Docket: 2008-447(IT)APP

BETWEEN:

JODI ROCK,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application for Extension of Time heard on common evidence with the applications of Michelle Rice *2009-1117(IT)APP* and Brenda Laforme *2009-199(IT)APP* on November 22, 2010 and Reasons for Order delivered from the Bench on November 26, 2010 at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Applicant:	Scott A. Smith
Counsel for the Respondent:	Brandon Siegal

ORDER

Having heard the application for an Order extending the time within which an appeal from the assessment made under the *Income Tax Act* for the 1995 taxation year may be instituted;

And having heard what was alleged and argued by the parties;

This Court orders that the time within which an appeal may be instituted is extended to the date of this Order, and the Notice of Appeal received with the

application is deemed to be a valid Notice of Appeal, in accordance with and for the reasons set out in the attached Reasons for Order.

ACCORDINGLY, IT IS ORDERED that:

1. the Respondent shall file and serve a Reply to the Amended Notice of Appeal no later than January 24, 2011.

2. the appeal is set down for hearing at the Federal Judicial Centre, 180 Queen Street West, 6th Floor, Toronto, Ontario commencing at 9:30 a.m. on February 7, 2011 or at such later time that week as decided by the Court at that time.

Signed at Ottawa, Canada this 30th day of November 2010.

"J.E. Hershfield"

Hershfield J.

Docket: 2009-1117(IT)APP

BETWEEN:

MICHELLE RICE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application for Extension of Time heard on common evidence with the applications of Jodi Rock *2008-447(IT)APP* and Brenda Laforme *2009-199(IT)APP* on November 22, 2010 and Reasons for Order delivered from the Bench on November 26, 2010 at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Applicant:	Scott A. Smith
Counsel for the Respondent:	Brandon Siegal

ORDER

Having heard the application for an Order extending the time within which an appeal from the assessment made under the *Income Tax Act* for the 2006 taxation year may be instituted;

And having heard what was alleged and argued by the parties;

This Court orders that the time within which an appeal may be instituted is extended to the date of this Order, and the Notice of Appeal received with the application is deemed to be a valid Notice of Appeal, in accordance with and for the reasons set out in the attached Reasons for Order.

ACCORDINGLY, IT IS ORDERED that:

1. the Respondent shall file and serve a Reply to the Amended Notice of Appeal no later than January 3, 2011.

2. the appeal is set down for hearing at the Federal Judicial Centre, 180 Queen Street West, 6th Floor, Toronto, Ontario commencing at 9:30 a.m. on January 11, 2011 or at such later time that week as decided by the Court at that time.

Signed at Ottawa, Canada this 30th day of November 2010.

"J.E. Hershfield"

Hershfield J.

Docket: 2009-199(IT)APP

BETWEEN:

BRENDA LAFORME,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application for Extension of Time heard on common evidence with the applications of Jodi Rock *2008-447(IT)APP* and Michelle Rice *2009-1117(IT)APP* on November 22, 2010 and Reasons for Order delivered from the Bench on November 26, 2010 at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Applicant: Scott A. Smith

Counsel for the Respondent: Brandon Siegal

ORDER

Having heard the application for an Order extending the time within which an appeal from the assessments made under the *Income Tax Act* for the 2005 and 2006 taxation years may be instituted;

And having heard what was alleged and argued by the parties;

This Court orders that the time within which an appeal may be instituted is extended to the date of this Order, and the Notice of Appeal received with the application is deemed to be a valid Notice of Appeal, in accordance with and for the reasons set out in the attached Reasons for Order.

ACCORDINGLY, IT IS ORDERED that:

1. the Respondent shall file and serve a Reply to the Amended Notice of Appeal no later than November 30, 2010.

2. the appeal is set down for hearing at the Federal Judicial Centre, 180 Queen Street West, 6th Floor, Toronto, Ontario commencing at 9:30 a.m. on December 6, 2010 or at such later time that week as decided by the Court at that time.

Signed at Ottawa, Canada this 30th day of November 2010.

