Docket: 2007-1402(IT)I

BETWEEN:

BRUCE MARCINYSHYN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Sheila Marcinyshyn *2007-1409(IT)I* and Martha Mawakeesic *2007-2221(IT)I*
on September 21, 2011 at Thunder Bay, Ontario

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Ryan Gellings

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2002, 2003, 2004 and 2005 taxation years is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia this 8th day of November 2011.

"D.W. Rowe"

Rowe D.J.

Docket: 2007-1409(IT)I

BETWEEN:

SHEILA MARCINYSHYN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Bruce Marcinyshyn *2007-1402(IT)I* and Martha Mawakeesic *2007-2221(IT)I*
on September 21, 2011 at Thunder Bay, Ontario

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Agent for the Appellant:	Bruce Marcinyshyn
Counsel for the Respondent:	Ryan Gellings

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2002, 2003, 2004 and 2005 taxation years is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia this 8th day of November 2011.

"D.W. Rowe"

Rowe D.J.

Docket: 2007-2221(IT)I

BETWEEN:

MARTHA MAWAKEESIC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Bruce Marcinyshyn *2007-1402(IT)I* and Sheila Marcinyshyn *2007-1409(IT)I*
on September 21, 2011 at Thunder Bay, Ontario

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Agent for the Appellant:	Bruce Marcinyshyn
Counsel for the Respondent:	Ryan Gellings

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2003, 2004, 2005 and 2006 taxation years is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia this 8th day of November 2011.

"D.W. Rowe"

Rowe D.J.

Citation: 2011 TCC 516
Date: 20111108
Docket: 2007-1402(IT)I

BETWEEN:

BRUCE MARCINYSHYN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2007-1409(IT)I

AND BETWEEN:

SHEILA MARCINYSHYN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2007-2221(IT)I

AND BETWEEN:

MARTHA MAWAKEESIC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Rowe D.J.

[1] Upon consent of counsel for the Respondent and of each Appellant, these appeals were heard on common evidence. The Appellants Martha Mawakeesic

("Mawakeesic") and Sheila Marcinyshyn ("Marcinyshyn") advised that the Appellant Bruce Marcinyshyn ("Bruce") was authorized to act as their agent.

[2] The issue in the appeal of Marcinyshyn is whether the employment income earned by her from Native Leasing Services ("NLS") in each of the taxation years 2002 to 2005, inclusive, was the personal property of an Indian situated on a reserve and whether the Minister of National Revenue (the "Minister") correctly included amounts received by Marcinyshyn from NLS in determining her adjusted income for the purpose of determining her eligibility for the Canada Child Tax Benefit (CCTB) for the 2003 taxation year. Marcinyshyn is a member of the Peguis First Nation, Peguis, Manitoba.

[3] The issue in the appeal of Mawakeesic is whether the employment income earned by her from NLS in each of the taxation years 2003 to 2006, inclusive, was the personal property of an Indian situated on a reserve and whether the Minister correctly included amounts received from NLS in determining her adjusted income for the purpose of determining her eligibility for the Goods and Services Tax (GST) tax credit for the 2003, 2004 and 2005 taxation years. Mawakeesic is a member of the Sandy Lake First Nation, Sandy Lake, Ontario.

[4] The issue in the appeal of Bruce is whether he is entitled to deduct the personal credit for married status pursuant to paragraph 118(1)(a) of the *Income Tax Act* for the 2003 and 2004 taxation years on the basis the employment income received by his spouse – Marcinyshyn – during those years was the personal property of an Indian situated on a reserve. Bruce acknowledged that his appeal would follow the result in the appeal of Marcinyshyn.

[5] It is not in dispute that the head offices of both O.I. Employee Leasing Inc. ("O.I.") and NLS were located on the Six Nations of the Grand River Reserve ("Six Nations Reserve") and that NLS is a sole proprietorship – owned and operated by Roger Obonsawin – that leased employees to native organizations located off-reserve with the intent they could claim a tax exemption pursuant to section 87 of the *Indian Act*, R.S.C. 1985, c. I-5, as amended.

[6] On his own behalf and as agent for Marcinyshyn and Mawakeesic, Bruce advised that they were content to proceed on the basis that no oral evidence would be presented and that each of them was willing to rely on the material contained in the binder filed as Exhibit A-1, tabs 1 to 25, inclusive, in support of their request that each of their appeals be allowed. Reference hereafter to a tab means the document(s) are within said exhibit. Included in said exhibit are various documents pertaining to

the employment of both Marcinyshyn and Mawakeesic, including an employment contract dated April 16, 2004. At other tabs, the Appellants included other material including case reports, extracts from the Canada Revenue (as it then was) website and information regarding the Fetal Alcohol Syndrome Disorder program ("FASD") at Anishnawbe Mushkiki Inc ("AMI").

[7] Counsel for the Respondent called Bernice Dubec ("Dubec") to the stand. Dubec testified she is a status Indian and resides in Kenora, Ontario. She was the Executive Director of AMI from January 2000 to August 2010 and had been placed in that position as an employee of O.I.. AMI was incorporated on March 3, 2000 as a non-profit corporation and provides services to people of Aboriginal ancestry in accordance with the objects set forth in the Letters Patent, a copy of which was filed as Exhibit R-1. The objects are stated in paragraph 4 of the Letters Patent as follows:

> (a) establishment of a medical centre and clinic in the Thunder Bay area to provide people of Aboriginal ancestry with primary health care;
>
> (b) establishment of a health counselling program;
>
> (c) promotion of health care and preventative medicine;
>
> (d) creation and distribution of educational materials relating to health care;
>
> (e) enhancing availability of culturally appropriate translation, medical interpretation and resources;
>
> (f) encouraging Aboriginal people to reclaim knowledge and understanding of traditional teachings;
>
> (g) increasing support mechanisms to provide necessary resources, advocacy, and access to traditional healing;
>
> (h) enhancing collaboration and collective initiatives between agencies and communities;
>
> (i) increase access to traditional Elders, medicines and ceremonies; and
>
> (j) such other charitable programs in the areas of Aboriginal health care as the Directors deem advisable.

[8] Dubec testified that from its headquarters at Royston Court in Thunder Bay, AMI provides services to Aboriginal people whether status Indians, non-status, Métis or other ancestry. On occasion, services are provided to a family unit that may be

blended in the sense it includes non-native members. The area covered by the AMI mandate is the District of Thunder Bay and even though the resources were limited, it delivered service to 22 population centres, including First Nation communities, small towns and villages. Dubec stated the aim of the organization was to utilize traditional healing methods to deal with health problems and to promote health care and a healthy lifestyle. AMI employed physicians and a chiropodist – part-time – and a nurse practitioner, nutritionist, diabetes educator – all full-time – and retained the services of consultants – including surgeons – as required. Dubec stated Mawakeesic and Marcinyshyn both worked for AMI. Mawakeesic worked as a Counsellor in the FASD program which included instruction in parenting skills and nutrition. AMI offered pre-natal and post-natal services. Dubec estimated that 80% of the work was performed at the Royston Court office, although some home visits were done within the city of Thunder Bay. About 10% of the total workload was devoted to workshops, seminars and classes and most of the remaining balance was provided to the residents on Fort William First Nation ("Reserve"), located 15 kilometres from the AMI office. Marcinyshyn was employed initially as a Child Care Worker and then worked in the FASD program where she performed substantially the same tasks as Mawakeesic.

[9] In cross-examination by Bruce, Dubec stated that most workers at AMI were employees of O.I. and that – initially – a version of AMI had been located on the Reserve and received its funding from an Aboriginal organization. The employment income of workers was exempt from income tax but the structure was modified through the issuance of Letters Patent whereby it became a self-governing organization funded by the Province of Ontario. Dubec stated there was no space on the Reserve to construct an adequate facility so AMI purchased the property on Royston Court to use as its headquarters and was able to expand the nature and scope of its programs in accordance with the objects of the corporation.

[10] With respect to the appeal of Marcinyshyn, the assumptions of fact – stated at paragraphs 18(b) to 18(e), inclusive, of the Reply to the Notice of Appeal ("Reply") are:

> …
> b) The appellant is an Indian as defined in the *Indian Act*;

c) NLS had a head office on the Six Nations;

d) The duties of employment, the place of performance and the services provided by the appellant were off-reserve; and

e) The Appellant did not live on a reserve.

[11] With respect to the appeal of Mawakeesic, the relevant assumptions of fact are stated at paragraphs 23(b) to 23(e), inclusive, and paragraphs 24(b) to 24 (d), inclusive, of the Reply.

…

b) The appellant is an Indian as defined in the *Indian Act*;

c) NLS had a head office on the Six Nations;

d) The duties of employment, the place of performance and the services provided by the appellant were off-reserve; and

e) The appellant did not live on a reserve.

…

b) the appellant worked directly for Anishnawbe Mushkiki during the 2006 taxation year;

c) the appellant claimed $47,437 in income from Anishnawbe Mushkiki; and

d) Anishnawabe Mushkiki is not located on a reserve.

[12] Bruce submitted that it was apparent Marcinyshyn had entered into a contract dated April 1, 2002 – tab 1 – with NLS on the basis that any payment for her employment would be made from the NLS office located at Six Nations Reserve. Her name at that time was Sheila Blue. It was understood between the parties that her income would be exempt from income tax. The T4 slips issued by NLS – tab 7 – for the relevant years disclosed that no income tax had been deducted from her salary. Bruce stated that since payment for the employment had been made from an employer situated on a Reserve that the income was exempt. Bruce submitted that two recent decisions by the Supreme Court of Canada had transformed the application of earlier decisions to the point where the location of the employer – who owed a debt to Marcinyshyn and Mawakeesic for having provided their services during each pay period – was paramount and determinative of the issue of their right to an exemption from tax from employment income.

[13] Counsel for the Respondent submitted no evidence had been adduced on behalf of any Appellant to demonstrate that the assessments issued by the Minister were incorrect. Counsel submitted the jurisprudence relied on by Bruce did not alter the well-established body of jurisprudence concerning the tax exemption provided under section 87 of the *Indian Act.* It was apparent the employment of both Mawakeesic and Marcinyshyn was off-reserve and that less than 10% of all services provided by AMI were to residents of the Reserve and that the AMI mandate was to provide services to all persons of Aboriginal ancestry and – on occasion – also to those members of a family unit who were non-native.

[14] **Relevant Legislation**

> *Property exempt from taxation*
>
> **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:
> …
>
> (b) the personal property of an Indian or a band situated on a reserve.
>
> **81. (1) Amounts not included in income** -- There shall not be included in computing the income of a taxpayer for a taxation year,
>
> > (a) **statutory exemptions [including Indians]** -- 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;

[15] The Supreme Court of Canada in *R. v. Nowegijick*, [1983] 1 S.C.R. 29, decided that property within the meaning of paragraph 87(1)(*b*) of the *Indian Act* included income. This decision gave rise to the situs test. At page 5 – in part – Dickson J. stated:

> One point might have given rise to argument. Was the fact that the services were performed off the reserve relevant to situs? The Crown conceded in argument, correctly in my view, that the situs of the salary which Mr. Nowegijick received was sited on the reserve because it was there that the residence or place of the debtor, the Gull Bay Development Corporation, was to be found and it was there the wages were payable.

[16] In *Williams v. Canada*, [1992] 1. S.C.R. 877, the Supreme Court of Canada established a series of connecting factors to be utilized when determining the situs of personal property. As referred to by counsel for the Appellants in their submissions, that case concerned an appellant Indian who received regular unemployment insurance benefits as a result of working with a logging company and for his Band in a specially-funded project. In both cases, the work was performed on the reserve. At paragraphs 33 to 38, inclusive of the judgment of Gonthier J. – delivered for the Court – he stated:

> **33** Because the transaction by which a taxpayer receives unemployment insurance benefits is not a physical object, the method by which one might fix its situs is not immediately apparent. In one sense, the difficulty is that the transaction has no situs. However, in another sense, the problem is that it has too many. There is the situs of the debtor, the situs of the creditor, the situs where the payment is made, the situs of the employment which created the qualification for the receipt of income, the situs where the payment will be used, and no doubt others. The task is then to identify which of these locations is the relevant one, or which combination of these factors controls the location of the transaction.
>
> **34** The appellant suggests that in deciding the situs of the receipt of income, a court ought to balance all of the relevant "connecting factors" on a case by case basis. Such an approach would have the advantage of flexibility, but it would have to be applied carefully in order to avoid several potential [page892] pitfalls. It is desirable, when construing exemptions from taxation, to develop criteria which are predictable in their application, so that the taxpayers involved may plan their affairs appropriately. This is also important as the same criteria govern an exemption from seizure.
>
> **35** Furthermore, it would be dangerous to balance connecting factors in an abstract manner, divorced from the purpose of the exemption under the Indian Act. A connecting factor is only relevant in so much as it identifies the location of the property in question for the purposes of the Indian Act. In particular categories of cases, therefore, one connecting factor may have much more weight than another. It would be easy in balancing connecting factors on a case by case basis to lose sight of this.
>
> **36** However, an overly rigid test which identified one or two factors as having controlling force has its own potential pitfalls. Such a test would be open to manipulation and abuse, and in focusing on too few factors could miss the purposes of the exemption in the Indian Act as easily as a test which indiscriminately focuses on too many.
>
> **37** The approach which best reflects these concerns is one which analyzes the matter in terms of categories of property and types of taxation. For instance, connecting factors may have different relevance with regard to unemployment

> insurance benefits than in respect of employment income, or pension benefits. The first step is to identify the various connecting factors which are potentially relevant. These factors should then be analyzed to determine what weight they should be given in identifying the location of the property, in light of three considerations: (1) the purpose of the exemption under the Indian Act; (2) the type of property in question; and (3) the nature of the taxation of that property. The question with regard to each connecting factor is therefore what weight should be given that factor in answering the question whether to tax that form of property in that manner [page893] would amount to the erosion of the entitlement of the Indian qua Indian on a reserve.
>
> **38** This approach preserves the flexibility of the case by case approach, but within a framework which properly identifies the weight which is to be placed on various connecting factors. Of course, the weight to be given various connecting factors cannot be determined precisely. However, this approach has the advantage that it preserves the ability to deal appropriately with future cases which present considerations not previously apparent.

[17] At paragraphs 55 and 56, Mr. Justice Gonthier continued:

> **55** Furthermore, as can be seen from our discussion of the test for the situs of unemployment insurance benefits, the creation of a test for the location of intangible property under the Indian Act is a complex endeavour. In the context of unemployment insurance we were able to focus on certain features of the scheme and its taxation implications in order to establish one factor as having particular importance. It is not clear whether this would be possible in the context of employment income, or what features of employment income and its taxation should be examined to that end.
>
> **56** Therefore, for the purposes of the present appeal, we merely note that the employment of the appellant by which he qualified for unemployment insurance benefits was clearly located on the reserve, no matter what the proper test for the situs of employment income is determined to be. Because the qualifying employment was located on the reserve, so too were the benefits subsequently received. The question of the relevance of the residence of the recipient of the benefits at the time of receipt does not arise in this case since it was also on the reserve.

[18] The judgment – at paragraphs 61 to 62, inclusive – concluded as follows:

> **61** Determining the situs of intangible personal property requires a court to evaluate various connecting factors which tie the property to one location or another. In the context of the exemption [page900] 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.
>
> **62** With regard to the unemployment insurance benefits received by the appellant, a particularly important factor is the location of the employment which gave rise to the qualification for the benefits. In this case, the location of the qualifying employment was on the reserve, therefore the benefits received by the appellant were also located on the reserve. The question of the relevance of the residence of the recipient of the benefits at the time of receipt does not arise in this case.

[19] Recently, the Supreme Court of Canada decided two cases, both involving the question of whether interest income paid to a status Indian was situate on a reserve and therefore exempt from taxation. *Bastien Estate v. Canada*, 2011 SCC 38 (*Bastien)* was heard together with *Dubé v. Canada*, 2011 SCC 39 *(Dubé*). The facts, proceedings and issue were set out in the reasons of Cromwell J. at paragraphs 5 to 10, inclusive as follows:

> II. Facts, Proceedings and Issue
>
> 1. Facts
>
> …
>
> [5] The late Rolland Bastien was a status Indian and belonged to the Huron-Wendat Nation. He was born and died on the Wendake Reserve near Quebec City. His wife and children who succeed him are also Huron and live on the reserve. From 1970 until 1997 when he sold the business to his children, Mr. Bastien operated a moccasin manufacturing business on the Wendake Reserve: Les Industries Bastien enr. He invested some of the income from the operation and sale of his business in term deposits with two caisses populaires situated on Indian reserves, the Caisse populaire Desjardins du Village Huron (the "Caisse") situated on the Wendake Reserve and the Caisse populaire Desjardins de Pointe-Bleue situated on the Mashteuiatsh Reserve. Only the income from the investments with the Caisse on the Wendake Reserve is in issue on this appeal. The Caisse has since its founding in 1965 had its head office, its only place of business and its sole fixed asset on the reserve (partial agreed statement of facts, A.R., vol. II, at p. 200).
>
> [6] In 2001, Mr. Bastien held certificates of deposit at the Caisse and these investments paid interest that was deposited in a transaction savings account at the Caisse. Mr. Bastien considered this income to be property exempt from taxation. However, in 2003, the Minister of National Revenue made an assessment in which he added the investment income to Mr. Bastien's income for the 2001 taxation year. The Minister confirmed the assessment and Mr. Bastien's estate appealed unsuccessfully to the Tax Court and the Federal Court of Appeal.

2. Proceedings

[7] In the Tax Court (2007 TCC 625, 2008 D.T.C. 4064), Angers J. applied the Federal Court of Appeal's decision in *Recalma v. Canada* (1998), 158 D.L.R. (4th) 59. He was of the view that the location of investment income should be analysed by having regard to four factors: its connection to the reserve; whether it benefited the traditional Native way of life; the risk that taxation would erode Native property; and the extent to which the investment income was derived from economic mainstream activity. Angers J. thought that this fourth factor — whether the income was derived from the economic mainstream — was the most important. He found that the Caisse earned its income from activities in the economic mainstream which were not closely connected to the reserve. Consequently, in his view, the investment income was not exempt from taxation.

[8] The Federal Court of Appeal upheld this conclusion (2009 FCA 108, 400 N.R. 349). Nadon J.A. thought that this case was governed by the court's previous decisions in *Recalma*, *Lewin v. Canada*, 2002 FCA 461, 2003 D.T.C. 5476, and *Sero v. Canada*, 2004 FCA 6, [2004] 2 F.C.R. 613. Nadon J.A. highlighted that the most important consideration was whether the investment income — that is, the profit generated from the capital invested in a financial institution — was produced on or off the territory of the reserve. In other words, Nadon J.A. found that if all or part of the funds were invested in the general mainstream of the economy, the taxation exemption could not apply. In his view, that was the case and the appeal should be dismissed.

[9] In concurring reasons, Pelletier J.A. (Blais J.A. concurring) added some comments about the nature of the caisses populaires' business activities. The caisses populaires, he thought, now fully participate in the capital market, at least to the extent that their cash requirements permit or their surplus funds demand. The nature of the capital market itself should be given the most weight in order to determine the location of investment income. That market is not limited to a reserve, a province or even a country.

3. Issue

[10] There is only one question before the Court: Was Mr. Bastien's interest income earned on the term deposits with the Caisse populaire Desjardins du Village Huron exempt from income taxation because it was personal property situated on a reserve?

[20] At paragraphs 11 and 12, Cromwell J. commenced his analysis and stated:

III. Analysis

> [11] The appellant submits that the analyses in the Tax Court and the Federal Court of Appeal were faulty in two related respects. First, they failed to give appropriate weight to the contractual nature of the investment vehicle in determining whether or not it was situated on a reserve. Mr. Bastien contracted with the Caisse on the reserve for a particular rate of return on his investment to be paid to him on the reserve; how the Caisse produced income by dealings with others, the appellant contends, was not relevant to determining the location of Mr. Bastien's investment income. The appellant points to art. 1440 of the *Civil Code of Québec*, S.Q. 1991, c. 64, which provides that a contract has effect only between the contracting parties and does not generally affect third persons. Second, the appellant submits that the courts below erred by giving determinative weight to the fact that the income was derived from the commercial mainstream; the appellant says that all the relevant factors ought to have been considered and they all favour the reserve as the location of the interest income.
>
> [12] The respondent substantially supports the reasoning of the Federal Court of Appeal. To be exempt from taxation, the interest income must be closely connected to a reserve, that is to say, that the issuer's income-generating activities must be exclusively situated on a reserve. In this case, as the Caisse's income-generating activities were in the commercial mainstream, Mr. Bastien's interest income paid by the Caisse cannot be exempt from taxation. Additionally, the respondent submits that the privity of contract rule should not limit the courts in making factual findings about the location of the issuer's income-generating activities. Nor should the rule imply that the *situs* of the contract is the *situs* of the investment income.

[21] Cromwell J. – at paragraph 16 – referred to *Williams*, *supra*, and acknowledged the location of property is "not objectively easy to determine." He commented that:

> … While this search for location may seem at times to be more the stuff of metaphysics than of law, the attribution of location is what the *Indian Act* provisions require. The difficulty of doing so means that it is not generally possible to apply a simple, standard test to determine the location of intangible property. …

[22] In the course of his analysis concerning the location of income, Cromwell J. – at paragraphs 18 to 28 – continued:

> [18] To address this challenge, Gonthier J. in *Williams* set out a two-step test. At the first step, the court identifies potentially relevant factors connecting the intangible personal property to a location. "A connecting factor is only relevant", wrote Gonthier J., "in so much as it identifies the location of the property in question for the purposes of the *Indian Act*" (p. 892). Thus, even in this somewhat metaphysical sphere, the focus is clearly on ascribing a physical location to the property in question. Connecting factors mentioned in *Williams* include things such as the residence of the payor and the payee, the place of

payment and where the employment giving rise to qualification for the benefit was performed: *Williams*, at p. 893. As Gonthier J. noted, potentially relevant connecting factors have different relevance depending on the categories of property and the types of taxation in issue. So, for example, "connecting factors may have different relevance with regard to unemployment insurance benefits than in respect of employment income, or pension benefits" (p. 892). To take this into account, as well as to ensure that the analysis serves to identify the location of the property for the purposes of the *Indian Act*, at the second step, the court analyses these factors purposively in order to assess what weight should be given to them. This analysis considers the purpose of the exemption under the *Indian Act*; the type of property in question; and the nature of the taxation of that property (p. 892).

[19] *Williams* thus establishes a clearly structured analysis, but one that turns on careful consideration of the particular circumstances of each case assessed against the purpose of the exemption. As Gonthier J. noted at p. 893, the *Williams* approach "preserves the flexibility of the case by case approach, but within a framework which requires the court to assess the weight which is to be placed on the various connecting factors". The *Williams* approach applies here because we are dealing with the location of a transaction — the payment of interest pursuant to a contract — for the purposes of taxation.

[20] In this case and others, the Tax Court and the Federal Court of Appeal have developed and applied jurisprudence which adapts the *Williams* analysis to the taxation of interest and other investment income. As this is the first case in this Court since *Williams* to address this issue, it is timely to restate and consolidate the analysis that should be undertaken in applying the s. 87 exemption to interest income. I will therefore review the analysis required by *Williams* in more detail, focusing in turn on the purpose of the exemption, the type of property, the nature of the taxation of that property and the potentially relevant connecting factors.

(i) The Purpose of the Exemption

[21] In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, La Forest J. discussed the purpose of both the tax exemption and the immunity from seizure in the *Indian Act*. With respect to the exemption from taxation, he observed that it serves to "guard 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" (p. 130). He summed up his discussion of the purpose of the provisions by noting that since the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, "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". He added an important qualification: the purpose of the exemptions is to preserve property reserved for their use, "not to remedy the economically disadvantaged position of Indians by ensuring that [they could] acquire, hold and

deal with property in the commercial mainstream on different terms than their fellow citizens": p. 131. As La Forest J. put it:

> These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply 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. [Emphasis added; p. 133.]

[22] However, La Forest J. was careful to emphasize that even with respect to purely commercial arrangements, the protections from taxation and seizure always apply to property situated on a reserve. As he put it, at p. 139:

> … if an Indian band concluded a purely commercial business agreement with a private concern, the protections of ss. 87 and 89 would have no application in respect of the assets acquired pursuant to that agreement, except, of course, if the property was situated on a reserve. It must be remembered that the protections of ss. 87 and 89 will always apply to property situated on a reserve. [Emphasis added.]

[23] The Court returned to the purpose of the exemptions in *Williams*. Gonthier J. confirmed that the purpose of the exemptions "was to preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize" (p. 885). Echoing the limitation described by La Forest J. in *Mitchell*, Gonthier J. added that "the purpose of the sections was not to confer a general economic benefit upon the Indians" (at p. 885) and that "[w]hether 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" (p. 887). In light of this, Gonthier J. held that the purpose of the requirement in s. 87 that the property be "situated on a reserve" is to "determine whether the Indian holds the property in question as part of the entitlement of an Indian *qua* Indian on the reserve" (p. 887). In both *Union of New Brunswick Indians* and *God's Lake*, the Court confirmed that the purpose of the exemptions was as set out in *Mitchell* and *Williams*.

[24] It will be useful to make two additional points.

[25] The first is that a purposive approach to the application of the exemption provisions must be rooted in the statutory text and does not give the court "license to ignore the words of the Act ... or otherwise [circumvent] the intention of the legislature" which that text expresses: *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 371. As Professor Sullivan has wisely observed, even when the broad purposes of legislation are clear, "it does

not follow that the unqualified pursuit of those purposes will give effect to the legislature's intention": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 297; see also *Nowegijick*, at p. 34. A purposive analysis must inform the court's approach to weighing the connecting factors. But it must be acknowledged that there may not always be a complete correspondence between the meaning of the text and its broad, underlying purpose.

[26] The second and related point concerns the expression "Indian *qua* Indian". In both *Mitchell* and *Williams*, the Court referred to the purpose of the exemption as protecting property which Indians hold *qua* Indians: *Mitchell*, at p. 131; *Williams*, at p. 887. In some of the subsequent jurisprudence, this has been taken as a basis for importing into the s. 87 analysis the question of whether the income in question benefits the traditional Native way of life. For example, in *Canada v. Folster*, [1997] 3 F.C. 269, the Federal Court of Appeal attributed the significance of this factor to La Forest J. in *Mitchell*, observing that he had "characterized the purpose of the tax exemption provision as, in essence, an effort to preserve the traditional way of life in Indian communities by protecting property held by Indians *qua* Indians on a reserve" (para. 14). In *Recalma*, the Federal Court of Appeal identified as a relevant consideration the question of whether the investment income benefits the traditional Native way of life (para. 11). This factor has been relied on in cases in the Tax Court and the Federal Court of Appeal since *Recalma*: see, e.g., *Lewin v. Canada*, 2001 D.T.C. 479, at paras. 36 and 63–64.

[27] The reference to rights of an "Indian *qua* Indian" in *Mitchell*, which was repeated in *Williams*, and the linking of the tax exemption to the traditional way of life have been criticized: C. MacIntosh, "From Judging Culture to Taxing 'Indians': Tracing the Legal Discourse of the 'Indian Mode of Life'" (2009), 47 *Osgoode Hall L.J.* 399, at p. 425. However, I do not read either judgment as departing from a focus on the location of the property in question when applying the tax exemption. The exemption provisions must be read in light of their purpose, but not, as Professor MacIntosh puts it, be "let loose from the moorings of their express language" (p. 425). A purposive interpretation goes too far if it substitutes for the inquiry into the location of the property mandated by the statute an assessment of what does or does not constitute an "Indian" way of life on a reserve. I do not read *Mitchell* or *Williams* as mandating that approach.

[28] In my respectful view, *Recalma* and some of the cases following it have gone too far in this direction. The exemption was rooted in the promises made to Indians that they would not be interfered with in their mode of life: see, e.g., R. H. Bartlett, "The Indian Act of Canada" (1977-1978), 27 *Buff. L. Rev.* 581, at pp. 612-13; *Mitchell*, at pp. 135–36. However, a purposive interpretation of the exemption does not require that the evolution of that way of life should be impeded. Rather, the comments in both *Mitchell* and *Williams* in relation to the protection of property which Indians hold *qua* Indians should be read in relation to the need to establish a connection between the property and the reserve such

> that it may be said that the property is situated there for the purposes of the *Indian Act*. While 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, the availability of the exemption does not depend on whether the property is integral to the life of the reserve or to the preservation of the traditional Indian way of life. See M. O'Brien, "Income Tax, Investment Income, and the Indian Act: Getting Back on Track" (2002), 50 *Can. Tax J.* 1570, at pp. 1576 and 1588; B. Maclagan, "Section 87 of the Indian Act: Recent Developments in the Taxation of Investment Income" (2000), 48 *Can. Tax J.* 1503, at p. 1515; M. Marshall, "Business and Investment Income under Section 87 of the *Indian Act*: *Recalma* v. *Canada*" (1998), 77 *Can. Bar Rev.* 528, at pp. 536-39; T. E. McDonnell, "Taxation of an Indian's Investment Income" (2001), 49 *Can. Tax J.* 954, at pp. 957-58.

[23] In *Bastien, supra* the property in question was interest income derived from term deposits in a branch of Caisse Populaire Desjardins du Village Huron, situated on the Wendake Reserve. Cromwell J. held that the investment income earned from the term deposits was personal property and – except for the exemption – would be included as income from property since it was not part of any business activity.

[24] Cromwell J. returned to the matter of the connecting factors and – at paragraphs 38 to 42, inclusive – stated:

> (iv) Connecting Factors
>
> [38] *Williams* requires the court to identify the connecting factors for the type of property in question: p. 892. Gonthier J. identified several potentially relevant connecting factors including: "the residence of the debtor, 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 benefits": p. 893. While it is instructive to review the various connecting factors considered in that case, one must bear in mind that the factors relevant to the receipt of unemployment insurance benefits which were in issue there are not necessarily those relevant to receipt of interest income. The type of property is important in identifying the relevant connecting factors.
>
> [39] Gonthier J. turned first to the "traditional test" (p. 893), the residence of the debtor, which had been applied in *Nowegijick*, at p. 34. However, given that the debtor in *Williams* was the federal Crown and that there were special considerations in determining the location of the Crown, he concluded that the residence of the debtor was a factor entitled to limited weight in the context of unemployment insurance benefits: p. 894. For the same reasons, he found that the place of payment was also of limited weight. Other potentially relevant factors considered were the residence of the recipient and where the employment income, which was the basis of the qualification for the benefits paid, had been earned: p. 894. Noting that unemployment insurance benefits are based on premiums arising out of previous employment, Gonthier J. observed that

"the connection between the previous employment and the benefits is a strong one" (p. 896). He thought that the tax treatment of premiums and benefits reinforced the strength of this connection: p. 896. Given the strength of this connecting factor, Gonthier J. concluded that the place of residence of the recipient at the time of receipt would only be significant if it pointed to a location different from that of the qualifying employment. Importantly, he also concluded that given the many links between the employment income and the reserve, the employment income giving rise to the benefits was clearly on the reserve on any test: "[t]he employer was located on the reserve, the work was performed on the reserve, the appellant resided on the reserve and he was paid on the reserve" (p. 897). Gonthier J. was also careful to note that he was not attempting to develop a test for the *situs* of the receipt of employment income or to determine the relevance to the analysis of the benefit recipient's place of residence at the time of receipt: pp. 897-98.

[40] Gonthier J. rejected resolving the location of the unemployment insurance benefits by simply applying conflict of laws principles about the location of a debt. He noted that the purposes of conflict of laws principles have little or nothing in common with the purpose underlying the *Indian Act* tax exemption and that the location of property for tax exemption purposes should be considered according to the purposes of the *Indian Act*, not the purposes of the conflict of laws: p. 891. However, as Gonthier J. acknowledged and later cases have confirmed, this does not make irrelevant for *Indian Act* purposes the whole body of existing law about the location of various types of property. While Gonthier J. in *Williams* declined to adopt the residence of the debtor as the governing factor simply because that is the applicable conflict of laws rule, he noted that it may remain an important connecting factor, or even an exclusive one, provided that the weight assigned to it is determined in light of the purpose of the *Indian Act* tax exemption, the type of property and the nature of the taxation in issue.

[41] Other cases illustrate the ongoing relevance to the *Indian Act* tax exemption of general legal principles about the location of property. In *Union of New Brunswick Indians*, the question was whether Indians living in New Brunswick were exempt from sales tax on purchases, made off the reserve, of goods to be used on the reserve. A majority of the Court applied the rule that tax is paid at the point of sale and concluded that the tax was not in respect of property situated on a reserve. Similarly in *God's Lake*, in the context of interpreting the exemption from seizure of property situated on a reserve, the Court applied traditional common law principles and statutory provisions to determine that funds in an off-reserve bank account were not situated on the reserve. The Court was careful to distinguish taxation transactions where the location is objectively difficult to determine from cases in which the issue is simply where a potentially exigible asset is located: para. 18. However, it is important to note that the rule about the location of a bank account is not a conflict of laws principle, but a generally applicable legal rule which, in that case,

> was included in a statute. Of course, a different legal test is used to determine the location of a bank account for the purposes of protection from seizure and the location of a transaction, such as the payment of interest, for the purposes of taxation. However, it would be hard to justify the conclusion, for example, that a bank account was situated on a reserve for the purposes of exemption from seizure but that a contractual obligation entered into on the reserve to pay interest there on that same account was not on the reserve for the purposes of exemption from taxation.
>
> [42] These cases underline the point that general legal rules about the location of property are relevant for the purposes of the *Indian Act*. Thus, provisions and jurisprudence relating to the location of income may prove helpful in deciding whether income is located on a reserve: see O'Brien, at pp. 1589-91. While these rules cannot be imported from one context into another without due consideration, they ought to be considered and given appropriate weight in light of the purpose of the exemption, the type of property and the nature of the taxation in issue.

[25] After finding the connecting factors identified in *Williams*, *supra* were potentially relevant, Cromwell J. embarked on the following analysis at paragraphs 44 to 47, inclusive.

> [44] I turn first to the location of the debtor, a factor traditionally relied on to determine the location of the obligation to pay. Here the debtor is the Caisse whose head office and only place of business as well as its only fixed asset is located on the Wendake Reserve. The income — interest agreed to be paid by the Caisse to Mr. Bastien — arises from a contractual obligation between the taxpayer and the Caisse which was entered into on the reserve. By virtue of the contract, the income was to be paid (and was paid) by the Caisse by depositing it into the taxpayer's account on the reserve: see art. 1566 of the *Civil Code of Québec*. Thus, the location of the debtor and the place where payment must be made are clearly on the reserve. Unlike the situation facing the Court in *Williams*, where reliance on the location of the debtor involved the complex question of the location of the federal Crown, there is no such complication here. The Caisse's only place of business is on the reserve and its obligation, both under the contract and the *Civil Code*, was to pay on the reserve. As noted earlier, the Court in *God's Lake* applied generally applicable legal rules about the location of a bank account for the purposes of the exemption from seizure and while the fact that it applied these rules is not dispositive of the question of the location of the interest income in issue here, it tends to reinforce the conclusion that the interest income is located on the reserve in this case. While the provisions relied on by the Court in *God's Lake* do not apply here because they relate to banks and not to caisses populaires, both the contract between the parties and the provisions of art. 1566 of the *Civil Code* provide that payment of the interest income is to be made on the reserve.

