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Citation: 2007 FC 1052

Ottawa, Ontario, October 16, 2007

PRESENT: The Honourable Mr. Justice Phelan

Docket: T-2241-95

BETWEEN:

MARGARET HORN

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL REVENUE

Defendant

and

ABORIGINAL LEGAL SERVICES OF TORONTO

Intervener

and

Docket: T-2242-95

BETWEEN:

SANDRA WILLIAMS

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL REVENUE

Defendant

and

ABORIGINAL LEGAL SERVICES OF TORONTO

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

I. OVERVIEW

[1] Margaret Horn and Sandra Williams are both status Indians. Both are employed by Native Leasing Services (NLS), an employment leasing business headquartered on the Six Nations Reserve near Brantford, Ontario. NLS leased the two Plaintiffs' services to not-for-profit organizations situated off their respective Reserves.

[2] The two not-for-profit organizations, the Odawa Native Friendship Centre (Centre) and the Hamilton-Wentworth Native Women's Centre (Shelter), provided services to Natives and non-Natives. Throughout these reasons the term "native" and "aboriginal" are used interchangeably consistent with the use of those words in the documentary and oral evidence.

[3] An essential feature of the Plaintiffs' employment with NLS was that they did not pay income tax on the basis of their native status.

[4] The Plaintiffs' employment income received from NLS in relation to their work for their respective organizations was assessed as taxable by, what is now called, Canada Revenue Agency (CRA).

[5] The Plaintiffs are seeking a declaration that their employment income falls within the tax exemption provided under s. 87 of the *Indian Act*:

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:	87. (1) Nonobstant toute autre loi fédérale ou provinciale, mais sous réserve de l'article 83 et de l'article 5 de la *Loi sur la gestion financière et statistique des premières nations*, les biens suivants sont exemptés de taxation :
(a) the interest of an Indian or a band in reserve lands or surrendered lands; and	*a)* le droit d'un Indien ou d'une bande sur une réserve ou des terres cédées;
(b) the personal property of an Indian or a band situated on a reserve.	*b)* les biens meubles d'un Indien ou d'une bande situés sur une réserve.
(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.	(2) Nul Indien ou bande n'est assujetti à une taxation concernant la propriété, l'occupation, la possession ou l'usage d'un bien mentionné aux alinéas (1)*a)* ou *b)* ni autrement soumis à une taxation quant à l'un de ces biens.
(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	(3) Aucun impôt sur les successions, taxe d'héritage ou droit de succession n'est exigible à la mort d'un Indien en ce qui concerne un bien de cette nature ou la succession visant un tel bien, si ce dernier est transmis à un Indien, et il ne sera tenu compte d'aucun

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.	bien de cette nature en déterminant le droit payable, en vertu de la *Loi fédérale sur les droits successoraux*, chapitre 89 des Statuts revisés du Canada de 1952, ou l'impôt payable, en vertu de la *Loi de l'impôt sur les biens transmis par décès*, chapitre E-9 des Statuts revisés du Canada de 1970, sur d'autres biens transmis à un Indien ou à l'égard de ces autres biens.

[6] The Plaintiffs also claim that the application to them of s. 87 of the *Indian Act* by CRA in accordance with the 1994 CRA Guidelines discriminates under s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

[7] This case is centred principally on the "connecting factors" test in *Williams v. The Queen*, [1992] 1 S.C.R. 877, as discussed significantly by the Federal Court of Appeal in *Shilling v. Canada (Minister of National Revenue – M.N.R.)*, [2001] F.C.J. No. 951 (QL), 2001 FCA 178.

[8] Taking into account these factors and with particular reference to the location and nature of the Plaintiffs' work, including the provision of social services off-reserve to off-reserve Natives, the Plaintiffs are not entitled to tax exemption on their employment income.

II. FACTUAL BACKGROUND

[9] The evidence in this case consisted of both an Agreed Statement of Facts and *viva voce* evidence from some 20 witnesses.

A. *Agreed Statement of Facts*

[10] While not all of the Agreed Facts are described in the following paragraphs, the salient aspects are:

Margaret Horn

(a) Margaret Horn (Horn) is an Indian within the meaning of the *Indian Act*. She is a member of the Kahnawake Band of Indians, a band within the meaning of the *Indian Act*.

(b) In filing her income tax returns for the 1993 and 1994 taxation years, Horn did not include income in the amounts of $9,000 and $45,000 respectively, being the amounts she had earned from Native Leasing Services (NLS) arising from her placement at and the services she provided to the Centre.

(c) In filing her income tax return for the 1995 taxation year, Horn included the income in the amount of $31,426 but then deducted the same amount as an "other" deduction.

(d) Horn's returns for the 1993, 1994 and 1995 taxation years were assessed as filed on December 12, 1994, May 15, 1995 and October 7, 1996 respectively.

(e) The Plaintiffs benefited from the *Indian Income Tax Remission Order*, P.C. 1993-523, March 16, 1993 (S.I./93-44), as amended, in the 1993 and 1994 taxation years

in respect of her employment income during the period from October 1993 to December 1994. Accordingly, the 1993 and 1994 taxation years are not in issue in this action.

(f) This action seeks declaratory relief as to the applicability of s. 87 of the *Indian Act* in relation to employment income earned by Horn in 1995 in the amount of $31,426, being the amount paid to her by NLS in respect of her placement at the Centre.

Sandra Williams

(a) Sandra Williams (Williams) is an Indian within the meaning of the *Indian Act*. She is a member of the Six Nations Band of Indians, a band within the meaning of the *Indian Act*.

(b) In filing her income tax returns for the 1991, 1992 and 1993 taxation years, Williams included in her income employment income that she received from NLS in respect of her placement at the Shelter in the amounts of $27,993, $29,118 and $29,330 respectively.

(c) Williams' returns for the 1991, 1992 and 1993 taxation years were assessed as filed on August 28, 1992, April 22, 1993 and September 1, 1994 respectively.

(d) In filing her income tax returns for the 1994 taxation year, Williams included in income employment income in the amount of $29,486 received from NLS in respect of her placement at the Shelter.

(e) Williams' income tax return for the 1994 taxation year was assessed on February 6, 1996 to grant remission of taxes under the *Indian Income Tax Remission Order*, P.C.

1993-523, March 16, 1993 (S.I./93-44), as amended, in respect of her employment income received during the 1994 taxation year.

(f) With regard to the 1995 taxation year, Williams filed a pre-bankruptcy income tax return on July 5, 1995, including employment income in the amount of $16,510. Williams further filed a post-bankruptcy return in respect of the remainder of the 1995 taxation year in which she included employment income paid to her by NLS in respect of her placement at the Shelter in the amount of $14,449, but then deducted the same amount as an "other" deduction.

(g) The pre-bankruptcy return was assessed as filed on February 6, 1996.

(h) The post-bankruptcy return was assessed on August 26, 1996, to disallow the deduction of the employment income in the amount of $14,449. The assessment was on the basis that the employment income paid to her by NLS in respect of her placement at the Shelter was not exempt from taxation pursuant to s. 87 of the *Indian Act*.

(i) On July 21, 1997, Williams' 1996 return of income was assessed so as to include her income in the amount of $30,917 paid to her by NLS in respect of her placement at the Shelter. The assessment was on the basis that her employment income was not exempt from taxation pursuant to s. 87 of the *Indian Act*.

(j) This action seeks declaratory relief as to the applicability of s. 87 of the *Indian Act* in relation to employment income earned by Williams in 1995 and 1996 in the amounts of $14,449 and $30,917 respectively, being the amounts paid to her by NLS in respect of her placement at the Shelter.

Native Leasing Services

(a) During the years 1992-1996, NLS entered into placement agreements with 81 placement organizations.

(b) NLS has a fiscal period ending on the 31st of January each year.

(c) For the years 1995 and 1996, the financial statements of NLS were prepared by Mark Schlein, a chartered accountant.

(d) The NLS Statement of Operations for the year 1995, which forms part of the Financial Statements of NLS for that year, provides as follows:

	1995
	$
Fees Earned	15,692,945
Subcontractors' Wages and Benefits	14,958,303
Gross Profit	734,642
Expenses	
Contributions to Aboriginal and Treaty Rights Defence Fund	213,183
Office Salaries and Benefits	213,274
Publicity and Promotion	113,967
Bank and Payroll Charges	17,632
Office and General	17,202

Professional Fees	15,000
Telephone	14,694
Rent	9,810
Training	4,968
Travel	3,023
Amortization	901
	613,654
Less: Interest earned	24,069
	599,585
Net Profit	135,057

(e) During its 1995 fiscal period, NLS incurred the following expenditures on-reserve:

Office Salaries & Benefits	$213,274
Rent	9,810
Office and General	9,780
TOTAL	$232,864

(f) The NLS Statement of Operations for the year 1996, which forms part of the Financial Statements of NLS for that year, provides as follows:

	1996
	$
Fees Earned	13,344.801

Subcontractors' Wages and Benefits	12,708,747
Gross Profit	636,054
Expenses	
Contributions to Aboriginal and Treaty	105,658
Rights Defence Fund	
Office Salaries and Benefits	217,041
Advertising and Promotion	29,152
Bank and Payroll Charges	16,804
Office and General	30,644
Professional Fees	8,579
Telephone	17,425
Rent	11,772
Training	3,979
Travel	-
Amortization	1,248
	442,302
Less: Interest earned	28,163
	414,139
Net Profit	221,915

(g) During its 1996 fiscal period, NLS incurred the following expenditures on-reserve:

Office Salaries & Benefits	$217,041

Rent	11,772
Office and General	11,807
TOTAL	$240,620

B. *Hearing Evidence*

(1) Margaret Horn

[11] As indicated earlier, Horn is a member of the Kahnawake Band of Indians. She was born on the Kahnawake Reserve just outside Montreal and is one of nine children, eight of whom currently live on the Kahnawake Reserve with their own children.

[12] Horn was raised on the Reserve and lived there until 1972 when she married a non-Native and lost her Indian status. She reacquired that status when she remarried a Native from Kahnawake in 1975.

[13] In that same year she purchased a house on the Reserve along with four acres of land. She has continued to own that land and maintain a house which she uses when she frequents the Reserve.

[14] Horn has continued to maintain connection with the life of the Reserve. She is a member of the Longhouse, the traditional social and political government of the Mohawks of the Six Nations. She and her family participate in Longhouse ceremonies and activities, including representing the

Longhouse at the United Nations conferences in 1991 and 1992 on the Prevention of Discrimination and Protection of Minorities.

[15] From 1982 to 1995, Horn and her children resided primarily in the City of Ottawa where she had an apartment. During this period she worked in the City of Ottawa for the National Association of Friendship Centres, and then for the Office of the Solicitor General dealing with native issues. Throughout this period she maintained her connection to the Kahnawake Reserve.

[16] In 1992, Horn obtained a Master of Arts in Canadian Studies from Carleton University.

[17] In 1993 and until 1995, Horn worked as the Executive Director of the Centre located in Ottawa. Starting in 1993, she was an employee of NLS and working at the Centre. During that period she maintained a small apartment in Ottawa but travelled back to her Reserve on weekends. She considered the Reserve as her base of life.

[18] The Centre is a not-for-profit corporation serving the aboriginal community in Ottawa and the surrounding communities. It acts as a cultural link and connection for First Nations and aboriginal people and offers services and referrals designed to meet the needs of this community.

[19] As indicated in its Letters Patent and in its brochure, the purpose of the Centre is:

- To promote a counselling and referral service for status and non-status Indians, Metis, Eskimos, and Inuits, hereafter referred to as “Natives” in the City of Ottawa and surrounding area;
- To facilitate understanding and educational opportunities for people of Native background in order to include them into the social and economic structure of the community;
- To act as a liaison between people of Native background and government agencies, industry and other groups;
- To provide facilities for university and vocational school students for the purpose of giving them an opportunity to organize social, cultural and recreational activities;
- To establish a centre where non-Native people will have an opportunity to visit the centre and socialize with Native people;
- To provide Native transients and permanent residents an opportunity to utilize the centre for social activities and as a meeting place in which Native people can seek friendships among people with similar interests and backgrounds; (emphasis added)

[20] The services provided by Odawa in the relevant period included recreational programs for youths and community services such as counselling, family support services, daycare as well as aboriginal cultural and linguistic events and training.

[21] The purpose of Friendship Centres generally was described by the National Association of Friendship Centres as:

> The concept of a 'Friendship Centre' originated in the mid-1950s. A noticeable number of Aboriginal people were moving to the larger urban areas in Canada, primarily to seek an improved quality of life. In an effort to address the needs expressed by their communities, concerned individuals began to push for the establishment of specialized agencies. These agencies would provide referrals and counselling on matters of employment, housing, education, health and liaison with other community organizations. … In spite of the many obstacles, the Centres have continued to expand *the programs and services offered to urban Aboriginal People*. (emphasis added)

[22] Horn has described Friendship Centres as:

> non-sectarian, non-political, non-profit organizations which attempt to bridge the gap between rural and urban Native and non-Native people, and effectively assist in the transition to an urban environment.

Horn's testimony was that Friendship Centres could offer services to both those Natives in transit and those who were living and working in the city.

[23] The staff of the Centre was a mix of Native and non-Native while the Board of Directors was exclusively Native. Moreover, the evidence established that the real purpose and operation of the Centre was to service the Native community generally, whether temporarily in the city or as permanent city dwellers.

[24] While the Centre maintained connections to reserve communities, it provided its services off reserves to Natives who were also off-reserve temporarily or permanently. There is no "bright line" between urban Natives and reserve Natives; there is a certain flow between the two locations or communities. To that extent, any reserve receives some benefit (the precise nature and quantity is

unclear) if members avail themselves of the Centre's services. However, the target "market" for the Centre is not Natives on a particular reserve or on reserve generally but those Natives who for one reason or another are off the reserve.

(2) Sandra Williams

[25] Sandra Williams, an Indian within the meaning of the *Indian Act*, is a member of the Six Nations Band in the Brantford, Ontario area and has lived on the Six Nations Reserve since she was five years old. Except for the period 1977 to 1983, she has continued to live on the Reserve. Her only period of living off-reserve was due to her work in Hamilton at a time when she did not own a car.

[26] Williams' connection to the Reserve is substantial. She currently lives in a house she built on land she inherited from her family. She lives there with her husband and daughter. Prior to owning her house, Williams rented a house on the Reserve. As well, much of her family also live on the Reserve.

[27] Except for food supplies which are purchased in Brantford, Williams does her other shopping on the Reserve. Her social and religious activities are on the Reserve.

[28] Her situation is in contrast to that of Horn, who lived off the Reserve but maintained connections with the Reserve. Williams is physically resident on the Reserve.

[29] Williams has worked at the Shelter since 1977. She has worked as a night supervisor, evening counsellor and senior counsellor. She also worked as a community liaison worker and, on occasion, as Executive Director.

[30] In 1993, Williams signed an employment contract with NLS and continued her previous duties but as an employee of NLS leased to the Shelter. She worked exclusively at the Shelter which is located in Hamilton, 30-35 miles from the Six Nations Reserve.

[31] In the relevant taxation years 1995 and 1996, the members of the Shelter's Board of Directors were Native of whom four were Six Nations band members. All directors resided off the Reserve.

[32] In 1996, all individuals working at the Shelter were NLS employees and Natives. Most of these were Six Nations band members.

[33] As the Shelter's Objectives state, and as confirmed by various witnesses, the primary objective of the Shelter is to provide shelter for aboriginal women and their children. The precise wording is "to provide emergency accommodation with a stable environment for women and their children during a crisis situation".

[34] The Shelter provides a number of resources for women to deal with various problems including legal issues, drug and alcohol abuse, financial difficulties, and family and marital

problems. It also provides cultural programs targeted for aboriginals including the quarterly "cleansing ceremonies" and the use of traditional healers.

[35] The only pertinent statistical evidence related to the services provided showed that in the fiscal years 1995-96, the Shelter serviced 100 women and 50 children of whom 38 women were Natives. There were no statistics related to what percentage of these users were on or off-reserve.

[36] During 1995-96, the Shelter was one of five shelters in the Hamilton area. The Shelter, like all other shelters, provided shelter to women in need "regardless of age, ancestry, culture, place of origin or sexual orientation".

[37] This non-discriminatory mandate is a condition of provincial and other funding without which these shelters presumably would not likely survive.

[38] There were a number of shelters servicing the area outside Hamilton and within reasonable proximity to the Six Nations Reserve. One of the shelters, Ganohkwa'Sra', was located on that Reserve. The non-reserve shelters, while taking in Natives, did not target Natives or set up programs for Natives whereas the Shelter did.

[39] The Court heard the compelling evidence of a Mrs. B (whose evidence is subject to a publication ban) who spoke to the issue of the limitations of on-reserve shelters and the concern of abused women for anonymity and confidentiality – essential for their protection. Mrs. B spoke to

the fear of discovery on a reserve by the very perpetrators of abuse, whether the abuse was directed to the woman or her children. It is difficult, if not impossible, to hide one's presence in an on-reserve shelter. Her problem is the same type of problem which exists in small communities where abusers can more easily track down their victims.

[40] While it is true that persons seeking shelter do so primarily based on need for protection not on ethnicity, the Shelter does not lose its native quality merely because it does not discriminate in favour of Natives. A Salvation Army shelter is no less connected to the Salvation Army simply because it accepts everyone; nor is a Catholic elder's home only less affiliated with that Church because it takes in other faiths.

[41] However, what is particularly germane to the issues in this case is the evidence that the Shelter's services were similar to that of other shelters in the area and that Williams' job function and salary were consistent with those other shelters.

(3) Native Leasing Services

[42] Central to a consideration of each of the Plaintiffs' employment situations and the determination of the situs of their personal property (their income) is an understanding of the nature of NLS and its relationship with its employees, in particular the Plaintiffs.

[43] NLS is a sole proprietorship carried on by Roger Obonsawin (Obonsawin), a status Indian and a member of the Odanak First Nations. At the times material to this action, Obonsawin resided in Toronto.

[44] Originally Obonsawin carried on his business under a corporation – O.I. Employee Leasing Inc. – established in 1987. The business was and continued to be carried out for profit earned through fees charged.

[45] Obonsawin had extensive experience and training in the delivery of social services. His evidence was clear, direct and credible. The purpose of his business, aside from profit, was to improve his client organizations by providing training, governance expertise and administrative services including employee leasing.

[46] The concept of employee leasing is another aspect of outsourcing. For a fee, an organization hires a leasing company to provide personnel and the administrative support for that personnel who, although employees of the leasing company, work for the hiring organization.

[47] The genesis of the aboriginal employee leasing concept arose after Obonsawin and his partner, Ljuba Irwin, formed Obonsawin-Irwin Consulting Inc., a management consulting company focused on aboriginal organizations. Obonsawin saw the need for skills improvement in aboriginal organizations.

[48] The original employee leasing operation was conducted by O.I. Employee Leasing Inc. However, in 1991 NLS was formed, as a proprietorship, and the operations of O.I. Employee Leasing Inc. were split. O.I. Employee Leasing Inc. clients were departments and agencies of various levels of government while NLS's clients were aboriginal not-for-profit organizations.

[49] Obonsawin testified that NLS was set up originally to deal with GST problems and only later was he made aware of the decision of the Supreme Court in *R. v. Nowegijick*, [1983] 1 S.C.R. 29. Obonsawin testified that he saw the immediate tax benefits under s. 87 in that it would allow aboriginal organizations the opportunity to offer more competitive salaries and would attract a better skilled work force.

[50] This testimony is instructive in that it focuses attention on competitive salaries and raises the question of "with whom is the competition for salaries". It suggests that attention is being paid to the "market place" or "the mainstream of commerce". The implication is that by employees being income tax exempt, NLS's clients could offer employment to Natives through NLS which would be the same net amount to the employee but at a lesser gross cost amount to NLS's client. The NLS fee was less than the applicable tax rate imposed on the native employee's income.

[51] There is no issue that NLS is the employer of the Plaintiffs. The employment relationship has been admitted in the Agreed Statement of Facts. Nor is there any issue that NLS and its method of employee leasing is a legitimate exercise. The fact that NLS may be a creative vehicle of tax

planning and benefit is no basis for undermining its legitimacy. Innovative tax structures are not the exclusive preserve of non-Native entities.

[52] However, it is a legitimate inquiry to review the nature of that employment relationship, its interplay with the not-for-profit NLS clients and the work of the NLS employees, particularly as it relates to the range of connecting factors to be examined.

[53] A central feature of NLS's business is its employee leasing function. It is not, however, the only feature – NLS provided benefits to its client native organizations particularly that of training to assist new and existing directors, and training for the development of strategic and financial plans. The evidence is replete with instances of NLS assisting its clients in dealing with structural and governance issues. However, these organizations, such as the Centre and the Shelter, continued to do their own training. NLS training was clearly supplemental to those clients.

[54] From a business perspective, the employee leasing business is the *sine qua non* of NLS's operations. This is evident from the financial statement evidence:

- In 1995 and 1996 respectively, NLS had gross revenues of $15,692,945 and $13,344,801, all of which were derived from the work of NLS employees off-reserve.
- 95% of NLS's costs were the wages and benefits paid to its employees who were contracted to off-reserve organizations. These costs of employees' pay and benefits are funded by the clients in what is essentially a flow through where the employee's

pay and benefits are deposited by the client in NLS's bank account to be drawn down (less fees to be discussed) to fund NLS's payroll for those employees leased to the client.

- NLS's expenses on reserve were $232,864 in 1995 and $240,620 in 1996.

[55] The structure of the payment to NLS by the client was 5% of each leased employee's income for which the client received the benefits of payroll and benefits management, human resources support, training and shared information between other similar organizations. The leased native employee principally received the benefit of the tax exempt status.

[56] The importance to an employee of this tax status is clear from Horn's situation where she paid the $2,200 fee to be part of NLS and to receive the benefits of being a leased employee. This was an exceptional circumstance due to the financial problems at the Centre but it underscores the fact that for a leased employee, the s. 87 tax exemption was a critical aspect of being a NLS leased employee.

[57] Considerable effort was expended in this case with regard to establishing the location of the employer, NLS, and its connection to the reserve. The thrust of the Defendant's position is that NLS conducted its business off-reserve with entirely off-reserve clients for the benefit of Obonsawin, the proprietor of NLS, who lived off-reserve. With respect to the issue of benefits, that matter is discussed in paragraphs 66 to 69.

[58] The essence of NLS's business was to hire the client organization's employees and lease them back to the client. None of the client organizations, including those germane to this case, were on-reserve.

[59] Obonsawin, for some considerable time and during the relevant years, lived in Toronto. He was neither a member of the Six Nations Band nor the Kahnawake Band.

[60] In some sense, as a proprietorship, NLS would be conducting its business wherever Obonsawin was situated at any particular time. However, to benefit from principles in the *Nowegijick* case, it was necessary for Obonsawin to have NLS's principal office situated on a reserve, in this case, the Six Nations Reserve.

[61] Despite Obonsawin's location, there is no doubt that NLS, as an operating unit, was located on a reserve. NLS leased its office premises at the Woodland Cultural Centre on the Six Nations Reserve. The evidence, by way of letterhead and promotional material, that NLS and other members of the O.I. Group of companies had offices in Toronto and Winnipeg does not alter the fact that NLS was operated out of the Six Nations Reserve.

[62] NLS banked at the CIBC in Hagersville, there being no adequate banking facilities on the Reserve. However, the key function of payroll preparation and issuance of cheques to NLS employees was done from the Reserve.

