Date: 20090408

Docket: A-7-08

Citation: 2009 FCA 109

CORAM: **NADON J.A.**
BLAIS J.A.
PELLETIER J.A.

BETWEEN:

ALEXANDRE DUBÉ

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on November 20, 2008.

Judgment delivered at Ottawa, Ontario, on April 8, 2009.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRING REASONS BY: PELLETIER J.A.
CONCURRED IN BY: BLAIS J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from the decision of Justice Angers of the Tax Court of Canada, 2007TCC393, dated December 6, 2007, dismissing the appeal of Alexandre Dubé (the appellant) from the assessments made by the Minister of National Revenue (the Minister) under the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, (the ITA), for the taxation years 1997 to 2002 inclusive.

[2] This appeal raises the question of whether the investment income of the appellant, an Indian under the *Indian Act*, R.S.C. 1985, c. I-5, was situated on a reserve and is therefore exempt from taxation pursuant to paragraph 81(1)(*a*) of the ITA and section 87 of the *Indian Act*.

The facts

[3] The following summary of facts is necessary to fully understand the issues raised by the appeal.

[4] The appellant, who has been a member of the Obedjiwan First Nation since birth, uses the services of the Caisse populaire Desjardins de Pointe-Bleue (the Caisse) situated on the Mashteuiatsh Reserve. There is no financial institution on the Obedjiwan Reserve, which is located approximately 300 kilometres from the Mashteuiatsh Reserve.

[5] It is likely that the majority of the members of the Caisse are Native people. The Caisse has three main sources of revenue. First, 25 percent of the Caisse members' deposits are invested with the Fédération des caisses populaires Desjardins (the Federation), which makes investments in investment funds and liquidity funds that, in turn, are invested in the economic mainstream off the reserve. Second, the remainder of the deposits, namely 75 percent of the total, is lent to members of the Caisse residing on or off the reserve. Last, the Caisse receives income from other revenue sources, such as administrative fees, brokerage fees and others.

[6] The appellant considers himself to be a resident of the Obedjiwan Reserve, even though, for a few years, he owned a residence in St-Félicien and then in Roberval. The main reason he acquired these homes was to enable his children to attend schools in St-Félicien. His spouse and two of his children lived in these homes during the school year, which is ten months of the year. The appellant acknowledged having also lived in them, but clarified that he returned to Obedjiwan almost every weekend.

[7] The appellant used the services of the Caisse for personal purposes and for the purposes of his business, through which he offers transportation services, including transportation from the Obedjiwan Reserve to Roberval, for reserve residents in need of medical care. However, it is not certain that the appellant's business income was used as funds to generate the investment income, since the appellant was not able to clearly identify the source of the funds in question to the satisfaction of the trial judge.

[8] The Minister made assessments and reassessments for 1997 to 2002. For 1997 to 1999, the Minister added the investment income from the Caisse in computing the appellant's taxable income. For 2000, 2001 and 2002, the appellant included his investment income from the Caisse in his returns but claimed a deduction for the same amounts. However, the Minister refused the deduction. In addition, the Minister imposed a penalty for late filing for the 1997, 1998, 2000 and 2001 taxation years. The penalties imposed are respectively 7 percent, 8 percent, 10 percent and 6 percent of the tax payable for each of those taxation years.

[9] The appellant's investment income for each of the taxation years in question is $19,956 for 1997, $12,115 for 1998, $73,210 for 1999, $82,303 for 2000, $80,116 for 2001 and $49,530 for 2002.

[10] The appellant appealed these assessments to the Tax Court of Canada.

Decision of Justice Angers

[11] To begin with, Justice Angers noted that in order for the exemption from taxation provided for at paragraph 87(1)(*b*) of the *Indian Act* to apply, three elements must be present: being an Indian within the meaning of the *Indian Act*, having possession of personal property, and that property being situated on a reserve. The judge noted that, in this case, it is admitted that the appellant was an Indian and that the investment income was personal property. Accordingly, the issue in dispute was whether the investment income was, in fact, situated on a reserve.

[12] To answer this question, the judge carefully reviewed the legal principles established in case law, particularly those from the Supreme Court's decisions in *Williams v. Canada*, [1992] 1 S.C.R. 877 (*Williams*) and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 (*Mitchell*) and from the decision of this Court in *Recalma v. Canada* (1998), 98 D.T.C. 6238 (*Recalma*).

[13] Justice Angers highlighted that in *Recalma*, above, this Court restated the principles enunciated in *Williams*, above, and identified four connecting factors to be considered in determining the *situs* of investment income: (1) the investment income's connection to the reserve;

(2) the benefit of the investment income to the traditional Native way of life; (3) the potential danger of the erosion of Native property; and (4) the extent to which the investment income may be considered as being derived from economic mainstream activity. However, according to Justice Angers, the fourth factor was the most important in that case.

[14] Based on an analysis of the connecting factors, the judge found that there were indeed several connections between the investment income and the reserve. For one thing, the reserve was the appellant’s place of residence, the source of the capital, the location of the Caisse, the place where the investment income, or at least a good part of it, was used, the location of the investment vehicle, and the place where the investment income was paid. The judge nonetheless found that these were factors of lesser importance in determining the *situs* of investment income and that for that purpose, the emphasis should mainly be placed on how the income was earned. In the case, the judge found that the income-generating activities were derived from an economic mainstream activity and not closely connected to the reserve. Consequently, the investment income was not exempt from taxation.

Submissions of the parties

A. Appellant’s submissions

[15] The appellant’s first ground for challenging Justice Angers’ decision is that the judge made an error in his assessment of certain facts: among others, the appellant submits that his St-Félicien residence or Roberval residence was only a secondary residence, that there is no evidence that his

income came from any source but his business and that the Caisse is involved in Native economic development.

[16] Second, the appellant submits that the judge erred in his assessment of the connecting factors by placing undue importance on the criterion of the location of the sums used to produce the investment income. According to the appellant, *Recalma*, above, suggests that funds invested in a banking institution situated on a reserve may be exempt from taxation if the funds are used exclusively or mainly to grant loans to Native people on the reserve. The appellant alleges that in this case, the Caisse's loans were mainly granted to Native people on the reserve. The appellant also alleges that the case at bar must be distinguished from *Lewin v. Canada*, 2002 FCA 461 (*Lewin*).

[17] Third, the appellant alleges that the judge erred in neglecting to assess the danger of the erosion of Native property presented by taxation of investment income and to adequately consider the benefit of investment income to the traditional Native way of life.

[18] Last, the appellant, submits that his bank account is clearly situated on a reserve and that the judge erred in making a distinction between the capital, which would not be threatened by the taxation in question, and the product of that capital.

B. Respondent's submissions

[19] The respondent submits that this Court has already dealt with the question of connecting factors on a number of occasions and that this case provides no basis for reconsidering the method used to identify the *situs* of investment income when applying section 87 of the *Indian Act*.

[20] According to the respondent, Justice Angers' decision is consistent with the principles developed by the case law. In particular, the respondent alleges that there is no major distinction between this case and *Lewin*, above, which dealt with interest income from deposit certificates with the same establishment at issue, namely the Caisse populaire du Village Huron.

Issue

[21] It is common ground, in this case, that the appellant is an Indian and that investment income is personal property. Therefore, the appeal raises a single issue, which is whether Justice Angers erred in concluding that the appellant's investment income was not property "situated on a reserve" and was therefore not exempt from taxation.

Analysis

A. Statutory provisions

[22] Paragraph 81(1)(*a*) of the ITA provides that an amount that is declared to be exempt from taxation by any other enactment of Parliament shall not be included in computing the income of a taxpayer:

> 81. (1) There shall not be included in computing the income of a taxpayer for a taxation year,
> (*a*) 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.

> 81. (1) Ne sont pas inclus dans le calcul du revenu d'un contribuable pour une année d'imposition :
> *a*) une somme exonérée de l'impôt sur le revenu par toute autre loi fédérale, autre qu'un montant reçu ou à recevoir par un particulier qui est exonéré en vertu d'une disposition d'une convention ou d'un accord fiscal conclu avec un autre pays et qui a force de la loi au Canada.

[23] The exemption provided by another enactment is found at section 87 of the *Indian Act*, which 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, the following property is exempt from taxation, namely,
> (*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.

> 87. (1) Nonobstant toute autre loi fédérale ou provinciale, mais sous réserve de l'article 83, les biens suivants sont exempts de taxation :
> *a*) le droit d'un Indien ou d'une bande sur une réserve ou de terres cédées;
> *b*) les bien 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.

B. Standard of review

[24] From the decision of the Supreme Court in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, we know that the standard of review on a question of law is correctness, and that the trial judge's finding of fact or of mixed fact and law cannot be overturned unless the judge made a palpable and overriding error.