> [45] Having regard to the purpose of the exemption, the type of property and the nature of the taxation of that property, the connecting factors of the location of the debtor, the place where the legal obligation to pay must be performed and the location of the term deposits giving rise to the income should in my view be given significant weight in the circumstances of this case. As noted, the property flows from a contractual obligation which, both under the contract and the terms of the *Civil Code* (art. 1566), is to be performed on the reserve. The deposits themselves and the account into which the interest on them is paid are on the reserve. The debtor's only place of business is on the reserve. Thus, the type of property supports the view that the connecting factors of the place of contracting, the place of performance and the residence of the debtor should weigh heavily in attributing a location to the interest income. The nature of the taxation — the income is income from property — reinforces this view. And so does the purpose of the exemption, which is to preserve Indian property on a reserve.
>
> [46] The analysis must also take account of other potentially relevant connecting factors. Here, those factors reinforce rather than detract from the conclusion that the interest income is property situated on the reserve.
>
> [47] Consider the residence of the payee, Mr. Bastien. That of course was on the reserve. As for the source of the capital which was invested to produce the interest income, it too was earned on the reserve. There is some parallel with *Williams* in this regard. In *Williams*, the employment income which gave rise to the entitlement to unemployment insurance benefits had been earned on the reserve. Gonthier J. noted that the connection between the benefits and the qualifying employment was strong because the benefits are based on premiums arising from the previous employment: p. 896. In this case, while the interest income was derived from the loan to the Caisse, it was Mr. Bastien's business income, generated on the reserve and not assessed by the Minister, which produced the capital which in turn was invested to produce that income. These other potentially relevant connecting factors do not point to any other location than the reserve and tend to strengthen rather than undermine the connection between the investment income and the reserve.

[26] With respect to the form of the investment and the meaning of the phrase "commercial mainstream", Cromwell J. continued at paragraphs 51 to 54, inclusive:

> [51] Mr. Bastien made a simple loan to the on-reserve Caisse. The Caisse's income-producing actions and contracts after Mr. Bastien invested in term deposits cannot be deemed his own and do not diminish the many and clear connections between his interest income and the reserve. Consequently, the potentially relevant factor of the location of the issuer's income-generating activities is of no importance in this case.
>
> [52] In my respectful view, the *Recalma* line of cases has sometimes wrongly elevated the "commercial mainstream" consideration to one of

determinant weight. More precisely, several decisions have looked to whether the debtor's economic activity was in the commercial mainstream even though the investment income payable to the Indian taxpayer was not. This consideration must be applied with care lest it significantly undermine the exemption.

[53] The expression "commercial mainstream" was used in *Mitchell*. In one context, the expression was used to emphasize the distinction between property that is held pursuant to treaty or agreement from property that is not. This distinction is important for the purposes of s. 90 of the *Indian Act*, which deems certain personal property to be on a reserve for the purposes of the tax exemptions. La Forest J.'s reasons in *Mitchell* distinguish between property that is deemed by s. 90 to be on a reserve — that is, property purchased with Indian funds or money appropriated by Parliament for the benefit of Indians, or property given to Indians under a treaty or agreement — from property otherwise acquired and therefore not deemed to be on the reserve. Thus, the expression "commercial mainstream" in this context was not a factor to identify the location of property, but a consideration to help identify property which, although actually located elsewhere, was deemed by s. 90 to be located on a reserve. La Forest J. explained (at p. 138):

> When Indian bands enter the commercial mainstream, it is to be expected that they will have occasion, from time to time, to enter into purely commercial agreements with the provincial Crowns in the same way as with private interests. … Indians have a plenary entitlement to their treaty property; it is owed to them *qua* Indians. Personal property acquired by Indians in normal business dealings is clearly different; it is simply property anyone else might have acquired, and I can see no reason why in those circumstances Indians should not be treated in the same way as other people.
>
> There can be no doubt, on a reading of s. 90(1)(*b*) [i.e. personal property given to Indians under a treaty or agreement], that it would not apply to any personal property that an Indian band might acquire in connection with an ordinary commercial agreement with a private concern. Property of that nature will only be protected once it can be established that it is situated on a reserve. Accordingly, any dealings in the commercial mainstream in property acquired in this manner will fall to be regulated by the laws of general application. [Emphasis added.]

(See also O'Brien, at p. 1576; D. K. Biberdorf, "Aboriginal Income and the 'Economic Mainstream'" in Canadian Tax Foundation, *Report of Proceedings of the Forty-Ninth Tax Conference* (1998), 25:1-23, at pp. 25:8-25:9; Maclagan, pp. 1507-8.)

> [54] As I mentioned earlier, La Forest J. in *Mitchell* also noted that the purpose of the legislation is not to permit Indians to "acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens": p. 131. However, he was clear that, even if an Indian acquired an asset through a purely commercial business agreement with a private concern, the exemption would nonetheless apply if the asset were situated on a reserve. As he emphasized, "[i]t must be remembered that the protections of ss. 87 and 89 will always apply to property situated on a reserve": p. 139.

[27] In the course of concluding his reasons, Cromwell J. stated – at paragraphs 60 to 64:

> [60] I do not agree that the "commercial mainstream" factor should be given determinative weight in this case. The question is the location of Mr. Bastien's interest income. As I have discussed earlier, the question is not where the financial institution earns the profits to pay its contractual obligation to Mr. Bastien. Yet the focus of the "commercial mainstream" analysis in the courts below led them to concentrate the analysis on the Caisse's income-earning activities rather than on Mr. Bastien's. The exemption from taxation protects an Indian's personal property situated on a reserve. Therefore, where the investment vehicle is, as in this case, a contractual debt obligation, the focus should be on the investment activity of the Indian investor and not on that of the debtor financial institution: see McDonnell, at p. 957; Maclagan, at p. 1522; O'Brien, at pp. 1576 and 1580.
>
> [61] When one focuses, as required by *Williams*, on the connecting factors relevant to the location of Mr. Bastien's interest income arising from his contractual relationship with the Caisse, it is apparent that the other commercial activities of the Caisse should have been given no weight in this case. Mr. Bastien's investment was in the nature of a debt owed to him by the Caisse and did not make him a participant in those wider commercial markets in which the Caisse itself was active.
>
> [62] Of course, in determining the location of income for the purposes of the tax exemption, the court should look to the substance as well as to the form of the transaction giving rise to the income. The question is whether the income is sufficiently strongly connected to the reserve that it may be said to be situated there. Connections that are artificial or abusive should not be given weight in the analysis. For example, if in substance the investment income arises from an Indian's off-reserve investment activities, that will be a significant factor suggesting that less weight should be given to the legal form of the investment vehicle. There is nothing of that nature present in this case. Cases of improper manipulation by Indian taxpayers to avoid income tax may be addressed as they are in the case of non-Indian taxpayers.

> [63] Applying the exemption of interest income in this case is broadly consistent with the purpose of preserving Indian property situated on the reserve. It provides an investment option protected from taxation for Mr. Bastien's property while preserving it against possible seizure.
>
> 4. *Conclusion*
>
> [64] All potentially relevant factors in this case connect the investment income to the reserve. In the circumstances of this case, the fact that the Caisse produced its revenue in the "commercial mainstream" off the reserve is legally irrelevant to the nature of the income it was obliged to pay to Mr. Bastien. This is true as to both form and substance. Mr. Bastien's investment income should therefore benefit from the s. 87 *Indian Act* exemption.

[28] The English version of the reasons of Deschamps and Rothstein JJ. was delivered by Deschamps J.. Although agreeing with the result, she delineated those portions of the judgment of Cromwell J. with which she disagreed, commenting – at paragraphs 105 to 110, inclusive as follows:

> [105] Furthermore, regarding the application of the connecting factors proposed in *Williams*, I do not agree that 20 years of experience drawn from decisions of Canadian courts should be swept aside.
>
> [106] I cannot agree with Cromwell J.'s description of the nature of the relevant transaction for income tax purposes. My colleague considers that the relevant transaction is the payment of interest (paras. 15, 19 and 41). With respect, if, in *Williams*, the transaction on which the issue of eligibility for the exemption was based was found to be the receipt of benefits, it was because of the taxing provision in issue in that case (*Williams*, pp. 891 *et seq.*). In the instant case, the property in issue is the right to be paid interest under the investment contract. Under s. 12(4) of the *Income Tax Act*, it is only when the taxpayer's income for a given taxation year is computed that the tax consequences of this right are realized: the accrued interest must be included in the taxpayer's income. Since the interest does not actually have to be paid for the property to attract tax consequences, I do not see how the payment of interest could be the personal property whose status under the *Indian Act* is in issue. Accordingly, little weight should be attached to the place where the payment is to be made.
>
> [107] Moreover, the decision to attach determinative weight to the fact that the payment could be made on the reserve is in my view not only anachronistic, but unrealistic. In this age of electronic transactions, the fact that interest is paid at maturity into an account administered on a reserve seems to me to be a tenuous connection. Indians, like all other citizens, can have access to their funds from almost anywhere. To assume that they go to a Caisse populaire situated on a reserve when they want to have access to their funds, it would be necessary to assume that they do things differently than other citizens.

> [108] I would also point out that ownership of a right provided for in a contract does not lead to the concept of the location of a deposit account as was the case in *God's Lake*, which concerned the seizure of amounts deposited in an account.
>
> [109] In sum, I cannot agree with Cromwell J.'s analysis for several reasons. First, he attaches excessive weight to formal connections that, in certain circumstances, have a tenuous relationship with the reserve. Second, he essentially gives determinative weight to a single factor — the debtor's place of residence — while rejecting the concrete connecting factors of the creditor's place of residence and the location of the activity that generated the capital. Third, he fails in his analysis to consider the provision that governs the tax treatment of interest income. In short, the factors he chooses to apply are in reality but one, the debtor's place of residence, and his analysis is inconsistent with the historical purpose of the exemption.
>
> [110] The parallel consideration of these two appeals highlights the need to identify concrete and discernable connections with the reserve. In the appeal of Mr. Bastien's estate, all the connecting factors favour granting the exemption. In Mr. Dubé's appeal, on the other hand, the connection results from a legal fiction that has no basis in solid evidence.

[29] In *Dubé*, *supra* the judgment of the majority was delivered by Cromwell J.. As in *Bastien*, *supra* the issue was whether the interest earned on term deposits with the Caisse was exempt from taxation because it was situated on a reserve. With respect to the issue of whether the property was situated on a reserve, Cromwell J. – at paragraphs 14 to 18, inclusive, stated:

> 1. *Property Situated on a Reserve*
>
> [14] As noted, the Caisse issuing the deposit certificates, while it is located on a reserve, is not located on Mr. Dubé's reserve. Moreover, the trial judge was not persuaded that Mr. Dubé's principal residence was on *any* reserve. In my view, the first fact — that the Caisse was not on Mr. Dubé's reserve — does not make the income ineligible for the exemption and that fact, as well as the fact that his principal residence was not on a reserve, while potentially relevant, should receive little weight when considered in light of the type of property, the nature of the taxation in issue and the purpose of the exemption. The text of the *Indian Act* and the Court's jurisprudence lead me to this conclusion.
>
> [15] The taxation exemption under s. 87(1)(*b*) of the *Indian Act* refers to an Indian's personal property situated on "a" reserve and not to property on his or her "own" reserve. The Court has consistently held that the meaning of the words "on a reserve" should be approached having regard to their substance and their ordinary, common sense meaning: *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 41; *R. v. Lewis*, [1996] 1 S.C.R. 921, at p. 958; *Union of New Brunswick*

> *Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161, at paras. 13–14; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, at para. 19. The ordinary, common sense meaning of "on a reserve" does not require that the property be on any particular reserve. As my colleague Deschamps J. points out, the legislative history of the exemption provides further support for the view that residence on the reserve where the property is located is not a requirement.
>
> [16] At least two decisions of the Court also support this interpretation. In *Union of New Brunswick Indians*, the Court observed that on-reserve sales to Indians living off-reserve were exempt from sales tax: para. 43. My reading of this conclusion is that it is not necessary for an Indian to hold property on his or her own reserve, nor is it necessary that he or she reside on a reserve, to be eligible for the tax exemption provided for in s. 87. Similarly, in *God's Lake*, McLachlin C.J., writing for a majority of the Court, noted that a band's property would be situated on a reserve and therefore exempt from seizure even if it were on deposit at a financial institution on a reserve other than the band's own reserve: para. 62. Both of these decisions support the view that the exemption applies to property on a reserve, not just to property on a particular reserve.
>
> [17] In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, La Forest J. stated at one point in his reasons that the exemptions in ss. 87 and 89 have "no application" absent "a discernible nexus between the property concerned and the occupancy of reserve lands by the owner of that property": p. 133. In my view, this brief reference cannot be taken as authority for the view that the Indian claiming the exemption must occupy reserve lands where the property is situated. Rather, when read in the context of the reasons as a whole, the passage in my view was intended simply to emphasize the need for a strong connection between the property and the reserve. As noted earlier, imposing a requirement that the Indian claiming the exemption needs to occupy reserve land where the property is situated would be inconsistent with the text and legislative history of the provisions as well as with the subsequent jurisprudence from this Court.
>
> [18] I conclude that, having regard to the ordinary meaning of the words and the Court's decisions interpreting them, the expression "situated on *a* reserve" means any reserve, not just a reserve where the Indian taxpayer resides or to which community he or she belongs. In other words, Mr. Dubé's investment income is not excluded from the exemption simply because he did not reside on the reserve where the income was paid.

[30] Further in his analysis, Cromwell J. held that Dubé's place of residence should be accorded little weight since the absence of a financial institution on his own reserve did not permit him to make an investment there. Further, the type of property – income earned on term deposits – had a strong connection with the particular reserve where the Caisse was located. In the course of concluding that the interest

income was located on a reserve – and therefore exempt from taxation – Cromwell J. – at paragraphs 28 to 31, inclusive stated:

> [28] First, it is important to take into account the significant differences between unemployment insurance benefits and interest income, in other words, to pay careful attention to the type of property. As Gonthier J. pointed out in *Williams*, connecting factors may have a different relevance with regard to unemployment insurance benefits than in respect of other types of income: p. 892. With respect to unemployment insurance benefits paid by the federal government, the "traditional test" of the residence of the debtor was given limited weight because the debtor — the federal Crown — is present throughout Canada, and the purposes behind fixing the *situs* of an ordinary person do not apply to the Crown and in particular to the Canada Employment and Immigration Commission in respect of the receipt of unemployment insurance benefits: pp. 893–94. In this case, unlike in *Williams*, the potentially relevant connecting factors such as the place of contracting, place of the debtor and place of payment can be applied meaningfully: the Caisse is physically present and carries on business on the reserve and the interest income was payable there. In short, there is no reason in this case, unlike the situation in *Williams*, to discard or give little weight to these factors which connect the interest income to the Mashteuiatsh Reserve.
>
> [29] Second, absent in this case is the symmetry between the tax implications of premiums and benefits that existed in *Williams*. That symmetry was found in *Williams* to strengthen the connection between the place of employment and the benefits. The same cannot be said here. The fact that capital (such as, for example, the aggregation of profits from a business on the reserve) is accumulated in a way that was exempt from tax bears no necessary relationship to the tax treatment of investment income arising from that capital. Moreover, to give determinant weight to this factor in these circumstances could open the door to tax exemption for investment income wherever and however earned, provided that the sums invested had been accumulated on a tax exempt basis on a reserve.
>
> [30] Finally, in weighing the connecting factors on a case-by-case basis, it is easy to lose sight of the fact that in particular categories of cases, one connecting factor may have much more weight than another: *Williams*, at p. 892. Given the strength of the connecting factors relating to the location where the contract of investment was entered into, where it was to be performed and the Caisse's place of business, the fact that the bulk of the capital invested was not derived from the tax-exempt activities on a reserve does not in my view appreciably weaken the connection between the income and the Mashteuiatsh Reserve.
>
> 3. *Where the Income was Spent*

> [31] During the years under assessment, the appellant lived part time off-reserve and owned real property off-reserve. The trial judge thus inferred that a portion of the interest income may well have been spent off a reserve. The location where the investment income is spent was identified as a potentially relevant factor by the trial judge in *Recalma v. Canada*, [1997] 4 C.N.L.R. 272 (T.C.C.), although one entitled to little weight in determining the location of investment income: pp. 278-79. This factor has also been considered in subsequent investment income cases: see, e.g., *Lewin v. Canada*, 2001 D.T.C. 479, at paras. 43 and 63, aff'd 2002 FCA 461, 2003 D.T.C. 5476. However, in my view, this consideration is not a relevant connecting factor in determining the location of the income earned on the term deposits in issue here. As I see it, the type of property, the nature of the taxation of that property and the purpose of the exemption do not support giving any weight to where the money received as interest income is spent.

[31] The dissenting reasons of Deschamps and Rothstein JJ. were delivered by Deschamps J. and at paragraphs 34 to 40, inclusive of the English version, she stated:

> [34] This appeal was heard together with *Bastien Estate v. Canada*, 2011 SCC 38. In *Bastien*, I explain why the interest accrued under Alexandre Dubé's investment contract cannot be exempt from taxation. I express the opinion in that case that for the exemption provided for in s. 87(1) of the *Indian Act*, R.S.C. 1985, c. I-5, to apply to an Indian's personal property, the property must have concrete and discernible connections with a reserve.
>
> [35] In the instant case, the findings of fact of the Tax Court of Canada judge disclose no such concrete connections. The connections resulting from the investment contracts that generated the interest that accrued in the taxation years in issue are of limited weight for the purposes of the *Indian Act*. Under the provision governing the tax treatment of interest income, the taxpayer must include any accrued interest in his or her income, even if it has not been paid (*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 12(4)). For this reason, the place of payment should be given little weight. Moreover, any significance of the place of payment is further reduced by the fact that the taxpayer can have access to his or her money without going to the reserve.
>
> [36] The place at which a contract was signed is a factor that cannot be considered in isolation for the purposes of the *Indian Act*, since the parties would have been free to choose a place without regard to any objective requirement that it be connected with a reserve. The factors established by the Court must not be open to contractual manipulation in ways that are inconsistent with the purpose of the exemption. Experience has shown that it is easy for taxpayers to set up contractual frameworks that create legal relationships that are not based on real requirements. This is why it is necessary to identify concrete and discernible connections with a reserve.

> [37] The creditor's place of residence might be of some relevance, but it cannot be determinative, since this factor ceased to be a condition of eligibility for the exemption more than a century ago.
>
> [38] Where a taxpayer has a right to be paid interest that is provided for in an investment contract, the particular nature of this type of property makes it necessary, in order to take account of the purpose of the exemption, to consider the activity that resulted in the accumulation of the capital deposited with the financial institution. If that capital results from an on-reserve activity that generates exempt property, this factor could justify giving the interest provided for in the contract the same tax treatment as the product of the activity. This approach would make it possible to maintain a form of symmetry between the tax treatment of the property that results in the accumulation of the capital and the tax treatment of the interest.
>
> [39] In light of the findings of fact of the Tax Court of Canada judge, it is impossible to identify a sufficient concrete connection with the reserve in this appeal. Those findings are set out in *Bastien*, and it will not be necessary to repeat them here in their entirety. It will suffice to mention that Mr. Dubé did not reside on the reserve, that he was unable to explain where large deposits made at the Caisse populaire Desjardins de Pointe-Bleue came from and that the judge was unable to establish a connection between the deposited capital and the transportation company operated by Mr. Dubé. No reason was given for entering into the contract on the reserve that would enable the Court to hold that this fact furthers the purpose of the exemption. Even though the debtor was situated on the reserve and even though this factor does connect the property with the reserve, the other concrete factors outweigh it significantly. While it is true that the contract in this case was signed on the reserve, this factor cannot be considered significant, since the debtor's place of residence was also on the reserve.
>
> [40] To grant the exemption in such circumstances would be tantamount to turning the reserve into a tax haven for Indians engaged in unspecified for-profit activities off the reserve.

[32] The position of the Appellants is that the recent decisions of the Supreme Court of Canada were in effect game-changers and that it is now permissible for the lower courts to apply the plain meaning of s. 87 of the *Indian Act*, without resorting to the complicated and imprecise process of attempting to assign weight to the various connecting factors. At least, the intent of the parties should be given consideration and the location of the employer – as debtor – on the Six Nations Reserve should override other factors identified in *Williams, supra.*

[33] I cannot agree with that proposition. I repeat the opening sentence of paragraph 16 of the reasons of Cromwell J. in *Bastien, supra*:

> Where, because of its nature or the type of exemption in question, the Location of property is not objectively easy to determine, the courts must apply the connecting factors approach set out in *Williams v. Canada*, … (Emphasis added.)

Connecting factors:

Location of the employer:

[34] NLS was located on the Six Nations Reserve. Although there was no direct evidence adduced in the within appeals, the relevant years at issue with respect to the employment of Mawakeesic and Marcinyshyn are within the same period as those taxation years under appeal in the case of *Robinson v. The Queen*, 2010 TCC 649, [2011] 2. C.T.C. 2286. I wrote that decision and there was an Agreed Statement of Facts referred to at paragraph 8, wherein the extent and nature of the operations of NLS and O.I. – referred to in that case as OIEL – were set forth in considerable detail, including – at paragraphs 9 and 10 – those extracted from previous judgments issued by the Tax Court of Canada and the Federal Court. I am prepared to infer that there was no significant difference in the facts relevant to the within appeals and those in *Robinson* and earlier cases cited therein pertaining to the scope of the operations of NLS that would render it unsafe to apply the following statement – from *Robinson* – to the within appeals. At paragraph 75 of that judgment, I commented:

> [75] NLS was located on the Six Nations Reserve and employed some people living on that Reserve. Some employees lived there but none of the Appellants lived on Six Nations or any other reserve during the periods relevant to their appeals. It is clear on the evidence – including the Agreed Facts – that Obonsawin located NLS on Six Nations Reserve so employees could claim a tax exemption pursuant to section 87 of the *Indian Act*. Not that there is anything wrong with that. The contracts between NLS and each Appellant employed in the within appeals were genuine and legal rights and obligations were created. It is obvious the economic benefit to Six Nations Reserve was very modest, particularly in the context of overall revenue generated by NLS through its business operations where – in 1997 – 94% of its gross income went to pay employees. At one point, 1400 people were employed by NLS and there is no evidence that after 1997 any amount of revenue was available to benefit the Six Nations Reserve. There is no evidence as to the number of people employed in the NLS office who lived on the Reserve or – if off-reserve – whether they were sufficiently nearby to engage in activities that could be beneficial to the Reserve by providing even a modest economic benefit. On the evidence before me, there was no significant benefit flowing to the Six Nations Reserve from the business activities of NLS when examined in the larger context of its purpose and business operations throughout Canada. None of the Appellants in

> the within appeals worked on nor lived on that Reserve and there is no evidence any of them spent any money there. In *Canada v. Monias (C.A.)*, 2001 FCA 239, [2001] 3 C.T.C. 244, the Federal Court of Appeal held that although the location of the employer can be regarded as a connecting factor, the evidence must demonstrate the scope of the employer's activities on the reserve or some benefit flowing to the reserve attributable to the employer's location. A location mainly as a convenience will not assist to any significant extent in making the necessary connection of employment income to a reserve. On March 14, 2002, the Supreme Court dismissed the application for leave to appeal.

Location of employment:

[35] The overwhelming majority of services provided by Mawakeesic and Marcinyshyn were performed off-reserve, within the City of Thunder Bay or the District of Thunder Bay, which encompassed 22 towns and villages and included the Reserve. The evidence of Dubec, Executive Director of AMI during the relevant years was that less than 10% of the total services delivered by that organization were provided to the Reserve. AMI had its headquarters at Royston Court in Thunder Bay where its administrators, office staff and service providers carried out tasks in accordance with the objects stated in the Letters Patent. Several people were employed – full-time and part-time – and consultants were retained, when needed, to provide various services to all persons of Aboriginal ancestry. It is reasonable to assume they would have participated in the delivery of services to residents of the Reserve. Mawakeesic and Marcinyshyn worked primarily in the FASD program and while they may have attended at the Reserve – on occasion – for home visits, the proportion of the work performed by each of them at that location could only have been a fraction of the 10% of the overall mandate of AMI that was carried out there.

[36] In her testimony, Dubec stated that a predecessor agency to AMI was located on the Reserve and income earned by the workers was exempt from tax. The facility and programs were funded by an Aboriginal organization. There was no space on the Reserve to expand the operations of that agency. On March 3, 2000, AMI was incorporated pursuant to the laws of Ontario as a self-governing entity and received funding from the provincial government to carry out the objects set forth in the Letters Patent. AMI purchased the Royston Street property in Thunder Bay, additional staff was hired and the scope of programs, although expanded, pursued the same goals of the predecessor agency in providing various services to persons of Aboriginal ancestry residing in the District of Thunder Bay.

[37] The on-reserve location of the predecessor organization has the potential to raise an issue that was the subject of the decision of the Federal Court of Appeal in

Clarke v. Minister of National Revenue, 1997 CarswellNat 623, also reported as *Canada v. Folster*, [1997] 3. F.C. 269. The case dealt with the income taxation of a status Indian who lived on the Norway House Reserve and was employed as an Administrator in the Norway House Indian Hospital. The hospital – before being destroyed by fire – had been located on that reserve. It was rebuilt nearby and continued to serve – primarily - the residents of Norway House Reserve. The judgment of the Court was delivered by Linden J.A. who analyzed the connecting factors considered in *Williams*. At paragraphs 24 to 29, inclusive, he stated:

> **24** It has been submitted on behalf of the appellant that, as a result of a "technical relocation" of the hospital in which she worked, the appellant has been denied tax exempt status in a manner which is contrary to the spirit of Williams. It is interesting to note that, following the 1952 relocation, the federal government continued to recognize the tax exemption to registered Indians who worked in the hospital until 1968, when the policy was unilaterally changed. The change was explained in a letter written by Mr. Jean Chrétien, then Minister of Indian Affairs and Northern Development.[42] The letter stated that, "effective January 1, 1968, a new interpretation was given to the word reserve' in relation to Indians and any income earned from employment at institutions on Crown-owned lands which were not reserves, was subjected to taxation". The effect of this policy change, after 16 years in which the exemption had been granted, was suddenly to deny the exemption to Indian employees of the Norway House Indian Hospital, despite the fact that absolutely nothing about the actual place or the manner in which the income was earned had changed. In addition, it has been pointed out by the appellant that the federal government is currently engaged in preparing a proposal to designate the land upon which the hospital is built as reserve land.[43] While such a future possibility cannot, as the respondent points out, affect the current status of the land on which the hospital is located, it further demonstrates that the circumstances surrounding the location of the Norway House Indian Hospital are such that its utility in determining the situs of the appellant's employment income is substantially diminished. For this reason, I agree with the submission of the appellant that the exact location of the metes and bounds of the hospital cannot play a decisive role in determining whether a tax exemption in this case would merely combat economic disadvantage or whether it would help to prevent the erosion of property held by an Indian qua Indian on a reserve.
>
> **25** I am equally unpersuaded that the location or residence of the employer is a major factor in the context of this case. The residence of the debtor was considered and discarded in Williams as a significant connecting factor on the ground that there were "conceptual difficulties in establishing the situs of a Crown agency in any particular place within Canada".[44] The multitude of possibilities when the Crown is involved renders the residence of the employer a somewhat arbitrary concept, and certainly not a reliable ground upon which to extend or deny tax exempt status. Furthermore, the traditional conflict of laws justification, the ability to enforce judgment against the debtor, has nothing to add to the

analysis in the case of the Crown, which may be sued anywhere in Canada. Responding to this ambiguity, Gonthier J. proposed that "the significance of the Crown being the source of the payments at issue in this case may lie more in the special nature of the public policy behind the payments, rather than the Crown's situs, assuming it can be fixed".[45]

26 A similar argument can be made on the facts of this case. The appellant was an employee of the federal government. She was paid at the Norway House Indian Hospital by cheques which were issued to her by the Department of Supply and Services office in Winnipeg, Manitoba. Although the structure and function of Health and Welfare Canada may not be analogous to that of the Canada Employment and Immigration Commission, as considered by Gonthier J. in Williams, its situs might be similarly fixed at any number of locations. The respondent in this case has suggested, as potential locations of the employer, the Department of Supply & Services office in Winnipeg, the City of Ottawa and the location of the hospital itself.[46] In my view, there is nothing in the location where the cheques were drawn up which speaks meaningfully to the issue of whether or not the employment income was property situated on a reserve at the time that it was earned by the appellant. The more significant feature of the issuance of cheques by the Crown to the appellant is the fact that these funds were advanced as part of the Crown's responsibility for the health care of Indians and, in particular, the health of Indians on the Norway House Indian Reserve.

27 Thus, a more in-depth analysis reveals that the connecting factors relied upon by the Trial Judge were inadequate in the context of this case. The inquiry must, therefore, be expanded in order to consider other connecting factors. 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. Assessing these factors in the context of this case, I am of the view that the tax exemption must be accorded to the appellant's income in order to avoid the erosion of an Indian entitlement. The personal property at issue is income earned by an Indian who is resident on a reserve, and who works for a hospital which attends to the needs of the reserve community; a hospital that was once located on, and is now adjacent to, the reserve it services.

28 As the Trial Judge pointed out in his application of the "connecting factors" test to the employment situation of Elizabeth Ann Poker, "[n]ot to consider the circumstances surrounding the employment does not accord with the purpose of the tax exemption in the Indian Act as stated in Mitchell, supra, and Williams,

> supra".[47] Similarly, in McNab v. Canada, a 1992 decision of the Tax Court, Beaubier T.C.J. applied the connecting factors test set out in Williams in the context of employment income. The case involved a status Indian employed by the Saskatchewan Indian Women's Association. She performed her employment duties both on and off reserves.[48] The Tax Court Judge placed a great deal of emphasis on the circumstances surrounding the claimant's employment. In finding that the employee's income ought to be exempted from tax, he noted in particular that "all of her work was on the instructions of an employer whose sole purpose was to benefit Indians on reserves".[49] The Tax Court Judge also took into account the employer's location, the locations where the employee worked and the place of payment. Each of these factors, however, was assessed in light of the main purpose and functions of her employment. In my view, when the personal property at issue is employment income, it makes sense to consider the main purpose, duties and functions of the underlying employment; specifically, with a view to determining whether that employment was aimed at providing benefits to Indians on reserves.
>
> **29** In this case, the appellant's employment was intimately connected with the Norway House Indian Reserve. Added to this is the fact that the appellant, as I have noted, lived on the Norway House Indian Reserve, the community which was served by the hospital in which she worked. This residence factor in itself certainly cannot determine the situs of employment income, just as other single factors cannot. An Indian who resides on a reserve but derives employment income from his or her participation in the commercial mainstream, cannot obtain the exemption. In conjunction with the other circumstances surrounding the appellant's employment income in this case, however, it does assist the Court in painting a more complete picture of the relationship between the appellant's property, her salary, and the Indian reserve: the appellant was a resident of the Norway House Indian Reserve who benefited from and contributed to life on the reserve by working in a hospital near the reserve which was dedicated to meeting the health needs of the reserve community. To attribute great significance to the fact that the hospital is now physically situated not on the reserve, but adjacent to it, obscures the true nature of the employment income in this case. In my view, based on all the factors discussed, the purpose of the legislation is best served by holding that her salary was property held by an Indian qua Indian on a reserve.

[38] The difference between the facts in *Clarke* and the within appeals of Mawakeesic and Marcinyshyn is apparent. The headquarters of AMI were located 15 kilometres from the Reserve and were housed in a property purchased by that corporate entity for its purposes. The employment of these appellants was not “intimately connected” with that Reserve. Having regard to the particular circumstances in *Clarke*, it was not difficult for the Court to accept that the situs of the new hospital was a “technical relocation” and the taxpayer continued to live on the reserve serviced by that newly-constructed medical facility.

The nature and circumstances of the employment including any benefit to a reserve:

[39] There is no evidence that the employment of either Mawakeesic or Marcinyshyn provided a benefit to any reserve in the sense this factor is used in accordance with the decision in *Williams* and numerous subsequent decisions. In order to access services provided by AMI, it was necessary merely to self-identify as an individual of Aboriginal ancestry and – as mentioned earlier – recipients of services included Métis, non-status Indians, other Aboriginal people and members of a blended family who were non-native. The services provided and programs offered by AMI were extremely worthwhile and of great benefit to those who chose to access those services provided by its office staff, care providers and consultants. In *Robinson*, occasionally, some services provided by the various organizations and their facilities required a direct link to a particular reserve, usually to satisfy a requirement of Health Canada. Also, to gain admission to a certain housing component operated within a larger program, women had to produce a status Indian card.

Connections to a reserve:

[40] In *Robinson*, a substantial body of evidence was adduced to demonstrate that many of the appellants had a connection to their own reserve or another reserve and visited family and friends or participated in powwows and other cultural events. In the within appeals, there was no evidence that either Mawakeesic or Marcinyshyn had a connection with any reserve, including their own.

Residence of the employee:

[41] At all times material, both Mawakeesic and Marcinyshyn lived off-reserve in Thunder Bay.

Place of payment:

[42] Payment was made from the office of NLS located on the Six Nations Reserve. Although there was no evidence as to where the payments were received, it is reasonable to infer they were transmitted electronically to a financial institution in Thunder Bay or cheques were mailed to Mawakeesic and Marcinyshyn either to the AMI office at Royston Court or to their residence. This method of payment was described in the Agreed Statement of Facts in *Robinson*, as stated at paragraph 18 of the judgment of Paris J. in *Roe v. Canada*, 2008 TCC 667. In the within appeals,

there is no evidence that connects the employment income of either of these Appellants to any reserve either as a physical location or an economic base.

[43] There have been hundreds of appeals filed in recent years by employees or former employees of NLS and O.I. in which the issue was whether employment income was exempt from taxation by virtue of section 87 of the *Indian Act.* In the within appeals of Mawakeesic and Marcinyshyn, I am unable to distinguish the facts from those in earlier cases, including *Robinson*. I reject the proposition that the connecting factors test has become obsolete as a result of the recent decisions of the Supreme Court of Canada in *Bastien* and *Dubé*, although the analysis of Cromwell J. in each case will prompt ongoing discussion concerning the weight to be assigned to those factors identified in *Williams.*

[44] It is apparent there will be a continuing need for a case-by-case analysis where warranted. It is also evident there is a significant distinction between income generated from property – including passive investment on a reserve – or income attributable to benefits flowing from previous employment on a reserve, and employment income earned by a non-resident providing services – off-reserve – in return for payment from an employer located on a reserve. To hold otherwise would be to ignore all relevant jurisprudence on this point since the decision in *Nowegijick, supra*.

[45] The appeal of Mawakeesic for the taxation years at issue is dismissed.

[46] The appeal of Marcinyshyn for the taxation years at issue is dismissed.

[47] The appeal of Bruce – spouse of Marcinyshyn – for the taxation years at issue is tied to the result of her appeal and is dismissed.

[48] Although costs were sought in the Reply filed in response to the Notice of Appeal filed by each Appellant, counsel did not request costs at the hearing. The Appellants legitimately believed that the recent decisions of the Supreme Court of Canada referred to extensively in the within Reasons could permit a finding that the location of NLS – as employer – was either determinative of the issue of the exemption from tax on employment income or, alternatively, was of sufficient weight – standing alone – to justify that result, even absent some of the other factors referred to in the jurisprudence.

[49] Having regard to all the circumstances, no costs are awarded to the Respondent.

Signed at Sidney, British Columbia this 8th day of November 2011.

"D.W. Rowe"

Rowe D.J.

CITATION:	2011 TCC 516
COURT FILE NOS.:	2007-1402(IT)I; 2007-1409(IT)I; 2007-2221(IT)I
STYLE OF CAUSE:	BRUCE MARCINYSHYN AND H.M.Q. AND BETWEEN SHEILA MARCINYSHYN AND H.M.Q. AND BETWEEN MARTHA MAWAKEESIC AND H.M.Q.
PLACE OF HEARING:	Thunder Bay, Ontario
DATE OF HEARING:	September 21, 2011
REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF JUDGMENT:	November 8, 2011

APPEARANCES:

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