



SUPREME COURT OF CANADA

CITATION: Bastien Estate v. Canada, 2011 SCC 38

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BETWEEN:

Estate of Rolland Bastien

Appellant

and

Her Majesty The Queen

Respondent

- and -

Huron-Wendat Nation, Assembly of Manitoba Chiefs,

Grand Council of the Crees (Eeyou Istchee)/Cree

Regional Authority, Assembly of First Nations, Chiefs

of Ontario and Union of Nova Scotia Indians

Intervenors

OFFICIAL ENGLISH TRANSLATION: Reasons of Deschamps J.

CORAM: McLachlin C.J. and Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 65)

Cromwell J. (McLachlin C.J. and Binnie, Fish and Charron JJ. concurring)

CONCURRING REASONS:
(paras. 66 to 111)

Deschamps J. (Rothstein J. concurring)

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BASTIEN ESTATE v. CANADA

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Indexed as: Bastien Estate v. Canada

2011 SCC 38

File No.: 33196.

2010: May 20; 2011: July 22.

Present: McLachlin C.J. and Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Aboriginal law — Taxation — Exemptions — Interest income — Status Indian living on reserve investing income in term deposits with caisse populaire on same reserve — Interest income earned on term deposits paid and deposited in savings account — Whether interest income exempt from income taxation as personal property “situated on a reserve” — Connecting factors approach to determining location of intangible personal property — Whether caisse’s economic activity in “commercial mainstream” off reserve is potentially relevant factor — Indian Act, R.S.C. 1985, c. I-5, s. 87(1)(b).

Taxation — Income tax — Exemptions — Income from property — Interest income earned on term deposits deposited in status Indian’s savings account on reserve — Whether interest income exempt from tax as “personal property of an Indian situated on a reserve” — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 3, 9 — Indian Act, R.S.C. 1985, c. I-5, s. 87(1)(b).

B was a status Indian who belonged to the Huron-Wendat Nation. He was born and died on the Wendake Reserve near Quebec City. From 1970 until 1997, B operated a moccasin manufacturing business on that reserve. He invested some of the income from the operation and sale of his business in term deposits with the Caisse populaire Desjardins du Village Huron. The Caisse has since its founding had its head office, its only place of business and its sole fixed asset on the Wendake Reserve. In 2001, the certificates of deposit paid interest that was deposited in B’s transaction savings account at the Caisse. B considered this income to be property

exempt from taxation under the *Indian Act*. However, in 2003, the Minister of National Revenue made an assessment in which he added the investment income to B's income for the 2001 taxation year. The assessment was confirmed and B's estate appealed unsuccessfully to the Tax Court of Canada and the Federal Court of Appeal. Both courts held that the Caisse generated its revenues in the "economic mainstream", not on the reserve, and therefore that the interest it paid to B was not situated on the reserve.

Held: The appeal should be allowed.

Per McLachlin C.J. and Binnie, Fish, Charron and **Cromwell JJ.**: The phrase "on a reserve" in s. 87 of the *Indian Act* should be interpreted having regard to the substance and the plain and ordinary meaning of the language used. Where, because of its nature or the type of exemption in question, the location of property is not objectively easy to determine, the connecting factors approach set out in *Williams v. Canada*, [1992] 1 S.C.R. 877, must be applied: First, the court identifies potentially relevant factors connecting the intangible personal property to a location. Second, the court analyses these factors purposively in order to assess what weight should be given to them. This analysis considers the purpose of the exemption under the *Indian Act*, the type of property in question and the nature of the taxation of that property. The *Williams* approach applies here, since the location of a transaction — the payment of interest pursuant to a contract — for the purposes of taxation has to be determined.

The purpose of the tax exemption is to preserve Indian property on a reserve. While the relationship between the property and life on the reserve may in some cases be a factor tending to strengthen or weaken the connection between the property and the reserve, the availability of the exemption does not depend on whether the property is integral to the life of the reserve or to the preservation of the traditional Indian way of life. The property in issue here is investment income derived from term deposits, which are a basic investment vehicle evidenced by a certificate of deposit. The investor, as the holder of a certificate of deposit, is not a participant in the equity markets but rather is simply entitled to be paid the agreed-upon rate of interest over the agreed-upon period of time in addition to having the capital returned at the end of that period. This investment income is personal property for the purposes of s. 87 of the *Indian Act*. The contract provides for a right to a sum of money payable under certain conditions. But for the tax exemption, B's interest income earned from term deposits would be income from property to be added to his yearly income pursuant to ss. 3, 9 and 12(1)(c) of the *Income Tax Act*.

The relevant connecting factors identified in *Williams* include: the residence of the debtor, the residence of the person receiving the benefits, the place the benefits are paid, and the location of the employment income which gave rise to the qualification for benefits. General legal rules about the location of property are relevant for the purposes of the *Indian Act*. Thus, provisions and jurisprudence relating to the location of income may prove helpful in deciding whether income is located on a reserve. While these rules cannot be imported from one context into

another without due consideration, they ought to be considered and given appropriate weight in light of the purpose of the exemption, the type of property and the nature of the taxation in issue.

Here, the connecting factors identified in *Williams* are potentially relevant. When they are considered and weighed in light of the purpose of the exemption, the type of property and the nature of the taxation of that property, all point to the reserve as the location of the interest income. The location of the debtor, the Caisse, and the place where payment must be made, both under the contract between B and the Caisse and under art. 1566 of the *Civil Code of Québec*, are clearly on the reserve. The income arises from a contractual obligation which was entered into on the reserve. These connecting factors should weigh heavily in attributing a location to the interest income. Other potentially relevant connecting factors reinforce rather than detract from the conclusion that the interest income is property situated on the reserve. The residence of the payee, B, was on the reserve. As for the source of the capital which was invested to produce the interest income, it too was earned on the reserve.

The fact that the Caisse produced its revenue in the “commercial mainstream” off the reserve is legally irrelevant to the nature of the income it was obliged to pay to B. This is true as to both form and substance. While that factor may have weight with respect to other types of investments, it has been given significantly too much weight by the lower courts with respect to the term deposits in

issue here. B made a simple loan to the Caisse. The Caisse's income-producing actions and contracts after B invested in term deposits cannot be deemed his own and do not diminish the many and clear connections between his interest income and the reserve. The question is the location of B's interest income and not where the financial institution earns the profits to pay its contractual obligation to B. The exemption from taxation protects an Indian's personal property situated on a reserve. Therefore, where the investment vehicle is, as in this case, a contractual debt obligation, the focus should be on the investment activity of the Indian investor and not on that of the debtor financial institution. When one focuses on the connecting factors relevant to the location of B's interest income arising from his contractual relationship with the Caisse, it is apparent that the other commercial activities of the Caisse should have been given no weight in this case. B's investment was in the nature of a debt owed to him by the Caisse and did not make him a participant in those wider commercial markets in which the Caisse itself was active. B's investment income should therefore benefit from the s. 87 *Indian Act* exemption.

Per Deschamps and Rothstein JJ.: The identification of connecting factors for the purposes of the *Indian Act* must be focused on concrete and discernible links between the property and the reserve, regardless of whether the property is tangible or intangible.

In this case, the personal property whose location must be determined is the personal right whose legal existence is provided for in the investment contract,

that is, a right to be paid interest, subject to certain conditions. For the purpose of determining the location of this intangible property, the debtor's place of residence is a factor that can have some weight, but this factor cannot be paramount, since what must be done is not, as might be the case in a private international law context, to determine the place where judicial proceedings should be introduced. The place of payment of the interest is not really relevant for the purpose of determining the place where the property is held, since the taxing provision that governs the tax treatment of interest income — s. 12(4) of the *Income Tax Act* — does not require that interest actually be paid to be included in the taxpayer's income. The fact that the creditor resides on a reserve is relevant. It is to the advantage of Indians living on a reserve to foster the economic development of the reserve, and income spent or invested on a reserve can only contribute to that development. Nevertheless, residence must not be considered a prerequisite for the exemption, since it ceased to be a statutory requirement more than a century ago. The place where the contract was signed does not on its own constitute a sufficiently objective legal basis for determining the location of a right to be paid interest, since it would be open to manipulation and could be artificial. To be compatible with the purpose of the exemption, the choice to sign the contract on a reserve must not have been based simply on obtaining a personal benefit for an Indian whose usual place of business was off the reserve. Lastly, in the case of a right to be paid interest, it is necessary to look beyond the investment contract and consider the source of the invested capital. Where the capital resulted from several different activities, the place where the greatest proportion of

the activities were carried out should serve as a factor by analogy with the paramount location concept used in relation to tangible property.

In this case, the debtor's place of residence, that of the creditor, the place where the contract was signed and the activity that generated the capital that made it possible to enter into the investment contract all favour granting the exemption to B's estate.

There is agreement with the majority that it is not necessary to consider whether the property or the activity that generated it is connected with the traditional Aboriginal way of life. It is also agreed that the activity engaged in by a financial institution to fulfil its monetary obligations in the context of investment contracts providing for the payment of interest is not a valid factor for determining whether personal property held by an Indian is situated on a reserve. However, there is disagreement with the weight attached in the analysis to formal connections that, in certain circumstances, have a tenuous relationship with the reserve. The majority's approach disregards the provision that governs the tax treatment of interest income and is inconsistent with the historical purpose of the exemption.

Cases Cited

By Cromwell J.

Applied: *Williams v. Canada*, [1992] 1 S.C.R. 877; **disapproved:** *Recalma v. Canada* (1998), 158 D.L.R. (4th) 59; **considered:** *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; **referred to:** *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161; *R. v. Lewis*, [1996] 1 S.C.R. 921; *Lewin v. Canada*, 2002 FCA 461, 2003 D.T.C. 5476, aff'g 2001 D.T.C. 479; *Sero v. Canada*, 2004 FCA 6, [2004] 2 F.C.R. 613; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Canada v. Folster*, [1997] 3 F.C. 269; *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915; *Southwind v. Canada* (1998), 156 D.L.R. (4th) 87.

By Deschamps J.

