

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20101108

Docket: A-392-09

Citation: 2010 FCA 300

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

BETWEEN:

MARCEL PELLETIER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Winnipeg, Manitoba, on November 8, 2010.

Judgment delivered from the Bench at Winnipeg, Manitoba, on November 8, 2010.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

TRUDEL J.A.

DISSENTING REASONS BY:

SHARLOW J.A.

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REASONS FOR JUDGMENT

(Delivered from the Bench at Winnipeg, Manitoba, on November 8, 2010)

EVANS J.A.

[1] Marcel Pelletier is a status Indian and a member of the Red Rock Indian Band. He appeals to this Court from a decision of the Tax Court of Canada (2009 TCC 358), in which Justice Bowie dismissed Mr Pelletier's appeals from reassessments under the *Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp.) (ITA) for the taxation years 1999, 2000, 2001, and 2002.

[2] The Judge held that Mr Pelletier's income from his logging business in those years was not exempted from tax by paragraphs 81(1)(a) of the ITA and 87(1)(b) of the *Indian Act*, R.S.C. 1985, c. I-5, because he had not established that the income was "situated on a reserve".

[3] Having reviewed the evidence, the Judge concluded on the basis of the factors prescribed by the case law, particularly *Southwind v. Canada* (1998), 156 D.L.R. (4th) 87 (FCA) (*Southwind*), that the income was not sufficiently closely connected with a reserve so that it was "personal property of an Indian situated on a reserve" within the meaning of paragraph 87(1)(b) of the *Indian Act*.

[4] The Judge held that the fact that the business activities and the customers of the business were located off reserve indicated that the income from the business was not situated on a reserve. In addition, he stated, the type of business and the nature of the work indicated that the business was in the commercial mainstream.

[5] Counsel for Mr Pelletier argues that the Judge erred by not taking into account the circumstances surrounding the nature of the employment and how the income was earned. Counsel also submits that the Judge placed insufficient weight on the fact that Mr Pelletier maintained a residence on the reserve, in addition to his family's residence off-reserve, and that the office of the business was located on the reserve.

[6] In essence, counsel alleges that the Judge erred in his application to the facts of the multi-factor test for determining the *situs* of employment or business income for the purpose of paragraph

87(1)(b). This is a question of mixed fact and law with which the Court will only interfere if persuaded that the Judge made a palpable and overriding error in applying the law to the facts, or made an error of law: *Housen v. Nikolaisen*, 2001 SCC 33, [2002] 2 S.C.R. 235 at para. 28.

[7] In my opinion, the Judge committed no such error. First, it is clear from the Judge's statement of the facts that he was fully alive to the totality of the evidence, and the "surrounding circumstances" connecting the business to and benefiting the reserve, which Mr Pelletier says that he ignored. The fact that the Judge did not refer to the particular facts again when examining the *Southwind* factors does not mean that he overlooked them in reaching his conclusion. The Judge's reasons are to be read as a whole.

[8] Second, Mr Pelletier alleges that the Judge attached too little weight to the fact that he resided on the reserve during the winter months, and his business office is on-reserve. However, this is an invitation to the Court to reweigh the evidence before the trial judge. This an appellate court will not do, absent a palpable and overriding error or an error of law, and we see no such errors here.

[9] For these reasons, the appeal will be dismissed with costs.

"John M. Evans"

J.A.

"I agree.

Johanne Trudel, J.A."

SHARLOW J.A. (Dissenting Reasons)

[10] I respectfully disagree with my colleagues that this appeal should be dismissed.

[11] It is an error of law, in applying the connecting factors test, to fail to give weight to a relevant factor. In my view, in determining whether Mr. Pelletier's logging income was located on the Red Rock First Nation reserve, it was relevant that the economic foundation of Mr. Pelletier's income earning capacity as a logger was an asset owned by the Red Rock first Nation. It is also relevant that Mr. Pelletier was contractually entitled to exploit that asset, subject to paying a fee to Red Rock First Nation and undertaking to provide training and employment to its members.

[12] The judge clearly understood these aspects of the contractual relationship between Red Rock First Nation and Mr. Pelletier's logging business. However, as I read his reasons, it is not clear whether he appreciated that these are connecting factors that should weigh in favour of a conclusion that, for the purpose of section 87 of the *Indian Act*, Mr. Pelletier's logging income was situated on the reserve. I do not say that these factors are necessarily conclusive. However, they should have been expressly considered in the judge's determination and in my view they were not.

[13] For these reasons, I would remit this matter to the Tax Court for redetermination.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-392-09

**APPEAL FROM AN ORDER OF THE TAX COURT OF CANADA DATED JULY 3, 2009,
DOCKET NO. 2005-2632(IT)G.**

STYLE OF CAUSE: MARCEL PELLETIER v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: November 8, 2010

REASONS FOR JUDGMENT OF THE COURT BY: EVANS, SHARLOW, TRUDEL
J.J.A.

DELIVERED FROM THE BENCH BY: Evans, J.A.

APPEARANCES:

Michael Harris FOR THE APPELLANT

Brooke Sittler FOR THE RESPONDENT

SOLICITORS OF RECORD:

MACIVOR HARRIS RODDY FOR THE APPELLANT
Winnipeg, Manitoba

Myles J. Kirvan, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada