

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20120320**

**Docket: A-362-09**

**Citation: 2012 FCA 95**

**CORAM: EVANS J.A.  
PELLETIER J.A.  
LAYDEN-STEVENSON J.A.**

**BETWEEN:**

**RON BALLANTYNE**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Winnipeg, Manitoba, on November 16, 2011.

Judgment delivered at Ottawa, Ontario, on March 20, 2012.

**REASONS FOR JUDGMENT BY:**

**EVANS J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
LAYDEN-STEVENSON J.A.**

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**REASONS FOR JUDGMENT**

**EVANS J.A.**

[1] Ron Ballantyne is a status Indian and a member of the Grand Rapids First Nation. He has lived all his life on the Grand Rapids Reserve (Reserve), which is located on the shores of Lake Winnipeg in Manitoba.

[2] In a decision dated June 16, 2009 and reported at 2009 TCC 325, Justice Webb (Judge) of the Tax Court of Canada rejected Mr Ballantyne's submission that the Minister of National Revenue (Minister) had erroneously included in his income for the 2001 and 2002 taxation years income that he had earned from his commercial fishing business.

[3] The Judge held that the income in question was not situated on a reserve and was therefore not exempt from tax under paragraph 87(1)(b) of the *Indian Act*, R.S.C. 1985, c. I- 5, as “the personal property of an Indian ... situated on a reserve”.

[4] The Judge summarized (at para. 77) the bases of his decision as follows:

The Appellant in this case caught the fish off the Reserve, spent most of his working time while carrying on his business during the fishing season off the Reserve and sold his entire catch to ... [Freshwater Fish Marketing Corporation] (who were located off the Reserve and who transported the entire catch off the Reserve as soon as possible). None of the fish were sold on the Reserve. In my opinion, the Appellant’s fishing activity was carried on in the commercial mainstream and his income from this activity does not qualify for the exemption pursuant to section 87 of the *Indian Act*.

[5] Mr Ballantyne appeals to this Court from that decision. The hearing of his appeal was adjourned so that the Court could hear it together with the Minister’s consolidated appeals from the Tax Court’s decisions in *Robertson v. Her Majesty the Queen* and *Saunders v. Her Majesty the Queen*, reported at 2010 TCC 552 (*Robertson*).

[6] The Court dismissed the appeal in *Robertson* and that decision is being released concurrently with this one. It is reported at 2012 FCA 94. For the reasons given by this Court in *Robertson*, I would allow Mr Ballantyne’s appeal.

[7] The material facts of the present appeal are very similar to those in *Robertson*. Briefly, Mr Ballantyne has been a self-employed fisher since 1976, and owns two fishing quotas that allow him to pursue that vocation. He fishes half the time at a location in Lake Winnipeg near his house, and

half in Gull Bay, also in Lake Winnipeg, a 45-minute drive away. When away from home fishing, he splits his time between two fishing camps on Lake Winnipeg. He does his business banking on-reserve.

[8] Mr Ballantyne is a member of the Grand Rapids Fishermen's Co-op (Co-op), which is an on-reserve institution with approximately 104 members. Roughly 99 of those members are Treaty Indians, while the other five are of mixed Aboriginal ancestry. The Co-op employs its own workers to staff its administrative office and packing station, both situated on the Reserve. The Co-op assists fishers by providing them with supplies (such as oil, gas, and nets) on a credit basis. It also acts as an agent of Freshwater Fish Marketing Corporation (Freshwater) in the buying and selling of fish, and acts as the representative of the fishers when dealing with Freshwater. While the Co-op was created prior to the establishment of Freshwater, the current arrangement between the fishers, the Co-op, and Freshwater is described below.

[9] The Co-op grades, sorts, and packs the fish brought to it by its members, to whom it issues receipts tallying their catch. Freshwater then collects the fish from the Co-op's on-reserve packing station and eventually sells the fish in domestic and international markets. Freshwater transfers money to the Co-op based on the receipts issued to fishers. The amount transferred to the Co-op in trust for the fishers is 85% of Freshwater's prediction of the market price for different species of fish sold in that year. In addition to the payments collected from the Co-op, fishers also receive a cheque directly from Freshwater at the end of each year for the difference between 85% of the predicted market price and the actual market price, if any.

[10] Because I rely on the reasons in *Robertson*, it is not necessary to provide full reasons for the present decision. However, in deference to the Judge, whose decision was released before the Supreme Court of Canada's decisions in *Bastien v. Canada*, 2011 SCC 38, [2011] 2 S.C.R. 710 (*Bastien*), and *Dubé v. Canada*, 2011 SCC 39, [2011] 2 S.C.R. 764, I would note two aspects of his analysis that, in light of *Bastien* and this Court's decision in *Robertson*, appear, with respect, to have led him astray.

[11] First, the Judge attached significant weight to the fact that all the fish were sold off-reserve: both Freshwater, the purchaser of the fish from Mr Ballantyne, and Freshwater's customers were off-reserve. However, as explained in *Robertson* (at paras. 75-79), what Freshwater did with the fish after purchasing them from the fishers is largely irrelevant for determining the *situs* of the fishing business income. It was also an error for the Judge to attach more significance to Freshwater as the customer of the fishers' business, than to the Co-op, the on-reserve institution with which the fishers dealt and through which the fish were sold. The Co-op played a critical and pervasive role in all aspects of its members' fishing businesses.

[12] Second, the Judge stated that Mr Ballantyne's fishing activities were carried on in the commercial mainstream and were therefore not exempt from tax under section 87. The principal basis of this conclusion seems to have been that the fish were sold off-reserve and, to a lesser extent, that they were caught off-reserve as well. He was also of the view (at para. 14) that an activity could not be both in the commercial mainstream and integral to the life of the reserve.

[13] However, *Bastien* (at para. 52) cautions against using the “commercial mainstream” principle as a basis for concluding that income is not situated on a reserve. The Court also stated (at para. 54) that, even if earned in the “commercial mainstream”, income may still be sufficiently closely connected to a reserve to be situated there for the purpose of section 87: compare Justice Hershfield’s reasons in *Robertson* (at paras. 144-45). Indeed, this is the basis on which Justice Valerie Miller in *MacDonald v. Canada*, 2011 TCC 437, another fishing income case, but decided after *Bastien*, upheld the appellant’s claim that his income was tax-exempt under section 87.

[14] I also note five factual differences between *Ballantyne* and *Robertson*.

[15] First, unlike Mr Saunders, one of the Respondents in *Robertson*, Mr Ballantyne lived on-reserve, where he also maintained his equipment and kept his business records.

[16] Second, unlike the packing stations used by Messrs Robertson and Saunders, the packing station to which Mr Ballantyne delivered his catch, and where the receipt for the catch was issued, was on-reserve.

[17] Third, most of the time he also cleaned his fish on reserve at the packing station, whereas Messrs Robertson and Saunders generally cleaned theirs off-reserve.

[18] In my view, these differences, while seemingly small, serve to strengthen, not weaken, the connection between the Reserve and Mr Ballantyne’s fishing business income.

[19] Fourth, the Judge did not have as much historical evidence as was adduced to Justice Hershfield in *Robertson*. However, in my view, the history of commercial fishing was far from dispositive of the ultimate question in issue: was the business income from fishing situated on a reserve?

[20] Fifth, Mr Ballantyne owns two fishing quotas, which determine the quantity and species of fish he may catch in a season. In contrast, in *Robertson* the fishing quotas were owned by the Co-op, which allocated them to individual fishers. However, all other roles played by the Co-op in Mr Ballantyne's fishing business as well as the entire circumstances of this case must be considered. I am not persuaded that the fact that the Co-op did not own the quotas so weakens the connection between the Reserve and the fishing business that the resulting income was not situated on a reserve.

[21] For these reasons, and for those given by this Court in *Robertson*, I would allow the appeal with costs here and below, set aside the decision of the Tax Court, and remit the matter to the Minister for reassessment in accordance with these reasons.

“John M. Evans”

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J.A.

“I agree  
J.D. Denis Pelletier J.A.”

“I agree  
Carolyn Layden-Stevenson J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-362-09

**STYLE OF CAUSE:** Ron Ballantyne v. Her Majesty  
The Queen

**PLACE OF HEARING:** Winnipeg, Manitoba

**DATE OF HEARING:** November 16, 2011

**REASONS FOR JUDGMENT BY:** EVANS J.A.

**CONCURRED IN BY:** PELLETIER AND  
LAYDEN-STEVENSON J.J.A.

**DATED:** March 20, 2012

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