Referred to: *Dubé v. Canada*, 2011 SCC 39, rev'g 2009 FCA 109, 393 N.R. 143, and 2007 TCC 393, 2008 D.T.C. 4022; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Williams v. Canada*, [1992] 1 S.C.R. 877; *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *The Queen v. National Indian Brotherhood*, [1979] 1 F.C. 103; *McDiarmid Lumber Ltd. v. God's Lake First Nation*,

2006 SCC 58, [2006] 2 S.C.R. 846; *Robinson v. The Queen*, 2010 TCC 649, [2011] 2 C.T.C. 2286; *Horn v. Canada*, 2007 FC 1052, [2008] 1 C.T.C. 140, aff'd 2008 FCA 352, 302 D.L.R. (4th) 472; *Shilling v. M.N.R.*, 2001 FCA 178, [2001] 4 F.C. 364; *Canada v. Monias*, 2001 FCA 239, [2002] 1 F.C. 51; *Southwind v. Canada* (1998), 156 D.L.R. (4th) 87; *Large v. The Queen*, 2006 TCC 509, 2006 D.T.C. 3558.

Statutes and Regulations Cited

An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury, S.C. 1850, c. 74, s. 4.

Civil Code of Québec, S.Q. 1991, c. 64, arts. 1440, 1566.

Deposit Insurance Act, R.S.Q., c. A-26.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 3, 9, 12(1)(c), (4), 56, 248(1) "property".

Indian Act, R.S.C. 1985, c. I-5, ss. 87, 89, 90.

Indian Act, S.C. 1951, c. 29, s. 86.

Indian Act, 1876, S.C. 1876, c. 18, ss. 64, 65.

Regulation respecting the application of the Deposit Insurance Act, (1993) 125 G.O.Q. II, 3333, r. 1, s. 1.

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1.

Treaty No 8 (1899).

Trust and Loan Companies Act, S.C. 1991, c. 45.

Authors Cited

- Bartlett, Richard H. "The Indian Act of Canada" (1977-1978), 27 *Buff. L. Rev.* 581.
- Biberdorf, Donald K. "Aboriginal Income and the 'Economic Mainstream'", Canadian Tax Foundation, *Report of Proceedings of the Forty-Ninth Tax Conference*, 25:1. Toronto: The Foundation, 1998.
- Canada. Revenue Canada, Taxation. Interpretation Bulletin No. IT-62, "Paragraph 81(1)(a) (also subparagraph 110(1)(a)(iv) and paragraph 149(1)(c))", August 18, 1972.
- Dockstator, Mark. "The Nowegijick Case: Implications for Indian Tax Planning Strategies", [1985] 4 C.N.L.R. 1.
- L'Heureux, Nicole, Édith Fortin et Marc Lacoursière. *Droit Bancaire*, 4^e éd. Cowansville, Qué.: Yvon Blais, 2004.
- Lord, Guy, et autres. *Les principes de l'imposition au Canada*, 13^e éd. Montréal: Wilson & Lafleur, 2002.
- MacIntosh, Constance. "From Judging Culture to Taxing 'Indians': Tracing the Legal Discourse of the 'Indian Mode of Life'" (2009), 47 *Osgoode Hall L.J.* 399.
- MacLagan, Bill. "Section 87 of the Indian Act: Recent Developments in the Taxation of Investment Income" (2000), 48 *Can. Tax J.* 1503.
- Marshall, Murray. "Business and Investment Income under Section 87 of the *Indian Act: Recalma v. Canada*" (1998), 77 *Can. Bar Rev.* 528.
- McDonnell, Thomas E. "Taxation of an Indian's Investment Income" (2001), 49 *Can. Tax J.* 954.
- O'Brien, Martha. "Income Tax, Investment Income, and the Indian Act: Getting Back on Track" (2002), 50 *Can. Tax J.* 1570.
- Slattery, Brian. "Understanding the Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL from a judgment of the Federal Court of Appeal (Nadon, Blais and Pelletier JJ.A.), 2009 FCA 108, 400 N.R. 349, 2010 D.T.C. 6740, 2010 D.T.C. 5054, [2009] F.C.J. No. 434 (QL), 2009 CarswellNat 5362, affirming a decision of Angers J., 2007 TCC 625, 2008 D.T.C. 4064, [2008] 5 C.T.C. 2533, [2007] T.C.J. No. 541 (QL), 2007 CarswellNat 5406. Appeal allowed.

Michel Beaupré and Michel Jolin, for the appellant.

Pierre Cossette and Bernard Letarte, for the respondent.

Peter W. Hutchins and Lysane Cree, for the intervener the Huron-Wendat Nation.

Jeff D. Pniowsky and Sacha R. Paul, for the intervener the Assembly of Manitoba Chiefs.

John Hurley and François Dandonneau, for the intervener the Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority.

Maxime Faille and Graham Ragan, for the intervener the Assembly of First Nations.

David C. Nahwegahbow and James Hopkins, for the intervener Chiefs of Ontario.

Brian A. Crane, Q.C., and Guy Régimbald, for the intervener the Union of Nova Scotia Indians.

The judgment of McLachlin C.J. and Binnie, Fish, Charron and Cromwell JJ. was delivered by

CROMWELL J. —

I. Overview

[1] Under the *Indian Act*, R.S.C. 1985, c. I-5, the late Rolland Bastien was exempt from taxation with respect to personal property situated on a reserve. He earned interest income on term deposits with an on-reserve caisse populaire, a Quebec savings and credit union. The income is admittedly personal property for the purposes of the tax exemption. At issue is whether this personal property *C* the interest income *C* was situated on a reserve so that the exemption from tax applies to it. The Tax Court of Canada and the Federal Court of Appeal held that the exemption did not apply. They reasoned that the caisse populaire generated its revenues in the “economic mainstream”, not on the reserve, and therefore that the interest it paid to Mr. Bastien was not situated on the reserve. Mr. Bastien’s estate challenges that conclusion.

[2] In my respectful view, the interest income paid to Mr. Bastien was situated on a reserve and was therefore exempt from taxation. One determines the location of intangible personal property such as the interest income in issue in this case by conducting a two-step analysis. First, one identifies potentially relevant factors tending to connect the property to a location and then determines what weight they should be given in identifying the location of the property in light of three considerations: the purpose of the exemption from taxation, the type of property and the nature of the taxation of that property. In this case, virtually every potentially relevant factor connects the interest income to the reserve: Mr. Bastien obtained the certificates of deposit on the reserve and the interest income was payable there; the caisse populaire which issued the certificates of deposit has its only place of business on the reserve. The principal that gave rise to the interest income was earned on the reserve and Mr. Bastien lived there. I would allow the appeal.

II. Facts, Proceedings and Issue

1. Facts

[3] Under the *Indian Act*, the personal property of an Indian situated on a reserve is exempt from taxation. This includes exemption from income taxation: *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at pp. 38–39. The relevant provisions are ss. 87(1)(b) and (2) of the *Indian Act*, as they read at the time the interest income was paid to Mr. Bastien:

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

...

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

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

[4] This exemption from taxation under s. 87 with respect to on-reserve property is part of a larger scheme of protections. Under s. 89, real and personal property of an Indian (or band) situated on a reserve is not subject to attachment or seizure. Thus, the location of the property on the reserve is relevant both to whether it is taxable and to whether it is exigible. The words “situated on a reserve” should be interpreted consistently throughout the Act to mean “within the boundaries of the reserve”: *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161, at para. 13; *R. v. Lewis*, [1996] 1 S.C.R. 921, at pp. 955–58. Under s. 90, certain property is deemed to be situated on a reserve even though it may in fact be physically located elsewhere. The deeming provision applies, speaking generally, to personal property purchased for the use and benefit of Indians (with Indian funds or funds appropriated by Parliament) and to personal property given to Indians under a treaty or agreement with the Crown. There are no other provisions of the *Indian Act* specifying how the location of property is to be determined for the purposes of this protective scheme.

[5] The late Rolland Bastien was a status Indian and belonged to the Huron-Wendat Nation. He was born and died on the Wendake Reserve near Quebec City. His wife and children who succeed him are also Huron and live on the reserve. From 1970 until 1997 when he sold the business to his children, Mr. Bastien operated a moccasin manufacturing business on the Wendake Reserve: Les Industries Bastien enr. He invested some of the income from the operation and sale of his business in term deposits with two caisses populaires situated on Indian reserves, the Caisse populaire Desjardins du Village Huron (the “Caisse”) situated on the Wendake Reserve and the Caisse populaire Desjardins de Pointe-Bleue situated on the Mashteuiatsh Reserve. Only the income from the investments with the Caisse on the Wendake Reserve is in issue on this appeal. The Caisse has since its founding in 1965 had its head office, its only place of business and its sole fixed asset on the reserve (partial agreed statement of facts, A.R., vol. II, at p. 200).

[6] In 2001, Mr. Bastien held certificates of deposit at the Caisse and these investments paid interest that was deposited in a transaction savings account at the Caisse. Mr. Bastien considered this income to be property exempt from taxation. However, in 2003, the Minister of National Revenue made an assessment in which he added the investment income to Mr. Bastien’s income for the 2001 taxation year. The Minister confirmed the assessment and Mr. Bastien’s estate appealed unsuccessfully to the Tax Court and the Federal Court of Appeal.

2. Proceedings

[7] In the Tax Court (2007 TCC 625, 2008 D.T.C. 4064), Angers J. applied the Federal Court of Appeal's decision in *Recalma v. Canada* (1998), 158 D.L.R. (4th) 59. He was of the view that the location of investment income should be analysed by having regard to four factors: its connection to the reserve; whether it benefited the traditional Native way of life; the risk that taxation would erode Native property; and the extent to which the investment income was derived from economic mainstream activity. Angers J. thought that this fourth factor C whether the income was derived from the economic mainstream C was the most important. He found that the Caisse earned its income from activities in the economic mainstream which were not closely connected to the reserve. Consequently, in his view, the investment income was not exempt from taxation.

[8] The Federal Court of Appeal upheld this conclusion (2009 FCA 108, 400 N.R. 349). Nadon J.A. thought that this case was governed by the court's previous decisions in *Recalma*, *Lewin v. Canada*, 2002 FCA 461, 2003 D.T.C. 5476, and *Sero v. Canada*, 2004 FCA 6, [2004] 2 F.C.R. 613. Nadon J.A. highlighted that the most important consideration was whether the investment income C that is, the profit generated from the capital invested in a financial institution C was produced on or off the territory of the reserve. In other words, Nadon J.A. found that if all or part of the funds were invested in the general mainstream of the economy, the taxation exemption could not apply. In his view, that was the case and the appeal should be dismissed.

[9] In concurring reasons, Pelletier J.A. (Blais J.A. concurring) added some comments about the nature of the caisses populaires' business activities. The caisses populaires, he thought, now fully participate in the capital market, at least to the extent that their cash requirements permit or their surplus funds demand. The nature of the capital market itself should be given the most weight in order to determine the location of investment income. That market is not limited to a reserve, a province or even a country.

3. Issue

[10] There is only one question before the Court: Was Mr. Bastien's interest income earned on the term deposits with the Caisse populaire Desjardins du Village Huron exempt from income taxation because it was personal property situated on a reserve?

III. Analysis

[11] The appellant submits that the analyses in the Tax Court and the Federal Court of Appeal were faulty in two related respects. First, they failed to give appropriate weight to the contractual nature of the investment vehicle in determining whether or not it was situated on a reserve. Mr. Bastien contracted with the Caisse on the reserve for a particular rate of return on his investment to be paid to him on the reserve; how the Caisse produced income by dealings with others, the appellant contends, was not relevant to determining the location of Mr. Bastien's investment income. The appellant points to art. 1440 of the *Civil Code of Québec*, S.Q. 1991, c. 64, which provides that a contract has effect only between the contracting parties and

does not generally affect third persons. Second, the appellant submits that the courts below erred by giving determinative weight to the fact that the income was derived from the commercial mainstream; the appellant says that all the relevant factors ought to have been considered and they all favour the reserve as the location of the interest income.

[12] The respondent substantially supports the reasoning of the Federal Court of Appeal. To be exempt from taxation, the interest income must be closely connected to a reserve, that is to say, that the issuer's income-generating activities must be exclusively situated on a reserve. In this case, as the Caisse's income-generating activities were in the commercial mainstream, Mr. Bastien's interest income paid by the Caisse cannot be exempt from taxation. Additionally, the respondent submits that the privity of contract rule should not limit the courts in making factual findings about the location of the issuer's income-generating activities. Nor should the rule imply that the *situs* of the contract is the *situs* of the investment income.

[13] I agree substantially with the appellant. To explain why, I will discuss first, the statutory language of the exemption; second, the analysis that is required to determine the location of property for the purposes of the exemption; and finally, how it applies in this case.

1. The Statutory Language

[14] The exemption from taxation (s. 87(1)(b)) applies to “the personal property of an Indian or a band situated on a reserve”. Courts should interpret the phrase “on a reserve” having due regard to the “substance and the plain and ordinary meaning of the language used rather than to forensic dialectics”: *Nowegijick*, at p. 41; see also *Lewis*, at p. 958; *Union of New Brunswick Indians*, at paras. 13–14; *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, at para. 19. As noted earlier, there is an exemption from both taxation and from seizure (s. 89) with respect to property “situated on a reserve” and that phrase should be given the same construction wherever it is used throughout the *Indian Act*: *Union of New Brunswick Indians*, at para. 13.

[15] The phrase “on a reserve” refers throughout the Act to the property being within the boundaries of the reserve. However, different legal tests are used to determine whether various types of property are so situated for the particular purposes. For example, an issue in the *God’s Lake* case was whether a bank account in an off-reserve bank was exempt from seizure. The Court looked for guidance to the traditional common law rules and the terms of the *Trust and Loan Companies Act*, S.C. 1991, c. 45. These made it clear that the account was located at the branch which was off the reserve: para. 13. However, where the question concerns the location of non-physical property generated by a transaction, such as the payment of benefits, for taxation purposes, a more fact-specific analysis is used which weighs factors potentially relevant to identifying the location of the transaction. An important point, however, is that regardless of the type of property or the difficulty of ascribing to it a

location, the objective must always be to implement the statutory language, and that requires keeping the focus on whether the property is situated on a reserve.

2. Determining the Location of Income

[16] Where, because of its nature or the type of exemption in question, the location of property is not objectively easy to determine, courts must apply the connecting factors approach set out in *Williams v. Canada*, [1992] 1 S.C.R. 877, in order to attribute a location to the property. While this search for location may seem at times to be more the stuff of metaphysics than of law, the attribution of location is what the *Indian Act* provisions require. The difficulty of doing so means that it is not generally possible to apply a simple, standard test to determine the location of intangible property. Gonthier J. recognized this in *Williams*, at p. 891, where he was considering whether unemployment insurance benefits were exempt from taxation under s. 87:

Because the transaction by which a taxpayer receives unemployment insurance benefits is not a physical object, the method by which one might fix its *situs* is not immediately apparent. In one sense, the difficulty is that the transaction has no *situs*. However, in another sense, the problem is that it has too many. There is the *situs* of the debtor, the *situs* of the creditor, the *situs* where the payment is made, the *situs* of the employment which created the qualification for the receipt of income, the *situs* where the payment will be used, and no doubt others. The task is then to identify which of these locations is the relevant one, or which combination of these factors controls the location of the transaction.

[17] As the location of such property will always be notional, there is a risk that attributing a location to it will be arbitrary. An alternative would be to apply consistently a single strict rule, but that solution is not without its limitations. Gonthier J. expressed caution against a single criteria test. Indeed, where one or two factors have a controlling force, there could be manipulation or abuse, and there is cause to worry that such an analysis would miss the purpose of the *Indian Act* exemption: *Williams*, at p. 892.

[18] To address this challenge, Gonthier J. in *Williams* set out a two-step test. At the first step, the court identifies potentially relevant factors connecting the intangible personal property to a location. “A connecting factor is only relevant”, wrote Gonthier J., “in so much as it identifies the location of the property in question for the purposes of the *Indian Act*” (p. 892). Thus, even in this somewhat metaphysical sphere, the focus is clearly on ascribing a physical location to the property in question. Connecting factors mentioned in *Williams* include things such as the residence of the payor and the payee, the place of payment and where the employment giving rise to qualification for the benefit was performed: *Williams*, at p. 893. As Gonthier J. noted, potentially relevant connecting factors have different relevance depending on the categories of property and the types of taxation in issue. So, for example, “connecting factors may have different relevance with regard to unemployment insurance benefits than in respect of employment income, or pension benefits” (p. 892). To take this into account, as well as to ensure that the analysis serves to identify the location of the property for the purposes of the *Indian Act*, at the

second step, the court analyses these factors purposively in order to assess what weight should be given to them. This analysis considers the purpose of the exemption under the *Indian Act*; the type of property in question; and the nature of the taxation of that property (p. 892).

[19] *Williams* thus establishes a clearly structured analysis, but one that turns on careful consideration of the particular circumstances of each case assessed against the purpose of the exemption. As Gonthier J. noted at p. 893, the *Williams* approach “preserves the flexibility of the case by case approach, but within a framework which requires the court to assess the weight which is to be placed on the various connecting factors”. The *Williams* approach applies here because we are dealing with the location of a transaction C the payment of interest pursuant to a contract C for the purposes of taxation.

[20] In this case and others, the Tax Court and the Federal Court of Appeal have developed and applied jurisprudence which adapts the *Williams* analysis to the taxation of interest and other investment income. As this is the first case in this Court since *Williams* to address this issue, it is timely to restate and consolidate the analysis that should be undertaken in applying the s. 87 exemption to interest income. I will therefore review the analysis required by *Williams* in more detail, focusing in turn on the purpose of the exemption, the type of property, the nature of the taxation of that property and the potentially relevant connecting factors.

(i) The Purpose of the Exemption

[21] In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, La Forest J. discussed the purpose of both the tax exemption and the immunity from seizure in the *Indian Act*. With respect to the exemption from taxation, he observed that it serves to “guard against the possibility that one branch of government, through the imposition of taxes, could erode the full measure of the benefits given by that branch of government entrusted with the supervision of Indian affairs” (p. 130). He summed up his discussion of the purpose of the provisions by noting that since the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, “the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians”. He added an important qualification: the purpose of the exemptions is to preserve property reserved for their use, “not to remedy the economically disadvantaged position of Indians by ensuring that [they could] acquire, hold and deal with property in the commercial mainstream on different terms than their fellow citizens”: p. 131. As La Forest J. put it:

These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements. [Emphasis added; p. 133.]

[22] However, La Forest J. was careful to emphasize that even with respect to purely commercial arrangements, the protections from taxation and seizure always apply to property situated on a reserve. As he put it, at p. 139:

... if an Indian band concluded a purely commercial business agreement with a private concern, the protections of ss. 87 and 89 would have no application in respect of the assets acquired pursuant to that agreement, except, of course, if the property was situated on a reserve. It must be remembered that the protections of ss. 87 and 89 will always apply to property situated on a reserve. [Emphasis added.]

[23] The Court returned to the purpose of the exemptions in *Williams*. Gonthier J. confirmed that the purpose of the exemptions “was to preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize” (p. 885). Echoing the limitation described by La Forest J. in *Mitchell*, Gonthier J. added that “the purpose of the sections was not to confer a general economic benefit upon the Indians” (at p. 885) and that “[w]hether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian” (p. 887). In light of this, Gonthier J. held that the purpose of the requirement in s. 87 that the property be “situated on a reserve” is to “determine whether the Indian holds the property in question as part of the entitlement of an Indian *qua* Indian on the reserve” (p. 887). In both *Union of New Brunswick Indians* and *God’s Lake*, the Court confirmed that the purpose of the exemptions was as set out in *Mitchell* and *Williams*.

[24] It will be useful to make two additional points.

[25] The first is that a purposive approach to the application of the exemption provisions must be rooted in the statutory text and does not give the court “license to

ignore the words of the Act ... or otherwise [circumvent] the intention of the legislature” which that text expresses: *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 371. As Professor Sullivan has wisely observed, even when the broad purposes of legislation are clear, “it does not follow that the unqualified pursuit of those purposes will give effect to the legislature’s intention”: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 297; see also *Nowegijick*, at p. 34. A purposive analysis must inform the court’s approach to weighing the connecting factors. But it must be acknowledged that there may not always be a complete correspondence between the meaning of the text and its broad, underlying purpose.

[26] The second and related point concerns the expression “Indian *qua* Indian”. In both *Mitchell* and *Williams*, the Court referred to the purpose of the exemption as protecting property which Indians hold *qua* Indians: *Mitchell*, at p. 131; *Williams*, at p. 887. In some of the subsequent jurisprudence, this has been taken as a basis for importing into the s. 87 analysis the question of whether the income in question benefits the traditional Native way of life. For example, in *Canada v. Folster*, [1997] 3 F.C. 269, the Federal Court of Appeal attributed the significance of this factor to La Forest J. in *Mitchell*, observing that he had “characterized the purpose of the tax exemption provision as, in essence, an effort to preserve the traditional way of life in Indian communities by protecting property held by Indians *qua* Indians on a reserve” (para. 14). In *Recalma*, the Federal Court of Appeal identified as a relevant consideration the question of whether the investment income benefits the traditional Native way of life (para. 11). This factor has been relied on in

cases in the Tax Court and the Federal Court of Appeal since *Recalma*: see, e.g., *Lewin v. Canada*, 2001 D.T.C. 479, at paras. 36 and 63–64.

[27] The reference to rights of an “Indian *qua* Indian” in *Mitchell*, which was repeated in *Williams*, and the linking of the tax exemption to the traditional way of life have been criticized: C. MacIntosh, “From Judging Culture to Taxing ‘Indians’: Tracing the Legal Discourse of the ‘Indian Mode of Life’” (2009), 47 *Osgoode Hall L.J.* 399, at p. 425. However, I do not read either judgment as departing from a focus on the location of the property in question when applying the tax exemption. The exemption provisions must be read in light of their purpose, but not, as Professor MacIntosh puts it, be “let loose from the moorings of their express language” (p. 425). A purposive interpretation goes too far if it substitutes for the inquiry into the location of the property mandated by the statute an assessment of what does or does not constitute an “Indian” way of life on a reserve. I do not read *Mitchell* or *Williams* as mandating that approach.

[28] In my respectful view, *Recalma* and some of the cases following it have gone too far in this direction. The exemption was rooted in the promises made to Indians that they would not be interfered with in their mode of life: see, e.g., R. H. Bartlett, “The Indian Act of Canada” (1977-1978), 27 *Buff. L. Rev.* 581, at pp. 612-13; *Mitchell*, at pp. 135–36. However, a purposive interpretation of the exemption does not require that the evolution of that way of life should be impeded. Rather, the comments in both *Mitchell* and *Williams* in relation to the protection of property

which Indians hold *qua* Indians should be read in relation to the need to establish a connection between the property and the reserve such that it may be said that the property is situated there for the purposes of the *Indian Act*. While the relationship between the property and life on the reserve may in some cases be a factor tending to strengthen or weaken the connection between the property and the reserve, the availability of the exemption does not depend on whether the property is integral to the life of the reserve or to the preservation of the traditional Indian way of life. See M. O'Brien, "Income Tax, Investment Income, and the Indian Act: Getting Back on Track" (2002), 50 *Can. Tax J.* 1570, at pp. 1576 and 1588; B. MacLagan, "Section 87 of the Indian Act: Recent Developments in the Taxation of Investment Income" (2000), 48 *Can. Tax J.* 1503, at p. 1515; M. Marshall, "Business and Investment Income under Section 87 of the *Indian Act: Recalma v. Canada*" (1998), 77 *Can. Bar Rev.* 528, at pp. 536-39; T. E. McDonnell, "Taxation of an Indian's Investment Income" (2001), 49 *Can. Tax J.* 954, at pp. 957-58.

[29] Sharlow J.A. in *Sero* acknowledged that this aspect of *Recalma* may be open to criticism, adding that:

[I]t is not clear to me whether, in determining the *situs* of investment income for purposes of section 87 of the *Indian Act*, it is relevant to consider the extent to which investment income benefits the "traditional Native way of life". This seems to me a difficult test to apply, since it is at least arguable that the "traditional Native way of life" has little or nothing to do with reserves. [para. 25]

[30] I agree with these comments. Section 87 protects the personal property of Indians which is situated on a reserve from taxation. In determining the location of personal property for the purpose of s. 87, there is no requirement that the personal property be integral to the life of the reserve, or that it, in order to be exempted from taxation, must benefit what the court takes to be the traditional Indian way of life.

(ii) The Type of Property

[31] This factor examines the nature of the property in question. The property in issue here is investment income derived from term deposits. As noted, the parties agree that Mr. Bastien's investment income is "personal property" ("*biens meubles*") within the meaning of the s. 87 exemption. However, for the purposes of considering what weight to ascribe to various potentially relevant connecting factors, the nature of the term deposits needs to be considered in more detail.

[32] A term deposit is a basic investment vehicle evidenced by a certificate of deposit. Generally, the investor lends money to a financial institution on condition that he or she can only withdraw the money after the term has ended or forego some or all of the interest if the funds are withdrawn before the end of the term. In return, the financial institution pays a predetermined rate of interest to the investor. Term deposits are similar to savings accounts in that the investor, like the account holder, is a creditor of the financial institution. The investor, as the holder of a certificate of deposit, is not a participant in the equity markets but rather is simply entitled to be paid the agreed-upon rate of interest over the agreed-upon period of time in addition

to having the capital returned at the end of that period. See N. L'Heureux, É. Fortin and M. Lacoursière, *Droit bancaire* (4th ed. 2004), at p. 408.

[33] The term deposits in issue here were “deposits of money” within the meaning of the Quebec *Deposit Insurance Act*, R.S.Q., c. A-26, and the *Regulation respecting the application of the Deposit Insurance Act*, (1993) 125 G.O.Q. II, 3333, r. 1. However, the Regulation excludes from the definition of “deposit of money” funds used to acquire shares in the capital stock of a savings and credit union or shares of a mutual fund (s. 1). This exclusion underlines the point that the holder of the certificate is not participating in the equity markets.

[34] To sum up, this investment income is, for the purposes of s. 87 of the *Indian Act*, personal property. The contract provides for a right to a sum of money payable under certain conditions.

(iii) Nature of Taxation

[35] But for the exemption, Mr. Bastien's interest income earned from term deposits would be included in his income for income tax purposes. I will explain briefly.

[36] Interest income, for taxation purposes, can be income from a business or from property. G. Lord et al. explain the difference:

[TRANSLATION] Thus, income from property is income earned from one or more pieces of property, as opposed to business income, which must

come from an activity related to a profession, calling, trade or manufacture. (G. Lord et al., *Les principes de l'imposition au Canada* (13th ed. 2002), at p. 154)

[37] As Mr. Bastien's interest income was not part of his business activities, it was income from property. The *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), defines "property" as "property of any kind", including "a right of any kind" and, "unless a contrary intention is evident, money": s. 248(1). From the point of view of income taxation, Mr. Bastien exchanged property (the principal sum) for the right to recover the debt (the term deposit) at a later fixed time in order to obtain a sum of money (interest). Income from property must be added to the taxpayer's yearly income pursuant to ss. 3, 9 and 12(1)(c) of the *Income Tax Act*. I do not think that the fact that tax is payable on accrual rather than payment is relevant to the determination of where the investment income is situated.

(iv) Connecting Factors

[38] *Williams* requires the court to identify the connecting factors for the type of property in question: p. 892. Gonthier J. identified several potentially relevant connecting factors including: "the residence of the debtor, the residence of the person receiving the benefits, the place the benefits are paid, and the location of the employment income which gave rise to the qualification for benefits": p. 893. While it is instructive to review the various connecting factors considered in that case, one must bear in mind that the factors relevant to the receipt of unemployment insurance benefits which were in issue there are not necessarily those relevant to receipt of

interest income. The type of property is important in identifying the relevant connecting factors.

[39] Gonthier J. turned first to the “traditional test” (p. 893), the residence of the debtor, which had been applied in *Nowegijick*, at p. 34. However, given that the debtor in *Williams* was the federal Crown and that there were special considerations in determining the location of the Crown, he concluded that the residence of the debtor was a factor entitled to limited weight in the context of unemployment insurance benefits: p. 894. For the same reasons, he found that the place of payment was also of limited weight. Other potentially relevant factors considered were the residence of the recipient and where the employment income, which was the basis of the qualification for the benefits paid, had been earned: p. 894. Noting that unemployment insurance benefits are based on premiums arising out of previous employment, Gonthier J. observed that “the connection between the previous employment and the benefits is a strong one” (p. 896). He thought that the tax treatment of premiums and benefits reinforced the strength of this connection: p. 896. Given the strength of this connecting factor, Gonthier J. concluded that the place of residence of the recipient at the time of receipt would only be significant if it pointed to a location different from that of the qualifying employment. Importantly, he also concluded that given the many links between the employment income and the reserve, the employment income giving rise to the benefits was clearly on the reserve on any test: “[t]he employer was located on the reserve, the work was performed on the reserve, the appellant resided on the reserve and he was paid on the reserve” (p.

897). Gonthier J. was also careful to note that he was not attempting to develop a test for the *situs* of the receipt of employment income or to determine the relevance to the analysis of the benefit recipient's place of residence at the time of receipt: pp. 897-98.

[40] Gonthier J. rejected resolving the location of the unemployment insurance benefits by simply applying conflict of laws principles about the location of a debt. He noted that the purposes of conflict of laws principles have little or nothing in common with the purpose underlying the *Indian Act* tax exemption and that the location of property for tax exemption purposes should be considered according to the purposes of the *Indian Act*, not the purposes of the conflict of laws: p. 891. However, as Gonthier J. acknowledged and later cases have confirmed, this does not make irrelevant for *Indian Act* purposes the whole body of existing law about the location of various types of property. While Gonthier J. in *Williams* declined to adopt the residence of the debtor as the governing factor simply because that is the applicable conflict of laws rule, he noted that it may remain an important connecting factor, or even an exclusive one, provided that the weight assigned to it is determined in light of the purpose of the *Indian Act* tax exemption, the type of property and the nature of the taxation in issue.

[41] Other cases illustrate the ongoing relevance to the *Indian Act* tax exemption of general legal principles about the location of property. In *Union of New Brunswick Indians*, the question was whether Indians living in New Brunswick were

exempt from sales tax on purchases, made off the reserve, of goods to be used on the reserve. A majority of the Court applied the rule that tax is paid at the point of sale and concluded that the tax was not in respect of property situated on a reserve. Similarly in *God's Lake*, in the context of interpreting the exemption from seizure of property situated on a reserve, the Court applied traditional common law principles and statutory provisions to determine that funds in an off-reserve bank account were not situated on the reserve. The Court was careful to distinguish taxation transactions where the location is objectively difficult to determine from cases in which the issue is simply where a potentially exigible asset is located: para. 18. However, it is important to note that the rule about the location of a bank account is not a conflict of laws principle, but a generally applicable legal rule which, in that case, was included in a statute. Of course, a different legal test is used to determine the location of a bank account for the purposes of protection from seizure and the location of a transaction, such as the payment of interest, for the purposes of taxation. However, it would be hard to justify the conclusion, for example, that a bank account was situated on a reserve for the purposes of exemption from seizure but that a contractual obligation entered into on the reserve to pay interest there on that same account was not on the reserve for the purposes of exemption from taxation.

[42] These cases underline the point that general legal rules about the location of property are relevant for the purposes of the *Indian Act*. Thus, provisions and jurisprudence relating to the location of income may prove helpful in deciding whether income is located on a reserve: see O'Brien, at pp. 1589-91. While these

rules cannot be imported from one context into another without due consideration, they ought to be considered and given appropriate weight in light of the purpose of the exemption, the type of property and the nature of the taxation in issue.

(v) Applying the *Williams* Analysis to Mr. Bastien's Interest Income

[43] In my view, the connecting factors identified in *Williams* are potentially relevant here. When they are considered and weighed in light of the purpose of the exemption, the type of property and the nature of the taxation of that property, all point to the reserve as the location of the interest income in this case.

[44] I turn first to the location of the debtor, a factor traditionally relied on to determine the location of the obligation to pay. Here the debtor is the Caisse whose head office and only place of business as well as its only fixed asset is located on the Wendake Reserve. The income *C* interest agreed to be paid by the Caisse to Mr. Bastien *C* arises from a contractual obligation between the taxpayer and the Caisse which was entered into on the reserve. By virtue of the contract, the income was to be paid (and was paid) by the Caisse by depositing it into the taxpayer's account on the reserve: see art. 1566 of the *Civil Code of Québec*. Thus, the location of the debtor and the place where payment must be made are clearly on the reserve. Unlike the situation facing the Court in *Williams*, where reliance on the location of the debtor involved the complex question of the location of the federal Crown, there is no such complication here. The Caisse's only place of business is on the reserve and its obligation, both under the contract and the *Civil Code*, was to pay on the reserve. As

noted earlier, the Court in *God's Lake* applied generally applicable legal rules about the location of a bank account for the purposes of the exemption from seizure and while the fact that it applied these rules is not dispositive of the question of the location of the interest income in issue here, it tends to reinforce the conclusion that the interest income is located on the reserve in this case. While the provisions relied on by the Court in *God's Lake* do not apply here because they relate to banks and not to caisses populaires, both the contract between the parties and the provisions of art. 1566 of the *Civil Code* provide that payment of the interest income is to be made on the reserve.

[45] Having regard to the purpose of the exemption, the type of property and the nature of the taxation of that property, the connecting factors of the location of the debtor, the place where the legal obligation to pay must be performed and the location of the term deposits giving rise to the income should in my view be given significant weight in the circumstances of this case. As noted, the property flows from a contractual obligation which, both under the contract and the terms of the *Civil Code* (art. 1566), is to be performed on the reserve. The deposits themselves and the account into which the interest on them is paid are on the reserve. The debtor's only place of business is on the reserve. Thus, the type of property supports the view that the connecting factors of the place of contracting, the place of performance and the residence of the debtor should weigh heavily in attributing a location to the interest income. The nature of the taxation *C* the income is income from property *C*

reinforces this view. And so does the purpose of the exemption, which is to preserve Indian property on a reserve.

[46] The analysis must also take account of other potentially relevant connecting factors. Here, those factors reinforce rather than detract from the conclusion that the interest income is property situated on the reserve.

[47] Consider the residence of the payee, Mr. Bastien. That of course was on the reserve. As for the source of the capital which was invested to produce the interest income, it too was earned on the reserve. There is some parallel with *Williams* in this regard. In *Williams*, the employment income which gave rise to the entitlement to unemployment insurance benefits had been earned on the reserve. Gonthier J. noted that the connection between the benefits and the qualifying employment was strong because the benefits are based on premiums arising from the previous employment: p. 896. In this case, while the interest income was derived from the loan to the Caisse, it was Mr. Bastien's business income, generated on the reserve and not assessed by the Minister, which produced the capital which in turn was invested to produce that income. These other potentially relevant connecting factors do not point to any other location than the reserve and tend to strengthen rather than undermine the connection between the investment income and the reserve.

[48] The Tax Court and the Federal Court of Appeal attached great weight to the fact that the Caisse's income-generating activities were in general commercial markets off the reserve. While that factor may have weight with respect to other

types of investments, it has been given significantly too much weight with respect to the term deposits in issue here. I agree with the following comments by MacLagan, at pp. 1516-17:

In the case of a fixed-income security, there is legally no further income-generating activity of anyone that needs to take place beyond that which takes place when a taxpayer purchases the securities. ... The mere step of acquiring a fixed-income investment generates the right to receive a certain fixed amount of income. The income-generating activity that matters is the generation of the original capital and the acquisition of the securities. Of course, the issuer has to pay the income to the investor, but this might be paid out of capital, other borrowings, or unrelated earnings [Emphasis added.]

[49] The general legal principles concerning privity of contract reinforce this view. The majority of the Court in *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915, at para. 31, noted that the *Income Tax Act* does not operate in a vacuum but rather relies implicitly on the general law, especially the law of contract and property. The same, in my view, may be said of the exemption provisions in the *Indian Act*.

[50] I turn therefore to the general law relating to privity of contract. The rule is set out in art. 1440 of the *Civil Code of Québec* which provides:

1440. A contract has effect only between the contracting parties; it does not affect third persons, except where provided by law.

[51] Mr. Bastien made a simple loan to the on-reserve Caisse. The Caisse's income-producing actions and contracts after Mr. Bastien invested in term deposits cannot be deemed his own and do not diminish the many and clear connections between his interest income and the reserve. Consequently, the potentially relevant factor of the location of the issuer's income-generating activities is of no importance in this case.

[52] In my respectful view, the *Recalma* line of cases has sometimes wrongly elevated the "commercial mainstream" consideration to one of determinant weight. More precisely, several decisions have looked to whether the debtor's economic activity was in the commercial mainstream even though the investment income payable to the Indian taxpayer was not. This consideration must be applied with care lest it significantly undermine the exemption.

[53] The expression "commercial mainstream" was used in *Mitchell*. In one context, the expression was used to emphasize the distinction between property that is held pursuant to treaty or agreement from property that is not. This distinction is important for the purposes of s. 90 of the *Indian Act*, which deems certain personal property to be on a reserve for the purposes of the tax exemptions. La Forest J.'s reasons in *Mitchell* distinguish between property that is deemed by s. 90 to be on a reserve *C* that is, property purchased with Indian funds or money appropriated by Parliament for the benefit of Indians, or property given to Indians under a treaty or agreement *C* from property otherwise acquired and therefore not deemed to be on the

reserve. Thus, the expression “commercial mainstream” in this context was not a factor to identify the location of property, but a consideration to help identify property which, although actually located elsewhere, was deemed by s. 90 to be located on a reserve. La Forest J. explained (at p. 138):

When Indian bands enter the commercial mainstream, it is to be expected that they will have occasion, from time to time, to enter into purely commercial agreements with the provincial Crowns in the same way as with private interests. ... Indians have a plenary entitlement to their treaty property; it is owed to them *qua* Indians. Personal property acquired by Indians in normal business dealings is clearly different; it is simply property anyone else might have acquired, and I can see no reason why in those circumstances Indians should not be treated in the same way as other people.

There can be no doubt, on a reading of s. 90(1)(b) [i.e. personal property given to Indians under a treaty or agreement], that it would not apply to any personal property that an Indian band might acquire in connection with an ordinary commercial agreement with a private concern. Property of that nature will only be protected once it can be established that it is situated on a reserve. Accordingly, any dealings in the commercial mainstream in property acquired in this manner will fall to be regulated by the laws of general application. [Emphasis added.]

(See also O’Brien, at p. 1576; D. K. Biberdorf, “Aboriginal Income and the ‘Economic Mainstream’” in Canadian Tax Foundation, *Report of Proceedings of the Forty-Ninth Tax Conference* (1998), 25:1-23, at pp. 25:8-25:9; MacLagan, pp. 1507-8.)

[54] As I mentioned earlier, La Forest J. in *Mitchell* also noted that the purpose of the legislation is not to permit Indians to “acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens”:

p. 131. However, he was clear that, even if an Indian acquired an asset through a purely commercial business agreement with a private concern, the exemption would nonetheless apply if the asset were situated on a reserve. As he emphasized, “[i]t must be remembered that the protections of ss. 87 and 89 will always apply to property situated on a reserve”: p. 139.

[55] The “commercial mainstream” was an important factor in the reasoning of the Federal Court of Appeal in *Folster*. Mrs. Folster challenged the assessment that her employment income was not tax exempt. She lived on a reserve and worked as a nurse in a hospital adjacent to the reserve which was funded by the federal government for the benefit of Indians. Most patients served were Aboriginal and the hospital had once been located on reserve, but had since been relocated. Linden J.A. held:

Where, therefore, an Aboriginal person chooses to enter Canada’s so-called “commercial mainstream”, there is no legislative basis for exempting that person from income tax on his or her employment income. Hence, the requirement that the personal property be “situated on a reserve”. The *situs* principle provides an internal limit to the scope of the tax exemption provision by tying eligibility for the exemption to Indian property connected with reserve land. Thus, as will be seen, where an Indian person’s employment duties are an integral part of a reserve, there is a legitimate basis for application of the tax exemption provision to the income derived from performance of those duties. [Emphasis added; para.14.]

[56] This paragraph is problematic because it might be taken as setting up a false opposition between “commercial mainstream” activities and activities on a reserve. Linden J.A. in *Folster* was alive to this danger when he observed that the use

of the term “commercial mainstream” might “... imply, incorrectly, that trade and commerce is somehow foreign to the First Nations” (para. 14, note 27). He was also careful to observe in *Recalma* that the “commercial mainstream” consideration was not a separate test for the determination of the *situs* of investment property, but an “aid” to be taken into consideration in the analysis of the question (para. 9). Notwithstanding this wise counsel, the “commercial mainstream” consideration has sometimes become a determinative test. So, for example, in *Southwind v. Canada* (1998), 156 D.L.R. (4th) 87 (F.C.A.), the court observed that the term “commercial mainstream”

... seeks to differentiate those Native business activities that deal with people mainly off the Reserve, not on it. It seeks to isolate those business activities that benefit the individual Native rather than his community as a whole. [para. 14]

[57] Similarly, in *Lewin*, Tardif J. made the following statement which was upheld by the Federal Court of Appeal:

Thus, the income of the reserve’s credit union was derived mainly from off-reserve economic activities, including mortgage loans, personal loans, investments with the Fédération des caisses populaires and purchases of municipal bonds.

If it had been a financial institution created solely for the purposes, concerns and needs of the Indians living on the reserve and if the bulk of its income had primarily been reinvested on the reserve to strengthen, develop and improve the social, cultural and economic well-being of the Indians living there, the situation could have been different. [paras. 35-36]

[58] Then in *Sero*, Sharlow J.A. wrote:

The Royal Bank operates in the “commercial mainstream”, to use the phrase from *Mitchell v. Peguis Indian Band*. The source of the interest income earned by Ms. Sero and Mr. Frazer is found in that commercial mainstream, and not on a reserve. I can discern no relevant factual distinction between these cases and *Recalma* and *Lewin*. [para. 22]

[59] The same is true for the decision under appeal. The Tax Court judge concluded:

In the case at bar, it is true that the Reserve was the late Rolland Bastien's place of residence, the source of the capital, the location of the Caisse populaire, the place where the investment income, or a good part of it was used, the location of the investment vehicle, and the place where the investment income was paid. However, these are factors of lesser importance in determining the *situs* of investment income, as for that purpose the emphasis is mainly on the connection between the investment income and the reserve and the extent to which that income can be considered as being derived from an economic mainstream activity. [para. 37]

The Federal Court of Appeal upheld this conclusion: para. 39.

[60] I do not agree that the “commercial mainstream” factor should be given determinative weight in this case. The question is the location of Mr. Bastien's interest income. As I have discussed earlier, the question is not where the financial institution earns the profits to pay its contractual obligation to Mr. Bastien. Yet the focus of the “commercial mainstream” analysis in the courts below led them to concentrate the analysis on the Caisse's income-earning activities rather than on Mr.

Bastien's. The exemption from taxation protects an Indian's personal property situated on a reserve. Therefore, where the investment vehicle is, as in this case, a contractual debt obligation, the focus should be on the investment activity of the Indian investor and not on that of the debtor financial institution: see McDonnell, at p. 957; MacLagan, at p. 1522; O'Brien, at pp. 1576 and 1580.

[61] When one focuses, as required by *Williams*, on the connecting factors relevant to the location of Mr. Bastien's interest income arising from his contractual relationship with the Caisse, it is apparent that the other commercial activities of the Caisse should have been given no weight in this case. Mr. Bastien's investment was in the nature of a debt owed to him by the Caisse and did not make him a participant in those wider commercial markets in which the Caisse itself was active.

[62] Of course, in determining the location of income for the purposes of the tax exemption, the court should look to the substance as well as to the form of the transaction giving rise to the income. The question is whether the income is sufficiently strongly connected to the reserve that it may be said to be situated there. Connections that are artificial or abusive should not be given weight in the analysis. For example, if in substance the investment income arises from an Indian's off-reserve investment activities, that will be a significant factor suggesting that less weight should be given to the legal form of the investment vehicle. There is nothing of that nature present in this case. Cases of improper manipulation by Indian

taxpayers to avoid income tax may be addressed as they are in the case of non-Indian taxpayers.

[63] Applying the exemption of interest income in this case is broadly consistent with the purpose of preserving Indian property situated on the reserve. It provides an investment option protected from taxation for Mr. Bastien's property while preserving it against possible seizure.

4. *Conclusion*

[64] All potentially relevant factors in this case connect the investment income to the reserve. In the circumstances of this case, the fact that the Caisse produced its revenue in the "commercial mainstream" off the reserve is legally irrelevant to the nature of the income it was obliged to pay to Mr. Bastien. This is true as to both form and substance. Mr. Bastien's investment income should therefore benefit from the s. 87 *Indian Act* exemption.

IV. *Disposition*

[65] I would allow the appeal with costs throughout.

English version of the reasons of Deschamps and Rothstein JJ. delivered by

DESCHAMPS J. —

[66] Before Confederation, the Crown promised not to tax lands and personal property of Indians situated on reserves. The current *Indian Act*, R.S.C. 1985, c. I-5, includes a provision to that effect. The courts have considered several aspects of this exemption. This Court has now been asked to decide two cases in which Indians argue that property belonging to them is situated on a reserve and consequently exempt from taxation (see also *Dubé v. Canada*, 2011 SCC 39, released concurrently). For the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the property in question is a right provided for in an investment contract, that is, a right to be paid interest. Under s. 12(4) of the *Income Tax Act*, interest accrued in a taxation year must be included in computing the taxpayer's income. The notices of assessment in these two cases resulted from the application of that provision.

[67] Intangible property, such as a right provided for in a contract, has no actual substance and cannot, strictly speaking, be physically situated in a place. The legal characterization exercise required by the *Indian Act* is therefore to attribute a location to the property in question. Since this exercise is required by statute but has no physical basis, the location is a pure legal fiction. This is not the first time that the issue of the location of intangible property for the purposes of the *Indian Act* has been considered. The fact that it has not been settled yet shows how hard it is to develop a test that is consistent with the purpose of the exemption and is also consistent with a liberal interpretation of the *Indian Act*. The two cases now before the Court involve facts that are so different that they highlight how risky it would be to adopt a test that focuses on formal factors and under which the circumstances of the liability for tax or

the eligibility for the exemption are not taken into account. With all due respect, I find that the analysis proposed by my colleague Cromwell J. gives too much weight to connecting factors that may in some circumstances be artificial, and that it essentially makes a single factor — the debtor's place of residence — determinative. In my view, this analysis is compatible with neither the context nor the purpose of the exemption.

[68] It will be helpful to reproduce the relevant passages from the provisions that protect the property of Indians, and more specifically those according to which personal and real property of Indians that is or is deemed to be situated on a reserve is exempt from taxation or is not subject to seizure. These passages from the *Indian Act* read as follows:

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, . . . 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.

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

90. (1) For the purposes of sections 87 and 89, personal property that was

- (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
- (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

[69] The scope of the protection from taxation afforded to Aboriginal people has varied over time. The original statutory protection, which dates back to 1850, extended to Indian lands and to any Indians residing on such lands (*An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S.C. 1850, c. 74, s. 4). That protection was altered by the *Indian Act, 1876*, S.C. 1876, c. 18 (ss. 64 and 65), which provided that the exemption would from then on apply to personal and real property belonging to Indians, but it no longer required that the Indians themselves reside on a reserve. This important aspect was provided for once again in 1951 when the *Indian Act*, S.C. 1951, c. 29, s. 86 (now s. 87), was passed.

[70] This exceptional protection from taxation was linked to the Crown's fiduciary duty to protect the lands of Aboriginal peoples after the latter had renounced the use of force against non-Aboriginal people. The *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1, provided: "it is just and reasonable, and essential to our Interest and the Security of our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds" (see also B. Slaterry, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753, and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 131). This undertaking by the Crown was also repeated in certain treaties under which Aboriginal peoples surrendered lands: "We

assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax” (*Treaty No. 8* (1899), quoted in R. H. Bartlett, “The Indian Act of Canada” (1977-1978), 27 *Buff. L. Rev.* 581, at p. 613).

[71] In *Mitchell*, La Forest J., who based his analysis on the origins and the historical evolution of the exemption, summarized the Crown’s undertaking as set out in ss. 87 and 89 of the *Indian Act* as follows: “the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base” (*Mitchell*, at p. 131 (emphasis added)). The purpose of the exemption was reformulated — as follows — in *Williams v. Canada*, [1992] 1 S.C.R. 877 (at p. 885), and the new formulation was reproduced in *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161 (at para. 8):

The purpose of the s. 87 exemption was to “preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize”. It “was not to confer a general economic benefit upon the Indians”.

[72] A modern view of relations between the Crown and Aboriginal people would suggest that the Court should base the exemption, to repeat the expression used by La Forest J. in *Mitchell*, on the honour of the Crown and on the Crown’s duty to respect the ability of Aboriginal people to manage the economic development of their reserves. Indeed, this philosophy pervaded *Union of New Brunswick Indians*, as is

clear in particular from the following comment by the Chief Justice: “The fact that the exemption is closely tied to the reserve enhances reserve-linked benefits, promotes privatization of reservation economies and encourages an entrepreneurial spirit” (para. 44).

[73] The requirement that the property be or be deemed to be situated on a reserve is related to the purpose of the exemption. From a historical perspective, the reserve was a place reserved to unemancipated Aboriginal people, a place where they resided and owned their property, and a place where the Crown had promised to protect them. The emphasis placed on the requirement in question helps not only to determine whether a decision is consistent with the purpose of the exemption, but also to define the corollary to the requirement: what the exemption provided for in ss. 87 and 89 does not cover. La Forest J. discussed this very point in *Mitchell*:

The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians. [p. 131]

[74] This discussion of the interpretive approach to and the purpose of the exemption will help in identifying the factors that can be applied to determine the location of a right to be paid interest.

[75] For many years, although its official position was that intangible property was not exempt from taxation for the purposes of s. 87(1) of the *Indian Act*, the Department of National Revenue nevertheless extended the exemption to certain types of intangible property by applying criteria based on categories. For example, the location of employment income was where the services were performed — for a teacher it was the location of the school, for an office employee it was the location of the office, and so on (see Interpretation Bulletin No. IT-62 of Revenue Canada, Taxation (1972); see also M. Dockstator, “The Nowegijick Case: Implications for Indian Tax Planning Strategies”, [1985] 4 C.N.L.R. 1, at p. 14).

[76] In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, the Court confirmed that the exemption applies to intangible property. In the case of employment income, it adopted the debtor’s place of residence as a criterion by referring to the principles of private international law and to the judgment of Thurlow A.C.J. in *The Queen v. National Indian Brotherhood*, [1979] 1 F.C. 103 (T.D.). Thurlow A.C.J. had made the following comment (at p. 109):

A chose in action such as the right to a salary in fact has no situs. But where for some purpose the law has found it necessary to attribute a situs, in the absence of anything in the contract or elsewhere to indicate the contrary, the situs of a simple contract debt has been held to be the residence or place where the debtor is found. See Cheshire, *Private International Law*, seventh edition, pp. 420 *et seq.*

[77] However, the criterion of the debtor’s place of residence has not been adopted for all types of intangible property. In *Mitchell*, after reviewing the case law

with respect to tangible property and noting that where property is not kept permanently on a reserve, the paramount location of the property must be determined, La Forest J. held that for the purposes of ss. 87 and 89 of the *Indian Act*, a discernible nexus must be found between the property in question and the occupancy of the reserve (*Mitchell*, at p. 133).

[78] The discernible nexus test is a flexible one. It can be used for both tangible and intangible property. And it is the discernible nexus test that emerges from the analysis of the location of the property in *Mitchell*. La Forest J. referred to the property — electricity delivered on a reserve — on which the tax itself was based rather than to the debtor's place of residence, which would have corresponded to the test adopted in *Nowegijick* (*Mitchell*, at p. 147) and would have resulted in denial of the exemption.

