Date: 20081112

Docket: A-511-07

Citation: 2008 FCA 352

CORAM: **LINDEN J.A.**
EVANS J.A.
RYER J.A.

BETWEEN:

MARGARET HORN

Appellant

and

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

Respondent

AND BETWEEN:

SANDRA WILLIAMS

Appellant

and

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

Respondent

Heard at Toronto, Ontario, on November 12, 2008.

Judgment delivered from the Bench at Toronto, Ontario, on November 12, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

Date: 20081112

Docket: A-511-07

Citation: 2008 FCA 352

CORAM: **LINDEN J.A.**
EVANS J.A.
RYER J.A.

BETWEEN:

MARGARET HORN

Appellant

and

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

Respondent

AND BETWEEN:

SANDRA WILLIAMS

Appellant

and

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

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on November 12, 2008)

EVANS J.A.

[1] This appeal is from a decision of the Federal Court (2007 FC 1052), in which Justice Phelan dismissed actions by Sandra Williams and Margaret Horn, both status Indians, for declarations that

their employment income in the taxation year 1995 and, in Ms Williams' case, 1996 as well, was "situated on a reserve" and thus exempt from tax by virtue of section 87 of the *Indian Act*, R.S.C. 1985, c. I-5.

[2] The appellants made two principal arguments before us. First, they said, the Trial Judge erred in law by applying the "connecting factors" test to determine where the appellants' employment income was situated. They argue that in *McDiarmid Lumber Co. v. God's Lake First Nation*, [2006] 2 S.C.R. 846 ("*God's Lake*"), the Supreme Court of Canada indicated that the appropriate test was the location of the debtor, thereby implicitly overruling a long line of decisions from this Court applying a connecting factors approach to determining whether employment income is situated on a reserve for the purpose of section 87.

[3] We do not agree. The issue in *God's Lake* was whether funds in a bank account were exempt by section 89 of the *Indian Act* from seizure. The Court determined this issue by looking solely to the location of the debtor, that is, the branch of the bank where the funds had been deposited.

[4] However, the Court expressly stated (at para. 18) that the "contextual form of analysis" was appropriate for, *inter alia*, cases involving a taxation transaction "where the location is objectively difficult to determine". It quoted (at para. 17) the observation of the court below that *God's Lake* was "not concerned with where a transaction is located for the purposes of taxation." The Court also referred with approval to the adoption of the connecting factors approach in *Williams v. Canada*,

[1992] 1 S.C.R. 877, the origin of this Court's jurisprudence on the location of employment income as personal property for the purpose of section 87, even though *Williams* concerned employment insurance payments.

[5] In our view, the words quoted above from *God's Lake* make it clear that the Supreme Court has not issued an invitation to this Court to revisit its well settled law. The Supreme Court has so far refused leave to appeal from the section 87 cases decided by this Court applying the connecting factors analysis to determine the location of employment income for tax purposes. Short of Parliamentary intervention, only the Supreme Court of Canada may review the soundness of the analytical framework developed and consistently applied on the issue by this Court.

[6] Second, the appellants argue, if the connecting factors test is applicable, Justice Phelan erred in his application of it to the facts. Since the application of the law to the facts is a question of mixed fact and law, the appellants must establish that his decision is vitiated by palpable and overriding error, or that he did not apply the correct legal test.

[7] For the most part, the appellants criticise the Judge's reasons on the ground that they attach too much weight to the location, surrounding circumstances and nature of their work with the clients to whom they were "leased" by their employer, Native Leasing Services. The appellants work for not-for-profit organizations delivering social services off-reserve in Hamilton and Ottawa to aboriginal people (some of whom resided off-reserve and some on-reserve) and, in the case of Ms. Horn, to non-aboriginals as well. Conversely, the appellants say, the Judge gave insufficient weight

to the on-reserve location of the employer, to the benefits accruing to the reserve from both the employer's presence on the reserve and its activities, and the appellants' employment, and to Ms Williams' residence on and Ms Horn's continuing connections to a reserve.

[8] It is primarily the function of a trial judge to assess the relative weight to be given to the constituent elements of a multi-factored test in the particular circumstances of a case. Applying the "connecting factors" test is a very fact specific exercise. This Court may not substitute its view for that of the judge, absent a palpable and overriding error in the application of the test or an error of law.

[9] In our opinion, Justice Phelan's analysis is consistent with the guidance provided by this Court in its previous decisions, including the particular weight given by *Shilling v. Canada (Minister of National Revenue*), [2001] 4 F.C.R. 364, 2001 FCA 178, to the location, nature and other circumstances surrounding the work which gave rise to the employment income. We can detect no overriding and palpable error in the Judge's treatment of the relevant factors, either individually or as a whole.

[10] However, we agree with the appellants that whether employment income is earned in the "commercial mainstream" is a conclusion to be drawn from an examination of the connecting factors, and not a reason in itself for concluding that employment income is not situated on a reserve: *Recalma v. Canada* (1998), 158 D.L.R. (4th) 59 (F.C.A.) at para. 9.

[11] To the extent that Justice Phelan may have expressed a different view, and we are not sure that he did, we would respectfully disagree. Nonetheless, even if he erred as the appellants allege, any error was not sufficiently material, when considered in the context of his reasons as a whole, to warrant our intervention.

[12] For these reasons, the appeal will be dismissed with one set of costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-511-07

(APPEAL FROM REASONS FOR JUDGMENT AND JUDGMENT OF THE HONOURABLE MR. JUSTICE PHELAN DATED OCTOBER 16, 2007, DOCKET NO. T-2241-95.)

STYLE OF CAUSE:	MARGARET HORN v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL REVENUE AND BETWEEN: SANDRA WILLIAMS v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 12, 2008
REASONS FOR JUDGMENT OF THE COURT BY:	(LINDEN, EVANS & RYER JJ.A.)
DELIVERED FROM THE BENCH BY:	EVANS J.A.

APPEARANCES:

Brian A. Crane Max Faille	FOR THE APPELLANT
Gordon Bourgard Sandra Phillips	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Brian A. Crane GOWLING LAFLEUR HENDERSON LLP Ottawa, Ontario	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT