Docket: 2005-830(IT)G

BETWEEN:

RONALD BALLANTYNE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on March 16, 17 and 18, 2009 at Winnipeg, Manitoba

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant:	R. Ivan Holloway Shawn Scarcello
Counsel for the Respondent:	Gérald L. Chartier Melissa Danish

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JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the Appellant's 2001 and 2002 taxation years are dismissed, with costs.

Signed at Ottawa, Canada, this 16th day of June, 2009.

"Wyman W. Webb"

Webb J.

Citation: 2009TCC325
Date: 20090616
Docket: 2005-830(IT)G

BETWEEN:

RONALD BALLANTYNE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Appellant is an Indian as defined in section 2 of the *Indian Act*. The issue in this case is whether the income derived by the Appellant from his fishing business in 2001 and 2002 is exempt from taxation pursuant to subsection 87(1) of the *Indian Act* (and therefore would not be included in computing his income for the purposes of the *Income Tax Act* as a result of the provisions of paragraph 81(1)(*a*) of that *Act*).

[2] At the conclusion of the first day of the hearing, counsel for the Appellant and counsel for the Respondent filed three separate statements of agreed facts. The facts that were agreed upon are set out in Schedule "A" to these Reasons. The references to the Exhibits have not been included.

[3] In the Notice of Appeal that was filed the Appellant stated that he was appealing on the basis that his income was exempt from taxation as a result of the provisions of section 87 of the *Indian Act*. He also stated that he had a right to commercially fish as a result of the provisions of Treaty 5 and that imposing an income tax on his fishing income violated his rights under Treaty 5. At the commencement of the hearing, counsel for the Appellant stated that the Appellant was no longer pursuing an argument that his income from fishing should not be taxed

based on Treaty 5 and was only arguing that his income was exempt from taxation as a result of the provisions of section 87 of the *Indian Act*. Counsel for the Appellant stated that this decision had been made several months prior to the hearing but the Notice of Appeal had not been amended to delete the references to the argument related to Treaty 5. Prior to the commencement of the Appeal, the Notice of Appeal was amended to delete the reference to these arguments. Therefore the only argument raised by the Appellant was that his income was exempt from taxation as a result of the provisions of section 87 of the *Indian Act*.

[4] Subsections 87(1) and (2) of the *Indian Act* provide as follows:

> 87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:
>
> (*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (*b*) the personal property of an Indian or a band situated on a reserve.
>
> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

[5] The Appellant submitted that the personal property in question is income and not the fish that were sold by the Appellant. In *Williams v. The Queen*, [1992] 1 S.C.R. 877, Gonthier J. stated as follows in relation to the application of section 87 of the *Indian Act* to unemployment insurance benefits:

> 20 Section 56 of the Income Tax Act is the section which taxes income from unemployment insurance benefits. That section specifies that unemployment insurance benefits which are "received by the taxpayer in the year" are to be included in computing the income of a taxpayer. The parties have approached this question on the basis that what is being taxed is a debt owing from the Crown to the taxpayer on account of unemployment insurance which the taxpayer has qualified for. This is not precisely true, since the liability for taxation arises not when the debt (if that is what it is) arises, but rather when it is paid, and the money is received by the taxpayer. However, it is true that the taxation does not attach to the money in the hands of the taxpayer, but instead to the receipt by the taxpayer of the money. Thus, the incidence of taxation in the case of unemployment insurance benefits is on the taxpayer in respect of the transaction, that is, the receipt of the benefit.
>
> 21 This Court's decision in *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29, stands for the proposition that the receipt of salary income is personal property for the purpose of the exemption from taxation provided by the *Indian Act*. I can see no

> difference between salary income and income from unemployment insurance benefits in this regard, therefore I hold that the receipt of income from unemployment insurance benefits is also personal property for the purposes of the Indian Act.
>
> 22 *Nowegijick* also stands for the proposition that the inclusion of personal property in the calculation of a taxpayer's income gives rise to a tax in respect of that personal property within the meaning of the *Indian Act*, despite the fact that the tax is on the person rather than on the property directly.

[6] Section 9 of the *Income Tax Act* is the section that provides that a taxpayer's income from a business is the taxpayer's profit from that business. Therefore the incidence of taxation, in the case of a business, is on the taxpayer in respect of the taxpayer's profit from that business. For a fishing business, it is not imposed on the fish but on the profit realized from the sale of the fish.[1] A sale of fish does not, in and of itself, necessarily result in income tax being imposed. If, for example, for a particular year that a business is being carried on and fish are sold, no profit is realized, then there is no tax liability under the *Income Tax Act* in relation to the business. It therefore seems to me that the property in question for the purposes of the *Indian Act* is the profit from the Appellant's fishing business and not the fish since the income tax liability (subject to the *Indian Act*) is based on the profit realized. The particular issue in this case is whether this profit was personal property situated on a reserve.

[7] In *Williams, supra,* Gonthier J. described the connecting factors test that is to be used to determine if the personal property in question is personal property situated on a reserve:

> 37 The approach which best reflects these concerns is one which analyzes the matter in terms of categories of property and types of taxation. For instance, connecting factors may have different relevance with regard to unemployment insurance benefits than in respect of employment income, or pension benefits. The first step is to identify the various connecting factors which are potentially relevant. These factors should then be analyzed to determine what weight they should be given in identifying the location of the property, in light of three considerations: (1) the purpose of the exemption under the Indian Act; (2) the type of property in question; and (3) the nature of the taxation of that property. The question with regard to each connecting factor is therefore what weight should be given that factor in answering the question whether to tax that form of property in that manner would amount to the erosion of the entitlement of the Indian qua Indian on a reserve.

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[1] Taxpayers who are carrying on a farming or a fishing business also have the right to elect to report income on a cash basis pursuant to section 28 of the *Income Tax Act*.

[8] Linden J. in *Folster* v. *The Queen*, [1997] 3 C.T.C. 157, 97 DTC 5315, after referring to this connecting factors test as out in *Williams*, stated that:

> 16 This new test was not designed to extend the tax exemption benefit to all Indians. **Nor was it aimed at exempting all Indians living on reserves.** Rather, in suggesting reliance on a range of factors which may be relevant to determining the situs of the property, Gonthier J. sought to ensure that any tax exemption would serve the purpose it was meant to achieve, namely, the preservation of property held by Indians qua Indians on reserves so that their traditional way of life would not be jeopardized.
>
> (emphasis added)

[9] In *Recalma* v. *The Queen*, [1998] 2 C.T.C. 403, 98 DTC 6238, Linden J. stated as follows in relation to the connecting factors:

> 10 It is plain that different factors may be given different weights in each case. Extremely important, particularly in this case, is the type of income being considered as attracting taxation. Where the income is employment or salary income, the residence of the taxpayer, the type of work being performed, the place where the work was done and the nature of the benefit to the Reserve are given great weight. (See *Folster*, *supra*). Where the income is unemployment insurance benefits, the most weighty factor is where the qualifying work is performed. (See *Williams*, *supra*) **Where business income is involved, most weight was placed on where the work was done and where the source of the income was situated.** (See *Southwind* v. *The Queen*, [1998] F.C.J. No. 15, January 14, 1998, Docket No. A-760-95 (F.C.A.))
>
> (emphasis added)

[10] In this particular case the type of income being considered is business income. In *Southwind* v. *The Queen*, [1998] 1 C.T.C. 265, 98 D.T.C. 6084, Linden J. stated that:

> 12 For the Crown, Mr. Bourgard rightly offered a more complex set of factors to consider in deciding whether business income is situated on the reserve. He suggested that we examine (l) the location of the business activities, (2) the location of the customers (debtors) of the business, (3) where decisions affecting the business are made, (4) the type of business and the nature of the work, (5) the place where the payment is made, (6) the degree to which the business is in the commercial mainstream, (7) the location of a fixed place of business and the location of the books and records, and (8) the residence of the business' owner.

