

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180510

Docket: A-358-16

Citation: 2018 FCA 91

**CORAM: WEBB J.A.
NEAR J.A.
LASKIN J.A.**

BETWEEN:

HELEN BELL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on December 7, 2017

Judgment delivered at Ottawa, Ontario, on May 10, 2018

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**NEAR J.A.
LASKIN J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the judgment of the Tax Court of Canada dated July 27, 2016 (2016 TCC 175). The Tax Court found that certain amounts that Helen Bell had received as bonuses from Reel Steel Ltd. (Reel Steel) during the taxation years from 2005 to 2008 were not exempt from taxation under section 87 of the *Indian Act*, R.S.C. 1985, c. I-5.

[2] For the reasons that follow, I would dismiss the appeal.

I. Background

[3] Reel Steel installs rebar for construction projects which, during the years in issue, were large high rise and residential towers in the greater Vancouver and southern interior areas of British Columbia. None of the customers of Reel Steel during the years under appeal were located on a reserve.

[4] Helen Bell owned 51% of the shares of Reel Steel and her husband, Michael (Mike) Bell, owned the balance of 49% of the shares. Helen Bell is a status Indian under the *Indian Act* but Mike Bell is not. Helen Bell was the President and the sole director of Reel Steel during the taxation years under appeal. Helen Bell did not live on a reserve at any time during any of the taxation years under appeal.

[5] The office of Reel Steel was located on the Capilano Indian Reservation #5, a reserve as defined by the *Indian Act*. Although Helen Bell was not a member of the Capilano Indian Band, she was a member of another band. Helen Bell performed most of her employment duties at the office of Reel Steel.

[6] The Tax Court Judge described the roles of Helen and Mike Bell in relation to Reel Steel as follows:

59 Both the Appellant and Mike had important roles in Reel Steel. It was the combination of their hard work that made Reel Steel a success. But the evidence does not support that the Appellant's role was greater.

60 Mike's role, in addition to placing rebar alongside the other construction employees, was to manage the construction work, including dealing with customers, making sure that the projects were appropriately staffed which

including the hiring of construction workers, and providing overall management at the sites.

61 The Appellant generally had two major roles. One was to be responsible for administrative functions, such as purchasing, invoicing, payables, receivables, payroll, banking and accounting. The other significant role was to look after the welfare of the employees, including arranging benefits, safety training, and reporting of injuries. The Appellant's contribution with respect to employees went beyond this in that she was very active in instilling a positive corporate culture. The Appellant organized many social events such as dinners and lunches, and she even arranged flowers for spouses and girlfriends on Valentines' Day.

[7] During the taxation years under appeal, Reel Steel paid the following amounts to Helen and Mike Bell as salary and as bonuses (in addition to the salary):

| Year | Helen Bell's Salary | Helen Bell's Bonus | Mike Bell's Salary | Mike Bell's Bonus |
|---------------|----------------------------|---------------------------|---------------------------|--------------------------|
| 2005 | \$79,000 | \$351,000 | \$75,150 | 0 |
| 2006 | \$105,600 | \$257,500 | \$101,282 | 0 |
| 2007 | \$101,760 | \$715,000 | \$103,760 | 0 |
| 2008 | \$232,150 | \$2,037,000 | \$137,800 | 0 |
| Total: | \$518,510 | \$3,360,500 | \$417,992 | 0 |

[8] Helen Bell had a service agreement with Reel Steel that provided that she would receive bonuses equal to 50% of the net income of Reel Steel. The bonuses paid in the taxation years under appeal, however, were approximately equal to 100% of the net income of Reel Steel.

[9] The issue before the Tax Court was whether the amounts paid as bonuses to Helen Bell in 2005 to 2008 (inclusive) are exempt from taxation as a result of the provisions of section 87 of the *Indian Act*. No one raised any issue concerning whether any portion of the bonuses should have been included in the income of Mike Bell.

II. Decision of the Tax Court

[10] The Tax Court Judge concluded that the bonuses were remuneration from employment. The Tax Court Judge, however, found that the salary that was paid to Helen Bell was adequate compensation for the services that she provided. As a result, she found that the bonuses were not reasonable and, at paragraph 82, that the bonuses were “in substance ... simply corporate distributions to a key shareholder”. Therefore, the Tax Court Judge considered the business that was being carried on by Reel Steel in determining the relevant connecting factors for the bonuses paid to Helen Bell. Since virtually all of Reel Steel’s business was generated and performed off reserve, this resulted in the Tax Court Judge concluding that the connecting factors were not sufficient to find that the bonuses were exempt from taxation under the *Indian Act*.

III. Issue

[11] The issue in this appeal is whether the Tax Court Judge erred by considering the operation of the business that was carried on by Reel Steel in determining whether the amounts paid as bonuses to Helen Bell are exempt from taxation as a result of the provisions of section 87 of the *Indian Act*.

