Glenn Williams *Appellant v.* **Her Majesty The Queen** *Respondent* **Indexed as: Williams** *v.* **Canada**

File No.: 22116.

1991: October 10; 1992: April 16.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

on appeal from the federal court of appeal

Income tax -- Exemptions -- Regular and enhanced unemployment insurance benefits received by Indian residing on reserve -- Indian qualifying for benefits for work done on reserve -- Test for situs of unemployment insurance benefits -- Whether benefits exempt from tax under Indian Act -- Indian Act, R.S.C. 1970, c. I-6, s. 87 -- Income Tax Act, S.C. 1970-71-72, c. 63, s. 56(1)(a)(iv).

Indians -- Taxation -- Exemptions -- Regular and enhanced unemployment insurance benefits received by Indian residing on reserve -- Indian qualifying for benefits for work done on reserve -- Test for situs of unemployment insurance benefits -- Whether benefits exempt from tax under Indian Act -- Indian Act, R.S.C. 1970, c. I-6, s. 87 -- Income Tax Act, S.C. 1970-71-72, c. 63, s. 56(1)(a)(iv).

The appellant, a member of an Indian Band, received regular unemployment insurance benefits in 1984 for which he qualified because of his former employment with a logging company, and his employment by the Band in a "NEED" project. In both cases, the work was performed on the reserve, the employer was located on the reserve, and the appellant was paid on the reserve. In addition to regular benefits, the appellant also received "enhanced" unemployment insurance benefits paid in respect of a job creation project administered on the reserve by the Band, pursuant to a written agreement between the Band and the Canada Employment and Immigration Commission. The regular and enhanced benefits were paid by the Commission's regional computer centre in Vancouver.

The appellant received a notice of assessment by the Minister of National Revenue which included in his income for 1984 the regular and enhanced unemployment insurance benefits. The appellant contested the assessment but his objection was overruled by the Minister. The appellant then appealed to the Federal Court, Trial Division which concluded that, under the *Indian Act*, both the regular and enhanced unemployment insurance benefits were exempt from taxation. The Federal Court of Appeal set aside the judgment holding that only the enhanced portion of those benefits was exempt. The issue in this case is the *situs* of unemployment insurance benefits received by an Indian for the purpose of the exemption from taxation provided by s. 87 of the *Indian Act*.

Held: The appeal should be allowed and the cross-appeal should be dismissed.

The *situs* of the receipt of unemployment insurance benefits cannot be determined in the same way the conflict of laws determines the *situs* of a debt. To simply adopt general conflicts of law principles and to apply the "residence of the debtor" test in the present context would be entirely out of keeping with the scheme and purposes of the *Indian Act* and *Income Tax Act*. While the residence of the debtor may remain an important factor, or even the exclusive one, this conclusion cannot be directly drawn from an analysis of how the conflict of laws deals with such an issue.

The proper approach to determining the *situs* of intangible personal property is for a court to evaluate the various connecting factors which tie the property to one location or another. In the context of the exemption from taxation in the *Indian Act*, the connecting factors which are potentially relevant should be weighed in light of three important considerations: the purpose of the exemption; the type of 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 connecting factor is relevant in determining whether taxing the particular kind of property in a particular manner would erode the entitlement of an Indian *qua* Indian to personal property on the reserve.

The location of the employment which gave rise to the qualification for the unemployment insurance benefits is a particularly relevant factor in identifying the *situs* of the benefits. The connection between the previous employment and the benefits is a strong one. The benefits are based on premiums arising out of previous employment, not general tax revenue, and the duration and extent of the benefits are tied to the terms of employment during a specified period. The manner in which unemployment insurance benefits are treated for the purposes of taxation further strengthens this connection, as there is a symmetry of treatment in the taxation of premiums and benefits, since premiums are tax-deductible and benefits are taxed. For an Indian whose qualifying

employment income was on the reserve, however, the symmetry in the tax implications of premiums and benefits breaks down. The original employment income was tax-exempt and the taxation paid on the subsequent benefits does more than merely offset the tax saved by virtue of the premiums. It is an erosion of the entitlements created by the Indian's employment on the reserve.

