A-558-99

2001 FCA 178

Her Majesty the Queen (Appellant)

v.

Rachel Shilling (Respondent)

INDEXED AS: SHILLING v. M.N.R. (C.A.)

Court of Appeal, Rothstein, Evans and Malone JJ.A. —Toronto, March 27; Ottawa, June 4, 2001.

Native peoples — Taxation — Rama Indian Band member living and working in Toronto — Providing services to Native health centre under contract to native employment agency situated on reserve — On review of connecting factors, employment income not covered by Indian Act, s. 87 tax exemption for Indians' personal property situated on reserve.

Income tax — Exemptions — Indians — Employment income of Rama Indian Band member living and working in Toronto — Providing services to Native health centre under contract to native employment agency situated on reserve — On review of connecting factors, employment income not covered by Indian Act, s. 87 tax exemption for Indians' personal property situated on reserve.

The respondent, a member of the Rama Indian Band and an Indian under the *Indian Act*, was raised on the Rama Indian reserve near Orillia, Ontario and maintained strong ties with the reserve community. In 1993, she began to work at a Native health centre in Toronto, through a contract with a native employment agency with its head office on an Indian reserve. The taxpayer chose this arrangement for the section 87 tax exemption it offered. The taxpayer's salary was wired to her band account on a reserve from the agency's account, also on a reserve. The issue was whether the taxpayer was entitled, by operation of section 87 of the *Indian Act*, to exemption from income tax with respect to the salary paid to her by the agency for the years 1995 and 1996. The Trial Judge, applying the connecting factors test established by the Supreme Court of Canada in *Williams v. The Queen*, found that the location of the taxpayer's employer was very important because of the substantive legal and commercial consequences of her employment relationship, and decided in the taxpayer's favour. The Trial Judge was of the opinion that it did not matter that the reason for contracting with the native employment agency was to gain a tax advantage. This was an appeal from that decision.

Held, the appeal should be allowed.

Although the Supreme Court of Canada has not yet had occasion to apply to employment income the connecting factors test formulated in *Williams*, the Federal Court of Appeal has dealt with this issue in several cases. In *Canada v. Foster* and *Bell v. Canada*, the following factors were said to be potentially relevant in determining this issue: the location or residence of the employer; the nature, location and surrounding circumstances of the work performed by the employee, including the nature of any benefit that accrued to the reserve therefrom; and the residence of the employee. The weight to be assigned to any of these factors may vary according to the facts of the case, even when the category of property in question (employment income) and the nature of the tax (income tax) are the same. Case law suggests that particular attention should be given to the nature of the work performed by the employee, and the circumstances surrounding it.

In the case at bar, the Trial Judge erred in ascribing excessive significance to the employer's location. In the absence of more information than was presented in this case (as to the amount of business conducted at the head office, whether any residents of the reserve were employed there, or how the reserve benefited from the taxpayer's employment contract), it was difficult to discern a strong connection between the location of the employer and the purpose of section 87. There was a similar absence of evidence about the nature of the employment relationship between the taxpayer and the native employment agency. A question was raised, but not decided, as to the significance of the fact that the head office of the agency was located on a different reserve than the taxpayer's Rama Indian reserve.

The Trial Judge did not err in holding that, unless it was a sham or in contravention of the *Income Tax Act*, section 245 anti-avoidance rule, taxpayer's motivation in contracting with the native employment agency (to avoid paying income tax), created no problem. While there should be no discounting of the weight to be accorded the on-reserve location of the employer because the employment by that employer was motivated by tax planning and a desire to avoid the payment of income tax, in the absence of evidence which would support giving additional weight to this connecting factor, contracting with an on-reserve employer, whether motivated by tax planning or not, will be given only limited weight.

Location of employment will generally be an important, but not an exclusive, factor to be considered in determining the situs of employment income. The reason for this is that it is the services provided by the employee that create an entitlement to the receipt of employment income. Here, the taxpayer's place of employment was Toronto. This indicated that she was employed in the commercial mainstream. The taxpayer's work benefited the Native health centre and its off-reserve clientele. Thus, *Canada v. Folster* could be distinguished as, in that case, most of the hospital patients resided on reserve. The fact that the employment at issue involved providing social services to off-reserve Native people, was no reason, per se, for conferring preferred tax treatment under section 87 of the *Indian Act*.

While the Crown had conceded at trial that the taxpayer's place of residence was not a factor, it was allowed to withdraw that concession on appeal, as the taxpayer was not prejudiced thereby. Here, the taxpayer's off-reserve residency was considered a less significant factor pointing in the same direction as the location of employment. Although it was argued that the Court was required by the Supreme Court of Canada' s decision in *Corbiere v. Canada (Minister of Indian and Northern Affairs)* to treat off-reserve residency as irrelevant, reliance thereon would not be appropriate in the instant case, especially in the absence of evidence with respect to section 15 of the Charter.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 15.

Federal Court Rules, 1998, SOR/98-106, r. 220.

Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1, ss. 5(1), 245.

Indian Act, R.S.C. 1970, c. I-6, ss. 87, 88, 89, 90.

Indian Act, R.S.C., 1985, c. I-5, s. 87(1)(b).

CASES JUDICIALLY CONSIDERED

APPLIED:

Williams v. Canada, [1992] 1 S.C.R. 877; (1992), 90 D.L.R. (4th) 129; 41 C.C.E.L. 1; [1992] 3 C.N.L.R. 181; [1992] 1 C.T.C. 225; 92 DTC 6320; 136 N.R. 161; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; (1983), 144 D.L.R. (3d) 193; [1983] 2 C.N.L.R. 89; [1983] CTC 20; 83 DTC 5041; 46 N.R. 41; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; (1990), 71 D.L.R. (4th) 193; [1990] 5 W.W.R. 97; 67 Man. R. (2d) 81; [1990] 3 C.N.L.R. 46; 110 N.R. 241; 3 T.C.T. 5219; *Canada v. Folster*, [1997] 3 F.C. 269 (1997), 148 D.L.R. (4th) 314; [1997] 3 C.T.C. 157; 97 DTC 5315; 212 N.R. 342 (C.A.); *Bell v. Canada*, [2000] 3 C.N.L.R. 32; (2000), 256 N.R. 147 (F.C.A.); confg (1998), 98 DTC 1857 (T.C.C.); *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564; (1988), 13 Q.A.C. 241; 38 B.L.R. 221; 83 N.R. 232; *Symes v. Canada*, [1991] 3 F.C. 507 (1991), 7 C.R.R. (2d) 333; [1991] 2 C.T.C. 1; 91 DTC 5386; 127 N.R. 348 (C.A.); affd. [1993] 4 S.C.R. 695; (1993), 110 D.L.R. (4th) 470; 19 C.R.R. (2d) 1; [1994] 1 C.T.C. 40; 94 DTC 6001; 161 N.R. 243.

DISTINGUISHED:

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203; (1999), 173 D.L.R. (4th) 1; [1999] 3 C.N.L.R. 19; 239 N.R. 1.

REFERRED TO:

Desnomie v. Canada (2000), 186 D.L.R. (4th) 718; 2000 DTC 6250; 254 N.R. 58 (F.C.A.); *Leonard v. R. in Right of British Columbia* (1984), 52 B.C.L.R. 389; [1984] 4 C.N.L.R. 21 (C.A.); *Neuman v. M.N.R.*, [1998] 1 S.C.R. 770; (1998), 159 D.L.R. (4th) 1; [1998] 3 C.T.C. 177; 98 DTC 6297; 225 N.R. 190.

APPEAL from a Trial Division decision (Shilling v. M.N.R., [1999] 4 F.C. 178 (1999), 176 D.L.R. (4th) 226; [1999] 4 C.N.L.R. 238; 169 F.T.R. 238 (T.D.)) holding that the employment income of the respondent was exempt from taxation under paragraph 87(1)(b) of the Indian Act. Appeal allowed.

APPEARANCES:

Paul E. Plourde, Q.C. for appellant.

Leslie J. Pinder and *Clarine Ostrove* for respondent.

SOLICITORS OF RECORD:

Deputy Attorney General of Canada for appellant.

Mandell Pinder, Vancouver, for respondent.

The following are the reasons for judgment rendered in English by

BY THE COURT:

INTRODUCTION

[1] This is an appeal by the Crown from a decision of the Federal Court Trial Division rendered on June 9, 1999 (*Shilling v. M.N.R.*, [1999] 4 F.C. 178(T.D.)). The Trial Judge held that the 1995 and 1996 employment income of Rachel Shilling, the respondent, was exempt from income tax under paragraph 87(1)(*b*) of the *Indian Act*, R.S.C., 1985, c. I-5, on the ground that it was "the personal property of an Indian … situated on a reserve", the condition necessary for the tax exemption to apply.

[2] The only issue to be decided in this appeal is whether the employment income was "situated on a reserve" for the purpose of paragraph 87(1)(*b*). The answer depends on the application of the now well-known "connecting factors" test first enunciated in *Williams v. Canada*, [1992] 1 S.C.R. 877, and in particular, on whether the location of Ms. Shilling's employer's head office on a reserve is sufficient to situate her employment income there, when other connecting factors do not to point in that direction.

FACTS

[3] Ms. Shilling is a member of the Rama Indian Band and an Indian under the Indian Act. She was born in 1951, and raised on the Rama Indian reserve near Orillia, Ontario.

[4] Between 1971 and 1979, she lived in Toronto. In 1979, she returned to the Rama reserve so that her 7 year-old son could meet the rest of his family and be part of the reserve community. Ms. Shilling found work on the reserve as a social counsellor for her Band. In 1984, having discovered that her son was part of a bicycle group that was getting into trouble, Ms. Shilling decided that it would be better if they moved from the reserve.

[5] Consequently, she applied for a job as the Executive Director of the Ahkinomagai Kemik Education Council and worked at the First Nations School of Toronto. After commuting from her home on the Rama reserve for one year, she moved to Toronto in 1985 and has resided there at all material times since then.

[6] Even though Ms. Shilling has lived most of her adult life in Toronto, she has maintained her connections with the Rama reserve, which she visits regularly and considers to be her home. Her personal identity is connected to her membership in the Rama Band and the Ojibway First Nation.

[7] In 1993, when the respondent began to work at Anishnawbe Health Toronto (AHT), a Native health centre in Toronto, she was offered the option of contracting with either AHT or Native Leasing Services (NLS). One year earlier, NLS had entered into agreements with AHT whereby NLS placed employees with AHT. Ms. Shilling was informed that, by choosing NLS, she would have the benefit of the section 87 tax exemption. She chose to contract with NLS.

[8] NLS is a sole proprietorship owned and operated by Roger Obonsawin, who is an Indian. NLS has its head office on the Six Nations of the Grand River reserve near Brantford, Ontario.

[9] The respondent has worked within AHT in the following positions: co-ordinator for a training program for Native people; co-ordinator for the street patrol program; outreach worker/counsellor for the street patrol program; co-ordinator to start up a Head Start program; and, at the time of trial, Acting Program Director.

[10] The respondent's salary is wired to her bank account from NLS's bank account at the branch of the Canadian Imperial Bank of Commerce (CIBC) located on the reserve at Mississauga of New Credit. Until June 1995, the respondent maintained an account with Canada Trust in Toronto. On June 14, 1995, she opened an account at the branch of the Toronto-Dominion Bank situated on the Walpole Island reserve north of Windsor. Her salary has been wired to this account since then. This is the only bank account that she has and it is used for all her banking transactions. This account was established on Walpole Island because it is on a reserve and is close to where the respondent often goes for ceremonial sweats.

[11] The respondent received employment income of $44,390 in 1995 and $36,026 in 1996. Unemployment insurance and Canada Pension Plan premiums were withheld by NLS. No deduction was made in respect of income tax.

[12] The Minister of National Revenue assessed the respondent, including her employment income in 1995 and 1996 in her taxable income. The respondent's objections to the assessment are being held in abeyance by agreement, pending the outcome of these proceedings.

DECISION OF THE TRIAL JUDGE

[13] The issue at trial was framed as a question of law under rule 220 of the *Federal Court Rules*, 1998 [SOR/98-106]. The evidence consisted of an agreed statement of facts and excerpts from the examination for discovery of the respondent. The question of law stated for determination was [at paragraph 80]:

> Is Rachel Shilling entitled by operation of section 87 of the Indian Act to exemption from income tax with respect to the salary paid to her by Native Leasing Services for the years 1995-1996 in the circumstances described in the agreed statement of facts …?

In concluding in the respondent's favour, the Trial Judge applied the connecting factors test established in *Williams*, supra.

[14] The Trial Judge found that the location of the respondent's employer was a very important connecting factor because of the substantive legal and commercial consequences of her employment relationship. She reasoned that if the employment relationship broke down, the only recourse the respondent would have had was to her on-reserve employer. If the employer were to become insolvent, the respondent might not be paid.

[15] In addition, the Trial Judge inferred from the location of NLS that the respondent's work produced a profit to the on-reserve employer and benefited the reserve, thus connecting the respondent's employment income to a reserve.

[16] The Trial Judge rejected the Crown's argument that the significance of the location of the employer should be discounted as a connecting factor because the respondent only entered into an employment relationship with NLS for the tax advantage. The Trial Judge concluded that everyone is entitled to arrange their affairs to minimize tax and that this may be done through legal relationships whose only purpose is to obtain tax relief.

[17] The Trial Judge found no logical connection between the respondent's residency in Toronto and the location of her employment income. Nor did she find the respondent's personal and family connections to a reserve to be a relevant consideration in determining the location of her employment income.

[18] The Trial Judge also considered the location and nature of the work of the respondent. She found that Ms. Shilling performed most of her duties in Toronto and sometimes on one of a number of reserves. Her work benefited AHT, a Toronto-based organization, which maintained connections to several reserves for the purpose of its work.

[19] The Trial Judge found that there was no factual basis for concluding that the services of AHT or the work done by the respondent benefited any particular reserve. Nor was it reasonable to conclude that the relatively small amount of work that the respondent performed on various reserves was a sufficient basis for locating her employment income on-reserve.

[20] Finally, the Trial Judge observed that the parties had agreed that the place of payment of the respondent's salary was irrelevant. No other connecting factor was suggested by the parties or considered by the Trial Judge.

[21] Given the importance of the location of the employer as a connecting factor, the Trial Judge concluded that Ms. Shilling's employment income was situated on a reserve and thus exempt from income tax under paragraph 87(1)(*b*), even though none of the other factors connected it to a reserve.

ANALYSIS

Framing the Issue

(a) Legislation

[22] Subsection 87(1) provides:

> 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,

> (*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. [Underlining added.]

[23] A taxpayer's income from employment in a given year is "the salary … . received by the taxpayer in the year" Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1, subsection 5(1).

(b) General principles

[24] The Supreme Court of Canada has not prescribed a list or assessed the relative weighting of the factors to be considered in determining whether an Indian's employment income is situated on a reserve for the purpose of paragraph 87(1)(*b*). Nonetheless, a determination of whether, on particular facts, an Indian's employment income falls within the exemption must start with the analytical framework that has been provided by the Court, from which we derive the following propositions.

[25] First, even though income tax is a tax on persons, it is levied "in respect of" property, and for tax purposes, income is property. Accordingly, the statutory exemption in section 87 extends to the taxation of an Indian's employment income if it is located on a reserve: *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.

[26] Second, whether intangible property is located on a reserve depends on an examination of factors connecting the property to a reserve. The identity of, and the weight to be ascribed to, these factors cannot be determined in the abstract. In *Williams*, supra, at pages 899-900, Gonthier J. summarized the methodology for determining and weighing the connecting factors:

> In the context of the exemption from taxation in the Indian Act, there are three important considerations: the purpose of the exemption; the character of the property in question; and the incidence of taxation upon that property. Given the purpose of the exemption, the ultimate question is to what extent each factor is relevant in determining whether to tax the particular kind of property in a particular manner would erode the entitlement of an Indian qua Indian to personal property on the reserve.

[27] Third, the Supreme Court of Canada has defined at a rather general level the purpose of the exemption from tax contained in section 87, which in its present form dates back to 1876, well before the introduction of income tax in Canada. Thus, in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, La Forest J. said that section 87 should be understood as part of the provisions contained in sections 87-90 of the *Indian Act* [R.S.C. 1970, c. I-6] that were designed to protect Indians in various ways from the erosion of their economic base, namely reserve lands and personal property there belonging to an Indian. On the basis of the historical record, he concluded, at page 131:

> From [1763], 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.

[28] Fourth, it was also established in *Mitchell*, supra, that, because the various immunities and exemptions for personal property in sections 87-90 only applied to property situated on a reserve, these provisions do not serve the purpose of generally ameliorating the economic disadvantages suffered by many Indians. Thus, they do not apply when Indians choose to acquire and hold personal property "in the commercial mainstream" as opposed to on a reserve: *Mitchell*, supra, at page 131.

(c) Locating employment income

[29] As we have already noted, the Supreme Court has not yet had occasion to apply to employment income the connecting factors test formulated in *Williams*, supra. *Williams* itself concerned the location of unemployment insurance benefits.

[30] However, in several cases this Court has been called upon to apply the Supreme Court's jurisprudence in order to determine whether an Indian's employment income was situated on a reserve and thus exempt from income tax by virtue of paragraph 87(1)(*b*) of the *Indian Act*.

[31] Thus, in *Canada v. Folster*, [1997] 3 F.C. 269 (C.A.); and *Bell v. Canada*, [2000] 3 C.N.L.R. 32 (F.C.A.), the following factors were said to be potentially relevant in determining whether an Indian's employment income is situated on a reserve: the location or residence of the employer; the nature, location and surrounding circumstances of the work performed by the employee, including the nature of any benefit that accrued to the reserve from it; and the residence of the employee.

[32] The place where the employee was paid has also been considered a potentially relevant connecting factor, although not one that has been given much weight: Bell v. Canada (1998), 98 DTC 1857 (T.C.C.), at paragraphs 45-47. The Tax Court Judge's decision was upheld on appeal and his identification of the connecting factors approved: [2000] 3 C.N.L.R. 32 (F.C.A.), at paragraph 35.

[33] The weight to be assigned to any of these factors may vary according to the facts of any given case, even when the category of property in question (employment income) and the nature of the tax (income tax) are the same. Nonetheless, the case law suggests that particular attention should be given to the nature of the work performed by the employee, and the circumstances surrounding it. As Linden J.A. explained in Folster, supra, at paragraph 27:

> In my view, having regard for the legislative purpose of the tax exemption and the type of personal property in question, the analysis must focus on the nature of the appellant's employment and the circumstances surrounding it. The type of personal property at issue, employment income, is such that its character cannot be appreciated without reference to the circumstances in which it was earned. Just as the situs of unemployment insurance benefits must be determined with reference to its qualifying employment, an inquiry into the location of employment income is equally dependent upon an examination of all the circumstances giving rise to that employment.

Applying the Framework

(a) Location of employer

[34] The Trial Judge concluded that the location of the employer was the most important factor in determining the location of Ms. Shilling's employment income for the purpose of paragraph 87(1)(*b*). She stated that the employer, NLS, had its head office on the Six Nations of the Grand River Reserve, and that Mr. Obonsawin, the proprietor of the business, resided and carried on its business there. She inferred that the on-reserve business and its owner, Mr. Obonsawin, must have profited from the employment relationship and benefits to the reserve must have resulted therefrom.

[35] In our respectful opinion, the Trial Judge erred in ascribing such significance to the location of the employer in this case. In the absence of more factual information than is contained in the agreed statement of facts, and the transcript of the examination for the discovery of Ms. Shilling, it is difficult to discern a strong connection between the location of the employer and the purpose of section 87. For the on-reserve location of the employer to be accorded significant weight requires evidence in addition to the bare fact that an employment relationship with an on-reserve employer exists. It has already been held that the location of the employer is not important because it is where the debt, i.e. the right to employment income, may be enforced. That conflict of laws rule was expressly rejected by Gonthier J. in *Williams*, supra, at page 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.

[36] The agreed statement of facts and the transcript of the examination for discovery of Ms. Shilling are singularly lacking in the kind of detail that might add weight to this factor. While the head office of NLS is on one reserve, and its bank accounts are on another, there is nothing to indicate what aspects, if any, of its business are conducted from the head office, whether any residents of the reserve are employed there, or how the reserve benefits from the Shilling employment contract.

[37] The record is also very meagre and unclear with respect to Mr. Obonsawin and his businesses. For example, the agreed statement of facts is silent on the place of residence of Mr. Obonsawin, the sole proprietor of NLS. Further, the agreed statement of facts refers to "OI", which apparently is the umbrella name for various of Mr. Obonsawin's businesses, including NLS. However, the record does not disclose where OI conducts its business. Since the agreed statement of facts says both that Ms. Shilling is an employee of NLS and that she chose the option of becoming an employee of OI, and because NLS is a sole proprietorship, we have assumed for the purpose of this appeal that OI and NLS are legally one and the same.

[38] The only evidence of NLS's operations is that in each pay period, it does the "paper work" for each employee's salary and deductions and provides that information to the CIBC's payroll department. When the CIBC produces a payroll register, NLS

approves it. The CIBC then takes funds out of NLS's account and wires the salary amount to each individual employee's account.

[39] Even if NLS received some benefit from the respondent's work, there is no basis for inferring from the record that the Six Nations reserve was in any way the beneficiary of the respondent's employment with NLS. There is simply no evidence that the employment of Ms. Shilling by NLS benefited the Six Nations reserve.

[40] The agreed facts indicate that, when the respondent worked at the Canada Employment Centre in Toronto from 1990 to 1992, she used to go to NLS's office to read their newsletter in order to learn about job opportunities for Native people. This suggests that significant aspects of the NLS business were conducted from an office in Toronto at least in the 1990-1992 period. It may be that during 1995-1996, NLS was operated from the head office on the Six Nations reserve, but there is no evidence establishing exactly where, during the relevant period, NLS's business was actually conducted.

[41] There is a similar absence of evidence about the nature of the employment relationship between Ms. Shilling and NLS. The employment contract is not in evidence. There is no evidence about the relationship between AHT and NLS or to whom the respondent would have recourse in the event of a breakdown in her relationship with AHT. Accordingly, it is not possible to tell what would be the parties' legal rights and duties in the event of a breakdown in the relationship between AHT and the respondent. Without such evidence, the Trial Judge's findings about the commercial and legal significance of the employment relationship between NLS and Ms. Shilling are speculative and do not justify the weight that the Trial Judge attached to the location of the employer as a factor connecting Ms. Shilling's employment income to a reserve.

[42] We would also note that the head office of NLS was located on the Six Nations reserve. There is no evidence that NLS had any connection to the Rama Band of which Ms. Shilling was a member. We acknowledge that paragraph 87(1)(*b*) refers to personal property of an Indian that is situated on "a reserve" and not "the reserve" of the Indian in question. The Trial Judge inferred (at paragraph 73) from this that an Indian's property situated on any reserve is eligible for the tax exemption conferred under paragraph 87(1)(*b*). However, we are not convinced that this meaning is compelled by the language of paragraph 87(1)(*b*), although we recognize that the personal property of an Indian may attract the benefits of section 87, even when, like Ms. Shilling, its owner does not reside on a reserve.

[43] In *Desnomie v. Canada* (2000), 186 D.L.R. (4th) 718 (F.C.A.), at paragraph 21, it was doubted whether section 87 applies to personal property located on a reserve other than the taxpayer's own reserve. These doubts are reinforced by a passage in *Leonard v. R. in Right of British Columbia* (1984), 52 B.C.L.R. 389 (C.A.), at page 395, where Macfarlane J.A. seems to have taken the more restrictive view of the scope of section 87:

> It is a reasonable interpretation of the section to say that a tax exemption on the personal

> property of an Indian will be confined to the place where the holder of such property is expected to have it, namely on the lands which an Indian occupies as an Indian, the reserve. [Emphasis added to the word "the".]

This passage is quoted with approval by La Forest J. in *Mitchell*, supra, at page 132.

[44] While this is an important issue, in light of the factual gaps in the record in the case before us that prevent the location of the employer from being considered a significant factor, it is not necessary to decide how the words "a reserve" should be interpreted.

[45] One other issue respecting the location of the employer requires comment. That tax planning was the motivation for the respondent to enter into an employment relationship with NLS is not a concern in the absence of an allegation that either the transaction is a sham, or that the general anti-avoidance rule in section 245 of the *Income Tax Act* is applicable. The Crown has made no such allegation in this case. As the Trial Judge found, there should be no discounting of the weight to be accorded the on-reserve location of the employer because the employment by that employer was motivated by tax planning and a desire to avoid the payment of income tax. See *Neuman v. M.N.R.*, [1998] 1 S.C.R. 770, at paragraph 39. On the other hand, in the absence of evidence which would support giving additional weight to this connecting factor, contracting with an on-reserve employer, whether motivated by tax planning or not, will be given only limited weight.

(b) Location and nature of the employee's work

[46] The Trial Judge doubted that the location where the respondent's services were performed had any relevance in determining the location of her employment income. However, in her view, if location was to be considered, the respondent's employment in Toronto pointed to locating the employment income off-reserve.

[47] In our respectful view, location of employment will generally be an important, but not an exclusive, factor to consider when determining the situs of employment income. In Williams, an unemployment insurance case, the location of the qualifying employment was considered to be an important factor in establishing whether subsequent unemployment insurance benefits would erode the entitlement of an Indian qua Indian on a reserve. At page 896, Gonthier J. stated:

> The location of the qualifying employment income is therefore an important factor in establishing whether the taxation of subsequent benefits would erode the entitlements of an Indian qua Indian on the reserve. For in the case of an Indian whose qualifying employment income was on the reserve, the symmetry in the tax implications of premiums and benefits breaks down. For such an Indian, the original employment income was tax-exempt. The taxation paid on the subsequent benefits therefore does more than merely offset the tax saved by virtue of the premiums. Instead, it is an erosion of the entitlements created by the Indian's employment on the reserve. [Emphasis added.]

If the situs of Unemployment Insurance benefits is affected by the location of the antecedent qualifying employment, then in employment income cases, the location of the employment should also be a relevant consideration.

[48] The reason is that it is the services provided by the employee that create an entitlement to the receipt of employment income. That an Indian is employed on a reserve is an indication that he or she is acquiring employment income as an Indian qua Indian, in employment integral to the life of the reserve: Folster, supra, at paragraph 14. The opposite would also be true, that is, employment off-reserve is an indication that the Indian is acquiring employment income in the commercial mainstream. In Mitchell, supra, La Forest stated for the majority at page 131:

> … 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. [Emphasis added.]

[49] In this case, the respondent's place of employment was in Toronto. This is a factor that would tend to locate her employment income off-reserve. However, under the connecting factors analysis, location of employment alone will not be conclusive. Normally, regard must be had to the nature of the employment as a whole and the surrounding circumstances to determine what connection, if any, the off-reserve employment has to a reserve.

[50] This is what was done in *Folster*, *supra*, where, although the employment was off-reserve, its location adjacent to the reserve, on land to be annexed by the reserve, and for a hospital whose clientele was primarily reserve Indians, was sufficient to situate the employment income on a reserve. Indeed, in *Bell*, *supra*, Létourneau J.A., at paragraph 36, subsequently stated that the nature of the employment and the circumstances surrounding it are the considerations that best indicate whether the personal property in question is within the commercial mainstream.

[51] AHT appears to be a social services organization involved in preventative health care and other social assistance for off-reserve Native people in Toronto. The respondent's work benefits AHT and its off-reserve clientele. This is in stark contrast to *Folster* where the hospital's patients mostly lived on-reserve. As the Trial Judge found, merely because the nature of employment is to provide services to Indians does not connect that employment to an Indian reserve as a physical place.

[52] In finding that the nature of the respondent's duties are not a connecting factor to a reserve, we do not overlook the fact that the services provided are social services to Native people as opposed to employment in a for-profit enterprise. However, many not-for-profit social service organizations exist in Canadian cities. Employees of such organizations are not exempt from income tax. Given the limited purpose of paragraph 87(1)(*b*) of the *Indian Act*, the fact that the employment at issue involves providing

social services to off-reserve Native people, is no reason for conferring preferred tax treatment under that provision.

(c) Place of residence of the employee

[53] At the hearing before the Trial Judge, counsel for the Crown had conceded that Ms. Shilling's off-reserve residence was irrelevant as a connecting factor. In addition, counsel for the respondent had argued that Ms. Shilling's residence in Toronto should not count against her because, as was recognized in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, residence off-reserve is often not a free choice for Native people.

[54] In her reasons, the Trial Judge appears to have attached some importance to both the Crown's concession (paragraph 56) and the argument based on *Corbiere* (paragraph 57). However, her reason for rejecting the employee's place of residence as a connecting factor seems to be contained in her statement (at paragraph 58) that she saw no logical connection between the location of employment income for the purpose of section 87 and the employee's place of residence, or personal and family connections to a reserve.

[55] On appeal, the relevance of Ms. Shilling's residency was put in issue. Counsel for the Crown argued that, to the extent that he had made a concession that residency was irrelevant as a connecting factor, it was a concession on a point of law which he ought to be able to withdraw: see *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564, at page 612; *Symes v. Canada*, [1991] 3 F.C. 507(C.A.), at page 524, affd. [1993] 4 S.C.R. 695.

[56] Counsel for the respondent opposed the withdrawal, but candidly acknowledged that this Court is not bound by the earlier concession on the part of the Crown. The question of whether a circumstance or state of facts is relevant in a connecting factors analysis is a question of law for the Court to determine. Since it has not been demonstrated that withdrawal of the concession would prejudice the respondent, such as by depriving her of an opportunity to call evidence or enter documents, the Crown may withdraw the concession.

[57] While residency may not normally be an important factor in connecting intangible property to a reserve, in cases decided before *Corbiere* it was not regarded as irrelevant either. For example, in the context of locating unemployment insurance benefits, Gonthier J. said in *Williams*, *supra*, at page 897, that because of the importance of the location of the qualifying employment, residency was only potentially significant "if it points to a location different from that of the qualifying employment". In addition, in *Folster*, *supra*, and *Bell*, *supra*, residency was included as a potentially relevant factor for determining the location of employment income for the purpose of section 87, although not one that would generally be given much weight.

[58] In this case, the respondent both worked and resided in Toronto. The location and nature of her employment are the important factors locating her employment

income off-reserve. Her off-reserve residency is a less significant factor pointing in the same direction.

[59] Since there are no significant factors connecting Ms. Shilling's employment income to a reserve, the fact that she resided in Toronto at the relevant time does not materially affect the decision. Accordingly, it is not necessary to address in any depth the argument that, when conducting the connecting factors test mandated by Williams, supra, the Court is required by *Corbiere*, *supra*, to treat the off-reserve residency of the employee as irrelevant.

[60] Nonetheless, we do not think reliance on *Corbiere* would be appropriate in this case. In *Corbiere*, *supra*, the Supreme Court of Canada held that aboriginal residency was an analogous ground for the purposes of section 15 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], and that a law limiting to on-reserve band members the right to vote in band elections discriminated against those who were off-reserve. The decision was based, in part, on the observation that for many Indians, life off-reserve is not a choice taken willingly, but rather is compelled by the lack of housing and economic opportunity on reserves, as well as by a history of laws and government policy which forced band members off reserves.

[61] This Court is of course bound to follow *Corbiere*, *supra*. However, although section 15 of the Charter was pleaded, there was no significant argument on the point, let alone any evidence adduced on it. It is not obvious to us that the observation of the Supreme Court in *Corbiere*, *supra*, necessarily applies in a connecting factors analysis under section 87 of the *Indian Act*. For example, it is not clear how the respondent's dignity would be affronted if her residency off-reserve were considered in a connecting factors analysis. In view of the complexity of a section 15 analysis and without full argument, and evidence, we are not prepared to say that *Corbiere*, *supra*, overrules previous jurisprudence which has found that place of residence may be relevant in a connecting factors analysis.

CONCLUSIONS

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

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

[64] It follows that Ms. Shilling's employment is to be regarded as in the "commercial mainstream". This conclusion may appear counter-intuitive when applied to a Native person who identifies with her Band and First Nation, and is working with a social agency delivering programmes to assist Native people, in large part through reconnecting them with their culture and traditions.

[65] However, in the context of determining the location of intangible property for the purpose of section 87, "commercial mainstream" is to be contrasted with "integral to the life of a reserve": *Folster*, *supra*, at paragraph 14. There is no doubt that, if Ms. Shilling had been an employee of AHT, her employment income would not have been exempt from income tax. The purpose of the tax exemption in paragraph 87(1)(*b*) is not to address the general economically disadvantaged position of Indians in Canada.

[66] Hence, Ms. Shilling's work must be characterized as being in the "commercial mainstream", unless the fact that she is employed by a business with its head office and bank account on reserves is in itself sufficient to make her employment "integral to the life of the reserve". For the reasons that we have given, we think not.

[67] Accordingly, we would allow the appeal and set aside the order of the Trial Judge with costs. The question of law stated for determination is answered as follows:

> Rachel Shilling is not entitled by operation of section 87 of the *Indian Act* to exemption from income tax with respect to the salary paid to her by Native Leasing Services for the years 1995-1996 in the circumstances described in the Agreed Statement of Facts.