[79] In *Williams*, the exemption would have been denied had the criterion of the debtor's place of residence adopted in *Nowegijick* been applied: the debtor was the federal government. But Mr. Williams argued that a rationale based on the principle applied in the context of the conflict of laws was not legally satisfactory and that *National Indian Brotherhood* and *Nowegijick* had left open the possibility of considering other factors. His arguments were accepted. The Court noted that the reason a debt is associated with the debtor's place of residence in the conflict of laws is that that is where the debt can normally be enforced, but that the purposes of the

conflict of laws in fact have little or nothing in common with those of the *Indian Act*.

More specifically, Gonthier J. wrote the following (*Williams*, at p. 891):

It is simply not apparent how the place where a debt may normally be enforced has any relevance to the question whether to tax the receipt of the payment of that debt would amount to the erosion of the entitlements of an Indian *qua* Indian on a reserve. The test for *situs* under the *Indian Act* must be constructed according to its purposes, not the purposes of the conflict of laws.

[80] The Court showed that it was aware of the desirability of developing criteria that are predictable in their application, and also of avoiding abstract connecting factors that are divorced from the purpose of the exemption. In Gonthier J.'s words, "[a] connecting factor is only relevant in so much as it identifies the location of the property in question for the purposes of the *Indian Act*. In particular categories of cases, therefore, one connecting factor may have much more weight than another" (p. 892). The Court warned that a test focused on too few factors — or on too many — might be open to manipulation and abuse. Such approaches might be inconsistent with the purpose of the exemption.

[81] In *Williams*, the property that was, according to the Indian, exempt from taxation consisted of unemployment insurance benefits. The Court began by discussing the nature of the property and the incidence of the tax. After concluding that the benefits constituted personal property within the meaning of the *Indian Act*, the Court stressed that because of the wording of the provision (s. 56 of the *Income Tax Act*), the incidence of the tax attached to the transaction itself — the receipt of

benefits — rather than to the money in the taxpayer's hands. However, because the reference in the taxing provision to the receipt of benefits had to do with the determination of the time of imposition of the tax, the place where they were received was unimportant.

[82] In view of these conclusions regarding the nature of the property and the words of the taxing provision, all that remained in *Williams* was to identify one or more connecting factors that would take the purpose of the exemption into account. The debtor's place of residence, that of the creditor, and the place of employment might be considered relevant (p. 893). Since the case concerned benefits resulting from a policy decision, the place of residence of the debtor — the Government of Canada — was a connecting factor of limited weight (p. 894). And since the duration and the amount of the benefits were closely tied to the employment, it was the location of the qualifying employment that was considered to be the most important factor (p. 900). It was not necessary to develop a general test for the location at which employment income is received, because in the case then before the Court, all the possible connecting factors for the type of property in question pointed to the reserve (p. 897): the employer was located on the reserve, the work was performed on the reserve, the appellant resided on the reserve, and he had been paid on the reserve.

[83] It is interesting to compare *Mitchell* and *Williams*. In both cases, the Court focused on the purpose of the exemption. In *Mitchell*, La Forest J. recognized

the value of the concepts of the paramount location and the concrete and discernible connection with the reserve, and gave weight to the activity — the delivery of electricity — that had resulted in the debt owed to the band (*Mitchell*, at pp. 147-48). In *Williams*, although Gonthier J. did not actually use the expressions “paramount location” and “discernible nexus”, the test he adopted was based on connecting factors that corresponded precisely to those concepts. Moreover, the important connection was with the activity — the employment — on which the payment of benefits was based. It was this connection that was concrete (see also, on identifying a concrete connection: *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846). Indeed, it was because a debt does not have a location of its own that the Court had to resort to identifying a concrete connection in both those cases. This comparison will in several respects be helpful to us in identifying the most important connections in the two cases now before the Court.

[84] In these appeals, the requirement that the appellants — the Estate of Rolland Bastien and Alexandre Dubé — include in their income interest generated by the investment contract flows from the facts that each of them, as a taxpayer, held an “interest” (which corresponds in the civil law context to the concept of a right) in an investment contract, and that interest accrued to them in the taxation years in issue (s. 12(4) of the *Income Tax Act*). Under the provision in question, the legal transaction that results in the incidence of the tax is the holding of an interest in an investment contract with respect to which interest has accrued. The taxpayer must include the accrued interest in his or her income, even if it has not actually been paid

and received. Section 12(4) provides that the taxpayer is liable to pay tax if he or she “holds” an interest in a given contract, but what “holds” means is not relevant to the determination of the place where the property is situated. It is relevant to the determination of the time of taxation. As in *Williams*, therefore, the taxing provision with respect to the calculation of income is of little help in determining the property’s location for the purposes of the *Indian Act* (*Williams*, at p. 888).

[85] Since the taxing provision that requires the taxpayer to include the interest in his or her income is not really helpful for the purpose of determining the place where the property is held, it will be necessary to look more closely at the nature of the property in question. Section 248(1) of the *Income Tax Act* defines “property” as follows: “‘property’ means property of any kind whatever whether real or personal or corporeal or incorporeal and . . . includes . . . a right of any kind whatever”. The investment contract provides for a personal right, that is, a right to be paid interest, subject to certain conditions. The interest is the product of the invested capital. Its amount depends on the amount that was invested and on the rate agreed to by the parties. In sum, it is this personal right whose legal existence is provided for in the contract that is the personal property whose location must be determined for the purposes of the *Indian Act*.

[86] A number of connecting factors could be relied on in determining the location of the right to be paid interest provided for in an investment contract. Building on the ones enumerated in *Williams*, I will consider the following: the

debtor's place of residence, that of the creditor, the place where the contract was signed, and the activity that generated the capital that made it possible to enter into the investment contract.

[87] In my opinion, the debtor's place of residence is a factor that can have some weight in a case concerning a right, provided for in a contract, according to which interest is to accrue to a creditor. However, since what must be done is not, as might be the case in a private international law context, to determine the place where judicial proceedings should be introduced against a debtor in order to enforce the payment of a debt, this factor cannot be paramount. On this point, I agree with Gonthier J. in *Williams* that the private international law criterion of the debtor's place of residence is not really helpful in the context of the *Indian Act*. Nor is the place of payment under the *Civil Code of Québec*, S.Q. 1991, c. 64, or under a contract really relevant, since the taxing provision does not require that interest actually be paid. What is being taxed is not an actual payment.

[88] The fact that the creditor resides on a reserve is relevant to the determination of the location of the right provided for in the contract. It is to the advantage of Indians living on a reserve to foster the economic development of the reserve. Income spent or invested on a reserve can only contribute to that development: if people who earn income reside on a reserve, it can be inferred from this that they will, in spending or investing it, generate economic activity that will contribute to protecting property situated on the reserve. Nevertheless, for the Indian

in question to reside on the reserve must not be considered a prerequisite for the exemption, since it ceased to be a statutory requirement more than a century ago.

[89] What now remains is to consider the activity that generated the capital that made it possible to enter into the investment contract. I will begin by mentioning the factors that I do not consider relevant in the context of an investment contract. In my view, neither the capital nor the interest is in itself helpful. These are two types of intangible property that have, by definition, no actual location. It would be artificial to attribute a legal location to them for the purpose of subsequently determining the legal location of the right to be paid interest provided for in the contract. It seems to me that to do so would be to give excessive weight to factors that have no basis in fact. A discernible connecting factor must have a concrete basis, as opposed to being the product of “crossbred” legal fictions. What is more, it would be pointless to try to determine the location at which the interest accrued. The accrual of interest results not from an activity, but solely from the passage of time.

[90] In my view, it would be unsatisfactory from the standpoint of legal certainty to give significant weight to the place where the investment contract providing for the right to be paid interest was signed, since this is a factor that would be open to manipulation. For example, the parties to a contract could choose to sign it in a given place for the sole purpose of benefiting from an exemption. Such a choice could be an artificial one. On its own, therefore, the place where the contract was signed does not appear to constitute a sufficiently objective legal basis for

determining the location of a right to be paid interest provided for in an investment contract. It could be a relevant factor if it reinforced other facts linking the property to the reserve or to a location off the reserve. However, its value would be minimal if it was also the debtor's place of residence and if that factor had already been taken into consideration. To be compatible with the purpose of the exemption, the choice to sign the contract on a reserve must not have been based simply on obtaining a personal benefit for an Indian whose usual place of business was off the reserve. Such a choice would be inconsistent with the comments made in *Mitchell* — and reproduced in *Williams* — on what the exemption does not cover. The two cases now before the Court involve contracts signed on reserves, so this is not an appropriate occasion to discuss a case in which, even though a contract is entered into elsewhere than on a reserve, a concrete and discernible connection with a reserve can be identified.

[91] The identification of connecting factors for the purposes of the *Indian Act* must be focused on concrete and discernible links between the property and the reserve. In the case of a right to be paid interest, it is therefore necessary to look beyond the investment contract and consider the source of the invested capital. The activity that generated the capital is a factor based on identifiable facts that are not open to manipulation and that are sufficiently concrete to aid in determining the location of intangible property such as a right to be paid interest. I am well aware that it might appear to be difficult to trace such an activity back to its origin, but it seems to me that this difficulty can be overcome, since all that it involves is an assessment

of facts. And the fact that the capital resulted from several different activities does not pose an unusual problem. This Court has already endorsed the paramount location concept in relation to tangible property (see *Mitchell*, *Union of New Brunswick* and *God's Lake*). In my opinion, absent a clear breakdown of the various activities, the place where the greatest proportion of the activities were carried out should serve as a factor by analogy with the paramount location concept used in relation to tangible property.

[92] An analysis that is based on the underlying activity not only takes the essentially intangible nature of the property in issue into account, but it can also provide a solid foundation for the development of a form of symmetry in the tax treatment of property belonging to Indians. Just as the employment on the reserve was the activity that resulted in the benefits in *Williams*, it is the location of the activity that resulted in the accumulation of the interest-producing capital that will be more relevant in these appeals. Owing to the nature of the property, this is a factor that must be considered in light of the purpose of the exemption and the incidence of the tax.

[93] In his reasons in *Dubé* (at para. 29), Cromwell J. maintains that the source of the capital cannot be determinative of whether the exemption should apply, because that would mean that investment contracts could be entered into elsewhere than on a reserve and still benefit from the exemption. In my view, it is inappropriate to make alarmist comments based on hypothetical examples. The test continues to be

based on the identification of concrete and discernable connections with the reserve. In the appeals now before the Court, the facts are such that the connecting factors can be applied without difficulty. The facts favour granting the exemption in the case of Rolland Bastien's estate and denying it in that of Alexandre Dubé.

[94] In *Estate of Rolland Bastien*, the parties have agreed on the main facts. Mr. Bastien was an Indian within the meaning of the *Indian Act*. He was born on the Wendake Reserve in 1919, lived there all his life and died there in 2003. He worked on the reserve all his life, operating the family moccasin manufacturing business founded by his great-grandfather. In 1997, he sold the family business to his children, Denis and Ginette, both of whom were residents of the Wendake Reserve. The business generated economic activity on the reserve. Its income was never taxed. The invested capital came exclusively from the business's income and from the proceeds of its sale. The amounts in question were invested in term deposits at the Caisse populaire Desjardins du Village Huron, located on the Wendake Reserve, and the Caisse populaire Desjardins de Pointe-Bleue, located on the Mashteuiatsh Reserve, near Roberval. At no time in his life did Mr. Bastien live on the Mashteuiatsh Reserve.

[95] In this appeal, it is clear that all the factors — the debtor's place of residence, that of the creditor, the place where the contract was signed and the activity that generated the capital that made it possible to enter into the investment contract — connect the property with a reserve.

[96] In *Dubé*, the facts are less clear, however, and I must defer to the findings of fact of the Tax Court of Canada judge. Mr. Dubé is an Indian within the meaning of the *Indian Act*. He has been a member of the Obedjiwan Reserve ever since he was born. At the time of the hearing in the Tax Court of Canada, he owned two residences: one on the Obedjiwan Reserve and another in Roberval, Quebec. He had also owned another residence in St-Félicien before buying the one in Roberval. His spouse and children lived in the residences in St-Félicien and Roberval during the school year. Mr. Dubé acknowledged that he too lived in them. The judge found it difficult to accept Mr. Dubé's argument that he lived on the reserve, given that the family spent 10 months a year in a residence off the reserve and given that no capital gain had been reported when the residence in St-Félicien was sold.

[97] Mr. Dubé operated a business that transported passengers between the Obedjiwan Reserve and St-Félicien and provided a medical transportation service from the Obedjiwan Reserve to Roberval and from Roberval to other destinations. Since no banking services were available on the Obedjiwan Reserve, Mr. Dubé did business with the Caisse populaire Desjardins de Pointe-Bleue. According to the judge, Mr. Dubé's interest income was "substantial": the amount on deposit that generated it was over a million dollars. When asked at the hearing about the source of the income that had enabled him to accumulate this capital, Mr. Dubé was unable to provide information about deposits that far exceeded the income from his transportation business. The judge summed up the evidence as follows: "the appellant initially stated that it was business income and then said that he did not

know where the money came from and that he would have to, as he put it, look into his affairs” (*Dubé v. The Queen*, 2007 TCC 393, 2008 D.T.C. 4022, at para. 16). The judge stated that he was unable “to conclude that [Mr. Dubé’s] business [was] the source of the income deposited” (para. 43). As a result, he was unable to establish a connection with the reserve. He added that because the family lived off the reserve, he was unable to conclude that the income was used on the reserve.

[98] On the basis of the findings of fact of the Tax Court of Canada judge, it is difficult to find a concrete and discernible connection with the reserve. The judge was unable to establish a connection between the activity that generated the interest-producing capital and the reserve. In this regard, the debtor’s place of residence was clearly situated on a reserve, but as I explained above, the place where interest payments were to be made is not really relevant in light of the transaction to which the incidence of the tax attached: interest accrued in a year must be reported as income, regardless of whether it was actually paid. The judge rejected Mr. Dubé’s argument that he resided on the reserve. If the accrued interest were exempt from taxation, this would amount to giving it preferential treatment in relation to the property generated by the activity itself. Mr. Dubé did not show how the fact that the contract was entered into on the reserve furthers the purpose of the exemption. His choice appears to have been based on obtaining a personal tax benefit. There was no connection with the economic development of the reserve. Indeed, there is no solid evidence of a connection between the right provided for in the contract with respect to which the interest accrued and a reserve.

[99] In these circumstances, I can only conclude that the purpose of the exemption would not be furthered by protecting this property from taxation. The connection is tenuous. Mr. Dubé did not reside on the reserve, and the economic activity that generated the property to which an investment contract applied — that is, the capital — was not connected with the reserve. The incidence of the tax does not favour granting the exemption, quite the contrary. If, as the Tax Court of Canada judge found, the capital did not come from Mr. Dubé's business activities, granting the exemption would be tantamount to turning the reserve into a tax haven for Indians engaged in unspecified for-profit activities off the reserve. This squares in every respect with La Forest J.'s description in *Mitchell* (quoted above) of what the exemption does not cover. The economic development of the reserve cannot justify granting the exemption in these circumstances.

[100] Since my conclusion is different from that of Cromwell J., I should explain the points on which we are in agreement and those on which we disagree. I agree with my colleague that there is no need to consider whether the property or the activity that generated it is connected with the traditional Aboriginal way of life. I also agree with him that the activity engaged in by a financial institution to fulfil its monetary obligations in the context of investment contracts providing for the payment of interest is not a valid factor for determining whether personal property held by an Indian is situated on a reserve. What must be considered is the location of the activity that generated the invested capital.

[101] However, I have reservations regarding certain other criticisms — evident in some of the academic commentary — that favour artificial connections. I am not prepared to rewrite the law on the basis of these criticisms or to disregard the experience acquired over nearly 30 years, since *Nowegijick*. For this same reason, I cannot, as a matter of principle, agree with Cromwell J., since in my view he pays insufficient attention to the purpose of the exemption and to this experience. I also have reservations about how my colleague applies the connecting factors proposed in *Williams*.

[102] In principle, I cannot agree that significant weight should be given to connecting factors that can be easily manipulated. In my view, that is the effect of the importance attached to the contractual aspects of the investment contract rather than to the property's concrete and discernible connections with the reserve. Cromwell J. accepts the argument that the Tax Court of Canada failed to give sufficient weight to the contractual nature of the deposit at the Caisse populaire in determining the location of the property in issue (paras. 11 and 13). In my opinion, the Tax Court of Canada was right not to dwell on that aspect of the property.

[103] It can be seen from past experience, as is clear from a number of decisions, that it is easy to set up, on the basis of a purely legal test, a contractual framework that, on its face, meets the requirements for the exemption. The courts have been asked to decide numerous cases concerning employment income in which, in order to gain a financial advantage, employers had designated an establishment on

a reserve on the assumption that their employees would be able to benefit from the exemption under the *Indian Act* even though the jobs had no real connection with the reserve (see: *Robinson v. The Queen*, 2010 TCC 649, [2011] 2 C.T.C. 2286; *Horn v. Canada*, 2007 FC 1052, [2008] 1 C.T.C. 140, aff'd 2008 FCA 352, 302 D.L.R. (4th) 472; *Shilling v. M.N.R.*, 2001 FCA 178, [2001] 4 F.C. 364; *Canada v. Monias*, 2001 FCA 239, [2002] 1 F.C. 51; *Southwind v. Canada* (1998), 156 D.L.R. (4th) 87). This type of planning had even extended to other types of businesses (see *Large v. The Queen*, 2006 TCC 509, 2006 D.T.C. 3558). Indeed, what the Aboriginal community seemed to understand from *Nowegijick* was that they could, by contract, arrange their affairs to take advantage of the exemption (see Dockstator). Although this approach may seem attractive from a financial perspective, it is hard to see how it can be consistent with the purpose of the exemption. With respect, Cromwell J.'s approach opens the door to setting up contractual frameworks on reserves that have nothing to do with the purpose of the exemption, and it provides an impetus for tax planning aimed solely at benefiting from the exemption (see, on interest income: *Large v. The Queen*). Although such planning is legitimate for contractual purposes, it cannot be endorsed and held to be consistent with the purpose of the exemption provided for in the *Indian Act*.

[104] In my view, it is necessary to continue to emphasize the application of concrete factors. What the *Indian Act* provides for is a right to protect property situated on a reserve, not a right to an exemption that applies to planning measures

that notionally situate intangible property on a reserve for the sole purpose of sheltering them from taxation.

[105] Furthermore, regarding the application of the connecting factors proposed in *Williams*, I do not agree that 20 years of experience drawn from decisions of Canadian courts should be swept aside.

[106] I cannot agree with Cromwell J.'s description of the nature of the relevant transaction for income tax purposes. My colleague considers that the relevant transaction is the payment of interest (paras. 15, 19 and 41). With respect, if, in *Williams*, the transaction on which the issue of eligibility for the exemption was based was found to be the receipt of benefits, it was because of the taxing provision in issue in that case (*Williams*, pp. 891 *et seq.*). In the instant case, the property in issue is the right to be paid interest under the investment contract. Under s. 12(4) of the *Income Tax Act*, it is only when the taxpayer's income for a given taxation year is computed that the tax consequences of this right are realized: the accrued interest must be included in the taxpayer's income. Since the interest does not actually have to be paid for the property to attract tax consequences, I do not see how the payment of interest could be the personal property whose status under the *Indian Act* is in issue. Accordingly, little weight should be attached to the place where the payment is to be made.

[107] Moreover, the decision to attach determinative weight to the fact that the payment could be made on the reserve is in my view not only anachronistic, but

unrealistic. In this age of electronic transactions, the fact that interest is paid at maturity into an account administered on a reserve seems to me to be a tenuous connection. Indians, like all other citizens, can have access to their funds from almost anywhere. To assume that they go to a Caisse populaire situated on a reserve when they want to have access to their funds, it would be necessary to assume that they do things differently than other citizens.

[108] I would also point out that ownership of a right provided for in a contract does not lead to the concept of the location of a deposit account as was the case in *God's Lake*, which concerned the seizure of amounts deposited in an account.

[109] In sum, I cannot agree with Cromwell J.'s analysis for several reasons. First, he attaches excessive weight to formal connections that, in certain circumstances, have a tenuous relationship with the reserve. Second, he essentially gives determinative weight to a single factor — the debtor's place of residence — while rejecting the concrete connecting factors of the creditor's place of residence and the location of the activity that generated the capital. Third, he fails in his analysis to consider the provision that governs the tax treatment of interest income. In short, the factors he chooses to apply are in reality but one, the debtor's place of residence, and his analysis is inconsistent with the historical purpose of the exemption.

[110] The parallel consideration of these two appeals highlights the need to identify concrete and discernable connections with the reserve. In the appeal of Mr. Bastien's estate, all the connecting factors favour granting the exemption. In

Mr. Dubé's appeal, on the other hand, the connection results from a legal fiction that has no basis in solid evidence.

[111] For these reasons, I would allow the appeal in the case of Mr. Bastien's estate, with costs throughout.

Appeal allowed with costs.

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