

Date: 20081209

**Dockets: A-157-08
A-158-08
A-159-08**

Citation: 2008 FCA 392

**CORAM: LINDEN J.A.
SHARLOW J.A.
TRUDEL J.A.**

BETWEEN: Docket: A-157-08

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

HENRY BOUBARD

Respondent

Docket: A-158-08

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

RICHARD BOUCHIE

Respondent

Docket: A-159-08

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CLIFFORD J. HOUSTON

Respondent

Heard at Vancouver, British Columbia, on December 9, 2008.

Judgment delivered from the Bench at Vancouver, British Columbia, on December 9, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on December 9, 2008)

SHARLOW J.A.

[1] The Crown is appealing a judgment of Justice Campbell J. Miller of the Tax Court of Canada allowing the appeals of Henry Boubard, Richard Bouchie and Clifford J. Houston from income tax reassessments for 2000, 2001 and 2002 (2008 TCC 133). The issue in this appeal is whether Justice Miller erred in concluding that the income earned by Mr. Boubard, Mr. Bouchie and Mr. Houston from their employment with the Tembec Pulp Mill in Pine Falls, Manitoba was exempt from income tax by virtue of the combined operation of section 87 of the *Indian Act*, R.S.C. 1985, c. I-5, and paragraph 81(1)(a) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th supp.).

[2] The Crown argues that, because the Mill is not located on reserve land, the section 87 exemption cannot apply to the employment income of Indians employed at the Mill. In our view, that argument is based on a rigid approach to section 87 that was rejected by this Court in *Canada v. Folster (C.A.)*, [1997] 3 F.C. 269.

[3] Whether section 87 of the *Indian Act* exempts particular employment income from income tax must be determined on a case by case basis by applying what has come to be called the “connecting factors” test from *Williams v. Canada*, [1992] 1 S.C.R. 877. There is no single formula or set of questions that can be applied to determine the result in all cases. We agree with the following statement of Justice Evans, speaking for this Court in *Horn v. Canada*, 2008 FCA 352 (at paragraph 8):

It is primarily the function of a trial judge to assess the relative weight to be given to the constituent elements of a multi-factored test in the particular circumstances of a case. Applying the "connecting factors" test is a very fact specific exercise. This Court may not substitute its view for that of the judge, absent a palpable and overriding error in the application of the test or an error of law.

[4] Justice Miller determined that there were sufficient connecting factors in this case to afford the respondents the benefit of section 87. In making that determination, he gave controlling weight to the following factors:

1. the circumstances in which the Mill came to be built and operated on land that had once been part of the Fort Alexander Reserve but was surrendered to the Crown for sale in 1926 to permit the Mill to be built, and
2. the reasonable expectations of the members of the Fort Alexander Band, when they reluctantly consented to that surrender, that the Mill would provide them with employment near the Reserve.

At the same time he gave little or no weight to the fact that the Mill was not actually located on the Reserve. In our view, Justice Miller’s reasons disclose that he correctly understood section 87 and

the connecting factors test. We are unable to find any error of law, or any palpable and overriding factual error, warranting the intervention of this Court.

[5] We would add that, contrary to the submission of counsel for the Crown, Justice Miller did not determine that the Band's expectation of employment from the Mill detracts from the legal effect of the surrender or its finality. Nor did he determine that the surrendered land was still part of the Reserve.

[6] For these reasons, these appeals will be dismissed with one set of costs.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED
MARCH 6, 2007 (2008 TCC 133)**

STYLE OF CAUSE: HMQ v. Henry Boubard
HMQ v. Richard Bouchie
HMQ v. Clifford J. Houston

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: December 9, 2008

REASONS FOR JUDGMENT OF THE COURT BY: LINDEN, SHARLOW, TRUDEL
JJ.A

DELIVERED FROM THE BENCH BY: SHARLOW J.A.

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