> 13 As was found by the Tax Court Judge, and having considered all of these factors, I am of the view that the appellant's business income does not fit within paragraph 87(1)(b) because it is not property situated on a reserve. While it is significant that the appellant lives on a Reserve, engages in some administrative work out of his home on the Reserve, and stores the business records and the business assets which he owns on the Reserve when they are not in use,[5] **the appellant, in my view, is engaged not in a business that is integral to the life of the Reserve, but in a business that is in the "commercial mainstream".**
>
> (emphasis added)

[11] While “the degree to which the business is in the commercial mainstream” is listed as one of the factors in paragraph 12 referred to above, it is stated as conclusion and contrasted with “integral to the life of the Reserve” in paragraph 13 (as noted above). In *Recalma, supra,* Linden J. stated that:

> 9 In evaluating the various factors the Court must decide where it "makes the most sense" to locate the personal property in issue in order to avoid the "erosion of property held by Indians qua Indians" so as to protect the traditional Native way of life. It is also important in assessing the different factors to consider whether the activity generating the income was "intimately connected to" the Reserve, that is, an "integral part" of Reserve life, or whether it was more appropriate to consider it a part of "commercial mainstream" activity. (see *Folster* v. *The Queen* (1997), 97 D.T.C. 5315 (F.C.A.)) **We should indicate that the concept of "commercial mainstream" is not a test for determining whether property is situated on a reserve; it is merely an aid to be used in evaluating the various factors being considered.** It is by no means determinative. The primary reasoning exercise is to decide, looking at all the connecting factors and keeping in mind the purpose of the section, where the property is situated, that is, whether the income earned was "integral to the life of the Reserve", whether it was "intimately connected" to that life, and whether it should be protected to prevent the erosion of the property held by Natives qua Natives.
>
> (emphasis added)

[12] In *The Queen* v. *Shilling*, 2001 DTC 5420, the federal Court of Appeal stated that:

> 65 However, in the context of determining the location of intangible property for the purpose of section 87, "commercial mainstream" is to be contrasted with "integral to the life of a reserve": *Folster, supra,* at paragraph 14.

[13] In *Horn* v. *The Queen*, 2008 FCA 352, 2008 DTC 6743, Evans J. stated that:

> 10 However, we agree with the appellants that whether employment income is earned in the "commercial mainstream" is a conclusion to be drawn from an examination of the connecting factors, and not a reason in itself for concluding that employment income is not situated on a reserve: *Recalma v. Canada* (1998), 158 D.L.R. (4th) 59 (F.C.A.) at para. 9.

[14] The comments of the Federal Court of Appeal in relation to whether income is earned in the commercial mainstream would apply equally whether the income in question is business income or employment income as in each case the issue is whether that income is personal property situated on a reserve. Therefore the question of whether the business income of the Appellant is earned in the commercial mainstream should not be analyzed as a connecting factor but the question is whether the connecting factors lead to a conclusion that the business income of the Appellant was earned in the commercial mainstream. As well, since "'commercial mainstream' is to be contrasted with 'integral to the life of a Reserve'", it seems to me that an activity, for the purposes of section 87 of the *Indian Act*, cannot, at the same time, be both in the "commercial mainstream" and "integral to the life of a Reserve".

[15] The following connecting factors were identified as relevant connecting factors in determining whether business income is situated on a reserve in *Southwind, supra*:

(l) the location of the business activities,

(2) the location of the customers (debtors) of the business,

(3) where decisions affecting the business are made,

(4) the type of business and the nature of the work,

(5) the place where the payment is made,

(6) the degree to which the business is in the commercial mainstream, (As noted above although this is listed as a factor, the question will be whether the connecting factors lead to a conclusion that the Appellant's business was in the commercial mainstream.)

(7) the location of a fixed place of business and the location of the books and records, and

(8) the residence of the business' owner.

Location of the Business Activities / Type of Business / Nature of the Work

[16] The Grand Rapids Reserve (where the Appellant has resided since he was born and still resides) is located on the northwestern shore of Lake Winnipeg near the mouth of the Saskatchewan River. The Appellant fished in two different areas on Lake Winnipeg. For one area he would launch his boat from behind his house and for the other area (the Gull Bay area) he would haul his boat by truck approximately 45 miles from the Grand Rapids Reserve. The Gull Bay area (as measured in a straight line from the Grand Rapids Reserve) is approximately 15 miles from the Grand Rapids Reserve.

[17] The Appellant's estimate is that he would fish in the Gull Bay area approximately 50% of the time that he was fishing and the balance in the area near the Grand Rapids Reserve. It was acknowledged by the Appellant that the Reserve did not include any part of Lake Winnipeg. Therefore when he was in his boat on the water he was off the Reserve.

[18] The fishing season would generally start around the first of June and last for 6 weeks. The Appellant was assigned a quota that limited the amount of fish he could catch. The Appellant would usually try to catch his quota as soon as possible to reduce his costs. Generally, the Appellant would catch his quota and be finished fishing by the end of June.

[19] The Appellant and his helper would make one or two trips in one day on the water during the fishing season. His first trip of the day would start around 5:00 a.m. and he would return to shore around 11:00 a.m. Prior to departing he would spend approximately one hour getting ready or 2 hours (including travel time) if he was fishing in the Gull Bay area. After returning to shore the Appellant and his helper would remove the heads from the fish and cut open the fish and remove the organs. Although the Appellant indicated that occasionally he would remove the heads and dress the fish while he was still in the boat, he stated that this would not happen very often and I accept that this would not happen often.

[20] When the Appellant was fishing in the Gull Bay area, the fish would be cleaned on the shore (which was not part of the Reserve) or transported back to the

Grand Rapids Fishermen's Co-op (the "Co-op") which is located on the Grand Rapids Reserve and cleaned there. I accept the Appellant's testimony that the majority of the time the fish would be dressed at the Co-op. The estimate of the Appellant is that the dressing of the fish and the other onshore matters that he would attend to during the fishing season would take approximately 2 hours.

[21] As a result, if the Appellant only made one trip on the water, he would spend approximately 3 hours working on shore (preparing the boat and dressing the fish after he returned) and 6 hours on the water. If he traveled to the Gull Bay area his time spent on shore would be greater but since the Gull Bay area is 45 miles from the Grand Rapids Reserve, the extra time would be spent traveling off the Reserve to the Gull Bay area and back to the Reserve.

[22] When the Appellant was on the water he would set the nets (he would usually use between 6 and 10 nets) and haul the nets.

[23] If there were a lot of fish the Appellant would make a second trip on the water in the evening. If he made a second trip he would leave around 7:00 p.m. and return around 11:00 p.m. These fours hours would again be spent off the Reserve as he would be on Lake Winnipeg.

[24] There was also maintenance work that would be done on the Reserve and some in the town of Grand Rapids (which is off the Reserve). The Appellant did his banking at the Credit Union located on the Reserve.

[25] Therefore the Appellant's business activities were performed on the Reserve and off the Reserve. Since the Appellant was carrying on business for himself he did not keep track of his hours. It is very difficult to determine exactly how many hours he spent each year working on the Reserve (preparing for fishing, doing maintenance work, cleaning the boat and the trays, and dressing the fish) and off the Reserve setting and hauling the nets, dressing the fish in Gull Bay, arranging for the maintenance work that was performed of the Reserve and occasionally buying supplies at locations off the Reserve. The majority of the time spent during the days when he was fishing would be spent off the Reserve, either on Lake Winnipeg or in the Gull Bay area. He would spend 6 hours a day on Lake Winnipeg when he made one trip and 10 hours a day on Lake Winnipeg when he made two trips. His onshore duties during the days when he was fishing would take approximately 3 hours. It would seem to me that the most important task in a fishing business would be catching the fish, which took place off the Reserve.

[26] Counsel for the Appellant stressed that Bowie J. in his decision in *Bell v. The Queen*, 98 D.T.C. 1857, [1998] 4 C.T.C. 2526, [1999] 1 C.T.C. 2086, stated that:

> 39 The fact that the work is performed at a location away from the Reserve is not of itself determinative of anything. Indeed, the work could only be done away from the Reserve, because that is where the fish are.

[27] I agree that the fact that the Appellant caught the fish on Lake Winnipeg is not, in and of itself determinative. If for example, the Appellant were to catch fish on Lake Winnipeg and sell his entire catch to the individual residents of the Reserve for their own consumption, then the result would not necessarily be the same as in this case.

Location of the Customers

[28] The Appellant had only one customer for his fish. All of his fish were sold to the Co-op who were acting as an agent for Freshwater Fish Marketing Corporation ("FFMC"). It is the position of the Appellant that his customer was the Co-op and it is the position of the Respondent that the Appellant's customer was FFMC.

[29] FFMC would purchase fish caught in Manitoba, Saskatchewan, Alberta, the Northwest Territories, and part of Northwestern Ontario. It purchased fish caught in Lake Winnipeg from various agents and co-operatives. Some of the agents or co-operatives were located on reserves (such as the Co-op which was located on the Grand Rapids Reserve) and others were not located on a reserve. FFMC dealt with the Appellant on the same terms and in the same manner as it dealt with all other fishermen, whether such person was an Indian (as defined in section 2 of the *Indian Act*) or not.

[30] The agreement between FFMC and the Co-op dated June 17, 2002 was introduced as an Exhibit. Although this agreement is dated June 17, 2002, since the parties agreed that the Co-op purchased fish as agent for FFMC in both of the years under appeal, presumably there was a similar agreement in place for 2001 and the earlier part of 2002. Paragraph 3.01 of this agreement provides as follows:

> 3.01 The Agent shall purchase on behalf of the Corporation all fish lawfully fished by fishers which are offered for sale to the Agent …

[31] Paragraph 5.03 of this agreement provides that:

> 5.03 All payments made by the Corporation to the Agent to pay fishers shall be held in trust by the Agent for the Corporation until paid to the fishers.

[32] As a result, the Co-op clearly was purchasing fish for FFMC and could not sell the fish to any other person (since it was purchasing on behalf of FFMC all fish lawfully fished and offered for sale) and the funds it received from FFMC for the fishers were held in trust for the fishers until paid to them.

[33] In *Bowstead and Reynolds on Agency*, 17th ed, it is stated at page 459 as follows:

> In the absence of other indications, when an agent makes a contract, purporting to act solely on behalf of a disclosed principal, whether named or unnamed, he is not liable to the third party on it. Nor can he sue the third party on it.
>
> "There is no doubt as to the general rule as regards an agent, that where a person contracts as agent for a principal, the contract is the contract of the principal and not that of the agent; and prima facie, at common law the only person who may sue is the principal and the only person who can be sued is the principal."

[34] In this case it is clear that the principal was disclosed. The agreed statements of facts included the following:

> The Co-op purchases fish as agent for Freshwater Fish. All of the Appellant's fish catch is purchased by the Co-op on behalf of Freshwater Fish.

[35] That the Appellant knew that the Co-op was purchasing fish as agent for FFMC is clear from the Appellant's testimony. The following is an excerpt from the Appellant's testimony:

> Q When you catch your fish, where do you deliver your fish to?
>
> A To the Grand Rapids Fishermen's Co-op.
>
> Q Do you know where the fish go from the Grand Rapids Fishermen's Co-op?
>
> A They go to Freshwater Fish Marketing Corporation.
>
> Q And when you say the Freshwater Fish Marketing Corporation, is there a particular location of that organization where these fish go?
>
> A It's in Winnipeg here, in Transcona.

Q Who pays you?

A The Grand Rapids Fishermen's Co-op.

…

and during cross examination:

Q Now when you deliver the fish to the Co-op, when you come with the boat and you unload it and they go through it and they throw out the bad fish and keep the good fish and grade it and all that and give you the daily catch record, we know the fish get trucked down to Winnipeg to the plant in Transcona, Freshwater Fish Marketing Board, correct?

A Correct.

Q So the Co-op buys the fish on behalf of Freshwater Fish Marketing Board, correct?

A It's an agent of Freshwater Fish, yes.

Q And so the Co-op doesn't buy the fish and do something with it? They buy it for the specific purpose of -- I mean it's specifically for Freshwater Fish? They're buying it on behalf of Freshwater Fish, you don't disagree with that?

A No.

Q And Freshwater Fish Marketing Board pays the Co-op with the money and it's that money that's used to pay you as a fishermen --

A Yes.

Q -- correct?

A Yes.

…

Q Now in the years in issue, your catch, you didn't sell any of your fish to anyone other than the Freshwater Fish Marketing Board, is that right?

A I sold it at Grand Rapids. I don't sell directly to the Fish Marketing Board. I sell it to the agent, which is Grand Rapids Fishermen's Co-op.

Q Okay, you sold it to -- you know, you delivered it at the Grand Rapids Fishermen's Co-op?

A Yes.

Q To the Co-op, to the Fishermen's Co-op?

A Yes.

Q Who is buying it on behalf of Freshwater Fish, correct?

A Correct.

Q None of your catch, other than -- like all your catch was sold to the Co-op, who was buying it on behalf of Freshwater Fish during those years, right?

A Yes.

Q So you didn't sell any of that, of your catch to anybody on the reserve in the years in issue?

A No.

[36] The Appellant clearly indicated by his answers that he knew that the Co-op was acting as the agent for FFMC. As well the Appellant is a director of FFMC and had been a director for the last few years. The Appellant also had been a director of the Co-op. He also received weekly summary sheets showing the amount of his catch for the week. The weekly summary sheets clearly identified FFMC. It is clear that FFMC was disclosed as the principal. As a result it seems to me that FFMC was the customer of the Appellant.

[37] All of the fish purchased by FFMC was shipped from the Co-op to Winnipeg. FFMC then sold the fish to customers in Canada, the United States and other countries.

[38] The Appellant also submitted that since FFMC (which is a corporation that was formed by the *Freshwater Fish Marketing Act*, R.S.C. 1985, c. F-13) is, pursuant to section 14 of that statute, an agent of Her Majesty in Right of Canada, that FFMC should be treated in the same manner as a Crown agency and found to have its *situs* everywhere in Canada based on the decision of the Supreme Court of Canada in *Williams, supra*. However it seems to me that the context in which the statements were made by Gonthier J. of the Supreme Court of Canada is relevant. In

Williams the issue was whether unemployment insurance benefits were exempt from taxation as a result of the provisions of section 87 of the *Indian Act*. The comments of Gonthier J. in relation to the *situs* of a Crown agency were as follows:

> **A - The Test for the Situs of the Unemployment Insurance Benefits**
>
> 39 Unemployment insurance benefits are income replacement insurance, paid when a person is out of work under certain qualifying conditions. While one often refers to unemployment insurance "benefits", the scheme is based on employer and employee premiums. These premiums are themselves tax-deductible for both the employer and employee.
>
> 40 There are a number of potentially relevant connecting factors in determining the location of the receipt of unemployment insurance benefits. The following have been suggested: the residence of the debtor, the residence of the person receiving the benefits, the place the benefits are paid, and the location of the employment income which gave rise to the qualification for the benefits. One's attention is naturally first drawn to the traditional test, that of the residence of the debtor. The debtor in this case is the federal Crown, through the Canada Employment and Immigration Commission. The Commission argues that the residence of the debtor in this case is Ottawa, referring to s. 11 of the *Employment and Immigration Department and Commission Act*, S.C. 1976-77, c. 54 (now R.S.C., 1985, c. E-5, s. 17), which mandates that the head office of the Commission be located in the National Capital Region.
>
> 41 **There are, however, conceptual difficulties in establishing the *situs* of a Crown agency in any particular place within Canada. For most purposes, it is unnecessary to establish the *situs* of the Crown. The conflict of laws is interested in *situs* to determine jurisdictional and choice of law questions. With regard to the Crown, no such questions arise, since the Crown is present throughout Canada and may be sued anywhere in Canada.** Unemployment insurance benefits are also available anywhere in Canada, to any Canadian who qualifies for them. Therefore, the purposes behind fixing the *situs* of an ordinary person do not apply to the Crown, and in particular do not apply to the Canada Employment and Immigration Commission in respect of the receipt of unemployment insurance benefits.
>
> 42 **This does not necessarily mean that the physical location of the Crown is irrelevant to the purposes underlying the exemption from taxation provided by the *Indian Act*.** However, it does suggest that the significance of the Crown being the source of the payments at issue in this case may lie more in the special nature of the public policy behind the payments, rather than the Crown's *situs*, assuming it can be fixed. Therefore, the residence of the debtor is a connecting factor of limited weight in the context of unemployment insurance benefits. For similar reasons, the place where the benefits are paid is of limited importance in this context.
>
> (emphasis added)

[39] It does not seem to me that the comments of Gonthier J. in relation to the *situs* of a Crown agency in the *Williams* case apply equally to FFMC. As noted by Gonthier J. the "conflict of laws is interested in *situs* to determine jurisdictional and choice of law questions". Section 14 of the *Freshwater Fish Marketing Act* provides that:

> 14. The Corporation is for all purposes of this Act an agent of Her Majesty in right of Canada.

[40] Section 83 of the *Financial Administration Act*, R.S.C. 1985, c. F-11, provides in part that:

> 83. (1) In this Part,
>
> "agent corporation" means a Crown corporation that is expressly declared by or pursuant to any other Act of Parliament to be an agent of the Crown;

[41] Section 98 of the *Financial Administration Act, supra,* provides as follows:

> 98. Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by an agent corporation, whether in the name of the Crown or in the name of the corporation, may be brought or taken by or against the corporation in the name of the corporation in any court that would have jurisdiction if the corporation were not an agent of the Crown.

[42] Since the jurisdiction applicable for proceedings commenced by or against FFMC would be determined as if FFMC were not an agent of the Crown, the jurisdictional and choice of law questions would not be resolved in the same manner for FFMC as for the federal Crown, through the Canada Employment and Immigration Commission.

[43] As also noted by Gonthier J.:

> This does not necessarily mean that the physical location of the Crown is irrelevant to the purposes underlying the exemption from taxation provided by the Indian Act.

[44] It seems to me that in this case the physical location of the Crown is relevant. In this case the Appellant's business is the sale of a product – fish. The physical location of FFMC in Winnipeg is relevant as the product sold by the Appellant is transported off the Reserve to the physical location of FFMC in Winnipeg.

[45] In *Bell* v. *The Queen*, [2000] 3 C.T.C. 181, 2000 DTC 6365, Létourneau J. stated that:

> 50 As the House of Lords said in *Unit Construction Co. Ltd.* v. *Bullock*, [1960] A.C. 351, at page 366 per Lord Radcliffe and at page 372 per Lord Cohen: "a company resides, for purposes of income tax, where its real business is carried on... and the real business is carried on where the central management and control actually abides"; see also *Pet Milk Canada Ltd.* v. *Olympia and York Developments*, (1974), 4 O.R. (2d) 640 (Ont. Master).

[46] As noted in the agreed facts, the head office of FFMC is in Winnipeg (as provided in the *Freshwater Fish Marketing Act*). Also as noted in the agreed facts, the Board of Directors of FFMC meets six times during its fiscal year in Winnipeg. It seems to me that in determining where FFMC resides, it is important to determine where "the central management and control **actually** abides"[2]. Since the central management and control of FFMC abides in Winnipeg, it seems to me that FFMC resides in Winnipeg, which is not on the Reserve.

[47] As noted by La Forest J. in *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85:

> 88 It is also important to underscore the corollary to the conclusion I have just drawn. **The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that 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.
>
> (emphasis added)

[48] In *Folster, supra*, Linden J. stated that:

> 14 LaForest J. characterized the purpose of the tax exemption provision as, in essence, an effort to preserve the traditional way of life in Indian communities by protecting property held by Indians qua Indians on a reserve. Section 87, however, was not intended as a means of remedying the economic disadvantage of Indians. Although a laudable goal, it is not for the courts to attempt to achieve it by stretching the boundaries

[2] Emphasis added.

> of the tax exemption further than they can be supported on a purposive reading of the legislation. **Where, therefore, an aboriginal person chooses to enter Canada's so-called "commercial mainstream"[27], there is no legislative basis for exempting that person from income tax on his or her employment income.**[28] Hence, the requirement that the personal property be "situated on a reserve". The situs principle provides an internal limit to the scope of the tax exemption provision by tying eligibility for the exemption to Indian property connected with reserve land. Thus, as will be seen, where an Indian person's employment duties are an integral part of a reserve, there is a legitimate basis for application of the tax exemption provision to the income derived from performance of those duties.
>
> (emphasis added)

[49] In *Southwind* v. *The Queen, supra,* Linden J. stated that:

> 14 According to the Supreme Court in Mitchell, where an Indian enters into the "commercial mainstream", he must do so on the same terms as other Canadians with whom he competes. **Although the precise meaning of this phrase is far from clear, it is clear that it seeks to differentiate those Native business activities that deal with people mainly off the Reserve, not on it.** It seeks to isolate those business activities that benefit the individual Native rather than his community as a whole, recognizing, of course, as Mr. Nadjiwan says, that a person benefits his or her community by earning a living for his family.
>
> …
>
> 17 In concluding, it should be noted that section 87 does not exempt all Natives resident on a Reserve from income taxation. The process of determining the tax status of income earned by Natives on Reserves has become quite complex, depending on a sophisticated analysis of a series of factors. It may appear to some that inconsistencies exist in the treatment of the various cases, but each of them depends on its unique facts. **All we can do is evaluate the factors and draw the lines, as best we can, between business income and employment income that is situated on the Reserve and integral to community life, and income that is primarily derived in the commercial mainstream, working for and dealing with off-reserve people.**
>
> (emphasis added)

[50] It seems to me that it is important to recognize that in this case the income arises as a result of the sale of a property – fish and not from the provision of services (which is the subject of several cases dealing with employment income). It seems to me in light of the comments of La Forest, J. and Linden, J. noted above

that it is important to determine whether the Appellant, in selling his fish, was dealing with on-reserve people or off-reserve people. In my opinion it is a very important factor in this case that the Appellant sold his entire catch to FFMC who were located off the Reserve. The fact that the Appellant would purchase ice, fuel and other supplies from the Co-op does not change the identity of the person who purchased the Appellant's fish.

Where Decisions Affecting the Business are Made

[51] The decisions affecting the business would be made both on the Reserve and off the Reserve. Clearly when the Appellant was on Lake Winnipeg his decision concerning where to place his nets in the water (which would presumably be a very important decision in a fishing business) were made off the Reserve.

Place Where the Payment is Made

[52] The Appellant was paid in two different ways. When the price to be paid for the fish was initially set, the fishers (including the Appellant) would be paid 85% of the estimated market price. Each week he would be paid by cheque based on this 85% of the estimated market price and the quantity of fish that were delivered to the Co-op. The Co-op paid the Appellant from the funds that it had received from FFMC, and as noted above under the agreement with FFMC, that the Co-op had agreed were being held in trust for the Appellant. After the fishing season was completed and when the final market price was known, the Appellant received his final payment directly from FFMC. FFMC dealt with the Appellant on the same terms and in the same manner as it dealt with all other fishermen, whether such person was an Indian (as defined in section 2 of the *Indian Act*) or not.

Location of a Fixed Place of Business and of the Books and Records

[53] The location of the Appellant's fixed place of business and the location of his books and records were at his house on the Reserve. He would store his boat and equipment during the off season at his house.

Residence of the Business' Owner

[54] The Appellant resided on the Reserve.

Conclusion Based on these Connecting Factors

[55] It seems to me that these connecting factors lead to a conclusion that the Appellant earned his business income in the commercial mainstream. Of particular importance, as noted by the Federal Court of Appeal in *Recalma* and *Southwind*, is the place where the work was done and where the source of income was situated. The Appellant in this case caught the fish off the Reserve, spent most of his working time while carrying on his business during the fishing season off the Reserve and sold his entire catch to FFMC (who were located off the Reserve and who transported the entire catch off the Reserve as soon as possible). None of the fish were sold on the Reserve. It would appear that the product that was sold (fish) spent very little time on the Reserve.

[56] In *Bell* v. *The Queen*, [2000] 3 C.T.C. 181, 2000 DTC 6365 the Federal Court of Appeal held that the fishing income (which included the income of the president, sole shareholder and sole director of the company that employed the other appellants) was not exempt from taxation. Létourneau J. made the following comments:

> 39 The appellants submit, as an additional connecting factor, the benefit to the Native community and life on a Reserve. As the argument goes, the appellants' ability to fish and support themselves and their families in an activity which is a traditional Native activity allowed for a continuation of the traditional Native way of life in today's society. They find support for their submission in the following passage from our colleague Linden J.A. in *Folster*, at page 5323:
>
> > In my view, when the personal property at issue is employment income, it makes sense to consider the main purpose, duties and functions of the underlying employment; specifically, with a view to determining whether that employment was aimed at providing benefits to Indians on reserves (emphasis added by Létourneau J.)
>
> 40 I want to emphasize at the outset that the benefit concept relied upon by the appellants is not an independent, free-standing connecting factor, but rather is a standard by which to evaluate the "nature of the employment" factor. In Folster, the appellant worked for a hospital which attended to the health needs of the Reserve community. It is clear in that case that the hospital provided services to the people of the Reserve and that it is this kind of benefit directly connected to, and resulting from, the employment that our Court retained as a yardstick against which to measure the "employment" factor. In *McNab* v. *Canada*, [1992] 2 C.T.C. 2547, at page 2551, the Tax Court found that the claimant's work was for an employer whose sole purpose was to benefit Indians on Reserves. Common to both these employments was the fact that Indians on a Reserve benefitted from the actual work done. In *Amos et al.* v. *The Queen*, 99 DTC 5333, our Court found that the employment of Band members benefited the Reserve because there was an express

agreement, between the Band and the corporation who leased lands from the Band, that these leased lands whose use was integral to the operation of the corporation's pulp mill would be used to provide employment to Band members. Our Court found that the "employment was directly related to the realization by the Band and its members of their entitlements to the reserve land": Ibid., at p. 5335. There is no such understanding in the present instance and, as previously mentioned, the appellants represent only a small portion of the entire work force of the Company.

41 There is no doubt that the fact that the appellants drew a salary and brought it back to the Reserve provided some economic benefits to the Reserve but it is obviously not benefits of this nature that this Court sanctioned in *Folster* and in *Recalma, supra*. Indeed, as this Court said in *Southwind* v. *The Queen*, 98 DTC 6084, at page 6087 (F.C.A.), the phrase "commercial mainstream" "seeks to isolate those business activities that benefit the individual Native rather than his community as a whole, recognizing, of course,... that a person benefits his or her community by earning a living for his family". Otherwise, any employment located off the Reserve, no matter how unconnected, would be seen as benefiting life on the Reserve and, therefore, would attract the tax exemption. **This is not the purpose of section 87 of the Act which, as La Forest J. stated in Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, at pages 130-131, is aimed not at conferring a general economic benefit upon Indians, but rather at protecting them against attempts by non-natives to dispossess them of the property which they hold qua Indians, i.e., their land base and the chattels on that land base.**

42 Like the Tax Court judge, I believe that **the appellants are "engaged not in a business that is integral to the life of the Reserve", but in a business that is in the "commercial mainstream":** *Southwind* v. *The Queen, supra*, at page 6087 (F.C.A.). I agree with counsel for the respondent that the appellants cannot remove themselves from that "commercial mainstream" merely through asserting that, by earning a living for an individual's family, they benefit the Native community.

43 The appellants also submit that their employment goes beyond providing an economic benefit to their Native community: it permits Band members to carry on their traditional way of life, albeit in a modern context. In this regard, the Tax Court judge found at page 15 of his decision that "there is no evidence that the fishing activity of the Company which gives rise to the incomes of the Appellants has any close connection with the Reserve, or any historic, social or cultural connection with either the Band or the Reserve". In other words, there was no evidence that the commercial fishing activity of the Company, as opposed to the annual food fishery in which the appellants participated to the benefit of the Band, was an activity closely connected with either the Band or the Reserve. The appellants have not demonstrated to us that this finding of fact is erroneous. In the absence of a proper factual foundation for the appellants' allegation, we are left to speculate, and neither speculation nor well-intended guesses are valid substitutes for real and probative evidence.

> 44 **Moreover, in isolating as a connecting factor the maintaining and enhancing of the native life on the Reserve as a means of supporting themselves, the appellants assume and submit that paragraph 87(1)(b) of the Act has a second purpose: the tax exemption therein aims at securing for Indians their right to enjoy the benefits of their traditional ways of life such as hunting and fishing.** They claim that trade and commerce was not foreign to the members of the First Nations and, therefore, that, in a modern context, the traditional Indian activity of fishing, from which they derive the income necessary to pursue a career that is consistent with their aboriginal identity, dictates that it be performed in the commercial mainstream. Hence, they should be entitled to the benefit of the tax exemption when fishing in the commercial mainstream.
>
> 45 **The short answer to the appellants' contention is, in my view, that it runs contrary to the decisions of the Supreme Court of Canada in *Williams* and *Mitchell, supra*, where the Court held that those Indians who acquire, hold and deal with property "in the commercial mainstream" must do so on the same terms as their fellow citizens. Happily or not, in our modern society and context, income obtained from commercial fishing in the commercial mainstream is taxable.** Section 87 of the Act ought not to be given an expansive scope by ascribing an overly broad purpose to it: see *Union of New Brunswick Indians and Tomah* v. *N.B. (Min. of Finance)*, (1998), 227 N.R. 92, at page 115 (S.C.C.); see also *R.* v. *Lewis*, [1996] 1 S.C.R. 921 where the phrase "on the reserve" was given a narrow interpretation as the Court held that it did not mean "adjacent to", but in or within the boundaries of the Reserve, and that it should receive the same construction wherever used within the Act.
>
> 46 In the end, I am satisfied, as the Tax Court judge was, that the appellants' property, derived from commercial fishing with a private company in the commercial mainstream had, to use the words of La Forest J. in *Mitchell*, *supra*, at page 137, no "immediate and discernable nexus to the occupancy of reserve lands".
>
> (emphasis added)

[57] As noted by Sheridan J. in *Dumont* v. *The Queen*, 2006 DTC 2160 (affirmed by the Federal Court of Appeal 2008 D.T.C. 6091):

> The business of fishing is common to both Indian and non-Indian communities.

Historical Evidence

[58] At the hearing before the Federal Court of Appeal in *Bell, supra,* the appellants attempted to file additional historical documents in relation to the tradition of fishing. Létourneau J. made the following comments on the motion:

> 26 As a matter of fact, the appellants asserted at the hearing, in response to a question from the Bench, that the documents were tendered for the purpose of

establishing that the appellants were members of a coastal Indian Band which had a tradition of fishing. They conceded that the documents, however, could not establish that the appellants' Band had a tradition of commercial fishing and that, in any event, they were not filed for that purpose. To the extent that they are filed for the stated purpose, they are unnecessary because the Tax Court judge accepted as a fact that coastal Indians fished as a way of life. This is made clear in the following passage of his decision, at page 15, when he was dealing with the food fishing activity of the Company:

> The food fishery no doubt has its roots in the traditions of the coastal Indian people.

What the judge experienced difficulties with, however, is the fact that there was no evidence of commercial fishing as a tradition.

…

29 The fact that the documents submitted to us are unnecessary and beside the point is sufficient to dispose of the motion. However, there is more. They are also unhelpful for the following reasons.

