

Court File No.: CV-12-453976

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

GILLIAN FRANK AND JAMIE DUONG

Applicants

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA**

Respondent

**APPLICATION UNDER Rule 14.05(3) of the *Rules of Civil Procedure* and the
Canadian Charter of Rights and Freedoms, ss. 1, 3 and *Constitution Act*,
1982, s. 52.**

REPLY AFFIDAVIT OF DON DE VORETZ

I, **DON DE VORETZ**, of the City of Langley, in the Province of British Columbia,
in Canada, MAKE OATH AND SAY:

1. This affidavit is sworn in reply to portions of the affidavits of Kevin Shoom, Paul O'Brien and Mario Paquet.
2. I also attach to this affidavit my *curriculum vitae*, updated since swearing my affidavit in May, 2012. My recent CV is attached as Exhibit A.

I. Affidavit of Kevin Shoom

3. In paragraph 18 of his affidavit, Mr. Shoom says he is not able to opine on whether non-resident Canadian citizens make comparatively less use of social programs. Given the breadth of my expertise on citizenship and immigration, I do have specialized knowledge about the use non-resident citizens make of social programs. I can advise, for example, that Canadian citizens who live outside of Canada for six months plus one day are not entitled to British Columbia health care coverage (pursuant to the Medical Services Plan (MSP) regulation). The timing of losing coverage varies province by province but all provinces have a date when non-residents lose public coverage. In addition, in order to collect social assistance, a Canadian citizen needs to be a standing resident of a province. These are two significant indicators of the comparatively lesser use of social programs of non-resident Canadians.

4. At paragraph 20 of his affidavit, Mr. Shoom references recent data regarding non-resident income tax revenues (the most recent of which was published after I swore my May 2012 affidavit). While the information, which was attached as Exhibit B to Mr. Shoom's affidavit, shows a decrease in non-resident income tax revenues starting in 2009-2010 compared to 2008-2009 numbers, this is because of the recession. It is not because non-residents were less willing or less liable to make income tax payments starting in 2009-2010.

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5. In paragraphs 20 to 21 of his affidavit, Mr. Shoom states that the conclusions found in paragraphs 30, 38 and 39 of my affidavit with respect to taxes paid by non-resident Canadians are unfounded. I disagree. Mr. Shoom's concern is that the numbers I used did not distinguish between citizens and non-citizens, nor between individuals and corporations.

6. While it is correct that the raw dollar numbers I provided may overstate the contributions of non-resident citizens, this is only because the government refused to provide me with numbers which were further broken down, in spite of my request for those. Attached as Exhibit B to this Affidavit is a copy of a request I submitted in November, 2010 to the Canada Revenue Agency ("CRA"), requesting the number of non-resident Canadians who were deemed to be "non-residents" for tax purposes for the period 2005-2009. This was one of my repeated requests for data which went unanswered. For example, although I did not retain a copy of it, in an earlier request I had sought information distinguishing between citizens and non-citizens. This request also went unanswered and I understood from discussions with CRA officials that the CRA did not collect information in that format. Therefore, the only information I was able to use was the published information found at Exhibit G to my affidavit sworn May, 2012. This publicly available information provided non-resident income taxes, but did not break those down into citizens and non-citizens. I also now understand that this information was not broken down into individuals and corporations.

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7. While I understand that the government may not distinguish in its collection of information between citizens and non-citizens, it is clear from Mr. Shoom's affidavit that the government does distinguish between corporations and individuals but did not provide me with that information.

8. At the time of my calculation, I understood that "non-resident income tax" as set out in Exhibit G to my May 2012 affidavit consisted only of personal income tax as it did not indicate that corporate taxes were included. In any event, now revising my calculation, my central point, which was that non-residents make substantial and growing tax payments compared to residents, remains fair and valid. In addition, and as detailed below, I have reviewed further information now provided by the Respondent in response to a request from counsel for the Applicants. In my opinion, this information underscores the attachment of non-resident Canadians given their substantial and growing tax payments compared to their use of social services.

A. *Citizens and Non-Citizens*

9. Mr. Shoom is correct that the group I provided as remitting taxes from outside the country is broader than only Canadian citizens. As set out above, I was using the only available information, which was not broken down by citizens versus non-citizens residing outside the country. While those numbers will be an overstatement of the precise taxes remitted by Canadian citizens, the vast majority of Canadians remitting taxes from outside the country will be Canadian citizens.

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10. That is, of the population of Canada, which is approximately 30 million people, only approximately 4 million people are not citizens since seventy-five per cent of people who come to Canada become citizens in six years. If the population of non-resident Canadians is drawn from a population which is more than 85% citizens, the vast majority of the non-resident population paying taxes also will be citizens.

B. Individuals and Corporations

11. While I was not able to break down the numbers to isolate non-resident taxes from individuals as opposed to corporations (given the information I was provided), I maintain that the numbers which include corporate taxes evidence attachments of non-residents to Canada.

12. First, the taxes paid by Canadian corporations into Canada provide evidence of attachment to Canada. These corporations employ people from Canada and there is therefore a connection between the corporations and Canadian citizens living abroad.

13. Moreover, the central point of my analysis with respect to taxes was to compare the taxes paid within Canada with those paid from outside Canada. If both groups include both individuals and corporations, the comparison is fair and valid. Therefore, comparing the \$6.3 billion which I now understand includes both non-resident individuals and corporations to the total personal and corporate income taxes (from within Canada) for 2008-2009, the non-resident taxes are 4.1% and not 5.2 % of the

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total tax revenue. This remains, in my view, evidence of substantial attachment to Canada by non-residents.

14. In addition, in response to a request from counsel for the Applicants, the Respondent now has provided additional information which supports my analysis. Attached as Exhibit C to this Affidavit is a copy of a letter from Gail Sinclair, counsel for the Respondent, to Shaun O'Brien, counsel for the Applicants, dated April 2013 attaching tables of information which were relied on by Kevin Shoom in his affidavit.

15. Table 2 of that information reveals that individual non-residents have made substantial and growing tax payments, almost \$900 million in 2009. Moreover, individual tax payments by non-residents grew by over 90% between 2000 and 2009, or on average 10% per year. Finally, if we combine the information provided in tables 1 and 2, we see that in 2010 individual non-residents received \$963 million in publicly funded social security payments and paid \$614 million in 2010 taxes. In short, non-residents repaid in one year over 60 per cent of benefits received.

16. These numbers are all the more striking considering the number of retirees in the non-resident population. While we do not have a precise calculation of the number of non-residents who are retirees, we know that approximately 18% of the Canadian population is aged 60 or older. At least 18% or more of the non-resident population will be 60 or older considering that many retirees retire in the southern part of the United States. These retirees typically have paid taxes in Canada for many years prior to

retirement. On average, individuals aged 25 to 60 in Canada pay more in taxes than they receive in benefits. At retirement, it is expected that they will receive much more in benefits than they pay in taxes. Therefore, while one would expect a population comprised of a large number of retirees to receive significantly more benefits than they pay in taxes, it is striking that this population re-pays a significant percentage of the benefits received. The proportion of taxes paid compared to social security benefits received is evidence of strong attachment especially considering the number of retirees in the Canadians abroad population.

17. In paragraph 28 of his affidavit, Mr. Shoom discusses withholding tax revenues with respect to services that non-residents perform in Canada. Within this group of non-residents will be some Canadian citizens and, indeed, they are probably more likely to come back to Canada to provide services (for example, artists who perform) if they are citizens. While a breakdown of this information is not available (it falls within the category of what economists term "private information"), some of these will be individual Canadian citizens like Neil Young, Celine Dion or Joni Mitchell whose earnings would be sufficiently high that they would qualify for a 43% tax rate. In short, evidence would support that individual Canadian citizens performing in non-team sports – performing artists, or highly skilled and mobile individuals like IT workers and professors, for example – would have large gross revenues which would expose them to significant taxes. These taxes, especially when the individuals are not eligible for health care or a

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number of other social programs, provide evidence of a significant attachment to Canada.

18. In paragraphs 30-31 of his affidavit, Mr. Shoom criticizes my conclusions regarding the comparative increase in taxes paid into Canada by non-residents. While I agree with Mr. Shoom that the numbers I was provided did not isolate citizens from other non-residents, and, therefore, the dollar amounts paid by citizens alone would be lower, my comparison is valid. That is, I compared "apples to apples" – meaning the total taxes from outside of Canada in 1998-1999 as compared to the total amount from outside Canada in 2008-2009. In addition, the composition of the group outside Canada has changed since 1998-1999 in that the number of Canadian citizens living abroad has grown by about 50% more than the number of other Canadian non-residents. Therefore, it is fair to say that individual Canadian citizens living abroad are paying comparatively more taxes since 1998, considering that there is now a higher proportion of them living abroad. Finally, the belatedly supplied information from the Respondent, attached as Exhibit C, confirms my initial inference with a revealed 90% increase in individual non-resident tax payments between 2000 and 2009 which was my period of study.

19. Overall, while the raw dollar numbers in my affidavit may have been overestimated due to the lack of further refined data (not provided to me upon request), I continue to conclude that Canadian citizens form part of the group that pay significant

taxes into Canada and that they pay a high proportion of taxes compared to their use of benefits. This indicates a strong attachment to Canada.

