Docket: 2008-2808(IT)G

BETWEEN:

REYNOLD DICKIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 28, 29 and 30, 2012,
at Vancouver, British Columbia.

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Sarah D. Hansen and Robert Janes
Counsel for the Respondent:	Nadine Taylor Pickering

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2003 taxation year is allowed, and the reassessment dated June 2, 2008, is vacated.

Costs are awarded to the Appellant. The parties are invited to file written submissions as to costs within 30 days if any of them feel a standard costs award should not stand.

Signed at Ottawa, Canada, this 10th day of July 2012.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2012 TCC 242
Date: 20120710
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BETWEEN:

REYNOLD DICKIE,

Appellant,

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REASONS FOR JUDGMENT

Pizzitelli J.

[1] The Appellant, a status Indian, operated a proprietorship from a location on the Fort Nelson Indian Reserve #2 (the "Reserve"), of which he was a member and resident of, under the name Deer River Ventures in 2003 which carried on the business of essentially clearing and slashing timber and brush for oil and gas companies based off reserve to enable the latter to conduct seismic surveys in search of minerals and oil and gas or permit pipelines (the "Business"). The Appellant was reassessed to include his business income as taxable income. The main issue to be decided in this case is whether the business income from the Appellant's Business was exempt from income tax in 2003 as being personal property situated on a reserve within the meaning of paragraph 87(1)(*b*) of the *Indian Act* (the "*Act*") and hence exempt from taxation under paragraph 81(1)(*a*) of the *Income Tax Act* ("*ITA*"). If it is found the Appellant's business income was not so exempt, then the Court must determine whether the Appellant was entitled to deduct all or any portion of the sum of $161,000 as a management fee allocated to his spouse during the 2003 year.

[2] The relevant provisions of the *Act* and *ITA* are as follows.

[3] Paragraph 87 of the *Act* reads 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.
>
> (3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(*a*) or (*b*) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

[4] Paragraph 81 of the *ITA* reads as follows:

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

[5] Paragraph 81(1)*(a)* of the *ITA* effectively excludes from the computation of a taxpayer's income, any amount that is declared to be exempt from income tax by any other enactment of Parliament, such as the *Act*.

[6] I would propose to deal with the issue of the applicability of the above mentioned *Act* exemption to the Appellant's business income first, as its applicability may render the second issue redundant.

[7] The facts surrounding the first issue, of the applicability of the above mentioned *Act* exemption are generally not in dispute. The Appellant, a status Indian,

was a member of and lived on the Reserve in 2003. The Appellant's home contained the office of the Business and the Appellant also had a shop building for the Business next to his house on the same property as well as stored his equipment, including Bobcat machinery in his home yard. There is no dispute that the Appellant's administrative centre for the business was his home address on the Reserve. The Appellant received mail for the business at his home office, had computers and other business equipment for the Business stationed and operating on behalf of the Business from that location, received inquiries by phone or email or personal visits by potential workers who wished to work for the Business there, conducted orientation for projects for work crews from his home office and held safety meetings there (in addition to those held on site) before crews departed for specific work sites, negotiated the majority of his contracts there or received requests to tender for work there, completed the tender packages and forwarded the tender bids from that location, received the vast majority of payment for services at such location through the mail and paid bills from there and that is the location where his spouse, L.D., also a status Indian from a Vancouver Island Band, resided and performed her duties as the bookkeeper, office manager and safety coordinator of the Business, basically performing the role of the Appellant's "right-hand man". The evidence is overwhelming that the Appellant's home on the Reserve was the head office and administrative centre of the Business.

[8] While the Appellant clearly negotiated and received accepted contracts for work from the Reserve location, it is clear that 99% of the work was conducted off Reserve, within an 80-kilometre radius of the Reserve. In 2003, the Appellant had over 140 workers engaged for his Business and had revenue of approximately $3.4 million. The Appellant testified he hired mainly aboriginal workers, 16 in all from the Reserve, and others from Reserves in other parts of British Columbia, Alberta, Saskatchewan and even as far away as Newfoundland and Labrador. In all, the evidence is that approximately 105 of the 140 workers were aboriginal workers.

[9] The Appellant testified that the Business would bid on between 20 to 25 tenders a year and was usually successful 20% of the time, hence was awarded four to five contract bids a year. He also testified a small portion of the work of the Business was from small job requests but that the great majority of the Appellant's Business revenue was from the larger bid contracts. The evidence is clear that all of the clients of the Business, generally oil and gas exploration or distribution companies, were not located or based on the Reserve and in fact most were based in Calgary, Alberta, the place of their office. The Appellant also testified that in 2003 the Business was a competitive one, evidenced also by the fact he was only successful on 20% of his bids.

[10] Although the requirements of the clients of the Business differed, the larger clients would often send out pre-qualifying questionnaires to various competitors of and to the Business, if interested have them enter into a general master services agreement which set out general terms and conditions, including warranties for work and indemnity clauses for improper performance, and then seek bids on tenders let out and award the contract. Entering into a master services agreement with a client did not guarantee any work but served more of acting as standard contract terms for those contractors it pre-qualified, if a job was awarded. Once a contract was entered into, the Appellant would assemble the required crew by generally phoning from his Reserve office to engage workers who were on his list generally and of course put together the necessary equipment and tools needed to do the job, often renting additional equipment needs from an equipment rental business in Fort Nelson, off reserve.

[11] Workers received orientation before leaving for a job as a crew, usually from the Reserve offices, and each worker was required to have the necessary safety training certification, licences to drive a vehicle and operate the necessary tools. In general, the workers hired were already trained and qualified to perform the duties required to fell trees and clear the land. Once on site, the workers appear to be supervised by foremen of the Appellant who worked on site, one for every twelve men and who acted as liaisons with the office as well as ensured safety protocols were followed. The client also provided project managers or supervisors on site to supervise the project.

