NOWEGIJICK V. THE QUEEN ET AL.

Reported: (1983),C.T.C. 20, 83 D.T.C. 5041, 46 N.R. 41

Supreme Court of Canada, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ., January 25, 1983

Micha J. Menczer, for the appellant, Nowegijick
Wilfred Lefebvre and Fred Caron, for the respondent
James O'Reilly, for the intervenants, Grand Council of the Cree (of Quebec) et al.
William T. Badcock, for the intervenant, National Indian Brotherhood

The taxpayer, a registered Indian living on a reserve, was assessed income tax on wages paid to him on the reserve by a company situated on the reserve for work performed off the reserve. The taxpayer argued that this income was exempt from taxation by virtue of s.87 of the Indian Act, R.S.C. 1970, c.I-6. The Federal Court Trial Division ruled in favour of the taxpayer ([1979] 3 C.N.L.R. 82). On appeal the Federal Court of Appeal ruled against the taxpayer [1981] 2 C.N.L.R. 146). The Court held that s.87 only contemplated a tax on property and that a tax on income is not a tax on property.

Held: (Dickson J., for the Court)

1. A tax on income is a tax on personal property.

2. Section 87 exempts not only property but also persons from taxation.

3. The situs of wages is where the employer is located.

4. Statutes and treaties dealing with Indians should be liberally construed and doubtful expressions resolved in favour of the Indian.

5. **Appeal allowed**.

* * * * * *

DICKSON J.: The question is whether the appellant, Gene A. Nowegijick, a registered Indian can claim by virtue of the Indian Act, R.S.C. 1970, c.I-6, an exemption from income tax for the 1975 taxation year.

I

The Facts:

The facts are few and not in dispute. Mr. Nowegijick is an Indian within the meaning of the Indian Act and a member of the Gull Bay (Ontario) Indian Band. During the 1975 taxation year Mr. Nowegijick was an employee of the Gull Bay Development Corporation, a company without share capital, having its head office and administrative offices on the Gull Bay Reserve. All the directors, members and employees of the Corporation live on the Reserve and are registered Indians.

During 1975 the Corporation in the course of its business conducted a logging operation 10 miles from the Gull Bay Reserve. Mr. Nowegijick was employed as a logger and remunerated on a piece-work basis. He was paid bi-weekly by cheque at the head office of the Corporation on the Reserve.

During 1975, Mr. Nowegijick maintained his permanent dwelling on the Gull Bay Reserve. Each morning he would leave the Reserve to work on the logging operations, and return to the Reserve at the end of the working day.

Mr. Nowegijick earned $11,057.08 in such employment. His assessed taxable income for the 1975 taxation year was $8,698.00 on which he was assessed tax of $1,965.80. By Notice of Objection he objected to the assessment on the basis that the income in respect of which the assessment was made is the "personal property of an Indian-situated on a reserve" and thus not subject to taxation by virtue of s.87 of the Indian Act.

Mr. Nowegijick also brought an action in the Federal Court, Trial Division [[1979] 3 C.N.L.R. 82] to set aside the Notice of Assessment. Mr. Justice Mahoney of that Court ordered that Mr. Nowegijick's 1975 income tax return be referred back to the Minister of National Revenue for re-assessment on the basis that the wages paid him by the Gull Bay Development Corporation were wrongly included in the calculation of his taxable income.

The Crown appealed the decision of Mr. Justice Mahoney. The Federal Court of Appeal [[1981] 2 C.N.L.R. 146] allowed the appeal and restored the original assessment.

The proceedings have reached this Court by leave. The Grand Council of Crees of Quebec, three Cree organizations, eight Cree bands and their respective Chiefs have intervened to make common cause with Mr. Nowegijick.

II

The Legislation

Mr. Nowegijick, in his claim for exemption from income tax relies upon s.87 of the Indian Act:

> Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 83, the following property is exempt from taxation, namely:
>
> (a) the interest of an Indian or a band in a reserve or surrendered lands; and
> (b) the personal property of an Indian or band situated on a reserve;
>
> and-no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the Dominion Succession Duty Act, being chapter 89 of

> the Revised Statutes of Canada, 1952, or the tax payable under the Estate Tax Act, on or in respect of other property passing to an Indian.

Section 83 of the Indian Act, referred to in s.87 has no application. Subsection 87(2), also mentioned, was repealed in 1960 by S.C. 1960, c.8, although the reference to it in what was formerly subsection (1) remains.

Stripped to relevant essentials s.87 reads:

> Notwithstanding any other Act of the Parliament of Canada the following property is exempt from taxation, namely
>
> (a) the interest of an Indian or a band in reserve or surrendered lands, and (b) the personal property of an Indian or band situated on a reserve;
>
> and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property ....

Further distilled, the section provides that (i) the personal property of an Indian situated on a reserve is exempt from taxation; (ii) no Indian is subject to taxation "in respect of" "any" such property.

It is arguable that the first part of the quoted passage which exempts from taxation (a) the "interest of an Indian or a band in a reserve or surrendered lands" and (b) the "personal property of an Indian or band situated on a reserve", is concerned with exemption from direct taxation of land or personal property by a provincial or municipal authority. The legislative history of the section lends support to such an argument. But the section does not end there. It is to the latter part of the section that our attention should primarily be directed.

The short but difficult question to be determined is whether the tax sought to be imposed under the Income Tax Act, S.C. 1970-71-72, c.63 upon the income of Mr. Nowegijick can be said to be "in respect of" "any" personal property situated upon a reserve.

We need not speculate upon parliamentary intention, an idle pursuit at best, since the antecedent of s.87 of the Indian Act was enacted long before income tax was introduced as a temporary war-time measure in 1917.

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. See Cheshire, Private International Law (10th ed.) pp.536 et seq and also the judgment of Thurlow A.C.J. in R. v. National Indian Brotherhood, [1979] 1 F.C. 103 [[1978] C.N.L.B. (No.4) 107] particularly at pp.109 et seq.

The other piece of legislation which bears directly on the question before us is the Income Tax Act. I would like to refer to several sections. The first is found in Part I, Division A, of the Act, entitled "Liability for Tax". Section 2(1)(2) provides:

(1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year.

(2) The taxable income of a taxpayer for a taxation year is his income for the year minus the deductions permitted by Division C.

Thus, income tax is paid upon the taxable income (income minus deductions) of every person resident in Canada.

Section 5(1) of the Act is worth noting. It defines the taxpayers income from employment as the salary, wages and other remuneration received. The liability is at the point of receipt. The section reads:

Subject to this Part, a taxpayers income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by him in the year.

The only other section is s.153(l) which provides that every person paying salary or wages to an employee in a taxation year shall deduct the prescribed amount, and remit that amount to the Receiver General of Canada on account of the payee's tax for the year.

III

The Federal Court Judgments

I turn now to the conflicting views in the Federal Court. The opinion of Mr. Justice Mahoney at trial was expressed in these words [[1979] 3 C.N.L.R. 82, at 83-4]:

> The question is whether taxation of the Plaintiff in an amount determined by reference to his taxable income is taxation "in respect of" those wages when they are included in the computation of his taxable income. I think that it is.
>
> The tax payable by an individual under the Income Tax Act is determined by application of prescribed rates to his taxable income calculated in the prescribed manner. If his taxable income is increased by the inclusion of his wages in it, he will pay more tax. The amount of the increase will be determined by direct reference to the amount of those wages. I do not see that such a process and result admits of any other conclusion than that the individual is thereby taxed in respect of his wages.

The Federal Court of Appeal concluded that the tax imposed on Mr. Nowegijick under the Income Tax Act was not taxation in respect of personal property within the meaning of s.87 of the Indian Act. The Court, speaking through Mr. Justice Heald, said [[1981] 2 C.N.L.R. 146]:

> We are all of the view that there are no significant distinctions between this case and the Snow case (Russell Snow v. The Queen [1979] C.T.C. 227) ere this Court held:
>
> > Sec.86 of the Indian Act contemplates taxation in respect of specific personal property qua property and not taxation in respect of taxable income as defined by the Income Tax

> Act, which, while it may reflect items that are personal property, is not itself personal property but an amount to be determined as a matter of calculation by application of the provisions of the Act.

IV

Construction of Section 87 of the Indian Act

Indians are citizens and, in affairs of life not governed by treaties or the Indian Act, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.

It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In Jones v. Meehan, 175 U.S. 1, it was held that "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians".

There is little in the cases to assist in the construction of s.87 of the Indian Act. In R. v. The National Indian Brotherhood (1978), 78 D.T.C. 6488 [[1978] C.N.L.B. (No.4) 107] the question was as to situs, an issue which does not arise in the present case. The appeal related to the failure of the National Indian Brotherhood to deduct and pay over to the Receiver General for Canada the amount which the defendant was required by the Income Tax Act and regulations to deduct from the salaries of its Indian employees. The salaries in question were paid to the employees in Ottawa by cheque drawn on an Ottawa bank. Thurlow A.C.J. said at p.6491 [pp.113-4 C.N.L.R.]:

> I have already indicated that it is my view that the exemption provided for by subsection 87 does not extend beyond the ordinary meaning of the words and expressions used in it. There is no legal basis, notwithstanding the history of the exemption, and the special position of Indians in Canadian society, for extending it by reference to any notional extension of reserves or of what may be considered as being done on reserves. The issue, as I see it, assuming that the taxation imposed by the Income Tax Act is taxation of individuals in respect of property and that a salary or a right to salary is property, is whether the salary which the individual Indian received or to which he was entitled was "personal property" of the Indian "situated on a reserve".

The other case is Greyeyes v. R. (1978), 78 D.T.C. 6043 [[1978] C.N.L.B. (No.4) 47]. The question was whether an education scholarship paid by the federal government to a status Indian was taxable in the Indian's hands. Mahoney J. held that it was not taxable, by reason of s.87 of the Indian Act.

Administrative policy and interpretation are not determinative but are entitled to weight and can be an "important factor" in case of doubt about the meaning of legislation: per de Grandpre J. in Harel v. The Deputy Minister of Revenue of the Province of Quebec, [1978] 1 S.C.R. 851, at 859. During argument in the present appeal the attention of the Court was directed to Revenue Canada Interpretation Bulletin IT-62 dated 18 August 1972, entitled: "Indians". Paragraph 1 of the Bulletin reads:

> This bulletin does not represent a change in either law or assessing policy as it applies to the taxation of Indians but is intended as a statement of the Department's interpretation and policies that have been established for several years.

Paragraph 5 reads:

> While the exemption in the Indian Act refers to "property" and the tax imposed under the Income Tax Act is a tax calculated on the income of a person rather than a tax in respect of his property, it is considered that the intention of the Indian Act is not to tax Indians on income earned on a reserve. Income earned by an Indian off a reserve, however, does not come within this exemption, and is therefore subject to tax under the Income Tax Act.

Counsel for the Crown said the Bulletin was simply "wrong".

The prime task of the Court in this case is to construe the words "no Indian ... is subject to taxation in respect of any such [personal] property". Is taxable income personal property? The Supreme Court of Illinois in the case of Bachrach v. Nelson (1932), 182 N.E. 909 considered whether "income" is "property" and responded at p.914:

> The overwhelming weight of judicial authority holds that it is. The cases of Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300; Tax Commissioner v. Putnam, 227 Mass. 522, 116 N.E. 904, L.R.A. 1917F, 806; Stratton's Independence v. Howbert, 231, U.S. 399, 34 S. Ct. 136, 58 L. Ed. 285; Doyle v. Mitchell Bros. Co., 247 U.S. 179, 38 S. Ct. 467, 62 L. Ed. 1054; Board of Revenue v. Montgomery Gaslight Co., 64 Ala. 269; Greene v. Knox, 175 N.Y. 432, 67 N.E. 910; Hibbard v. State, 65 Ohio St. 574, 64 N.E. 109, 58-L.R.A. 654; Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S.W. 196; and State v. Pinder, 7 Boyce (30 Del.) 416, 108 A. 43, define what is personal property and in substance hold that money or any other thing of value acquired as gain or profit from capital or labor is property, and that, in the aggregate, these acquisitions constitute income, and, in accordance with the axiom that the whole includes all of its parts, income includes property and nothing but property, and therefore is itself property.

I would adopt this language. A tax on income is in reality a tax on property itself. If income can be said to be property I cannot think that taxable income is any less so. Taxable income is by definition, s.2(2) of the Income Tax Act, "his income for the year minus the deductions permitted by Division C." Although the Crown in paragraph 14 of its factum recognizes that "salaries" and "wages" can be classified as "personal property" it submits that the basis of taxation is a person's "taxable" income and that such taxable income is not "personal property" but rather a "concept", that results from a number of operations. This is too fine a distinction for my liking. If wages are personal property it seems to me difficult to say that a person taxed "in respect of" wages is not being taxed in respect of personal property. It is true that certain calculations are needed in order to determine the quantum of tax but I do not think this in any way invalidates the basic proposition.

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

Crown counsel submits that the effect of s.87 of the Indian Act is to exempt what can properly be classified as "direct taxation on property" and the judgment of Jackett C.J. in Minister of National Revenue v. Iroquois of Caughnawaga (Caughnawaga Indian Band), [1977] 2 F.C. 269 [[1977] C.N.L.B. (No.1) 15] is cited. The question in that case was whether the employer's share of unemployment insurance premiums was payable in respect of persons employed by an Indian band at a hospital operated by the band on a reserve. It was argued that the premiums were "taxation" on "property" within s. 87 of the Indian Act. Chief Justice Jackett held that even if the imposition by statute on an employer of liability to contribute to the cost of a scheme of unemployment insurance were "taxation" it would not, in the view of the Chief Justice, be taxation on "property" within the ambit of s.87. The Chief Justice continued at p.271:

> From one point of view, all taxation is directly or indirectly taxation on property; from another point of view, all taxation is directly or indirectly taxation on persons. It is my view, however, that when section 87 exempts "personal property of an Indian or band situated on a reserve" from taxation", its effect is to exempt what can properly be classified as direct taxation on property. The courts have had to develop jurisprudence as to when taxation is taxation on property and when it is taxation on persons for the purposes of section 92(2) of The British North America Act, 1867, and there would seem to be no reason why such jurisprudence should not be applied to the interpretation of section 87 of the Indian Act. See, for example, with reference to section 92(2), Provincial Treasurer of Alberta v. Kerr, [1933] A.C. 710.

There is a line of cases which hold that taxes imposed pursuant to various income tax acts are taxes "on a person" and not taxes on property: McLeod v. Minister of Customs and Excise, [1926] S.C.R. 457; Kerr v. Superintendent of Income Tax and Attorney General of Alberta, [1942] S.C.R. 435; Sura v. Minister of National Revenue, [1962] S.C.R. 65. More recently, in Alworth v. Minister of Finance., [1977] 76 D.L.R. (3d) 99 and in Attorney General of British Columbia and The Canada Trust Company and Olga Ellett, [1980] 2 S.C.R. 466, this Court again had occasion to consider the distinction in the case law between a tax on persons and a tax on property or upon income.

In the McLeod case the question was whether a fund accumulating in the hands of a trustee under the deceased's will was income accumulating in trust for the benefit of unascertained persons, or persons with contingent interests, within the meaning of s.3(6) of the Income War Tax Act, 1917. In the Kerr, Alworth and Ellett cases the issue was one of constitutional law. The Sura decision turned on the position under the Income Tax Act of persons domiciled in Quebec who did not enter into a pre-nuptial contract stipulating separation as to property and were therefore, under the provisions of the Civil Code, married under the regime of the community of property.

With all respect for those of a contrary view, I cannot see any compelling reason why the jurisprudence developed for the purpose of resolving constitutional disputes or for determining the tax implications of Quebec's communal property laws, or for interpreting the phrase "unascertained persons or persons with contingent interests" in the Income War Tax Act should be applied to limit the otherwise broad sweep of the language of s.87 of the Indian Act.

With respect, I do not agree with Chief Justice Jackett that the effect of s.87 of the Indian Act is only to exempt what can properly be classified as direct taxation on property. Section 87 provides that "the personal property of an Indian-on a reserve" is exempt from taxation; but it also provides that "no Indian...is...subject to taxation in respect of any such property". The earlier words certainly exempt certain property from taxation; but the latter words also exempt certain persons from taxation

in respect of such property. As I read it, s.87 creates an exemption for both persons and property. It does not matter then that the taxation of employment income may be characterized as a tax on persons, as opposed to a tax on property.

We must, I think, in these cases, have regard to substance and the plain and ordinary meaning of the language used, rather than to forensic dialectics. I do not think we should give any refined construction to the section. A person exempt from taxation in respect of any of his personal property would have difficulty in understanding why he should pay tax in respect of his wages. And I do not think it is a sufficient answer to say that the conceptualization of the Income Tax Act renders it so.

I conclude by saying that nothing in these reasons should be taken as implying that no Indian shall ever pay tax of any kind. Counsel for the appellant and counsel for the intervenants do not take that position. Nor do I. We are concerned here with personal property situated on a reserve and only with property situated on a reserve.

I would allow the appeal, set aside the judgment of the Federal Court of Appeal and reinstate the judgment in the Trial Division of that Court. Pursuant to the arrangement of the parties the appellant is entitled to his costs in all courts to be taxed as between solicitor and client. There should be no costs payable by or to the intervenors.