

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Nova Scotia v. Owens*, 2007 NSSC 341

**Date:** 20071127

**Docket:** SH 267567

**Registry:** Halifax

**Between:**

Michael Owens

Appellant

v.

Her Majesty The Queen

Respondent

**Judge:** The Honourable Justice M. Heather Robertson

**Heard:** May 29, 2007, in Halifax, Nova Scotia

**Written Decision:** November 27, 2007

**Counsel:** David J. Demirkan and Jessie Irving (student), for the appellant  
Caitlin A. Ward and John Ashley, for the respondent

**Robertson, J.:**

[1] Michael Owens the appellant disputes his reassessment under the *Nova Scotia Income Tax Act*, R.S.N.S. 1989, c. 217 (“*NSITA*”) in respect to the taxation years 2002-2003. The appellant has been employed as a pilot with WestJet since January of 1999. The base of WestJet’s operations and the appellant’s employment is Calgary, Alberta.

[2] Section 5 of the *NSITA* sets out the liability of an individual to pay income tax under the *NSITA*. It states:

5 An income tax shall be paid as hereinafter required for each taxation year by every individual

(a) who was resident in the Province on the last day of the taxation year;  
or

(b) who, not being resident in the Province on the last day of the taxation year, had income earned in the taxation year in the Province, as defined in clause 7(c).

[3] The phrase “income earned in the taxation year in the Province” is defined in clause 7(c) of the *NSITA* as:

(c) "income earned in the taxation year in the Province" means income earned in the year in the Province as determined in accordance with Federal Regulations made for the purposes of the definition "income earned in the year in a province" in subsection 120(4) of the Federal Act;

[4] The reassessment did not change the federal tax owing but did change the appellant’s provincial tax liability by deeming that he was a resident of Nova Scotia for the taxation years 2002-2003.

[5] Although most appeals of income tax matters are heard by the Tax Court of Canada, uniquely this appeal is a provincial income tax appeal under s. 64 of the *Income Tax Act*, R.S.N.S. 1989, c. 217. *Gardner v. Canada*, 2001 F.C.N. 401 [2002] S.C.C.A. No. 90, *Little v. Canada*, 2006 TCC 627.

[6] The sole issue before this Court is therefore the factual determination of whether the appellant's residency in Nova Scotia has been established.

[7] Counsel for the appellant has submitted a partial agreed statement of facts. They are as follows:

1. Since January, 1999, and during the 2002 and 2003 income tax years (the "period under appeal"), Mr. Owens has been employed as a pilot with WestJet, whose headquarters is in Calgary. The Appellant's employment requires significant travel.
2. After taking employment with WestJet, the Appellant moved into a rented apartment leased by another WestJet pilot, Kevin Hollands. The Appellant signed a month-to-month lease with Mr. Hollands. This lease transitioned into a subsequent agreement to live in a townhouse condominium owned by Mr. Hollands. Mr. Hollands and the Appellant have shared accommodations since 1999.
3. He required by his contract of employment to report for duty in Calgary for a minimum of 18 days per month.
4. During the 2002-2003 tax years Michael Owens was a full time employee of WestJet.
5. Mr. Owens has an Alberta driver's license and an Alberta health card, and maintains a bank account in Alberta. He had Nova Scotia Medical Services Insurance (MSI) coverage from June 1, 1988 to April 30, 1999 at which point he was covered by Alberta Medicare. He has held a valid Alberta driver's licence since April 19, 2001.
6. The Appellant's motor vehicle insurance and investment information from CIBC Mellon were sent to his Alberta address. The Appellant had motor vehicle insurance provided by Security National Insurance Company of Edmonton, Alberta through Meloche Monnex, a broker located in Alberta.
7. In November, 2005, he purchased a home in the Calgary suburb of Crossfield.
8. Before going to work for WestJet, he resided in Nova Scotia with his wife and two children.

9. Mr. Owens built a family home in Windsor, Nova Scotia in 1990 in joint ownership with his wife, who still lives there. One of the Appellant's children lived with his wife during the period under appeal and attended high school. The other child attended university in Nova Scotia.

10. The Appellant's wife was employed as a teacher in Nova Scotia during the period under appeal. The Appellant was not legally separated from his wife during the period under appeal and remains married to her. The Appellant currently spends the majority of his time in Alberta, and his wife continues to live in the family home in Nova Scotia.

11. Mr. Owens spent time with his family in Nova Scotia during the period in question and continues to do so.

12. During the period under appeal, the Appellant and his wife maintained a joint bank account in Nova Scotia into which their salaries were deposited. During the period under appeal, the Appellant's pay stub showed his Alberta address. He also has a bank account in Alberta.

13. He has investments that are managed in Toronto (CIBC Mellon). He also has investments with National Bank Financial in Montreal.

14. He entered into a Rogers AT&T Wireless Service Agreement for a mobile phone with an Alberta area code in Calgary on November 20, 2000. The Appellant used this cell phone during the period under appeal.

15. Commencing in 2000, Mr. Owens filed tax returns on the basis that he was resident in Alberta on December 31 of 2002 and 2003. For the period under appeal, the Canada Revenue Agency ("CRA") assessed him on the basis that he was resident in Nova Scotia, rather than Alberta, on December 31, 2002 and 2003.

16. Mr. Owens filed valid Notices of Objection with respect to the assessment of his 2002 and 2003 taxation years. The assessments were confirmed by the Minister of National Revenue on March 22, 2006.

[8] The affidavit evidence of Paulus Augustinus Ysselmuiden and Kevin Holland, were before the Court. Mr. Holland's affidavit remained unsigned by him. They were fellow employees of WestJet who confirmed both his employment and living arrangements in Alberta.

[9] The Court also heard the *viva voce* evidence by Michael Owens and Cathy Owens. His evidence is as follows:

[10] Michael Owens has been a pilot since 1974 flying for the military until 1988 before joining civilian airlines. He was born in Winnipeg and still participates in the family farm business, spending 3-4 days a month attending a farm business with his brothers.

[11] In 1988, he joined Air Atlantic as a pilot and stayed with this company throughout its various bankruptcies and rebirth as the IMP owned CanJet.

[12] In June 1999, Mr. Owens testified that seeking a better employment opportunity he packed his truck with all his personal belongings and went to live in Alberta to gain full-time employment with WestJet. He left his family behind, as his wife was not yet ready to retire from her teaching career, from which she wanted full pension benefits, that would only accrue at the end of June 2006.

[13] His children also remained behind with his wife at the family's home in Windsor, Nova Scotia. His daughter Caitlin was in grade 10 at the local highschool and his daughter Alexandra was in first year at a Nova Scotian university in 2002-2003. The children had grown up in Hants County and were very involved in sports and other extra mural activities and wished to complete their education in Nova Scotia.

[14] This is not a case where Mr. Owens, who was required to fly 18 days of each month, was able to commute to Nova Scotia on any regular basis and live with his family.

[15] WestJet during the period of time in question had no flights to eastern Canada, Mr. Owens testified. Further due to 911, his evidence is that pilots lost the privilege in 2001 of "sharing a flight deck" i.e. being able to get on other airlines to commute to Nova Scotia.

[16] Accordingly, he testified he had to travel by plane, train or automobile at very infrequent intervals to visit Nova Scotia. Driving took five days and was therefore not really an option. He could fly east on WestJet as far as Hamilton, Ontario and then take a train overnight to get as far as Halifax. This he did when possible if he could get a group of days off. He also purchased out of his own

pocket tickets on Air Canada flights and his evidence is that he would spread the price of a ticket over two months buying a \$600 plus tax excursion fare from Calgary to Halifax. If his schedule changed for the next month he would incur a further cost of \$100 to change the excursion reservation.

[17] His evidence was that he might make it back to Nova Scotia to visit about four days each month but there were some months when he did not return at all, waiting until he could put together a block of time of 10 days or so to enjoy a longer visit. He also had farm business to attend to each quarter in Manitoba.

[18] On time off from the airline he testified that he was also obligated to take training sessions three times a year, going to ground school as well as loft or flight training and taking examinations to maintain his pilot's qualifications. Each training event took three days or nine days annually, outside of his commitment to fly 18 days per month. Study time in preparation for these courses took up additional days off, when he was unable to visit Nova Scotia.

[19] His evidence was therefore that he could not visit Nova Scotia as often as once per month.

[20] Mr. Owens testified that during these years in question, away from his family he developed a social life with the families of fellow pilots, so he would be occupied on his days off spent in Alberta. He also had the opportunity to go to Banff to watch his daughter participate in a national downhill ski racing event.

[21] Mr. Owens then reviewed Exhibit 3 of the Court record, verifying the documentation he held as a resident of Alberta, as referred to in the statement of facts. The record also included details of his house purchase, lease arrangement, investment portfolio, pilot schedule and working conditions and medical information, all relating to his residency in Alberta.

[22] I accept this documentation and his evidence as establishing the fact of his residency in Alberta.

[23] Mr. Owens' evidence was supported by the evidence of his wife Cathy Owens. Indeed, she described living without her husband since his departure to Alberta and the effect of his absence. She performed all major household chores and repairs herself or had to hire others to do them, such as snow removal,

gardening and property maintenance and preparation for the sale of their Nova Scotia residence.

[24] In 2006, after her retirement from teaching she joined her husband in Alberta, where they are both now full-time residents.

[25] I am satisfied on all the evidence before me that Michael Owens, was resident in Alberta for the taxation years 2002-2003. He made the move to Calgary at significant personal sacrifice and that of his family to find secure full-time employment.

[26] The appeal is allowed. With respect to costs, in the absence of agreement by the parties the court is prepared to address the issue of costs.

Justice M. Heather Robertson