C. Is the investment income situated on an Indian reserve?

[25] In my opinion, Justice Angers properly grounded his analysis in the legal principles that have been established in the case law and did not err in law or make a palpable and overriding error. Furthermore, I can find no error in Justice Angers' analysis of the connecting factors developed by this Court in *Recalma*, above.

[26] To determine whether an Indian's investment income is situated on a reserve, it is first necessary to consider the intent of the exemption provided in the *Indian Act* and the principles set forth by the Supreme Court in *Mitchell* and *Williams*, above.

[27] The intended purpose of the exemption provided at paragraph 87(1)(*b*) of the *Indian Act* was explained in the following manner by Justice La Forest in *Mitchell*, above, at paragraphs 86 and 88:

> … The exemptions from taxation and distraint have historically protected the ability of Indians to benefit from this property in two ways. First, they 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. Secondly, the protection against attachment ensures that the enforcement of civil judgments by non-natives will not be allowed to hinder Indians in the untrammelled

> enjoyment of such advantages as they had retained or might acquire pursuant to the fulfillment by the Crown of its treaty obligations. In effect, these sections shield Indians from the imposition of the civil liabilities that could lead, albeit through an indirect route, to the alienation of the Indian land base through the medium of foreclosure sales and the like; see Brennan J.'s discussion of the purpose served by Indian tax immunities in the American context in *Bryan v. Itasca County*, 426 U.S. 373 (1976), at p. 391.
>
> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, 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, i.e., their land base and the chattels on that land base.
>
> It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians.
>
> [Emphasis added]

[28] At paragraph 112, Justice La Forest elaborated on the Crown's obligation not to dispossess Indians of their property:

> … As is the case with the restrictions on alienability to which I drew attention earlier, the intent of these sections is to guard against the possibility that Indians will be victimized by "sharp dealing" on the part of non-natives and dispossessed of their entitlements.
>
> [Emphasis added]

[29] In *Williams*, above, Justice Gonthier discussed the choice that Native taxpayers have as to how they organize their personal property and whether they situate them on or off a reserve. At paragraph 18, he states the following:

> Therefore, under the *Indian Act*, an Indian has a choice with regard to his personal property. The Indian may situate this property on the reserve, in which case it is within the protected area and free from seizure and taxation, or the Indian may situate this property off the reserve, in which case it is outside the protected area, and more fully available for ordinary commercial purposes in society. Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian.

[30] At paragraph 61, Justice Gonthier also explained how to determine the location of intangible personal property:

> Determining the *situs* of intangible personal property requires a court to evaluate various connecting factors which tie the property to one location or another. In the context of the exemption from taxation in the *Indian Act*, there are three important considerations: the purpose of the exemption; the character of the property in question; and the incidence of taxation upon that property. Given the purpose of the exemption, the ultimate question is to what extent each factor is relevant in determining whether to tax the particular kind of property in a particular manner would erode the entitlement of an Indian *qua* Indian to personal property on the reserve.
>
> [Emphasis added]

[31] Moreover, at paragraph 35, Justice Gonthier also stressed that each case must be decided on its own facts:

> Furthermore, it would be dangerous to balance connecting factors in an abstract manner, divorced from the purpose of the exemption under the *Indian Act*. A connecting factor is only relevant in so much as it identifies the location of the property in question for the purposes of the *Indian Act*. In particular categories of cases, therefore, one connecting factor may have much more weight than another. It would be easy in balancing connecting factors on a case by case basis to lose sight of this.

[32] These connecting factors were restated in *Recalma*, above, where this Court identified certain factors to consider in determining the *situs* of investment income. The substantive portion of the reasoning in this case was set forth by Justice Linden at paragraph 11:

> [11] So too, where investment income is at issue, it must be viewed in relation to its connection to the Reserve, its benefit to the traditional Native way of life, the potential danger to the erosion of Native property and the extent to which it may be considered as being derived from economic mainstream activity. In our view, the Tax Court judge correctly placed considerable weight on the way the investment income was generated, just as the Courts have done in cases involving employment, U.I. benefits and business income. Investment income, being passive income, is not generated by the individual work of the taxpayer. In a way, the work is done by the money which is invested across the land. The Tax Court judge rightly placed great weight on factors such as the residence of the issuer of the security, the location of the issuer's income generating operations, and the location of the security issuer's property. While the dealer in these securities, the local branch of the Bank of Montreal, was on a Reserve, the issuers of the securities were not; the corporations which offered the Bankers' Acceptances and the managers of the Mutual Funds in question were not connected in any way to a Reserve. They were in the head offices of the corporations in cities far removed from any reserve. Similarly, the main income generating activity of the issuers was situated in towns and cities across Canada and around the world, not on Reserves. In addition, the assets of the issuers of the securities in question were predominantly off Reserves, which in case of default would be most significant.
>
> [Emphasis added]

[33] *Recalma*, above, was followed by this Court in *Lewin*, above, and in *Sero v. Canada*, 2004 FCA 6 (*Sero*). *Recalma* is now the leading authority on the question of whether section 87 can exempt certain investment income from tax (see *Sero* at paragraph 16).

