Federal Court of Appeal | Cour d'appel fédérale

Date: 20130626

Docket: A-207-09

Citation: 2013 FCA 171

CORAM: **DAWSON J.A.**
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

FRED KELLY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on January 16, 2013.

Judgment delivered at Ottawa, Ontario, on June 26, 2013.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20130626

Docket: A-207-09

Citation: 2013 FCA 171

CORAM: **DAWSON J.A.**
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

FRED KELLY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] This is an appeal from the judgment of the Tax Court of Canada (*per* Rip C.J.): 2009 TCC 189. The Tax Court dismissed Mr. Kelly's appeals from assessments made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for the taxation years 1994-2003 inclusive. It found that Mr.

Kelly's business income in those taxation years was not "personal property situated on a reserve" under section 87 of the *Indian Act*, R.S.C. 1985, c. I-5 and, thus, exempt from taxation.

[2] In reaching its decision, the Tax Court did not have the benefit of two recent decisions of the Supreme Court of Canada concerning section 87 of the Act: *Bastien Estate v. Canada*, 2011 SCC 38, [2011] 2 S.C.R. 710 and *Dubé v. Canada*, 2011 SCC 39, [2011] 2 S.C.R. 764.

[3] Of the two cases, *Bastien* is the more jurisprudentially significant. *Dubé* is best regarded as a companion case, useful in that it sheds light on some of the principles set out in *Bastien*. As a result, these reasons will refer more to *Bastien* and the principles set out in it.

[4] At paragraph 28 of *Bastien*, the Supreme Court observed that nineteen years had passed since its last significant section 87 case, *Williams v. Canada*, [1992] 1 S.C.R. 877. Since that time, this Court and the Tax Court have tried to follow its principles, fleshing them out through practical application, and, to some extent developing the law beyond *Williams*. Given the passage of time and the evolution of the section 87 jurisprudence, the Supreme Court in *Bastien* considered it "timely to restate and consolidate the analysis that should be undertaken in applying the [section] 87 exemption to interest income" and other types of intangible property: *Bastien*, at paragraph 20. In the course of its reasons, it rolled back developments fashioned by this Court and the Tax Court. In particular, the Supreme Court cast doubt on this Court's decision in *Recalma v. Canada* (1998), 158 D.L.R. (4th) 59 (F.C.A.) and a number of cases following it – cases that, in the case at bar, the Tax Court in this case took to be good law: see the Tax Court's reasons at paragraphs 31-38.

[5] Therefore, as a result of *Bastien*, and as will be seen in these reasons, some of the reasoning of the Tax Court, central to its decision, cannot be sustained. Accordingly, I would allow the appeal and set aside the Tax Court's judgment.

[6] In my view, out of fairness to the parties who may have cast their cases in reliance upon certain cases, now discredited, and bearing in mind the importance to aboriginal peoples of the right expressed in section 87 of the *Indian Act*, I propose that this Court remit the matter to the Tax Court so that the parties have an opportunity to adduce new evidence responsive to the legal tests set out in *Bastien*.

[7] In argument before us, the parties disagreed concerning how *Bastien* should be interpreted and applied. We received full submissions on this. Indeed, *Bastien* is complex and requires careful interpretation. We would do the parties no service by sending them back to the Tax Court without guidance.

[8] Therefore, in these reasons, I shall offer some guidance so that the Tax Court's redetermination proceeds in accordance with proper principle.

B. The basic facts and the Tax Court's decision

[9] The reasons of the Tax Court provide a full account of the facts of this case as they stand at the present time. However, in light of the proposed disposition of this Court – namely the return of the matter to the Tax Court for redetermination – the factual record before the Tax Court may alter.

Therefore, I will give only a short summary of what the Tax Court has found to date in order to provide a context for these reasons.

[10] Broadly put, the Minister has contended in this Court and in the Tax Court that in the taxation years in question Mr. Kelly was just an ordinary advisor, consultant or employee performing important services for reserves in return for business income. That alone does not trigger the section 87 exemption. The Minister also emphasized the large amount of time Mr. Kelly has spent off-reserves in generating his business income. In this regard, the Minister relied strongly upon the pre-*Bastien* decision of *Akiwenzie v. Canada*, 2003 FCA 469.

[11] On the other hand, Mr. Kelly has contended he is far removed from an ordinary advisor or consultant. In his view, his services are quite special and have a poignant and intimate relationship to reserves' spirituality, culture, language, history, community pride, self-respect and mode of life. In Mr. Kelly's view, in light of this, his business income is located on reserves and so it was exempt under section 87.

[12] The Tax Court concluded that the income earned by Mr. Kelly from his services was not exempt under section 87.

[13] However, at least insofar as its factual findings were concerned, the Tax Court agreed with some of Mr. Kelly's submissions. The Tax Court found that Mr. Kelly has "unique qualifications, skills and experience" in the area of "traditional strategic planning and traditional governance." He renders services aimed at addressing "in a holistic manner the social, cultural, economic and

political spheres and issues of traditional life on the reserves," to First Nations' "leadership, institutions and organizations that are based on reserves." See the Tax Court's Reasons, paragraphs 2, 4 and 6.

[14] As a member of *Medewe'in*, the Sacred Law and Medicine Society of the Anishinaabe, and employing his knowledge of language, history, ceremonies and spiritual matters, Mr. Kelly renders services almost exclusively to reserves through "conceptualizing, drafting, analysing, explaining, translating, consecrating and teaching…traditional concepts, including orders of Anishinaabe law." This work includes a variety of unique spiritual and cultural activities, ranging from teaching the Anishinaabe language to healing ceremonies for the survivors of residential schools. See the Tax Court's Reasons, paragraphs 4, and 11-13.

[15] The Tax Court found Mr. Kelly's services, performed personally by him, to be "invaluable." They are "entrenched in the traditional, social and cultural integrity of life on reserves," and "promote the preservation and furtherance of the traditional way of life on reserves," benefiting "Native communities as a whole." In this one way, the connection between Mr. Kelly's services and the reserves "cannot be overemphasized." See the Tax Court's Reasons, paragraphs 18, 47(f) and 51.

[16] The Tax Court noted Mr. Kelly does provide some services to off-reserve clients. However, he is not seeking the section 87 exemption for business income received from off-reserve clients. He seeks it only for the business income from his clients located on reserves. The Tax Court found that

although Mr. Kelly had some off-reserve clients, this did not "detract from the overall nature of the business," which was aimed at the reserves. See the Tax Court's Reasons, paragraph 17.

[17] However, despite these factual findings, the Tax Court found that Mr. Kelly was not entitled to the exemption under section 87. There were other important factual findings. In the Tax Court's view, these were determinative.

[18] The Tax Court found that although Mr. Kelly's work was "of great value to preserving [the] traditional way of life [of] Indian communities," one "cannot ignore the manner in which [Mr. Kelly's] business was operated." His business was carried on "to a very large extent" off reserves.

[19] Indeed, Winnipeg was "the centre or nucleus of his business operations" and to some extent "he carried on his business as any other consultant would." Most of the time Mr. Kelly was physically present outside of reserves, often in Winnipeg where his home, office, books and records were located. Mr. Kelly's business decisions occurred in Winnipeg, not on reserves. Any research or development necessary for his work was done at his Winnipeg home. Some consultations with clients happened at his Winnipeg home. Payments for his services were received at his Winnipeg home and he kept his money in off-reserve banks. See Reasons, paragraphs 52 to 54.

[20] The Tax Court concluded that despite the usefulness of his work for reserves, Mr. Kelly was "carrying on business as any other Canadian in a commercial mainstream" (at paragraph 54). As will be seen in more detail below, it is fair to say that the Tax Court placed considerable emphasis on Mr. Kelly's presence in the "commercial mainstream." It found that as soon as the money paid to

Mr. Kelly "left a reserve" it "entered the economy off the reserve" and "ceased to have anything to do with a reserve" (at paragraph 57). The Tax Court added there was "no nexus between the business income received by Mr. Kelly and the occupancy of reserve lands by him personally" (at paragraph 57).

[21] Mr. Kelly appeals to this Court.

C. Analysis

(1) The standard of review

[22] In this Court, neither party has attacked the Tax Court's findings of fact. The only issue is the Tax Court's identification and weighing of the factors under section 87 of the Act, seen in light of *Bastien*, *supra*, and *Dubé*, *supra*, released afterward.

[23] In *Her Majesty the Queen v*. *Robertson*, 2012 FCA 94, this Court considered an appeal from a decision of the Tax Court concerning section 87 of the Act where, as here, the Tax Court did not have the benefit of *Bastien* and *Dubé*. This Court reviewed the Tax Court's identification and weighing of the connecting factors on a standard of correctness: *Robertson*, at paragraph 34. In the case at bar, no either party has urged upon us a different standard. Here, as in *Robertson*, some of the reasoning of the Tax Court cannot be sustained post-*Bastien*. This necessitates a *de novo* review. Therefore, I shall proceed on the basis that correctness is the proper standard.

(2) The Supreme Court's recent decisions in *Bastien* and *Dubé*

[24] In *Robertson, supra* at paragraphs 33-34, this Court has recognized *Bastien* and *Dubé* "in some respects modified the previous law" and "reset the previous analytical framework in some significant respects." In particular, the Supreme Court addressed the following:

a. the methodology to be followed in section 87 cases;

b. the purposes lying behind section 87; and

c. the factors that, in conjunction with the purposes that lie behind section 87, the Court must consider when determining whether the section 87 exemption applies.

It is best to discuss these three areas as part of an overall enumeration of the basic propositions set out in *Bastien*.

[25] While I have identified seven basic propositions, it is important to stress that what follows is not necessarily a comprehensive list of matters to be considered. In *Bastien*, the Supreme Court stressed that it was important to "preserve the flexibility of the case by case approach" (at paragraph 19). It follows that no exhaustive set of propositions can be enumerated.

– I –

[26] *Always implement the statutory language.* In *Bastien, supra*, the Supreme Court reminds us that the specific language of section 87 guides our analysis throughout. That language tells us that the section 87 exemption applies only to "the personal property of an Indian or a band situated on a reserve."

[27] Therefore, here is the question we must keep front of mind throughout our analysis: is the property alleged to be exempt under section 87 situated on a reserve?

[28] In *Bastien*, at paragraph 15, the Supreme Court admits that this question can cause "difficulty," especially where "non-physical property generated by a transaction, such as the payment of benefits" or the receipt of income, is involved.

[29] Some might not think of benefits or income as property that has a specific location. Nevertheless, *Bastien* confirms such non-physical property can qualify as "property…situated on a reserve" under section 87.

[30] Despite the "type of property or the difficulty of ascribing to it a location," the Court must still try "to implement the statutory language." Our objective throughout is to "focus on whether the property is situated on a reserve." See *Bastien*, at paragraph 15.

– II –

[31] *In cases of non-physical property, certain factors, known as connecting factors, are useful indicia of location.* Recognizing the difficulty of determining the location of non-physical property, such as the payment of benefits or the receipt of income, the Supreme Court has suggested certain factors as useful indicia of location. In the jurisprudence, these are described as "connecting factors": *Bastien, supra* at paragraph 16, citing *Williams, supra*.

– III –

[32] *The relevance and weight of the connecting factors depends on the type of property, the nature of the taxation of the property and the purposes behind section 87*. The general methodology is to identify potential connecting factors and consider their relevance and weight. This is done with due consideration to the "purpose of the exemption, the type of property and the nature of the taxation of the property." This triplet is repeated throughout the majority reasons in *Bastien*, *supra* and, thus, must be seen as lying at the core of the analysis that must be conducted: see paragraphs 18, 20, 42 and 43. This triplet is also repeated throughout the companion case of *Dubé*, *supra*: see paragraphs 12, 14, 20 and 31.

[33] At various other places in *Bastien*, the Supreme Court sheds more light on this. It emphasizes that while there are many potential connecting factors, the relevance and weight of a particular connecting factor depends upon the particular facts. For this reason, no simple, standard test can be used to determine the location of intangible property such as benefits or income.

[34] Instead, "potential relevant connecting factors have different relevance [and weight] depending on the categories of property and the types of taxation in issue": *Bastien*, at paragraph 18. For example, in *Williams, supra* at page 892, the Supreme Court stated that "connecting factors may have different relevance with regard to unemployment insurance benefits than in respect of employment income, or pension benefits."

[35] Elsewhere in *Bastien*, the Supreme Court emphasizes that the purposes behind the exemption also affect the relevance and weight of a particular connecting factor. In its words, "[a] purposive analysis must inform the court's approach to weighing the connecting factors": *Bastien*, at paragraph 25.

[36] In this regard, in *Bastien*, at paragraph 18, the Supreme Court reaffirms the approach in *Williams*. The approach in *Williams* was to consider carefully "the particular circumstances of each case assessed against the purpose[s] of the exemption": *Bastien* at paragraph 19.

– IV –

[37] *The type of property must be properly identified and factored into the analysis of relevance and weight*. In *Bastien, supra* and *Dubé, supra*, the property under examination was interest income earned from term deposits. Both confirm that that income is "property" for the purposes of section 87.

[38] To assess the relevance and weight of the connecting factors between this income and the reserve, the Supreme Court in *Bastien* considered the nature of the term deposits in much detail, examining their legal characteristics and where the money represented by them flows from time to time: *Bastien*, at paragraphs 32-34.

[39] In *Williams*, *supra*, the property under examination was the receipt of unemployment insurance benefits. Examining this type of property, several factors were relevant: the residence of the debtor (the government), 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 the benefits: *Williams* at page 893. In assessing the weight to be given to these factors, the nature of the property, unemployment benefits, was significant: *Williams* at 893-898, discussed in *Bastien* at paragraph 39. While in *Williams* the Supreme Court rejected the relevance of conflict of laws principles in determining the location of a debt, common law principles such as that, as well as provisions and jurisprudence relating to the location of income, may nevertheless be an important connecting factor – but, as always the weight to be ascribed to it depends on the type of property, the nature of the taxation and the purposes underlying section 87: see *Bastien*, at paragraphs 41-42.

[40] In the case at bar, the property said to be exempt under section 87 is Mr. Kelly's business income arising from services. Business income arising from services has a source, a destination, a reason for why it arises and continues, and a manner in which it is earned. Therefore, to assess the location of Mr. Kelly's business income one might have to examine, among other things, the quantity, quality and nature of the services, who is providing the services and where, who is receiving the services and where, the reasons why the services are being rendered and received, the

manner in which the services are being rendered and received, and the overall management of the business and where that is done. Another factor we shall see is the "commercial mainstream": sometimes the services that generate the business income are readily available from rival off-reserve sources in the commercial mainstream, but sometimes they are not.

– V –

[41] *The nature of the taxation must be properly identified and factored into the analysis of relevance and weight*. In *Bastien*, *supra*, the Supreme Court noted that but for section 87, the interest earned from the term deposits would be included in his income for income tax purposes. For income tax purposes, 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). In the case at bar, we are concerned with the taxation of business income for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

– VI –

[42] *The purposes of the section 87 exemption must be properly identified and factored into the analysis of relevance and weight*. In *Bastien*, *supra*, the Supreme Court reviewed, restated and, to some extent, reformulated the purposes underlying section 87:

- Section 87 "guard[s] 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." The Crown must "shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians." Does "the Indian [hold] the property in question as part of the entitlement of an Indian *qua* Indian on the reserve"? The aim is 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." See *Bastien*, at paragraphs 21-23, citing *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at pages 130-131 and 133 and *Williams*, *supra* at pages 885 and 887.

- "The exemption was rooted in the promises made to Indians that they would not be interfered with in their mode of life": *Bastien*, at paragraph 28. I note that this appears to be somewhat broader than the statements of purpose underlying section 87 set out in *Mitchell* and *Williams*, summarized immediately above. *Williams* did not cast the purpose behind section 87 that broadly. *Mitchell* concerned paragraph 90(1)(*b*) of the Act, a paragraph that deems personal property given to Indians under a treaty or agreement to be situated on a reserve.

- Section 87 is not about "remedy[ing] the economically disadvantaged position of Indians" by allowing them to "acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens": *Bastien*, at paragraph 23, citing *Mitchell*, at pages 131. Nor is section 87 about "confer[ring] a

general economic benefit upon the Indians": *Bastien*, at paragraph 23, citing *Williams*, at page 885.

- The purposes of section 87 must not be taken to amend the words of section 87. Section 87 remains focused on determining whether "the personal property of an Indian or a band [is] situated on a reserve." It is not necessary to find that the property under examination must benefit "the traditional Native way of life," and suggestions to the contrary in cases such as *Canada v. Folster*, [1997] 3 F.C. 269 (C.A.), *Recalma*, *supra* and *Lewin v. The Queen*, 2001 D.T.C. 479 (T.C.C.) are to be disregarded. The focus is on whether there is a "connection between the property and the reserve such that it may be said the property is situated there for the purposes of the *Indian Act*" and not on whether "the property is integral to the life of the reserve or to the preservation of the traditional Indian way of life." See *Bastien*, at paragraphs 26-27.

- While the property under examination need not benefit "the traditional Native way of life," 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": *Bastien*, at paragraph 28. In finding that a sufficiently close connection existed between the reserve and the source of the taxpayers' income in *Robertson*, this Court (at paragraph 61) attached significant weight to the long history of commercial fishing in lakes near the reserve by the First Nation and

> their ancestors, and the continuing importance of that fishing to the economic, social, and cultural fabrics of the reserve.

[43] Post-*Bastien*, this Court has observed that the lack of clarity in the Supreme Court's enumeration of the purposes underlying section 87 poses a challenge in particular cases:

> Absent a clearer sense of legislative objective, the juggling of multiple connecting factors is apt to result in arbitrary results. Nonetheless, our job is to apply the settled law to the facts before us as best we can.

(*Robertson*, *supra* at paragraph 51.)

[44] I agree. However, one matter that is quite clear from *Bastien* is that ascribing too much weight to individual connecting factors can undermine the purposes underlying section 87. Instead, the relevance and weight of the connecting factors must be determined in light of those aspects of the purposes underlying section 87 that are brought alive by the facts of the particular case.

[45] In light of *Bastien*, the approach of listing factors in the abstract, as if they are relevant and deserving of weight in all cases, and then simply applying them to the facts of a particular case can no longer stand in light of *Bastien*: for such an approach, see *Southwind v. Canada* (1998), 156 D.L.R. (4th) 87 (F.C.A.) at paragraphs 12 and 13.

[46] In *Bastien*, the Supreme Court explicitly criticized the approaches this Court has followed in some of its cases. For example, it criticized *Recalma*, *supra*, for attaching too much weight to whether the economic activity of a taxpayer generating the income was in the "commercial

mainstream." It warned that the "commercial mainstream" consideration "must be applied with care" in light of the purposes of section 87, lest it significantly undermine the exemption": *Bastien*, at paragraph 52. It added that First Nations do engage in trade and commerce and so the fact that income is generated by trade and commerce does not necessarily oust the section 87 exemption: *Bastien*, at paragraph 56. In its view, property can be both in the commercial mainstream and connected or even integral to a reserve at the same time: *Robertson*, at paragraph 62.

[47] In *Bastien*, too much focus on the "commercial" nature of the term deposits led the lower courts into error. They started to concentrate on the income-earning activities of the Caisse that issued the term deposit, rather than on the income-earning activities of Mr. Bastien: *Bastien*, at paragraph 60. The proper approach in *Bastien* was to focus on the investment activity of Mr. Bastien and not the debtor financial institution and its activities as a participant in wider commercial markets.

– VII –

[48] *Beware of artificial or abusive connections.* In *Bastien*, the Supreme Court recognized that taxpayers can create artificial or abusive connections between their income and a reserve in order to try to claim a section 87 exemption. The Court noted that the legal form of an instrument creating income is relevant, but the substance must also be examined. In some cases, the substance predominates and less weight must be given to legal form: *Bastien*, at paragraph 62.

(3) Applying these principles to the Tax Court's decision

[49] In my view, the core of the Tax Court's decision, set out at paragraph 57 of the reasons, is inconsistent with *Bastien*, *supra*, in a number of respects. In paragraph 57, the Tax Court begins by noting:

> I cannot satisfy myself that Mr. Kelly's income from his business is protected from section 87 of the [*Indian Act*], that he held his income from business as part of the entitlement of an Indian *qua* Indian on a reserve.

[50] The test is not whether Mr. Kelly held his income from business as part of the entitlement of "an Indian *qua* Indian on a reserve." As explained above, the income need not be related to the aboriginal way of life. The overarching test is that set out in the statutory language, namely whether the property, here business income, is situated on a reserve.

[51] In paragraph 57 of its reasons, the Tax Court adds:

> There is no nexus between the business income received by Mr. Kelly and the occupancy of reserve lands by him personally.

[52] The wording of section 87 commands us to ask not whether the *owner* of the property (here, Mr. Kelly) is situated on a reserve, but whether the *property* (here, income) is situated on a reserve. In part for this reason, the physical location of the taxpayer was not deserving of great weight in *Dubé*, *supra*. And in holding that the physical location of the taxpayer "is not necessarily a factor of great weight," this Court's decision in *Robertson*, *supra* is to the same effect (at paragraph 57). There is no need for a "nexus between the business income received by Mr. Kelly and the

occupancy of reserve lands by him personally." Instead, the focus of the analysis is whether the income earned by the taxpayer can be said to be situated on a reserve in light of the type of property, the nature of the taxation of the property and the purposes behind section 87.

[53] In this regard, part of the Tax Court's analysis leading up to paragraph 57 of its reasons involved a calculation of the time Mr. Kelly spent in locations on or off a reserve. While that may be relevant to the analysis, *Bastien* warns us that attaching too much weight to this in isolation without viewing it in its overall context can be overly simplistic.

[54] For example, although Mr. Kelly spent less than half his time physically present on reserves, some important and meaningful parts of his services – teaching, healing, the performance of traditional ceremonies, and imparting spiritual, cultural and historical knowledge about the Anishinaabe mode of life – were performed while he was physically present on reserves. As well, it may be relevant that some of his time outside of reserves was to prepare for these activities on reserves.

[55] Business income, as described in paragraph 42, above, is more complex and nuanced than just the physical location from time to time of the person providing the services and the books and records of the business.

[56] In light of the foregoing, placing significant weight on the percentages of time Mr. Kelly is physically present on or off reserves or where he maintains his books and records fastens on only one aspect of the nature of the income in this case. More significant is what he was doing at various

times and the connection of those activities to the reserves, all viewed in light of the purposes underlying section 87.

[57] How these considerations weigh into the overall analysis will be for the Tax Court to determine when it redetermines the matter.

[58] Finally, at the end of paragraph 57, the Tax Court adds:

> While I have given some weight to the fact that his debtors were reserves or persons residing on reserves and significant weight to the services he provided to these persons, I cannot identify the location of Mr. Kelly's income as being on a reserve. Once the property, *i.e.*, the amount of money invoiced and paid to Mr. Kelly, left a reserve it entered the economy off the reserve. The money, when received by Mr. Kelly, ceased to have anything to do with a reserve. The factors in favour of the income not being on a reserve have more weight than any factors that may arguably be connected to a reserve.

[59] It is fair to say from this passage that "commercial mainstream," construed in the way the Tax Court did, loomed large in its analysis and overall conclusion.

[60] In my view, the Supreme Court has changed the meaning and significance of the commercial mainstream factor such that the Tax Court's analysis in paragraph 57 can no longer be said to be correct.

[61] If the place where the money enters the economy were determinative, section 87 would seldom, if ever, be available to Indians who earn income from trade and commerce. As noted above, the Supreme Court in *Bastien* has emphasized that the commercial mainstream factor should be

only an "aid" in determining the location of property for the purposes of section 87, not a determinative test (at paragraph 56). It identified several cases where this Court and others have over-emphasized the importance of this factor, placing undue emphasis on off-reserve activities (at paragraphs 52 and 55-59). An activity that is off-reserve and bears resemblance to a commercial activity does not automatically oust the application of section 87. That would imply, incorrectly, that "trade and commerce is somehow foreign to the First Nations": *Bastien* at paragraph 56.

[62] In paragraph 57 of its reasons, the Tax Court seems to have elevated the commercial mainstream factor, as it defines it, to the level of a "determinative test," setting up "a false opposition between 'commercial mainstream' activities and activities on a reserve," contrary to the recent words of the Supreme Court in *Bastien*, at paragraph 56.

[63] To similar effect, this Court stated the following in *Robertson* (at paragraph 62):

> That the Appellants' fishing business may have connections with markets off-reserve does not weaken the connection of the resulting income to the Reserve. In *Bastien* (at paras. 52-56), the Court firmly rejected the "false opposition" between income earned in the "commercial mainstream" and that earned from an activity that was "integral to the life of a reserve," a distinction on which some previous cases has relied. Since the commercial nature of an income-generating activity does not preclude its being situated on a reserve, the Court indicated that property can be both in the commercial mainstream and connected (or even integral) to a reserve at the same time.

[64] The commercial mainstream factor, among other things, is meant to ensure that section 87 is not used to remedy the economically disadvantaged position of Indians "[b]y ensuring that Indians may acquire, hold and deal with property in the commercial mainstream on different terms than their fellow citizens": *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at page 131, cited in

Bastien, *supra* at paragraphs 21 and 54. Care must be taken not to ascribe weight to the commercial mainstream factor in a manner that undercuts the purposes of section 87.

[65] Finally, it is not apparent that in paragraph 57 of its reasons the Tax Court factored the underlying purposes of section 87 into its overall assessment. As *Bastien* makes clear, the relevance and weight of the connecting factors is driven in a significant way by the purposes underlying section 87. It is fair to say that the Tax Court analyzed the connecting factors to some extent in the abstract, rather than assessing their relevance and weight in light of the purposes underlying section 87 that are brought alive by the facts of this case.

(4) What follows now?

[66] The judgment of the Tax Court cannot stand. Under paragraph 52(*c*) of the *Federal Courts Act*, R.S.C. 1985 c. F-7, this Court may give the decision that should have been given by the Tax Court or refer the matter back to the Tax Court for redetermination. I opt for the latter.

[67] In *Robertson*, *supra*, this Court found that although *Bastien* and *Dubé* "in some respects modified the previous law" and "reset the previous analytical framework in some significant respects," this did not matter because the Tax Court reached the correct result. The evidentiary record showed that the property under examination was exempt under section 87 and *Bastien* and *Dubé* did not affect that result.

[68] This case is different. Based on the record before us, especially a review of the transcript of the proceedings before the Tax Court, I am not confident that the parties appreciated the concept of "commercial mainstream," as defined in *Bastien*, and adduced evidence relevant to it. Nor am I confident upon a reading of that transcript that the parties appreciated the need, highlighted in *Bastien*, to examine thoroughly the nature of the type of property, here business income, a matter involving a number of nuances discussed at paragraph 42, above. Nor am I confident that the record contains sufficient information concerning what Mr. Kelly was doing at various times and the connection of those activities to the reserves, a matter also emphasized in *Bastien*; the parties seemed to fasten more on the physical location of Mr. Kelly when he was performing his activities.

[69] Also, as the above summary of *Bastien*, shows, the assessment of the relevance and weight of the connecting factors, in light of the purposes underlying section 87 that are brought alive by the facts of this case, is a subtle one and, in this case, particularly so. In this case, I am reluctant to assess the relevance and weight of the connecting factors when some of the key evidence concerning some of them was offered by Mr. Kelly in oral testimony. The Tax Court that heard Mr. Kelly's oral testimony is best equipped to assess this, not us.

[70] I am also mindful of the practical litigation context. Parties construct their cases carefully to elicit evidence that prompts factual findings that trigger the applicable legal tests. Here, the parties no doubt constructed their cases around the jurisprudence of this Court and the Tax Court over the last nineteen years, jurisprudence that has now been altered.

[71] Finally, we are dealing with the application of section 87, a section of great importance to aboriginal peoples. Applying the section, especially in the sort of case before us, requires a nuanced approach, with careful regard to the perspective of aboriginal peoples, a perspective that is most important: see *Robertson* at paragraph 84, citing *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paragraphs 49-50; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paragraphs 81-82; *R. v. Marshall*, [1999] 3 S.C.R. 456 at paragraph 19. The sort of nuances involved in a case such as this are best appreciated by the judge who heard and saw the witnesses, not by an appeal court reading words on a transcript. In this particular case, I am not satisfied that this Court is in as good a position as the Tax Court to assess and weigh the evidence: *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at paragraph 33.

[72] Therefore, I conclude that out of fairness the parties should be given an opportunity to adduce further evidence, if necessary, and have this matter redetermined on the basis of the existing record and any new evidence offered by the parties as a result of the release of *Bastien* and *Dubé* and considered relevant by the Tax Court.

D. Proposed disposition

[73] For the foregoing reasons, I would allow Mr. Kelly's appeal, set aside the judgment of the Tax Court, and remit the matter to the original Tax Court judge for redetermination in accordance with the principles set out in these reasons.

[74] Costs generally follow the event. Mr. Kelly has been successful in this appeal and, therefore, I would grant him his costs of this appeal. As the matter is to be remitted to the Tax Court, I would leave the costs of the earlier and future Tax Court proceedings to the discretion of the Tax Court judge hearing the redetermination.

"David Stratas"
J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-207-09
APPEAL FROM A JUDGMENT OF THE HONOURABLE CHIEF JUSTICE RIP DATED APRIL 7, 2009, NO. 2005-1710(IT)G	
STYLE OF CAUSE:	Fred Kelly v. Her Majesty the Queen
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 16, 2013
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Dawson and Trudel JJ.A.
DATED:	June 26, 2013

APPEARANCES:

David C. Nahwegahbow	FOR THE APPELLANT
Julien Bédard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nahwegahbow Corbiere Rama, Ontario	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT