Docket: 2015-1404(IT)I

BETWEEN:

ANDREW ORR,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on March 21, 2022, at Edmonton, Alberta

Before: The Honourable Justice Bruce Russell

Appearances:

Counsel for the Appellant:	Priscilla Kennedy
Counsel for the Respondent:	Wendy Bridges

AMENDED JUDGMENT

In accordance with the attached Reasons for Judgment this appeal of the March 16, 2015 reassessment of the Appellant's 2013 taxation year is dismissed, without costs.

The Amended Judgment is issued in substitution of the Judgment dated August 8, 2022.

Signed at Toronto, Ontario, this 18th day of October 2022.

"B. Russell"

Russell J.

Citation: 2022 TCC 88
Date: October 18, 2022
Docket: 2015-1404(IT)I

BETWEEN:

ANDREW ORR,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

AMENDED REASONS FOR JUDGMENT

Russell J.

[1] The appellant Andrew Orr is registered under the federal *Indian Act* and is a member of the Peerless Trout First Nation in northern Alberta.

[2] In his 2013 taxation year return Mr. Orr reported his employment income as being tax exempt per paragraph 81(1)(a) of the federal *Income Tax Act*. Nevertheless the Minister of National Revenue (Minister) assessed Mr. Orr's 2013 employment income as taxable. By reassessment raised March 12, 2015 the Minister affirmed Mr. Orr's 2013 taxation year employment income as being taxable; hence this appeal.

[3] Mr. Orr submits that his 2013 employment income is tax exempt per paragraph 81(1)(a) of the *Income Tax Act* because that income was, "personal property of an Indian situated on a reserve" per paragraph 87(1)(b) of the *Indian Act*. That provision states:

> 87(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the First Nations Fiscal Management Act, the following property is exempt from taxation:…(b) the personal property of an Indian or a band situated on a reserve. (underlining added)

[4] Also, the term "reserve" is defined in subsection 2(1) of the *Indian Act*. It,

> a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and
>
> b) except in subsection 18(2), sections 20 to 25, 28, 37, 38, 42, 44, 46, 48 to 51 and 58 to 60 and the regulations made under any of those provisions, includes designated lands;

Also in subsection 2(1) is defined the term "designated lands" appearing in the definition of "reserve". It,

> means a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition;

Further, the above-cited paragraph 81(1)(a) of the *Income Tax Act*, provides:

> Amounts not included in income – There shall not be included in computing the income of a taxpayer for a taxation year,
>
> (a) statutory exemptions [including Indians] – 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;

[5] The parties filed an agreed statement of facts, which includes the following facts: Mr. Orr is a status Indian; the federal Crown and Bigstone Cree Nation entered into a Settlement Agreement dated December 18, 2009; Schedule 10 of that Settlement Agreement is the Peerless Trout First Nation Treaty Land Agreement; in 2013 Mr. Orr worked in Northern Alberta for the Municipal District of Opportunity No. 17 [MDO17], earning employment income of $55,971; his work involved providing security services for the communities of Peerless Lake and Trout Lake; Peerless Trout First Nation has one reserve described as Peerless Trout 238 with 3,553.20 hectares on land; and the reserve was created in 2016.

[6] The respondent Crown submits that Mr. Orr's 2013 employment income was not "personal property of an Indian…situated on a reserve" per paragraph 87(1)(b) of the *Indian Act* because that income was not property "situated on a reserve". The respondent Crown says that in 2013 and even now there is no reserve encompassing the Peerless Lake and Trout Lake communities wherein Mr. Orr worked in earning his 2013 income as an employee of MDO17.

[7] Mr. Orr testified. His evidence in summary was that he grew up in the community of Peerless Lake. He was employment in 2013 by MDO17 as a security/animal control officer. This work was mostly carried out in the area of the two small communities of Trout Lake and Peerless Lake, which are about 18 kilometres apart. He said that for one year he instead worked in the area of Red Earth Creek, another small community in MDO17, but he was not sure what year that was. In re-examination by his counsel, Mr. Orr recalled that he filed his 2013 return when he was working in the Peerless Lake and Trout Lake communities. In argument there was no suggestion that Mr. Orr carried out his 2013 employment work other than within the Trout Lake and Peerless Lake communities.

[8] The 2009 Settlement Agreement between the federal Crown and Bigstone Cree Nation *inter alia* reflected agreement for establishment of the Peerless Trout First Nation as a "band" under the *Indian Act*, with lands identified for reserve creation for that new band.

[9] Mr. Orr was aware of the Peerless Trout First Nation Treaty Land Agreement dated July 21, 2010 between the Peerless Trout First Nation (PTFN) and the federal Crown. He acknowledged paragraph 4 thereof, headed "Identification and Transfer of PTFN and Settlement Lands for Reserve Creation". It reads:

> The Parties acknowledge that Alberta shall transfer administration and control of the PTFN settlement lands to Canada for the purpose of reserve creation so that not less than sixty-three thousand (63,000) acres of land, as depicted in Schedules C, D, E and F of the Canada – Alberta agreement, will be available for reserve creation for PTFN.

[10] Also Mr. Orr identified the Schedule C referred to in this paragraph 4, being a government plan delineating some of the lands to be available for reserve creation for PTFN. Schedule C is entitled, "Bigstone Treaty Land Entitlement Peerless Trout".

[11] This Schedule C depicts one of seven parcels of land to be available for PTFN reserve creation. The other six parcels are depicted by Schedules D, E, F, G, H and I of the PTFN Treaty Land Agreement. Schedules D and E for example are similar government plans of lands and respectively entitled, "Bigstone Treaty Land Entitlement Gods Lake" and "Bigstone Treaty Land Entitlement Twin Lakes".

[12] Also, from the parties' jointly filed book of documents (Ex. A-2), Mr. Orr identified at tab 4 a plan identified as "103535CLSR", entitled, "Peerless Trout Settlement Split into 4 Smaller Areas". It is hand-dated December 4,

2014 and shows the aforementioned Schedule C parcel of land, “split into 4 smaller areas”, identified as Areas 1, 2, 3 and 4.

[13] The other witness in this matter was Ms. Lise Harmonic, employed within the federal government department of Indigenous Services Canada. She holds the position of manager, based in Edmonton, of the “consultation and additions to reserve unit”. She testified regarding what she identified as the four steps of the federal government’s reserve creation process. The first is the application phase which involves receiving a formal application from one or a group of First Nations requesting specific lands to be added to an existing reserve or to have a new reserve created. The second phase is to ensure that all required information is included in the application.

[14] She testified that the third phase is the busiest. The department works with the particular First Nation(s) to together identify all the third party interests involved with the requested land. Such interests could be an existing interest in the land such as a right-of-way, easement, permit, lease, etc. Basically in these situations, upon negotiation the provincial form of land tenure entitlement is replaced with a federal one. The department works with the applicant First Nation(s) to negotiate replacement dispositions of those third parties where possible, and where feasible to have third party interests discharged.

[15] She added that depending on their number, third party interests can take a long time to be resolved. Third party interests would include underground pipelines for oil and gas, or water; or surface works such as a road use; or an oil and gas lease.

[16] Once all such interests are resolved, and the surveys and environmental work are completed, the government can move to phase four which is, essentially, ministerial approval. The ministerial order-in-council is prepared and Ms. Harmonic’s unit seeks to anticipate questions the departmental minister’s office may have. Ultimately that minister signs off on the ministerial order and the land is set apart as a reserve.

[17] Ms. Harmonic testified that these steps for addition of land to reserves and creation of reserves are in accordance with the federal *Addition of Lands to Reserves and Reserve Creation Act* (assented to 2018-12-13). I note that that statute replaced the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* (S.C. 2002, c. 3) which was in force at all material times of this appeal, and until its 2019-08-27 repeal.

[18] Subsection 5(1) of this now repealed statute provided, with the heading "setting lands apart" that, "The [federal] Minister [of Indian Affairs and Northern Development] may in accordance with an agreement to which this Act applies, set apart as a reserve any lands the title to which is vested in Her Majesty in right of Canada." Section 2 provided that "reserve means a reserve within the meaning of the Indian Act". Clearly the crucial act in creation of a reserve is the setting apart of the pertinent lands.

[19] Interestingly, the now in force *Addition of Lands to Reserves and Reserve Creation Act* provides at subparagraph 4(1), likewise under the heading "setting lands apart", that, "The (federal) Minister (of Crown-Indigenous Relations) may, by order, at the request of the governing body of the First Nation, set apart as a reserve any lands the title to which is vested in Her Majesty in right of Canada or for which Her Majesty in right of Canada has the administration and control." Section 2 provides that "reserve has the same meaning as in subsection 2(1) of the Indian Act".

[20] Ms. Harmonic was shown the Ex. A-2 plan that Mr. Orr had identified, dividing into Areas 1, 2, 3 and 4 the Schedule C parcel of land, "that will be available for reserve creation for PTFN". She identified Area 1 as covering the Peerless Lake community and Area 4 as encompassing the Trout Lake community. She said that the Area 3 land had been created a reserve in 2016, but that none of Areas 1, 2 and 4 had yet been created in addition to the current 2016 reserve.

[21] She testified that the Peerless Lake and Trout Lake communities, encompassed by the aforesaid Areas 1 and 4, had not yet moved to reserve creation due to still unresolved third party issues with MDO17 regarding certain municipal assets, including a water treatment plant, the wastewater lagoon, a baseball field, an arena and an airfield, that MDO17 wants to transfer to PTFN.

[22] She testified also that the respective Peerless Lake and Trout Lake community lands (again, Areas 1 and 4) remain within provincial jurisdiction. Alberta has not yet proffered "administration and control" of those lands to Canada. She added however that that could occur at any time.

[23] Both counsel handed up briefs of argument. Mr. Orr's position is expressed in paragraphs 16 and 17 of his counsel's brief, which read:

> 16. Pursuant to the Settlement Agreement, the Reserve at Peerless Lake was established in 2010 and recorded as the Peerless Trout First Nation Reserve on the First Nations Profile database. Alberta was constitutionally required to provide title

> to this land as settled in the *Constitution Act*, 1930, Alberta Natural Resources Agreement, section 10. It was required as a term repeated numerous times in the Settlement Agreement to convert this land to reserve land. It is irrelevant for the purposes of the exemption from taxation contained in section 87 of the *Indian Act*, whether or not the title had actually issued in the name of Canada or not.
>
> 17. The Settlement Agreement stipulated that the Reserve was established and the title was to be registered in Canada's name once all of the interests in the lands were resolved. Canada was bound to do this or the Settlement Agreement would have been breached. It is submitted that this Reserve was established from the outset by the Settlement Agreement and could have been registered in Canada's name but for some interest in oil and gas leases that had to be resolved before title could be registered exclusively in the name of Canada. Section 36 of the *Indian Act* applies to this Reserve and it is submitted that Andrew Orr is not taxable for work which he performed on the Reserve where he lives. (underlining added)

[24] This extract asserts that a reserve was established in 2010 pursuant to the 2009 Settlement Agreement, covering the community of Peerless Lake, where Mr. Orr lived and in part worked during his 2013 taxation year. In the appellant's brief, sections 3.1 and 16 of the 2009 Settlement Agreement are referenced in support of the first statement in each of these paragraphs 16 and 17 of the appellant's brief.

[25] Section 3.1, entitled "Creation of Peerless Trout First Nation", refers only to creation of that First Nation and not to any reserve. It reads:

> Pursuant to the authority provided to the Minister in May 2003, upon the successful Ratification Vote relating to this agreement by BCN, Canada will immediately take all necessary steps to constitute Peerless Trout First Nation.

[26] And section 16, virtually at the end of the Settlement Agreement, is a "further assurances" clause, usual in contracts. Again there is no reference to any reserve.

[27] What the Settlement Agreement does say about reserves is principally at section 5, entitled "Reserve Creation", of which in particular sections 5.1 and 5.30 read:

> 5.1 Pursuant to the terms and conditions of this Agreement, the Canada-Alberta Agreement, and subject to Sections 5.6 to 5.16, 25, inclusive, upon Alberta transferring administration and control of any Settlement Lands to Canada, Canada shall accept such transfer and shall take all necessary steps to set apart as reserve those BCN Settlement Lands for BCN in accordance with this section and to set apart as reserves those PTFN Settlement Lands for PTFN in accordance with the Peerless Trout First Nation Treaty Land Agreement. In particular, Canada shall make reasonable efforts to effect reserve creation for each parcel of Settlement

> Lands no later than five years from the transfer of administration and control of that parcel of Settlement Lands to Canada by Alberta.
>
> 5.30 The Parties acknowledge that the PTFN Settlement Lands will be set apart as reserve by Canada for the use and benefit of PTFN in accordance with the Peerless Trout First Nation Treaty Land Agreement.

[28] Again there is nothing in these provisions suggestive of immediate reserve creation.

[29] Appellant's counsel referenced also Ex. A-3, being a photocopy of a page from a federal government database called "First Nations Profiles", to indicate that a pertinent reserve did exist as of 2010. However, this single page document shows no 2010 (or other) date except for, "Date modified: 2021-12-07".

[30] The document is headed "Reserves/Settlements/Villages". It refers to 3,553.20 hectares and identifies "Peerless Trout 238". I understand this to be the reserve created in 2016 as referenced in the statement of agreed facts, covering Area 3 of Schedule C. Those lands do not include either of the Trout Lake and Peerless Lake communities, which are in Areas 1 and 4 as referenced above.

[31] Ms. Harmonic testified that even now (as of the March 2022 hearing) the Areas 1 and 4 lands have not been "set apart", due to still continuing negotiation of third party interests.

[32] The same is so as to evidence appellant's counsel put forward that the federal government had made a payment or payments to the Peerless Trout First Nation band, created by virtue of the 2009 Settlement Agreement. In my view that does not at all evidence existence of any reserve encompassing the Peerless Lake and Trout Lake communities, whether in 2009, 2010, 2016 or to the present.

[33] Also, the appellant's brief cites, as substantiating the appellant's 2010 reserve creation assertion, various provisions of the aforementioned Schedule 10 "Peerless Trout First Nation Treaty Land Agreement", dated July 21, 2010. These are sections 1-4, 9, 23, 27-29, 32-34, 36-39 and Schedule A, s. 1.

[34] Section 4 has already been referred to. It straight-forwardly anticipates that Alberta shall transfer administration and control of PTFN settlement lands to Canada for PTFN reserve creation, and absent commitment to any timeline.

[35] Section 23 deals with land surveys. Sections 27 – 29 deal with third party interests. Sections 36 – 39 address "release terms" as between PTFN and Canada as to, for example subsection 36(a) - "quality or quantity of the land to be set apart by Canada as reserve for PTFN". Schedule A, section 1 is part of a PTFN Council resolution requesting the federal Minister to set apart as reserve the PTFN Settlement Lands pursuant to the said PTFN Treaty Land Agreement.

[36] Most particularly, sections 33 and 34, under the heading, "Setting Apart as Reserve", read:

> 33. Subject to Sections 1 and 5, as soon as practicable after receiving the relevant Band Council Resolutions under sections 9, 10, 12, 13, 25 and 30, or the expiry of any applicable time limits, and upon the transfer of administration and control of any of the PTFN Settlement Lands by Alberta to Canada, and the acceptance of the transfer by Canada, the Minister shall set apart PTFN Settlement Lands as reserve lands for the use and benefit of PTFn subject to the condition that the setting apart of the lands as reserved has been approved by Canada pursuant to its policies respecting reserve lands, in particular the Additions to Reserves Policy, and subject to the condition that the BCN Settlement Agreement has been ratified by the BCN prior to Canada taking any action to set apart lands as reserve for PTFN.
>
> 34. PTFN acknowledges that prior to the transfer of administration and control of the PTFN Settlement Lands to Canada, Alberta will continue to exercise jurisdiction over any PTFN Settlement Lands that have not yet been transferred to Canada and activity related to existing Third Party Interests will continue on those Lands.

[37] These provisions as well say nothing indicative of immediate 2010 reserve creation. To the contrary they contemplate a process, leading to transfer by Alberta to Canada of "administration and control" of PTFN settlement lands, to occur before Canada may "set apart" such lands as reserves.

[38] Furthermore, the above-stated definition of "reserve" in subsection 2(1) of the *Indian Act* requires for a reserve that the pertinent tract of land must have been "set apart by Her Majesty for the use and benefit of a band". That has not happened, according to Ms. Harmonic's un-contradicted testimony, due to still unresolved third party interests in respect of the relevant lands being Areas 1 and 4 of Schedule C.

[39] Alberta has not yet passed over "administration and control" of those lands to Canada, so as to enable federal setting apart to occur. Consequently a key component of the definition of "reserve" has not yet been met – and certainly not met as of Mr. Orr's 2013 taxation year, now nine years ago.

[40] As well, contrary to the "reserve" definition, legal title is not vested in the federal Crown. The appellant puts forward section 36 of the *Indian Act* in responding to this. It reads:

> 36. Where lands have been set apart for the use and benefit of a band and legal title thereto is not vested in Her Majesty, this Act applies as though the lands were a reserve within the meaning of this Act. (Underlining added)

[41] But clearly section 36 operates only where, "lands have been set apart for the use and benefit of a band". And, that is not the case here, as addressed above.

[42] In conclusion the Settlement Agreement of December 2009 does not provide or stipulate that a reserve covering Areas 1 and 4 would be established in 2010. Nor does the PTFN Treaty Land Settlement.

[43] Paragraph 4 of the PTFN Treaty Land Agreement, set out above, clearly states that Alberta is to transfer administration and control of lands specified to be set apart as reserves. But only one anticipated reserve of Schedule C lands has to date been created, being the Peerless Trout 238 reserve (i.e., Area 3), created in 2016. And, that reserve is not relevant to Mr. Orr's appeal insofar as Areas 1 and 4 – but not Area 3 – pertain to the lands proposed for reserve purposes that encompass the Peerless Lake and Trout Lake communities whereat Mr. Orr carried out his employment work in 2013.

[44] Additionally, of course the 2016 creation of the PTFN reserve (Area 3) was well subsequent to Mr. Orr's 2013 taxation year.

[45] In conclusion, it cannot be said that Mr. Orr's 2013 employment income was "situated on a reserve" so as to satisfy paragraph 87(1)(b) of the *Indian Act*, providing for tax exemption, as being "personal property of an Indian…situated on a reserve".

[46] This informal procedure appeal will be dismissed, without costs.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated August 8, 2022, in order to correct the words and figured underscored in paragraph 6 hereof.

Signed at Toronto, Ontario, this 18th day of October 2022.

"B. Russell"

Russell J.

CITATION:	2022 TCC 88
COURT FILE NO.:	2015-1404(IT)I
STYLE OF CAUSE:	ANDREW ORR AND HIS MAJESTY THE KING
PLACE OF HEARING:	Edmonton, Alberta
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APPEARANCES:

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