Docket: 2007-170(IT)I

BETWEEN:

WAYNE ROE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard in part on common evidence with the appeals of *Delores Jim* (2007-1835(IT)I), *Jonathan Labillois* (2007-2213(IT)I), *Pauline Janyst* (2007-2978(IT)I), *Lisa Gagnon* (2007-3013(IT)I), *Barbara Matilpi* (2007-974(IT)I), *Tanya McKenzie* (2007-975(IT)I), *Alegha Van Hanuse* (2007-118(IT)I) and *Catherine Wherry* (2007-306(IT)I) on July 21 to 31, 2008, at Victoria, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Eric Lay Meredith Rose
Counsel for the Respondent:	John Shipley Gordon Bourgard

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 1999, 2000, 2001, 2002, 2003, 2004, 2005 and 2006 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of December 2008.

"B. Paris"

Paris J.

Docket: 2007-1835(IT)I

BETWEEN:

DELORES JIM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard in part on common evidence with the appeals of *Wayne Roe* (2007-170(IT)I), *Jonathan Labillois* (2007-2213(IT)I), *Pauline Janyst* (2007-2978(IT)I), *Lisa Gagnon* (2007-3013(IT)I), *Barbara Matilpi* (2007-974(IT)I), *Tanya McKenzie* (2007-975(IT)I), *Alegha Van Hanuse* (2007-118(IT)I) and *Catherine Wherry* (2007-306(IT)I) on July 21 to 31, 2008, at Victoria, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Eric Lay Meredith Rose
Counsel for the Respondent:	John Shipley Gordon Bourgard

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 1999, 2000 and 2001 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of December 2008.

"B. Paris"

Paris J.

Docket: 2007-2213(IT)I

BETWEEN:

JONATHAN LABILLOIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard in part on common evidence with the appeals of *Wayne Roe* (2007-170(IT)I), *Delores Jim* (2007-1835(IT)I), *Pauline Janyst* (2007-2978(IT)I), *Lisa Gagnon* (2007-3013(IT)I), *Barbara Matilpi* (2007-974(IT)I), *Tanya McKenzie* (2007-975(IT)I), *Alegha Van Hanuse* (2007-118(IT)I) and *Catherine Wherry* (2007-306(IT)I) on July 21 to 31, 2008, at Victoria, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Eric Lay Meredith Rose
Counsel for the Respondent:	John Shipley Gordon Bourgard

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2000, 2001 and 2002 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of December 2008.

"B. Paris"

Paris J.

Docket: 2007-2978(IT)I

BETWEEN:

PAULINE JANYST,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard in part on common evidence with the appeals of *Wayne Roe* (2007-170(IT)I), *Delores Jim* (2007-1835(IT)I), *Jonathan Labillois* (2007-2213(IT)I), *Lisa Gagnon* (2007-3013(IT)I), *Barbara Matilpi* (2007-974(IT)I), *Tanya McKenzie* (2007-975(IT)I), *Alegha Van Hanuse* (2007-118(IT)I) and *Catherine Wherry* (2007-306(IT)I) on July 21 to 31, 2008, at Victoria, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Eric Lay Meredith Rose
Counsel for the Respondent:	John Shipley Gordon Bourgard

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2000 and 2001 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of December 2008.

"B. Paris"

Paris J.

Docket: 2007-3013(IT)I

BETWEEN:

LISA GAGNON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard in part on common evidence with the appeals of *Wayne Roe* (2007-170(IT)I), *Delores Jim* (2007-1835(IT)I), *Jonathan Labillois* (2007-2213(IT)I), *Pauline Janyst* (2007-2978(IT)I), *Barbara Matilpi* (2007-974(IT)I), *Tanya McKenzie* (2007-975(IT)I), *Alegha Van Hanuse* (2007-118(IT)I) and *Catherine Wherry* (2007-306(IT)I) on July 21 to 31, 2008, at Victoria, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Eric Lay Meredith Rose
Counsel for the Respondent:	John Shipley Gordon Bourgard

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2001, 2002, 2003, 2004 and 2005 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of December 2008.

"B. Paris"

Paris J.

Docket: 2007-974(IT)I

BETWEEN:

BARBARA MATILPI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard in part on common evidence with the appeals of *Wayne Roe* (2007-170(IT)I), *Delores Jim* (2007-1835(IT)I), *Jonathan Labillois* (2007-2213(IT)I), *Pauline Janyst* (2007-2978(IT)I), *Lisa Gagnon* (2007-3013(IT)I), *Tanya McKenzie* (2007-975(IT)I), *Alegha Van Hanuse* (2007-118(IT)I) and *Catherine Wherry* (2007-306(IT)I) on July 21 to 31, 2008, at Victoria, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Eric Lay Meredith Rose
Counsel for the Respondent:	John Shipley Gordon Bourgard

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2001 and 2002 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of December 2008.

"B. Paris"

Paris J.

Docket: 2007-975(IT)I

BETWEEN:

TANYA MCKENZIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard in part on common evidence with the appeals of *Wayne Roe* (2007-170(IT)I), *Delores Jim* (2007-1835(IT)I), *Jonathan Labillois* (2007-2213(IT)I), *Pauline Janyst* (2007-2978(IT)I), *Lisa Gagnon* (2007-3013(IT)I), *Barbara Matilpi* (2007-974(IT)I), *Alegha Van Hanuse* (2007-118(IT)I) and *Catherine Wherry* (2007-306(IT)I) on July 21 to 31, 2008, at Victoria, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Eric Lay Meredith Rose
Counsel for the Respondent:	John Shipley Gordon Bourgard

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2002 and 2004 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of December 2008.

"B. Paris"

Paris J.

Docket: 2007-118(IT)I

BETWEEN:

ALEGHA VAN HANUSE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard in part on common evidence with the appeals of
Wayne Roe (2007-170(IT)I), *Delores Jim* (2007-1835(IT)I),
Jonathan Labillois (2007-2213(IT)I), *Pauline Janyst* (2007-2978(IT)I),
Lisa Gagnon (2007-3013(IT)I), *Barbara Matilpi* (2007-974(IT)I),
Tanya McKenzie (2007-975(IT)I) and *Catherine Wherry* (2007-306(IT)I)
on July 21 to 31, 2008, at Victoria, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Eric Lay Meredith Rose
Counsel for the Respondent:	John Shipley Gordon Bourgard

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2000 and 2001 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of December 2008.

"B. Paris"

Paris J.

Docket: 2007-306(IT)I

BETWEEN:

CATHERINE WHERRY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard in part on common evidence with the appeals of
Wayne Roe (2007-170(IT)I), *Delores Jim* (2007-1835(IT)I),
Jonathan Labillois (2007-2213(IT)I), *Pauline Janyst* (2007-2978(IT)I),
Lisa Gagnon (2007-3013(IT)I), *Barbara Matilpi* (2007-974(IT)I),
Tanya McKenzie (2007-975(IT)I) and *Alegha Van Hanuse* (2007-118(IT)I)
on July 21 to 31, 2008, at Victoria, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Eric Lay Meredith Rose
Counsel for the Respondent:	John Shipley Gordon Bourgard

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2002, 2003 and 2004 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of December 2008.

"B. Paris"

Paris J

Citation: 2008 TCC 667
Date: 20081205
Dockets: 2007-170(IT)I, 2007-1835(IT)I,
2007-2213(IT)I, 2007-2978(IT)I,
2007-3013(IT)I, 2007-974(IT)I,
2007-975(IT)I, 2007-118(IT)I,
2007-306(IT)I

BETWEEN:

WAYNE ROE, DELORES JIM,
JONATHAN LABILLOIS, PAULINE JANYST,
LISA GAGNON, BARBARA MATILPI,
TANYA MCKENZIE, ALEGHA VAN HANUSE,
CATHERINE WHERRY

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Paris, J.

[1] The issue in each of these appeals is whether employment income earned by the appellants was exempt from income tax by virtue of paragraph 87(1)(*b*) of the *Indian Act*, R.S.C. 1985, c. I-5, which provides that the personal property of an Indian or a band is exempt from taxation if it is situated on a reserve**.**

[2] The applicable test for determining whether intangible personal property such as employment income is situated on a reserve within the meaning of paragraph 87(1)(*b*) is the "connecting factors test" laid down by the Supreme Court of Canada in *Williams v. The Queen*, [1992] 1 S.C.R. 877. That test analyses the

factors that connect the personal property of an Indian to a reserve in order to establish whether the property is situated on the reserve.

[3] The appellants were reassessed by the Minister of National Revenue (the "Minister") for the years in issue on the basis that their employment income was not situated on a reserve, and therefore was required to be included in calculation of their income under the *Income Tax Act* (the "*Act*"). The appellants are disputing those reassessments.

[4] The appellants maintain that the Minister erred in his appreciation of the factors which connected their employment income with a reserve, and that in each case their employment income was situated on a reserve.

[5] The appeals were heard together, in part on common evidence. The taxation years in issue for each appellant are set out in the appendix to these reasons.

Facts

[6] All of the appellants are Indians as defined in the *Indian Act*.

[7] All of the appellants, except Wayne Roe, were employed by Native Leasing Services ("NLS"), an employee leasing business whose head office was located on the Six Nations Indian Reserve in Brantford, Ontario. NLS leased their services to various non-profit native organizations across Canada. NLS is a sole proprietorship operated by Roger Obonsawin.

[8] Mr. Roe was employed by another employee leasing business, O.I. Employee Leasing Inc. ("OI"), which is wholly owned by Mr. Obonsawin. OI's head office was also located on the Six Nations Reserve. OI leased the services of Mr. Roe to two trucking businesses operating in Canada and the U.S.

[9] Mr. Obonsawin is a status Indian and is a member of the Abenaki First Nation whose reserve is at Odanak, Quebec. He has had extensive experience working with native non-profit organizations and was the first president of the National Association of Friendship Centres.

[10] In 1981 he and his partner, Ljuba Irwin, formed O.I. Consulting to provide services to native groups and government departments working on projects affecting natives. Their goal was to enhance the capacity of native groups and to create a network of resources to support the work of those groups.

[11] Later on, Mr. Obonsawin set up NLS and OI. Both NLS and OI provide workers to clients (referred to in the evidence as "placement organizations") on a contract basis. NLS leases the services of native workers to native organizations, while OI leases the services of native workers to businesses in general. Most, if not all, of NLS and OI clients were located off-reserve.

[12] Mr. Obonsawin said that the advantage to the placement organization of using the services of NLS or OI was that NLS or OI would free up client resources by taking over responsibility for personnel administration and human resource functions. Mr. Obonsawin also said that the NLS and OI employees had greater job security than if the worker had been employed directly by the placement organization. If employment at one placement organization did not work out, the worker could be moved to another more suitable position. No evidence was given as to how often this occurred.

[13] Up to 1999, the offices of NLS and OI were located in the Woodland Indian Cultural Centre on the Six Nations Reserve. In 2000 the offices were moved to a building known as the "Eagle's Nest" which was also on the Six Nations Reserve. The offices in both locations were rented from the Six Nations Band Council.

[14] Mr. Obonsawin said that NLS and OI did not carry on any business elsewhere than on the Six Nations Reserve and that all of its records were kept there and all of its contracts were signed there. NLS and OI had approximately 14 staff on those premises who handled finance, sales, legal, human resource and training matters for the businesses. Mr. Obonsawin said that Ms. Irwin handled the day-to-day operations of the businesses, while he was responsible for overall operations and strategic planning and promotion and did some training. Both worked from the offices at the Eagle's Nest.

[15] NLS and OI recruited employees through information sessions held by Roger Obonsawin at various sites across Canada, including the offices of many aboriginal organizations. In most cases, at the time a person became an NLS or OI employee, he or she was already directly employed by the placement organization to which they were subsequently leased back by NLS or OI. Where a placement organization and any of its workers wished to use the services of NLS or OI, the worker would sign a document prepared by NLS or OI terminating his or her employment with the placement organization and execute an employment contract with NLS or OI. The placement organization would enter into a placement agreement with NLS or OI for the worker and NLS or OI would arrange to have another worker

(usually also an NLS or OI employee) at the placement organization act as the on-site supervisor on behalf of NLS or OI.

[16] NLS and OI employees were able to access a range of optional benefits such as life and disability insurance and health and dental coverage that might not have been available if the worker had been employed directly by the client organization. Mr. Obonsawin said that NLS and OI also provided training and retreats to evaluate the strategic plans of its employees, thus providing them with stability and direction. NLS and OI also maintained a library of training material on-site that could be accessed by any of the employees. Of the nine appellants in the cases at bar, only one took any training from NLS and none had used the library or participated in a retreat. NLS and OI also sent out newsletters and notices of job postings for different placement organizations to their employees.

[17] NLS and OI charged a fee that varied between 5 and 7% of the placed worker's gross pay for the services they supplied. In some cases the fee was paid by the placement organization, in some cases it was split between the organization and the worker and in others it was paid entirely by the employee. For some of the years in issue, NLS and OI levied an additional charge of 1.5% of gross pay to set up a fund used to pay legal fees to challenge tax reassessments that denied employees' claims for the exemption from income tax on their salary.

[18] NLS or OI would invoice the placement organizations four weeks in advance for the wages and fees for the NLS or OI employees working at the placement organization and, after receiving those funds, would pay the employees either by cheque or through direct deposit to their bank account. NLS and OI had bank accounts at an off-reserve bank in Ottawa for receiving direct deposits from clients and on the Hobbema Indian reserve in Alberta for paying employees and bills. No income tax was deducted from the salaries paid to the NLS or OI employees.

[19] Mr. Obonsawin agreed that the tax exemption was a benefit that NLS and OI marketed to potential clients. He said that the net effect of the exemption was to give the worker a higher salary. This was important to NLS and OI workers, who were mostly single mothers. He said the exemption helped stabilize families and had a positive effect on aboriginal youth.

[20] Mr. Obonsawin testified that one of the goals of NLS and OI was to assist in the development of a self-supporting native network in Canada. He said that the cross-country network of clients and employees that NLS and OI maintained, allowed employees to move between jobs and gain more skills and allowed them to

give more back to their communities. He saw this as a means of dealing with native poverty. He said that the NLS and OI services could benefit any community and that the benefits to a reserve would come from the employees moving back to reserves with their new skills. Mr. Obonsawin estimated that NLS and OI had 1000 leased employees in 1999 and as many as 1400 in the years between 1999 and 2006.

[21] The background and employment circumstances of the appellants are as follows:

Catherine Wherry

[22] Ms. Wherry is a member of the Chippewas of Mnjikaning First Nation, whose reserve is located approximately 160 kilometres north of Toronto. Her grandfather elected to give up his status when he was young in order to be able to vote, to move about freely and to avoid having his children sent to residential schools. Ms. Wherry was born in Port Hope, Ontario and has never lived on a reserve. A change in federal legislation enabled her to obtain status in 1986.

[23] In 1996 Ms. Wherry was hired on a contract basis by the First Peoples' Heritage, Language and Cultural Council ("FPHLCC") in Victoria, B.C. to work in the organization's arts grant program.

[24] The FPHLCC is a B.C. Crown corporation with a mandate to preserve and enhance Aboriginal heritage, language and culture, to increase understanding and sharing of knowledge both within Aboriginal and non-Aboriginal communities, and to heighten appreciation and acceptance of the wealth of cultural diversity among all British Columbians. The FPHLCC is governed by an Advisory Committee composed of representatives of the 24 Tribal Councils of B.C. Its board of directors is chosen largely from the Committee. It carries out its mandate in part by providing grants to Aboriginal organizations and individuals for language preservation and revitalization and for arts and cultural development.

[25] Ms. Wherry worked directly for the FPHLCC until August 2001. At that point, she entered into an employment contract with NLS, and NLS contracted to provide her services to the FPHLCC as a special projects coordinator.

[26] The commencement of Ms. Wherry's employment with NLS coincided with the move of the FPHLCC office from a reserve near Victoria to downtown Victoria. When the office of the FPHLCC had been located on the reserve, Ms. Wherry's

employment income and that of the other FPHLCC workers was accepted by the Minister to be exempt from tax under section 87 of the *Indian Act*.

[27] According to Ms. Wherry, prior to the move the management and workers at FPHLCC realized that the move off the reserve would put the tax exempt status of their employment income at risk, and they sought a way to retain the exemption. They came to the conclusion that the only way to maintain their tax exemption and level of income after the move was to use the services of NLS.

[28] Ms. Wherry's main duties while employed by NLS at the FPHLCC were the oversight and administration of the FPHLCC art grants program. She also provided support to the language program and was also involved in fundraising and communications.

[29] Under the art grants program, the FPHLCC provided funding of up to $10,000 to native artists for projects involving all means of artistic expression including painting, carving, weaving, dance, music and literature. The FPHLCC also provided development programs for native artists.

[30] Over her years at the FPHLCC, Ms. Wherry worked to increase awareness of the grant program among native artists, and to provide assistance in preparing applications for the grants. She said that the FPHLCC did not distinguish between applicants living on or off reserve or between status or non-status Indians or Métis applicants. A significant number of grants did go to native artists living and working on a reserve and Ms. Wherry felt that these grants would have had an impact on those reserves and that the grants benefited everyone on the reserves.

[31] Ms. Wherry worked mainly in the FPHLCC office but occasionally traveled in the course of her work. According to the exhibits entered at the hearing, she visited reserves on three occasions in 2003 and 2004 each lasting one or two days.

[32] She terminated her employment with NLS and became an employee of FPHLCC when the FPHLCC moved its office to another reserve near Victoria in 2006.

Jonathan Labillois

[33] Jonathan Labillois is a member of the Listuguj Mi'Gmaq (Micmac) First Nation. The Listuguj Reserve is located in Quebec, close to the New Brunswick border. The nearest town is Campbellton, New Brunswick.

[34] Mr. Labillois lived on the reserve until he was 18, when he left to go to college. While in college, he spent his summers on reserve with his family. After graduation, he worked for a time at the Victoria Aboriginal Friendship Centre, where he developed and taught a computer skills course.

[35] In September 2000, Mr. Labillois was hired by the Micmac Friendship Centre in Halifax to teach the computer course he had developed in Victoria. In October 2000 he chose to terminate his employment with the Centre and to become an employee of NLS. His services as a computer instructor were then leased by NLS to the Centre until May 2002.

[36] Mr. Labillois taught the computer course to nine students at a time at the Centre from September 2000 to May 2001 and from September 2001 to May 2002. All of his students were natives and four of them each year lived on a reserve.

[37] The Micmac Friendship Centre is not located on a reserve, and Mr. Labillois did not reside on a reserve while working at the Centre. He did say that he considered the Centre like a reserve because of the environment there. He also said that he returned to his reserve in the summer of 2001 and 2002 after he finished teaching.

[38] The Micmac Friendship Centre was operated by the Micmac Aboriginal Friendship Society for the use and benefit of people of Aboriginal descent. It promoted the educational and cultural advancement of Aboriginal people in the Halifax-Dartmouth area and assisted people of Aboriginal descent newly arrived in Halifax-Dartmouth to adjust to an urban environment and to take an active part in urban society. It also promoted mutual understanding and improved relations between people of Aboriginal descent and others. Specifically, the Centre offered the following services: family support and counseling for drug and alcohol abuse, child care and children's programs, health education, a needle exchange and methadone program, youth programs, literacy training, employment support and computer training, various adult education and recreation programs, and a marketplace for aboriginal crafts.

Wayne Roe

[39] Wayne Roe is a member of the Thessalon First Nation. The Thessalon Reserve is located east of Sault Ste. Marie, Ontario. Mr. Roe's mother was native. Mr. Roe's parents separated when he was young and he only learned of his heritage when he was an adult. He has never lived on a reserve.

[40] Mr. Roe is a commercial truck driver. In about 1998 he was hired by B.N Dulay Trux Ltd. ("Trux") to transport commercial cargo throughout Canada and the U.S. Trux had its offices in Richmond and Delta B.C. Those offices were not on a reserve and the principals of Trux were not natives.

[41] At some point while working for Trux, Mr. Roe attended a native rights seminar in Vancouver where Mr. Obonsawin was speaking and learned about OI's services. In September 1999, at Mr. Roe's request, Trux ceased employing him directly and he arranged to be employed by OI and to provide his services to Trux as a leased employee. Mr. Roe said in cross-examination that his reason for joining OI was to obtain an exemption from paying income tax.

[42] In February 2000 Mr. Roe's services were leased by OI to Aujla Trucking Ltd., who contracted to Trux to provide trucks and drivers to carry out contracts arranged by Trux for cargo transport in Canada and the U.S. Aujla's offices were not located on a reserve and the principals of Aujla were not natives.

[43] From September 2000 until 2006, Mr. Roe's services were again leased directly to Dulay Trux by OI.

[44] Mr. Roe said that some of the locations to which he delivered cargo for Trux and Aujla might have been on a reserve but that the vast majority of the destinations were not.

[45] During the periods in appeal, Mr. Roe was on the road most of the time and lived in his truck. He did not have any other residence.

Alegha Van Hanuse

[46] Alegha Van Hanuse is a member of the Oweekeno First Nation whose reserve is located near Bella Bella, B.C. She grew up off-reserve in Bella Bella and Victoria, although at one point as an adult she lived on the reserve for 7 months.

[47] After graduating from university with a degree in social work in 2000, she moved to Kelowna and was hired by the Ki-Low-Na Friendship Society. When she was offered employment at the Society, Ms. Van Hanuse said that the bookkeeper told her about the services of NLS and offered to "set it up" for her. Ms. Van Hanuse chose to be employed through NLS and entered into an employment contract with NLS on September 11, 2000 and her services were then leased to the Society.

[48] Ms. Van Hanuse started off as a volunteer coordinator but she took on additional duties as the Community Action Plan for Children ("CAPC") worker at the Society in order to have full-time work. The CAPC was a federal government program promoting the healthy development of children and families through parenting and nutrition support groups. Few details of the initiative were presented. Ms. Van Hanuse said that most of her clients in this program were natives from other parts of Canada. She also said that she held at least one weekly CAPC session at the Society's office in Kelowna and one on the nearby Westbank Reserve.

[49] After a couple of months at the Society, Ms. Van Hanuse also took over as the Canadian Pre-natal Program ("CPNP") worker when a co-worker went on leave. The evidence did not show what the particular goals of this program were but it appears that it was designed to assist and educate expectant mothers on nutrition and health care during pregnancy. Ms. Van Hanuse said that she was left on her own to decide what she wanted to do to develop the CAPC and CPNP programs and relationships with the community. For the CPNP she said that her caseload consisted of pregnant native women, many of whom were homeless and living in tents and shelters. She tried to meet with these clients where they were living. She said the clients would also drop in to see her at the Society office. She also did home visits on the Westbank Reserve.

[50] She said that for the first weeks that she worked at the Society she was mostly in the office, but by the time she finished the job in March 2001 she was spending between 70 and 80 per cent of her time working on the Westbank Reserve. She would go to the Reserve with her boyfriend (later her husband), Luc Van Noorden, who was a family services worker at the Society, when he did home visits there because she did not have a driver's license herself. At one point in her evidence she said that Luc was with her whenever she was on the reserve, but later said she would sometimes go to the reserve with a person who worked at "Métis services". She did not say how frequently this occurred or give any details of those visits.

[51] While Mr. Van Hanuse (the name Mr. Van Noorden took after he and Ms. Van Hanuse got married) testified that Ms. Van Hanuse did a lot of outreach on the reserve, his claims for reimbursement of travel expenses incurred in the course of his employment with the Society show only a limited number of trips to the Westbank Reserve. Although he did not apparently submit claims for all the months he worked at the Society, the claims for January, February and March 2001 appear to be complete. During those three months, which were the last months worked by Ms. Van Hanuse at the Society, there are references to trips to the Westbank reserve on

only five days. Mr. Van Hanuse said that a couple of additional entries may have related to trips to the Westbank Reserve, but that he could not say for certain. Even allowing for missed entries, it appears to me that Mr. Van Hanuse visited the Westbank Reserve only one and occasionally two days a week. Therefore, Ms. Van Hanuse herself would not have traveled there much more frequently than that herself. Also, Mr. Van Hanuse said that Ms. Van Hanuse only traveled to the Westbank Reserve with him.

[52] Ms. Van Hanuse said that she chose to be employed by NLS because it gave her access to the tax exemption and to other benefits. She could not recall what other benefits were offered besides the tax exemption. She did not need the other benefits at the time, but she wished to have the option of taking them in the future should the need arise.

Pauline Janyst

[53] Pauline Janyst is a member of the Da'Naxda'xw First Nation. She grew up on the Da'Naxda'xw Reserve near Alert Bay, B.C. but left at the age of 12 to attend residential school in Alert Bay and Port Alberni. She attended college in Vancouver and then moved to Campbell River where she worked in retail and ran her own clothing store. Later, she worked with Campbell River Family Services and created a number of programs for native people. In 1992, with funding from the government and local bands, she set up a separate organization to help prevent family violence. She also worked for a time in Victoria in native services delivery.

[54] In August 1999, Ms. Janyst began working for the Aboriginal Healing Foundation ("AHF"). The AHF was set up by the federal government in 1998 to provide support, through research and funding contributions, to community-based Aboriginal directed healing initiatives addressing the legacy of residential school abuse. In its 2000 Annual Report the AHF stated that it sought "to support the participation of all Aboriginal people, including Métis, Inuit, and First Nations, both on and off reserves and both status and non status, in effective healing processes".

[55] The AHF has its offices in Ottawa and is governed by a Board of Directors made up of Aboriginal people from across Canada.

[56] Ms. Janyst worked on contract in the Ottawa office until early 2000, revising the proposal review process for the AHF. She then returned to Victoria and acted as a community support coordinator for the B.C. region, putting on information sessions and assisting applicants with the development and presentation of their proposals,

carrying out site visits to monitor approved projects, creating project networks, and reviewing and evaluating projects. Ms. Janyst was based out of her home in Victoria, which was not located on a reserve. She traveled extensively in B.C. and also on occasion to Ottawa.

[57] In February 2000, Ms Janyst entered into an employment contract with NLS and was placed at the AHF. She was given the option by the AHF to go through NLS when she was offered the position of community support coordinator, the same position she had been in on contract. Some of the AHF workers were employees of NLS and others were employed directly by the AHF.

[58] While acting as the community support coordinator, she estimated that she was on the road about three and a half days a week, with much of that time spent on reserves. She also visited Friendship Centres and offices of native organizations located off-reserve.

[59] A number of reports prepared by Ms. Janyst in the course of her work for the AHF were entered as exhibits, including monthly summaries of her activities for May to August and October 2000. The summaries showed that Ms. Janyst visited reserves once in May, three times in June, once in July, three times in August. No visits to a reserve were shown on the October report. From the information available it appeared that in all she spent ten or eleven days on reserve during those five months. The remaining documents that were presented showed that Ms. Janyst also visited reserves for her work twice in April 2000, three times in November 2000 and twice in February 2001. Ms. Janyst's estimate that she was on the road about three and a half days a week, with much of that time spent on reserves therefore does not accord with the reports she prepared during those years. Those reports tend to show that she spent no more than two or three days a month on reserves.

Barbara Matilpi

[60] Barbara Matilpi is a member of the Namgis First Nation whose reserve is off the Northern Coast of Vancouver Island. She was raised on the reserve, but moved to Vancouver with her sister to attend high school. She attended college in Victoria and worked for the B.C. government for 22 years. Her last position with the government was at the Ministry of Aboriginal Affairs where she administered funding programs under the First Citizens' Fund.

[61] In 1997 she was hired by the B.C. Association of Aboriginal Friendship Centres ("BCAAFC") as the program administrator.

[62] The BCAAFC is an umbrella organization for the 23 Friendship Centres in B.C. Friendship Centres were created to help natives integrate into urban centres from reserves and maintain their culture in an urban environment. The Friendship Centre movement began with the acceleration of native migration from reserves to urban centres in the 1960s. All but one of the B.C. Friendship Centres were located in urban centres off-reserve. Although the programs and services at the Centres were directed at natives, they provided services to anyone, regardless of race, where resources were available.

[63] The mandate of the BCAAFC is to promote the betterment of Aboriginal Friendship Centres in B.C., to establish and maintain communications between the Centres and other provincial and territorial associations and the National Association of Friendship Centres (the "NAFC"), to act as a unifying body for the Centres and to act as liaison between the Centres and government agencies, and to advise the government on programs to assist the Centres in the development of programs to better the lives of Aboriginal people in B.C. It is one of seven provincial and territorial Friendship Centre associations ("PTAs") in Canada.

[64] At the time Ms. Matilpi was hired, Heritage Canada had just transferred the administration of the core funding for Friendship Centres to the NAFC. The BCAAFC had been designated to review and make recommendations concerning applications by the B.C. Friendship Centres to the NAFC for funding. As program director, Ms. Matilpi evaluated the applications submitted by the Friendship Centres. She verified that the audited financial reports of the applicant for the previous year had been received by the BCAAFC and forwarded the applications along with her comments and recommendations to the NAFC. Ms. Matilpi also was assisted with financial monitoring of certain Friendship Centres and provided support and training to directors of the Centres when requested.

[65] Ms. Matilpi was also given responsibility for reviewing and making recommendations on applications for grants under the First Citizens' Fund when that role was transferred to the BCAAFC by the provincial government. The First Citizens' Fund was set up by the B.C. government to provide money for bursaries for native students, for native elders' to travel to conferences and gatherings, and for programs at Friendship Centres. Ms. Matilpi did not say what the conditions the applicants for these grants were required to meet, or how the successful applicants were selected.

[66] Ms. Matilpi performed most of her work in the offices of the BCAAFC and occasionally visited some of the Friendship Centres. When she started at the BCAAFC, its offices were on the Tsawout Reserve near Victoria but they were moved off-reserve to downtown Victoria in July 2001.

[67] When the BCAAFC office was moved, the executive director arranged for those BCAAFC employees who wished to do so to enter into an employment relationship with NLS. Ms. Matilpi chose to become an NLS employee and entered into an employment contract with NLS in July 2001. She was employed by NLS until July 26, 2002. From September 2001 until her resignation she had her paycheques deposited in a bank located on a reserve in North Vancouver.

[68] Ms. Matilipi did not live on a reserve in the years in issue.

Delores Jim

[69] Delores Jim is a member of the Penelakut Indian Band whose reserve is located on Thetis Island and Penelakut Island off the east coast of Vancouver Island. Ms. Jim grew up on a reserve at Ruby Lake, B.C. and moved to the Penelakut Reserve when she got married. She was a community aid worker at the residential school on the reserve and provided medical care and alcohol and drug counseling to the community. In about 1985 she moved to North Vancouver and was hired by as a house supervisor at the Circle of the Eagles Lodge, a community residential facility for natives on conditional release from federal correctional institutions. In the years in issue the facility was run by the Circle of the Eagles Lodge Society ("COELS"). It was located in Vancouver and was not on a reserve.

[70] Ms. Jim's duties at the Lodge were dependent on the shift that she worked. For the 4 p.m. to midnight shift, she monitored the residents, cooked and cleaned. On the midnight shift, she monitored the residents, did bed checks and did record keeping. On the day shift she monitored the residents, cooked and cleaned and taught the residents how to cook.

[71] The mandate of the COELS is to help reduce the number of native repeat offenders through its residential half-way house and rehabilitation services. The facility was open to status and non-status Indian, Inuit and Métis offenders from across Canada. Acceptance into the facility is not conditional on past or future residency on a reserve, but many of the participants were from reserves. According to the director of the COELS, Mr. Mervin Thomas, the only criterion for acceptance at

the facility was that the participant self-identify as a native. All directors of the Society and generally all staff at the facility are native.

[72] Ms. Jim had little recollection of the arrangements that were made for her to be employed by NLS, or why she signed up with NLS. She said that she was given papers to sign by the Society and understood that she was going to be an NLS employee.

[73] Mr. Thomas said that the tax exemption through NLS was important to the COELS because it was chronically under funded and the wages that it could pay were low. Most if not all of the full-time workers at the facility were NLS employees.

[74] During the years in issue Ms. Jim lived with her sister on a reserve in North Vancouver.

Tanya Mackenzie

[75] Tanya Mackenzie is a member of the Temagami First Nation, whose reserve is near Sudbury, Ontario. Ms. Mackenzie was raised partly on the reserve and partly in Sudbury, moving back and forth depending on the season and the school year. In grade five she moved to Chalk River with her mother but spent summers on the reserve.

[76] After graduating from Laurentian College in 2001, she was hired by the NAFC in Ottawa for a summer position as the Aboriginal Friendship Centre Program administrative assistant. Through the Aboriginal Friendship Centre Program, the NAFC provides the core funding for staff and operations of Friendship Centres across Canada and acts as a central body to represent the interests of the Centres and to provide them with training and technical support. It also provides administrative funding to PTAs.

[77] In October, 2001 Ms. Mackenzie entered into an employment contract with NLS and was placed in the same position she held previously with the NAFC. However, according to a letter from the executive director of the NAFC to Ms. Mackenzie found in exhibit A-3, volume II at tab 29, she was apparently also hired by the NAFC *directly* for the position for a three month term. That letter of offer was signed by both the executive director of the NAFC and accepted by

Ms. Mackenzie as witnessed by her signature on the letter. Other documents indicate that Ms. Mackenzie was being paid by NLS after October 15, 2001 (Exhibit A-3 volume II tabs 30, 32 and 33).

[78] On January 31, 2002, her term at NAFC through NLS was extended to March 31, 2002 and then extended indefinitely on March 8, 2002. In the spring of 2002, Ms. Mackenzie also took on the duties of administrative assistant for the Urban Multipurpose Aboriginal Youth Centre Program ("UMAYC"). The UMAYC was set up to assist urban native youth in enhancing their economic social and personal prospects by providing financial support to community-level projects with a focus on respect, awareness and support for preservation of Aboriginal cultures and values. The program was directed at all First Nations, Métis and Inuit peoples and provided its services off reserve. Funding was provided by Heritage Canada.

[79] For the last month and a half that Ms. Mackenzie worked at the NAFC she took on an acting position as the program manager with oversight of a number of NAFC programs. She left the NAFC in July 2004.

[80] Ms. Mackenzie did not live on a reserve while working at the NAFC. She understood that she was technically working for NLS while at the NAFC and that she was paid by NLS. Her pay was deposited to an account she had opened at a bank on a reserve.

[81] She said that Mr. Obonsawin visited the NAFC office once or twice a year to talk about the court cases (presumably involving the tax exemption claims) and how NLS was pursuing the rights of its employees.

Lisa Gagnon

[82] Lisa Gagnon is a member of the Mikisew Cree First Nation which has its reserve in Alberta, near Lesser Slave Lake. She grew up in Gold River and Campbell River, B.C. and attended a program in aboriginal government at a college in the Yukon and then worked for a number of years at the Royal Bank in Victoria. She has never lived on a reserve.

[83] In 1999 she became a volunteer at the BCAAFC in Victoria, and began part-time paid work there in 2000. In April 2001, she was hired full-time by the BCAAFC as the Aboriginal Peoples's Council ("APC") Policy Assistant. The APC was a federally-funded initiative to provide advice and support to all urban native organizations in Canada and to consult with those organizations on proposed

legislation. It developed policy on child and family services issues as well. While it was not entirely clear from the evidence, it appears that the APC was made up in part of staff from the various provincial and territorial Friendship Centre Associations such as the BCAAFC. The APC was dissolved in 2003 when its funding was cut.

[84] In July, 2001, Ms. Gagnon ceased her employment with the BCAAFC and became an employee of NLS placed at the BCAAFC. This coincided with the move of the BCAAFC office to downtown Victoria from a reserve. Ms. Gagnon said that in addition to the tax exemption, her employment with NLS gave her access to employee benefits which were not offered by the BCAAFC. She said that she received information bulletins, job postings in native organizations and notice of training opportunities from NLS, and had access to legal counsel if needed to assert her rights as a native person. Ms. Gagnon's bank account into which NLS deposited her pay was at a branch located on the Westbank reserve, near Kelowna.

[85] On July 29, 2002, Ms. Gagnon took over the duties of Ms. Barbara Matilpi as the program administrator at the BCAAFC. Her responsibilities included reviewing and making recommendations on the applications to the NAFC for core funding for Friendship Centres, and administering the applications for funding under the First Citizens' Fund. As with Ms. Matilpi, that role involved some training of Friendship Centre directors and financial monitoring of Friendship Centres.

[86] Since 2006, Ms. Gagnon has also administered the Aboriginal Gaming Support program, which assisted native charitable groups in obtaining and accounting for grants made by the government out of gaming revenues.

[87] Ms. Gagnon is still an NLS employee and continues to work at the BCAAFC. During the years in issue she performed her work mostly at the BCAAFC office in Victoria, but made approximately twelve visits to various Friendship Centres in the province each year.

Relevant Legislation

[88] Paragraph 87(1)(*b*) of the *Indian Act* reads:

> 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:
>
> (*b*) the personal property of an Indian or a band situated on a reserve.

Paragraph 87(1)(*a*) is applied through paragraph 81(1)(*a*) of the *Income Tax Act*, which reads:

> 81(1) There shall not be included in computing the income of a taxpayer for a taxation year,
>
> > (*a*) an amount that is declared to be exempt from income tax by any other enactment of Parliament, other than an amount received or receivable by an individual that is exempt by virtue of a provision contained in a tax convention or agreement with another country that has the force of law in Canada;

Analysis

The connecting factors test

[89] In *Williams*, (supra), the Supreme Court established the connecting factors test to determine the *situs* of intangible personal property for the purpose of section 87 of the *Indian Act*. At paragraph 61 of that decision Gonthier, J. described the test in the following terms:

> Determining the *situs* of intangible personal property requires a court to evaluate various connecting factors which tie the property to one location or another. In the context of the exemption from taxation in the *Indian Act*, there are three important considerations: the purpose of the exemption; the character of the property in question; and the incidence of taxation upon that property. Given the purpose of the exemption, the ultimate question is to what extent each factor is relevant in determining whether to tax the particular kind of property in a particular manner would erode the entitlement of an Indian *qua* Indian to personal property on the reserve.

[90] The Federal Court of Appeal, has considered the application of the connecting factors test to employment income in a number of decisions, including *Monias v. the Queen*, 2001 FCA 239, *Shilling v. The Queen*, 2001 FCA 178, *Folster v. The Queen*, 97 D.T.C. 5315, *Bell v. The Queen*, 2000 D.T.C. 6365, *The Queen v. Akiwenzie*, 2003 FCA 469, *Desnomie v. The Queen*, [2000] F.C.J. No. 528 , and *Horn and Williams v. The Queen*, 2008 FCA 352. In doing so, it has identified certain factors that are potentially relevant in determining whether an Indian's employment income is situated on a reserve. These are: the nature, location and surrounding circumstances of the work performed by the employee, including the nature of any benefit that accrued to the reserve; the location of the employer, the residence of the employee, and the place where the employee was paid. The Court has said that the weight to be

assigned to any of these factors may vary according to the facts of any given case but that particular attention should be given to the nature and location of the work performed by the employee, and the circumstances surrounding it (*Monias*, paragraph 33).

[91] The decisions in *Shilling* and *Horn and Williams* both involved claims by employees of NLS that their employment income was exempt from income tax by virtue of paragraph 87(1)(*b*). The circumstances of the employment in *Shilling* and *Horn and Williams* were very similar in many respects to those in these appeals. In both cases it was held that the income was not exempt from tax.

[92] In *Shilling v. The Queen*, the appellant lived off-reserve, was employed by NLS and was placed with a social services organization delivering services to off-reserve natives in Toronto. The Federal Court of Appeal found that the only factor that connected her employment to a reserve was the location of her employer, NLS, on the Six Nations reserve, but said that there was insufficient evidence relating to the operations of NLS to enable the Court to conclude that this factor connected her employment income to a reserve in any significant way. The court stated that there was no evidence to show where NLS's business was conducted in the relevant years, what benefits if any from Ms. Shilling's employment accrued to a reserve, or the nature of the employment relationship between Ms. Shilling and NLS.

[93] The Court found that the nature of the work performed by Ms. Shilling was not a connecting factor to a reserve, saying that "merely because the nature of employment is to provide services to Indians does not connect that employment to an Indian reserve as a physical place", and that "given the limited purpose of paragraph 87(1)(*b*) of the *Indian Act*, the fact that the employment at issue involves providing social services to off-reserve Native people, is no reason for conferring preferred tax treatment under that provision."

[94] The Court also said that Ms. Shilling's residence off-reserve was a less significant factor pointing to the location of her employment income off-reserve.

[95] In *Horn and Williams*, both applicants worked off-reserve, Ms. Horn as the executive director at the National Association of Friendship Centres, and Ms. Williams at the Hamilton-Wentworth Native Women's Shelter. Ms. Horn resided primarily off-reserve in Ottawa, while Ms. Williams resided on a reserve. Both chose to be employed by NLS in order to connect their employment income with a reserve.

[96] In order to address the evidentiary deficiencies identified by the Federal Court of Appeal in *Shilling* relating to the operations of NLS on the Six Nations Reserve, the applicants in *Horn and Williams* called evidence at the hearing in the Federal Court to show the nature and extent of the business carried on by NLS on the Reserve.

[97] The Federal Court found, however, that "the real work of NLS's assets (its leased employees) was carried out off the reserve" and that only administrative functions were carried out on the reserve. It also found that the benefits of NLS operations to the reserve were not overwhelming since its expenditures on rent and salaries were only a small percentage of its gross income and that Mr. Obonsawin, worked principally off-reserve for NLS and did not reside on a reserve. These findings led the Court to give little weight to the location of NLS on-reserve as a connecting factor.

[98] The Federal Court concluded that the income of both applicants was not exempt from tax under paragraph 87(1)(*b*). It held that the location of Ms. Horn's work and residence off-reserve and the nature of her work providing services to off-reserve Natives outweighed the location of NLS on-reserve. In the case of Ms. Williams, the location of her work off-reserve and the nature of her work providing services to an off-reserve clientele outweighed her residence on reserve and the location of "the administrative functions of her employment" on reserve.

[99] The Federal Court of Appeal upheld the decision of the Federal Court, saying that the analysis of the connecting factors by the trial judge was "consistent with the guidance provided by this Court in its previous decisions, including the particular weight given by *Shilling* to the location, nature and other circumstances surrounding the work which gave rise to the employment income."

Appellants' objections to the choice of connecting factors

[100] Counsel for the appellants stated that the Federal Court of Appeal case law involving the application of paragraph 87(1)(*b*) of the *Indian Act* to employment income shows that it is difficult for a claimant to obtain the tax exemption when he or she lives and works off-reserve. Counsel said that this approach was out of date and failed to reflect both, the reality facing native people today and the current attitudes expressed by the government and the Supreme Court concerning the treatment of native people living off-reserve. He said that, for many today, residing and working on a reserve is not a viable option.

[101] He also said that focusing on whether the tax in question would erode the Indian's property on a reserve and whether the claimant can be seen to be acting "qua Indian" ties the connecting factors test to an antiquated notion that aboriginal identity is dependent on residence on a reserve.

[102] Counsel also argued that the Federal Court of Appeal has applied the connecting factors test too restrictively by placing too much weight on the location where the work is performed. He submitted that this Court should apply the test in a way that takes into account that natives today are often not in a position to work on a reserve. He said that it is generally not a choice of, or within the power of, a native person whether they are raised on a reserve or whether they can obtain employment on a reserve since often there is no housing or employment available to them there. In the cases before the Court, Mr. Labillois, Ms. Matilpi, Ms. Janyst, Ms. Mackenzie, Ms. Wherry and Ms. Jim or their families all left their reserves in order to obtain schooling or to seek better economic opportunities.

[103] He suggested, therefore, that less emphasis should be placed on where a claimant works and lives and more on the choices that the claimant has made to connect him or herself with a reserve.

[104] He said the appellants in the cases at bar have all chosen to be employed by NLS or OI because those businesses are located on a reserve, and all but Mr. Roe have chosen to work for organizations providing services to natives. Essentially, these were the only choices open to them in order to obtain the tax exemption.

[105] Counsel submitted that the notion of choice is important in interpreting section 87 of the *Indian Act*, and referred to paragraph 18 of *Williams v. Canada*, [1992] 1 S.C.R. 877:

> Therefore, under the *Indian Act*, an Indian has a choice with regard to his personal property. The Indian may situate this property on the reserve, in which case it is within the protected area and free from seizure and taxation, or the Indian may situate this property off the reserve, in which case it is outside the protected area, and more fully available for ordinary commercial purposes in society. Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian.

[106] I am not convinced that it is inappropriate to attach significant weight to the location where the work was done in determining the *situs* of the income arising from that work. In *Shilling*, the Federal Court of Appeal said at paragraph 48 that the location of the employment was a relevant consideration because it is the services of

the employee that create an entitlement to the receipt of employment income, and went on to say:

> That an Indian is employed on a reserve is an indication that he or she is acquiring employment income as an Indian qua Indian, in employment integral to the life of the reserve: *Folster*, supra, at paragraph 14. The opposite would also be true, that is, employment off-reserve is an indication that the Indian is acquiring employment income in the commercial mainstream. In *Mitchell*, supra, Laforest stated for the majority at page 131:
>
> > […] The purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians.

[107] In my view, the difficultly that a native person may have in finding employment on a reserve does not change the fact that employment off-reserve is still an indication of employment in the commercial mainstream, a fact that must be taken into account in determining the *situs* of the income. This same point was noted by the Federal Court of Appeal in *Monias*, where the taxpayer argued that the Court should take into account that it would have been very difficult for his employer to operate from an office on any of the reserves it served because of the remoteness of those reserves and the lack of facilities there. The Court rejected this argument, saying, at paragraphs 42 and 43 of the decision:

> That it was impracticable for the work to be performed on the reserves, as Awasis' articles of incorporation and the Order in Council seem originally to have envisaged, does not enable the Court to proceed on the basis that the employment duties had in fact been performed there. As Rothstein J.A. said in *Desnomie v. R.* (2000), 186 D.L.R. (4th) 718 (Fed. C.A.), at paragraph 21:
>
> > The necessity argument in effect says that the employer, employee and place of employment would be on a reserve if that were possible and therefore the employment income should be treated as if it were located on a reserve. The difficulty with this argument is that in the circumstances of this case, it does not deal with the issue at hand, namely, whether the appellant's employment income is his property on a reserve. *This is a locational, or situs determination, based upon the location of the relevant transaction.* (Emphasis added)

> I agree that necessity cannot locate on a reserve the performance of employment duties that were clearly performed off reserve, nor situate employment income on a reserve when the connecting factors clearly point to another location. The fact that the respondent works off reserve is a factor that tends to connect his employment income elsewhere than on a reserve.

[108] The effect this might have on the availability of the tax exemption to many natives is not a sufficient reason to disregard the location of the employment, given that the purpose of paragraph 87(1)(*b*) is not to remedy economic disadvantage faced by native people.

[109] To the extent that the appellants are challenging the policy behind the tax exemption, their remedy lies with Parliament rather than the Courts. The scope of the exemption is a result of policy choices made by Parliament in drafting paragraph 87(1)(*b*) and it is not open to the Courts to expand the exemption beyond what was intended by Parliament.

Application of the connecting factors test in the cases at bar

Location of the employer

[110] Counsel for the appellants pointed out the location of NLS and OI on a reserve, the benefit flowing to the reserve from the business conducted there and the benefit flowing to all of their employees through training, job postings and the creation of a self-supporting native network.

[111] Counsel for the respondent submitted that the location of NLS and OI on the Six Nations Reserve should be not be considered to be a relevant connecting factor at all because it would tend to connect the appellants' income with a reserve other than their own reserves. He submitted that the tax exemption was only applicable to property located on an Indian's own reserve and not to property of that Indian that is located on any other reserve. Since none of the appellants lived on or even ever visited the Six Nations Reserve, the link between their employment income and the Six Nations Reserve is not relevant for the purposes of paragraph 87(1)(*b*) of the *Indian Act*.

