Federal Court  Cour fédérale

Date: 20110601

Docket: T-2067-09

Citation: 2011 FC 638

Ottawa, Ontario, June 1, 2011

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

LAWRENCE ABRAHAM,
WALLACE ABRAHAM,
WALTER ABRAHAM,
ANTHONY ALEXANDER,
HENRY BOUBARD, RICHARD BOUCHIE,
NEIL BOULETTE,
GEORGE BRUYERE,
DANIEL BUNN, JASON BUNN,
JOSEPH BUNN,
EVA MARIE COURCHENE,
HAROLD COURCHENE (DECEASED),
JASON COURCHENE,
JONATHON COURCHENE,
LARRY COURCHENE,
REINIE COURCHENE,
WAYNE COURCHENE,
BARRY FONTAINE, CURTIS FONTAINE,
FELIX FONTAINE (DECEASED),
GEORGE FONTAINE,
HARRY FONTAINE, KEITH FONTAINE,
NELSON FONTAINE, NORMAN FONTAINE,
PETER FONTAINE (DECEASED),
RONALD FONTAINE, WILFRED LEO FONTAINE (DECEASED),
BRADLEY FOUNTAIN, BRIAN DOUGLAS FOUNTAIN (DECEASED),
DOUGLAS FOUNTAIN (DECEASED),
MARK FOUNTAIN,

**ADRIAN GUIMOND, ALLAN GUIMOND,
NORBERT GUIMOND,
RANDAL PAUL GUIMOND,
TERRY GUIMOND, DARRIN HATHER,
ARTHUR HENDERSON,
CHRIS HENDERSON,
DONALD HENDERSON,
FLOYD HENDERSON,
JOHN HENDERSON, ALLAN HOUSTON,
CLIFFORD HOUSTON, EDGAR HOUSTON,
RAYMOND HOUSTON, VINCENT KUZDAK,
HAROLD LAVADIER,
ROGER LUSTY,
KELVIN PAKOO, MARK PAKOO,
NEIL PAKOO, RODERICK PAKOO,
JOHN GLEN SANDERS,
LEE GLENN SANDERSON, JAMES SETTE,
HANK SIEGAL, WALTER SOUKA,
JASON STARR, JOSEPH STRONGQUILL,
DOUGLAS SWAMPY, RICHARD SWAMPY,
KELLY ZACHARIAS**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] In 1926, the Sagkeeng Band (the Band) received an offer to sell part of their Reserve land for the purposes of building a mill. It was well suited for the use. The Band initially rejected the offer saying that their ancestors who had signed the treaty in 1871 told them "to hold our Reserve as long as sun shines or as long as river flows" (Application Record, p. 31). However, based on a promise that Band members would be employed in the mill, the Band eventually surrendered the land. Because Reserve land cannot be sold without Federal Crown involvement, the surrender

occurred in 1926 with the Crown's direct participation. The mill was built and, according to the agreement, Band members worked in the mill.

[2] The question to be answered in the present Application is whether certain of the Band members who worked in the mill should have been granted discretionary relief from paying tax on the income they received.

[3] The meaning of s. 87 of the *Indian Act* (R.S.C., 1985, c. I-5) as applied to the facts of this case is central to answering this question.

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	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) le droit d'un Indien ou d'une bande sur une réserve ou des terres cédées; b) les biens meubles d'un Indien ou d'une bande situés sur une réserve. (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) Aucun impôt sur les successions, taxe d'héritage ou droit de succession n'est

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. R.S., 1985, c. I-5, s. 87; 2005, c. 9, s. 150.	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 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. L.R. (1985), ch. I-5, art. 87; 2005, ch. 9, art. 150.

[4] Procedurally, the Band members who worked in the mill have taken different paths towards receiving an exemption from paying tax on the income they earned. Some appeared before the Tax Court on a reassessment of taxes paid, and others, including the Applicants in the present case, applied to the Minister of National Revenue (Minister) for discretionary relief pursuant to s. 152(4.2) of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)). Given the parallel approaches taken, the Minister agreed to consider a new submission under the taxpayer relief provisions once the Tax Court decision was released. The Tax Court decision in *Boubard v. R.*, 2008 TCC 133 (*Boubard*) was wholly favourable to the Band members who followed the reassessment path. A detailed analysis of Chief Justice Miller's decision is necessary because, as outlined below, the decision is important to consideration of the decision presently under review.

I. The Decision in *Boubard*

[5] In *Boubard*, Chief Justice Miller was faced with the question of whether the employment income of the Band members' property was exempt from taxation in accordance with s. 87 of the *Indian Act*. In addressing the question, Chief Justice Miller relied on the Supreme Court's decision in *Williams v. R.*, [1992] 1 S.C.R. 877 which followed the "connecting factors" approach to considering questions of this nature and which has been widely followed. As stated in *Williams* at paragraph 37:

> 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.

[6] The factors that were considered by Chief Justice Miller were the: "residence of Appellant, residence of employer, extent of employer's activities on and off Reserve, location of work carried out by Appellants, nature of work, and historical circumstances giving rise to employment income" (paragraph 38). At paragraph 39, he stated as follow:

> [..] I emphasize that I am dealing with a tax on personal property, not on real property. Determining the *situs* of an intangible must necessarily be something of a notional exercise, as was stated by the Federal Court of Appeal in *Clarke v. Minister of National Revenue*. The Federal Court of Appeal concluded that "the solution, as will be seen, lies in an approach to the interpretation and application of the phrase 'situated on the Reserve' which is found in the purpose of the exemption in the provision of the *Indian Act*". The purpose, as

> explained in *Williams*, citing *Mitchell v. Sandy Bay Indian Band*, ([1990] 2 S.C.R. 85) is 'to preserve the entitlement of Indians to their Reserve lands and to ensure that the use of the property on the Reserve lands was not eroded by the ability of the Government to tax'.
>
> [Emphasis added]

[7] At paragraph 50 of the decision, Chief Justice Miller made a critical finding of fact as emphasized:

> Notwithstanding the Parties' debate around the issue of the nature of the promise of work, I am less concerned with specifying the true legal nature of that understanding, whether it was a condition, a guarantee, a contractual term, an understanding, as I am with how significant a connecting factor the employment aspect of the surrender is to the present day employment. For that purpose, it is not the legality of the arrangement, but the perceived import of the arrangement to the Band for their collective future, and how that relates to preserving their Treaty entitlements. I am satisfied that the Band did not surrender part of its Reserve lightly — this was an extremely serious matter to the Sagkeeng and their expectation went well beyond a simple cash transfer. A steady supply of employment income was an integral part of what the Band believed it was getting in taking this most serious step of surrendering part of their Reserve. It drove the deal. How more closely connected can employment income from the Mill be than this: for the Sagkeeng people it effectively stood in place of their Reserve.

[8] According significant weight to the historical circumstances giving rise to the Band members' employment income, at paragraph 53, Chief Justice Miller stated, what I find to be, the ratio of his decision:

> It is enough that the circumstances surrounding the Sagkeengs' absolute surrender of Reserve are a significant connecting factor in my concluding that employment income from the Mill on the surrendered land is property that falls within the exempting

> provisions of section 87 of the *Indian Act*. To subject employment income of the Sagkeeng people from the Mill to taxation in these circumstances is to erode their entitlement that flows directly from the Reserve land.
>
> [Emphasis added]

The Federal Court of Appeal upheld Chief Justice Miller's decision in *Boubard v. R.*, 2008 FCA 392 (*Boubard FCA*).

[9] The factual argument made before the Tax Court, and the decision in *Boubard* which accepted the argument, were advanced to the Minister on behalf of those Band members that followed the relief path.

