

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120320

Docket: A-456-10

Citation: 2012 FCA 94

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

**RONALD ROBERTSON and
ROGER SAUNDERS**

Respondents

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:

LAYDEN-STEVENSON J.A.

CONCURRING REASONS BY:

PELLETIER J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This is yet another case in which the Court must determine whether income is exempt from income tax because it is “the personal property of an Indian ... situated on a reserve.” Again, the disputed question is whether the income in question is “situated on a reserve” within the meaning of paragraph 87(1)(b) of the *Indian Act*, R.S.C. 1985, c. I-5 (Act).

[2] This is the first occasion this Court has had to consider the issue since the Supreme Court of Canada’s restatement of the relevant law in *Bastien Estate 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 (*Dubé*), which the Court released at the same time. I shall refer in these reasons principally to paragraphs in *Bastien* because it is the leading case.

[3] The present case is an appeal by the Crown from a decision of the Tax Court of Canada, in which Justice Hershfield (Judge) allowed the appeals of Ronald Robertson and Roger Saunders from assessments of their income tax liability for the taxation years 1999, 2000, 2001, and 2002 (Mr Robertson), and 2002 and 2003 (Mr Saunders). He held that the Minister of National Revenue (Minister) had wrongly included in their income the business income they had earned in those years from commercial fishing, and the employment insurance benefits that they had received.

[4] The Judge held that the Appellants' income was situated on the Norway House Reserve (Reserve) and was thus exempt from income tax by virtue of section 87 of the Act. He did not have the benefit of *Bastien* and *Dubé*, and his analysis may be inconsistent with this jurisprudence in one or two respects, particularly in the weight he attached to the fact that commercial fishing had long been integral to the life of the Reserve.

[5] Nonetheless, in my opinion the Judge reached the right result. For the reasons that follow, I would dismiss the Crown's appeals.

B. *FACTUAL BACKGROUND*

[6] The facts set out in these reasons are taken from the parties' partial agreed statements of facts prepared for the purpose of their appeals to the Tax Court, and from the Judge's additional findings of fact. What follows is an introductory factual synopsis.

(i) *Appellants*

[7] Both Mr Robertson and Mr Saunders are Indians as defined by section 2 of the *Indian Act*, and members of the Norway House Cree First Nation (First Nation), which in 1875 became signatory to Treaty No. 5.

[8] Mr Robertson has lived his entire life on the Reserve, situated near the Norway House Settlement, on the south shore of Little Playgreen Lake which flows into Lake Winnipeg. During the years in question, Mr Saunders lived off-reserve on West Island Route, in the Norway House Settlement, not far from the Reserve.

[9] In the taxation years in question, both Appellants were self-employed commercial fishers. They owned fishing licences and received fishing quotas from the Norway House Fishermen's Co-operative (Co-op), the owner of the quotas. Mr Robertson started his fishing business in 1992, and Mr Saunders in 1973. They fish during the summer and fall in Playgreen Lake, Lake Winnipeg and, in Mr Saunders' case, in Grassy Lake as well. They generally reach the lakes by boat from the Reserve, although the lakes themselves are off-reserve.

[10] The Appellants stay overnight at off-reserve fishing camps on about half of their fishing trips; they are able to return home from the others at the end of a day's fishing. They dress the fish in the camps or in their boats. Each day, weather permitting, they take their catch to packing stations operated by the Co-op, which is described further below. The packing stations are located off-reserve, but not far from either the fishing camps or the Reserve. The Judge described (at para. 107) the camps and the packing stations as being only "short commutes from the on-reserve docks of both Appellants."

[11] At the packing stations, the fish are graded, sorted for size and species, weighed, and packed on ice. An official receipt for the fish delivered by the fishers, and the price to be paid, is prepared at the packing station where they deliver their catch.

[12] In addition to starting out for their fishing areas from the Reserve, the Appellants store and maintain their boats on the Reserve. Mr Robertson also keeps and maintains his nets and other fishing gear on the Reserve. Because he lives off-reserve, Mr Saunders sometimes keeps his fishing gear at his home. The Appellants employ helpers from the Reserve, where they pick them up to take them fishing. Before setting out, the Appellants fill their boats with gas from the Co-op on the Reserve.

