Docket: 2004-2163(IT)G

BETWEEN:

TARA STIGEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 5, 2008, at Edmonton, Alberta

Before: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Carman R. McNary and Benjamin C. Evans
Counsel for the Respondent:	Darcie Charlton and Julia S. Parker

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JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2001 taxation year is dismissed.

Signed at Ottawa, Canada, this 8th day of July 2008.

"Campbell J. Miller"

C. Miller J.

Citation: 2008 TCC 405
Date: 20080708
Docket: 2004-2163(IT)G

BETWEEN:

TARA STIGEN,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Miller J.

[1] Ms. Tara Stigen, an Indian as defined in section 2 of the *Indian Act*, claims that interest of $2,920.68 earned from Peace Hills Trust Company ("Peace Hills") in 2001 is exempt from tax pursuant to paragraph 81(1)*(a)* of the *Income Tax Act* and subsection 87(2) of the *Indian Act*. The Minister of National Revenue denies the exemption on the basis that the interest, while personal property, is not situated on a reserve.

[2] The parties filed an Agreed Statement of Facts, most of which is reproduced as follows:

> 2. The Appellant earned interest income in the amount of $2,920.68 from Peace Hills Trust Company ("PHTC") (the "Interest") but did not include the amount on her 2001 personal income tax return because the Appellant believed that the Interest was exempt from taxation.
>
> 3. The Minister reassessed the Appellant to include the Interest in her 2001 income.
>
> …

5. The Interest comprises interest from the following:

Guaranteed Investment Certificate ("GIC") (PHTC – Saskatoon branch)	$2,128.54
GIC(s) (PHTC – Edmonton branch)	787.60
Joint Savings Account (PHTC – Edmonton branch)	4.54
Total	$2,920.68

6. The Appellant is an individual resident in Canada.

7. The Appellant is an aboriginal Canadian and is an Indian as defined in section 2 of the *Indian Act*.

8. The Appellant has never resided on a reserve as defined in section 2 of the *Indian Act*.

9. The Appellant banked at the Edmonton branch of PHTC. In 1999, she and her husband Chad Stigen opened a joint savings account at PHTC's Edmonton branch (the "Joint Account"). The paperwork relating to the Joint Account was prepared and kept at the Edmonton branch of PHTC.

10. The Appellant and Chad Stigen both contributed funds to the Joint Account.

11. During 2001, the Appellant owned three interest-bearing GICs issued by PHTC (the "GICs"):

    - GIC #334250-5, which the Appellant purchased at PHTC's branch in Saskatoon, Saskatchewan, in 1999, while in Saskatoon on a visit;

    - GICs #334250-7 and 334250-8, which the Appellant purchased at PHTC's branch in Edmonton, Alberta, in 2001.[1]

12. The paperwork in respect of each GIC was prepared and maintained at the PHTC branch at which the GIC was purchased.

13. The Interest was earned on money in the Joint Account and the GICs.

14. The Appellant did not spend the Interest; she left it in the Joint Account and/or GICs.

15. PHTC is a trust company that was incorporated on November 19, 1980 under the federal *Trust Companies Act*.

16. PHTC is wholly owned by the Samson Cree Nation of Hobbema, Alberta.

17. In its 2001 Annual Report, PHTC's mission statement is: "To operate a full service trust company on a national basis with emphasis on the First Nations communities".

18. PHTC is registered in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, the Yukon Territory and the Northwest Territories.

19. PHTC uses a regional branch concept to position itself on or off reserve, to serve the largest number of First Nations customers in a given area.

20. During 2001, PHTC maintained on-reserve branches in Kelowna, British Columbia; Hobbema, Alberta; Fort Qu'Appelle, Saskatchewan; and Saskatoon, Saskatchewan.

21. During 2001, PHTC maintained off-reserve branches in Edmonton, Alberta; Calgary Alberta; Winnipeg, Manitoba; and Fredericton, New Brunswick.

22. The head office of PHTC is located in Hobbema, Alberta on the Samson Reserve.

23. At the head office of PHTC, the Board of Directors sets the policy and general framework, and organizes the mission statement, operating philosophies, strategic plans, annual business plans and capital plans of PHTC.

24. The Board of Directors of PHTC generally meets on-reserve.

25. The minute books and share registers of PHTC are maintained at the head office of PHTC.

26. The corporate office of PHTC is located off reserve in Edmonton, Alberta.

27. PHTC's corporate office in Edmonton oversees the delivery of the policy of the Board of Directors and provides support to the operating regional offices.

28. The Saskatoon branch is on the Muskeg Cree Nation's urban reserve.

29. PHTC offers a range of financial services to First Nations, their members and non-Native clientele.

30. PHTC has both Native and non-Native clients. There is no difference between the services that PHTC provides to First Nations and their members, corporations, institutions and associations, and the services provided to non-Native clientele.

31. All PHTC's branches offer the same services and follow the same policies.

32. Interest on a savings account at the Edmonton branch of PHTC would be paid at the Edmonton branch. The interest rates for savings accounts were set at PHTC's corporate office, and were based on market surveys.

33. Interest on a GIC would be credited depending on whether or not interest was paid by cheque, in which case it would be paid via an account in Hobbema. If paid directly into a bank account, it would be paid at the location where the GIC was opened.

34. Starting in 1996, the Appellant was employed by Ledcor (a large multi-discipline construction company) on a seasonal basis as a member of a crew working on road paving projects in Alberta.

35. The Appellant did not claim a tax exemption under the *Indian Act* with respect to her employment earnings from Ledcor.

36. The vast majority of the funds the Appellant used to purchase the GICs were employment earnings from Ledcor. Some of the funds were reinvested interest, and some may have been employment insurance benefits.

37. The funds the Appellant and her husband deposited in the Joint Account were savings from their employment with Ledcor.

38. PHTC is generally similar to other institutions that offer banking and trust services, and is competitive with other such institutions of its size.

39. In 2001 the capital assets of PHTC were located in the various offices, as follows:

(thousands $)

Hobbema	256
Calgary	122
Edmonton	106
Winnipeg	172
Saskatoon	135
Fort Qu'Appelle	242
Kelowna	64
Fredericton	69
Corporate Office	509
Total	1674

40. The Muskeg Cree Nation's urban reserve in Saskatoon is an industrial park.

41. Money that PHTC receives from all of its clients, including the Appellant, as deposits into chequing and savings accounts, for GICs and as fees for various services, go into a single company-wide pool (the "Pool"). The funds in this national Pool are invested by PHTC in cash and short term deposits, securities and loans (the "Investments"). The Investments generate income for PHTC.

42. The money that flows from a particular branch into the Pool (including money that clients have placed in GICs or accounts in that particular branch) cannot be tracked to specific Investments made by PHTC.

43. The money that any client, including the Appellant, places in a GIC or in a savings account cannot be tracked to specific Investments made by PHTC.

44. The income that PHTC earns on the Investments becomes part of the Pool.

45. The interest paid to clients on savings and chequing accounts and GICs is paid out of the Pool.

46. Interest compounded on a GIC is credited to the GIC through a software system run by a service provider in Halifax.

47. When making loans to client, PHTC's branches can draw on the entire Pool to do so.

48. As reflected in PHTC's 2001 Annual Report, the value of PHTC's Investments and the income generated by each category in 2001 were as follows:

2001

PHTC's Investments	Amount	Income from each Investment category
• Cash, short term deposits and securities	$113,158,237	$ 5,584,683
• Mortgages and loans "First Nations Component"	364,627,182	28,662,475
• Mortgages and loans "non First Nations Component"	38,717,187	2,861,022
Total	516,502,606	37,108,180

49. The short term deposits and securities are investments in off-reserve institutions. The short term deposits comprise money market investments (e.g. in chartered banks and other financial institutions), and the securities comprise government treasury bills, Government of Canada bonds, provincial bonds, bankers acceptances and other securities (e.g. corporate bonds).

50. The mortgages and loans (collectively, the "Loans") comprise: residential mortgages, commercial mortgages, collateral loans, commercial loans, and consumer loans.

51. In coding Loans for its database, PHTC identifies certain ones as "on reserve". The "First Nations Component" of its Loans portfolio comprises loans and mortgages coded "on reserve".