[112] Should the location of NLS and OI on reserve be found to be a relevant connecting factor, the respondent's counsel submitted that it should be accorded little weight in connecting the appellants' employment income with a reserve since the income-generating activities of NLS and OI occurred off the Six Nations Reserve

and the amount of money spent on the Reserve was a small percentage of their overall revenue. Furthermore, the connection between the appellants and the Reserve is mitigated by the fact that the employment relationships between the appellants and NLS or OI were created merely for the purpose of obtaining a paragraph 87(1)(*b*) exemption. Counsel referred to paragraph 50 of the *Monias* decision where the FCA said:

> In particular, an employer's location of convenience on a reserve will do little to connect the employment income to a reserve.

[113] With respect to the respondent's first argument, I do not believe that paragraph 87(1)(*b*) requires that the property for which an Indian is seeking a tax exemption be located on his or her own reserve, so long as it is located on a reserve. I agree with the comments of the Federal Court Trial Division in *Shilling* that:

> The language of section 87 is very broad, and refers to property situated on "*a* reserve", not "*the* reserve", and not "the reserve belonging to the band of which the Indian is a member".

[114] I am aware that the Federal Court of Appeal has expressed doubt as to the correctness of this position in its decisions in *Desnomie* and *Shilling*. More recently, however, the Supreme Court took the opposite view in *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58. One of the issues in that case was whether money deposited in the God's Lake Band's account at a Winnipeg bank was notionally located on reserve and therefore exempt from seizure under Section 89 of the *Indian Act*. The relevant portion of Section 89 reads:

> 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.

[115] The evidence showed that the God's Lake Reserve was in a remote location and that there was no bank located on the Reserve. In the minority reasons, Binnie J. suggested that a finding that the money was not located on a reserve would mean that Indian bands that did not have a bank on their reserve would have no means of protecting money they kept in bank deposits against seizure. In response, McLachlin C.J. writing for the majority, stated that a Band could protect its deposits from seizure by depositing the funds in a financial institution located on the reserve of *another* band. The Chief Justice said, at paragraph 62:

> …even if there is no deposit-taking financial institution on the God's Lake Reserve, it was open to the God's Lake Band to deposit its funding in financial institutions on other reserves. The funds would then have been protected, by virtue of s. 89 of the *Indian Act*. As Gonthier J. noted in *Williams*, at p. 887, "under the *Indian Act*, an Indian has a choice with regard to his personal property. ... Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian."

[116] It is reasonable to assume that the use of the same wording ("property…situated on *a* reserve") in paragraph 87(1)(*b*) of the *Indian Act* should be interpreted in the same way, especially given that the two provisions share a similar purpose.

[117] With respect to the respondent's next argument, I do not accept the proposition that since the employment relationships in this case were created in order to obtain the exemption that they can be accorded less weight than if the appellants had a non-tax motivation for entering into the relationship. In the cases at bar, the respondent did not allege that the employment relationship between the appellants and NLS and OI was a sham. It is clear that the contract of employment entered into between each appellant and NLS or OI created genuine legal rights and obligations.

[118] Also, the evidence shows that the location of the NLS and OI offices on the Six Nations Reserve was not a location of convenience in the same sense that the office of the native business in *Bell v. The Queen* (supra) was. In that case, the on-reserve office was found not to be the place where the "real business" of the company was carried on or where its "central management and control" actually resided because the office was only used occasionally and for limited business purposes over the span of three years. For NLS and OI, even though the vast majority of their employees (i.e. the leased employees) did not work on the Six Nations Reserve, the administration for those employees was still carried out by NLS and OI at the Six Nations Reserve office on a regular and continuous basis.

[119] The appellants have not shown, however, that any significant benefit flowed to the Six Nations Reserve from NLS and OI operations there. It is unclear what amount of the outlays of NLS and OI were made on the Reserve. Mr. Obansawin was unable to say with certainty how many of the NLS and OI office staff lived on the Reserve and therefore what portion of the salaries paid may have contributed to reserve life. In addition, the rent of $21,000 per year shown in the 1997 financial statement for NLS that was paid to the Band Council was modest in comparison to its overall expenditures. No amount of rent was listed in the expenses for OI for that year.

Finally, it is apparent that none of the revenue of NLS and OI was generated on the Reserve.

[120] I find therefore that the location of NLS and OI on the Six Nations Reserve connects the employment income of the appellants with that Reserve, but that the weight to be attributed to this factor is limited by the extent to which the operations of NLS and OI were carried out off-reserve and in the commercial mainstream and by the lack of evidence of a significant benefit flowing to the Six Nations Reserve or any other reserve.

Location of the work

[121] The location where the work was done is important because the services provided by the employee are what give rise to the right to the employment income. The fact that the work is performed off-reserve connects the income with the off-reserve location.

[122] In the case of the appellants, only Ms. Janyst and Ms. Hanuse regularly spent time working on reserves. It is not disputed that the rest of the appellants spent no time or almost no time working on reserves.

[123] Ms. Mackenzie worked off-reserve at the NAFC. Ms. Gagnon and Ms. Matilpi worked off-reserve at the BCAAFC. Ms. Jim worked off-reserve at the Circle of the Eagles Lodge. Mr. Labillois worked off-reserve at the Micmac Friendship Centre. Ms. Wherry worked from the off-reserve office of the FPHLCC in Victoria. Mr. Roe's work driving truck was performed off-reserve as well. For these appellants, the location of the work points strongly to their employment income being located off-reserve.

[124] With respect to Ms. Janyst and Ms. Van Hanuse, counsel for the respondent submitted that the evidence as a whole showed that they worked much less time on reserves than claimed. He submitted that the evidence does not establish for either Ms. Janyst or Ms. Van Hanuse that the majority of their work was carried out on-reserve. Ms. Hanuse worked primarily at the Ki-Low-Na Friendship Society and Ms. Janyst worked primarily from her home in Victoria. Counsel also said that the Court should also take into account that the reserves on which Ms. Janyst and Ms. Van Hanuse worked were not their home reserves.

[125] Counsel for the appellants, on the other hand, contended that Ms. Hanuse and Ms. Janyst spent significant time on reserves in the course of their work.

[126] The evidence shows that Ms. Janyst worked regularly between two and three days a month on various reserves throughout B.C. She also spent time in many off-reserve locations serving an off-reserve aboriginal and Métis clientele and worked from her home in Victoria setting up her travel and meetings, writing reports and doing paperwork. From all of the evidence I conclude that her work was based off-reserve and that she performed the major part of her work off-reserve.

[127] I also find that Ms. Van Hanuse worked regularly, about one and occasionally two days a week, on the Westbank Reserve in the last months that she worked for the Ki-Low-Na Friendship Society. The remainder of her time was spent serving a mostly off-reserve aboriginal clientele in Kelowna generally at the Friendship Society. Ms. Van Hanuse's work was based off-reserve at the Friendship Society and the majority of her work was performed off-reserve.

[128] Given these conclusions, I find that the location of Ms. Janyst's and Ms. Van Hanuse's work also points strongly to their employment income being off-reserve.

The nature and circumstances of the employment including any benefit to a reserve:

[129] The goal of Ms. Janyst's employer, AHF, was to fund and support healing initiatives developed within the native community to address the legacy of residential school abuse. Its work was directed at and benefited the native community at large and not exclusively on-reserve natives.

[130] Ms. Van Hanuse's work relating to the Canadian Pre-natal Program and the Canadian Action Plan for Children did not exclusively target on-reserve natives but included them. The appellant did not provide any further details of the programs that would indicate that there was a particular focus on or benefit to natives residing on a reserve or that the work was integral to the Westbank Reserve community. Therefore as in Ms. Janyst's case, while the Reserve benefited from her work, this was also true of the off-reserve Métis and Indian population.

[131] Mr. Labillois and Ms. Wherry both worked off-reserve for employers serving both on and off-reserve natives without regard to their place of residence. As a result a number of the individuals who benefited from their services lived on-reserve.

[132] The purpose of Mr. Labillois' employment was to provide computer training to clients of the Micmac Friendship Centre. Mr. Labillois said that four out of nine of his students each year lived on reserve while taking his course.

[133] Ms. Wherry's work was directed at preserving and developing native heritage through the award of development grants to native artists. About half of all grant applicants either lived or carried out their artistic endeavours on various reserves throughout B.C. A significant number of FPHLCC art grants did go to aboriginal artists living and working on a reserve but the actual proportion of successful applicants that lived on reserve was not available because FPHLCC did not distinguish between applicants living on or off reserve or between status or non-status Indians or Métis applicants.