…

32 Third, the documents are of no assistance since it is not disputed that the commercial fishing of the appellants and the Company they worked for took place outside of the Reserve and we have no ways of determining, on the basis of these documents alone, whether the fishing grounds referred to in some of these documents are the location where the commercial fishing activity in issue was performed. **In any event, even if it were the same location, this fact cannot alter the nature of the appellants' fishing which gave rise to their income.**

(emphasis added)

[59] In this case both the Appellant and the Respondent filed expert's reports on the history of fishing in the Grand Rapids area. The Appellant stated in the written submissions filed by his counsel:

> that historical evidence is important for the following reasons:
>
> 1. It is relevant to the issue as to whether the Appellant's activity is "integral to the life of the reserve";
>
> 2. It is relevant to the issue of whether the Appellant is benefiting his community as a whole or just himself;

> 3. It is relevant to a determination, on a purposive basis, as to whether the property in question is "property of an Indian *qua* Indian".

[60] The Respondent's expert, in her report stated that:

> Commercial fishing did not develop in the Grand Rapids region until the 1880's, after Treaty 5 (1875).

[61] The Appellant's expert, in her report, stated that:

> Commercial fishing, though a far cry from the spears and nets of the early peoples, supplied their needs in the twenty-first century as it had for thousands of years before that.

[62] The documents on which the Appellant's expert based her report are vague with respect to references to commercial fishing prior to the formation of the Grand Rapids Reserve and the signing of Treaty 5 in 1875. It seems obvious that the authors of the various documents written at that time were not concerned with detailed analysis or the issue of whether the individuals, whose descendents would eventually inhabit the Grand Rapids Reserve, were carrying on a business of fishing. Given the geographic location of the Grand Rapids Reserve it seems obvious that fishing would have been important to the people living in that area but whether commercial fishing was carried on prior to 1875 is another matter.

[63] Most of the references to fishing prior to the 1880's are simply references to fishing or people living well from fishing (which could simply mean that they ate what they caught). Dr. McCarthy, the appellant's expert, in referring to one of the bases for her report of fishing prior to 1875 stated as follows during her examination:

> Q: …Can you tell us, you're saying that fish and fish products could be sold along the Saskatchewan River around the early contact time. Could you tell us on what basis that you say that?
>
> A I have a basis, but I should make clear when I say sell that I don't mean they got cash for it. There was no cash. It was barter.
>
> But it was customary in all of the Hudson's Bay posts, and I've read many, many, many journals, which are very boring to read, but -- but the fish is an important staple in the northern posts, as the buffalo was on the plains, very similar, and the Hudson's Bay Company and the Norwesters would establish their posts where there was a good fishery, because they lived on the fish.

> Those who undertook the transport were usually in a hurry to cross the portage and they had been probably travelling some time using pemican or dried food. **It just -- I believed that it would have been an obvious way for the people who had surplus fish, especially the oil of the sturgeon, it's very valuable to increase the food value, and fresh fish would be an enormous help to them, a change in their diet**.

(emphasis added)

[64] This, however, is simply speculation on the part of Dr. McCarthy of what might have taken place and not evidence of an actual commercial fishery.

[65] With respect to another document, the following exchange took place during the cross examination of Dr. McCarthy:

> Q So right at the bottom of that page you say, you write,
>
> "Those who lived at Grand Rapids also sold fish and oil to travellers and passing boat brigades. This was not always done willingly. According to Emile Petitot, a priest of the Oblates of Mary Immaculate, when the HBC boats on which he was travelling in 1862 came in sight, the Cree women ran to hide their sturgeon in the woods. Meanwhile the men tried to distract the Metis boatmen by offering to sell them poles to be used in the passage of the rapids. Instead the boatmen increased their speed, landed and took the fish, although the Cree protested that they were destitute and had no fish to sell".
>
> I mean I put it to you that this source, this is the source that you have about that they could sell their surplus fish?
>
> A H'mn, h'mn.
>
> Q That, in fact, that source shows that the fish was taken without the consent of the Indians, would you not agree with that?
>
> A Not in that sense, because they complained that they had no fish to sell, which I deduced meant that they had been in the habit of selling, or trading it basically, but in that particular year the fish had failed and yet the Metis boatmen were accustomed to getting the fish, therefore they took it.

[66] Her conclusion that the native people would sell fish is again based on speculation, not evidence. In this case it is based on a negative statement that they did not have any fish to sell.

[67] The following exchange also took place between counsel for the Appellant and Dr. McCarthy:

> Q What about, do we have any knowledge about -- was there any -- at some point in time the fishery changed, right, the nature of the fishery changed, did it not? I'm talking about the latter part of the nineteenth century.
>
> A Well, yes, commercial fishing established there by the 1880s, in the middle 1880s.

[68] In the Appellant's written submission, counsel for the Appellant stated as follows:

> The nature of the activity is fishing, which, in one form or another, Aboriginal peoples in the Grand Rapid areas have been doing for least 250 years. Commercial fishing, no matter how that phrase is defined, has been undertaken by members of the Grand Rapid Band since at least the last 120 years. The irresistible inference from reviewing Dr. McCarthy's and Dr. Lovisek's reports, combined with the testimony of Albert Ross and Ronald Ballantyne, is that commercial fishing has been done more or less continuously, and has been important to, the Grand Rapids Band since the 1880's.

[69] I accept the report of the expert for the Respondent with respect to her conclusion that commercial fishing did not commence in the Grand Rapids area until the 1880's, a conclusion with which the Appellant concurs as noted above. This was after the formation of the Grand Rapids Reserve in 1875. A determination of whether an activity is (for the purposes determining whether the income of the Appellant is situated on a reserve) integral to the life of a reserve should not be based on an activity that commenced after the formation of the reserve.

[70] If the Appellant is correct that any activity started after the formation of the reserve could be "integral to the life of the Reserve" if it is carried on for a long period of time, then a new activity started now (the income from which would be taxable) would cease to be taxable after the activity has been carried on for a number of years. One obvious problem with the position of the Appellant is defining the number of years that would be required to determine that the activity has qualified as "integral to the life of the Reserve". In any event it does not seem to me that the exemption under section 87 of the *Indian Act* was intended to apply to convert activities that are started after the formation of the reserve and that would be taxable into activities that are not taxable only because the activity is carried on for some time.

[71] With respect to the issue of "whether the Appellant is benefiting his community as a whole or just himself", it is not clear how the historical evidence is relevant in relation to this issue. This issue is resolved by looking at the Appellant's activities, not those of individuals who lived and worked many years ago.

[72] The Appellant, in relation to this question, submitted evidence of how he spends his money at businesses located on the Reserve. In *Bell, supra,* Létourneau J. stated that:

> 41 There is no doubt that the fact that the appellants drew a salary and brought it back to the Reserve provided some economic benefits to the Reserve but it is obviously not benefits of this nature that this Court sanctioned in *Folster* and in *Recalma, supra*. Indeed, as this Court said in *Southwind* v. *The Queen*, 98 DTC 6084, at page 6087 (F.C.A.), the phrase "commercial mainstream" "seeks to isolate those business activities that benefit the individual Native rather than his community as a whole, recognizing, of course,... that a person benefits his or her community by earning a living for his family".

[73] The fact that the Appellant spent money on the reserve, as noted in the decision of the Federal Court of Appeal in *Bell, supra,* is not the kind of benefit that will result in his income being exempt from taxation.

[74] With respect to the "determination, on a purposive basis, as to whether the property in question is property of an Indian *qua* Indian", Linden J. in *Folster* v. *The Queen, supra,* after referring to the connecting factors test as set out in *Williams,* stated that:

> 16 This new test was not designed to extend the tax exemption benefit to all Indians. Nor was it aimed at exempting all Indians living on reserves. Rather, in suggesting reliance on a range of factors which may be relevant to determining the situs of the property, **Gonthier J. sought to ensure that any tax exemption would serve the purpose it was meant to achieve, namely, the preservation of property held by Indians qua Indians on reserves so that their traditional way of life would not be jeopardized.**
>
> (emphasis added)

[75] It seems to me that the reference to their traditional way of life would not include a way of life that commenced after the formation of the reserve. Therefore commercial fishing as a way of life (which did not commence until the 1880's) would not be a traditional way of life to which Linden J. was referring in *Folster*.

[76] It should also be noted that the issue in this case is not whether the Appellant had the right to fish but whether his income from fishing is exempt from tax. There is no dispute that the Appellant had the right to catch the fish that were sold to FFMC.

[77] It does not seem to me that the historical evidence related to commercial fishing carried on from the Grand Rapids Reserve in this case is a connecting factor or affects any of the connecting factors. The Appellant in this case caught the fish off the Reserve, spent most of his working time while carrying on his business during the fishing season off the Reserve and sold his entire catch to FFMC (who were located off the Reserve and who transported the entire catch off the Reserve as soon as possible). None of the fish were sold on the Reserve. In my opinion, the Appellant's fishing activity was carried on in the commercial mainstream and his income from this activity does not qualify for the exemption pursuant to section 87 of the *Indian Act*.

[78] As a result, the appeals are dismissed, with costs.

Signed at Ottawa, Ontario, this 16th day of June, 2009.

"Wyman W. Webb"

Webb J.

Schedule "A"

The following are the facts as agreed upon by the parties:

1. The Appellant is an Indian as defined in section 2 of the *Indian Act* and a member of the Grand Rapids First Nation. Grand Rapids First Nation is a signatory to Treaty Number 5.

2. The Grand Rapids Reserve is located on the south shore of the Saskatchewan River, where the river empties into Lake Winnipeg. The Town of Grand Rapids is located across the river from Grand Rapids Reserve.

3. According to DIAND records the number of Grand Rapids Band members on the Grand Rapids Reserve as of December 31, 2001 was 702. According to a 2001 Census, the population of the Town of Grand Rapids was 355.

4. During the taxation years at issue the Appellant resided on the Grand Rapids Indian Reserve. The Appellant has resided at 218 River Road, Grand Rapids Reserve, continuously since 1976.

5. The Appellant has resided on the Grand Rapids Indian Reserve all of his life.

6. The Appellant is a self-employed fisherman and has been a self-employed fisherman since 1976.

7. During that taxation years at issue all of the fishing done by the Appellant was done on Lake Winnipeg.

8. The Grand Rapids Reserve is adjacent to Lake Winnipeg.

9. The Appellant fishes on waters situated off reserve, the locations marked with X1 and X2 on Exhibits 4 and 5, respectively. During the years in question the Appellant split his time fishing between these two locations.

10. The Appellant fishes during the summer fishing season, starting June 1 and ending in the third week of July.

11. The fall fishing season starts in the first week of September and lasts until the third week of October.

12. The Appellant did not fish during the winter fishing season in the tax years in question.

13. The Appellant is a member of the Grand Rapids Fishermen's Co-op.

14. The Co-op is located on the Grand Rapids Reserve.

15. The Co-op is owned by its members. The Co-op has approximately 104 members. Approximately 99 of the members are Treaty Indians.

16. There are five members who are of mixed aboriginal ancestry who live in the Town of Grand Rapids.

17. The Co-op provides gas, oil and nets and other fishing equipment on a for credit basis or for sale at cost.

18. The Co-op maintains its books and records on the Grand Rapids Reserve.

19. The Co-op employs its own employees on the reserve, including a book keeper and individuals who grade the fish.

20. The Co-op purchases fish as agent for Freshwater Fish. All of the Appellant's fish catch is purchased by the Co-op on behalf of Freshwater Fish.

21. All of the Appellant's fish catch purchased by the Grand Rapids Fishermen's Co-op is delivered by the Co-op to Freshwater Fish at its head office in Winnipeg.

22. None of the Appellant's fish catch is sold directly by the Appellant to residents of the reserve.

23. The Appellant sometimes uses a fishing camp located south of Long Point and identified at X3 on Exhibit 5.

24. The Appellant's fishing equipment and supplies are located at his residence on the reserve.

25. The Appellant maintained his business books and records on the reserve.

26. The Appellant prepared and maintained his boats, nets and motors on the reserve before, during and after the fishing season.

27. The Appellant received or earned business income, being self-employment income from fishing, in the amount of $13,164 in the 2001 taxation year.

28. The Appellant received or earned business income, being self-employment income from fishing, in the amount of $18,238 in the 2002 taxation year.

29. The Appellant does his banking at the Median Credit Union on the Grand Rapids Reserve.

30. The Appellant deposits the cheques that he receives from the Co-op for fishing at the Median Credit Union on the Grand Rapids Reserve.

31. The Appellant owns two quotas, which provide the Appellant with a right to fish a certain number of fish of a certain species in a certain area. These quotas are owned by the Appellant.

32. The Grand Rapids Fisherman's Co-operative Ltd. was incorporated on June 1, 1962, prior to the creation of Freshwater Fish in 1969. The Co-op's by-laws are agreed document 41. The Co-op's 2000 and 2001 Financial Statements are agreed documents 34 and 35, respectively. The Co-op's constating documents are collectively listed as agreed documents 36 to 40.

Freshwater Fish in general

33. The Freshwater Fish Marketing Corporation ("Freshwater Fish") was established in 1969 by the *Freshwater Fish Marketing Act*, R.S., 1985, c. F-13 for the purpose of marketing and trading in fish, fish products, and fish by-products in and outside of Canada. The objectives are to purchase all fish legally caught and offered for sale to Freshwater and to stabilize the prices for fish on behalf of fishers.

34. Freshwater Fish is a non-profit and self-sustaining agent Crown corporation.

35. Freshwater Fish is the buyer, processor and marketer of freshwater fish from Manitoba, Saskatchewan, Alberta, Northwest Territories, and part of Northwestern Ontario.

36. The purpose and powers of Freshwater Fish are as set out in sections 7 and 8 of the *Freshwater Fish Marketing Act*.

37. Freshwater Fish has the exclusive right in Manitoba to trade and market the products of the commercial fishery on an interprovincial and export basis under ss. 20(1) of the *Freshwater Fish Marketing Act*.

38. The *Freshwater Fish Marketing Act* mandates Freshwater Fish to purchase all commercially caught fish in Manitoba, Saskatchewan, Alberta, The Northwest Territories and part of Northwestern Ontario that is offered to it for sale. However, fishers may also sell to final consumers if they so chose.

39. Freshwater Fish's mandate also extends to creating an orderly market, promoting international markets, and increasing fish trade and returns to fishers (ss. 22(1) of the *Freshwater Fish Marketing Act*).

40. Freshwater Fish purchases fish caught on Lake Winnipeg through a number of private agents and co-operatives located along Lake Winnipeg.

41. Most of the fish received by Freshwater Fish comes from Lake Winnipeg.

42. Freshwater Fish has 31 contracted agents and three corporate agencies grading and purchasing fish at 56 delivery points.

43. The relationships between private agents and co-operatives and Freshwater Fish are governed by written agency agreements.

44. The Grand Rapids Fishermen's Co-op is an association or co-operative of fishers located on Grand Rapids Reserve.

45. The relationship between the Grand Rapids Fishermen's Co-op and Freshwater Fish is governed by an agency agreement (see Exhibit A1, Tab 21).

46. The agreement between Freshwater Fish and the Grand Rapids Fishermen's Co-op is the only instrument that governs the relationship between the parties.

47. The Grand Rapids Fishermen's Co-op acts as agent for Freshwater Fish in purchasing fish at Grand Rapids under the above-noted agency agreement. It does not act as agent for any other purchasers of fish.

48. Freshwater Fish purchases all of the fish that are sold at the Grand Rapids Fishermen's Co-op.

Payments

49. The *Freshwater Fish Marketing Act* entitles Freshwater Fish to establish a payment structure that provides initial and final payments to the fishers under a "pool" system where receipts and costs are allocated or "pooled" by fish species to determine final payments.

50. Generally, initial prices are set for each species by estimating its market value, subtracting its projected processing and operating costs and withholding a contingency amount.

51. The fishers receive initial payments by cheque from the Co-op, from money that is sent in trust from Freshwater Fish to the Co-op's bank account.

52. The end of the week, insofar as the Co-op and Freshwater Fish are concerned, is Saturday. Data is transmitted from the Co-op to Freshwater Fish with respect to

the amount of payments that will be made to fishers. Money is transferred to the Co-op's bank account on the Wednesday.

53. Fishers are paid every week from monies that are transferred from Freshwater Fish to the Co-op. The Co-op prints, executes and issues cheques on reserve to fishers. The fishers come to the Co-op to pick up their cheques.

Final payments

54. At the beginning of each fiscal year, Freshwater fish estimates the market price for fish for the coming year.

55. During the fishing season, as the fishers deliver their catches, Freshwater Fish pays the fishers 85% of the estimated market price.

56. At the end of the fiscal year, after which the actual market price for fish is known, the fishers are paid the difference between 85% of the estimated market price and the actual market price.

57. For example, if the estimated price for pickerel is $10 per pound, the fishers would receive regular payments of $8.50 per pound. If, at the end of the year, the actual market price was $9.50 per pound, the fishers would receive a reconciliation cheque for $1.00 per pound of pickerel caught in that year.

58. The year end payments are made to the fishers in November of each year, by way of cheques printed at Freshwater Fish in Winnipeg.

59. The final payment is made from Freshwater Fish to the fishers directly.

60. After the final payments are established, any remaining income for the year is recorded by Freshwater Fish as retained earnings.

Freshwater Fish and the Co-op

61. The grading, weighing, ice packing, categorizing species, and accounting of the fish is done at the Grand Rapids Fishermen's Co-op.

62. The Co-op also provides gas, oil and nets to fishers on a credit / debit basis.

63. Freshwater Fish pays the Co-op $.33 per kilogram of fish that is delivered to Freshwater Fish. This amount is inclusive of employee salaries for the packing, weighing, grading and administration services used to run the Co-op.

64. All money used by the Grand Rapids Fishermen's Co-op to pay the fishers for fish caught is provided by Freshwater Fish.

65. All of the Appellant's self employment income from fishing in the 2001 and 2002 taxation years was received from Freshwater Fish through its agent, the Grand Rapids Fishermen's Co-op.

66. Employees of the Co-op are paid by the Co-op.

67. Freshwater Fish has no employees at the Grand Rapids Fishermen's Co-op. The Co-op employs approximately three to six employees depending upon the season.

68. David Hourie is an employee of the Grand Rapids Fishermen's Co-op. Mr. Hourie sorts and grades the fish with the help of other employees of the Co-op. Mr. Hourie is paid $.05/$.06 per kilogram of fish he grades. David Hourie is a Treaty Indian and lives on Grand Rapids Reserve.

69. The grading process involves going through each fish separately and labelling them as either "good" or "bad". The bad fish are discarded and the good fish are then sorted by size and species and daily catch records are prepared.

70. A daily catch record is an official receipt, prepared at the Co-op, detailing the amount of fish sold as well as the species and the price paid.

71. Freshwater Fish pays for the fish based on the size and species (see Exhibit A1, Tab 19).

72. A trucking company, Gardewine North, hauls all the fish from the Grand Rapids Fishermen's Co-op to Freshwater Fish in Winnipeg.

73. When the fish arrives at Freshwater Fish in Winnipeg it is filleted, frozen whole or ground up.

74. At Freshwater Fish all fish species are divided up into different pools for marketing purposes.

Marketing of fish

75. Freshwater Fish markets fish both interprovincially and internationally.

76. Approximately 80% of the fish from Freshwater Fish is sold outside of Canada.

77. Freshwater Fish markets most of its fish into the United States.

78. Freshwater Fish is the largest supplier of whitefish in Finland, whitefish caviar in Sweden and Finland, and northern pike in France.

79. Freshwater Fish has an internal sales and marketing department.

80. There are two different ways Freshwater Fish markets its fish. The first is through direct sale to a major chain (i.e., Costco). The second is through the use of brokers.

81. In the Unites States Freshwater Fish has brokers in Chicago, New York, Michigan and Ohio, Minnesota, North Dakota and Wisconsin.

82. Freshwater Fish competes in the international markets against other fish suppliers. It competes against other fresh water fish, seafood and protein products. Major Canadian market competition is from the Great Lakes Region in Canada, such as Presteve Fish Company and the Great Lakes Fishing Company. It also competes against seafood products as Norwegian Salmon and Icelandic Cod suppliers and other protein products such as beef and chicken.

83. In 2003, Freshwater Fish retained Probe Research Inc. to conduct a questionnaire of the fishers who provide fish to Freshwater Fish. Approximately 3,500 questionnaires were sent out to 3,500 fishers in Western Canada and a small part of Ontario. These questionnaires contained over 100 questions and the broad objective of these questionnaires was to obtain a better understanding of the nature and demographics of fishers who supplied fish to Freshwater Fish. Participation in this questionnaire was voluntary. Out of 3,500 questionnaires, 800 were returned.

Operating Mind

84. Freshwater Fish's head office is located in Winnipeg, Manitoba pursuant to section 13 of the *Freshwater Fish Marketing Act*.

85. Within Manitoba, Freshwater Fish also has offices in Selkirk, Riverton, and The Pas. Freshwater Fish also has offices located in Saskatchewan and Alberta.

86. Freshwater Fish is governed by a Board of Directors, consisting of 11 Directors, including the President and the Chief Executive Officer. Currently, six of these Directors are aboriginal. Currently, the Appellant is a Director. He has been a Director for at least four and a half years.

87. All Board of Directors positions are federal Order-in-Council appointments, with five appointed on recommendation of the participating provincial governments.

88. The Board of Directors meets six times during its fiscal year in Winnipeg, Manitoba.

89. The quantity and species of fish that can be commercially fished is managed by a quota system.

90. In Lake Winnipeg, each licensed fisher can obtain up to a maximum of four to six individual quota entitlements (depending upon the residence of the fisher). An individual quota entitlement means a property interest of a fisher in a right to

fish a certain quantity of one or more species of fish, in a particular area and for a particular season, for commercial purposes [See s. 32 of *The Fisheries Act* (Manitoba).] A quota entitlement gives a fisher a proprietary right of access to fish for three species of fish. Grand Rapids Fishers can own up to four quota entitlements.

91. The Provincial Department of Manitoba Water Stewardship is responsible for managing the quota system.

92. Lake Winnipeg is divided into fishing zones. Zones are demarcated by lines connecting geographical features, and these zones are labeled by letters (example A, B, C, etc.). A commercial fisher residing in Grand Rapids can fish, pursuant to his quota, in zones B, C or G in the summertime; zones E or H in the fall time; and zones F or C in the wintertime. These zones contain the permissible areas to commercially fish for a person owning quota in Grand Rapids. The location of these zones are demarcated on the attached map.

93. The purpose of the residency requirement for individual quota entitlements is to maintain a wide distribution of economic benefit to communities, particularly remote communities, around Lake Winnipeg.

94. Quota entitlement is dependent on residency. However, once quota is acquired in a certain area an individual need not continue to be resident of that area to continue holding the quota.

95. Individual quota entitlements are transferrable and, subject to regulation, can be bought and sold by individual fishers. It may also be pledged as security. (See s.34(4) of *The Fisheries Act* (Manitoba).)

96. Individual quota entitlements can be quite valuable and may be sold for tens of thousands of dollars each. Currently, a fisher residing in Grand Rapids could sell his individual quota entitlements for a maximum of approximately $150,000.

97. No person engaged in commercial fishing shall, unless authorized by license, fish by means of a net in any lake within 1.5 kilometers of the location where a stream or river enters the lake. (See s. 51, Manitoba Fishing Regulations, 1987 (SOR187-509).)

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