Docket: 2007-1205(IT)I

BETWEEN:

JAMES DUGAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard with the appeals of
Wayne Sault (2007-1217(IT)I); *Douglas Henhawk* (2007-1831(IT)I);
Tina Jamieson (2006-3571(IT)I); *Alana McDonald* (2007-2222(IT)I);
Lynden Hill (2007-307(IT)I) on November 22, 23, 24, 25 and 26, 2010
at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant:	Scott Robertson Paul C.R. Seaman
Counsel for the Respondent:	Lesley L'Heureux Tamara Watters

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2002, 2003, 2004 and 2006 taxation years are dismissed, without costs, in accordance with the reasons set out in the attached Reasons for Judgment.

Signed at Ottawa, Canada this 24th day of May 2011.

"J.E. Hershfield"

Hershfield J.

Citation: 2011 TCC 269
Date: 20110524
Docket: 2007-1205(IT)I

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JAMES DUGAN,

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Docket: 2007-1217(IT)I

AND BETWEEN:

WAYNE SAULT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2007-1831(IT)I

AND BETWEEN:

DOUGLAS HENHAWK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2006-3571(IT)I

AND BETWEEN:

TINA JAMIESON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2007-2222(IT)I

AND BETWEEN:

ALANA MCDONALD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2007-307(IT)I

AND BETWEEN:

LYNDEN HILL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hershfield J.

[1] The appeals are all based on a claim that the assessments appealed imposed tax under the *Income Tax Act* (the "*Act*")[1] on employment income that was

[1] *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.).

protected from taxation by subsection 87(1) of the *Indian Act*[2] and section 81 of the *Act*. Section 81 of the *Act* simply reflects the protection from taxation afforded by subsection 87(1) of the *Indian Act* which reads as follows:

> 87.(1) Property exempt from taxation -- 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] The issue in each of these appeals is whether the employment income so assessed is personal property of an Indian situated on a reserve.

[3] All six appeals were heard in Toronto the week of November 22, 2010. Although there was no formal consolidation there was a Joint Book of Documents that included information about places where each of the Appellants performed services and an agreed statement of facts in respect of one Appellant, James Dugan (the "Dugan Agreed Facts"). As well, an agreed statement of facts was provided in respect of the employers of each of the Appellants, namely, Native Leasing Services ("NLS") or OI Employee Leasing Inc. ("OIEL") (the "NLS/OI Agreed Facts").

[4] The NLS/OI Agreed Facts describe the role of and the operating details respecting these employers. It was first filed with this Court in the appeal of Roger Obonsawin.[3] Such descriptive material includes findings made in respect of other appeals concerning NLS and OIEL.[4] Aside from that common evidence, each of the Appellant's appeals were heard separately during the week without argument. Argument in respect of each of them was heard on the last day of the week; namely, on Friday, November 26, 2010.

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[2] *Indian Act*, R.S.C. 1985, c.I-5. ("*Indian Act*")

[3] Docket: 2000-4164(GST)G.

[4] *Horn et al. v. M.N.R.*, 2008 FCA 352; *Googoo v. Canada*, 2008 TCC 589 and *Roe v. Canada*, 2008 TCC 667.

Background

[5] The NLS/OI Agreed Facts provide amongst other things that: OIEL leases its employees to businesses and non-Native enterprises that may have Native people in their program; NLS leases its employees to Native organizations; NLS and OIEL pay the wages of the Appellants from their office on the Six Nations of the Grand River reserve ("Six Nations reserve") located near Brantford, Ontario; NLS/OIEL also have offices in Toronto where they maintain their bank accounts; NLS/OIEL receive revenue from the lessees of the services of NLS/OIEL employees which fund the wages of such employees, its own employees on the Six Nations reserve and elsewhere and its operating costs and provide a profit to NLS/OIEL; and, NLS/OIEL provide a variety of particularized benefits to the Six Nations reserve.

[6] The NLS/OIEL employees such as the Appellants in the instant appeals claim their employment income from NLS/OIEL is personal property of an Indian situated on a reserve.

[7] Four of the Appellants, Douglas Henhawk, Lynden Hill, Alana McDonald and Tina Jamieson were NLS employees whose services were leased to Brantford Native Housing ("BNH"). James Dugan and Wayne Sault were OIEL employees. I will review the evidence applicable to these two Appellants first and then deal with the work of BNH under a separate heading before reviewing the evidence of the four Appellants who provided their services there. The evidence concerning BNH is drawn from the combined testimony of those four Appellants, material in the Joint Book of Documents and from the Fresh Amended Notices of Appeal in respect of matters seemingly accepted by the parties as agreed upon evidence. My analysis and decision, based on my findings of fact and the relevant governing authorities, as they apply to those facts in respect of each Appellant, will follow such review of the evidence. This follows the approach taken at the hearing which was to hear evidence in respect of all the appeals during the first four days leaving argument in respect of each of them to the fifth day.

James Dugan

[8] Mr. Dugan is a member of the Thames First Nation in Muncey, located near London, Ontario. Mr. Dugan is a status Indian by definition under the *Indian Act*. He appeals his 2002, 2003, 2004 and 2006 taxation years.

[9] It was acknowledged at the outset that Mr. Dugan's appeal in respect of his 2006 taxation year must be dismissed for want of this Court's jurisdiction to hear

it. No Notice of Objection to the assessment appealed from had been filed within the required time period and time limit for extensions had expired as well. Accordingly, this recitation of Mr. Dugan's evidence applies in respect of his 2002, 2003, and 2004 taxation years.

[10] At all relevant times, Mr. Dugan resided in Toronto. Mr. Dugan has never resided on a reserve. His mother grew up on the reserve and he has relatives on various reserves. He does not visit at his reserve regularly but votes for his band chief.

[11] During the relevant period Mr. Dugan was employed by Foster Printing and Digital Communications ("Foster") which offers custom printing services to the general public including several First Nations organizations.[5] Mr. Dugan performs his services for Foster primarily in Toronto with some visits to Scarborough. Mr. Dugan has never performed his duties on a reserve.

[12] Mr. Dugan was a production plant manager. His duties included overseeing all stages of print and finishing production but he also handled customer relations focusing that aspect of his work on First Nations.[6]

[13] After being employed by Foster for some four years, Mr. Dugan requested that Foster engage his services as a leased employee. The arrangement requested was that he become an employee of OIEL and that OIEL would enter into a contract whereby his services would be leased to Foster.

[14] Under this arrangement, Mr. Dugan was an employee of OIEL paid by OIEL. OIEL maintained offices on the Six Nations reserve but paid Mr. Dugan from off-reserve bank accounts.

[15] After the change in the employment arrangement Mr. Dugan continued to report to Foster and follow directions from it. Mr. Dugan's salary was determined by Foster notwithstanding that Foster paid OIEL under the leasing arrangement.

[16] The Crown admits that OIEL, being located on the Six Nations reserve resulted in the arrangement providing some benefit to that reserve.

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[5] Mr. Dugan testified that about 50% of Foster's work was done for First Nations. However, the Dugan Agreed Facts suggests that this might well have been considerably less.

[6] The Dugan Agreed Facts make no reference to such work.

Wayne Sault

[17] Mr. Sault is a member of the Mississaugas of the New Credit First Nation. He is a status Indian by definition under the *Indian Act*. He appeals his 1999, 2001 and 2002 taxation years.

[18] During the years under appeal, Mr. Sault resided in Hagersville, Ontario which is located on the New Credit reserve. The New Credit reserve is adjacent to the Six Nations reserve which is just south of Brantford, Ontario.[7] Mr. Sault was born on the Six Nations reserve which is where his mother was from. His father was from New Credit. Mr. Sault moved to the New Credit reserve when he was six years old and has never lived off-reserve. He has two sisters, one lives on the Six Nations reserve where her husband is from and the other lives on the New Credit reserve. Two brothers live off-reserve and his surviving parent, his mother, still lives on the New Credit reserve. One of his four children live on the Six Nations reserve where his mother is from.

[19] Mr. Sault performs his services for Hamilton Sod which is a division of Greenhorizons Group of Farms Ltd. ("Greenhorizons"). Greenhorizons has several divisions located throughout central and southwestern Ontario. This is a commercial business dealing with the production and delivery of sod. It is not what might be referred to as an aboriginal business and has no direct connection with a reserve. It is located in Mount Hope, Ontario which is not on a reserve. Mr. Sault was first employed by OIEL to work at Hamilton Sod in 1993 after one year of having worked there as an employee.[8] He followed his father's lead to sign on with OIEL as he understood it had tax advantages. He and his father were the only ones at Hamilton Sod, out of some 40 workers, that provided their services through OIEL.

[20] Mr. Sault performed his duties at Hamilton Sod's place of business in Mount Hope and also made deliveries to customers off-reserve. Mount Hope is south of Hamilton. He commuted to work every day. It was about a 25 minute drive.

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[7] Mississaugas of the New Credit First Nation is a Mississauga Ojibwa First Nation. Mr. Sault distinguished the New Credit reserve as being quite distinct in language and ancestry from the First Nations housed on the Six Nations reserve.

[8] The evidence concerning the actual employer referred to OIEL and NLS interchangeably. However, the contract included in the Joint Book of Documents confirms that the employer was OIEL which conforms with the structure explained to me, namely that NLS leases its employees to Native organizations.

[21] Mr. Sault was a sod technician or perhaps otherwise described as a general labourer. His duties included maintaining and harvesting sod and providing regular maintenance on farm machinery. As well, he made deliveries.

[22] Payment was made by direct deposit to Mr. Sault's on-reserve bank account.

[23] Although the Appellant did not work on the reserve, the Respondent acknowledges that OIEL's presence on the Six Nations reserve resulted in some benefit to that reserve.

BNH

[24] As noted at the outset of these Reasons four of the Appellants, Douglas Henhawk, Lynden Hill, Alana McDonald and Tina Jamieson were NLS employees whose services were leased to BNH. BNH is a non-profit charitable organization and an understanding of its work is of considerable importance as a potential connecting factor in the analysis that will determine the outcome of the appeals of each of these Appellants when considered together with other factors applicable to each of them. The following is comprised of information taken from material in the Joint Book of Documents and testimony heard during the hearing of these appeals. It will be augmented by further evidence that I will set out under my review of the testimony of the individual Appellants.

- The incorporating document refers to low income housing objects as well as the provision of cultural, educational, rehabilitation and medical facilities for low income families and persons. The organizational objectives of BNH are not intended to discriminate against clients they serve unless a program specifically requires it. It is a registered charity.

- The operational realities and actual focus of BNH is on aboriginal people recognizing homelessness due to migration caused by housing difficulties experienced on nearby reserves. There are no other low income housing facilities in the area that focus on aboriginal people. As well, mainstream facilities lack cultural appropriateness and sensitivity to aboriginal people's distinct needs.

- BNH offers special services for transition to city living including a 14 bed Aboriginal Transitional Home.

- BNH is not on a reserve but is a short distance from the Six Nations reserve.[9]

- In 2004 and 2005, there were nine employees at BNH. Four were engaged in maintenance services, one was engaged as a manager, one as a receptionist, one as an administrator and two as tenant counsellors.

- Not all of the members of BNH's board of directors were aboriginal or Native persons.

- BNH has a housing portfolio of 140 units scattered throughout the city of Brantford. It has a two story administrative centre in Brantford.[10]

- There is no requirement for tenants living in BNH housing to have lived on a reserve or to return to a reserve after they cease to occupy a BNH unit. To be eligible to rent, at least 50% of the household had to be of Native ancestry.

- BNH provided Native oriented cultural programming to its aboriginal tenants.

- Canada Mortgage and Housing Corporation ("CMHC") provided funding to BNH for its housing programs.

- BNH acted as agent for CMHC's Residential Rehabilitation Assistance Program ("RRAP") in Brantford and in other regions surrounding Brantford. The RRAP was a separate program distinct from the housing project operated by BNH.

- In spite of the organizational objectives, the parameters of the CMHC programs and funding criteria, each of the four Appellants that performed their employment services through NLS to BNH testified that, in fact, BNH throughout the relevant periods was for the most part an overflow housing

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[9] It is my understanding that the six Iroquois Nations living together on the Six Nations reserve are the Mohawk, Cayuga, Onondaga, Oneida, Seneca and Tuscarora. The Iroquois are also known as the Haudenosaunee or the "People of the Longhouse". It also appears that each Nation might consist of more than one Band to which members refer as being a separate Nation. A better understanding of these distinctions might have been gained had I asked more questions during the hearing.

[10] Testimony on the number of units varied amongst the witnesses.

facility for aboriginal persons (status Indians) waiting for residential placements on the Six Nations reserve.

- The credible and consistent testimony of these Appellants was that there were serious housing shortages on the First Nations reserve and, as a result, there were long waiting lists sometimes amounting to ten years before housing could be provided on the reserve. Even BNH had a waiting list at least partly due to the overflow from the reserve who came to BNH pending accommodation on the reserve.

Douglas Henhawk

[25] Mr. Henhawk has lived on the Six Nations reserve his entire life. He is part of the Mohawk Turtle Nation. His seven brothers and sisters and their children all live on the Six Nations reserve. One of his two children live on the reserve. He is the third generation on 16 acres of land he owns on the reserve. He is a status Indian by definition under the *Indian Act*. He appeals his 1995, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008 taxation years.

[26] Mr. Henhawk speaks proudly of the association of Nations that comprise the Six Nations reserve which he speaks of as a confederacy. He started work with BNH in about 1993 and was from the outset employed by NLS. He said he applied with NLS to work at BNH as a job there was posted on the reserve by NLS. He wanted to work at BNH because it dealt with Native people. He was given the job by the Manager of BNH, Chel Niro, after an interview. He worked there throughout the period that includes all the years under appeal. The main office of BNH is a ten minute drive from his home on the reserve. He commutes daily. He regards Brantford as reserve lands.[11]

[27] His duties included making minor plaster repairs to walls and ceilings; preparing surfaces for painting and properly applying paint to interior and exterior surfaces; constructing and preparing fences, partition walls, decks, roofs; cleaning; replacing and repairing doors, locks, windows, screens; maintaining landscaping;

[11] It is a matter of record that the First Nations that comprise the amalgam or confederacy that is the Six Nations reserve have only been granted reserve lands that are a fraction of what Treaties promised and that there are disputed claims to lands within the city of Brantford. However, it is also a matter of record that but for a few tracts of land such as where the casino sits, Brantford is not part of a reserve.

replacing roof shingles; installing siding, flooring and carpeting; and general repairs including repairs of plumbing and foundations.

[28] Mr. Henhawk talked about how BNH had grown from just a housing facility to a centre for various types of community support including court workers, youth workers, counsellors and Native liaisons. There are men's and women's circles where issues and traditions are discussed and traditional activities are taught. Different Natives, Indians, from different areas come, not just from Six Nations. He testified, however, that he knew many of the residents over the years, some family and friends and that 75-80% of the tenants would have been from Six Nations reserve.[12] He also said that 80% of the Native people that used the other services that BNH offered would be from the Six Nations reserve.

[29] Mr. Henhawk was paid by NLS at its office located on Six Nations either by cheque at NLS's office on the reserve or by direct deposit to his reserve bank account. The payment was made from NLS's off-reserve bank accounts.