II. Affidavits of Paul O'Brien and Mario Paquet

A. Attachments through CPP and OAS

20. Mr. O'Brien and Mr. Paquet have taken issue with statements I made with respect to the functioning of the Canada Pension Plan ("CPP") and the Old Age Security program ("OAS"), and, particularly, with the way in which I described Canadians as having attachment to Canada through these programs. I am replying in this section of my affidavit particularly to paragraphs 22-23 and 28-30 of the affidavit of Paul O'Brien and paragraphs 20-31 of the affidavit of Mario Paquet.

21. The following is intended to clarify the relevance of the CPP and OAS as it pertains to the attachments of Canadians, including Canadian citizens, living abroad. There are at least three ways in which Canadians living abroad may derive an attachment to Canada from the CPP or OAS:

22. The most significant attachment is when Canadian citizens living abroad receive payments from the CPP or OAS. I described this in my May 2012 affidavit at paragraphs 26 and 27.

23. Second, pursuant to social security agreements with other countries, Canadian citizens living abroad may accrue entitlements which assist in meeting the minimum

qualifying conditions for CPP or OAS. These social security agreements are not publicly available. However, the published summary of information about these agreements gives some indication as to how they function.

24. The Service Canada website includes an "infosheet" providing information with respect to each country with which Canada has an agreement. For the agreement with the United States, for example, Service Canada has described the benefit of the agreement to Canadians living in the United States as follows:

If you do not qualify for a Canada Pension Plan benefit, Canada will consider your periods of contribution to the pension program of the United States after the age of 18 as periods of contribution to the Canada Pension Plan.

25. With respect to OAS, the website states:

What happens if you do not qualify for a Canadian Old Age Security pension because you have not lived in Canada for the minimum number of years? Under the Agreement, Canada will consider periods of contribution to the pension program of the United States after the age of 18 and January 1, 1952, as periods of residence in Canada.

Attached as Exhibit D to this Affidavit is a copy of the Service Canada website describing Canada's social security agreement with the United States. Attached collectively as Exhibit E are the websites describing the agreements with Australia and France, by way of further examples.

26. Therefore, pursuant to these agreements, Canadian citizens living abroad may contribute to the program of another country and the periods of this contribution may be

considered in calculating whether the individual has met the minimum qualifications for payment under the Canadian program. This, in my opinion, creates an attachment to Canada given that it qualifies the individual for some payment from the Canadian program.

27. A third way in which Canadians abroad can derive an attachment to Canada through the CPP is by making contributions directly to the CPP. Paul O'Brien and Mario Paquet have made reference to this type of contribution in their affidavits (paras 12-13 of the affidavit of Paul O'Brien and paras 15-17, 20-26 of the affidavit of Mario Paquet). This creates an attachment to Canada for Canadian citizens living abroad but it is of less significance for those living abroad for extended periods.

28. In my view, the receipt of CPP and/or OAS payments while living abroad is the most important of the attachments described above and, particularly for retirees for whom this may be a significant source of income, evidences a significant attachment to Canada.

B. Total OAS and CPP Payments Abroad

29. At paragraphs 41 to 43 of the affidavit of Paul O'Brien, Mr. O'Brien has disputed my description of total benefits paid to individuals living outside the country, claiming they did not necessarily reside in countries with which Canada had a social security agreement

30. The first point in reply to this is that the question of attachment does not depend on whether or not payments are made pursuant to a social security agreement. The most significant form of attachment, in my opinion and as described above, is the receipt of CPP and/or OAS benefits while living abroad, whether pursuant to an agreement or otherwise.

31. In addition, the publicly available information does suggest that, even though certain payments are not made under an agreement, they are paid in countries with which Canada has concluded an agreement. Attached as Exhibit F to this affidavit is a copy of Service Canada's website information which publishes information about benefits paid in countries with which Canada has concluded a social security agreement. The attached Exhibit provides updated information compared to my May 2012 affidavit in that it summarizes payments from 2012.


32. According to the attached Exhibit, the total OAS and CPP payments made in 2012 in countries in which Canada has concluded a Social Security Agreement was over \$843 million. Some of these payments were made "under an agreement" (\$157 million) and some were made "without an agreement" (\$686 million), it appears that all these payments were made in countries with which Canada had concluded agreements. Because my original affidavit used numbers published in the same manner, I understood that the payments I summarized were made only in countries with which Canada had concluded security agreements.

33. With respect to paragraph 44 of Mr. O'Brien's affidavit, he is quite correct that my May 2012 affidavit included a typographical error. At paragraph 29 of my previous affidavit, I intended to make reference to "Canadians resident in 48 countries" and not "Canadian residents in 48 countries".

34. I make this affidavit in reference to the application to have relevant provisions of the *Canada Elections Act*, as described in the Notice of Application, declared unconstitutional and of no force and effect and for no other or improper purpose.

SWORN BEFORE ME at the City of
Toronto, Langley, in the Province of British Columbia, Ontario
Columbia, this 20th day of June, 2013.


DON DE VORETZ


A Commissioner for taking Affidavits.
Shaun O'Brien