In this case, since the location of the qualifying employment was on the reserve, the benefits received by the appellant were also located on the reserve. This conclusion also applies to the enhanced benefits. The appellant only qualified for participation in the job-creation program because he had been receiving regular unemployment insurance benefits, that is, because of his prior employment that had ceased. It follows that both the regular and enhanced benefits were exempt from taxation pursuant to s. 87 of the *Indian Act*.

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. The residence of the debtor and the place where the benefits are paid are connecting factors of limited weight in the context of unemployment insurance benefits.

Cases Cited

Referred to: *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *The Queen v. National Indian Brotherhood*, [1979] 1 F.C. 103; *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, [1989] 1 S.C.R. 1532.

Statutes and Regulations Cited

Employment and Immigration Department and Commission Act, S.C. 1976-77, c. 54, s. 11.

Income Tax Act, S.C. 1970-71-72, c. 63, s. 56(1)(*a*)(iv) [am. 1980-81-82-83, c. 140, s. 26].

Indian Act, R.S.C. 1970, c. I-6, ss. 87 [am. 1980-81-82-83, c. 47, s. 25], 89, 90.

Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 38(3) [ad. 1976-77, c. 54, s. 41].

Authors Cited

Castel, J.-G. *Canadian Conflict of Laws*, 2nd ed. Toronto: Butterworths, 1986.

Cheshire, G. C. and P. M. North. *Private International Law*, 11th ed. By P. M. North and J. J. Fawcett. London: Butterworths, 1987.

Dicey, A. V. and J. H. C. Morris. *The Conflict of Laws*, vol. 2, 11th ed. By Lawrence Collins and Others. London: Stevens & Sons, 1987.

APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal, [1990] 3 F.C. 169, 72 D.L.R. (4th) 336, 109 N.R. 223, 32 C.C.E.L. 1, 90 D.T.C. 6399, [1990] 2 C.T.C. 124, [1991] 2 C.N.L.R. 172, setting aside a judgment of the Trial Division, [1989] 2 F.C. 318, 24 F.T.R. 169, 24 C.C.E.L. 119, 89 D.T.C. 5032, [1989] 1 C.T.C. 117, [1989] 1 C.N.L.R. 184. Appeal allowed and cross-appeal dismissed.

G. S. Snarch and *T. R. Wintjes*, for the appellant.
David Sgayias, *Q.C.*, and *Bonnie F. Moon*, for the respondent.

The judgment of the Court was delivered by

Gonthier J.

Gonthier J. -- At issue in this case is the *situs* of unemployment insurance benefits received by an Indian for the purpose of the exemption from taxation provided by s. 87 of the *Indian Act*, R.S.C. 1970, c. I-6 (now R.S.C., 1985, c. I-5).

I -- Facts and Procedural History

The appellant received a notice of assessment by the Minister of National Revenue which included in his income, for the taxation year 1984, certain unemployment insurance benefits. The appellant contested the assessment. His objection was overruled by the Minister of National Revenue. The appellant appealed to the Federal Court, Trial Division: [1989] 2 F.C. 318, 24 F.T.R. 169, 24 C.C.E.L. 119, 89 D.T.C. 5032, [1989] 1 C.T.C. 117, [1989] 1 C.N.L.R. 184. The appeal proceeded on the basis of an agreed statement of facts.

At all material times, the appellant was a member of the Penticton Indian Band and resided on the Penticton Indian Reserve No. 1. In 1984 he received regular unemployment insurance benefits for which he qualified because of his former employment with a logging company situated on the reserve, and his employment by the Band in a "NEED" project on the reserve. In both cases, the work was performed on the reserve, the employer was located on the reserve, and the appellant was paid on the reserve. During his employment, contributions to the unemployment insurance scheme were paid both by the appellant and his employers.

All of the regular unemployment insurance benefits were paid by federal government cheques mailed from the Canada Employment and Immigration Commission's regional computer centre in Vancouver. (While the instruments of payment may not technically have been cheques, this is of no consequence in this appeal.)