II. The Minister's Decision

[10] The decision under review was rendered by the Director of the Winnipeg Tax Centre as a Delegate of the Minister. In deciding the Applicants' application, the Delegate did not approach the Applicants' request for relief as effectively a claim for exemption from federal taxation on the basis of the same reasoning as that conducted by Chief Justice Miller in *Boubard,* despite the fact that the Applicants stood in the same position in fact and in law as those that succeeded in *Boubard*. Instead the Delegate engaged in the following highly technical legal analysis:

> Your clients' requests have been referred to my attention for the subsequent review under the taxpayer relief provisions. I have conducted a thorough analysis of the case law and the Income Tax Act with respect to the employment income of the applicants. After careful consideration of the circumstances in this case, I am reassessing the 1999 and subsequent tax years for applicants who conform to the conclusions of the trial judge in the *Boubard, Bouchie,* and *Houston* decisions. Once the adjustments are

completed a notice of reassessment will be issued for each tax return. The decision of the Federal Court of Appeal (FCA) in The *Boubard, Bouchie,* and *Houston* appeals is final and binding as of December 9, 2008. In allowing the appeal in these cases, the Tax Court found that it was on all fours with the *Amos v Canada* [1999] decision.

In reviewing your clients' requests to reassess the 1985 to 1998 tax returns under the taxpayer relief provisions, it is my determination that reassessments will not be processed under the taxpayer relief provisions. Information Circular 1C07- I "Taxpayer Relief Provisions" sets out the guidelines that the CRA must follow when applying the Taxpayer Relief Legislation. In regards to "Acceptance of a Refund or Adjustment Request," paragraph 71 of the circular states, "The CRA may issue a refund or reduce the amount owed if it is satisfied that such a refund or reduction would have been made if the return or request had been filed or made on time, and provided that the necessary assessment is correct in law and has not been previously allowed." The CRA policy also states that the taxpayer relief provisions are not an acceptable substitute for the retroactive application of an adverse decision of a court where the taxpayer has not protected his or her right of objection or appeal. The following is a chronological list of court cases that describe the treatment of employment income from 1983 to 1999.

- In January 1983, the Supreme Court of Canada rendered its decision in the Nowegijick court case. In this case, the location of the employment income was found to be where the employer resided. If the individual was paid from the employer's head office, and the employer's head office was located on reserve lands, then the employment income would be considered tax exempt. Prior to this, the CRA policy based on IT-62 [Cancelled by Special Release to IT-397R dated July 15, 1995] required that the duties be performed directly on the reserve in order for the earned income to be tax exempt. Due to the discrepancy between the CRA policy and the Nowegijick decision, the Federal Government issued Remission Order P.C. 1985-2446. The Remission Order granted a remission of tax on any employment income earned for duties performed on a reserve for the years 1983 to 1992. As the income that your clients earned from the Mill does not meet the conditions of the remission order or the circumstances set out in Nowegijick, their income would not have been accepted as tax exempt during 1983 to 1991.

- In 1992, the Supreme Court of Canada rendered its decision in the Williams case. The Supreme Court stated that it was important to consider whether the activity generating the income was "intimately connected to" the reserve, or whether it was more appropriate to

> consider it as a part of the "commercial mainstream." Based on Williams, a connecting factors test was developed in 1994 and used to determine if income should be considered exempt. During the 1993 through 1998 tax years, the connecting factors and the weight to be accorded to them in respect to the situs of employment income was evolving and was not settled. In terms of employment income with similar circumstances to those involved in your clients' situation, it was settled in 1999 by the Federal Court of appeal in the Amos case. In 1998, the income would not have been accepted as tax exempt given the Tax Court of Canada decision in Amos in June 22, 1998.
>
> - In 2007, the Federal Court of Canada rendered its decision in the *Wyse* case. It agreed with the Minister's decision that the applicants' employment income would not have been accepted as tax exempt prior to 1999.
>
> Therefore, if your clients had claimed the income as exempt when they initially filed their 1985 to 1998 tax returns, the claim would not have been allowed based on the existing tax laws at that time. As a result, the 1985 to 1998 tax years cannot be reassessed under the taxpayer relief provisions. For requests or income tax returns filed on or after January 1, 2005, the taxpayer relief request is also subject to the 10 year limitation period.
>
> [Emphasis added]
>
> (Application Record, pp. 151 – 153)

[11] While the decision rendered granted limited relief, to gain full relief by the present Application, the Applicants take the position that the Delegate erred by engaging in the technical legal analysis when the real life history of the relationship between their Reserve land and employment at the mill was squarely before the Delegate, and effectively disregarded. The argument implies that a proper regard of the true nature of the Applicants' claim would have compelled the Delegate to analyze the evidence to reach the same critical finding of fact as that reached in paragraph 50 of *Boubard*, and by fairly applying s. 87 to that finding as was done in paragraph 53 of *Boubard*, to grant full relief.

[12] In support of the Delegate's decision, Counsel for the Minister makes three points: the power to provide taxpayer relief is discretionary, and, therefore, there is no entitlement to taxpayer relief; the decision is reasonable; and, even though it does not have to be correct, it is correct.

III. Conclusion

[13] Even though the decision under review was rendered pursuant to a discretionary power, it is important to note that the decision is based on findings of law, and, therefore, for the decision to be supported on judicial review, I find that the findings must be correct in law. In my opinion, the decision contains at least three errors of law.

[14] First, although *Boubard* is mentioned in the decision under review, the ratio in *Boubard*, as set out in paragraph 8 above, is not mentioned. Because Chief Justice Miller's decision was upheld in *Boubard FCA*, it stands as the law: the income of Band members who worked at the mill is exempt from tax. It is obvious from the decision under review that the Delegate failed to understand and correctly consider this fundamentally important precedent.

[15] Second, I find that with respect to the application of the decision in *Wyse v. Minister of National Revenue*, 2007 FC 535, the Delegate incorrectly came to the conclusion that, had the Applicants "claimed the income as exempt when they initially filed their 1985 to 1998 tax returns, the claim would not have been allowed based on the existing tax laws at that time". *Boubard* is the law, and it is the law that applies to income received by Sagkeeng Band members who worked at the mill back to 1926 which is the date of the sale of the land upon which the mill was built.

[16] Finally, the decision in *Wyse* dealt with leases of land by Aboriginal Bands; *Boubard* deals with the sale of Reserve land by the Sagkeeng Band under a fulfilled promise of employment. As Chief Justice Miller found, and as quoted above, "[t]o subject employment income of the Sagkeeng people from the Mill to taxation in these circumstances is to erode their entitlement that flows directly from the Reserve land". I find that the Delegate's failure to distinguish *Wyse* on this basis is a fundamental error.

[17] Therefore, I find that the decision under review must be set aside on the standard of correctness (see *Dunsmuir v. New Brunswick*, 2008 1 SCC 9, paragraph 50).

[18] With respect to the appropriate result of the Applicants' success in the present Application, Counsel for the Applicants has requested that a declaration be made that the Applicants are entitled to taxpayer's relief pursuant to s. 152(4.2) for all years in which their income conforms to the conclusions in *Boubard*, and the matter be sent back to the Minister for a decision to be made accordingly. In my opinion, I cannot usurp the discretion of the Minister to grant the fair and just result with respect to the Applicant's claim for relief, and, therefore, the matter will be returned to the Minister for this discretion to be exercised.

ORDER

THIS COURT ORDERS THAT:

By Consent of Counsel during the course of the hearing of the present Application, the Style of Cause of the present Application is amended as reflected herein.

For the reasons provided, the decision under review is set aside and the matter is referred back to the Minister for redetermination in accordance with the reasons provided herein.

Costs are ordered according to the agreement reached between Counsel as stated in the letter dated July 5, 2010 and filed with the Court on May 5, 2010.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2067-09
STYLE OF CAUSE:	LAWRENCE ABRAHAM ET AL v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Winnipeg, Manitoba
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