. In that circumstance, the other factors outlined become key. See *Yoon v. The Queen*, 2005 TCC 366, where the court compared the number of days spent in South Korea with the number of days spent in Canada to help determine residence.

49

See *Gaudreau* (TCC), supra note 23, at paragraph 32.

50

In CRA document no. 2002-0139005, supra note 21, the CRA has stated that storage of items in a location is a "minor tie, and unlikely to 'make or break' any residence determination, whether for national or provincial residence purposes," particularly when the more significant residential ties (family, employment or business, and residential property) exist. However, in *McFadyen v. R* (2000 DTC 2473 (TCC); aff'd. on this issue 2002 FCA 496; leave to appeal to the Supreme Court of Canada dismissed, April 24, 2003, [2003] 1 SCR iii), the Tax Court found that a taxpayer's placing of larger items in storage instead of moving or selling them indicated that the move was temporary and thus not a change in residence.

51

Unfortunately, the CRA does not seem to readily recognize that an individual may keep these ties in the old province, particularly if he or she lived there for a long time and the ties are important to the individual. For

example, individuals may continue to contribute to and even visit their "home" place of worship long after they have moved to a new province.

52

See *McFadyen*, supra note 50 (TCC), at paragraph 104. Professional organizations are important: they can often provide documentation specifying the date of change in membership—a key piece of evidence of a change in residence.

53

See *McFadyen*, supra note 50 (TCC), at paragraph 104. The change in registration can be a key factor, because the client often has to have the vehicle safety-certified in the new province before it can be registered. The time and inconvenience associated with this procedure is a strong indication that the individual intended to change provincial residence.

54

Matthews, supra note 4, at 25:13, states that the provinces agreed to this method of determining who would be subject to provincial taxation "to avoid a nightmare of conflicting tax laws and filing requirements for individuals."

55

Supra note 18, at paragraph 1 (emphasis in original).

56

CRA document no. 9414435, March 22, 1995. See also CRA document no. 9917145, September 10, 1999.

57

77 DTC 270, at 275 (TRB).

58

See also *Gray v. MNR*, 78 DTC 1814 (TRB) and *Park v. MNR*, 79 DTC 687 (TRB).

59

CRA document no. 2004-0054681I7, January 28, 2004.

60

Ibid.

61

Supra note 23.

62

Convention Between Canada and the Arab Republic of Egypt for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Cairo, Egypt on May 30, 1983.

63

Ibid., article 4(2). This article is almost identical to article IV of the Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, signed at Washington, DC on September 26, 1980, as amended by the protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, and July 29, 1997.

64

Gaudreau, supra note 23, at paragraph 34.

65

Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital* (Paris: OECD) (looseleaf), commentary on article 4.

66

The taxpayer's three grown children lived in Canada. However, they had all moved out of the family home, and it is not clear why the court considered this factor to be important.

67

The court arguably should not have given this factor much credence, since the employer provided a car to the taxpayer.

68

2006 FCA 216.

69

The taxpayer's mother-in-law's Ontario address was used for the account.

70

The minister had conceded that the taxpayer was also a resident of the Bahamas.

71

This applies, of course, to both provinces and countries.

72

Manitoba, CCSM, c. H35, as amended.

73

Manitoba, Department of Health, "Are You Covered—Questions and Answers about Health Care Coverage" (online: <http://www.gov.mb.ca/health/mhsip/index.html#eligible>).

74

Alberta, Department of Health, "Health Care Insurance Plan—Who Is Eligible" (online: http://www.health.gov.ab.ca/ahcip/ahcip_eligibility.html).

75

CCSM, c. R130, section 4(1) (emphasis added).

76

Taxation of Services (Accounting, Architectural, Engineering, Geoscientific, Legal, Private Investigation, Security and Security Monitoring) Regulation, Manitoba reg. 22/2005, registered February 8, 2005, section 2.

77

Manitoba, Department of Finance, "Legal Services," *The Retail Sales Tax Act—Bulletin No. 056*, April 2004, revised June 2004, and "Accounting Services," *The Retail Sales Tax Act—Bulletin No. 057*, April 2004, revised June 2004.

78

Manitoba reg. 22/2005, *supra* note 76, sections 4 and 5.

79

RSS, c. P-34.1, as amended, section 5(3).

80

These subsections deal with the purchase of items with a minimal price (less than 35 cents) and the rules for rounding the calculation of tax to 1 cent.

81

"Taxable service" is defined in section 3(1)(k) of the Saskatchewan act to include accounting services and legal services.

82

Saskatchewan, Provincial Sales Tax Regulations, c. E.3, reg. 1, as amended, effective January 15, 1986, sections 3 (4.3) and (1.1).

83

Saskatchewan, Department of Finance, "Information for Businesses Providing Accounting Services," *The Provincial Sales Tax Act: Information Bulletin No. PST-62*, June 2000, revised May 2004, and "Information for Lawyers," *The Provincial Sales Tax Act: Information Bulletin No. PST-62*, June 2000, revised March 2003.

84

RSBC 1996, c. 431, as amended, sections 46 and 47(1) (emphasis added).

85

In fact, as a result of the decision of the British Columbia Court of Appeal in *Christie v. British Columbia* (2005 BCCA 631), any tax collected in respect of "legal services related to the determination of rights and obligations by courts of law or independent legal tribunals" was to be held in trust pending the outcome of the British Columbia government's appeal to the Supreme Court of Canada. The only exception to this was if the client constituted a "low income" person. The British Columbia Ministry of Small Business and Revenue has now

directed that PST be charged on all legal services and that all funds held in trust be remitted.

86

2007 SCC 21.

87

For Manitoba, see Manitoba reg. 22/2005, supra note 76, sections 3(1) and (2). For Saskatchewan, see Saskatchewan regulations, c. E.3, reg. 1, supra note 82, sections 7(2.1) and (2.6). For British Columbia, see Social Service Tax Act, supra note 84, section 47(2). If the services relate to both the province and another jurisdiction, an allocation of the services for the purpose of the tax to be imposed must be made. Guidance as to this is provided in Manitoba by section 6 of reg. 22/2005; in British Columbia by section 47(3) of the Social Service Tax Act; and in Saskatchewan by section 5(10.2) of the Provincial Sales Tax Act.

88

See *Bulletin No. 056*, supra note 77, at 5, and *Bulletin No. 057*, *ibid.*, at 4.

89

The vendor is obligated to collect the tax. See the Retail Sales Tax Act, supra note 75, section 1(1).

90

In British Columbia, "vendor" is defined in the Social Service Tax Act, supra note 84, section 1, as

91

30 & 31 Vict., c. 3, as amended, section 92 (emphasis added).

92

See Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell) (looseleaf), at 31-24.

93

Manitoba, The Retail Sales Tax Act, supra note 75, section 1(1.2) (emphasis added).

94

Ibid., at section 2(4).

95

The Provincial Sales Tax Act, supra note 79, sections 5(10) and (10.1).

96

Social Service Tax Act, supra note 84, section 49.

97

See *Bulletin No. 056*, supra note 77, appendix, at 7.

98

See *Bulletin No. 057*, *ibid.*, appendix, at 6.

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