[30] The Appellant was under the supervision of BNH, reporting to BNH staff on a daily basis. There is no evidence that NLS provided any training to Mr. Henhawk. The General Manager of BNH completed the Appellant's performance evaluations. BNH determined the Appellant's salary and wage increases. Mr. Henhawk did not perform any of his work duties on a reserve.

Lynden Hill

[31] Mr. Hill is a member of the Upper Mohawk First Nation located in Ohsweken, Ontario which is on the Six Nations reserve. He was born on the Cape Croker reserve where his mother is from. His father is from the Six Nations reserve. He moved to the Six Nations reserve when he was 12 years old. Mr. Hill testified that he resided on the Six Nations reserve at all times relevant to his appeals.[13] His parents live there as do his brothers and sisters and their children, as do

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[12] I took his testimony to be that 80% of the units owned or operated by BNH were occupied by people from the Six Nations but that not all those households would be made up of only status Indians from the reserve. Some households were mixed and there only was a requirement that at least 50% of the household be status Indians.

[13] The Respondent raised evidence, including the testimony of an officer of the Canada Revenue Agency as to Mr. Hill's residence that conflicted with his testimony in respect of the years 1995-1997. I allowed rebuttal evidence, in spite of an objection, to be entered by the Appellant. The Respondent's evidence was not convincing and, in any event, having an address in this case that

his cousins. He is a status Indian by definition under the *Indian Act*. He appeals his 1995, 1996, 1997, 1999, 2000, 2001, 2002, 2003, 2004, 2005 and 2006 taxation years.

[32] It was acknowledged at the outset that Mr. Hill's appeal in respect of his 2006 taxation year must be dismissed for want of this Court's jurisdiction to hear it. No Notice of Appeal was filed within the required time period and the time limit for extensions has expired as well. Accordingly, this recitation of Mr. Hill's evidence applies in respect of the other taxation years under appeal.

[33] Mr. Hill provided maintenance services for BNH throughout the city of Brantford, Ontario. His duties related to general maintenance of the BNH properties all of which were located off-reserve. His specific duties are the same as that noted above for Mr. Dugan. He commutes daily to work by car. It takes about ten minutes each way.

[34] Mr. Hill gave similar testimony as Mr. Dugan that BNH offered cultural programs and noted that certain special programs or activities would be organized at other centres such as the community swimming pool.

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conflicts with the place where one believes one resides, is not sufficient to make me doubt Mr. Hill's testimony that he lived on the Six Nations reserve in those years. As well, the objected to evidence introduced by Mr. Hill's counsel tended to corroborate Mr. Hill's testimony. The objection was on procedural grounds not on authenticity. As these are appeals under the Informal Procedure, the evidence, was allowed.

[35] Mr. Hill was employed by BNH before being employed in 1992 by NLS to provide his services there. He understood the new arrangement would mean his income would be tax free. He testified that working with NLS also gave him health and insurance benefits. He was the only Appellant that testified to receiving such benefits and on cross-examination he wavered somewhat. I find his evidence on that one point not very reliable. His evidence as the nature of BNH's activities was likely the least reliable as well, although in general terms it corroborated the evidence of the other Appellants who worked there.

[36] Mr. Hill did not purport to know if all the housing tenants at BNH were Indians but he said they all appeared to be Native. His aunt and her family lived there because they needed subsidized housing which she would have to be on a 20 year waiting list to get on the reserve. People on the BNH waiting list might only have had to wait 18 months or two years.[14]

[37] Mr. Hill was paid by NLS by direct deposit to an on-reserve bank account. The payment was made from NLS's off-reserve bank accounts.

[38] There is no evidence that NLS provided any training to Mr. Hill. He reported to BNH on a daily basis and his performance evaluation was completed by the General Manager of BNH. BNH determined his salary and increases. None of his work was conducted on a reserve.

<u>Alana McDonald</u>

[39] Ms. McDonald is a member of the Cayuga First Nation located in Ohsweken, Ontario. It is one of the First Nations that form part of the Six Nations reserve. She is a status Indian by definition under the *Indian Act*. She appeals her 2002, 2003 and 2004 taxation years. During the years under appeal the Appellant resided with her husband in Brantford, Ontario and not on a reserve.[15] Her husband is not a status Indian; her children are status Indians.

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[14] Again the 20 year estimate underlines that his testimony may be less than reliable on many points. Other evidence points to the waiting list period being more like ten years.

[15] Ms. McDonald had lived at two different residences in Brantford at different times. One was neighboring the Six Nations reserve. There was no clear indication as to which residence she lived in during the subject years, however, her reference to the one neighboring the reserve was in the present tense. That leads me to believe that that degree of physical proximity to the reserve occurred after she ceased to work at BNH. That is, I take it that the change in the address occurred after she left BNH to work on the reserve.

[40] Ms. McDonald was born and raised in New York state completing grade 12 there. In 1995 her family moved to the Six Nations reserve. She lived there for two years. She completed grade 12 again and took several courses at Wilfrid Laurier University and obtained a Management Certificate from McMaster University. Her parents and siblings do not reside on-reserve although she does have distant cousins that reside there.

[41] For the last five years she has been Manager of Residential Services on Six Nations reserve and in that capacity she spends considerable time on the reserve. Prior to that, she attended events there.

[42] In the subject years, Ms. McDonald was employed by NLS to work at BNH. She learned of the work opportunity from an ad in the Teka, the local Six Nations newspaper. She applied and was interviewed by BNH's Manager, Mr. Niro. She was offered employment under a contract with NLS. She understood she had no choice and that it was done that way for tax reasons. She was paid by direct deposit to her bank account in Brantford.

[43] Ms. McDonald performed her duties in the office of BNH, or within the housing units operated by BNH all of which are located off-reserve in the city of Brantford. She described her initial position as Tenant Counsellor Assistant.

[44] Ms. McDonald's contract with NLS provides for the services that she is to perform for BNH which are receptionist, secretarial and administrative services; providing rental collection services for tenants at the BNH office; maintaining the data base pertaining to tenants, prospective tenants, housing units and rental incomes; assisting in income verification and family composition review; assisting with lease renewal; communicating with maintenance issues as they pertain to tenants and their units; and assisting in evictions, arrears, collections and reporting.

[45] Ms. McDonald testified that later she held a different position for a time as a RRAP administrator. RRAP, she testified, is an off-reserve program to assist low income homeowners to fix and repair their homes. There is no requirement for clients of the RRAP program to be of Native descent; in fact, she said few were.

[46] After that she became a tenant counsellor. During that time she was in contact with tenants doing home visits and was familiar with people on the waiting list. She testified that 80% of the tenants were from the Six Nations reserve. On cross-examination she acknowledged the presence of non-status Indians such as Inuit and Métis but she did not alter her testimony as to the high percentage of tenants from Six Nations. She had a good working knowledge of waiting lists for

the units that varied from one to four bedrooms. The longest waiting list would be for one bedroom units as there were fewer of these units. The waiting list would be from two to five years. She acknowledged that not all tenants had to produce their status cards unless there was a question -- presumably one concerning their status.

[47] She acknowledged a problem of homelessness on both the Six Nations reserve and in Brantford. There were not enough low cost, safe accommodations for Native people who couch-jumped from home to home; homes of family and friends; or, they lived on the street. Those that go into BNH were treated as temporary in the sense that they were encouraged to move on, to make room for others in need of housing. Some would go back to the reserve, although there was no requirement for them to do so. Some would follow different paths.

[48] Ms. McDonald also confirmed the emergence of social programs during her tenure there.

[49] Ms. McDonald was paid by NLS from its office located on Six Nations but payment was made from NLS's off-reserve bank accounts.

[50] There is no evidence that NLS provided Ms. McDonald any training. She reported to BNH on a daily basis and the General Manager of BNH completed her performance evaluations. BNH determined her salary and increases to it. None of her work was performed on-reserve.

Tina Jamieson

[51] Ms. Jamieson is a member of the (Upper) Mohawk First Nation located in Ohsweken, Ontario which is located on the Six Nations reserve. She is a status Indian by definition under the *Indian Act*. She appeals her 2003, 2004 and 2005 taxation years. She was a resident of the Six Nations reserve during the relevant times. She has never lived off-reserve and almost all her family live on the reserve. She left BNH in 2005 to work in a doctor's office on the reserve. She had done one year of nursing at the McMaster University.

[52] In the subject years, Ms. Jamieson was employed by NLS to work at BNH. She learned of the work opportunity from an ad in the Teka, the local Six Nations newspaper. She applied and was interviewed by BNH's Manager, Mr. Niro. She was offered employment under a contract with NLS. She understood that it was done that way for tax reasons. She commuted to work from her home on the

reserve. It was a seven minute commute in summer and 15 minutes in winter. She was paid by direct deposit to her on-reserve bank account on the reserve.

[53] Ms. Jamieson performed her duties in the office of BNH in the city of Brantford. She said her duties were as a receptionist with some involvement with the RRAP program. Her contract with NLS lists her duties to include: delivering the RRAP program; greeting the general public; providing rental collection services for tenants; maintaining the data base pertaining to tenants, prospective tenants, housing units and rental income; assisting in income verification and family composition review; assisting with lease renewal; communicating with maintenance issues as they pertain to tenants and their units and assisting in evictions, arrears, collections and reporting.

[54] Ms. Jamieson testified that BNH assisted Natives currently living off-reserve that needed housing or persons who could not find housing on the reserve. She said there was a two to three year waiting list. A majority of the tenants would be from Six Nations and 80% overall would be First Nations people. She said 88% would be status Indians. She said there was low cost housing on Six Nations and her view was that people would prefer to stay there but came to BNH because they could not be accommodated on the reserve. She said some might end up staying in Brantford – maybe 2%. She said that these tenants do not want urban lifestyles. Their lives were on the reserve. It must be noted that although such observations were based on her work and interaction at BNH and her lifetime on the reserve, they were somewhat anecdotal made without supporting documentary evidence.

[55] She also testified as to the social and cultural events held, as well counselling was provided. The counselling clients were primarily from Six Nations.

[56] Ms. Jamieson's work on the RRAP program could have involved about 50% of her time, however, when asked if it could be more she said no as she dealt with BNH tenants every day. As to her RRAP work she said she administrated that program for smaller towns in southern Ontario. Her duties with respect to the RRAP program were not tied to a reserve in any way. She testified, however, that BNH was paid an administration fee for administering the program. It was a funding source for BNH.

[57] Notwithstanding the admitted time spent on RRAP, even the Respondent's recitation of facts in their submission acknowledges that the duties performed by Ms. Jamieson appear to be primarily tied to the housing provided by BNH.

Regardless, I accept that her function at BNH was very much tied to its administering temporary housing to Indians a majority of whom came from the Six Nations reserve.

[58] Ms. Jamieson received her payment from NLS at its office located on Six Nations but the payment was made from NLS's off-reserve bank accounts.

[59] There is no evidence NLS provided any training to Ms. Jamieson. She reported on a daily basis to BNH and the General Manager of BNH completed her performance evaluations. BNH determined her salary and increases to it.

Appellants' Submissions

[60] The Appellants rely on the Supreme Court of Canada decision in *McDiarmid Lumber Ltd. v. God's Lake First Nation*[16] which is said to provide that the appropriate test is the location of the debtor. The Appellant continues to suggest that this decision implicitly overrules the decisions relating to the connecting factors approach to determine whether employment income is situated on a reserve for the purposes of section 87 of the *Indian Act*.

[61] The Appellants assert that the Respondent has mischaracterized BNH as providing housing for "urban Natives". It is further submitted that *Shilling v. Canada*[17] must be distinguished as the appellant in that case worked at a Health Centre that did not provide any direct benefit to her own Band. The majority of the clients of the Centre were not from her Band.

[62] Short of accepting *God's Lake,* I am urged, in effect, to allow the appeals at least of the workers who worked at BNH on the basis that their work connects their income to the Six Nations reserve with which they all have significant and relevant ties.

[63] Appellants' counsel emphasized the importance of the evidence that the Appellants have all maintained strong connections to their Native communities.

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[16] [2006] 2 S.C.R. 846. ("*God's Lake*")

[17] 2001 FCA 178, 2001 DTC 5420. ("*Shilling*")

[64] Two of the Appellants indicated that they found their positions at BNH through postings in the local Six Nations newspaper and that they relied on NLS to find them positions regardless of tax benefits. The Appellants who lived on or near the reserve had substantial connections to Six Nations and were well aware of NLS's presence as an on-reserve employer that was able to find them jobs.

[65] Appellants' counsel argues that by choosing to work with NLS, the Appellants were Indians who made a choice regarding where to situate their personal property which was to situate it on the reserve. He noted that the Supreme Court of Canada in *Williams v. Canada*[18] at paragraph 18 said that Indians are free to make that choice and when they make a choice to keep property on the reserve then it is protected from taxation.

[66] In suggesting that the Appellants had made that choice, Appellants' counsel relies on *God's Lake*.

[67] Appellants' counsel cites authorities for the proposition that the exemption in section 87 of the *Indian Act* is vague and requires clarification. He notes that the Appellants have self-assessed themselves in good faith and that the vagueness in the application of the exemption from taxation and the wide variety of factual circumstances have created a hardship. Mr. Henhawk, for instance, is looking at 12 years of taxation plus compounded interest. That understandings of how the law applies and how it is administered have changed over time has compounded itself into a significant problem for aboriginal peoples. Persons self-assessing with the reasonable and honest understanding of their tax liability should not be attended with the risk of financial ruin.

[68] Appellants' counsel also cites authorities emphasizing that taxpayers are entitled to arrange their affairs for the sole purpose of achieving a favourable position. Appellants' counsel points out that even as cases like *Shilling* were proceeding, the Appellants and persons like them were unable to discern their position. *Shilling*, for example, involved a case where the nature of the employment duties did not benefit First Nations persons residing on a reserve. There was no hint in Canada Revenue Agency correspondence to the litigants or potential litigants that would indicate that there would be a problem if their work benefited persons residing on *a* reserve.

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[18] [1992] 1 S.C.R. 877.

[69] Appellants' counsel argues that in considering the nature of the employment, the surrounding circumstances must be considered to determine what connection, if any, the off-reserve employment has to the reserve as was done in *Folster*.[19] The *Shilling* case is in stark contrast to *Folster*. In *Shilling*, based on an Agreed Statement of Facts, the appellant could not prove to the Court that what she was doing was specific to her own community or to First Nations people residing on a reserve. It was found that the surrounding circumstances led to the conclusion that the appellant's services were to benefit off-reserve Native people in Toronto. In *Folster* an off-reserve hospital benefited patients who lived mostly on the reserve which was found to be a sufficient connection to protect employment income earned there from taxation. Recognizing that distinction between *Folster* and *Shilling*, workers at BNH would have a sufficient connection to the reserve to have their employment income protected under section 87 of the *Indian Act* since in the appeals at bar, the persons benefiting from the social assistance efforts of the workers at BNH are persons living on the Six Nations reserve but who cannot find housing there.

[70] Appellants' counsel spoke of knowing the *Horn and Williams*[20] decision well, having worked on it. He underlined distinctions between that case and the appeals at bar. Mrs. Horn worked at a Friendship Centre that offered services to aboriginal peoples in transit or who were living and working in Ottawa. It is argued that unlike in *Horn and Williams* the target market for BNH was aboriginals from the Six Nations reserve who were only off the reserve on a temporary basis awaiting housing on the reserve. The testimonies of the witnesses make it clear that there is a housing shortage on Six Nations reserve. It takes ten years on a waiting list to get a house on the Six Nations reserve. The waiting list at BNH is three to five years. It is argued that a right to housing on one's own reserve is an essential aspect of life on a reserve. Only 2% of the tenants at BNH moved out to live off-reserve.

[71] Addressing the case of *Horn and Williams*, Appellants' counsel acknowledges some similarities with the instant appeals. However, it was submitted that the pivotal finding in that case was that there was no evidence of what percentage of the users of the facility were on or off-reserve. The statistics

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[19] *Clarke v. The Minister of National Revenue*, (1997), 148 DLR (4th) 314, (*sub nom Canada v. Folster*), [1997] 3 C.T.C. 157 (F.C.A.). ("*Folster*")

[20] *Horn et al. v. Canada (M.N.R.)*, 2007 FC 105, 2007 DTC 5589 affirmed 2008 FCA 352, leave to Supreme Court of Canada refused. ("*Horn and Williams*")

that were available showed that only 38 of 100 women assisted at the shelter were Natives. In the instant appeals the evidence is that up to 90% of the persons assisted were from the reserve.

[72] Appellants' counsel also noted that there was another test case in addition to *Shilling* and *Horn and Williams* that never went to trial. In that unreported case, "*Clark*" received a Consent Judgment. The Appellants' counsel said that was because the Crown acknowledged that 80% of the work done by the service agency was done on the reserve.

[73] As well as serving residents of the Six Nations reserve who cannot find housing there, Appellants' counsel argues that BNH is itself an aboriginal non-profit organization since four of the five members of the Board of Directors are aboriginal and two of those aboriginals came from the reserve.

[74] Appellants' counsel also cites *Nowegijick v. R.*[21] where the Supreme Court of Canada acknowledged that statutes relating to Indians should be liberally construed and doubtful expressions should be resolved in favour of the Indian. If the statute contains language which can reasonably be construed to confer a tax exemption, that construction is to be favoured over a more technical construction which might be available to deny the exemption. Chief Justice Dickson of the Supreme Court of Canada made similar remarks in *Mitchell v. Peguis Indian Band*.[22]

[75] Appellants' counsel seeks an application of the connecting factors tests that respects a choice not to assimilate as suggested in *Haida Nation v. British Columbia (Minister of Forests)*.[23]

[76] Applying a modern approach to the construction of the *Indian Act*, the connecting factors should be applied in a manner that does not seek assimilation but reconciliation without renunciation of First Nation identity. Appellants' counsel highlighted evidence that I had heard throughout the week that the Appellants were proud of their heritage and adamant about maintaining their Indian identity and the history and culture of their First Nation.

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[21] [1983] 1 S.C.R. 29, [1983] C.T.C. 20.

[22] [1990] 2 S.C.R. 85, [1990] 3 C.N.L.R. 46. ("*Mitchell*")

[23] 2004 SCC 73, [2004] 3 S.C.R. 511.

[77] Appellants' counsel makes a strong argument that there is an inherent danger of applying section 87 in a way that resurrects notions of assimilation and enfranchisement. Not protecting property earned by engaging in activities that are part of the commercial mainstream creates questions as to whether certain activities can only be engaged in at the risk of the actor being deemed to be assimilated into a non-aboriginal society. When does engaging in a particular activity mean one thereby ceases to hold property *qua* Indian and thus forego rights as an Indian? Does this contradict the principle that Indians have a choice as where to locate their personal property? Appellants' counsel cites Létourneau, J.A. in *Bell v. Canada*[24] at paragraph 36 where he stated that the nature of the employment and the circumstances surrounding it are the considerations that best indicate where the personal property in question is within the commercial mainstream. The circumstances here suggest that activities are effectively limited to services that are not mainstream.

[78] Appellants' counsel also argued that NLS was a substantive employer unlike the case in *Bell*. NLS was a *bona fide* on-reserve employer. Native people seek employment through NLS signaling their intent to take positive steps to hold their property on the reserve *qua* Indian.

[79] Focusing on the connecting factors that Appellants' counsel argued that what should be given the most weight are the nature, location and surrounding circumstances of the work to be performed by the employee including the nature of any benefit that accrued to the reserve. That together with the place where the employer is situated and the place of residence of the employees will support a finding in this case that the connecting factors point to an exemption under section 87 of the *Indian Act* for the Appellants who worked with BNH.

[80] It is argued that the benefit that accrued to the reserve went beyond the provision of temporary housing. The evidence is that traditional teachings particular to the peoples of the Six Nations were offered at BNH such as dance and music. Men's circles and traditional feasts were hosted by BNH. Counseling was offered. BNH was not a step-off point into urban living, it provided housing in a culturally reserve-like environment to people who otherwise would be house-surfing on the reserve.

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[24] [2000] 3 C.N.L.R. 32 (F.C.A.). ("*Bell*")

[81] Appellants' counsel also referred to the minimal geographical distinctions in the area. It is a dynamic community with people migrating back and forth without a break in family relationships. He referred to the *Corbiere v. Canada (Minister of Indian and Northern Affairs)*[25] decision where dealing with voting rights the court drew attention to the relevance of maintaining connections with the band of which persons were members when they lived part from their reserve due to factors beyond their control.

[82] Admitting to evidence that BNH offered a wider variety of services such as transitional, as opposed to temporary, housing and that it received funding to be applied to the benefit of a larger community than the Six Nations reserve, Appellants' counsel again spoke of it being a resurrection of the discredited enfranchisement assimilation objectives of the *Indian Act* if an Indian lost rights bestowed by that enactment simply by being employed outside the confines of a reserve in an enterprise that could only survive economically by being part of the wider community.

<u>Respondent's Submissions</u>

[83] Reviewing the history of what have become to be known as the Native Leasing Services appeals, the Respondent recognizes that the business model of NLS (leasing status Indian employees) was structured in a manner to obtain an exemption from taxation for its leased employees by virtue of section 87 of the *Indian Act*. It is acknowledged that prior to the April 16, 1992 decision of the Supreme Court of Canada in *Williams* the employees of NLS were entitled to the exemption. In *Williams*, the Court established the connecting factors analysis as the proper test for establishing the *situs* of intangible personal property for the purposes of the exemption under section 87 of the *Indian Act*. The connecting factors test in *Williams,* was consistently applied after that decision in a number of cases by the Federal Court of Appeal.[26] Following the *Williams* decision, the first NLS case was disposed of by the Federal Court of Appeal in June 2001.[27] Two

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[25] [1999] 2 S.C.R. 203.

[26] See for example *Folster* and *Southwind v. The Queen,* [1998] 2 C.N.L.R. 233 (F.C.A.).

[27] *Shilling v. Canada*, 2001 FCA 178. Leave to the Supreme Court of Canada denied. Shilling filed a second appeal which was dismissed on Summary Judgment. That Summary Judgment was upheld by the Federal Court of Appeal with leave to the Supreme Court of Canada denied. *Shilling v. Canada*, 2003 FC 1361; 2004 FCA 416.

more appeals regarding NLS employees proceeded to the Federal Court of Appeal, namely *Horn and Williams*.

[84] A number of other cases were heard before this Court, none of which were allowed.[28] That is the NLS/OIEL structural model of leasing the employment services of status Indians to enterprises operating outside a reserve, was found not to be a helpful model under the connecting factors test introduced by the decision in *Williams*.

[85] It is submitted that since *Williams*, this Court and the Federal Court of Appeal have consistently held that the connecting factors test is the appropriate test for determining whether the personal property that is employment income is situated on a reserve for the purposes of section 87 of the *Indian Act*.

[86] The Appellants rely on the Supreme Court of Canada decision in *God's Lake* which is said to provide that the appropriate test to determine where the Appellants' employment income is situated is, namely, the location of the debtor.

[87] The Respondent argues that in *God's Lake* the issue is whether the funds in the bank account were exempt by section 89 of the *Indian Act* from seizure. While it is true that the Court determined this issue by looking solely to the location of the debtor, it is argued that that case was not an invitation to revisit the well-established connecting factors test in the determination of the location of property for taxation purposes.

[88] It is argued that the Supreme Court of Canada in *Williams* rejected the notion that the residence of the debtor determines the *situs* of intangible personal property for the purposes of section 87 of the *Indian Act*. The connecting factors test is set out in that case at paragraphs 37-38. The approach to be taken was further described by Gonthier J. at paragraph 61 in the following terms:

> 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

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[28] *Roe v. Canada*, 2008 TCC 667; *Googoo v. Canada*, 2008 TCC 589; *McIver v. Canada*, 2009 TCC 469*;* Cases heard by this Court not referred to by the Respondent include *Robinson v. Canada*, 2010 TCC 649; *Turcotte et al. v. The Queen* (January 12, 2011), Docket no. 2007-1118(IT)I, (TCC) (unreported); *Hester et al. v. The Queen*, 2010 TCC 647.

> 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.

[89] While the Respondent's submissions provide much in the way of ammunition to support its position that the proper test to apply is the connecting factors test, it is not necessary to set out those well-founded submissions. There is no doubt that the connecting factors test has been universally applied by this Court and the Federal Court of Appeal since the pronouncement in *Williams* in the context of section 87 of the *Indian Act* exemption. As well, the Respondent argues that the Supreme Court of Canada and the Federal Court of Appeal have cautioned against describing an overly broad purpose to sections 87 and 89 of the *Indian Act* and has consistently rejected the argument that section 87 should be given an expansive scope.[29]

[90] The Respondent relies as well on *Monias v. Canada*[30] at paragraph 29 which provides:

> Thus, Gonthier J.'s statement in *Williams, supra*, at page 887, that the purpose of the *situs* test in section 87 is to determine whether the Indian holds the property in question "as part of the entitlement of an Indian *qua* Indian on the reserve" would seem more apposite to reserve lands than to personal property, such as employment income, which is owned by Indians individually.

[91] The Respondent relies on the authorities that find that the fact that a person works off-reserve is a factor that tends to connect that person's employment income elsewhere than on the reserve.[31] In *Folster*, the off-reserve employment was accepted as giving rise to on-reserve employment income on the basis that the work, at a hospital, had historically been performed on the reserve at an on-reserve hospital. That historical connection was relevant to finding that employment located at a hospital adjacent to the reserve was personal property that was sufficiently connected to the reserve to be entitled to protection under section 87.

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[29] See *God's Lake* and the specific caution in *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161 at para. 38. See also *Bell v. Canada*, [2000] 3 C.N.L.R. 32 (F.C.A.) at para. 45, leave to appeal to Supreme Court of Canada refused. *Southwind v. The Queen*, [1998] 2 C.N.L.R. 233 (F.C.A) at para. 17.

[30] 2001 DTC 5450.

[31] *Monias* at para. 43; *Shilling* at para. 47.

In that case, the hospital was providing health care services primarily to reserve residents. That case, and others that allowed off-reserve employment income to be exempt from taxation under section 87, stood in stark contrast to the circumstances of the Appellants in the case at bar who like Shilling and Horn and Williams and other previous NLS employees provided their services off-reserve without any factors pointing to the type of connection to a reserve that would invoke section 87 of the *Indian Act*.

[92] With respect to the nature of the work, the Respondent argues that merely because the nature of the employment is to provide not-for-profit social services to Indians does not connect that employment to a particular Indian reserve.[32]

[93] As to the location of the employer and the benefit to the reserve, the Respondent argues that the Federal Court of Appeal has consistently held that the location of the work, the nature of the work and the circumstances surrounding the employment are generally to be given greater weight than the location of the employer and the benefit to the reserve. The Respondent argues that this aspect of the current appeals has been discussed in *Shilling* and in *Horn and Williams* and that the location of the administrative offices of NLS on Six Nations reserve was not a connecting factor to be accorded much, if any weight. In any event, there was not sufficient evidence to establish what benefit there was to the reserve.

[94] The Respondent relies on the case of *Akiwenzie v. Canada*.[33] The Federal Court of Appeal at paragraph 10 clearly stated that even if employment duties were beneficial to reserves that it still had nothing to do with the preservation of an Indian's personal property *qua* Indian on such reserves.

[95] It is argued that even if an employee's work may help to maintain and enhance the quality of life on the reserve for Indians living there, that does not necessarily connect the employee's entitlement to, or use of, the employment income to the reserves as a physical location.[34] The erosion of the entitlement of an Indian *qua* Indian on a reserve has to be determined by reference to the person

[32] See *Shilling* at para. 51; *Desnomie v. Canada*, 2000 DTC 6250 (F.C.A.) at paras. 9 to 12; *Odjig v. Canada*, [2001] 2 C.T.C. 2592 at para. 21.

[33] 2003 FCA 469. ("*Akiwenzie*")

[34] *Monias* at para. 46.

whose income is involved and not by reference to different reserves that are benefiting directly or indirectly from the services of that person.[35]

[96] The Respondent also relies on a variety of authorities including *Shilling* that residence on a reserve is not necessarily an important factor connecting intangible property to a reserve when the location and nature of the employment locate the income off-reserve.

[97] The Respondent also argues that the authorities support the view that the employment off-reserve is an indication that the aboriginal is acquiring employment income in a commercial mainstream.[36]

[98] Applying the connecting factors test to the subject appeals, the Respondent says that in all cases the Appellants' work does not significantly connect their employment income to their reserve or any other reserve. Their duties were no different than those of many non-Native taxpaying employees who performed similar work duties throughout the province of Ontario. The circumstances surrounding the Appellants' work do not assist them. Like the taxpayer in *Shilling* and other cases, the specific facts relating to each Appellant fail to demonstrate that the work was "intimately connected to the life of the reserve".

[99] The location of NLS on the Six Nations reserve has been repeatedly denied as a significant connecting factor in the context of leased employees. Any benefit that the Six Nations reserve may have enjoyed from the location of NLS's administrative offices on the Six Nations reserve have to be regarded as minimal.

[100] The Respondent notes that many of the Appellants' arguments such as applying a construction of section 87 that denies choices or that harbors attitudes of enfranchisement is outdated and a step backward, have been heard before and rejected. Previous cases decided against NLS employees are sufficiently similar on the facts to the cases at bar, as to warrant their dismissal.

[101] Respondent's counsel also noted that in *Akiwenzie* where the Federal Court Appeal effectively said doing good things for reserves and the Indians who live there, do not create a right to protection from taxation. There must be a link to a

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[35] *Desnomie* at paras. 10 and 12.

[36] See *Shilling* at para. 48.

reserve as a physical location or economic base. There is no erosion of an entitlement to enjoy property on a reserve unless there is a link between the property and the reserve. The linkage should also be to the reserve where the Indian is expected to hold property as per *Mitchell*.[37] Not taxing employment income in these cases would be conferring a general economic advantage in a case where the tax sought to be imposed is not an attempt to dispossess property held on the reserve. It is property held in the course of making a living in the economic world outside of the reserve.

[102] The Respondent seeks costs in respect of the present appeals.

Analysis

James Dugan and Wayne Sault

[103] Mr. Dugan did not reside on a reserve during the periods relevant to his appeals. Mr. Sault did reside on a reserve during the periods relevant to his appeals. The employment income of each of them during such periods which is the personal property in respect of which they seek protection from taxation pursuant to section 87 of the *Indian Act*, was paid for performing duties off-reserve for an enterprise carrying on activities unrelated in any way to life on a reserve.

[104] Applying the connecting factors tests to these appeals leaves no room at all for finding that such personal property of Mr. Dugan and Mr. Sault is situated on a reserve.

[105] In Mr. Dugan's case, the only connection that the property has to the reserve is that it arises contractually from an arrangement under which it (the property, the employment income) is payable and paid on the reserve by an employer whose activities are largely centered on a reserve.

[106] This strategic connection does provide some benefit to life on the reserve and under the *situs* rule applied in G*od's Lake* there is authority to say that the appropriate test to apply is the location of the debtor, namely, OIEL in this case.

[107] However, the benefit to life on the reserve that OIEL provides the Six Nations reserve has been considered in other cases and it has not been accepted as

[37] At para. 90.

being sufficiently substantial or relevant as a connecting factor to be given much, if any, weight in circumstances such as this. As well, such an indirect benefit, as laudable as it might be in terms of adding to the industry on the reserve, does not address the question of where the benefit of the income is enjoyed by the Indian who seeks to protect it from taxation.[38] Where is the holder of such property expected to have and enjoy it? When the Indian lives off-reserve as in the case of Mr. Dugan who works entirely off-reserve in a mainstream off-reserve commercial operation, it is difficult to imagine the evidence that might be required to establish that the income is entitled to protection from diminution by taxation. In any event, no such evidence exits in respect of this Appellant.

[108] That Mr. Sault lived on the New Credit reserve which is located contiguous to the Six Nations reserve adds a relevant connecting factor to his appeals. However, the weight to be given it pales in relation to the weight of the other factors noted above. He worked entirely off-reserve in a mainstream off-reserve commercial operation which itself did nothing to benefit life on the reserve. While the property in question is integral to Mr. Sault's life on the reserve, the activity that gives rise to it is not integral to community life on the reserve. Both are potentially connecting factors but the authorities place more emphasis on the bigger picture when considering the purpose of section 87 of the *Indian Act* which is not to improve an Indian's residential life on its reserve where doing so effectively protects an activity that itself has no connection to it.

[109] Accordingly, the appeals of James Dugan and Wayne Sault are dismissed, without costs.

Tina Jamieson, Lynden Hill and Douglas Henhawk

[110] These three Appellants lived on the Six Nations reserve during the years to which their respective appeals relate. They worked at BNH and commuted short distances daily.

[111] The factors connecting their employment income to their reserve overwhelmingly favour a finding that their entitlement to it is personal property situate on their reserve entitled to protection from taxation under section 87 of the *Indian Act*.

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[38] See *Mitchell* at para. 90.

[112] The nature of their work derives from the services offered by BNH. Based on the evidence I have heard, I am satisfied that most of the persons given affordable housing by BNH, at the relevant times, were from the Six Nations reserve and that most of them moved back to the reserve once housing there was available. The Respondent's position that BNH's mandate is to provide its services to the greater population in need of affordable housing distracts from this reality and carries no weight. Applying the connecting factors test requires looking at what services the facility, in fact, provided and to whom. The reality in this case is that BNH does, in fact, serve a function for the Six Nations reserve community. It is of fundamental importance and provides a significant and direct benefit to that community. The Respondent's position that BNH offers its services to support aboriginal peoples adjusting to urban life is based somewhat, if not largely, on that being one of its formal objectives. However, given the circumstances of housing shortages on the neighbouring reserve, that does not reflect the bulk of the services provided by BNH. The services the Respondent asserts as those provided by BNH have turned out to be somewhat incidental to the services that circumstances have dictated that it provide. The uncontradicted evidence I have heard, supports no other conclusion, in my view. Objectives and a facility geared to implement those objectives take a back seat to the actual services provided, as circumstances have dictated.

[113] It must be noted that these are not the first appeals heard in respect of BNH workers. There are two others. Neither are reported but both merit mention even though they were appeals under the Informal Procedure with reasons give from the bench. The first, *Clarkson v. The Queen*,[39] was decided by Justice Bowie of this Court. Based on the evidence that he heard and accepted, he came to a similar conclusion in respect of Ms. Clarkson, that I have, in respect of these three Appellants.

[114] In that case a BNH worker employed by NLS, who did not reside on a reserve, performed social services including assisting young aboriginals, many of whom resided on the Six Nations reserve, who ran afoul of the law. Justice Bowie observed that the players in the justice system were off the reserve which required that the work be performed off-reserve. He drew an analogy, albeit he admitted that it was not a strong one, between the off-reserve location of the courthouse and the hospital in *Folster*. Such circumstances minimized the location of the work as a disconnecting factor. The weightier connecting factor was that she was addressing

[39] *Clarkson v. The Queen* (December 9, 2010), Docket no. 2007-882(IT)I, (TCC) (unreported).

problems that existed on the reserve. Her work provided a considerable benefit to the reserve. Further, supporting his finding that Ms. Clarkson's employment income was protected by section 87 of the *Indian Act*, was his finding that she spent considerable time on the Six Nations reserve with the young offenders and their families. Perhaps this off-set the fact that she did not live on the reserve. Balancing connecting factors is not a perfect exercise – but the scale tipping in one direction or another, in some cases, seems readily apparent. It did to Justice Bowie, as it does to me in respect of these three Appellants.

[115] As well, Justice Bowie referred to Justice Phelan's trial court decision in *Horn and Williams* where relying on the Federal Court of Appeal decision in *Desnomie v. Canada*,[40] reference was made to the need to consider the special circumstances surrounding the performance of the services. While the services Justice Bowie considered were those that pertained to the type of work done by the worker, as opposed to those performed by BNH, recognition of the benefit to the reserve community was the relevant connecting factor. Temporary low cost housing services for residents of a reserve who are waiting for on-reserve housing, is surely a special circumstance that would mitigate against any adverse impact of such housing being off-reserve. Such mitigation places more weight on the benefit that the services provide to a particular reserve community.

[116] The second unreported decision dealing with an NLS employee working with BNH is *Turcotte et al. v. The Queen* ("*Turcotte and Dubie*").[41] In that case, based on the evidence he heard and accepted, Justice Archambault came to a different conclusion than I have as to the nature of BNH's work. In his case, Justice Archambault came to his conclusion based on Mr. Niro's testimony. He concluded from that testimony that when Mr. Niro said that 90% of the people served came from the Six Nations reserve he meant only their origin. Accounting for constant back and forth migration, Justice Archambault found that BNH offered an affordable housing alternative consistent with its objective to provide same for "urban Natives" living in Brantford. I am relying on different evidence which I have found quite compelling. As well, I would distinguish the *Turcotte and Dubie* appeals on the basis that those appellants that worked with BNH did not appear to be residing on the reserve. As my decision below in respect of Ms. McDonald suggests, that can be a factor in BNH cases that outweighs other factors.

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[40] 2000 DTC 6250 (F.C.A.).

[41] *Turcotte et al. v. The Queen* (January 12, 2011), Docket no. 2007-1118(IT)I, (TCC) (unreported).

[117] In any event, as I have said, I accept the testimony I have heard and conclude that BNH's work, dealing with temporary off-reserve housing caused by on-reserve housing shortages, benefits the community of the very reserve of which these three Appellants are a part. The work is integral to life on the reserve of which these Appellants are a part. The work is linked to that reserve as a physical location, a place to live. An analysis that seeks linkages that underscore their significance in terms of satisfying the purpose of section 87 protection from taxation, seeks these very findings. They are weighty factors.

