Federal Court of Appeal | Cour d'appel fédérale

Date: 20140414

Docket: A-236-13

Citation: 2014 FCA 97

CORAM: **BLAIS C.J.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

THE ESTATE OF CHARLES PILFOLD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on April 9, 2014.

Judgment delivered at Ottawa, Ontario, on April 14, 2014.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: BLAIS C.J.
STRATAS J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The late Charles Pilfold was an "Indian" as that word is defined in the *Indian Act*, R.S.C. 1985, c. I-5. Mr. Pilfold claimed that the income he derived from fishing for the years 2000 and 2002 was exempt from tax by virtue of the combined operation of section 87 of the *Indian Act* and paragraph 81(1)(a) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The Minister did not agree, and assessed Mr. Pilfold accordingly. Mr. Pilfold appealed to the Tax Court of Canada. The appeal

was heard by Justice Campbell Miller and dismissed (2013 TCC 181). Mr. Pilfold's estate now appeals to this Court.

[2] The estate of Mr. Pilfold is entitled to the exemption claimed only if the income in issue was "property located on a reserve" within the meaning of that phrase as used in section 87 of the *Indian Act*. In that context, the location of income is determined by applying a judge-made principle that has come to be known as the "connecting factors" test. Stated simply, income is located on a reserve if the relevant facts disclose a sufficient connection between the income and the reserve.

[3] Justice Miller's reasons include a lengthy analysis of the case law through which the connecting factors test has been developed, including *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85, *Williams v. Canada*, [1992] 1 SCR 877, *Bastien Estate v. Canada*, 2011 SCC 38, [2011] 2 SCR 710, *Dubé v. Canada*, 2011 SCC 39, [2011] 2 SCR 764, *Canada v. Robertson*, 2012 FCA 94 and *Ballantyne v. Canada*, 2012 FCA 95. His legal analysis is correct and complete. It is not argued for Mr. Pilfold that Justice Miller misapprehended the relevant legal principles or the basic facts of the case. Rather, the argument is that Justice Miller erred when he did not give determinative weight to the fact that Mr. Pilfold's income was received by him directly from corporations that were located on a reserve.

[4] The direct source of Mr. Pilfold's income was a group of corporations owned by Mr. Pilfold and his family. One or another of the corporations owned the fishing boat and most of the fishing equipment and actually carried on the fishing business, although Mr. Pilfold owned the fishing licence. The corporations' head offices were located in a house on the Musqueam Reserve, all of its

books and records were kept there, and certain corporate decisions were made there. Mr. Pilfold was one of four owners of the house (the others being his spouse, his son and his son's wife), but Mr. Pilfold lived in that house for only part of the year, dividing the rest of his time between his homes in Prince Rupert, Palm Springs and Washington State.

[5] Justice Miller considered whether the location of the corporations on the Musqueam Reserve and the corporate decisions made there would justify a conclusion that for the purposes of section 87 of the *Indian Act*, Mr. Pilfold's income from the corporations was property located on the Musqueam Reserve. He concluded that it would not, as explained at paragraph 65 of his reasons:

> My interpretation of the Appellant's argument is that simply having the corporate head office on-Reserve, regardless of the nature or location of the business, is, since *Dubé* and *Bastien*, sufficient to locate any business derived by these corporate entities on-Reserve, and such *situs* flows through to an individual Status Indian recipient of the fishing income, such as Charles Pilfold. With respect, this would move the subtle shifts in the connecting factors jurisprudence recommended by the Supreme Court of Canada to an altogether different bright line test, akin to that of a permanent establishment-like test. I do not read *Dubé* or *Bastien* as going that far.

[6] In my view, Justice Miller made no error in reaching this conclusion. I agree with him that the application of the connecting factors test to income is a search for a substantive basis for connecting the income to a reserve. That requires a complete consideration of all of the facts relating to the income, which must include but cannot be limited to the formal legal structure through which the income is received. A useful framework for the application of the connecting factors test to income can be found in the recent decision of this Court in *Kelly v. Canada*, 2013 FCA 171. In my view, although Justice Miller did not have the benefit of *Kelly*, in substance his analysis is consistent with that framework.

[7] Justice Miller acknowledged that the location of the corporate offices and their books and records was a factor that connected Mr. Pilfold's income to the reserve, as was the fact that some corporate decisions were made there. But he found that those connections to be insufficient to overcome the factors relating to the substantive aspects of the source of the corporate income – the fishing business – which did not have a substantial connection to the reserve.

[8] Justice Miller found no substantial connection between the operational aspects of the fishing business and any reserve. The fishing boat and fishing equipment were kept off reserve. The extensive preparations required each season occurred off reserve under Mr. Pilfold's direction as captain of the fishing boat. The fishing took place off reserve under Mr. Pilfold's direction. All sales were made by Mr. Pilfold to commercial buyers off reserve. The only factual connections between the fishing operation and the reserve were weak or insubstantial: some telephone calls were made from the Musqueam home with respect to equipment repairs, and some trimmings from the roe on kelp harvesting – a relatively small amount – were donated to First Nations.

[9] I am unable to discern any error in Justice Miller's analysis, or in his conclusion that the income in issue was not property of Mr. Pilfold located on a reserve. Accordingly, I would dismiss the appeal with costs.

"K. Sharlow"

J.A.

"I agree
Pierre Blais C.J."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-236-13

(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE CAMPBELL MILLER OF THE TAX COURT OF CANADA, DATED JUNE 10, 2013, DOCKET NUMBER 2009-2302(IT)G.)

STYLE OF CAUSE:	THE ESTATE OF CHARLES PILFOLD v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 9, 2014
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	BLAIS C.J. STRATAS J.A.
DATED:	April 14, 2014

APPEARANCES:

George Douvelos	FOR THE APPELLANT THE ESTATE OF CHARLES PILFOLD
Matthew W. Turnell	FOR THE RESPONDENT HER MAJESTY THE QUEEN

SOLICITORS OF RECORD:

Wiebe Douvelos Wittman LLP Barristers & Solicitors	FOR THE APPELLANT THE ESTATE OF CHARLES PILFOLD
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT HER MAJESTY THE QUEEN