[13] The Appellants keep their books, records, and other material related to their fishing businesses, at home. For Mr Robertson this means on-reserve, and off-reserve for Mr Saunders.

(ii) *The Co-op*

[14] Like other fishers on the Reserve, the Appellants are members of the Co-op. In the taxation years in question, the Co-op had approximately 52 members; all but four lived on the Reserve. In addition, it employed about 160 Band members all of whom lived on the Reserve. However, not all members of the Co-op are members of the First Nation; a few are not status Indians.

[15] The Co-op purchases fish from its members as the agent of the Freshwater Fish Marketing Corporation (Freshwater), which is described below. The Co-op pays the fishers weekly, on the basis of the receipts sent to it by the packing stations. The Co-op makes the payments from funds provided by Freshwater, which pays money into the Co-op's bank account in trust for this purpose. Fishers collect the payment for their weekly catch from the Co-op's administration office on the Reserve.

[16] In addition to acting as Freshwater's purchasing agent, the Co-op assists its members in their fishing businesses in a number of ways. For example, it receives and divides the fishing quotas managed by the provincial government; it provides loans for the purchase of boats; sells gas, oil, nets, and other fishing gear; and it pays the fishers' helpers by deducting their wages from the fishers' cheques. The Co-op predates Freshwater.

[17] Indeed, the Co-op is active in every aspect of commercial fishing by members of the First Nation, from assisting fishers to get started in business, to acting on their behalf when dealing with Freshwater.

(iii) *Freshwater*

[18] Freshwater, a federal Crown corporation, was established in 1969 by the *Freshwater Fish Marketing Act*, R.S.C. 1985, c. F-13, to regulate inter-provincial and export trade in freshwater fish. Its purposes include marketing and trading in fish, their products and by-products, within Canada and beyond (section 7). It operates in Manitoba, Saskatchewan, Alberta, the Northwest Territories, and part of northwestern Ontario. Freshwater is obliged to purchase all legally caught fish offered to it by fishers in the areas where it operates (subsection 22(2)). However, Freshwater is not a monopoly buyer: fishers are at liberty to bypass it and to sell their fish directly into the market.

[19] Freshwater purchases fish through agents, including the Co-op. The relationship between Freshwater and the Co-op is governed by an agreement which provides, among other things, that the Co-op will purchase fish from its members as the agent of Freshwater at the agent's current delivery points at Whiskey Jack and Playgreen Point, which are off-reserve. Under the agreement, the Co-op charges Freshwater a fee for buying the fish, which covers some of the cost of the services it provides to its members.

[20] At the start of each fiscal year, Freshwater sets the price at which it will purchase different species of fish on the basis of their predicted market price, less its projected operating costs. As fishers deliver their catches, Freshwater pays to the Co-op in trust for the fishers 85% of the predicted market price of the fish caught. At the end of the fiscal year, Freshwater mails cheques directly to the fishers for the difference, if any, between the money paid to them by the Co-op and the actual market price of the fish sold. In the taxation years in question, Freshwater did make final

payments. In other years, however, there has been no difference to pay because 85% of the predicted market price was equal to or exceeded the price at which Freshwater actually sold the fish.

[21] Fish are collected by a trucking company from the Co-op on the Reserve and the Whiskey Jack packing station. From there they are hauled to Freshwater's head office in Winnipeg. Freshwater fillets, freezes the fish whole, or grinds them into meal. It sells 80% of the fish in international markets, mostly the United States.

[22] On the basis of evidence of the Co-op's President, the Judge summarized as follows (at para. 58) the role of the Co-op in the community, and in the fishing business of its members in particular:

[The witness] described the Co-op as the Band's fishers' representative, giving the reserve a place in the industry. The Co-op represents the fishers, ensuring that they are dealt with honestly and fairly. ... The Co-op certainly plays a role well beyond that as [*sic*] acting as an agent or intermediary between the fishers and [Freshwater]. Indeed, its main role was to represent the fishers of the community. ... On this point his evidence was clear: the Co-op was created to help the fishermen.

C. *DECISION OF THE TAX COURT*

[23] The Judge heard a considerable volume of evidence from the parties' expert witnesses on traditional fishing practices of the Appellants' ancestors. In particular, he found that before the signing of Treaty No. 5 in 1875, the Upland Cree, ancestors of the present First Nation, had long engaged in fishing for sale or barter to the Hudson's Bay Company. Commercial fishing had been

an integral part of their livelihood for a very long time and, to this day, remains of great importance to the social, cultural, and economic life of the First Nation and the Reserve.

[24] The Judge also noted that, following the flooding of traditional lands of the Norway House people for a hydroelectric project, the First Nation sought and received compensation, and pressed for the settlement of land claims. As a result, new reserve lands were promised and the Norway House Resource Management Area (RMA) was recognized.

[25] The RMA comprises land designated as such by Manitoba legislation following an agreement to settle a land claim between the First Nation, the provincial and federal governments, and the Manitoba Hydro-Electric Board. The First Nation has had a long association with the land in the RMA. The Reserve itself is within the boundaries of the RMA, but the rest of the RMA land is not, and has never been, part of the Reserve. The Judge found that while the Appellants' fishing activities occurred within the RMA, they were not on the Reserve.

[26] Having reviewed the evidence on the history of commercial fishing by the Norway House Cree and their ancestors, the Judge then turned to the central legal issue: was the Appellants' income from their fishing business situated on a reserve? In answering this question, the Judge adopted (at para. 98) the list of factors set out in *Southwind v. Canada*, (1998), 156 D.L.R. (4th) 87, 98 DTC 6084 (F.C.A.) for determining whether the connections between an Indian's business income and a reserve were sufficient to situate it on a reserve.

[27] The Judge stated (at para. 99) that he would focus primarily on the factors which, according to the Crown, indicated that the income was not situated on a reserve: the fact that many of the fishing activities and the fishers' customer (Freshwater) were off-reserve, and that the Appellants' businesses were in the commercial mainstream.

[28] He concluded that these factors did not so attenuate the connection between the Reserve and the Appellants' fishing activities that their resulting business income was not situated on the Reserve for the purpose of section 87. In any event, he held (at para. 101), the Appellants' relationship with the Co-op, and their "activities' historical, cultural and economic connection with the reserve ... create a compelling connection to the reserve."

[29] The Judge rejected (at para. 119) the stark dichotomy between income that arises from an activity in the "commercial mainstream" (and is therefore not situated on a reserve), and income from an activity that is integral to life on a reserve and is held by the Indian *qua* Indian (and is therefore situated on a reserve). True, the Appellants sold their fish to Freshwater, which in turn sold them on national and international markets. However, given all the other connections between the Appellants' fishing business activities and the Reserve, the Judge concluded that the role of Freshwater in the purchase and sale of the fish did not constitute a choice by them "to enter the commercial mainstream" (para. 129).

D. LEGISLATIVE FRAMEWORK

[30] Section 87 of the *Indian Act* is the only statutory provision directly relevant to this appeal.

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:

- (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
 (b) the personal property of an Indian or a band situated on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

87. (1) Nonobstant toute autre loi fédérale ou provinciale, mais sous réserve de l'article 83 et de l'article 5 de la *Loi sur la gestion financière et statistique des premières nations*, les biens suivants sont exemptés de taxation :

- a) le droit d'un Indien ou d'une bande sur une réserve ou des terres cédées;
 b) les biens meubles d'un Indien ou d'une bande situés sur une réserve.

(2) Nul Indien ou bande n'est assujéti à une taxation concernant la propriété, l'occupation, la possession ou l'usage d'un bien mentionné aux alinéas (1)a) ou b) ni autrement soumis à une taxation quant à l'un de ces biens.

(3) Aucun impôt sur les successions, taxe d'héritage ou droit de succession n'est exigible à la mort d'un Indien en ce qui concerne un bien de cette nature ou la succession visant un tel bien, si ce dernier est transmis à un Indien, et il ne sera tenu compte d'aucun bien de cette nature en déterminant le droit payable, en vertu de la *Loi fédérale sur les droits successoraux*, chapitre 89 des Statuts révisés du Canada de 1952, ou l'impôt payable, en vertu de la *Loi de l'impôt sur les biens transmis par décès*, chapitre E-9 des Statuts révisés du Canada de 1970, sur d'autres biens transmis à un Indien ou à l'égard de ces autres biens.

[31] Two other provisions of the *Indian Act* give some context to section 87. First, subsection 89(1) protects “the real and personal property of an Indian or a band situated on a reserve” from,

among other things, mortgage, seizure, distress, and execution. The underlined words are to be given the same meaning as they have in paragraph 87(1)(b), that is, “within the boundaries of the reserve”: *Bastien* at paras. 4 and 14.

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

89. (1) Sous réserve des autres dispositions de la présente loi, les biens d'un Indien ou d'une bande situés sur une réserve ne peuvent pas faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution en faveur ou à la demande d'une personne autre qu'un Indien ou une bande.

[32] Second, subsection 90(1) provides that for the purpose of sections 87 and 89, personal property shall be deemed always to be situated on a reserve if it was purchased by Her Majesty with either Indian moneys or moneys appropriated by Parliament, or was given to an Indian or to a band by Her Majesty under a treaty or agreement.

90. (1) For the purposes of sections 87 and 89, personal property that was

90. (1) Pour l'application des articles 87 et 89, les biens meubles qui ont été :

(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

a) soit achetés par Sa Majesté avec l'argent des Indiens ou des fonds votés par le Parlement à l'usage et au profit d'Indiens ou de bandes;

(b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

b) soit donnés aux Indiens ou à une bande en vertu d'un traité ou accord entre une bande et Sa Majesté,

shall be deemed always to be situated on a reserve.

sont toujours réputés situés sur une réserve.

E. ISSUES AND ANALYSIS

(i) Preliminary matters

(a) *standard of review*

[33] While retaining the essentials of the connecting factors approach established in *Williams v. Canada*, [1992] 1 S.C.R. 877 (*Williams*), the Supreme Court in *Bastien* and *Dubé* reset the previous analytical framework in some significant respects. In particular, the Court emphasized that section 87 protects only property that is within the boundaries of the reserve. It also rejected the “commercial mainstream” principle as a basis for determining if property was situated on a reserve and the notion that the activities giving rise to the property must be linked to a traditional Indian way of life.

[34] Since *Bastien* and *Dubé* were released after the Judge’s decision in the present case and in some respects modified the previous law, it is appropriate to review the Judge’s identification and weighing of the connecting factors on a standard of correctness. However, the findings of fact on which his conclusions are based may only be disturbed on appeal if they are shown to be vitiated by palpable and overriding error.

(b) *section 35*

[35] This appeal is not about whether either of the Appellants has an Aboriginal or Treaty right to engage in commercial fishing free of taxation, or whether the imposition of tax on their business income from fishing would infringe that right contrary to section 35 of the *Constitution Act, 1982*. The Appellants relied on section 35 in the Tax Court. However, having found in their favour on

section 87, the Judge did not find it necessary to decide the constitutional issue. The Appellants have not pursued the section 35 claim in this Court.

(c) *income as property*

[36] “Income” is a concept rooted more in the *Income Tax Act* than in the law of property. Nonetheless, the parties agree that *Bastien* confirms (at para. 1) that income is “property” for the purpose of section 87, whether it is derived from employment, employment insurance, investments, business, or property.

[37] However, attempting to situate income, an intangible, in a physical location through a consideration of factors connecting it to a reserve has proved a challenging task for the courts. The concept of “property” in section 87 has been extended from the physical means for earning an income to include the income earned by their use.

(d) *RMA*

[38] Although the Reserve is technically within the boundaries of the RMA, I have already noted that the whole RMA is not, and has never been, part of the Reserve. This is important because the Supreme Court in *Bastien* (at para. 15) made it clear that section 87 exempts an Indian’s personal property from taxation only if the property is situated on a reserve, that is, situated within the boundaries of a reserve.

[39] This interpretation of section 87 is inferentially supported by the contrasting wording of subsection 90(1). This provision deems certain limited categories of property, none of which is at issue in the present case, always to be situated on a reserve for the purpose of section 87.

[40] Hence, the fact that one or more of the factors may connect the Appellants' income to a part of the RMA other than the Reserve is not in itself sufficient to attract the protection of section 87.

(e) *absence of manipulation*

[41] The Crown has not suggested that the Appellants have attempted an artificial manipulation of the connecting factors in order to bring their fishing income within the exemption from tax provided by section 87. The various connections between the Reserve and the Appellants' income from fishing are indisputably *bona fide* and not motivated by tax avoidance considerations. This was also the situation in *Bastien* (see para. 62).

[42] However, in order to avoid potentially abusive or artificial manipulation of the connecting factors in other cases, a degree of flexibility must be maintained in the selection and weighing of the connecting factors, and in the emphasis given to those that provide a substantive basis for situating property on a reserve.

(ii) Analytical framework

[43] *Bastien* and *Dubé* concerned the location of investment income for the purpose section 87, while the present case involves business income. Nonetheless, the analytical framework set out in

those cases is applicable for determining the location of the Appellants' business income from fishing, with some adjustment of the relevant connecting factors and the relative weight to be assigned to them.

[44] In determining whether the Appellants' income was situated on the Reserve, I have considered and assessed the weight to be attached to the relevant factors in light of the Supreme Court of Canada's articulation of the statutory objective underlying section 87.

(a) purpose of section 87

[45] It is easier to say what the purpose of section 87 is not, than to state positively what it is. Thus, it is well settled that its purpose is not to "confer a general economic benefit upon the Indians": *Williams* at 885, quoted with approval in *Bastien* at para. 23. Nor is it limited to "the preservation of the traditional Indian way of life": *Bastien* at para. 28.

[46] More positively, Justice Gonthier in *Williams* (at 887) echoed a statement by Justice La Forest in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at 131, that the purpose of section 87 is to determine whether the Indian holds the property in question "as part of the entitlement of an Indian *qua* Indian on the reserve"; as such, the property is protected from erosion by either taxation or seizure. Factors connecting the property to a reserve must be selected and weighed, he said, with this purpose in mind.

[47] This articulation of the purpose of section 87 seems to have been endorsed by the majority in *Bastien* (at paras. 21-23) subject to two caveats.

[48] First, the relatively narrow scope of the operative words of section 87, namely “personal property of an Indian situated on a reserve”, cannot be expanded by reference to a broader underlying statutory objective: *Bastien* at para. 25. Second, section 87 should not be interpreted as limiting the protected property to that which is “integral to the life of the reserve or to the preservation of the traditional Indian way of life”: *Bastien* at para. 28.

[49] However, it is difficult to determine whether the Appellants’ business income is situated on a reserve by asking if it is property held by an Indian “as part of the entitlement of an Indian *qua* Indian on the reserve”.

[50] The reference to protection from erosion by taxation of “the entitlement of an Indian *qua* Indian” would seem to me more apt in the context of subsection 90(1) (personal property purchased by the Crown for, or given by the Crown under treaty to, Indians). Compare *Bastien* (at para. 53) where the Court stated that “commercial mainstream” was intended to identify property deemed by section 90 to be situated on a reserve.

[51] Absent a clearer sense of legislative objective, the juggling of multiple connecting factors is apt to result in arbitrary results. Nonetheless, our job is to apply the settled law to the facts before us as best we can.

[52] The concurring reasons of Justices Deschamps and Rothstein in *Bastien* provide assistance here when they say (at para. 71) that the basis for section 87 is “the Crown’s duty to respect the ability of Aboriginal people to manage the economic development of their reserves.” However, this does not mean that weight should be given to the fact that a taxpayer who lives on a reserve is likely to spend at least some of it there and thus enhance the reserve’s economic development: *Dubé* at para. 31; contrast the minority concurring opinion in *Bastien* at para. 88.

(b) type of property

[53] The property in this case is income that the Appellants earned from their fishing business in the taxation years in question. Since income is an intangible and has no physical location, where it is situated is largely governed by the location of the activities from which the income arises.

[54] The Appellants’ fishing business comprises activities of broadly two kinds: first, preparing for fishing, catching fish, and preparing them for sale and transportation; second, the “business” aspects of the enterprise, especially the sale of and payment for the fish. Locating these activities will go a long way to determining whether the resulting income is situated on a reserve.

(c) nature of taxation

[55] Section 87 apart, the Appellants’ income from their fishing business was their profit from that business and would be included in their taxable income for that year by virtue of subsection 9(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[56] Tax is imposed by reference to the source of a taxpayer's income, which, in this case, is the Appellants' fishing business. This, too, indicates that the location of the fishing business will largely determine the location of the income earned from it.

(d) residence of the taxpayers

[57] Whether a taxpayer lives on a reserve is not necessarily a factor of great weight in connecting the taxpayer's income to a reserve. The applicability of section 87 depends on whether the property in question, not its owner, is situated on a reserve. However, the fact that a person claiming the benefit of the section does live on a reserve is not altogether irrelevant either. Much depends on the facts of the particular case: *Bastien* at paras. 20-21.

[58] In my view, the fact that Mr Robertson lives on-reserve is relevant as a connecting factor because many of the activities and transactions associated with his fishing business – the source of the property in question – take place on the Reserve.

[59] Nonetheless, the fact that Mr Saunders lives off-reserve does not preclude him from establishing that his business income is situated on a reserve: *Dubé* at paras. 15-16. Nor, on the facts of this case, should his place of residence be taken as a clear indication that his income is situated off the Reserve: he lives near the Reserve, and conducts many of his fishing business activities there, as well as maintaining strong on-reserve family ties.

(e) *traditional way of life*

[60] In *Bastien* (at para. 28), the Court made it clear that the protection of section 87 is not limited to income earned in the course of activities that could be characterized as integral to a First Nation's traditional way of life. The application of section 87 should not be interpreted in a manner that limits the activities from which Indians may earn tax-exempt income to the past. At the same time, the Court did not categorically preclude consideration of this factor: see para. 28.

[61] In my opinion, the long history of commercial fishing in lakes near the Reserve by the First Nation and their ancestors, and its continuing importance to the economic, social, and cultural fabrics of the Reserve, is relevant to determining whether a sufficiently close connection exists between the Reserve and the source of the Appellants' income. In my view, these considerations serve to strengthen the connection between the Reserve and the Appellants' fishing business income, and thus tend towards situating the income on the Reserve.

[62] That the Appellants' fishing business may have connections with markets off-reserve does not weaken the connection of the resulting income to the Reserve. In *Bastien* (at paras. 52-56), the Court firmly rejected the "false opposition" between income earned in the "commercial mainstream" and that earned from an activity that was "integral to the life of the reserve", a distinction on which some previous cases had relied. Since the commercial nature of an income-generating activity does not preclude its being situated on a reserve, the Court indicated that property can be both in the commercial mainstream and connected (or even integral) to a reserve at the same time.

(f) location of the business activities

[63] As indicated earlier, the location of the source of the Appellants' income is, in my opinion, a very important indicator of whether their income is situated on a reserve: compare *Williams* at 896 (location of employment income important in situating employment insurance benefits); *Folster v. Canada*, [1997] 3 F.C. 269 (C.A) at para. 27 (previous and planned locations of employment important factors in situating employment income); *Bastien* at para. 47 (location of source of capital relevant to situating income earned from investing it).

[64] The activities that comprise the Appellants' business can be divided into two broad categories: those related principally to catching the fish, and those related principally to their sale.

1. fishing

[65] The Appellants' fishing activities are conducted partly on-reserve, and partly off-reserve. Most of the preparations necessary for a fishing trip take place on the Reserve: both Appellants start out from the Reserve; hire helpers there; and keep their boats and fill them with gas there. Mr Robertson also keeps and maintains his fishing gear there, while Mr Saunders sometimes keeps and maintains his at his off-reserve home. The Appellants are also able to obtain loans on the Reserve from the Co-op to purchase fishing equipment.

[66] On the other hand, they catch their fish in lakes that are not part of the Reserve. However, the lakes are close to the Reserve and are traditional fishing destinations for the people of the Reserve; there are no lakes in reserves. The Appellants prepare the catch at a fishing camp or in

their boats. The camps are not on the Reserve, but are not far away. Approximately half the time they stay overnight at a camp. Otherwise, they return home at the end of day: Mr Robertson to the Reserve, and Mr Saunders to his off-reserve home.

[67] It does not seem to me to be very useful to ask where the Appellants make the “business” decision as to where they will fish. The evidence is that sometimes they decide before they leave the Reserve, and sometimes while fishing.