In addition to regular benefits, the appellant also received "enhanced" unemployment insurance benefits paid in respect of a job creation project administered on the reserve by the Band, pursuant to a written agreement between the Band and the Commission. The appellant was employed pursuant to this project in work which took place on the reserve, during a time in which he would otherwise have received regular benefits. The Band paid the appellant $60 per week during the program. The enhanced benefits constituted the bulk of the appellant's remuneration for his work in this program.

Section 38 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, authorized the creation of such programs on a general basis, without any limitation to Indians. The enhanced unemployment insurance benefits were also paid by the Commission's regional computer centre in Vancouver.

The issue at trial was whether the unemployment insurance benefits received by the appellant were exempt from taxation pursuant to s. 87 of the *Indian Act*. With regard to the requirements of that section, the disputed issue was whether the benefits received by the appellant were "situated" on a reserve.

Cullen J. agreed with the appellant's argument that the *situs* of the benefits was on the reserve. While acknowledging that prior cases had focused on the residence of the debtor in order to determine the *situs* of a debt, Cullen J. was of the view that the residence of the debtor was only one of a number of "connecting factors" which must be examined in order to determine *situs*. In this case, all the connecting factors except the residence of the debtor suggested that the *situs* of the debt was on the reserve.

Cullen J. also found that the enhanced unemployment insurance benefits had been given to the appellant due, in part, to an agreement between the Band and the government, so that the benefits in question were deemed to be situated on a reserve by reason of s. 90 of the *Indian Act*.

In the result, Cullen J. found that the appellant had established that the relevant provisions of the *Income Tax Act*, S.C. 1970-71-72, c. 63, and the *Indian Act* operated to exempt both the regular and enhanced unemployment insurance benefits from taxation.

The respondent appealed the decision of the Trial Division to the Federal Court of Appeal: [1990] 3 F.C. 169, 72 D.L.R. (4th) 336, 109 N.R. 223, 32 C.C.E.L. 1, 90 D.T.C. 6399, [1990] 2 C.T.C. 124, [1991] 2 C.N.L.R. 172. The Federal Court of Appeal distinguished between the regular unemployment insurance benefits and the enhanced unemployment insurance benefits in assessing their liability to taxation. Stone J.A. held that the regular benefits were not exempt from income tax by virtue of s. 87(*b*) of the *Indian Act* because they were not "property ... situated on a reserve". Stone J.A. rejected the trial judge's "connecting factors" test and stated that the leading cases had been decided in accordance with the well-established contract principle that, in the absence of an intention in the contract to the contrary, the residence of the debtor determines the *situs* of a simple contract debt. The debt in this case was therefore situated off the reserve.

However, with regard to the enhanced unemployment insurance benefits, the Federal Court of Appeal agreed with the trial judge that s. 90(1)(*b*) can apply to agreements whereby a band merely participates in a national program. The court decided that these enhanced benefits did fall within s. 90(1)(*b*), and were therefore exempt from taxation.

The Federal Court of Appeal thus allowed the appeal in part, set aside the judgment of the Federal Court, Trial Division, and referred the matter back to the Minister of National Revenue for reassessment on the basis that the regular unemployment insurance benefits received by the appellant were not exempt from income tax but the enhanced portion of those benefits were exempt.

II -- Relevant Statutory Provisions

The following sections of the *Indian Act* are relevant to the issues to be determined in this appeal:

> **87.** Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely:
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> (*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; 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.
>
> **89.** (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian.
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> (2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller, may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.
>
> **90.** (1) For the purposes of sections 87 and 89, personal property that was
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> (*a*) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
> (*b*) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,
>
> shall be deemed always to be situated on a reserve.
>
> (2) Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.
>
> (3) Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve, is guilty of an offence.

The following section of the *Income Tax Act* is relevant to this appeal:

> **56.** (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,

(*a*) any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of,

. . .

(iv) a benefit under the Unemployment Insurance Act, 1971 . . .

III -- Framing the Issues

In order to decide the basis upon which a *situs* is to be assigned to the unemployment insurance benefits in this case, it is necessary to explore the purposes of the exemption from taxation in s. 87 of the *Indian Act*, the nature of the benefits in question, and the manner in which the incidence of taxation falls upon the benefits to be taxed.