[118] That the location of the work is off-reserve, is a disconnecting factor but not a fatal one. The reserve is essentially contiguous with Brantford. The primary work site is minutes away from the reserve. It is almost axiomatic that a community that lacks housing, even temporary housing, will gravitate to the closest place outside the community that has facilities to help deal with the problem. Indeed, the proximity of the BNH facilities to the reserve adds credibility to the function it has played in serving the needs of the reserve community. In such circumstances, to suggest that the location of the work severs the required connection to it, would be to submit to an unacceptable catch 22.

[119] Turning to another connecting factor, the employer is located on the Six Nations reserve. While appreciating that the authorities have given little or no weight to this as a relevant connecting factor given NLS's intermediary role under which it acts essentially only as the *de jure* (contractual or legal) "employer", in this case some weight might well be given to this arrangement as a connecting factor.[42] As an enterprise operating on the very reserve of which these Appellants are a part, it benefits their own community. Notwithstanding that its work extends to aboriginal and non-aboriginal communities where it has no operating presence, it does have a relevant presence, *in this case*, to the very reserve to which these Appellants' lives and work relates; work that I have said is integral to life on the reserve of which these Appellants are a part; work that is linked to that reserve as a physical location. These factors distinguish the present case from other cases. The distinction does not mean that the location of this employer would in any other case be a very relevant factor. In this case, however, NLS's intermediary role is a connecting factor – albeit, by itself, a modest one.

[120] The location of the personal property (the employer's debt to the employees), as determined by the location of the debt, is also a connecting factor in

[42] Justice Bowie came to the same conclusion in *Clarkson*.

this case distinct from the beneficial work of the on-reserve employer. Without meaning to invite renewed reliance on *God's Lake*, it is important to note that in *Williams* Gonthier J. did not altogether reject the place where a debt may be enforced as a connecting factor. At paragraph 32 he noted;

> …. Therefore, the position that the residence of the debtor exclusively determines the situs of benefits such as those paid in this case must be closely reexamined in light of the purposes of the Indian Act. It may be that the residence of the debtor remains an important factor, or even the exclusive one. However, this conclusion cannot be directly drawn from an analysis of how the conflict of laws deals with such an issue.

[121] In the case of the three Appellants in the case at bar, the place the debt is payable is also the place where they lived. The personal property is made available on the reserve where these Appellants lived. That that has relevance as a connecting factor was seemingly accepted by LaForest in *Mitchell*. There, at paragraph 90, he felt it was helpful to refer to a British Columbia Court of Appeal decision that said that the exemption from taxation applied to property of an Indian received at the place where the holder of such property was expected to have it, namely lands occupied as an Indian. In the case at bar, the subject personal property is "on-reserve" property in more than a conflict of law sense. It is received at the place where the holder who warrants protection from taxation should be expected to have it – on the reserve occupied by him. It is property on the reserve in that sense and in the sense that, in the normal course of its utilization, it would enhance their lives, *qua* Indian living on that reserve and would tend, as well, to benefit the community in which these three Appellants lived. Money sourced from employment linked to life on the reserve and paid on the reserve to a resident of the reserve tends to normalize, if not sanitize, the otherwise tenuous connection offered by NLS.

[122] As I said then, I am of the view that the factors connecting the employment income of Tina Jamieson, Lynden Hill and Douglas Henhawk to their reserve overwhelmingly favour a finding that their entitlement to it is personal property situate on their reserve entitled to protection from taxation under section 87 of the *Indian Act*.

[123] Accordingly, except as otherwise provided herein in respect of the dismissal of Mr. Hill's 2006 taxation year, their appeals are allowed, without costs.

Alana McDonald

[124] Ms. McDonald did not live on the Six Nations reserve at the times relevant to her appeals although she was a member of a First Nation that comprised the Six Nations reserve. That circumstance, her residence beyond the reserve, makes her case considerably more difficult, in my view.

[125] Needless to say, I am well aware that the authorities have not treated residence off-reserve as necessarily being fatal to the application of section 87 of the *Indian Act*; however, in this case, it is the on-reserve residence of the worker that tends to bring the connecting factors together in a very compelling way.

[126] Without that link, we only have an aboriginal person living and working off-reserve for an enterprise that assists aboriginal persons coming from a reserve. Even where the aboriginal person is a member of a Nation that is one of the Six Nations and has family ties to that reserve, those ties may not be sufficient to parallel the cases of Tina Jamieson, Lynden Hill and Douglas Henhawk.[43]

[127] Alana McDonald lived in Brantford. Her evidence as to her background, family ties and life in general presented no compelling reason to suggest that working for an organization that assisted life on the reserve might be a sufficient connection to protect her income from taxation. If those connections were as strong as those of Ms. Jamieson and the evidence was that she lived next door to the reserve, as it appears she did in years subsequent to those under appeal, a rigid border line may not have caused her to lose the protection of section 87 of the *Indian Act*.

[128] That is, I acknowledge that living on-reserve in the context of locating employment income in this case should not be decided by a rigid border. If one is *de facto* living on the reserve in every relevant way, then the required linkage of the employment income to that reserve might be sufficiently present to warrant the application of section 87 of the *Indian Act*. My decisions in *Robertson v. The Queen* and *Saunders v. The Queen*[44] are illustrative of that point since the outcome of each of those appeals was the same even though one of them lived next to the reserve as opposed to on it. That is, the work connection to the reserve was not

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[43] In *Clarkson*, Justice Bowie noted that the life history and family ties and visits are not factors that have a connection to the work done and the income earned.

[44] 2010 TCC 552 under appeal but not on the issue of the residency of Mr. Saunders.

prejudiced by living on the outer edge of a reserve. Similarly, one's personal, living connection to a reserve may not be prejudiced by living on the outer edge of a reserve.

[129] In any event, Ms. McDonald has not demonstrated a sufficient connection to the reserve in the years in question to warrant the same finding as made in respect of Ms. Jamieson, a co-worker.

[130] As I said then, I am of the view that residing off the Six Nations reserve is, in Ms. McDonald's case, essentially fatal to her appeals. Accordingly, her appeals are dismissed, without costs.

[131] As a closing comment, I note that I have chosen not to deal with the arguments of counsel for the Appellants dealing with applications of section 87 that may touch on such concepts as enfranchisement and an aboriginal's right to make choices that should not undermine a promise of protection against diminution of their personal property. These arguments have been heard in previous NLS cases and the response, with which I agree, is that such issues are for Parliament to consider as may be necessary. That necessity may arise from the way the higher courts are applying the connecting factors test but it is still only for Parliament to acknowledge that such necessity exists. In any event, those concerns touch largely on the commercial or economic mainstream factors that have seemingly played a role in some of these cases. It is my view that such factors have never been of paramount importance in any of the NLS cases and I have given it virtually no weighty role in these Reasons considering the decisive weight I have given to more relevant factors in the circumstances of these appeals.

Signed at Ottawa, Canada this 24th day of May 2011.

"J.E. Hershfield"

Hershfield J.

CITATION:	2011 TCC 269
COURT FILE NOS.:	2007-1205(IT)I; 2007-1217(IT)I; 2007-1831(IT)I; 2006-3571(IT)I; 2007-2222(IT)I; 2007-307(IT)I;
STYLE OF CAUSE:	JAMES DUGAN; WAYNE SAULT; DOUGLAS HENHAWK; TINA JAMIESON; ALANA MCDONALD; LYNDEN HILL AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 22, 23, 24, 25 and 26, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice J.E. Hershfield
DATE OF JUDGMENT:	May 24, 2011

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