

2011 CarswellNat 1995, 2011 TCC 296

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Nahwegahbow v. R.

Barbara Nahwegahbow, Appellant and Her Majesty the Queen, Respondent

Theresa Shilling, Appellant and Her Majesty the Queen, Respondent

Connie Hansenberger, Appellant and Her Majesty the Queen, Respondent

Tax Court of Canada [Informal Procedure]

Lucie Lamarre J.

Heard: February 1, 2011

Judgment: June 9, 2011

Docket: 2007-2806(IT)I, 2007-3098(IT)I, 2007-486(IT)I

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Counsel: Scott Robertson, for Appellants

Laurent Bartleman, for Respondent

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

Tax.

Aboriginal law.

Lucie Lamarre J.:

1 These three appeals were heard one after the other on the same day and the day after the hearing of the appeals of Michele Baptiste (2007-2261(IT)I). All these appeals have in common the fact that the appellants' employer was Native Leasing Services (NLS).

Issue and preliminary remarks of the parties

2 The issue in all the appeals is whether the employment income received by the appellants from NLS in different taxation years is taxable pursuant to sections 2, 3 and 5 of the *Income Tax Act (ITA)*, or whether it is exempt from income tax pursuant to paragraph 81(1)(a) of the ITA. The appellants are of the view that their employment income should be considered as personal property of an Indian situated on a reserve within the mean-

ing of section 87 of the *Indian Act* (IA) and therefore should be exempt from taxation. The appellants rely principally on the Supreme Court of Canada's decision in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, to argue that the *situs* of their employment income was a reserve because the employer's residence was on a reserve.

3 The respondent, on the other hand, argues that these appeals are related to over 1,000 other appeals before the Tax Court of Canada involving workers from the same placement agency, NLS, or its sister company O.I. Employment Leasing Inc. (OI). The issue raised here has been considered by this Court, the Federal Court of Appeal and the Supreme Court of Canada and the law with respect thereto is well settled. In considering whether employment income is situated on a reserve, various connecting factors have to be taken into account, of which the location or residence of the employer is one. Among the others are the nature, location and surrounding circumstances of the work performed by the employee (including the nature of any benefit that accrued to the reserve from that work), and the residence of the employee. The respondent argues that it was held in *Horn v.*, 2008 FCA 352, and *Rachel Shilling v. M.N.R.*, 2001 FCA 178, that the interposition of NLS as the employer does not significantly connect the employment income to a reserve in a manner relevant to section 87 of the IA. The respondent submits that the appellants carried out their income-earning activities in the "commercial mainstream", and did not receive employment income that was situated on a reserve as contemplated by section 87 of the IA.

Relevant legislative provisions

Income Tax Act

81. (1) 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;

Indian Act

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.

[Emphasis added.]

Facts admitted by consent through the production of the Statement of Agreed Facts (Exhibit R-1), of the Agreed Statement of Facts in *Roger Obonsawin v. Her Majesty the Queen* (Exhibit R-1, Tab A), and of the Supplemental Statement of Agreed facts (Exhibit R-2)

4 All the appellants were employed by NLS, a corporation owned and operated by Roger Obonsawin, who is a status Indian for the purposes of the IA. NLS's head office is on the Six Nations of the Grand River Reserve

(*Six Nations*) and is part of a group of companies all owned by Mr. Obonsawin (*OI Group*). Mr. Obonsawin is a member of the Odanak First Nation on the Odanak reserve, but he has never lived on that reserve. The OI Group provides consulting services and employment placement services to employers and employees in Canada's Native communities. NLS was created in 1991 to lease employees, whether status or non-status, to Native organizations. The NLS concept of leasing employees is that they rent out an employee and provide all administration and human resources support services as the employer. The employees get their instructions and direction from the placement organization for which they work and to which they report. NLS is responsible for the payroll, and invoices the placement organization on the basis of employees' time sheets approved by the on-site supervisor. As regards banking, the operating accounts of NLS were off-reserve up until 1996. Thereafter, it had some on-reserve bank accounts. The key functions of the employee-leasing operations were performed on the Six Nations Reserve by an administrative staff numbering from 8 to 15 people, depending on the year. All NLS files were kept at the Six Nations Reserve office. The rent paid to the Six Nations Band Council and the salary and benefits paid to onreserve staff, which constituted the direct benefits to the reserve, were approximately \$230,000 to \$240,000 for the years 1995 and 1996. There were other direct benefits resulting from the training of personnel who lived on the reserve, but those benefits are difficult to quantify. The entire gross revenue of NLS is generated off-reserve. It is estimated that the OI Group had approximately 800 employees by 1997, 1,000 in 1999 and as many as 1,400 in the years between 1999 and 2006. The only functions carried out on-reserve were administrative functions. In 1995 and 1996 respectively, NLS had gross revenue of \$15,692,945 and \$13,344,801, all of which was derived from the work of NLS employees off-reserve. 95% of NLS's costs were the wages and benefits paid to its employees, who were contracted to off-reserve organizations. These costs of employees' pay and benefits are funded by the clients in what is essentially a flow-through whereby the employees' pay and benefits are deposited by the client in NLS's bank account to be drawn down (less the service fee) to fund NLS's payroll for the employees leased to the client. Roger Obonsawin has no financial statements for NLS after 1997 although the business continues to operate.

Barbara Nahwegahbow

5 Barbara Nahwegahbow, a status Indian, is a member of the Whitefish River First Nation in northern Ontario. She moved to Sudbury at about the age of 17 to study Social Services at Cambrian College and then went to Toronto to continue those studies at Humber College, graduating in 1972. Her mother and few siblings still live on the reserve.

6 After her graduation she worked for different provincially or federally funded organizations for Aboriginal people. She was hired by NLS in 1992 to work for Anishnawbe Health Toronto (*AHT*) in downtown Toronto as its executive director. (Exhibit R-3, Volume 1, Tab 2A). Her work entailed little travel to reserves. AHT is a community health centre that is funded by the provincial and federal governments and which focuses on improving the health and well-being of Aboriginal people by providing traditional healing within the framework of a multidisciplinary health care model. AHT provides services to Aboriginal people regardless of the First Nation or reserve to which they belong (Exhibit R-2, Tab 1A). It was the sole organization in the country providing that kind of service. It was only for the years 1995 through 1998 that Ms. Nahwegahbow's employment income was considered as being taxable. It had not been for the previous years. Her role did not change during all the years she was with AHT, but the organization grew. The staff increased as did the number of people receiving services. During the years from 1992 to 1998, the year she left AHT, that organization's operating budget was approximately \$2 million. She worked personally with a healer on the Six Nations Reserve who would receive AHT clients and staff for healing ceremonies. When First Nations people came to Toronto to be treated at AHT, the provincial government financed their travel and their accommodation in a hostel for First Nations people

(Transcript, pp. 7-35).

7 In cross-examination, Ms. Nahwegahbow acknowledged that she was succeeded as the executive director of AHT by Joseph Hester, and she said she imagined that his duties were the same as hers had been (Transcript, p. 35).

Connie Hansenberger

8 Connie Hansenberger is a status Indian and a member of the Mississauga First Nation in Ontario. In 1993, she was hired by NLS to work for Aboriginal Legal Services in downtown Toronto. She signed a contract of employment with NLS (Exhibit R-3, Tab 1A) with the understanding that her employment income was exempt from taxation (Transcript, pp. 44-45). She worked for NLS until 2006. From 1993 till 2003, she provided legal support services as a Native Family Court worker, assisting Aboriginal persons with matters in Family Court. She dealt with a very high volume of people on a daily basis (40,000 Native people in 8 years). A lot of them were fleeing abusive relationships on reserves and came to her for help in obtaining custody orders (Transcript, pp. 46-47). From 2003 to 2006, she performed the duties of a tenant rights advocate, educating the community regarding homelessness and on landlord and tenant issues. From March 2006 till November 2006, NLS contracted her services to Anduhyaun Inc., located in downtown Toronto. This is an organization providing services to aboriginal women and children - regardless of the First Nation or reserve to which they belong - leaving abusive situations; it addresses the basic needs of safety, food and shelter. Ms. Hansenberger was the director of resident support services, and her duties included guiding the activities of the resident support programs and being responsible for the management of those programs. In 2007 and 2008, NLS contracted her services to Nishnawbe Homes Inc., located in downtown Toronto. This is a non-profit organization subsidized by the city, provincial and federal governments; it provides safe, secure housing for the Native homeless and underhoused in Toronto, mainly for students coming from reserves to study in the city, and for low-income people. It develops within its housing units a strong sense of community and support in the context of Native cultural values and encourages an environment free from alcohol and drugs. Nishnawbe does not, however, provide on-reserve housing. Ms. Hansenberger performed the duties of building manager, and was responsible for managing building and program operations, and also for collecting rent.

9 The years at issue for Ms. Hansenberger are 1995, 1999, 2000 through 2006, and 2008. During all those years, Ms. Hansenberger resided in Toronto. She was born of a status-Indian mother and a non-Native father in Sault Ste. Marie, and grew up in North Bay. She went to college in Belleville and attended university in Toronto. She studied social services.