[63] Obonsawin took considerable care to have management decisions made on the Reserve and to have contracts executed there. The vast majority of NLS staff were Six Nations members and worked on the Reserve. The key functions of the employee leasing operation – human resources administration, payroll and benefits administration, invoicing and accounting as well as general administrative support - were conducted on the Reserve.

[64] To the extent that there were any deviations from the procedures to concentrate administrative and business function on the Reserve, these instances were minor and insignificant. NLS was like many leasing organizations where its leased assets were distant from its head office.

[65] NLS, aside from being the true employer, was also truly located as a business on the Six Nations Reserve. If situs of the employer were the determining factor for tax exemption, the Plaintiffs would be successful. However, it is but one factor and its weight in the mix of connecting factors is discussed at paragraphs 93-98.

(4) Benefits

[66] Apart from some training (of which Horn took none) and access to some literature, the overwhelming benefit of NLS to the Plaintiffs was the opportunity to claim tax exemption. There is no doubt that the tax benefit was significant to the Plaintiffs as it was, according to Obonsawin's testimony, to the vast majority of NLS's employees who were women, sole supporters of their families, and working in social services for aboriginal people at relatively low average incomes.

[67] The benefits of NLS to their clients has been touched upon in paragraph 52. They include administrative and human resource functions, payroll management, training, networking, educational resources, and access to pensions – generally, the benefits of outsourcing and training. However, there is a downside to the NLS operations for a client who does not have all its workers with NLS (a common enough circumstance) in that, as Mr. Maracle testified, the client must do all of the same tasks for non-NLS employees and pay NLS to do the same tasks for its native employees. This duplication tends to show the importance of the tax relief as the primary benefit to the employee and tangentially to the employer.

[68] NLS provided certain benefits to the Six Nations Reserve. These include training of personnel who live or may come to live on the reserve; however, this benefit was difficult to quantify. More direct benefit is evident in the rent to the reserve and salary and benefits paid to on-reserve staff – approximately $230,000 to 240,000.

[69] While the benefits to the Plaintiffs, to the NLS clients and to the Reserves were to some extent intangible, the overwhelming benefits were tangible – tax exempt status, outsourcing and rent.

(5) Summary of Connecting Factors

[70] The Plaintiffs generally focused their evidence and argument on the personal and the benefits aspects of the connecting factors analysis. These aspects included the Plaintiffs' personal connections to their respective Reserves, the connection to their Reserves through their work, the

employer's location and relationship to both the employees and the Reserves and the benefits accruing to the Six Nations Reserve in particular.

[71] The Defendant, on the other hand, put particular emphasis on the work-related aspects of the connecting factors analysis. These included the location and nature of the employees' work, the location of the employer, the employees' residences and other relevant considerations related to employment.

III. ANALYSIS

[72] The purpose of s. 87(b) of the *Indian Act* was described by Justice La Forest in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at paragraph 130:

> … The purpose of s. 87(b) of that Act is to protect the personal property of Indians from taxation so as to prevent any impairment by the provincial or federal Crowns with the ability of Indians to possess and enjoy that property. …

[73] Justice La Forest also outlined that the protection is in respect of the property "which they hold *qua* Indians, i.e., their land base and the chattels on that land base". The learned justice also outlined the limitations of this protection – that it does attempt to remedy economic disadvantage or isolate Indians from the commercial mainstream consequences.

> 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.

[74] In *Nowegijick*, the Supreme Court concluded that the exemption provided by s. 87 required four conditions to be met:

- the property at issue must be considered "personal property" of which income tax is a tax on that property which is the employment income;
- the property must be owned by a status Indian;
- the Indian must be taxable in respect of that property; and
- the property must be situated on a reserve.

[75] The *Nowegijick* case turned, in part, on the fact that the situs of the salary Mr. Nowegijick received was situated on the reserve because it was there that the residence or place of the debtor was found and it was there that the wages were payable.

[76] This finding was obviously critical in the establishment and operation of NLS. The evidence confirms that Obonsawin set up NLS and its operations on the Six Nations Reserve to conform to this "place of debtor" and place of payment of wages as the basis upon which NLS native employees could claim exemption from income tax. The fact that NLS was operated, in part, to take advantage of tax benefits is irrelevant.

[77] However, the Supreme Court has either “moved away” from *Nowegijick* or “refined” it such that place of debtor is but one factor to be considered in determining whether property is situated on a reserve.

[78] To determine whether property is situated on a reserve, a “connecting factors” test was adopted as the analytical framework for making this determination. The test was created in order to overcome problems that arose in applying the customary situs test, the focus of which was solely the residence of the debtor. Although the residence of debtor test made sense in the context of conflicts of law, it was insufficient with regard to the purpose of s. 87.

[79] The ultimate question to be answered in determining whether an Indian’s property is “situated on a reserve” is whether by taxing the particular property at issue, would the erosion of the entitlement of the Indian, *qua* Indian, on a reserve result and, as such, jeopardize his/her traditional way of life.

[80] The historical perspective on s. 87 and its predecessors was described in the expert report of Professor Alain Beaulieu. His historical analysis ends in 1952 and does not take into account Justice La Forest’s analysis in *Mitchell*. Whatever the limitations of his report may be, it does indicate that provisions protecting Indians from taxation have long been part of the political, legislative and legal history of Canada.

[81] Attempting to discern legislative purpose is difficult because, as Professor Beaulieu showed, government policy in regard to aboriginal peoples swung widely from attempts at assimilation to segregation. An historical analysis adds little to the resolution of the issues in this case.

[82] Equally, however, the Plaintiffs' attempt (and that of the intervenor) to invoke self-government policy goals is not particularly consistent with history or, more importantly, with Justice La Forest's admonition that the legislation is not to remedy the economically disadvantaged position of Indians. It must be borne in mind that this is an exercise in the determination of the situs of property for purposes of taxation not an examination of a polycentric social/legal policy.