[12] The Appellant, through his spouse's duties, arranged to shop for and supply the workers with any personal goods or commissaries they required and requested while on work sites, the cost of which was deducted from their pay. Any such goods were generally delivered by the Appellant's foremen or expediters to the workers. Workers were paid twice a month, based on hours worked each day, which were tracked by the Client Supervisor and as well as the Business and remitted daily, and the Business sent invoices to its clients as per the contract terms.

[13] Payment by clients in 2003 was overwhelming by the mailing of payment by cheque through the mail addressed to the Appellant's Reserve office, with only two clients paying by direct deposit to the Appellant's CIBC bank account in Fort Nelson, British Columbia, in that year accounting for only about $97,000 of the Business' $3.4 million revenue or just less than 0.3% of the revenue.

Position of the Parties

[14] The Appellant takes the position that the facts are to be evaluated from his perspective as a businessman operating a business from a Reserve and not from the perspective of his workers or where their work is performed and accordingly his business income which is his property is situated on a Reserve and hence qualifies for the exemption under paragraph 87(1)(*b*) of the *Act*. The Respondent takes the position that the *situs* of the business income is the location where the activities to earn it occur, and basically argues that since almost all the Appellant's work projects are located off the Reserve, the *situs* is off reserve.

The Law

[15] There is no dispute that business income of the Appellant is intangible property that is personal property of an Indian.

[16] There is also no dispute between the parties that the test in determining whether income is personal property of an Indian situated on a reserve is the "Connecting Factors Test" enunciated by the Supreme Court of Canada in *Williams v. Canada*, [1992] 1 S.C.R. 877 and confirmed recently by the Supreme Court of Canada in the cases of *Bastien Estate v. Canada*, 2011 SCC 38, [2011] 2 S.C.R. 710 and *Dubé v. Canada*, 2011 SCC 39, [2011] 2 S.C.R. 764.

[17] As Cromwell J. confirmed in paragraph 2 of *Bastien Estate*, the test is a two-step analyses:

> [2] . . . First, one identifies potentially relevant factors tending to connect the property to a location and then determines what weight they should be given in identifying the location of the property in light of three considerations: the purpose of the exemption from taxation, the type of property and the nature of the taxation of that property. . . .

[18] Cromwell J. stated in paragraph 15 of *Bastien Estate*:

> [15] The phrase "on a reserve" refers throughout the Act to the property being within the boundaries of the reserve. However, different legal tests are used to determine whether various types of property are so situated for the particular purposes. . . . An important point, however, is that regardless of the type of property or the difficulty of ascribing to it a location, the objective must always be to implement the statutory language, and that requires keeping the focus on whether the property is situated on a reserve.

[19] Before determining which factors are relevant to connecting or not connecting the property to the location in question, in this case the Reserve, mention must be made of the three considerations that apply in determining the weight of such factors; namely the purpose of the exemption, the type of property and the nature of the taxation of that property.

The Purpose of the Exemption

[20] Cromwell J. discussed in detail the purpose of the exemption in *Bastien Estate* in paragraphs 20 to 30 and his concerns over the manner historical jurisprudence has allowed it to evolve; imputing purpose outside the clear wording of section 87 of the *Act*. In paragraphs 21 and 22, he quoted La Forest J. in *Mitchell v Peguis Indian Band*, [1990] 2 S.C.R. 85:

> [21] . . . With respect to the exemption from taxation, he observed that it serves to "guard against the possibility that one branch of government, through the imposition of taxes, could erode the full measure of the benefits given by that branch of government entrusted with the supervision of Indian affairs" (p.130). He summed up his discussion of the purpose of the provisions by noting that since the *Royal Proclamation* of 1763, R.S.C 1985, App. II, No. 1, "the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians". He added an important qualification: the purpose of the exemptions is to preserve property reserved for their use, "not to remedy the economically disadvantaged position of Indians by ensuring that [they could] acquire, hold and deal with property in the commercial mainstream on different terms than their fellow citizens": p.131. . . .
>
> [22] However, La Forest J. was careful to emphasize that even with respect to purely commercial arrangements, the protections from taxation and seizure always apply to property situated on a reserve. . . .

[21] Cromwell J. made it clear that the expression "Indian *qua* Indian" referred to by La Forest J. and Gonthier J. in *Williams* does not mean one can import into the purpose of the legislation "an effort to preserve the traditional way of life in Indian communities" or consider as a relevant factor "whether the investment income benefits the traditional Native way of life". While Cromwell J. found that he did not read the judgments in *Mitchell* or *Williams* "as departing from a focus on the location of the property in question when applying the tax exemption", he also found that neither decision mandated an approach that assessed what is in fact, to use the parlance of the Appellant here, the "Indianness" of the activity. In paragraph 27 of *Bastien Estate*, Cromwell J. stated:

> [27] . . . A purposive interpretation goes too far if it substitutes for the inquiry into the location of the property mandated by the statute an assessment of what does or does not constitute an "Indian" way of life on a reserve. . . .

[22] And in paragraph 28 stated:

> [28] . . ., a purposive interpretation of the exemption does not require that the evolution of that way of life should be impeded. Rather, the comments in both *Mitchell* and *Williams* in relation to the protection of property which Indians hold *qua* Indians should be read in relation to the need to establish a connection between the property and the reserve such that it may be said that the property is situated there for the purposes of the *Indian Act*. While the relationship between property and life on the reserve may in some cases be a factor tending to strengthen or weaken the connection between the property and the reserve, the availability of the exemption does not depend on whether the property is integral to the life of the reserve or to the preservation of the traditional Indian way of life. . . .

[23] Likewise Cromwell J. cautioned against elevating considerations of whether the economic activity was in the "commercial mainstream" as a factor of determinative weight in determining the *situs* of investment income, which he felt was done in *Recalma v. Canada*, 98 DTC 6238 (F.C.A.) and other decisions of the lower courts, as "problematic" as he stated in paragraph 56 :

> [56] . . . because it might be taken as setting up a false opposition between "commercial mainstream" activities and activities on a reserve. Linden J.A. in *Folster* was alive to this danger when he observed that the use of the term "commercial mainstream" might "… imply, incorrectly, that trade and commerce is somehow foreign to First Nations" (para. 14, note 27). He was also careful to observe in *Recalma* that the "commercial mainstream" consideration was not a separate test for the determination of the *situs* of investment property, but an "aid" to be taken into consideration in the analysis of the question (para. 9). Notwithstanding this wise counsel, the "commercial mainstream" consideration has sometimes become a determinative test. . . .

[24] Cromwell J. reiterated in paragraph 54 that La Forest J. in *Mitchell*, while noting

> [54] . . . that the purpose of the legislation is not to permit Indians to "acquire, hold and deal with property in the commercial mainstream on different terms than their fellow citizens": . . . was clear that, even if an Indian acquired an asset through a purely commercial business agreement with a private concern, the exemption would nonetheless apply if the asset were situated on the reserve. . . . it must be remembered that the protections of ss. 87 and 89 will always apply to property situated on a reserve": p. 139.

[25] What is abundantly clear from the Supreme Court of Canada decision in *Bastien Estate* is that the mere fact a status Indian engages in business that would normally be considered in the "commercial mainstream" does not per se preclude the ensuing business income from being situated on a Reserve. The question to be answered is not whether the business activity is normally considered in the commercial mainstream nor whether it is traditionally Indian, but whether it is property situated on a reserve. I do not read such decision to say however that the type or nature of the business is not relevant to the discussion nor, depending on the type of income involved, consideration of the "commercial mainstream" will never be a relevant consideration, only that the approach cannot be to make such consideration itself the determinative test as such approach would in fact result in the substituting itself for the issue that must be determined; namely, the *situs* of the property.

Type of Property and Nature of Taxation

[26] There is no dispute between the parties that it is the business income of the Appellant that is the type of property in question and that such property is taxed on the basis of "profits" as contemplated by subsection 9(1) of the *ITA* which reads:

> 9(1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

[27] It is trite to state that various elements factor into the determination of "profit"; namely, revenue as well as all the component expenses a taxpayer is entitled to deduct that were incurred for the purposes of gaining or producing income as contemplated by paragraph 18(1)(*a*) of the *ITA*. I mention this now because, as will become obvious later, the parties have couched some of their arguments based on the relative weighing of the Appellant's revenues and expenses relative to each other.

Step One - Factors to Consider

[28] In identifying what relevant factors are to be considered that may connect or not connect the business income to the Reserve, there appears to have been three decisions dealing with business income rendered by the Courts since the decision in *Bastien Estate*; all dealing with business income from fishing activities; namely two decisions of the Federal Court of Appeal in *Canada v. Robertson*, 2012 FCA 94, [2012] F.C.J. No. 358 (QL) and *Ballantyne v. Canada*, 2012 FCA 95, [2012] F.C.J. No. 359 (QL) heard at the same time and for which leave to appeal to the Supreme

Court of Canada has been filed, and the Tax Court of Canada decision in *McDonald v. Canada*, 2011 TCC 437, 2011 DTC 1314, which have all discussed relevant factors often under different headings. The decision of the Tax Court in *McDonald* was released two months after the Supreme Court of Canada's decisions in *Bastien Estate* and *Dubé*, while the Federal Court of Appeal decisions were released six months after *McDonald*.

[29] In short, the cases generally described and analysed the factors described in the Federal Court of Appeal's decision in *Southwind v. Canada*, [1998] 1 C.T.C 265 (FCA). In paragraph 36 of *McDonald*, V. Miller J. described the factors indentified in *Southwind* as being appropriate:

> 36 Some of the relevant factors which connect business income to a location were identified in *Southwind v. Canada*. I will discuss these same factors in the present case while, at the same time, addressing the concerns noted by the SCC in the *Estate of Rolland Bastien* with respect to the term 'commercial mainstream'. Those factors are (1) the type of business and the location of the business activities; (2) the location of the customers (debtors) of the business and where payment was made; (3) the residence of the business owners; (4) where decisions affecting the business are made; (5) place where the books for the business are kept; (6) nature of the work and the commercial mainstream.

[30] Although the factors set out in *Southwind* were used to structure the analyses in *McDonald*, the judgments in *Robertson* and *Ballantyne* were not structured as such but did address each of the potentially relevant factors from *Southwind*. In *Robertson* and *Ballantyne*, the first two factors in *Southwind* were analysed under the heading "location of business activities" but were nonetheless addressed. Likewise, in argument, the parties have identified factors which in some instances divide the elements of the factors in *Southwind* into more numerous factors. Accordingly, I propose to analyse the *Southwind* factors identified in *McDonald* in the same order as a good starting point, cognizant of course that there may be other relevant factors to consider which will be discussed under the category of "other factors" and as required by the two-step process identified in *Bastien Estate* above, give weight to them having regard to the appropriate considerations.

Step Two - Analyses of Relevant Factors and Weight

1. Type of Business and Location of Business Activities

[31] While the parties have identified this category as two different factors, I propose to discuss them under the same heading as I consider them too interrelated in the case at hand to separate them.

[32] The business has been previously described as that of clear-cutting trees and brush for predominantly the oil and gas industry to facilitate seismic testing and pipelines. The nature of the business is in my view analogous to that of a construction contractor or demolition contractor in that the business involves undertaking projects located outside its offices or headquarters on which it must generally bid on a competitive basis with its competitors located off reserve. It is in a sense a nomadic business where the business is expected to provide its services to different sites on a project-by-project basis. Its head office and administrative centre is located on Reserve but it predominantly engages the services of its operational employees off Reserve without having any physical or permanent type base at any of those sites. The administrative employees of the business are on the other hand located almost exclusively on the Reserve and these include the services of the Appellant himself as owner and manager as well as his "right-hand man", his spouse, who is the bookkeeper, safety coordinator and financial and administrative manager in almost every sense of the word.

[33] At this point, it is useful to note that the Appellant takes the position that the business activities of the Appellant should be seen from the perspective of the Appellant's duties, who, without doubt, based on the evidence, provides his managerial duties almost exclusively on Reserve. The Respondent, on the other hand, takes the position that the business activities of the Appellant are not the provision of workers or human resources per se but the provision of clear-cutting services which occurs very predominantly off Reserve under contracts for which it is liable to indemnify the party for whom it performs work for damages if it fails to perform its clear-cutting obligations properly. The Respondent argues that 99% of the Appellant's $3.4 million revenue is obtained from projects conducted off Reserve within a 20,000-kilometre area which it obtained in an open bidding process in competition with mainstream competitors. The Respondent states that the Appellant deployed almost all its labour and equipment on such off-reserve projects on which its employees, both Indian and non-Indian, provided services to off-reserve oil and gas companies using equipment, the majority of which, based on measure of value, was rented from off-reserve equipment providers.

[34] In essence, the Appellant asks the Court to focus on the *situs* of the management of the business while the Respondent asks the Court to focus on the *situs* of the labour activities of the business. In my view, both parties are too narrow

in their outlook. All the relevant components of the business must be evaluated in the quest to determine the location of its business activities having regard to the nature of the business. This approach is consistent with both the nature of the nomadic business I have described above as well as the manner of taxation of the property which is by taxing the profits as described above. The Supreme Court of Canada recognized the multiplicity of components which make up a business in *Stewart v. Canada*, 2002 SCC 46, [2002] 2 S.C.R. 645, at paragraph 38, referring to a quote from the case of *Erichsen v. Last* (1881), 4 T.C. 422, at page 423:

> I do not think there is any principle of law which lays down what carrying on a trade is. There are a multiple of incidents which together make the carrying on [of]a trade, but know of no one distinguishing incident which makes a practice a carrying on of trade, and another practice not a carrying on of trade. If I may use the expression, it is a compound fact made up of a variety of incidents.

[35] Likewise, in *Robertson*, the Federal Court of Appeal acknowledged that a proper analysis of the location of the business income requires considering all components of the business. In that case, the Court looked to both the physical activities of the Appellant's business (catching fish which occurred mainly off reserve as well as the business activities (selling fish which was to an on-reserve Co-op)) and found as a whole that the location of the business activities favoured an on-reserve result, particularly since that Appellant sold his catch to an entity located on reserve while his physical activities of catching fish were at best a weak connection to the reserve since they were predominantly caught off reserve notwithstanding that the boats departed from an on-reserve location.

[36] In the case at hand, there is no question that the employees other than the administrative or managerial staff, conducted most of their activities off Reserve on the different projects the business contracted to do. The evidence is that 99% of the $3.4 million business revenue was earned in relation to such off-reserve projects and that the vast majority of his $2.8 million in expenses were incurred off Reserve; namely approximately $1.22 million in wages, $575,000 in subcontract fees and $350,000 in equipment rental fees and other expenses outlined in the Appellant's financial statements. On this basis, the Respondent suggests that the management activities of the Appellant are but ancillary to the main thrust of its labour intensive business and could be done either off Reserve or on Reserve.

[37] With respect to the Respondent, it seems to me that to simply focus on the above sales and expense items is to ignore both the nature of the business and the other components of the business. Firstly, the nature of the business is nomadic in the

sense already explained. The Appellant performs its contractual obligations from a labour perspective, as the Respondent has suggested, off Reserve because that is where the work is. This is the case for both Indian and non-Indian owned businesses competing for this work and accordingly by its very nature, the location of the activities cannot by itself be determinative of the *situs* of the business income. This was acknowledged in *McDonald* at paragraph 43 by V. Miller J.:

> 43 The only fishing activity that occurred on the Reserve was the mending of gear and the loading of the Vessels for fishing. The location of most of the fishing activities was not on the Reserve nor was it in the inshore area close to the Reserve. However, this factor alone cannot be determinative of the issue. As Bowie J. remarked in *Walkus v. R.*,[15] 'the work could only be done away from the Reserve, because that is where the fish are.'

[38] To accept the position of the Respondent on this factor would be inconsistent with the Supreme Court of Canada's decision in *Bastien Estate* where Cromwell J. made it clear that the state of jurisprudence supports the fact that aboriginals are not limited to activities considered traditionally Indian nor prohibited from operating in the commercial mainstream in order to qualify for the section 87 *Indian Act* exemption.

[39] Secondly, on the facts of this case, there is strong evidence that the managerial activities of the business are much more than merely incidental to the business. The Appellant negotiated his contracts from the Reserve office, completed pre-qualifying questionnaires for the potential customers in order to qualify for the bidding process with them, undertook marketing activities such as meeting with prospective clients at band-arranged "meet and greets" and prepared and kept updated a business portfolio for such potential customers there, received employee inquiries and the qualifying material from prospective employees at the Reserve and kept lists as well as arranged to assemble and hire employees for each project from the Reserve. When the nature of the business is performing contracts obtained on a competitive bid process, it must be acknowledged that a great deal of effort is expended in bringing in the work or "sales" through this process and I am satisfied most if not all of such efforts occurred on the Reserve. This, of course, is in addition to the general administrative duties of paying employees from the Reserve, bookkeeping, filing payroll, workers' compensation and other returns and the myriad of administrative duties otherwise performed on Reserve. The nature of this business is such that the management services and duties of the Appellant's business are far more than merely incidental to the labour component and are in fact an essential and significant part of its business operations.

[40] Moreover, from the perspective of the labour activities themselves, the evidence is that the hiring and firing of employees occurred on the Reserve, the employees assembled at the Reserve offices before being transported on site and received training and orientation for each project there. The Business provided foremen who followed the workers to job sites and provided liaison between the Reserve office and the workers on site as well as some supervision. The needs of over 140 employees off site were satisfied by the office on Reserve via the supply of personal provisions or commissaries which were requested by the employees and arranged through the office and transported to the site and the employees were paid by cheques or payments issued from the Reserve office. These factors connect the employees while situated off site to the on-Reserve office and its sphere of influence. This is not the case of a single independent contractor or small operation working exclusively off site as was the case in *Southwind* where a single proprietor himself worked as a logger off site exclusively for one off-reserve company to earn $42,000. The Appellant's operation employed over 140 employees with a cumulative wage base in excess of $1.2 million which helped the Appellant earn over $3.4 million in gross revenues from multiple customers and profits of approximately $600,000 in one year; all the more remarkable when one considers the remote location in which the business operates.

[41] The Appellant owned and supplied bobcat machinery and equipment to the sites as well as rented equipment from off-reserve equipment renters. In fact, the financial statements of the Appellant for 2003 show that its capital assets cost approximately $0.5 million of which $200,000 was for brush cutter equipment in addition to over $100,000 in vehicle investments. In addition, the equipment was stored on the Reserve site and the Appellant's work shop to effect repairs was located on the Reserve site, both of which form part of the Appellant's capital investment in land and buildings identified in its financial statements. In this context, the fact the Appellant rents other needed equipment from off-site equipment renters seems inconsequential, particularly when no evidence was tendered suggesting what industry norms would be for comparison purposes.

[42] Accordingly, having regard to the above analysis of the labour, management and capital components of the business, I am of the view that the labour activities and capital components are undeterminative of the issue having regard to the nature of the business while the management component is highly indicative of setting the *situs* of the business activities on Reserve.

[43] At this point, I should also like to address the arguments of the Appellant that the proximity of the work sites to the Reserve and the preference of the customers in

awarding contracts to aboriginals suggest a connection to siting the business on the Reserve. In my opinion, the evidence shows that the Appellant operated his business within an 80-kilometre radius of the Reserve which comprises an area consisting of approximately 20,000 square kilometres. The Appellant indicated that his family and other members of his Reserve enjoy rights to hunt and trap on property outside the Reserve as a Treaty No. 8 Band. Treaty No.8, a copy of which was submitted into evidence, clearly granted rights to the signatory Indian Bands ". . .to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered . . . saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." In fact, the Appellant's family retains the rights to operate trap lines within a 120-square kilometre area of land outside the Reserve within such tract of land initially surrendered by Treaty No. 8.

[44] While the Appellant has testified he originally got into the business due to inquiries made of his father that were relayed to him from an oil and gas company that concerned clearing work over the trap line area, there is no evidence that in 2003 or even beforehand that the Appellant's business entered into any contract to clear land over the trap line area. The evidence is that the Appellant and his competitors bid for contracts to clear trees and brush over the 20,000-square kilometre area, including over areas in which other members of his band or other bands have trapping rights. As indicated, under the provisions of Treaty No. 8, the existence of trapping rights is subject to the use of those lands for "settlement, mining, lumbering, trading or other purposes" so do not prohibit the business activities of the Appellant's customers. In any event, the evidence is that those trapping lines became uneconomical and were not used in 2003 hence would have been for practical purposes unaffected by any mining or oil and gas activities, regardless of any obligation that may have existed by agreement with the Province of British Columbia or any other party to require consultation with the Band before undertaking any activity thereon.

[45] The only evidence of any services provided by the Appellant to the Reserve itself was that of one contract awarded to him from the Band valued at $30,000 in the 2003 year.

[46] Based on this evidence, I cannot find that the large area of 20,000 square kilometres in which the Appellant undertook contract work can be said to be in close proximity or contiguous to the Reserve such that it can be considered "on reserve". The facts here only remotely connect the Reserve to the wider non-reserve area, unlike those in the case of *Amos v. Canada*, 99 DTC 5333 (F.C.A.), where the

Reserve surrendered part of its lands by way of lease to a pulp mill that employed the Appellants in that case and that located the mill partly on the leased Reserve lands and partly on lands the mill owned contiguous to the leased lands.

[47] Likewise, I cannot agree with the Appellant that many of his clients through their written policy statements, grant preference to aboriginal businesses and thus lead to a conclusion the Appellant obtains his work as a result of his Indian status or residence on the Reserve or rights to a trapping area, thus creating a connection between the Reserve and the business activities of the Appellant. In the Aboriginal Guideline statement issued by EnCana, the Appellant's largest customer, it is clear that although it "encourage(s) aboriginal communities to develop business opportunities" with EnCana, that EnCana awards contracts to "both qualified Aboriginal and non-Aboriginal businesses . . . on a competitive basis. . ." Similar sentiments were expressed in the policy statements of other customers submitted into evidence. Notwithstanding as well that the Fort Nelson First Nation has a written policy that commits the Band Council to ". . . insist that oil and gas companies give initial full consideration to our member contractors" and to "Advocacy" on their behalf, the said Band Policy acknowledges that "Companies have the sole discretion to grant contracts to any contractor that meets its requirements." While the Band Policy clearly suggests a preference for its own member contractors, it is clear that such preference can only lead to a member receiving a contract on the Reserve, as in any other case the decision is that of the customer.

[48] Accordingly, I can find only a very weak argument for connecting the Business to the Reserve on basis of proximity or policy of any party save to contracts on the Reserve itself, especially having regard to the nature of the business.

2. Location of Customers and Where Payment Made

[49] There is no doubt in my mind that all but one of the Appellant's customers in 2003 was based off Reserve, such customers being made up of oil and gas exploration companies predominantly based in the Calgary, Alberta vicinity where their head office was. The Appellant takes the position that such a factor, coupled with the place where the work was done as earlier discussed are the predominant factors in applying the connecting factors test to business income, relying on the decisions in *Southwind* and *Pelletier v. Canada*, 2010 FCA 300, 2010 DTC 5193 (F.C.A.) and the Tax Court decision in *Pelletier v. The Queen*, 2009 TCC 358, [2009] 4 C.N.L.R. 243 (T.C.C.). *Southwind* involved a single independent contractor logger working off reserve exclusively for one off-reserve based corporation. *Pelletier* involved the Appellant therein who took over the logging business of his

Indian Band and conducted all his contracts off reserve for non-reserve customers, spending time working the logging sites as well as residing on the reserve.

[50] While the two above particular factors were discussed in both cases, I see no indication in those cases to suggest a presumption of weightiness in their favour over any other factors. In *Pelletier*, Bowie J. discussed the connecting factors outlined in *Southwind* and concluded in paragraph 15 that "Considering all of these factors, . . . I am of the view that the appellant's income derived from the 4 K Logging business does not qualify as property situated on a reserve. . ." The Federal Court of Appeal did not reverse Bowie J.'s decision, finding that the judge "was fully alive to the totality of the evidence, and the 'surrounding circumstances' connecting the business to and benefiting the reserve, . . ." In the appeal to the Federal Court of Appeal, the Appellant took the position that ". . . the Judge erred in his application to the facts of the multi-factor test for determining the *situs* of employment or business income. . .", in effect suggesting the judge should have given more weight to the other facts and the Court found he considered the totality of the evidence and refused to reweigh the evidence that was before the judge. In essence, in those cases, the judges considered what the relevant factors were and analysed them to give the respective factors the weight they thought it deserved. There was no statement that any connecting factor should per se receive more weight, but rather a determination by the judge of the weight he chose to give in the specific facts of that case.

[51] The Appellant here on the other hand suggests that the location of the customers is less relevant than the location of the place where the customers had their business dealings with the Appellant, which he suggests is the Reserve. Frankly, while there was some evidence to suggest certain of the customers representatives would attend the meet and greet sessions held by the Band or contact the Appellant by email, this hardly constitutes concluding that the "dealings" with the Appellant occurred on Reserve. All but one of the customers was clearly located off Reserve. However, I am not sure this factor should be given much weight in light of the fact the parties corresponded mainly by electronic means with each other and having regard to the fact the nature of the business was that of performing work at different sites, none of which were the customer's head offices in Calgary. This factor has more significance in my view where it is investment income that is the type of property in issue such as in *Bastien Estate* and *Dubé*, where such factor is more important in establishing where the obligation to pay the investment income occurs.

[52] In fact, the other side of the coin, whether one considers it the other component of this factor or a separate factor, is where payment is made and it is clear from the

evidence that most payments from the customers were by cheques mailed to the Appellant's Reserve office.

[53] In my view, the fact most customers are located off Reserve but payment is received on Reserve are factors which tend to neutralize the weight to be given to them. Moreover, as I mentioned above, in the modern world, where parties conduct their transactions in the electronic world, as appears to be the case in this business, such factors are of little assistance in aiding the Court to determine the *situs* of the business income for a business of this nature. The fact that the customers were located off Reserve appears to be more a fact related to the discussion of the "commercial mainstream", a factor in my view heavily relied on in both *Southwind* and *Pelletier* which were decided before *Bastien Estate*.

3. Residence of the Owners

[54] The Appellant was a status Indian who was born, grew up on and lived on the Fort Nelson First Nation Reserve, having lived there most of his life and certainly at all times since the commencement of his Business. Even though the Business was a proprietorship, it was described in evidence as the family business and in this light it is worthy to note that the other part of the management team, the spouse of the Appellant, even though a member of a different Indian Band, also lived on this Reserve with her husband, where both of them clearly provided most if not all of their services to the Business. The fact that the owner or owners in a looser sense not only lived on the Reserve but had a strong connection to the community on the Reserve, and started and grew their Business on the Reserve are factors which weigh in favour of suggesting the Business income was on Reserve.

4. Where Decisions Affecting the Business are made

[55] The evidence is overwhelming that the vast majority of decisions affecting the Business are made on Reserve. Both the Appellant and his spouse, representing the management of the Business, worked from the Reserve office and it was there they decided what business to pursue and tenders to bid on, which workers to hire, assemble and how to assign them to specific job sites, which workers to retain on their worker list and which workers to fire. It is on the Reserve they ensured they satisfied which requirements were necessary to bid on work, such as to obtain insurance, join the relevant associations, and keep the relevant industry and safety certifications. All the administrative and financial decisions were clearly made on Reserve, including decisions on their financing requirements, qualifying potential workers to ensure they had driver's licences and safety certificates, what equipment to buy or rent and so forth.

[56] The Respondent suggests that the employees were supervised by both the Appellant's foremen and the customers' representatives on off-reserve sites, and accordingly, suggests business decisions were also made off site hence this factor is not conclusive. I do not agree with the Respondent on this issue. Firstly, all other managerial and administrative decisions above described or described in the factual summary at the beginning of this decision were clearly made on the Reserve. As for any supervision provided off Reserve, the evidence was that the foremen acted as liaisons with the Reserve office and made only minor decisions regarding the employees and clearly within parameters established by the Appellant. The decision as to what employee worked on what site, whether to hire and fire an employee and how to deal with problems was clearly left to the Appellant.

[57] As for the role of the customers' consultants on site in the supervision of the employees, the evidence does not establish such consultants had the main right of supervision. The consultants determined what was to be cleared or done in the overall sense, much in the sense of an architect or civil engineer supervising a building site or road improvement, but it was the Appellant who, as the Respondent pointed out, was responsible for completing the clear cutting and was contractually liable to indemnify its customers if the work was not done satisfactorily. Any supervisory role by the customers' representative was minor compared to the number of decisions affecting the Business, both from a managerial and administrative perspective, as well as from a labour perspective, that were performed on Reserve. Accordingly, this factor also suggests the income is situate on Reserve.

5. Place where Books and Records kept

[58] There is no dispute the books and records were kept on Reserve. Moreover, it is clear having regard to the duties of the Appellant's spouse as bookkeeper as well as financial manager of the Business that all initial bookkeeping entries and ledgers were created on the Reserve, all employee lists, qualifying documents and records were put together and kept on Reserve, all invoices for supplies and assets were received and paid from the Reserve, all employee payments were issued or electronically entered on Reserve and all payroll remittances, workers' compensation and safety and other administrative reports were prepared on Reserve. In general, the Reserve was the place of not only storing but of creating such required books and records. Having regard to the size of the Business operation in 2003, earning $3.4 million in revenue, employing over 140 different employees and paying out more than $2.8 million in expenses, it is quite clear the creation, maintenance and storage of the books and records were quite substantial.

6. Nature of Work and the "Commercial Mainstream"

[59] Having regard to the Supreme Court of Canada's decision in *Bastien Estate* and *Dubé* above discussed, it is clear that the commercial mainstream factor is not a determinative one. As counsel for the Respondent pointed out, the *Bastien Estate* decision did (in paragraphs 56 and 60) acknowledge that this factor could be taken into consideration as an aid in the analysis of the *situs* of income. Whether one wishes to give the "commercial mainstream" the moniker of "aid" or "factor" is in my view irrelevant as long as the cautions of Cromwell J. in *Bastien Estate* are kept in mind; that the Court should not substitute the question as to what is the *situs* of the property with the question as to whether the work is in the "commercial mainstream",

nor fail to understand that the availability of the exemption does not depend on whether the property is integral to the life of the Reserve or to the preservation of the traditional Indian way of life.

[60] The nature of the work of the Appellant's business is, in its simplest sense, the clearing of paths by the felling of trees and cutting of brush to facilitate oil and gas or mineral extraction exploration or distribution via pipelines. The nature of his particular business involves both a large managerial and administrative component as well as a labour component, the latter mainly working on site, usually off Reserve, utilizing chain saws, bobcats and other modern equipment, all for profit.

[61] The Respondent, in paragraph 17 its Reply, assumes both:

> o) the Appellant conducts the Business in the commercial mainstream, competing with non-aboriginal businesses; . . .
>
> q) the Business is not integral to the life on an Indian reserve; . . .

[62] The Appellant argues that these assumptions on are not valid and I would agree with him in the sense that the Appellant need not be concerned about rebutting these specific assumptions in light of the dicta of the Supreme Court of Canada in *Bastien Estate* above. However, whether as aids or factors, the Court recognized that they may be of assistance in determining the *situs* of the property and the Respondent has acknowledged in argument that while the Court may conclude this factor has little weight, whatever weight it does have supports an off-reserve location for the income in issue.

[63] The difficulty I have with the Respondent's position is that it appears to be made of bold assertions; - "the Appellant conducts the Business in the commercial mainstream" without specific explanation. In the Respondent's defence, it cannot be blamed for taking this approach as many Court decisions have taken the same approach. In both *Southwind* and *Pelletier* mention is made of the term "commercial mainstream" as if it was clear what is meant by it. Is it in the commercial mainstream because it provides the services to customers who are not on the reserve, in which case it is a factor already contemplated in the *Southwind* list of factors and so is duplicative. Is it because the clearing of trees and brush are not considered traditionally an Indian activity or are not integral to life on the Reserve in this case? Was the logging activity in *Southwind* and *Pelletier* in the same category? I dare say, I believe aboriginal communities and non-aboriginal alike were clearing trees and brush for paths, patches to farm on and build accommodation or keep livestock on

long before the discovery of the new world and that these activities may have led to or facilitated trade. Is it because the manner in which the clearing of trees and brush today, using modern equipment and tools, is dissimilar to the more crude technologies utilized before the Crown treaties with the Indians were made? If so, was it not the same for non-aboriginals in that era who have evolved to utilizing the new technologies over time?

[64] It appears to me that in the above contexts the treatment of this factor has involved, as a corollary, a consideration of whether the activity is "Indian enough" in the historical perspective, which the Supreme Court of Canada clearly disavowed in *Bastien Estate* thus demonstrating the dangers with utilizing this factor. Moreover, the Supreme Court of Canada clearly warned that the purpose of the legislation could not be read so as to treat the aboriginal community as frozen in time and not permitted to evolve as alluded to by Cromwell J. in paragraph 28 of *Bastien Estate* quoted earlier.

[65] Based on the Respondent's argument, it seems that its main justification for considering it in the commercial mainstream is because the Appellant's Business competes with non-aboriginal businesses, which wording is specifically found in the assumption of paragraph 17(o) in the Respondent's Reply. In paragraphs 75 and 76 of the Respondent's written argument, the Respondent stated:

> 75. Recalling the purpose of section 87 of the *Indian Act*, which is to "shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians", but "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", the tax exemption contained therein should not be applied in this case.
>
> 76. If the Appellant is exempted from tax on his business profit, he will have an economic advantage over his non-Indian competitors, which is totally contrary to section 87.

[66] Having regard to the above, it is my view that the term "commercial mainstream" is now a misnomer. Competition with non-aboriginals is the more accurate category that describes the real reason for the existence of the factor. Clearly, categorizing it as suggesting it must describe the "non-Indianness" of the activity, as demonstrated by the earlier examples, are clearly inappropriate. However, as counsel for the Appellant pointed out, the Supreme Court of Canada also recognized, in the continuation of the quote utilized by the Respondent's counsel in its argument above from Cromwell J. in *Bastien Estate*, that while La Forest J. in

Mitchell noted that the purpose of the legislation is not to permit Indians to "acquire, hold and deal with property in the commercial mainstream on different terms than their fellow citizens," it was clear that, "even if an Indian acquired an asset through a purely commercial business agreement with a private concern, the exemption would nonetheless apply if the asset were situated on the reserve. … it must be remembered that the protections of ss.87 and 89 will always apply to property situated on a reserve."

[67] It is thus clear to me that, whether the aboriginal competes with non-aboriginals or not, the question of competition per se, or the "commercial mainstream" which I feel are one and the same, is irrelevant. The question is whether the property is situated on the Reserve and this had nothing to do with whether the same property can be owned by non-aboriginals and exist off reserve. In my view, any consideration of this "commercial mainstream" or "competition with non-aboriginals" factor is irrelevant to the determination of whether the Appellant's business income is situated on the Reserve and I assign no weight to it. It may be an aid in defining the nature of a business and the location of its business activities above, but no presumptive weight can be given to it in the manner it has been utilized in the past.

[68] Moreover, it must be emphasized that just because a finding that a property is situated on a Reserve may lead to a competitive advantage given an Indian over a non-Indian does not give reason to negate the finding it is situated on a Reserve. Any advantage such finding may render is in my view the exact advantage that was contemplated by section 87 of the *Act*.

Other Factors

[69] The other factor discussed and argued by the parties not discussed above is whether the purported benefit of the Appellant's Business to the Reserve weighs in connecting the Business to the Reserve or not. Simply put, I cannot find any real weight should be given to this "benefits to reserve" factor. Firstly, the nature of business income is that it is the property of the person earning it, which in this case is the Appellant. It cannot be said to directly accrue to or benefit the Reserve itself. Secondly, the Appellant argues that due to the fact he hires mainly aboriginal workers, 16 of over 140 from his own Reserve, that the benefits of their income on Reserve benefits the overall economy of the Reserve and is instrumental to the social and economic health of the Reserve by assisting members to stay, live and contribute to their own communities. With such a small portion of the Appellant's workers living on the Appellant's Reserve, it is difficult to accept that where the vast majority

of wages are paid to workers hailing from other parts of British Columbia, Alberta, Saskatchewan and as far away as Newfoundland and Labrador, who may be aboriginal and non–aboriginal alike, that the Reserve is a large beneficiary of the Business or that it is intended to be or that those 105 aboriginals of the over 140 working for the Appellant are assisted in remaining in their own communities when it is clear the vast majority do not hail from the Reserve. There was in fact no evidence given as to where they might in fact live. Moreover, there was no evidence tendered that the competitors of the Business do not operate in the same way so as to make any valuable comparison as to the relative benefits accruing to the Reserve that might tend to show a closer connection.

[70] The Appellant also argues that his Business provided direct benefit to the Reserve through his contributions to advertising and promotion on Reserve of which the evidence is he spent $2,900, as well his donation of $1,000 to sponsor sports teams on Reserve and his contribution of $1,000 to help a youth attend hockey camp off Reserve. While laudable, such contributions, relative to the $3.4 million revenue of the Business cannot be said to be a significant benefit.

[71] In all, the most that can be said is that a small benefit of the business income from the Business benefits the Reserve, itself constituting only a weak factor connecting the business income to the Reserve.

Conclusion

[72] Having regard to my analyses of the above relevant factors and the weight I have assigned to them, I must conclude that the Appellant's Business income as his personal property has a strong connection to the Reserve and thus is property situated on a Reserve for the purposes of paragraph 87(1)(*b*) of the *Indian Act* and hence exempt from taxation pursuant to section 81 of the *Income Tax Act*.

[73] Having come to this conclusion, it is not necessary to determine the second issue as to whether the Appellant can deduct a management fee paid to his spouse of $161,000. For the record, I would have found that such a deduction would have been permitted having regard to the vast myriad of duties undertaken by the Appellant's spouse over and above her bookkeeping duties in acting essentially in a capacity akin to being the Chief Financial Officer as well as Safety Officer, having regard to her onerous efforts, responsibilities and the principled manner in which her remuneration was determined; especially in light of the fact no contradictory evidence was before the Court to suggest otherwise. Moreover, although the Respondent had conceded at the beginning of the trial that the Appellant would also have been permitted a capital cost allowance such as to reduce his taxable income by $23,107, such fact, together with the issue of the management fee, is now at best only a bookkeeping adjustment to ensure proper reporting for accounting purposes.

[74] The appeal is allowed with costs to the Appellant; however, the parties are invited to file written submissions within 30 days as to costs if any of them feel a standard cost award should not stand.

Signed at Ottawa, Canada, this 10th day of July 2012.

"F.J. Pizzitelli"

Pizzitelli J.

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