[68] Thus, even though the Appellants do not catch their fish on the Reserve, many of the activities surrounding the catching of fish are located on reserve. When taken as a whole, these considerations, in my view, constitute no more than a weak indicator that the Appellants’ fishing income is situated on a reserve.

2. selling fish

[69] The Appellants take their fish to a packing station, not far from the Reserve, where employees of the Co-op record the content and weight of the catch, and give them a receipt for it. Co-op employees also pack the fish in preparation for transportation. The packing stations are not on the Reserve, but are operated and staffed by the Co-op, an on-reserve institution. A trucking company collects the fish from a packing station and from the Co-op on the Reserve, and hauls them to Freshwater’s premises in Winnipeg. The Appellants’ delivery of the fish to the Co-op thus takes place off-reserve, albeit at packing stations owned by the Co-op and operated by its employees.

[70] Although these aspects of the Appellants' business activities are not physically located on the Reserve, they are connected with the Reserve because of the important role played by the Co-op as owners and operators of the packing stations.

[71] As far as the Appellants are concerned, the process of selling the fish is complete when they are paid for their catch. Payment takes place at the Co-op's administration office, which is on the Reserve. However, this part of the transaction is relatively mechanical: the price is pre-determined by Freshwater; fishers are paid with funds provided to the Co-op by Freshwater; and the actual amount paid to individual fishers is based on the receipts issued to them at off-reserve packing stations by Co-op employees.

[72] Finally, I note that the Appellants kept their business records at home. For Mr Robertson, this meant on-reserve and for Mr Saunders, off-reserve. They also do their business banking on the Reserve.

[73] The Crown says that, despite the various connections between the Appellants' fishing business and the Reserve, identifying and locating the purchasers of the fish – the customers of the business – is an important factor in determining the location of the business and hence of the income produced from it. I agree.

[74] The Crown also goes on to argue that Freshwater purchases fish from the Appellants through its agent, the Co-op. Freshwater determines the price paid to the Appellants for their fish,

provides the funds from which the Co-op pays them, and arranges for the fish purchased to be delivered to it in Winnipeg. Freshwater is not located on the Reserve. Moreover, the ultimate customers are the purchasers of the fish from Freshwater in national and international markets. Of course, they are not located on the Reserve either.

[75] As a matter of the private law of agency and the sale of goods, I agree that the Appellants contract to sell the fish to Freshwater through the agency of the Co-op. In my opinion, however, the role of Freshwater is less important than the Crown contends in determining the location of the Appellants' business activities and hence of their resulting income.

[76] First, it is immaterial that the ultimate customers, that is, those who buy from Freshwater, have no connection with a reserve. What Freshwater does with the fish after taking delivery has relatively little direct impact on the amount that the Appellants are paid.

[77] This is because the price of fish is set by Freshwater before the fishing season begins, and is based on its prediction of the market prices of various species of fish in the coming year. The purchase price received by the fishers was 85% of this figure; market fluctuations in the price received by Freshwater, and the quantity of fish that it was able to sell, thus could have only a minor direct impact on the income received by the fishers in that year.

[78] Of course, the price paid to the fishers is indirectly related to projected prices for fish on national and international markets: last year's actual market price will generally be an important factor in predicting the price for the coming season.

[79] In this respect, the facts of the present case are analogous to those in *Bastien*, where the Indian's investment income was determined directly by the terms of the deposit with the on-reserve financial institution, and only indirectly by the rates of return that the institution could obtain by investing its funds in the financial markets. Accordingly, the Court stated (at paras. 60-61), the fact that the institution invested its funds in the market was less important in determining the location of Mr Bastien's investment income than the fact that he had a contract with the on-reserve financial institution, because his investment income flowed directly from the terms of that contract.

[80] Hence, Justice Cromwell said in *Bastien* (at para. 61), "the other commercial activities of the ... [financial institution] should have been given no weight". This is equally applicable to the commercial activities of Freshwater in the present case.

[81] Second, to characterize the Co-op simply as the purchasing agent for Freshwater substantially distorts its importance to the general economic life of the Reserve (to which it is the biggest contributor after the federal government) and to commercial fishing in particular by members of the First Nation, including the Appellants.