"J.E. Hershfield"

Hershfield J.

Citation: 2010 TCC 607
Date: 20101130
Docket: 2008-447(IT)APP

BETWEEN:

JODI ROCK,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-1117(IT)APP

AND BETWEEN:

MICHELLE RICE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-199(IT)APP

AND BETWEEN:

BRENDA LAFORME,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Hershfield J.

Introduction and Background

[1] Applications are made by each of the Applicants under subsection 167(5) of the *Income Tax Act* ("the *Act*") requesting an extension of time to file notices of appeal in respect of certain assessments which have denied the exemption afforded Indians under section 87 the *Indian Act*. Both Michelle Rice and Brenda Laforme testified at the hearing. Counsel for Jodi Rock submitted documentary evidence respecting her employment but she did not appear as a witness due to a personal emergency.

[2] During each of the years in respect of which the Applicants seek an extension of time to file notices of appeal, they were employed by Native Leasing Services ("NLS").

[3] NLS is a sole proprietorship owned and operated by a status Indian having its head office on the Six Nations of Grand River reserve.

[4] During the years in question NLS contracted each of the Applicant's services for placement at particular workplaces. The services of Brenda Laforme were contracted to work at the Fort Erie Native Friendship Centre located in Fort Erie, Ontario which is not on a reserve. Ms. Laforme has her Bachelor of Social Work degree. She provided social work services. The Applicant, Michelle Rice, was contracted by NLS to provide bookkeeping services to the Ontario Federation of Indian Friendship Centres located in Toronto, Ontario. Ms. Rice completed a four year CGA program. The documentary evidence submitted in respect of Jodi Rock does not indicate specifically where she performed her employment duties although contracts submitted in evidence indicate that she would take direction from Pine Tree Native Centre of Brant with respect to the performance of her duties which involved providing employment services to clients of the Centre.

[5] In order for the Applications to succeed 5 requirements prescribed under subsection 167(5) of the *Act* must be met.

[6] Paragraph (5)(a) requires that the Applications be brought within a year and 90 days from the mailing of the confirmations. The Respondent agrees that requirement has been met.

[7] With respect to subparagraphs (5)(b)(i) and (iii), the Respondent agrees that the Applicants had a *bona fide* intention to appeal and has not taken issue with the assertion that the Applications were made as soon as circumstances permitted. The evidence supports the Respondent's concessions in this regard. Accordingly, I find the requirements of those subparagraphs have been met.

[8] Subparagraph (5)(b)(ii) requires a finding that it would be just and equitable to grant an application given the reasons set out in the application and the circumstances of the case. The Respondent argues that this requirement has not been met.

[9] Similarly the Respondent argues that the requirement in subparagraph (5)(b)(iv), that there be reasonable grounds for the appeal, has not been met.

[10] Counsel for the Applicants argues that a *prima facie* case has been set out by the two Applicants who gave evidence at the hearing and that is sufficient to meet the requirement in subparagraph (5)(b)(iv), that there be reasonable grounds for the appeal. Relying primarily on the inequity of imposing an impossible financial burden on the Applicants without allowing them their day in Court to defend the basis of their appeal, it is argued that the just and equitable requirements of subparagraph (5)(b)(ii) have been met.

[11] The evidence of the two Applicants that testified at the hearing as it relates to the requirement in subparagraph (5)(b)(iv), that there be reasonable grounds for the appeal, was that they provided services to status Indians at friendship centres the nature of which was inherently linked to aboriginal life on reserves. They are both status Indians themselves although neither lived on a reserve at any relevant time. They both carried out some of their work on reserves but clearly, for the most part, their work and the most significant part of their duties, were performed at locations that were not located on reserves.

[12] One of the main thrusts of the legal argument that there are reasonable grounds for the appeals, is centred around the decisions of the Supreme Court of Canada in

Williams v. Canada[1] that confirmed that an Indian under the *Indian Act* has a choice with regard to where to situate a property on or off the reserve, and *Nowegijick v. R.*[2] that found that the *situs* of employment income was where the debtor resided. While these arguments seem doomed to failure based on authorities relied on by the Respondent, the Applicants also placed emphasis on the requirement that the Court consider each individual case to weigh in other connecting factors such as, most particularly, the type of endeavor and the nature of the work.[3]

[13] That takes me then to review the evidence of the two Applicants that testified.

The Testimony of the Applicants

[14] Brenda Laforme identified herself as Haudenosaunee and although she said that she was in a legal sense attached through her father to the Six Nations of Grand River reserve, her testimony was somewhat confusing as between her status and connection in respect of that reserve and the neighbouring reserve of New Credit of the Mississauga. Regardless, I am satisfied, and it is not disputed that she is a status Indian under the *Indian Act*.

[15] She testified she fled from her reserve with her mother when she was some 5 years old. They fled to Buffalo to avoid her being put in a residential school. After fleeing the reserve, she never went back there to live. She grew up in Buffalo and returned to Canada and after working in St. Catharines, she went back to school and got her degree in social work. She did post graduate studies in a masters program at Carlton but never finished her thesis.

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[1] [1992] 1 S.C.R. 877, [1992] 1 CTC 225.

[2] [1983] 1 S.C.R. 29, [1983] CTC 20.

[3] The Supreme Court in *Southwind v. Canada*, [1998] 1 CTC 265, 98 DTC 6084 (FCA) (in the context of employment) suggested a fairly long list of factors that might be considered.

[16] Even though she never went back to live on the reserve she maintained strong family connections there at both the Six Nations of Grand River reserve and the New Credit reserve where her parents' families lived. Further, she regularly attended at the reserve for Long House ceremonies. It keeps her and her children aware of who they are and of the community of which they are a part. She maintained that her connection to the reserves was fundamental to who she was. I believe that to be true and respect her sense of who she is which emphatically is Haudenosaunee, People of the Long House.

[17] As a social worker, she contracted through NLS to work at Fort Erie Native Friendship Centre. She performs her duties off reserve in Fort Erie and St. Catharines. She dealt with high risk or at-risk aboriginal youth who lack a connection to their heritage. She referred to her job as a youth reunification officer working with urban youth to build their connection to the reserves running programs about native ceremonies, healing circles and history and building spiritual and cultural connections to help them out of their dysfunctional lifestyles.

[18] She also worked with elders on reserves to help them through the process of dealing with their residential school experience. She took the urban youth there too for services. Stretching it she said she might spend cumulatively a month a year working on the reserves such as Six Nations which was an hour and a half drive from Fort Erie.

[19] In summary, I can only add that she strongly believes that she is serving both the aboriginal peoples at large and the native reserve community no matter where she provides that service. Indeed, I take it from her testimony that she would draw no distinction between the two.

[20] The testimony of Michelle Rice was more sparse than that of Ms. Laforme. She worked primarily in Toronto where she lived. She testified that she did provide some accounting services on reserve as part of her role of overseeing programs of different friendship centres some of which were located on the reserves. Her memory as to specific reserves that she spent time at, in any capacity, was vague at best although she did mention Fort Francis, Kenora and Perry Island more than once.

[21] Both Laforme and Rice had contracts with NLS that provided for 1.5% or 3% payment to NLS to create a fund for fighting Canada Revenue Agency if they instructed NLS not to deduct tax from their salary payments. Neither had tax

withheld. Both had their wages paid by NLS presumably to their off reserve bank accounts.

[22] Both Applicants testified as to the significant financial strain that they would suffer should they be required to pay the tax assessments that have been levied. Such concerns do not inform or impact the issues before me.

Applicants' Argument

[23] As noted at the outset, the Applicants' main thrust in asserting that they have met the burden to establish that they have reasonable grounds to appeal is that working for NLS and being paid on their reserve where the debtor resides is exercising a choice they have a right to make to locate their property on and under the protection of their reserve. The ground asserted as a sound basis for deciding their appeals is the presence and work of NLS on the reserve as the employer and as the debtor in relation to personal property, the income entitlement that is situated on the reserve. As noted at the outset, this argument is drawn from the Supreme Court case of *Nowegijick* and from a single paragraph of the Supreme Court case of *Williams*, namely, paragraph 18. If a status Indian can choose where to locate personal property so as to prevent the diminution of that property by seizure or taxation, nothing should interfere with that choice, exercised by choosing an on reserve employer who contracts your services off reserve.

[24] Another ground is to emphasize that even under the connecting factors test there is an arguable basis to suggest that there is a reasonable ground to appeal in these cases. The combination of factors and the weight to be given to each is flexible and allows for case by case consideration. In *Williams* at paragraph 35, it is pointed out that in respect of different categories of cases, one connecting factor in one category might be given more weight than in another. Similarly, in *McKay v. The Queen*,[4] Justice Little at paragraph 51 noted that the *situs* of employment income for the purposes of section 87 of the *Indian Act* was fact specific. Even Justice Evans said in *Horn et al. v. M.N.R.*,[5] *and Williams* at paragraph 8 that applying the connecting factors test is very fact specific. Further, even in *Shilling v. The Minister of National Revenue*,[6] at paragraph 33, it is acknowledged that the

[4] 2007 TCC 757.

[5] 2008 FCA 352.

[6] 2001 FCA 178, 2001 DTC 5420, leave to appeal to Supreme Court of Canada refused, [2001] SCCA No. 434.

weight to be given to different factors will vary from case to case giving particular attention to the nature of the work and the circumstances surrounding it. At paragraph 31 and 32 of that case, it is noted that any benefit accruing to the reserve and the place of payment are potentially relevant connecting factors.

[25] The connecting factors that the Applicants rely on most heavily are where the employees are paid, the nature of the work, their connections to the reserve and the benefit to the reserve. In *McKay*, Justice Little focused on the type of work being done and the nature of the benefit of the work to the reserve. Residence off the reserve was given less weight given the appellant's strong connections to the reserve and her regular visits there. He found that the performance of the work off the reserve was not determinative of locating the employment income derived from such work off-reserve.

[26] Aside from asserting that there is a *prima facie* case that there are reasonable grounds for their appeals, counsel for the Applicants argues that the right to be heard, to have one's day in court, is of paramount importance and cannot be undermined by premature decisions of what might be a reasonable ground to appeal.

Respondent's Argument

[27] The Respondent cites *Johnston v R.*[7] as authority for finding that the subject applications do not meet the requirement in subparagraph (5)(b)(iv), that there be reasonable grounds for the appeal.

[28] That case deals with four applications which the Respondent describes as test applications relating to three types of groups. The one of concern in the respect of the present Applications, is the group that filed outside the 90 day initial filing time requirement but within the further year allowed subject to meeting the 4 requirements, noted above, as set out in paragraph 167(5)(b). The applicant that was in that group was Pamela Johnston. The requirement that the Judge focused on in her case was that set out in subparagraph (5)(b)(iv), that there be reasonable grounds for the appeal.

[29] It was found that the circumstances of Ms. Johnston were indistinguishable from those of Ms. Shilling whose appeal had gone to the Federal Court of Appeal.

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[7] 2009 DTC 1072.

Ms. Shilling was employed by NLS to work at Anishnawbe Health Toronto, the exact same place at which Ms. Johnston worked. No possible connecting factors that were not already examined in *Shilling* were even suggested. Accordingly, the Court held that there were no reasonable grounds for Ms. Johnston's appeal and her application was dismissed.

[30] The Respondent argues that the facts of the current Applications are similar, if not indistinguishable, from *Shilling*. In all cases, the applicants lived and worked off reserve at a facility that served the interests of aboriginal peoples. In *Shilling*, those facts did not give rise to the exemption afforded by section 87 of the *Indian Act*, regardless that they were paid by an employer situated on the reserve.

[31] The connecting factors test established in *Williams*, is argued to be the relevant test to be applied and any assertion that places reliance on *Nowegijick* as simply requiring the debtor to reside on reserve as good law is not correct. The Respondent cites Justice Evans of the Federal Court of Appeal in *Horn*[8] *and Williams* at paragraph 5 where he states, after noting that the Supreme Court of Canada has consistently refused leave to appeal from section 87 cases decided by the Federal Court of Appeal by applying the connecting factors test. He went on to suggest, in effect, that short of Parliament intervening, the soundness of the analytical approach of the connecting factors test, developed and applied to date, could only be reviewed by the Supreme Court of Canada.

[32] It is argued that based on that test, as in *Johnston*, no evidence has been produced in the respect of the Applications before me now that would even suggest any reasonable possibility of the Appeals being successful. Accordingly, the Applications should be denied.

[33] Counsel for the Respondent also referred me to *Roe v. Canada*.[9] In that case, some of the arguments raised by the Applicants' counsel were dealt with by Justice Paris. Indeed, some of the factual elements dealt with in that case are similar to those presented in the subject Applications. One of the Appellants, for example, worked at a friendship centre presumably doing similar good work for aboriginal people as noted in respect of the work performed by Ms. Laforme. Similarly in each of *Googoo v. Canada*[10] and *McIvor et al. v. The Queen*,[11] one of the appellants worked

[8] 2008 DTC 6743.

[9] 2008 TCC 667, 2009 DTC 1020.

[10] 2008 TCC 589, 2009 DTC 1061.

at a friendship centre in circumstances that the Respondent would suggest should not be distinguished from those relating, for example, to Ms. Laforme's appeal. In all these cases, the appeals were dismissed. In *Roe*, one of the Appellants, Matilpi, worked for an association of friendship centres which suggests the nature of her work might have similarities to that of Ms. Rice. Ms. Matilpi lost her appeal.

Analysis

[34] Interestingly, I was not referred to any cases specifically discussing the extent of the burden of proof and the meaning of "reasonable grounds" in the context of the requirement in subparagraph 167(5)(b)(iv) that there be reasonable grounds for the appeal.

[35] I have not requested any submissions on that nor have I ventured off on my own to research this issue. My conclusions are simple and straightforward. They are pragmatic and to my mind, as a matter of common sense, they rely principally on the Applicants' right to be heard. Simply put, the test in subparagraph 167(5)(b)(iv) is not about the relative chances of success but about having a ground to appeal.

[36] The Applicants have capable counsel, who represent earnest persons seeking to either fit into a box that has excluded them and others, or to have that box expanded by persistently seeking to apply those legal principles and arguments that they hope might yet prove capable of succeeding, in some cases at least. The law is not static, after all, and some circumstances may warrant applying the connecting factors test as urged by counsel in respect of these Applications. However, I specifically note that any pursuit of the application of the section 87 exemption based on anything other than the connecting factors test might be so futile as to warrant a finding that there is no reasonable ground for the appeal. The Federal Court of Appeal has made that much clear. Justice Evans did so at paragraph 5 in *Horn and Williams* where, as noted above, he concludes that the connecting factors test is the only applicable test. He also concludes that the protection afforded Indians in the Supreme Court case of *McDiarmid Lumber Co. v. God's Lake First Nation*[12] of property situated on reserve determined by where the debtor resides, applies only to protection from seizure not protection from taxation.

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[11] 2009 TCC 469, 2009 DTC 1330.
[12] [2006] 2 S.C.R. 846.

[37] Still, I have reservations about the use of subparagraph 167(5)(b)(iv) as a means of invoking the doctrines of *res judicata*, non-mutual issue estoppel or abuse of process so as to prevent re-litigating an issue. Surely, subparagraph 167(5)(b)(iv) might be more appropriately seen as there to prevent frivolous, vexatious or nuisance appeals. Appeals should not be prejudged by these informal initial application hearings. If no further evidence is adduced at an appeal the appeals of the Applicants may well be dismissed, but it is not consistent, in my view, with our system of justice to deny a trial at this stage of the proceedings in respect of these Applicants. That is not to say that subparagraph 167(5)(b)(iv) should never be invoked on the basis that to do so would inevitably be tantamount to prejudging. It would not be pre-judging an application where, combined with the other requirements of subsection 167(5), it is clear that there is no legitimacy to the pursuit of the appeal. In that case, they may not succeed in an application even under the banner of their fundamental right to be heard.

[38] On balance then, as likely as it is that these cases will fail on appeal, I am going to grant the Applications. I am encouraged to take this view, in respect of these Applications, at this time, due to two other factors. Firstly, both Ms. Laforme and Ms. Rice have other years at issue that have been set down for trial on the same facts and issues as they relate to the year or years in respect of which the Applications are made. It has been agreed by counsel that should I allow the Applications, the appeals in respect of which Applications relate will be heard together at the same time and place as those other appeals already scheduled for trial. This would include Ms. Rock, as well. This ensures that even if the appeals prove unsuccessful, no time or resources will have been expended by the allowance of the Applications. I have heard six NLS cases this week and there is no hint that adding another year to any of the appeals would have added one extra minute to the proceedings.[13]

[39] Secondly, having heard those six appeals this week, I remain undecided as to their outcome. That is to say, there may well be limited circumstances where the particular facts and surrounding circumstances of an NLS appeal might invoke the section 87 exemption. As noted by Justice Evans in *Horn and Williams* at paragraph 8, it is the function of the trial judge to assess the relative weight to be

[13] Admittedly, that is not the case for Ms. Rock whose appeal will be added to the list of other appellants in similar circumstances as agreed by counsel. However, given how these appeals have been approached by counsel, and given my experience this week, it seems unlikely that adding her appeals to a week of similar NLS appeals would add more than an extra hour to the entire week.

given to the constituent elements of a multi-factored test in the particular circumstances of a particular case. Caution must therefore be exercised that an application's judge not pre-maturely perform that function by categorizing all NLS cases, even those with apparent similar facts with those that have failed, as following into a non-exempt category. Some cases with very similar facts can be presented in a very different light, evidence *Robertson et al. v. Her Majesty the Queen*[14] versus *Ballantyne v. Canada*.[15] In those cases, each judge was influenced by different factors based on the evidence presented. And here, I note that in *Shilling* at paragraphs 40 and 41, absences of evidence were noted. Fuller evidence might have resulted in a different outcome. Hence, the caution not to pre-judge.

[40] That caution, however, is not an invitation to allow all applications for extensions. It is simply a caution that *I* am heeding in allowing the years under these Applications to go to trial on an *expedient* basis. I have added my own emphasis here.

[41] Accordingly, the Applications are granted. The appeals to which the Applications relate shall be heard here at these premises in Toronto during the weeks commencing, in the case of Michele Rice, January 11, 2011, in the case of Brenda Laforme, December 6, 2010 and in the case of Jodi Rock, February 7, 2011. The specific dates and times of the hearings shall be as arranged by counsel with the permission of the Court. Times for the Respondent to file Replies to the Amended Notices of Appeals now received as properly filed shall be as follows: in respect of Michele Rice, January 3, 2011; in respect of Brenda Laforme, November 30, 2010; and, in respect of Jodi Rock January 24, 2011.

Signed at Ottawa, Canada this 30th day of November 2010.

"J.E. Hershfield"

Hershfield J.

[14] 2010 TCC 552.

[15] 2009 TCC 325, [2010] 1 CTC 2317.

CITATION:	2010 TCC 607
COURT FILE NO.:	2008-447(IT)APP; 2009-1117(IT)APP; 2009-199(IT)APP
STYLE OF CAUSE:	JODI ROCK AND THE QUEEN; AND BETWEEN MICHELLE RICE AND THE QUEEN; BRENDA LAFORME AND THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 22, 2010
REASONS FOR ORDER BY:	The Honourable Justice J.E. Hershfield
DATE OF ORDER:	November 30, 2010

APPEARANCES:

Counsel for the Applicant:	Scott A. Smith
Counsel for the Respondent:	Brandon Siegal

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