52. A Loan is coded "on reserve" if any one of the following criteria is met:

- The security is on reserve;
  Security on reserve may consist of:
  - INAC funding (acknowledged redirection)
  - Ministerial Guarantees (Government Guarantees)
  - Hard assets permanently located on a reserve secured by G.S.A. or Chattel Mortgage i.e. grocery store building & inventory
  - Moveable assets "normally situate on a reserve" secured by a G.S.A. or Chattel Mortgage i.e. heavy equipment, mobile homes, motor vehicles, recreational vehicles.

- The cash flow for debt service is from reserve;
  - INAC funding
  - Any revenues earned on reserve i.e. forestry contract, salaries paid by band.

- The borrower is *situs* on reserve;
  - Borrower's permanent residence or place of business is on a reserve.

- The guarantor is on reserve;
  - Guarantor's permanent residence or place of business is on a reserve.

53. Loans are coded during the loan application process and are not normally subject to monthly review or change. The actual criteria used to determine whether a particular loan is on or off reserve is not entered in a database and cannot be tracked.

54. PHTC does not maintain statistics on any of the following: the percentage of Loans used on reserve; the percentage of Loans to Indians residing on reserve; the percentage of Loans to Indian bands or councils with reserves; the percentage of Loans to Tribal Councils based on reserve; the percentage of Loans to Indians residing on the Muskeg Lake Cree Nation urban reserve in Saskatoon, or to the Muskeg Lake Cree nation or band council.

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[1] The GICs stipulate:

> "Notwithstanding any term, condition or provision contained in this Certificate to the contrary, it is understood and agreed that although the Certificate may be serviced or dealt with off an Indian Reserve, the Certificate and any other monies governed by the terms of this Certificate shall be, and be deemed to be, held at the Head Office of the Company on the Samson Indian Reserve at Hobbema, Alberta."

Issue

[3] The issue is whether the deposits or GICs or the interest income therefrom were personal property of an Indian situate on a reserve, exempting such interest income from taxation.

Analysis

[4] Paragraph 81(1)*(a)* of the *Income Tax Act* states:

> 81(1) There shall not be included in computing the income of a taxpayer for a taxation year,
>
> (*a*) an amount that is declared to be exempt from income tax by any other enactment of Parliament, other than an amount received or receivable by an individual that is exempt by virtue of a provision contained in a tax convention or agreement with another country that has the force of law in Canada;

[5] Subsections 87(1) and (2) of the *Indian Act* states:

> 87(1) Notwithstanding any other *Act* of Parliament or any *Act* of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:
>
> (*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (*b*) the personal property of an Indian or a band situated on a reserve.
>
> 87(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

[6] Appellant's counsel raised two arguments. He acknowledged at the outset that I could not accept the first argument, as it required ignoring case precedents from the Federal Court of Appeal. The second argument distinguished those Federal Court of Appeal precedents which had found, relying on the connecting factors approach established by *Williams v. Canada*[1], that interest income was not situate on a reserve.

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[1] [1992] 1 S.C.R. 877.

[7] Appellant's counsel's first argument did not follow the usual course of reviewing the connecting factors, an approach which evaluates factors tying personal property to a reserve, ultimately to determine if an Indian holds such property as part of an entitlement of an Indian *qua* Indian on the reserve. Rather, the Appellant looked at the nature of the property, the deposits, the GICs and the interest flowing therefrom, and applying banking principles taken from the *Trust and Loan Companies Act*, concluded such property was situated on reserve. I am not going to go in depth through the steps that Mr. McNary took me to get there, for, as he correctly foretold, I rely on the Federal Court of Appeal cases that have previously dealt with the issue of determining *situs* of interest income for purposes of section 87 of the *Indian Act*. I do have some comments, however, on his first argument that the Federal Court of Appeal have erred in its reasoning in *Sero v. Her Majesty the Queen*[2] and *Lewin v. Her Majesty the Queen*[3].

[8] First, Appellant's counsel relied on comments of the Manitoba Court of Appeal in the case of *McDiarmid Lumber Ltd. v. God's Lake First Nation*[4] dealing with the application of section 89 of the *Indian Act* which reads:

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

[9] Specifically, I was drawn to the following passage in *McDiarmid Lumber*:

> 75 It might be argued that *Sero* was wrongly decided by giving particular importance to the fact that the bank's investment income was derived in the commercial mainstream. Had the court viewed the place where Ms. Sero and Mr. Frazer chose to do their banking and investing and where they received their interest and investment income as the paramount connecting factors, the receipt of those funds for taxation purposes would be located on the reserve, the same place that the funds themselves were effectively situated.

[10] This passage, however, must be put in context. The Manitoba Court of Appeal emphasized repeatedly in its Reasons the difference between section 87 (exemption from taxation) and section 89 (exemption from seizure).

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2 2004 DTC 6037 (F.C.A.).

3 2003 DTC 5476 (F.C.A.).

4 2005 MBCA 22.

> 44 … In the result, as we see in *Williams*, the location of income-related benefits for the purposes of s. 87 may be difficult or even impossible to fix by the application of common law principles. And as we will see, a claim for exemption from taxation of income-related benefits under s. 87 raises conceptually different considerations than does a claim under s. 89 that intangible but otherwise exigible personal property is exempt from seizure.

[11] The Manitoba Court of Appeal was clear that the analysis for purposes of determining *situs* of personal property in the context of section 87 was based on the transaction – the receipt of income. The analysis for the exemption from seizure pursuant to section 89 should be based on the *situs* of the actual debt, the chose in action. This distinguished the Court of Appeal's reasoning. The Court stressed the difficulty in attempting to determine *situs* when dealing not with income, but with receipt of income. It was therefore understandable how and why the connecting factors could serve such a useful purpose in grappling with this difficult concept. Such was not the case when dealing with the debt itself, which was at issue in *McDiarmid Lumber* in the context of the exemption from seizure.

[12] I do not place the reliance on *McDiarmid Lumber* that Mr. McNary does, though I do agree with the Manitoba Court of Appeal that the considerations under section 87 are, and should be, different from the section 89 considerations. I have not been convinced that I should draw from *McDiarmid Lumber* a whole new approach to the analysis of *situs* for the purpose of section 87, by diminishing reliance on the connecting factors test in favour of a common law approach to determining *situs* of a debt.

[13] Briefly, the Appellant's argument on this front is that she deposited funds with Peace Hills which were held in trust for her, Peace Hills guaranteeing repayment with interest. Relying on *McDiarmid Lumber*, the Appellant contends the deposit is a simple contract debt and should be located, by relying on common law principles and legislation, at the branch where the account is maintained. Further, with respect to where GICs were held, the terms and conditions of the GICs themselves stated:

> Notwithstanding any term, condition or provision contained in this Certificate to the contrary, it is understood and agreed that although the Certificate may be serviced or dealt with off an Indian Reserve, the Certificate and any other monies governed by the terms of this Certificate shall be, and be deemed to be, held at the Head Office of the Company on the Samson Indian Reserve at Hobbema, Alberta.

[14] The Appellant contends therefore that the GICs were deemed to be held at Peace Hills' Head Office in Hobbema, which is on reserve. Further, with respect to the GICs acquired on reserve at the Saskatchewan branch (on reserve), section 447 of the *Trust and Loan Companies Act* ("*TLCA*") applies to render the indebtedness of Peace Hills in respect of that GIC on reserve. Subsections 447(1) and (4) of the *TLCA* read as follows:

> 447(1) For the purposes of this *Act*, the branch of account with respect to a deposit account is
>
> (*a*) the branch the address or name of which appears on the specimen signature card or other signing authority signed by a depositor with respect to the deposit account or that is designated by agreement between the company and the depositor at the time of opening of the deposit account; or
>
> (*b*) if no branch has been identified or agreed on as provided in paragraph (*a*), the branch that is designated as the branch of account with respect thereto by the company by notice in writing to the depositor.
>
> …
>
> (4) The indebtedness of a company by reason of a deposit in a deposit account in the company shall be deemed for all purposes to be situated at the place where the branch of account is situated.

According to the Appellant, it is irrelevant as to how Peace Hills invests the deposits it receives – *situs* has been established. The Appellant concludes her argument in this respect as follows:

> 31 Accordingly, the Appellant submits that regardless of the location of the branch of PHTC where each of the GICs was purchased, pursuant to section 447 of the *TLCA*, the GICs and the respective portion of the Interest in relation thereto, were situated on the Samson Cree Nation Reserve.

> 32 In the alternative, with respect to GIC No. 334250-5, this particular GIC was purchased at the Saskatoon branch of PHTC, which is on the Muskeg Cree Nation Reserve. Pursuant to subsection 447(4) of the *TLCA*, the indebtedness of PHTC in respect of GIC No. 334250-5 is situated on the Muskeg Cree Nation Reserve. Accordingly, the Appellant submits that even in the absence of the agreement between the Appellant and PHTC, GIC No. 334250-5 and the respective Interest, were situated on the Muskeg Cree Nation Reserve.

[15] I cannot accept this argument. To extrapolate from comments in *McDiarmid Lumber*, relating to exemption from seizure, to apply a new common law test to exemption from taxation is taking *McDiarmid Lumber* far beyond its ratio. The Federal Court of Appeal has specifically addressed the *situs* of personal property in the form of the receipt of interest income, including dealing with the application of subsection 461(4) of the *Bank Act* (equivalent to section 447 of the *Trust and Loan Companies Act*). The Federal Court of Appeal in *Sero* concluded:

> 47 For these reasons, I cannot accept the appellants' argument that subsection 461(4) of the *Bank Act* overrides the connecting factors test to compel the conclusion that the interest income in issue in this case is "situated on a reserve" for the purposes of section 87 of the *Indian Act*.

[16] The Federal Court of Appeal has determined that the connecting factors test is the test to be applied in these circumstances, commenting in *Recalma v. Her Majesty the Queen*[5] as follows:

> 11 So too, where investment income is at issue, it must be viewed in relation to its connection to the Reserve, its benefit to the traditional Native way of life, the potential danger to the erosion of Native property and the extent to which it may be considered as being derived from economic mainstream activity. In our view, the Tax Court Judge correctly placed considerable weight on the way the investment income was generated, just as the Courts have done in cases involving employment, U.I. benefits and business income. Investment income, being passive income, is not generated by the individual work of the taxpayer. In a way, the work is done by the money which is invested across the land. The Tax Court Judge rightly placed great weight on factors such as the residence of the issuer of the security, the location of the issuer's income generating operations, and the location of the security issuer's property. While the dealer in these securities, the local branch of the Bank of Montreal, was on a Reserve, the issuers of the securities were not; the corporations which offered the Bankers' Acceptances and the managers of the Mutual Funds in question were not connected in any way to a Reserve. They were in the head offices of the corporations in cities far removed from any reserve. Similarly, the main income generating activity of the issuers was situated in towns and cities across

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5 98 DTC 6238 (F.C.A.).

> Canada and around the world, not on Reserves. In addition, the assets of the issuers of the securities in question were predominantly off Reserves, which in case of default would be most significant.
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> 12 Less weight was properly accorded by the Tax Court Judge, in this case of investment income, to factors such as the residence of the taxpayer, the source of the capital with which the security was bought, the place where the security was purchased and the income received, the place where the security document was held and where the income was spent. We can find no fault with the reasoning of the Tax Court Judge in the way he balanced the various connecting factors involved in this case in the light of the purpose of the legislation.

I am compelled to consider the connecting factors approach.

[17] The following is a summary of the connecting factors that have been identified by both the Federal Court of Appeal and Tax Court of Canada as relevant in determining *situs* of passive income:

a) The residence of the taxpayer;

b) The origin or location of the capital invested;

c) The location of the branch where the investment activities occurred;

d) The location where the interest income is used;

e) The location of the investment instruments;

f) The location where the interest payment is made;

g) The nature of the investment;

h) The residence of the issuer;

i) The location of the issuer's property in the event of default that could be subject to potential seizure; and

j) The location of the issuer's income generating activity from which the interest derives.

a) Residence of the Taxpayer

[18] Ms. Stigen has never lived on a Reserve.

b) Origin and Location of Capital Invested

[19] The money invested by Ms. Stigen derived primarily from employment income with Ledcor in road construction. She claimed no exemption for her employment income, as it did not relate in any way to work on Reserve.

c) Location of Bank Branch Where Securities were Acquired

[20] Ms. Stigen banked at the Edmonton Branch of Peace Hills, which is off Reserve. Both the joint account and two of the GICs were located at that Branch. The third GIC was at Peace Hills' Saskatoon Branch, on the Muskeg Cree Nation's urban reserve, in an industrial park. Ms. Stigen acquired the GIC in Saskatoon while on a visit to Saskatoon.

d) Location where Interest Income was used

[21] Ms. Stigen did not spend the interest income; she left it in the joint account or the GICs.

e) Location of the Investment Instruments

[22] The paperwork relating to the joint account and two of the GICs was located off reserve at Peace Hills' Edmonton Branch. The paperwork relating to the remaining GIC was located on reserve at Peace Hills' Saskatoon Branch.

f) Location where Interest Payments were made

[23] The interest on the joint account was paid off reserve at Peace Hills' Edmonton Branch. Interest compounded on a GIC is credited to the GIC through a software system run by a service provider in Halifax. Interest paid on a GIC can be paid either from an account at Hobbema or directly from the Branch where the GIC is held, depending on the method of payment.

g) Nature of the Investment

[24] The investments were the joint accounts at Peace Hills, along with the GICs issued by Peace Hills.

h) Residence of the Issuer, Peace Hills

[25] Peace Hills is registered in six provinces and two territories. It has branches in five provinces and has branches both on and off reserve. While its head office is on reserve, its corporate office is off reserve.

i) Location of Peace Hills' Property

[26] In 2001, the majority of Peace Hills' capital assets were located off reserve. As can be seen from paragraph 39 of the Agreed Statement of Facts, the amount of capital assets in Hobbema, Saskatoon, Fort Qu'Appelle and Kelowna (on reserve) is considerably less than the capital assets in the other centres.

j) The Location of Peace Hills' Income Generating Activity

[27] There has been some criticism of the emphasis put on this factor, and generally by the approach taken by the Federal Court of Appeal in *Recalma*. The Federal Court of Appeal addressed this concern head-on in the case of *Sero*. It is indeed this very criticism that is at the root of the Appellant's alternative argument addressed at the outset of these Reasons. The Court of Appeal in *Sero* had this to say about *Recalma* and the importance of this particular connecting factor:

> 23 In reaching the conclusion that these appeals must be decided in the same way as *Recalma*, I have not ignored the fact that, in Mr. Frazer's case, the source of the money used to make the investments was Mr. Frazer's on-reserve business. That is a connection to the reserve but, in my view, a relatively weak one. It is not enough to overcome the fact that once Mr. Frazer invested his money in the Royal Bank, his investments became a source of income with no more connection to the reserve than the investment of Ms. Sero.
>
> 24 Nor have I ignored the published criticisms of *Recalma*: see, for example, Donald K. Biberdorf, "Aboriginal Income and the "Economic Mainstream" in *Report of Proceedings of the Forty-Ninth Tax Conference*, 1997 Conference Report (Toronto: Canadian Tax Foundation, 1998), 25:1-23); Murray Marshall, *Business and Investment Income and Section 87 of the Indian Act: Recalma v. Canada* (1998), 77 C.B.R. 528, Bill Maclagen, *Section 87 of the Indian Act: Recent Developments in the Taxation of Investment Income* (2000), 48 C.T.J. 1503; Thomas E. McDonnell, "Taxation of an Indian's Investment Income" in *Current Cases* (2001), 49 C.T.J. 954; Martha O'Brien, *Income Tax, Investment Income and the Indian Act: Getting Back on Track* (2002), 50 C.T.J. 1570.
>
> 25 There may be merit to some of the criticisms of *Recalma*. For example, it is not clear to me whether, in determining the *situs* of investment income for purposes

> of section 87 of the *Indian Act*, it is relevant to consider the extent to which investment income benefits the "traditional Native way of life". This seems to me a difficult test to apply, since it is at least arguable that the "traditional Native way of life" has little or nothing to do with reserves. However, it is not necessary to express an opinion on that point, because it is of no consequence in these appeals.
>
> 26 The principal criticism of *Recalma* is that it is anomalous to determine the *situs* of income on a debt by reference to the location of the activities of the debtor rather than the activities of the creditor. I see no anomaly in such an approach. The connecting factors test from *Williams* requires consideration of all of the characteristics of the property in issue. It seems to me that where the property is the interest on a debt, an analysis of the economic characteristics of the debtor is important.
>
> 27 Some critics also point out that the practical result of *Recalma* is to make it impossible for an Indian to earn tax-exempt investment income, except perhaps by investing in a financial or other enterprise with an asset base that is located or mostly located on a reserve. That criticism is based on the premise that section 87 is intended to permit an Indian to earn tax exempt income on any investment, as long as it is acquired through a financial institution with a presence on a reserve in the form of a branch. That is the premise that *Recalma* found to be unsound.

[28] The Federal Court of Appeal is clear on the approach to be followed. What then did Peace Hills do with the money invested with it? The Appellant's deposits became part of a Pool, which Peace Hills invested in cash and short-term deposits and securities (consisting of money market investments, Government treasury bills, Government bonds and corporate bonds) and loans (consisting of residential mortgages, commercial mortgages, collateral loans, commercial loans and consumer loans). The loans with a First Nations component constituted over 70% of all of Peace Hills' investments, yet Peace Hills is unable to break this down further into on or off reserve loans. Peace Hills' income from investments became part of the pool. Ms. Stigen's interest on the joint account and GICs would have been paid out of the pool.

[29] The Appellant concludes from this investment record that Peace Hills, unlike the issuers of securities in *Recalma*, had a strong connection to Reserves. With respect, I would not go so far: it is simply unknown how much investment is on reserve. Certainly there is a connection, but there appears to be a stronger connection to the commercial mainstream. The strength of connection required in this regard has been described in *Recalma* as follows:

> 14 … The result may, of course, be otherwise in factual circumstances where funds invested directly or through banks on reserves are used exclusively or mainly

> for loans to Natives on reserves. When Natives, however worthy and committed to their traditions, choose to invest their funds in the general mainstream of the economy, they cannot shield themselves from tax merely by using a financial institution situated on a reserve to do so.

[30] Also this Court expressed a similar view in *Lewin*:

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

[31] Peace Hills does have a connection with the First Nations community, but it is not in any way exclusive to on-reserve investments, and indeed it provides services to non-native clientele.

[32] Peace Hills is a financial institution operating across the country both on and off reserve, not differentiating between its native and non-native clientele. It is not an institution which is so directly connected to one or more reserves that the investment in it by an Indian requires protection as part of the entitlement of an Indian *qua* Indian on the Reserve. That is effectively what the Appellant seeks: that Peace Hills is so closely connected to Reserves that such a connecting factor is in and of itself sufficient to justify the application of section 87. I disagree. The connection to Reserves, taken in conjunction with all the other connecting factors, is simply not strong enough.

[33] The Appellant has attempted to distinguish *Sero, Lewin* and *Recalma* from the case before me. The major distinction is the nature of the financial institution and the investment activities engaged in by them. The Appellant emphasizes the extent of Peace Hills' investment with a First Nations connection, though cannot specify the on-reserve element. I see a financial institution engaged in the provision of the same financial services as other Canadian financial institutions, both on and off reserve. I do not find that the activities are so connected to reserves, as to distinguish them sufficiently to draw a different conclusion from *Recalma*, *Sero* or *Lewin*.

[34] I do not accept the Appellant's argument that Peace Hills is so connected to reserves that that factor alone is sufficient to exempt an Indian investor from taxation on interest earned from Peace Hills. Such a result ignores well-established case law that requires a weighing of all connecting factors; yes, some factors are more significant than others in dealing with passive income, but the weighing process is a cumulative one. When I consider the source of Ms. Stigen's investment (earned off

reserve), her residence (off reserve), her dealings with Peace Hills being primarily off reserve, the lack of tracking of her money to on-reserve investments, Peace Hills' corporate office being off reserve and the extent of Peace Hills' off-reserve investments, I simply cannot conclude that there are sufficiently strong connecting factors to find the interest income is situate on reserve. I also conclude that this result is consistent with sentiments expressed by the Supreme Court of Canada in *Williams* that "whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian". I have not been convinced that Peace Hills is part of that protected reserve system. It is a national financial institution with some emphasis on First Nations – that is not enough to grant Peace Hills some special status as an element of a protected reserve system. Ms. Stigen has not demonstrated any other supporting connecting factors that would make it so.

[35] For these reasons, I find Ms. Stigen cannot avail herself of the exemption from taxation found in section 87 of the *Indian Act* and the appeal is dismissed.

Signed at Ottawa, Canada, this 8th day of July 2008.

"Campbell J. Miller"

C. Miller J.

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