

2011 CarswellNat 756, 2011 TCC 162

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Davad v. R.

Denise Davad, Gloria Ruby Dreger, Marina Elliott, Gertrude Jacko, Tracey King, Emil Kwandibens, Appellants  
and Her Majesty the Queen, Respondent

Tax Court of Canada [Informal Procedure]

Robert J. Hogan J.

Heard: January 11-12, 2011

Judgment: March 24, 2011

Docket: 2007-2533(IT)I, 2007-1330(IT)I, 2007-1323(IT)I, 2007-964(IT)I, 2007-819(IT)I, 2007-54(IT)I

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Counsel: Scott Robertson, for Appellants

Justin Kutyan, Sara Chaudhary, for Respondent

Subject: Income Tax (Federal); Public; Tax — Miscellaneous

Tax.

Aboriginal law.

***Robert J. Hogan J.:***

1 The Appellants Denise Davad, Gloria Ruby Dreger, Marina Elliott, Gertrude Jacko, Tracey King and Emil Kwandibens, unless otherwise indicated, worked at all relevant times at Miziwe Biik Aboriginal Employment and Training ("Miziwe Biik"), a training and employment placement services centre located in Toronto and providing services to aboriginals<sup>[FN1]</sup> in the Greater Toronto Area ("GTA").

2 From January 8 to May 30, 2008, Emil Kwandibens worked at Aboriginal Legal Services of Toronto ("ALST"), a legal services organization located in Toronto and providing legal services to an aboriginal client base. From July 21 to December 31, 2008, Emil Kwandibens worked at the Ontario Federation of Indian Friendship Centres ("OFIFC") also located in Toronto.

3 The Appellants were not directly employed by Miziwe Biik. This was also the case for Emil Kwandibens while he worked at ALST and OFIFC. Each Appellant had signed an employment agreement with Roger Obonsawin, who carried on a placement business operating under the name of Native Leasing Services ("NLS"). NLS

assigned the Appellants to perform duties for the aforementioned organizations under the direction and control of those organizations' management.

4 The principal issue in these appeals is whether the employment income received by the Appellants from NLS is exempt from income tax. Secondary tax issues were also raised in some of the appeals. Counsel for all parties agreed that the resolution of these secondary issues was entirely dependent on the outcome with regard to the main issue. They presented no arguments on these secondary points. Therefore, the secondary issues will be disposed of in the same manner as the main issue, without specific reasons.

### **Factual Background**

5 Each Appellant is recognized as an "Indian" for the purposes of the *Indian Act*.<sup>[FN2]</sup> They are also all members of a First Nation.

6 The evidence shows that the centre of vital interests of each Appellant was the GTA at all relevant times. That is where the Appellants maintained their principal economic and personal ties. The Appellants, with the exception of Emil Kwandibens, owned or leased real property only in the GTA. Emil Kwandibens' principal place of residence was also Toronto, but he maintained a secondary dwelling on a First Nation reserve, which he used on quarterly visits to the reserve.

7 The evidence also shows that the Appellants maintained some cultural and family ties with band members residing on First Nation reserves. These relationships were maintained through visits to reserves two or three times per year. In the case of Emil Kwandibens, his visits to a First Nation reserve appear to have been more frequent, perhaps as many as six a year. The evidence was, however, imprecise on this particular point.

8 The parties submitted a Statement of Agreed Facts pertaining to NLS and Mr. Obonsawin and their relationship with the Appellants and the First Nations.<sup>[FN3]</sup> A summary of facts substantially identical to the Statement of Agreed Facts was presented and considered in a number of other appeals decided by this Court.<sup>[FN4]</sup> It is therefore pointless for me, in the absence of anything new on the subject, to summarize this evidence insofar as it concerns NLS.

9 The fresh as amended notices of appeal filed by the Appellants describe Miziwe Biik and its activities in the following terms:

Formerly known as the Greater Toronto Aboriginal Management Board, Miziwe Biik Aboriginal Employment and Training was created in 1991 to meet the unique training and employment needs of aboriginal peoples. Miziwe Biik provides the Greater Toronto Area's Aboriginal community with training initiatives and employment services in a supportive environment in which people can affirm their native identities and develop to their full potential. Miziwe Biik counsels Toronto urban native people on careers and paths and opportunities, works with employers to secure employment opportunities and delivers federal and provincial training programs.

Services provided by Miziwe Biik include employment counselling, assistance with cover letter and resume writing, a computer resource centre, referrals to employment supports network, health and other Aboriginal agencies, information about living in Toronto, and information about training, education and wage subsidies.

[Emphasis added.]

10 The evidence shows that this is an accurate description of that organization and the services it offers to aboriginals residing on a permanent or temporary basis in the GTA. The testimonial evidence revealed that Miziwe Biik's clients would often contact it as soon as they arrived in Toronto because it was well known in aboriginal communities that Miziwe Biik was the place where counselling, training and other services could be obtained to facilitate the transition to living and working in the GTA for aboriginals moving there from elsewhere in Canada. The testimonial evidence of Denise Davad reveals that Miziwe Biik provides much more than employment and training services to its aboriginal clients living in the GTA. She testified that Miziwe Biik would provide its clients with assistance in obtaining housing, childcare and a wide range of social and cultural services adapted for delivery to aboriginals living in the GTA.

11 Some of the Appellants testified that the aboriginal clients using Miziwe Biik's services did not always plan to permanently live and work in Toronto. They could return to live on reserves once they acquired work skills that could be put to productive use in their communities. The witnesses could not specify the percentage of Miziwe Biik clients that returned to live on reserves apparently because Miziwe Biik did not keep statistics on this. It was revealed that Miziwe Biik did keep statistics on the success of its placement activities and records of the nature and identity of the employers. These statistics and records were not introduced in evidence by the Appellants. I draw the inference that this information was not provided because it was not helpful to the Appellants' appeals and that substantially all of Miziwe Biik's placements were with employers located off-reserve and principally in the GTA. This inference is consistent with the following vision statement in the Miziwe Biik 2003/04 Annual Report:

#### **Vision Statement**

At Miziwe Biik Aboriginal Employment and Training, we believe that securing a job is crucial to becoming a full participating member of the community. A job is a passport to self-sufficiency. It brings pride, dignity, a better quality of life and hope for the future.

We know that Aboriginal people in Toronto face many barriers when attempting to join the work force. We are committed to breaking down those barriers by providing Native people with access to training programs and employment services, and by entering into partnerships within the Aboriginal community and non-Aboriginal community.[FN5]

[Emphasis added.]

12 It is also consistent with the objects of Miziwe Biik stated in its letters patent as follows:

The objects of the Corporation are as follows:

1. to provide an equitable process for responding to human resource development needs for persons in the Greater Toronto aboriginal community;
2. to assist in achieving self-determination for persons in the Greater Toronto aboriginal community by providing support for human resource recruitment, training, employment, education and community development activities, while maintaining the aboriginal identity of such persons;
3. to ensure that the mechanisms and processes by which the services which the Corporation provides,

or assists in providing, are managed, operated, implemented and arranged through the infrastructures existing within the Greater Toronto aboriginal community;

4. to undertake pro-active measures to improve human resource recruitment, training and employment of members of the Greater Toronto aboriginal community which are available as a result of employment equity initiatives;

5. to determine the needs and priorities of the labour force existing from time to time within the Greater Toronto aboriginal community and to inform persons in the Greater Toronto area in general of such needs and priorities, including workers, business persons, employers and prospective employers by holding discussions and conferences and disseminating information, whether by way of newsletter or otherwise;

6. to assess and approve employment service, labour market operations and related human resource development plans and programs which may exist from time to time for the training and development of persons in the Greater Toronto aboriginal community;

7. to ensure that persons and organizations in the Greater Toronto aboriginal community are aware of the Corporation's application process, priorities, policies, time frames, operations and other relevant information which may be required for the Corporation to be of valuable service to them;

8. to develop and establish appropriate criteria for the provision by the Corporation of financial assistance and other services to qualifying persons and organizations in the Greater Toronto aboriginal community, including workers, business persons, employers and prospective employers;

9. to ensure that the eligibility requirements for programs and services provided by the Corporation reflect the needs of the Greater Toronto aboriginal community;

10. to provide business development services in order to assist aboriginal persons to establish new business ventures;

11. to communicate and liaise with persons in the Greater Toronto area, whether aboriginal or non-aboriginal, and government bodies, commissions, agencies and committees, whether specifically established to assist aboriginal persons or otherwise;

and for such other complementary purposes not inconsistent with these objects.[\[FN6\]](#)

[Emphasis added.]

13 Finally, the inference is not inconsistent with what is shown by the list of Miziwe Biik's community partners,[\[FN7\]](#) which are all recognized to be employers based in the GTA and with which Miziwe Biik arranged subsidized employment training programs for its clients. NLS placed its employees directly with some of these community partners. The appeals of some NLS employees who were placed with these same community partners have been considered by this Court in a number of prior decisions.[\[FN8\]](#)

14 The fresh as amended notice of appeal filed on behalf of Emil Kwandibens describes ALST and its activities as follows:

ALST is a non-profit organization that serves Canada's largest urban Aboriginal community. ALST was established February 21, 1990 to provide Aboriginal individuals equitable treatment in the justice system, access to legal and related resources within the justice system as well as an understanding of the system and their options. ALST's main [purpose] is to strengthen the capability of the citizens of Aboriginal communities to handle legal issues, and offer the community culturally based legal alternatives. They try to create a community that deals with legal issues in a respectful, assertive and constructive way.

ALST provides several programs that assist Aboriginal individuals who come who require legal assistance. These programs include a community legal aid clinic, a Courtworker program and assistance in the Gladue Courts. ALST also provides a Community Council Program, which is a criminal diversion program for Aboriginal offenders — adult and youth — who live in Toronto. The program takes Aboriginal offenders out of the criminal justice system and brings them before members of the Aboriginal community.

15 Testimonial and documentary evidence presented in *Robinson v. The Queen*,<sup>[FN9]</sup> decided by my colleague Rowe D.J., was presented as evidence regarding ALST in these appeals.<sup>[FN10]</sup> Emil Kwandibens also testified on this point, and his testimony confirmed the accuracy of the foregoing description of ALST.

16 The parties produced a Statement of Agreed Facts on OFIFC<sup>[FN11]</sup> and its activities, the salient parts of which read as follows:

### **The Ontario Federation of Indian Friendship Centres**

#### **Incorporation**

1. The Ontario Federation of Indian Friendship Centres ("OFIFC"), formerly called the Federation of Indian Friendship Centres of Ontario, was established on July 9, 1971 under the *Ontario Corporations Act*. It is a not-for-profit private corporation.
2. The OFIFC is a provincial Aboriginal organization representing the collective interests of twenty-nine member Friendship Centres located in towns and cities throughout the province of Ontario.
3. The OFIFC administers a number of programs and services to member Friendship Centres, urban Aboriginal Service providers and a few First Nations in the following areas: employment, justice, children and youth, addictions and mental health, seniors, disabled, diabetes education, culture, recreation, healthy babies, pre-natal, fetal alcohol spectrum disorder, education, training, sensitivity awareness, healing and wellness, government liaison, and policy and research.

[Footnotes omitted.]

17 The fresh as amended notices of appeal filed on behalf of Emil Kwandibens, Denise Davad, Tracey King and Gloria Ruby Dreger describe their duties while they were working at Miziwe Biik as follows:

- client intake and employment counselling; [except Tracey King]
- providing employment counselling to clients, as well as assistance in the identification of their employment and training needs;
- referrals to specific employment opportunities and training programs;

- providing continued counselling to, and follow-up of clients placed in employment training;
- outreach to Native Community;
- facilitating workshops for Employment Skills, Resumes, Interviewing;
- responsible for inputting client information. [except Tracey King]

18 The testimonial evidence of these witnesses confirmed that substantially all of these services and those described in paragraphs 19 and 20 below were performed by the Appellants from Miziwe Biik facilities in the GTA and that these descriptions of their duties are accurate.

19 The fresh as amended notice of appeal filed on behalf of Gertrude Jacko describes her duties as follows:

- publishing bi-weekly employment newsletter: OPPORTUNITIES;
- researching job postings;
- marketing the newsletter;
- networking with other native agencies;
- maintained database of subscribers and mail out.

20 The fresh as amended notice of appeal filed on behalf of Marina Elliott describes her duties as follows:

From 1998 to April 1, 1999 the Appellant performed the duties of an Administrative Assistant. These duties included:

- preparing and typing various correspondence, reports and forms on a timely basis;
- maintaining and updating job boards, resource material, resource library and other public notice boards;
- answering incoming calls and making the appropriate referrals or taking messages;
- receiving, recording and directing to appropriate staff all incoming/outgoing mail, facsimile, couriers, etc.;
- photocopy and collate documents for distribution to staff;
- providing assistance to staff and clients when needed.

Starting April 1, 1999 the Appellant performed the duties of a Finance Administrator. These duties included:

- performing bookkeeping, monthly financial reports, banking, cashflows/budgets;
- maintaining personal records of staff;

- attending board meetings and taking minutes;
- payroll deposits;
- preparing financial reports to funders.

21 In the case of Emil Kwandibens, his duties at ALST and OFIFC are accurately described in the fresh as amended notice of appeal filed on his behalf, as follows:

While placed at ALST the Appellant performed the duties of a Community Council Liaison. The Community Council is a criminal diversion program for Aboriginal offenders — adult and youth — who live in Toronto. The project takes Aboriginal offenders out of the criminal justice system and brings them before members of the Aboriginal community. The duties of a Case Worker include:

- maintaining a case load of clients;
- reviewing Council decisions with each client upon completion of their Community Council hearing;
- providing necessary referrals to appropriate agencies/resources;
- acting as a liaison between referral sources and Community Council Program in order to assist clients successfully comply with Council decisions;
- assisting clients in crisis on an as-needed basis;
- supervising and assisting individual clients with their Community Council work;
- maintaining detailed case files on each client;
- liaising with all other staff persons at ALST on behalf of clients;
- maintaining and assisting the Program Coordinator and Director with the inputting and maintenance of the statistical database;
- maintaining and preparing reports, forms and documents as required;
- attending and facilitating Community Council hearings as needed and directed;
- reporting to the Program Coordinator and Program Director on a daily basis;
- becoming very familiar with the dominant justice system and endeavour to learn on an ongoing basis, the concepts of traditional Aboriginal Justice;
- attending conferences and gatherings and speaking publicly about the Community Council Program;
- assisting Program staff in the planning and hosting of advisory committee meetings, annual retreats and client honouring ceremony.

While placed at OFIFC the Appellant performed the duties of an Aboriginal Sport and Recreation Program Trainer. These duties included:

- promoting a philosophy of Aboriginal culture and community development that encourages healthy lifestyles through sport, recreation, and fitness;
- through consultation with the Friendship Centres' programs, develop an ongoing analysis of the training and educational needs;
- developing an inventory of resources which would assist in responding to the development of the training requirements;
- developing an effective training manual;
- ensuring the effective coordination of Friendship Centres' staff training;
- conducting an evaluation of all completed Program training;
- conducting training sessions with all Friendship Centres;
- participating actively as a member of the OFIFC training team;
- maintaining regular and effective verbal and written communications with the Training Director;
- maintaining current knowledge, skills, attitudes and values regarding new and developing training concepts;
- developing appropriate materials and visual aids to assist in achieving the above;
- maintaining ongoing communications with Native and Non-Native organizations/services, to ensure exchanges, information sharing, etc.

## Analysis

22 Subsection 81(1) of the *Income Tax Act* ("ITA"), insofar as it is relevant to these appeals, reads as follows:

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

(a) an amount that is declared to be exempt from income tax by any other enactment of Parliament, other than an amount received or receivable by an individual that is exempt by virtue of a provision contained in a tax convention or agreement with another country that has the force of law in Canada;

...

23 The statutory exemption claimed by the Appellants in these appeals is set out in paragraph 87(1)(b) of the *Indian Act* as follows:

87(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:



...

(b) the personal property of an Indian or a band situated on a reserve.

24 A determination of whether an Indian's employment income falls within the statutory exemption, in light of the factual findings of the Court, must be based on what has come to be known as the "connecting factors" test or analysis (hereinafter referred to as the "connecting factors test") initially established by the Supreme Court of Canada in *Williams v. Canada*, [1992] 1 S.C.R. 877, and further considered, refined and applied to employment income by the Federal Court of Appeal in the following cases: *Canada v. Folster*, [1997] 3 F.C. 269; *Southwind v. The Queen*, 98 D.T.C. 6084; *Amos et al. v. The Queen*, 98 D.T.C. 1740; *Bell et al. v. The Queen*, 2000 D.T.C. 6365; *Desnomie v. R.*, [2000] 3 C.T.C. 6; *Monias v. R.*, [2001] 3 C.T.C. 244; *The Queen v. Shilling*, 2001 FCA 178; *Canada v. Akiwenzie*, 2003 FCA 469; *Horn v. Canada*, 2008 FCA 352.

25 Counsel for the Appellants indicated at the outset of the hearing that he would not be disputing that the connecting factors test is to be applied for the purposes of section 87 of the *Indian Act*. Nonetheless, the Appellants submit that the section 87 exemption applies when the test is properly applied to their circumstances.

26 Counsel for the Appellants argues that the case law establishes that the connecting factors test is a flexible one that allows different weight to be given to the relevant factors depending on the particular facts and circumstances of the case. I do not dispute this proposition as a general statement only. Counsel further contends that the case law also establishes that the location of the employer is a relevant factor as well. Again, I do not disagree with this proposition as a general statement only.

#### **Location or Residence of the Employer**

27 The Appellants submit that the residence of the employer has been recognized as an important connecting factor in the case law. The suggestion is made that because NLS, the direct employer of the Appellants in the instant cases, is resident on the Six Nations reserve, the Appellants' employment income should be found to be situated on a reserve after proper weight is given to this factor.

28 I agree that the location of the employer is one of the connecting factors that I must weigh in considering the evidence. However, the facts concerning NLS and Mr. Obonsawin submitted in the Statement of Agreed Facts have been reviewed in a number of cases involving appellants living and working in an urban environment in circumstances very similar to those described in the factual background as summarized above.

29 I adopt the observations of my colleague Woods J. in *Hester v. The Queen*, [12] who disposes of the argument as follows:

26 As for facts concerning NLS and Mr. Obonsawin, the parties submitted an agreed statement of facts. Most of the relevant facts have been reviewed in other cases, notably in *Horn*, and it is not necessary for me to review them again here.

27 Based on the evidence before me, the facts in these appeals do not warrant a different outcome than that reached in *Shilling* and *Horn*.

...

29 I would note in particular the following comments of the Federal Court of Appeal in *Shilling*:

[62] In this case, only the location of the employer's head office connects the respondent's employment income to a reserve, and there is no evidence to justify giving this factor the significant weight that the learned Trial Judge attached to it. On the other hand, the location and nature of the employment, which have been held to be generally the most important factors in a connecting factors analysis in employment income cases, as well as the respondent's place of residence, indicate that Ms. Shilling's employment income was situated off-reserve.

[63] The factors connecting the employment income with an off-reserve location outweigh those connecting it with a reserve. Therefore, Ms. Shilling's employment income for 1995 and 1996 is not situated on a reserve and is not exempt from taxation under paragraph 87(1)(b) of the *Indian Act*.

30 The *Horn* decision is also relevant because it filled in some evidentiary gaps regarding NLS that were missing in *Shilling*. Based on the larger evidentiary record concerning NLS, *Horn* concludes that the relationship with NLS is not a strong connecting factor. Reproduced below is a brief excerpt from the trial court decision in *Horn* by Phelan J. (2007 FC 1052, 2007 DTC 5589).

[96] The benefits of NLS to the Six Nations Reserve are not overwhelming but are real. The majority of the administrative staff were members of the Six Nations, some of whom lived on the reserve. NLS paid rent to the reserve as well. However, these expenditures for rent and salary/benefit were modest amounts globally (approximately \$240,000) and only a small percentage of NLS's gross income (approximately 2%).

[97] Therefore, while NLS's location is on the Six Nations Reserve, these other circumstances indicate that this factor is not particularly weighty. It is of almost little weight to Horn as she is not a member of the Six Nations nor does her band at Kahnawake receive any direct benefits from NLS's location on the Six Nations Reserve.

30 Little weight should be given to the location of the employer in the instant appeals because the evidence shows that the employment relationship between the Appellants and NLS was bare minimum. Each Appellant was assigned to work at the organizations mentioned earlier, which were all located in the GTA, under the direction and supervision of those organizations' personnel. Denise Davad confirmed in her testimony that her employment relationship with NLS was terminated in 2006 and that she became a direct employee of Miziwe Biik, with no changes in her duties, functions, benefits or anything else, other than the fact that her employment income was now treated as taxable and Miziwe Biik collected and remitted all statutory payroll deductions.

### **Residence of the Appellants**

31 None of the Appellants lived on a reserve. The centre of their vital interests at all relevant times was the GTA. The Appellants visited their reserves much in the same way that other taxpayers may, on vacations or on statutory holidays, return to the communities where they were born or raised. For example, it is common knowledge, although less true in recent times, that many Newfoundlanders move out West to find employment in the oil and mining industries but return to the communities where family members live to take part in family activities, renew acquaintances and immerse themselves in the communities that form part of their heritage as Newfoundlanders. These Canadians generally reside and pay taxes where they work, although they maintain strong

social and cultural ties with the communities of their birth. The frequency of Emil Kwandibens' visits to a First Nation reserve may have been greater than those of the other Appellants, but this is not sufficient to situate his employment income on the reserve that he visited and on which he had a secondary dwelling made available to him.

### **Nature and Location of and Circumstances Surrounding the Work**

32 Each Appellant reported to work and lived in the GTA. There is little evidence to suggest that the Appellants performed any of their work directly on, or for the benefit of, a reserve. The nature of their work was to provide employment placement, training, legal and other social services to aboriginals living in the GTA. As stated in the *Shilling* case above:

51 ... As the Trial Judge found, merely because the nature of employment is to provide services to Indians does not connect that employment to an Indian reserve as a physical place.

33 The Respondent brought a motion to have Denise Davad's appeal dismissed for the 2006 taxation year on the grounds that she filed her notice of appeal prematurely with this Court. I do not have to decide this preliminary matter because in any event I would dismiss her appeal for that year for the substantive reasons set out above.

34 For these reasons, the appeals of the Appellants are all dismissed without costs.

[FN1](#) Counsel for both parties agreed that the term "aboriginals" is meant to designate people of Inuit, Métis and First Nations heritage.

[FN2](#) R.S.C. 1985, c. I-5.

[FN3](#) Exhibit A-4.

[FN4](#) See for example *Robinson v. The Queen*, [2010 TCC 649](#), and *Hester v. The Queen*, [2010 TCC 647](#).

[FN5](#) Exhibit A-1, Tab 1.

[FN6](#) *Ibid.*, Tab 2.

[FN7](#) Anishnawbe Health Toronto, Aboriginal Legal Services [of] Toronto, Aboriginal Voices Radio, Big Soul Productions, Blue Dawn Consulting, Community Information Toronto, Digital Distance, Evergreen, Native Child and Family Services, Native Men's Residence, Native Canadian Centre of Toronto, Native Women's Resource Centre, Nishnawbe Homes, Toronto Council Fire Cultural Centre (Exhibit A-1, Tab 1).

[FN8](#) See for example *Robinson*, footnote 4 above, and *Hester*, footnote 4 above.

[FN9](#) Footnote 4 above.

[FN10](#) Exhibit A-3.

[FN11](#) Exhibit A-2.

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