[34] However, the appellant is attempting to distinguish the relevant case law on section 87 from the case at bar. In particular, he submits that *Lewin*, above, must be distinguished. According to the appellant, several connecting factors were not present in that case; among other things, Mr. Lewin

did not reside on the reserve, the original capital investment had been constituted from work done off the reserve, and the interest paid to Mr. Lewin did not contribute to preserving the traditional way of life of Native people living on the reserve.

[35] The state of the law on the issue of taxation of Indians' investment income is currently well established. I am persuaded that there is no essential distinction between this case and the decisions of this Court in *Recalma*, *Lewin* and *Sero*, above. In my opinion, the factual distinctions that the appellant is trying to rely on are immaterial.

[36] When an Indian invokes paragraph 87(1)(*b*) of the *Indian Act* to obtain a tax exemption on his or her investment income, and the income in question is generated off the reserve, the exemption cannot be granted. In such a context, the other connection factors are of little importance. In particular, the mere fact that the financial institution is situated on the reserve merits little weight. What matters is whether the investment income—that is, the profit generated from the capital invested in a financial institution—was produced on or off the territory of the reserve. In other words, if all or part of the funds were invested in the general mainstream of the economy, the exemption from taxation provided at paragraph 87(1)(*b*) of the *Indian Act* cannot apply.

[37] In *Recalma*, above, Justice Linden implies at paragraph 14 of his reasons that "the result may, of course, be otherwise in factual circumstances where funds invested directly or through banks on reserves are used exclusively or mainly for loans to Natives on reserves". However, that is not so in this case, and accordingly, we do not have to rule on such a question. It is important to

recall that as, Justice La Forest emphasized in *Mitchell*, the intent of the exemption provided at section 87 of the *Indian Act* is not to allow Indians to acquire and deal with property situated outside the reserve on better terms than other Canadians.

[38] Accordingly, I find no error in the judge's decision to give considerable weight to the fact that Caisse populaire Desjardins de Pointe-Bleue was investing its funds in the economic mainstream.

[39] Moreover, contrary to the appellant's allegations, I do not believe that the judge erred in making a distinction between the capital invested with the Caisse and the product generated by that capital. In fact, this is a fundamental distinction that was at the core of the question at issue. The judge was entirely justified in concluding that there was no danger of the erosion of Native property, since the investment income was generated by the capital invested with the Caisse and the capital itself was not threatened.

Disposition

[40] For these reasons, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

Certified true translation
Sarah Burns

PELLETIER J.A. (CONCURRING REASONS)

[1] I agree with the reasons articulated by my colleague Justice Nadon, but I would add the following to his remarks.

[2] In *Recalma v. Canada* (1998), 98 D.T.C. 6238, Justice Linden acknowledged the possibility that in some circumstances, particularly when “funds invested directly or through banks on reserves are used exclusively or mainly for loans to Natives on reserves”, investment income could be exempt from taxation. This factor was only one of several in his analysis, but he gave it more weight than the others.

[3] Perhaps there was once a time when caisses populaires set themselves apart from other financial institutions by virtue of their limited activities and the common link that existed between members, but that is no longer the case. As shown by the evidence in this case, caisses populaires are no longer limited as to their geographical and financial operations. The fact that they belong to a group means that they participate fully in the capital market to the extent that their cash requirements permit or surplus funds demand.

[4] Additionally, as events in recent months have shown, the capital market is a global market. While the sources of the capital put on the market are local and the projects in which that capital is invested are local, the fact remains that the market itself is global. Investors can access that market from their own communities, but the point of entry does not, in itself, limit the market in which investors make profits and incur losses.

[5] I therefore conclude that in the case of the investment of capital through a financial institution, including a caisse populaire, the weightiest factor in determining the situs of the investment income is the nature of the capital market itself, which is not limited to a reserve, a province or even a country.

[6] I would therefore dismiss the appeal as my colleague Justice Nadon proposes.

"J.D. Denis Pelletier"
J.A.

"I agree."
Pierre Blais J.A.

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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