[83] The interpretation and application of s. 87(b) must be consistent with the goal, pronounced by Justice La Forest, to prevent the erosion of the tax exempt entitlement of an Indian *qua* Indian. That such an interpretation and application may strengthen native communities and increase self-reliance may be a consequence of the exercise. In 1995-96 it was not, however, an exercise whose aim was to foster self-government by First Nations. Indeed, in *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161, the Supreme Court took a narrow view of the exemption as it related to sales tax by specifically confining the exemption to on-reserve sales. Likewise, in regard to self-government agreements, many such agreements provide for the termination of s. 87 in order to achieve self-government - not by expanding the scope of s. 87.

[84] The connecting factors test requires that factors which potentially connect the property to a reserve be identified, analyzed and weighed in light of three important factors, as described by Justice Gonthier in *Williams v. The Queen*, [1992] 1 S.C.R. 877 at paragraphs 37 and 38:

> 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.
>
> 38. This approach preserves the flexibility of the case by case approach, but within a framework which properly identifies the weight which is to be placed on various connecting factors. Of course, the weight to be given various connecting factors cannot be determined precisely. However, this approach has the advantage that it preserves the ability to deal appropriately with future cases which present considerations not previously apparent.

[85] In the context of unemployment insurance payments, Justice Gonthier suggested that potentially relevant connecting factors are 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.

[86] In the context of employment income, as the decision in *Shilling, supra*, makes clear, the location (and circumstances) giving rise to the employment income takes on significant importance or weight.

[87] The following connecting factors regarding employment income have been identified in *Desnomie v. Canada*, [2000] F.C.J. No. 528 (QL), 186 D.L.R. (4th) 718 (C.A.) (leave to appeal denied) as relevant to this analysis:

1. residence of the employer;
2. residence of the employee;
3. where the work was performed;
4. where the employee was paid; and
5. the nature of the services performed or the special circumstances in which they were performed.

[88] The Plaintiffs have suggested that other factors, such as the Plaintiffs' maintenance of relationship with native people and their respective reserve, their acceptance by the reserve community, whether the work benefits native people generally without regard to where they live, and whether the employer is a native-controlled organization working for the benefit of native people, are relevant factors for this analysis.

[89] The issue of NLS's operation and tax exempt status of its employees was considered by the Federal Court of Appeal in *Shilling*. Despite the fact that that case is somewhat distinguishable from

this case in that some of the evidentiary deficiencies identified by the Court have now been filled in (what aspects of NLS's business are conducted on-reserve, whether employees are reserve residents, and what benefits to the reserve), the Court of Appeal's approach and its comments on key factors is binding on this Court.

[90] In determining the location of employment income, the Court of Appeal identified the following factors:

- the location and residence of the employer; and
- the nature, location and surrounding circumstances of the work performed by the employee, including the nature of any benefit that accrued to the reserve from it.

[91] The Court of Appeal observed that the place of payment may be relevant but not a particularly weighty consideration.

[92] Of particular importance is the Court's conclusion that the nature of the work performed and the circumstances surrounding it are deserving of particular attention.

A. *Application of Connecting Factors Test*

(1) Location of Employer

[93] For the reasons earlier stated at paragraphs 61-65, from a corporate perspective, NLS is located on the Six Nations Reserve. However, in weighing this factor, regard must be had for the

nature of NLS's work, the location of its directing mind and the benefits of NLS's location to the reserve.

[94] The real work of NLS's assets (its leased employees) is all carried out off the reserve. There are staff on the reserve but the gross income is generated off-reserve. The only functions carried out on the reserve are administrative functions.

[95] The analysis of NLS's location is further complicated by the fact that it is not a corporation but a sole proprietorship. Obonsawin is NLS but he did not work regularly on the reserve, worked principally out of Toronto and did not reside on the reserve.

[96] The benefits of NLS to the Six Nations Reserve are not overwhelming but are real. The majority of the administrative staff were members of the Six Nations, some of whom lived on the reserve. NLS paid rent to the reserve as well. However, these expenditures for rent and salary/benefit were modest amounts globally (approximately $240,000) and only a small percentage of NLS's gross income (approximately 2%).

[97] Therefore, while NLS's location is on the Six Nations Reserve, these other circumstances indicate that this factor is not particularly weighty. It is of almost little weight to Horn as she is not a member of the Six Nations nor does her band at Kahnawake receive any direct benefits from NLS's location on the Six Nations Reserve.

[98] In *Bell v. Her Majesty the Queen*, [2000] F.C.J. No. 680 (QL), 2000 DTC 6365 (C.A.), the taxpayer had argued that by simply employing natives, the business provided significant benefits to their families and the community. The Federal Court of Appeal held that these are not the type of benefits that are a significant connecting factor for a s. 87 analysis:

> 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.

(2) Plaintiffs' Residence/Connection to the Reserve

[99] In Horn's case, it is evident that she resides off-reserve in Ottawa and that is also where she works. Likewise, she continues to maintain a strong connection with the Kahnawake Reserve.

[100] However, the connecting factors analysis, as it applies to residence, focuses on where a person actually resides not their emotional connections.

[101] In *Canada v. Monias (C.A.)*, [2002] 1 F.C. 51 (C.A.) (leave to appeal denied), the Court found that the residence of the employees can be a significant factor because when the employee does not live on the reserve, it indicates that their employment income was not acquired or used on a reserve. The Court was careful to note that this was not the determinative factor. That conclusion is applicable here.

[102] In *Shilling*, the Court put little emphasis on residence as a connecting factor.

> 58. In this case, the respondent both worked and resided in Toronto. The location and nature of her employment are the important factors locating her employment income off-reserve. Her off-reserve residency is a less significant factor pointing in the same direction.

[103] As regards Horn, her off-reserve residence is a significant factor showing non-connection. It is though not determinative, as "the nature of the employment" is a more significant factor.

[104] As regards Williams, she is a resident of the Six Nations Reserve. She has strong ties to the community, both physical, social and emotional. However, the benefits to the Reserve of her employment, aside from those clients of the Shelter who come from the Reserve, is largely that of her spending income on living expenses. This is not a significant connecting factor, *per se*, as held in *Bell*.

[105] The Supreme Court held in *Williams* that because of the importance of the location of the qualifying employment, residency was a potentially significant factor "if it points to a location different from that of the qualifying employment".