[82] For example, the Co-op controls the quota (and thereby controls the fishers' income); it provides financial support through loans for the purchase of boats and other items needed for fishing; it operates the packing stations and issues receipts for the fish delivered by the fishers; it administers the funds provided by Freshwater and pays the fishers for their catch; it facilitates fishers in hiring helpers on the Reserve by assuming responsibility for their payment and debiting the fishers' accounts for the amounts paid; and, most important, it represents the interests of the fishers in dealing with Freshwater.

[83] The Co-op is thus a critically important institution in the economic life of the Reserve and pre-dates Freshwater. Its activities permeate all aspects of commercial fishing by its members, from the provision of interest-free loans for the purchase of boats and other fishing equipment, to representing the interests of fishers in negotiations with Freshwater.

[84] It is clear from the evidence that although the Appellants were aware that the fish they caught were eventually taken by Freshwater and sold to its customers off-reserve, all their business dealings were with the Co-op. From the perspective of the fishers, the Co-op bought their fish and paid them for their catch. As the Judge put it (at para. 68) in reference to Mr Robertson's evidence:

From his perspective, his connection to the Co-op on the reserve was an integral part of the activity in which he engaged. Indeed, it was the beginning and end of his commercial world.

(Emphasis added)

As the Supreme Court has stated in other Aboriginal rights contexts, the Aboriginal perspective is always important: see, for example, *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 49-50;

Delgamuukw v. British Columbia, [1997] 3 S.C. R. 1010 at paras. 81-82; *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 19.

[85] On the basis of these facts, I am satisfied that the business activities of the Appellants associated with their fishing business are situated on the Reserve.

G. CONCLUSIONS

[86] Having considered all the above factors, I have concluded that the business income earned by the Appellants from commercial fishing is situated on the Reserve and is therefore not subject to income tax by virtue of section 87. The role played by the Co-op, an on-reserve institution, in the fishing business of its members, nearly all of whom live on the Reserve, to my mind, firmly anchors the Appellants' business activities to the Reserve.

[87] The fact that the Appellants catch and deliver their fish off-reserve may not assist in locating their business on-reserve. However, in my opinion, it does not locate their business off-Reserve. Members of the First Nation have long fished commercially in the lakes abutting or near to the Reserve; they cannot fish on the Reserve itself; the packing stations are run by the Co-op; they keep their boats on the Reserve, and set out from there to fish.

[88] Finally, the Appellants' income from the employment insurance benefits they received was also situated on a reserve in the years in question, largely because that was the *situs* of their qualifying activities: *Williams* at 896-97.

[89] For all these reasons, I would dismiss the appeals with costs.

“John M. Evans”

J.A.

“I agree

Carolyn Layden-Stevenson J.A.”

PELLETIER J.A. (Concurring Reasons)

[90] I have read my colleague's carefully drafted reasons. He has analyzed, as the Supreme Court has told us we must, the issue of the situs of the appellants' business income in the light of the connecting factors which have been identified at various times in the jurisprudence. I agree with the conclusion he has reached on the basis of his analysis.

[91] In my view, there is a much more direct route to the same conclusion and it is this. While the objective of s. 87 of the Indian Act R.S.C. 1985 c. I-5 is far from clear, one can say that it must have been intended to protect or enhance Indians' economic interest in their reserve. Because income is intangible property, the application of s. 87 requires one to connect the income in issue with a reserve. In this case, the issue is the taxation of business income of residents of a northern reserve, income generated by commercial fishing, one of the few business activities open to residents of that reserve.

[92] In my view, the connection to the reserve required by s. 87 and the jurisprudence which it has spawned is supplied by the relationship between the business activity and the location and attributes of the reserve. In this case, the appellants are engaged in a business activity that is indigenous to their remote northern reserve. The application of s.87 should not be divorced from the reality of Indian reserve life. The inquiry required by s. 87 should focus on the business opportunities available to these appellants, living where they live, exercising the skills they have. If s. 87 is intended to protect, in some undefined way, the economic patrimony of Indians in relation to

their reserves, I can think of no circumstances in which its application would be more appropriate than it is in this case.

“J.D. Denis Pelletier”

J.A.

FEDERAL COURT OF APPEAL

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