IV. Standard of Review

[12] The standard of review for any question of law is correctness and for any question of fact or mixed fact and law (with no extricable question of law) is palpable and overriding error. (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

V. Analysis

[13] Paragraph 87(1)(b) of the *Indian Act* provides that “the personal property of an Indian ... situated on a reserve” is exempt from taxation. In order to determine whether any particular property of a status Indian satisfies this test for exemption from taxation it is necessary for the court to identify and examine the factors that connect such property to a reserve.

[14] In *Bastien Estate v. The Queen*, 2011 SCC 38, [2011] 2 S.C.R. 710 (*Bastien*), Justice Cromwell, writing on behalf of the majority of the Supreme Court of Canada, noted that:

16 Where, because of its nature or the type of exemption in question, the location of property is not objectively easy to determine, courts must apply the connecting factors approach set out in *Williams v. Canada*, [1992] 1 S.C.R. 877, in order to attribute a location to the property. While this search for location may seem at times to be more the stuff of metaphysics than of law, the attribution of location is what the *Indian Act* provisions require. The difficulty of doing so means that it is not generally possible to apply a simple, standard test to determine the location of intangible property...

17 As the location of such property will always be notional, there is a risk that attributing a location to it will be arbitrary. An alternative would be to apply consistently a single strict rule, but that solution is not without its limitations. Gonthier J. expressed caution against a single criteria test. Indeed, where one or two factors have a controlling force, there could be manipulation or abuse, and there is cause to worry that such an analysis would miss the purpose of the *Indian Act* exemption: *Williams*, at p. 892.

18 To address this challenge, Gonthier J. in *Williams* set out a two-step test. At the first step, the court identifies potentially relevant factors connecting the intangible personal property to a location. “A connecting factor is only relevant”, wrote Gonthier J., “in so much as it identifies the location of the property in question for the purposes of the *Indian Act*” (p. 892). Thus, even in this somewhat metaphysical sphere, the focus is clearly on ascribing a physical location to the property in question. Connecting factors mentioned in *Williams* include things such as the residence of the payor and the payee, the place of payment and where the employment giving rise to qualification for the benefit was performed: *Williams*, at p. 893. As Gonthier J. noted, potentially relevant connecting factors have different relevance depending on the categories of property and the types of

taxation in issue. So, for example, “connecting factors may have different relevance with regard to unemployment insurance benefits than in respect of employment income, or pension benefits” (p. 892). To take this into account, as well as to ensure that the analysis serves to identify the location of the property for the purposes of the *Indian Act*, at the second step, the court analyses these factors purposively in order to assess what weight should be given to them. This analysis considers the purpose of the exemption under the *Indian Act*; the type of property in question; and the nature of the taxation of that property (p. 892).

[15] As noted by the Supreme Court of Canada, in order to determine whether a particular property (in this case the bonuses paid to Helen Bell) is exempt from taxation, it is first necessary to identify the relevant factors that could connect the property to a reserve. The court is then to determine the amount of weight to be given to these particular factors. In this case, the Tax Court Judge referred to the decision of the Supreme Court of Canada in *Bastien* and also to the basic propositions arising from *Bastien* that were summarized by this Court in *Kelly v. The Queen*, 2013 FCA 171, 446 N.R. 339.

[16] In this appeal Helen Bell acknowledges that the Tax Court Judge recognized that the connecting factors test is to be applied. However, Helen Bell alleges, in paragraph 36 of her memorandum, that the Tax Court Judge erred in:

- (a) effectively disregarding the Respondent’s admission and her own finding that the Bonuses were paid by virtue of the Appellant’s employment;
- (b) concluding that the payment of the Bonuses to the Appellant was “abusive” of the Section 87 Exemption despite having concluded that the move of the Office on reserve was not abusive; and
- (c) effectively piercing the corporate veil to link the Appellant’s income from on-reserve employment to the business operations of the Company.

[17] Although identified as three errors, essentially Helen Bell is alleging that the Tax Court Judge erred by not restricting her analysis to the relevant connecting factors that have been

identified for employment income. Helen Bell submits that having found that the bonuses would, but for the exemption in section 87 of the *Indian Act*, be included in Helen Bell's income under section 5 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (ITA), the connecting factors that should have been examined in this case are only the connecting factors that have been identified in other employment situations. In particular Helen Bell referred to the decision of the Tax Court in *Desnomie v. The Queen*, [1998] 4 C.T.C. 2207, 98 D.T.C. 1744 in which the Tax Court held that the relevant connecting factors in relation to employment income are:

1. the residence of the employer;
2. the residence of the employee;
3. the location where the work is performed; and
4. the nature of the services performed and the special circumstances in which they are performed.

[18] These factors were approved by this Court on the appeal of the decision in *Desnomie* ([2000] 3 C.T.C. 6, 186 D.L.R. (4th) 718). Helen Bell submits that the analysis should have been restricted to only these four connecting factors and, in particular, that the place where she performed her work would be the most significant factor. The Tax Court Judge, according to Helen Bell, should not have considered whether the bonuses were reasonable. As a result, there would be no basis for the Tax Court Judge to have considered the business that was being carried on by Reel Steel in determining the connecting factors that would connect the bonuses paid to Helen Bell to a reserve.

[19] I agree with Helen Bell that the reasonableness of the bonuses should not have been used as a basis to consider the business that was being carried on by Reel Steel in determining the

relevant connecting factors in this case. The only issue in this appeal is whether the full amount of the bonuses should be taxable in the hands of Helen Bell under the ITA or exempt from taxation under section 87 of the *Indian Act*. The connecting factors should not be determined based on the reasonableness of the amount of remuneration but rather should be determined based on the circumstances related to the payment of the remuneration.

[20] While I do agree that the reasonableness of the bonuses cannot justify considering the business of Reel Steel to determine the relevant connecting factors, I do not agree that the Tax Court Judge erred in considering the operation of the business carried on by Reel Steel in determining the relevant connecting factors. The *Desnomie* factors were identified in relation to an arm's length employment relationship. As well, in each of the other employment cases to which Helen Bell referred, the employer and the employee were dealing with each other at arm's length.

[21] In this case Helen Bell was not dealing with Reel Steel at arm's length. She was the majority shareholder and the sole director of Reel Steel. The only other shareholder of this company was her spouse. In *Bastien*, the Supreme Court of Canada stated that the Court should consider the substance as well as the form when determining the location of income for the purposes of the exemption from taxation:

62 Of course, in determining the location of income for the purposes of the tax exemption, the court should look to the substance as well as to the form of the transaction giving rise to the income. The question is whether the income is sufficiently strongly connected to the reserve that it may be said to be situated there. Connections that are artificial or abusive should not be given weight in the analysis. For example, if in substance the investment income arises from an Indian's off-reserve investment activities, that will be a significant factor

suggesting that less weight should be given to the legal form of the investment vehicle. There is nothing of that nature present in this case. Cases of improper manipulation by Indian taxpayers to avoid income tax may be addressed as they are in the case of non-Indian taxpayers.

[22] In my view, in determining whether employment income that is paid by a corporation that is controlled by the employee is exempt under section 87 of the *Indian Act*, it would be appropriate to look at the particular business that is being carried on by that company to determine the relevant connecting factors. An example will illustrate why it would be relevant to examine the business that the company is carrying on when the employee controls his or her employer.

[23] Assume that there are two individuals who are each status Indians. One individual is carrying on business as a sole proprietorship. The other individual is the sole shareholder of a company that is carrying on the business and the net income for each year is paid as a bonus to that individual. Assume that the facts related to the residence of the individuals and the location and operation of the businesses are identical. The individuals will be taxed under different sections of the ITA – the first individual will be taxed based on the profit generated by the business (section 9 of the ITA), and the second individual will be taxed on the employment income paid by the company (section 5 of the ITA). It would not, however, seem appropriate to me to apply different connecting factors to determine whether the income of each individual would be exempt under section 87 of the *Indian Act*.

[24] If different connecting factors are applied to the two individuals, this could result in the business income earned by the sole proprietor not being exempt from taxation under section 87

of the *Indian Act*, and the employment income earned by the second individual being exempt from taxation under section 87 of the *Indian Act*, even though the only difference between the two is the legal form that was chosen to conduct the business. The exemption under the *Indian Act* should not be dependent on the legal form or structure that the particular person chooses to carry on his or her business, but rather on the substance of the activities and transactions that gives rise to the income in question.

[25] In this case, in substance, the business that gave rise to the bonuses was Helen and Mike Bell's business, as they were the only shareholders of Reel Steel. Helen Bell was also the majority shareholder and the sole director of the company. Therefore, in my view it was more appropriate in this case to consider the connecting factors that would be relevant in relation to the business of Reel Steel rather than the connecting factors that would be relevant in relation to employment income.

[26] As a result, the Tax Court Judge did not err in considering the operation of the business carried on by Reel Steel in determining the relevant connecting factors in relation to the location of the bonuses paid to Helen Bell.

[27] Helen Bell only challenged the right of the Tax Court Judge to examine the business of Reel Steel in determining the relevant connecting factors. She did not challenge any of the factual findings made by the Tax Court Judge in relation to the operation of the business or the relative weight that was given to these factors by the Tax Court Judge. In my view, it was appropriate in the circumstances of this case for the Tax Court Judge to consider the business of

Reel Steel in determining the relevant connecting factors to connect the bonuses to a reserve for the purpose of the exemption from taxation found in section 87 of the *Indian Act*. As a result, there is no basis to interfere with the decision of the Tax Court Judge that the bonus income of Helen Bell did not qualify for the exemption under section 87 of the *Indian Act*.

[28] As a result I would dismiss the appeal with costs.

“Wyman W. Webb”

J.A.

“I agree

D.G. Near J.A.”

“I agree

J.B. Laskin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA,
DATED JULY 27, 2016, NO. (2013-1806(IT)G)**

DOCKET: A-358-16

STYLE OF CAUSE: HELEN BELL v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: VANCOUVER,
BRITISH COLUMBIA

DATE OF HEARING: DECEMBER 7, 2017

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
LASKIN J.A.

DATED: MAY 10, 2018

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