[134] Therefore, while the work of Ms. Van Hanuse, Ms. Janyst, Mr. Labillois and Ms. Wherry in part contributed to life on certain reserves, this does not tend to connect their employment income more to a reserve than to an off-reserve location. The Federal Court of Appeal in *Monias* said at paragraph 66:

> That the work from which employment income is earned benefits Indians on reserves, and indeed may be integral to maintaining the reserves as viable social units, is not in itself sufficient to situate the employment income there. It is not the policy of paragraph 87(1)(*b*) to provide a tax subsidy for services provided to and for the benefit of reserves. Rather, it is to protect from erosion by taxation the property of individual Indians that they acquire, hold and use on a reserve, although in the case of an intangible, such as employment income, it is the *situs* of its *acquisition* that is particularly important.

[135] Given that beneficiaries of the services provided by Ms. Van Hanuse, Ms. Janyst, Mr. Labillois and Ms. Wherry were not required to reside on a reserve in order to access the services, the fact that some of them did live on a reserve is, in my view, of limited significance. The focus of their work was not exclusively, or even chiefly a reserve community and there was no evidence presented to show that the services they provided were integral to the life of any reserve. The nature of their work therefore points to an off-reserve location for their employment income.

[136] It is also relevant that Ms. Janyst's and Ms. Wherry's employment has not been shown to be connected to a particular reserve. Many different reserves benefited from their work. In *Desnomie*, the Federal Court of Appeal said at paragraph 21:

> Even if it could be argued that the section 87 exemption applies when the property of an Indian is located on a reserve other than his own, in this case the nature of

> the employer and employment alone do not identify a specific reserve to which the appellant's property can be connected. Therefore, these considerations do not help to locate his employment income.

The Federal Court of Appeal also said in *Monias* at paragraph 46 that:

> … while the employees' work may help to maintain and enhance the quality of life on the reserves for members of the Bands living there, it does not necessarily connect the acquisition or use of their *employment income* to the reserves as physical locations.

[137] Ms. Gagnon, Ms. Mackenzie and Ms. Matilpi all served an off-reserve aboriginal clientele through their work at National Association of Friendship Centres or the BCAAFC. The direct clients of both organizations were various Friendship Centres, all of which all were off-reserve, except one. Even if I were to count the users of the Friendship Centres as the clients of the NAFC or the BCAAFC, there is no evidence of whether those users lived on or off-reserve. The NAFC and the BCAAFC did not keep records of the number of clients that lived on a reserve since it was not material to their receiving services. It is material, though, that the Friendship Centres targeted off-reserve natives and were set up to assist natives migrating to urban centres.

[138] Ms. Jim’s work at the Circle of the Eagles Lodge assisted with the rehabilitation and reintegration of ex-offenders. No records were kept as to how many of the clients who were living at the Lodge had lived on a reserve before being incarcerated or who intended to live on a reserve after leaving the Lodge. Prior or subsequent residence on a reserve was not required for admission to the Lodge. The services provided by the Lodge were simply designed to assist the residents with reintegration into society wherever they went.

[139] For Ms. Mackenzie, Ms. Gagnon, Ms. Matilpi and Ms. Jim, it is not possible to say that their services contributed in any significant fashion to life on any reserve and the nature and circumstances of their employment do not connect their income to a reserve. As held by the Federal Court of Appeal in *Shilling* (at paragraph 51), services to off-reserve natives do not connect employment income to a reserve as a physical place.

[140] Finally, Mr. Roe worked for non-aboriginal employers and served a non-aboriginal clientele. For Mr. Roe, neither the nature of his work driving a truck throughout Canada and the U.S., nor the circumstances of his employment connected

his employment with a reserve or had anything in particular to do with any reserve. His work was undoubtedly in the commercial mainstream.

Residence of the employee:

[141] In *Williams*, Gonthier, J. said that the residence was a potentially relevant consideration in a connecting factors analysis if "it points to a location different from that of the qualifying employment". In *Shilling*, the Federal Court of Appeal reiterated this position, tacitly rejecting the argument that no weight should be attached to the residence of the taxpayer since residence off-reserve is in many cases not a matter of choice for a native person. In cases where an appellant both worked and lived off-reserve, the location of the appellant's residence has been accorded little weight.

[142] Of all of the appellants, only Ms. Jim lived on a reserve while employed by NLS. I do not attribute much weight to this factor in Ms. Jim's case. The fact that she took her employment income home to the reserve in North Vancouver was not shown to have amounted to a significant contribution to life on the reserve. In the case of Mr. Labillois, his visits to his home reserve to visit family and friends were at times he was not teaching at the Micmac Friendship Centre in Halifax and should not be considered to be a connecting factor. He resided off-reserve in Halifax at all times he was providing the services that gave rise to the employment income.

Place of payment

[143] The place where the appellants were paid is a potentially relevant factor, albeit a minor one. In *Monias*, the Federal Court of Appeal attached almost no significance to the location of branches of the banks from which the employer paid salaries and at which the employees' accounts were credited, saying (at paragraph 57):

> Where employees receive their employment income has little, if any, logical connection with the policy underlying section 87.

[144] The appellants were paid from a bank account located on a reserve in Alberta and some of them had their wages deposited directly into accounts they maintained at bank branches located on reserves. No evidence was led, though, to show that these arrangements connected the income to that reserve either as a physical location or as an economic base and I do not accord much weight to them.

Summary

[145] The factors that connect the employment of the appellants to a reserve are the location of NLS and OI on reserve and the payment of the employment income from a bank account on a reserve. For Ms. Jim, an additional connecting factor is her residence on a reserve while she worked at the Circle of the Eagles Lodge. However, for the reasons given, I would accord less weight to these factors than to the location and nature and circumstances of the appellants' work, which in all cases point to an off-reserve location for their employment income.

[146] In the absence of any special circumstances that would tie the appellants' work to a specific reserve, and in the absence of evidence of a significant connection between their work and the Six Nations Reserve or any other reserve, there is no basis for concluding that the taxation of their employment income from NLS or OI would result in the erosion of their entitlement to property they held as Indians on a reserve.

[147] As a result, I find that appellants' employment income from NLS and OI is not exempt from income tax.

[148] For all of these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 5th day of December 2008.

"B. Paris"

Paris J.

Appendix

Appellant	Court No.	Tax Years	Band Membership	Employer	Service Organization
Delores Jim	2007-1835(IT)	1999, 2000, 2001	Penelakut Indian Band	Native Leasing Services	Circle of Eagles Lodge Society, Vancouver
Jonathan Labillois	2007-2213(IT)	2000, 2001, 2002	Listuguj Mi'Gmaq First Nation	Native Leasing Services	Mic Mac Native Friendship Centre, Halifax
Pauline Janyst	2007-2978(IT)	2000, 2001	Da'naxda'xwnFirst Nation	Native Leasing Services	Aboriginal Healing Foundation, appellant based in Victoria
Lisa Gagnon	2007-3013(IT)	2001, 2002, 2003, 2004, 2005	Mikisew Cree First Nation	Native Leasing Services	BC Association of Aboriginal Friendship Centres, Victoria
Catherine Wherry	2007-306(IT)	2002, 2003, 2004	Chippewas of Mnjikaning First Nation	Native Leasing Services	First Peoples Heritage, Language and Culture Council., Victoria
Barbara Matilpi	2007-947(IT)	2001, 2002	Namgis First Nation	Native Leasing Services	British Columbia Association of Aboriginal Friendship Centres, Victoria
Tanya Mackenzie	2007-975(IT)	2002, 2004	Temagami First Nation	Native Leasing Services	National Association of Friendship Centres, Ottawa
Alegha Van Hanuse	2007-118(IT)	2000, 2001	Oweekeno/Wuikinuxv Nation	Native Leasing Services	Ki-Low-Na Friendship Society, Kelowna
Wayne Roe	2007-170(IT)	1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006	Thessalon First Nation	OI Employee Leasing	B.N. Dulay Trux; Aujla Trucking Ltd.

CITATION:	2008 TCC 667
COURT FILE NO.:	2007-170(IT)I
STYLE OF CAUSE:	WAYNE ROE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Victoria, British Columbia
DATE OF HEARING:	July 21, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Paris
DATE OF JUDGMENT:	December 5, 2008

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