A -- *The Nature and Purpose of the Exemption from Taxation*

The question of the purpose of ss. 87, 89 and 90 has been thoroughly addressed by La Forest J. in the case of *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85. La Forest J. expressed the view that the purpose of these sections 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. The corollary of this conclusion was that the purpose of the sections was not to confer a general economic benefit upon the Indians (at pp. 130-31):

The exemptions from taxation and distraint have historically protected the ability of Indians to benefit from this property in two ways. First, they 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. Secondly, the protection against attachment ensures that the enforcement of civil judgments by non-natives will not be allowed to hinder Indians in the untrammelled enjoyment of such advantages as they had retained or might acquire pursuant to the fulfillment by the Crown of its treaty obligations. In effect, these sections shield Indians from the imposition of the civil liabilities that could lead, albeit through an indirect route, to the alienation of the Indian land base through the medium of foreclosure sales and the like; see Brennan J.'s discussion of the purpose served by Indian tax immunities in the American context in *Bryan v. Itasca County*, 426 U.S. 373 (1976), at p. 391.

In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, 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, i.e., their land base and the chattels on that land base.

It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians.

La Forest J. also noted that the protection from seizure is a mixed blessing, in that it removes the assets of an Indian on a reserve from the ordinary stream of commercial dealings (at pp. 146-47).

Therefore, under the *Indian Act*, an Indian has a choice with regard to his personal property. The Indian may situate this property on the reserve, in which case it is within the protected area and free from seizure and taxation, or the Indian may situate this property off the reserve, in which case it is outside the protected area, and more fully available for ordinary commercial purposes in society. Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian.

The purpose of the *situs* test in s. 87 is to determine whether the Indian holds the property in question as part of the entitlement of an Indian *qua* Indian on the reserve. Where it is necessary to

decide amongst various methods of fixing the location of the relevant property, such a method must be selected having regard to this purpose.

B -- *Nature of Benefit and the Incidence of Taxation*

Section 56 of the *Income Tax Act* is the section which taxes income from unemployment insurance benefits. That section specifies that unemployment insurance benefits which are "received by the taxpayer in the year" are to be included in computing the income of a taxpayer. The parties have approached this question on the basis that what is being taxed is a debt owing from the Crown to the taxpayer on account of unemployment insurance which the taxpayer has qualified for. This is not precisely true, since the liability for taxation arises not when the debt (if that is what it is) arises, but rather when it is paid, and the money is received by the taxpayer. However, it is true that the taxation does not attach to the money in the hands of the taxpayer, but instead to the receipt by the taxpayer of the money. Thus, the incidence of taxation in the case of unemployment insurance benefits is on the taxpayer in respect of the transaction, that is, the receipt of the benefit.

This Court's decision in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, stands for the proposition that the receipt of salary income is personal property for the purpose of the exemption from taxation provided by the *Indian Act*. I can see no difference between salary income and income from unemployment insurance benefits in this regard, therefore I hold that the receipt of income from unemployment insurance benefits is also personal property for the purposes of the *Indian Act*.

Nowegijick also stands for the proposition that the inclusion of personal property in the calculation of a taxpayer's income gives rise to a tax in respect of that personal property within the meaning of the *Indian Act*, despite the fact that the tax is on the person rather than on the property directly.

Therefore, most of the requirements of s. 87 of the *Indian Act* have clearly been met in this case. The receipt of unemployment insurance benefits is personal property. That property is owned by an Indian. The Indian is being taxed in respect of that property, since it is being included in his income for the purpose of income taxation. The remaining question is whether the property in question is situated on a reserve.

Since it is the receipt of the benefit that is taxed, the simplest argument would be that the *situs* of the receipt of the benefit is where it is received, which would generally be the residence of the taxpayer. However, the *Income Tax Act* qualifies "received" by "in the year". This suggests that the notion of "receipt" in the *Income Tax Act* has more to do with when the income is received, rather than where. Thus, aside from the fact that the incidence of taxation falls upon the transaction itself, rather than the money in the hands of the employer or the taxpayer, little ought to be made of the notion of receipt in this context.