[106] In the case of the Plaintiff Williams, her residency on the reserve is a significant factor because it points to a location of her income which is different from that of her employment in Hamilton. It is a significant factor in her favour but does not counter the weight to be given to the location and nature of her work.

(3) Location and Nature of Employees' Work

[107] Under this factor, the Court also considers the benefit to a reserve which flows from the employee's work. In *Mitchell*, the Supreme Court cautioned, in paragraph 91, that:

> … in the absence of a discernible nexus between the property concerned and the occupancy of the reserve lands by the owner of that property, the protection and privileges of ss. 87 and 89 have no application.

[108] In Horn's case, the Centre focuses its attention on Natives who are off-reserve; it is the very purpose of the Centre. There is no identification of the Centre with Kahnawake as such. Any benefits to the Kahnawake Reserve, aside from Horn's spending, are incidental and tenuous. They are even more tenuous given that NLS has no connection to that Reserve. Therefore, the factors of location of employer and benefit to the Reserve have little weight in her case.

[109] In assessing the location and nature of the work, it is instructive that in Horn's case, she worked for the Centre without tax exemption for a number of years just as other employees did. By virtue of paying $2,400.00 to become an employee of NLS but continuing to do exactly the same work at the same location, she claims the benefits of s. 87. The mere injection of NLS as an employer does not alter the true facts as to the location and nature of her work. To the extent that social services are in the commercial mainstream, Horn is in that commercial mainstream.

[110] In *Shilling* the missing factors which are now filled in do not assist the Plaintiffs. Obonsawin is not on-reserve and the profits go to him. Only one reserve benefits and only to a marginal degree.

[111] In Williams' circumstances, the Shelter services off-reserve and on-reserve Natives but not necessarily those from the Six Nations. It is not like the case of *Canada v. Folster (C.A.)*, [1997] 3 F.C. 269 (C.A.) where the hospital was just outside the reserve but served, virtually exclusively, the reserve community. The Shelter is located in Hamilton, 50 kilometres from the Reserve, and serves and is designed to serve all Natives irrespective of where they live.

[112] Therefore, Williams works off-reserve in a social service focused on Natives who are off-reserve (the Court is mindful that not all Natives off-reserve are there because of choice or preference). The social services provided are similar to those provided by other shelters and are thus in the "commercial mainstream".

[113] The Defendant argued strenuously that the commercial mainstream test was designed to ensure consistent tax treatment of employees of a particular employer. The fact that employees have different tax status is no reason to deny Williams or Horn tax exemption if warranted. In most employment situations, employees have different tax status, some with one type of deductions, others with different ones.

[114] The connecting factors to the Reserve for Williams are her residence and the administrative functions of her employment. These are outweighed by the location and nature of her work off-reserve to a largely off-reserve clientele.

[115] The Court of Appeal in *Shilling* made it clear that the provision of social services to off-reserve Natives is not sufficient to qualify for s. 87 exemption.

> 52. In finding that the nature of the respondent's duties are not a connecting factor to a reserve, we do not overlook the fact that the services provided are social services to Native people as opposed to employment in a for-profit enterprise. However, many not-for-profit social service organizations exist in Canadian cities. Employees of such organizations are not exempt from income tax. Given the limited purpose of paragraph 87(1)(b) of the *Indian Act*, the fact that the employment at issue involves providing social services to off-reserve Native people, is no reason for conferring preferred tax treatment under that provision.

[116] Therefore, the Plaintiffs do not qualify for exemption under s. 87 of the *Indian Act*.

B. *Discrimination – CRA Guidelines and the Charter*

[117] The Plaintiffs contend that they are subject to discrimination by virtue of the manner in which the Defendant applies s. 87 in the *Indian Act Exemption for Employment Income Guidelines* (1994 Guidelines). It is this discrimination which gives rise to a breach of s. 15 of the *Charter*. The text of the 1994 Guidelines changed slightly following the *Shilling* decision but the relevant text has not.

[118] The Plaintiffs do not contend that s. 87 is discriminatory nor that a proper application of the connecting factors test results in discrimination. It is simply the 1994 Guidelines, as government administrative policy, which discriminates.

[119] A review of the critical portions of the 1994 Guidelines establishes, not so much discrimination, but administrative policy which appears to be inconsistent with the law.

[120] Guideline 1 of the 1994 Guidelines reads:

> Guideline 1
>
> When at least 90% of the duties of an employment are performed on a reserve, all of the income of an Indian from the employment will usually be exempt from income tax.
>
> Proration Rule
>
> When less than 90% of the duties of an employment are performed on a reserve and the employment income is not exempted by another guideline, the exemption is to be prorated. The exemption will apply to the portion of the income related to the duties performed on the reserve.

[121] Contrary to the Plaintiffs' submission, the 1994 Guidelines do not focus entirely on where the work is actually carried out. The use of the word "usually" serves to indicate that other factors may be relevant. However, the proration rule has no foundation either in the statute or in the case law. The situs of the income is analyzed from the perspective that income is either on a reserve or it is not. There is no apparent authority to support the notion of "sometimes part of income is and sometimes part is not situated on a reserve".

[122] Guideline 2 reads:

> When:
>
> - the employer is resident on a reserve; and
> - the Indian lives on a reserve;
>
> all of the income of an Indian from an employment will usually be exempt from income tax.

[123] This Guideline 2 may be saved by virtue of the word "usually" but it would appear to ignore the critically important factors of the location of the work and its nature.

[124] Guideline 3 reads:

> When:
>
> - more than 50% of the duties of an employment are performed on a reserve; and
> - the employer is resident on a reserve, or the Indian lives on a reserve;

> all of the income tax of an Indian from an employment will usually be exempt from income tax.

[125] It is correct, as the Plaintiffs argue, that the Guideline does not provide a benefit if the Indian works off-reserve. However, since this Guideline 3 does at least consider location of work and/or connection to the reserve of the employer/employee with the "usually" caveat, it does not appear to be at odds with the case law.

[126] Guideline 4, to which the Plaintiffs take exception, is as follows:

> When:
>
> - the employer is resident on a reserve; and
> - the employer is:
>   - an Indian band which has a reserve, or a tribal council representing one or more Indian bands which have reserves, or
>   - an Indian organization controlled by one or more such bands or tribal councils, if the organization is dedicated exclusively to the social, cultural, educational, or economic development of Indians who for the most part live on reserves; and
> - the duties of the employment are in connection with the employer's non-commercial activities carried on exclusively for the benefit of Indians who for the most part live on reserves;
>
> all of the income of an Indian from an employment will usually be exempt from income tax.

[127] The Plaintiffs suggest that the tax exemption will be granted even if the work is not carried out on a reserve and the employee has no connection to the reserve. This is purely speculative as there is no evidence that this in fact is how the Defendant would deal with those circumstances. The

Guideline does focus on the location of the employer and the nature of the work but without more, this Court cannot conclude that the Defendant is acting contrary to legal norms.

[128] The core of the Plaintiffs' complaint, as outlined in its Memorandum of Fact and Law at paragraph 179, is that:

> The application of s. 87 of the *Indian Act* by the CRA thus discriminates against both of the plaintiffs when they are compared to Indians who qualify for the s. 87 exemption under the Guidelines.

[129] With respect to the submission that this discrimination is contrary to s. 15(1) of the *Charter*, the Supreme Court in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, as followed in *Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans) (C.A.)*, [2002] F.C.J. No. 1739 (QL), 2002 FCA 485, set forth the following issues to be addressed:

(1) What is the appropriate comparator group?

(2) Does the impugned governmental action amount to differential treatment between the claimant and others?

(3) Is the differential treatment based upon a prohibited grounds of discrimination or an analogous ground?

(4) Is the differential treatment discriminatory under s. 15(1) in such a way as to demean the dignity of the individual?

[130] The first problem with the Plaintiffs' position on s. 15(1) is that there is the thinnest of a record as to differential treatment save for the 1994 Guidelines. The 1994 Guidelines are a policy which cannot be immutable (otherwise it ceases to be sufficiently flexible to be a true policy). As a policy, it uses language such as "usually" and there is little evidence of actual practice upon which the Court can make a proper finding.

[131] The second problem is that the Plaintiffs use a comparator group of Indians with a close connection to the reserve and who work off-reserve as compared to Indians who are not connected to the reserve at all. Yet the discrimination alleged is between the Plaintiffs (presumably Indians with a close connection to the reserve and who work off-reserve) and those who qualify under s. 87 – those Indians who have personal property on the reserve.

[132] This is a circuitous argument because those who qualify under s. 87 are those who meet the connecting factors test compared to those who do not. The Plaintfiffs do not contend that the connecting factors test is discriminatory.

[133] The third problem with the Plaintiffs' *Charter* challenge is that the distinction between the Plaintiffs and either of the comparator groups is not based on one or more personal characteristics. The distinction is based on the situs of property including such factors as location of work, location of the employer, location of the employee, and nature of work. None of these factors are personal characteristics. (See *Beattie v. Canada*, [2001] F.C.J. No. 62 (QL), aff'd 2002 FCA 105)

[134] The personal characteristic of residence is not referred to in the 1994 Guidelines, nor are other personal characteristics referenced.

[135] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, the Supreme Court held aboriginal residence to be an analogous grounds because it was being used to deprive people of a right to vote. It was not used in the context of property.

[136] There is nothing immutable like race, religion or a characteristic which can only be changed at an unacceptable cost to personal liberty, involved in the distinctions as to situs of property. The distinction as to the situs of personal property on a reserve is not therefore an analogous ground.

[137] Even if the Plaintiffs could make out a case based on analogous grounds, they would have to show discrimination in the 1994 Guidelines which have the effect of demeaning the Plaintiffs' essential human dignity as discussed at paragraph 88 of the *Law* decision.

[138] The scope of human dignity is a wide concept which focuses on personal traits or characteristics:

> … Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is

> enhanced when laws recognize the full place of all individuals and groups within Canadian society. … (*Law*, *supra* at para. 53)

[139] None of the distinctions in the 1994 Guidelines are based on personal traits or circumstances or impact on the Plaintiffs' human dignity. The location of one's personal property is not *per se* the type of matter which could reasonably be said to impact human dignity. There is no evidence that either Horn or Williams have lessened, or been viewed as having lessened, their status as Indian *qua* Indian, nor viewed as less integral to the life of their reserve by virtue of not qualifying for the tax exemption.

[140] With respect, I cannot find that there has been any violation of s. 15(1) by virtue of the 1994 Guidelines. I therefore need not consider s. 1 of the *Charter*.

IV. CONCLUSION

[141] For the above reasons, the Court concludes that neither Plaintiff is entitled to having their income earned from NLS in the relevant taxation years tax exempt in accordance with s. 87 of the *Indian Act*.

[142] The Court further concludes that the application of s. 87 of the *Indian Act* to them by CRA, as applied in the CRA Guidelines, does not discriminate against them under s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

[143] Therefore, the Plaintiffs' action will be dismissed with costs on a party and party basis. The Intervener shall pay costs to the Defendant of $7,500.00 plus disbursements.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the Plaintiffs' actions are dismissed, and the declarations sought are denied.

The Defendant shall have its costs on a party and party basis separately as against each Plaintiff.

The Intervener shall pay to the Defendant costs of $7,500.00 plus disbursements incurred solely in addressing the Intervener's submissions.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Brian A. Crane Mr. Max Faille Mr. Graham Ragan	FOR THE PLAINTIFFS
Mr. John Shipley Ms. Sandra Phillips	FOR THE DEFENDANT
Mr. Julian N. Falconer Ms. Kimberly R. Murray	FOR THE INTERVENER, ABORIGINAL LEGAL SERVICES OF TORONTO

SOLICITORS OF RECORD:

GOWLING LAFLEUR HENDERSON LLP Barristers & Solicitors Ottawa, Ontario	FOR THE PLAINTIFFS
MR. JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT
FALCONER CHARNEY Toronto, Ontario	FOR THE INTERVENER, ABORIGINAL LEGAL SERVICES OF TORONTO