10 In all cases, her services as an employee were provided to Aboriginal people, regardless of the First nation or reserve to which they belonged (Exhibit R-2, Tab 1C).

Theresa Shilling

11 Theresa Shilling is a status Indian and a member of the Chippewas of Rama First Nation located in Rama, Ontario. She was hired by NLS to work for AHT in downtown Toronto for the years 2000 through 2004, and 2006 and 2007 to perform the duties of a traditional counsellor. As such, she provided counselling services in Toronto to Aboriginal people - regardless of the First Nation or reserve to which they belonged - on health issues, on their healing path, and on social issues such as addiction and family violence. Her work was performed in Toronto, except for a few days when she travelled to reserves with clients who attended healing lodges, or when she attended staff retreats or ceremonies (as described in Exhibit R-2, Tab 1B, pp. 3 and 4). During all the

years at issue, she lived in Toronto. Her clients came mostly from Toronto, but some came directly from a First Nation reserve for a session, which lasted an hour.

12 Ms. Shilling was born in Orillia and grew up in the Rama First Nation and Curve Lake First Nation. Both her parents were Natives. She moved to Toronto in 1969 to get away from the reserve (Transcript, p. 68). She went to college in Toronto and in North Bay, and studied in the field of social work. She married a non-Native and had her children in Toronto. Before the years at issue, she worked for Native organizations in Toronto and Peterborough. She signed a contract of employment with NLS in May 2000 (Exhibit R-3, Tab 3A) with the understanding that her employment income would be exempt from taxation (Transcript, pp. 72-73).

Appellants' submissions

13 Counsel for the appellants relied on the same arguments as those made in the Michele Baptiste case (which was heard before me the day before these appeals) with respect to the interpretation of section 87 of the IA. In his arguments, counsel focused on how the connecting factors apply to the three appellants herein.

14 Counsel for the appellants referred to *Williams v. Canada*, [1992] 1 S.C.R. 877 (QL), for guidance when considering the factors to be weighed in determining whether or not income (as personal property of the appellants) is property held by an Indian qua Indian on a reserve. The question is the weight that should be given to each factor in answering the question whether taxing that form of property in that manner would amount to the erosion of the entitlement of the Indian qua Indian to the property. A connecting factor is only relevant insofar as it identifies the location of the property in question for the purposes of the IA (see *Williams*, *supra*, paragraph 35).

15 With respect to the first connecting factor (the residence of the debtor), the employer here is located on-reserve, and the situs of the debtor is often the most important factor when determining whether income is located on-reserve.

16 With respect to the second connecting factor (the benefit conferred on the First Nation), the employer is conferring significant benefits on the reserve community. It employs 8 to 15 members of the Six Nations band on-reserve and the salaries and benefits for the office staff located on the Six Nations reserve totalled almost \$250,000. The OI Group also contributed approximately \$21,000 to the Band Council in rent. Roger Obonsawin's vision in starting the OI Group was to create a network of positions across Canada which could enable First Nations people to get jobs and to increase and improve their skills.

17 With respect to the third connecting factor (the location and surrounding circumstances of the work performed), all three appellants dedicated their work to the service of Aboriginal people. Ms. Nahwegahbow and Ms. Shilling both worked for AHT helping First Nations people off-reserve by developing health programs and counselling services dealing with addiction and other social problems. Ms. Hansenberger provided legal support services to almost 40,000 Aboriginal people. In 2006, she provided assistance to abused women with An-duhyaun, and starting in 2007, she was involved in providing assisted living for First Nations people as the manager of Nishnawbe Homes. There is no doubt that assisting Aboriginal community members with respect to issues of health and family counselling is beneficial to those communities.

18 With respect to the fourth connecting factor (the residence of the appellants), it should be given little weight. The appellants' place of residence does not make much difference here. All of the appellants left their community to go to school or to seek job opportunities.

19 Most of the connecting factors demonstrate that the situs of the employment income was a reserve, and that income should therefore be exempt from taxation.

Respondent's submissions

20 Counsel for the respondent also relied on arguments made before me in the Michele Baptiste case argued before me the day before the hearing of these appeals. He added that the mere fact that a person is a status Indian does not indicate that the person's income is located on-reserve. With respect to the three appellants here, none of them resided on-reserve.

21 While it is true, he argued, that the employer was located on-reserve, the location of the work performed, the nature of the duties and the circumstances surrounding the employment are more important factors.

22 All three employees performed their duties in downtown Toronto. In an earlier case, *Rachel Shilling v. M.N.R.*, 2001 FCA 178, Rachel Shilling (not the same person as the appellant Theresa Shilling in the present case), was working for AHT as acting program director. The court held that her employment income was taxable, and yet she was on her reserve more often than the appellant Theresa Shilling here, who spent 3 to 9 days a year on reserves. In another case, *Hester v. The Queen*, 2010 TCC 647, Mr. Hester worked for AHT in exactly the same position (executive director) as that which Ms. Nahwegahbow had held, and his income was considered taxable by this Court.

23 With respect to the circumstances surrounding the employment, counsel for the respondent argued, AHT's services were provided for the Aboriginal community in Toronto. It was only incidentally that people came directly from reserves to use those services. Further, there is no evidence that the provision of services by the appellants was integral to the life of reserves. The vision of AHT is to seek to establish a strong, independent and self-sufficient Aboriginal community in Toronto (Exhibit R-3, Volume 2, Tab 3B, p. 360). Similarly, AHT provides services to members of the Aboriginal community who are not necessarily status Indians. It is a community health clinic in Toronto offering specialized expertise.

24 Similar facts have been analyzed by this Court in previous cases, argued counsel for the respondent. In *Googoo v. Canada*, 2008 TCC 589, *McIvor v. Canada*, 2009 TCC 469, *Roe v. Canada*, 2008 TCC 667, *Hester v. The Queen*, 2010 TCC 647 and *Robinson v. The Queen*, 2010 TCC 649, in similar circumstances, it was decided that employees of the OI Group were earning taxable employment income even though the Six Nations Reserve was receiving a quarter million dollars worth of benefits.

25 Counsel for the respondent pointed out that it is an agreed fact that there is no evidence that the appellants' home reserves received any direct benefit as a result of their work.

Analysis

26 Both counsel referred to the arguments they had made before me in the Michele Baptiste case, and I will not repeat here my analysis with respect to the application of the connecting factors test for the purpose of determining the location of the employment income. I consider that that analysis applies equally in the present appeals.

27 With respect to Barbara Nahwegahbow and Theresa Shilling, they both worked for AHT. Ms. Nahwegahbow did exactly the same work as executive director of that organization as did Joseph Hester, who suc-

ceeded her after her departure. [The case of Mr. Hester was decided by this Court \(2010 TCC 647\)](#) and I do not believe that the evidence presented before me by Ms. Nahwegahbow warrants a different outcome than that for Mr. Hester. Likewise with respect to Theresa Shilling, I do not think that the result in her appeal should be different than that in *Rachel Shilling, supra*, a case in which Rachel Shilling was also working for AHT in downtown Toronto and held various positions involving the providing of assistance for offreserve Native people in Toronto. Like Rachel Shilling, Theresa Shilling primarily performed her work in Toronto, although she did visit reserves occasionally as part of her duties.

28 Finally with respect to Ms. Hansenberger, she worked for Aboriginal Legal Services in Toronto (*ALST*) during the 1995 to 2006 taxation years. *ALST* is a nonprofit organization that serves the urban Aboriginal community off-reserve. In 2006, she worked for Anduhyaun Inc. in Toronto. That organization provides services to women and children leaving abusive situations, regardless of the First Nation or reserve to which they belong. Finally, Ms. Hansenberger worked in 2007 and 2008 for Nishnawbe Homes. That organization provides safe, secure housing for the Native homeless in Toronto regardless of the First Nation or reserve to which they belong. In all cases, Ms. Hansenberger's work benefited an off-reserve clientele. As was said in the *Rachel Shilling* decision, *supra*, at paragraphs 51-52, "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.... Given the limited purpose of paragraph 87(1)(b) of the IA, the fact that the employment at issue involves providing social services to off-reserve Native people, is no reason for conferring preferred tax treatment under that provision."

29 All three appellants lived in Toronto, worked in Toronto and provided services principally to off-reserve Aboriginal or Native people. I am of the view that, apart from the location of the employer, NLS, the connecting factors, i.e. the location of the work and the nature and circumstances of the employment, including any benefit to a reserve, point to an off-reserve location for the appellants' employment income. The appellants' work was not tied to a specific reserve and there is no basis for concluding that the taxation of the employment income they received from NLS would result in the erosion of their entitlement to property held as Indians qua Indians on a reserve (see *Roe, supra*, and *Robinson, supra*). As indicated in *Desnomie v. The Queen*, [2000 D.T.C. 6250](#) (FCA), at paragraph 10, the question of the erosion of the entitlement of an Indian qua Indian on a reserve has to be determined by reference to the person whose income is involved and not by reference to the different reserves that are benefiting directly or indirectly from the services of this person.

30 I therefore conclude that the employment income of all the appellants is not exempt from taxation pursuant to paragraph 81(1)(a) of the ITA and paragraph 87(1) (b) of the IA. All the appeals are dismissed.

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