C -- *Comments on the "Residence of the Debtor" Test*

The factor identified in previous cases as being of primary importance to determine the *situs* of this kind of property is the residence of the debtor, that is, the person paying the income. This was clearly stated by Thurlow A.C.J. in *The Queen v. National Indian Brotherhood*, [1979] 1 F.C. 103 (T.D.), at p. 109:

> A chose in action such as the right to a salary in fact has no situs. But where for some purpose the law has found it necessary to attribute a situs, in the absence of anything in the contract or elsewhere to indicate the contrary, the situs of a simple contract debt has been held to be the residence or place where the debtor is found. See Cheshire, *Private International Law*, seventh edition, pp. 420 *et seq.*

This conclusion was cited with approval by this Court in *Nowegijick v. The Queen*, *supra*, at p. 34:

> 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 and North, *Private International Law* (10th ed., 1979) at pp. 536 *et seq.* and also the judgment of Thurlow A.C.J. in *R. v. National Indian Brotherhood*, [1979] 1 F.C. 103 particularly at pp. 109 *et seq.*

The only justification given in these cases for locating the *situs* of a debt at the residence of the debtor is that this is the rule applied in the conflict of laws. The rationale for this rule in the conflict of laws is that it is at the residence of the debtor that the debt may normally be enforced. Cheshire and North, *Private International Law* (11th ed. 1987), quote Atkin L.J. to this effect in *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101 (C.A.), at p. 119:

> . . . the reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt.

Dicey and Morris adopt the same explanation in *The Conflict of Laws* (11th ed. 1987), vol. 2, at p. 908, as does Castel in *Canadian Conflict of Laws* (2nd ed. 1986), at p. 401. This may be reasonable for the general purposes of conflicts of laws. However, one must inquire as to its utility for the purposes underlying the exemption from taxation in the *Indian Act*.

The respondent argues that the *situs* of the receipt of unemployment insurance benefits should be determined in the same way the conflict of laws determines the *situs* of a debt. The debtor is the federal Crown, or the Canada Employment and Immigration Commission, neither of which reside on a reserve, therefore the receipt of benefits is not situated on the reserve.

The appellant argues that while *National Indian Brotherhood* and *Nowegijick* focus on the residence of the debtor, both cases leave room for additional factors to be considered. For instance, *National Indian Brotherhood* refers also to "anything in the contract or elsewhere to indicate the contrary" and *Nowegijick* refers to where the wages are to be paid. It is therefore open to the courts to consider these factors and others in fixing the *situs* of a debt for the purposes of this exemption.

However, the respondent argues that the other factors referred to in *National Indian Brotherhood* and *Nowegijick* are merely factors used in conflicts law where the debtor has more than one residence and it is necessary to choose between them (see Castel, *supra*, at pp. 401-2, and Cheshire and North, *supra*, at pp. 804-5). The residence of the debtor test would then remain the primary focus of the test.

In resolving this question, it is readily apparent that to simply adopt general conflicts principles in the present context would be entirely out of keeping with the scheme and purposes of the *Indian Act* and *Income Tax Act*. The purposes of the conflict of laws have little or nothing in common with the purposes underlying the *Indian Act*. It is simply not apparent how the place where a debt may normally be enforced has any relevance to the question whether to tax the receipt of the payment of that debt would amount to the erosion of the entitlements of an Indian *qua* Indian on a reserve. The test for *situs* under the *Indian Act* must be constructed according to its purposes, not the purposes of the conflict of laws. Therefore, the position that the residence of the debtor exclusively determines the *situs* of benefits such as those paid in this case must be closely reexamined in light of the purposes of the *Indian Act*. It may be that the residence of the debtor remains an important factor, or even the exclusive one. However, this conclusion cannot be directly drawn from an analysis of how the conflict of laws deals with such an issue.

IV -- The Proper Test

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.

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 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.

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.

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.

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 would amount to the erosion of the entitlement of the Indian *qua* Indian on a reserve.

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.

A -- *The Test for the Situs of the Unemployment Insurance Benefits*

Unemployment insurance benefits are income replacement insurance, paid when a person is out of work under certain qualifying conditions. While one often refers to unemployment insurance "benefits", the scheme is based on employer and employee premiums. These premiums are themselves tax-deductible for both the employer and employee.

There are a number of potentially relevant connecting factors in determining the location of the receipt of unemployment insurance benefits. The following have been suggested: 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 the benefits. One's attention is naturally first drawn to the traditional test, that of the residence of the debtor. The debtor in this case is the federal Crown, through the Canada Employment and Immigration Commission. The Commission argues that the residence of the debtor in this case is Ottawa, referring to s. 11 of the *Employment and Immigration Department and Commission Act*, S.C. 1976-77, c. 54 (now R.S.C., 1985, c. E-5, s. 17), which mandates that the head office of the Commission be located in the National Capital Region.

There are, however, conceptual difficulties in establishing the *situs* of a Crown agency in any particular place within Canada. For most purposes, it is unnecessary to establish the *situs* of the Crown. The conflict of laws is interested in *situs* to determine jurisdictional and choice of law questions. With regard to the Crown, no such questions arise, since the Crown is present throughout Canada and may be sued anywhere in Canada. Unemployment insurance benefits are also available anywhere in Canada, to any Canadian who qualifies for them. Therefore, the purposes behind fixing the *situs* of an ordinary person do not apply to the Crown, and in particular do not apply to the Canada Employment and Immigration Commission in respect of the receipt of unemployment insurance benefits.

This does not necessarily mean that the physical location of the Crown is irrelevant to the purposes underlying the exemption from taxation provided by the *Indian Act*. However, it does suggest 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. Therefore, the residence of the debtor is a connecting factor of limited weight in the context of unemployment insurance benefits. For similar reasons, the place where the benefits are paid is of limited importance in this context.

This leaves two factors to be considered: the residence of the recipient of the benefits, and the location of the employment income which was the basis of the qualification for the benefits. In order to assess the importance of the second factor, the location of the qualifying employment, a further analysis of the nature of unemployment benefits and their taxation is required.

In *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 41, this Court quoted from the judgment of Lacombe J. in that case to the effect that the purpose of the *Unemployment Insurance Act, 1971* was "to create a social insurance plan to compensate unemployed workers for loss of income from their employment and to provide them with economic and social security for a time, thus assisting them in returning to the labour market." It is apparent from this that the purpose behind unemployment benefits looks to the past, present and future. Benefits are contingent on qualifying employment in the past. They are meant to provide income and security for the present, in lieu of the employment income which has been lost. However, the benefits also look to the future, enabling the recipient to find a new job without hardship and with a sense of security.

There is, therefore, a connection between the receipt of benefits and the place where the employment which gave rise to those benefits was located. However, it cannot be said that unemployment insurance benefits look exclusively to the past. They are not a form of delayed remuneration.

The general scheme of taxation with regard to unemployment insurance premiums and benefits bears further examination in this regard. As noted above, unemployment insurance is premium based. The intent of the scheme is that the premiums received will, overall, largely equal the benefits paid out. This is not to say that the scheme is completely self-financing. However, it is more accurate to characterize an unemployment insurance benefit as something paid for through the premiums of employed persons than to characterize it as a benefit granted by the government out of its general revenues.

This becomes important in analyzing the tax implications of the unemployment insurance benefit scheme. The treatment of premiums and benefits for the purposes of taxation is that the premiums paid by employed persons are deductible from their taxable income, whereas the benefits paid to unemployed persons must be included in their taxable income. By allowing premiums to be deducted from taxable income, and mandating that benefits be included in taxable income, the effect of the unemployment insurance scheme on general tax revenue is minimized. The tax revenues lost by the government due to the deductibility of premiums are offset by the revenues gained by the taxation of the benefits. This is not to say that the unemployment insurance scheme has no effect on taxation revenues, since premiums may not precisely equal benefits overall, and the effect of different rates of taxation cannot be ignored. However, it is clear that the scheme established by Parliament was intended, in principle, to minimize the tax implications of unemployment insurance.

Since unemployment insurance benefits are based on premiums arising out of previous employment, not general tax revenue, the connection between the previous employment and the benefits is a strong one. The manner in which unemployment insurance benefits are treated for the purposes of taxation further strengthens this connection, as there is a symmetry of treatment in the taxation of premiums and benefits, since premiums are tax-deductible and benefits are taxed, thereby minimizing the influence of the unemployment insurance scheme on general tax revenues.

The location of the qualifying employment income is therefore an important factor in establishing whether the taxation of subsequent benefits would erode the entitlements of an Indian *qua* Indian on the reserve. For in the case of an Indian whose qualifying employment income was on the reserve, the symmetry in the tax implications of premiums and benefits breaks down. For such an Indian, the original employment income was tax-exempt. The taxation paid on the subsequent benefits therefore does more than merely offset the tax saved by virtue of the premiums. Instead, it is an erosion of the entitlements created by the Indian's employment on the reserve.

Furthermore, since the duration and extent of the benefits are tied to the terms of employment during a specified period, it is the location of the qualifying employment income during that period that is relevant.

Having regard to the importance of the location of the qualifying employment income as a factor in identifying the location of the unemployment insurance benefits, the remaining factor of the residence of the recipient of the benefits at the time of their receipt is only potentially significant if it points to a location different from that of the qualifying employment.

B -- *The Situs of the Appellant's Unemployment Insurance Benefits*

In the present case, the residence of the appellant when he received the benefits was on the reserve.

It has been assumed by the parties that the previous employment of the appellant which gave rise to the qualification for unemployment insurance benefits was also located on the reserve, since the two employers in question were located on the reserve. This question must be reexamined in light of our determination that this conclusion cannot safely be drawn from the principles of the conflict of laws.

However, this would not be an appropriate case in which to develop a test for the *situs* of the receipt of employment income. All the potential connecting factors with respect to the qualifying employment of the appellant point to the reserve. The 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. A test for the *situs* of employment income could therefore only be developed in an abstract vacuum in this case, since there is no real controversy of relevant factors pulling in opposite directions. The same would be true of any consideration of the weight, if any, to be given to the residence of the appellant upon receipt of the benefits as this was also on the reserve.

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.

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.

C -- *The Situs of the Enhanced Unemployment Insurance Benefits*

According to s. 38(3) of the *Unemployment Insurance Act, 1971* enhanced benefits are to be considered unemployment insurance benefits for the purpose of the *Income Tax Act*:

> **38.** . . .
>
> (3) For the purposes of this Part, a week during which the claimant is employed on a job creation project and is paid benefit under subsection (2) shall be deemed to be a week of unemployment and for the purposes of this Part, Part IV, the *Income Tax Act* and the *Canada Pension Plan*, any benefit paid to a claimant under subsection (2) shall be deemed not to be remuneration from employment.

This is also the manner in which enhanced benefits should be characterized for the purpose of the exemption from taxation in the *Indian Act*, since this only reflects the reality of the situation. The appellant only qualified for participation in the job creation program because he had been receiving regular unemployment insurance benefits, that is, because of his prior employment that had ceased. The benefits which he continued to receive would not have ceased had he quit his employment with the program. The program itself was located on the reserve. Therefore, the conclusion that the unemployment insurance benefits received by the appellant were situated on the reserve applies to both the regular and enhanced benefits.

For purposes other than the application of the *Income Tax Act*, enhanced unemployment insurance benefits may be characterized in a different manner (see *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, [1989] 1 S.C.R. 1532). Also, the portion of the unemployed person's income which is paid to them directly by the employer in the job creation program is not itself an unemployment insurance benefit, and should be characterized simply as employment income.

The Federal Court dealt with the further question whether the agreement giving rise to the enhanced unemployment insurance benefits was the type of agreement referred to in s. 90 of the *Indian Act*. In light of our conclusion that the enhanced unemployment benefits were located on the reserve in any event, it is not necessary to discuss this issue.

V -- Conclusion

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 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.

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.

The appeal is therefore allowed and the cross-appeal dismissed, with costs throughout. The matter is referred back to the Minister of National Revenue to be reassessed on the basis that all of the unemployment benefits in question are exempt from taxation.

Appeal allowed and cross-appeal dismissed.

Solicitors for the appellant: Snarch & Allen, Vancouver.

Solicitor for the respondent: The Deputy Attorney General of Canada, Ottawa.