

Ontario's imposed "unconstitutional" quota system in place

By Lynda Powless
Editor

At the Wabigoon First Nation band owned grocery store business is brisk.

The ice road is frozen and First Nations people from isolated communities are down to take advantage of cheaper prices.

They buy gasoline, filling their vehicles and drums.

And they load up on tobacco products at Wabigoon, near Dryden, Ontario.

Back in Cat Lake, an isolated northern First Nations community, the community doesn't even have a store so the ice road is welcome and so is Wabigoon First Nation's store.

Like an oasis in the desert, for any one travelling back home to northern communities or heading to Thunder Bay, Wabigoon Lake First Nation is the last stop on the highway home.

Wabigoon enjoys the business, says band councillor Lana Kooshet.

Any profits go back into community events.

But the community's economic success is limited by an Ontario government tobacco allocation system that determines the number of cigarettes any first nation person can buy.

And it's a system that has already been struck down by Ontario courts.

It cost Six Nations \$300,000 in 1989 to take Ontario to court over the, then "quota" system.

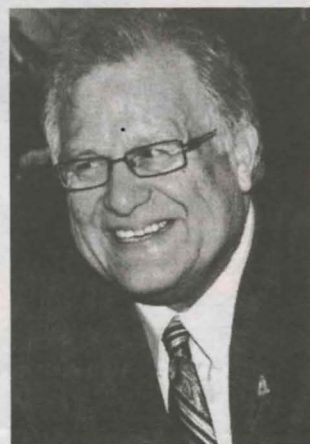
The courts agreed with Six Nations. Ontario had exceeded its authority and was illegally imposing a tobacco distribution system on First Nations.

But before First Nations could celebrate the win, Ontario changed the name to an "Allocation" system and left it to First Nations

to take them to court all over again.

Six Nations balked at the cost.

Former Elected Chief Bill Montour says as a result "the quota system became part of the community by default"



Former Six Nations Elected Chief Bill Montour

"That system is ghettoizing our people," he told Turtle Island News.

He says, "It's unconstitutional."

He was elected Chief when the tobacco industry first started taking off in 1985 and 1986. "That's when tobacco was just starting to become an issue. Ontario had a quota system, in 1983 and Six Nations had 150 quotas out, a number of councillors had quotas themselves at the time.

He said he tried to get the band council to get control of the system in 1987.

"I told them it will get out of hand now look what we got, 547 businesses, some are out of business, some have passed away."

He said Six Nations took Ontario to court in 1989 to prove Ontario had overstepped its authority.

"It's unconstitutional. They put a quota on a segment of Canadian society and we challenged it in court and the Supreme Court agreed with us. The

court said no, you cannot put a quota on First Nations."

Here's what happened.

Ontario began to impose its tobacco products quota on First Nations 31 years ago, in 1983.

Before that First Nations people could buy any quantity of tobacco products from a wholesale dealer in Ontario that they chose to, like any other business in Ontario.

And like any other business in Ontario, they sold to whomever walked in their door.

But First Nation businesses began to prosper with increased customer demand for tobacco products and Ontario put the brakes on.

Ontario claimed they were suffering a "substantial loss of tax revenue," and arbitrarily imposed a quota system on all First Nations in Ontario.

The Chiefs of Ontario (COO) tried to intervene, in 1982 when word leaked the restraints were coming.

The COO passed a motion that they would take the responsibility of nominating tobacco retailers on their reserves to purchase tax exempt tobacco products in bulk from wholesale dealers for their communities.

At Six Nations, 72 permits were issued by the Chief and council. In the four months between January 1, 1983 and April 30, 1983, more than forty million cigarettes were sold tax-exempt under the permits issued by the Chief and council.

Ontario's Minister of Finance wrote to then Chief Wellington Staats complaining "clearly, non-Indians not entitled to tax-exemption have improperly benefited from the



Wabigoon lake community store. (Supplied photo)

purchases made under these permits, resulting in a very substantial loss of tax revenue to the Province of Ontario."

The Minister urged Staats to limit the permits his council was handing out.

When Six Nations refused, the Ministry claimed they had "no alternative now but to impose the restrictions that the permit system was intended to achieve voluntarily."

The Minister's letter to then elected Chief Wellington Staats on May 31, 1983 read:

"Ontario abides by the federal law and recognizes that provincial tobacco tax is not payable by an Indian on the tobacco acquired by him for personal use on the reserve. In order to ensure that the individual Indian obtains this exemption to which he is entitled, prior to October 1, 1982 it was possible for an Indian to purchase tobacco products in any quantity from any wholesale dealer in Ontario."

By June 1, 1983, Ontario had imposed quotas on First Nations.

At Six Nations, the most populated First Nations community in Ontario, the community was limited to buying a total of 2.5 million tax exempt cigarettes a month from wholesalers.

In July 1983, Staats objected to the quota system, writing to the ministry that

the limited quota system they were imposing was "unconstitutional. There is no doubt that cigarettes are a vital part of our businesses, and under the system you have implemented, it leaves each and every store owner a capacity to sell approximately 35 cartons of cigarettes per week. This is absolutely undesirable, and I think the quota system is unconstitutional."

Staats had proposed setting up a cigarette by-law to be instituted by band council to help resolve the quota issue, but the ministry, on July 20, 1983, ordered all licensed wholesale dealers in the Brantford area to stop selling tax-exempt cigarettes to any retailers on the reserve, writing a letter to off-reserve wholesalers stating:

"...effective immediately and until further advised by me in writing, no further cigarettes are to be sold by you tax-exempt to any retailer on the Six Nations Reserve. The reason for this is that the number of cigarettes purchased tax-exempt in the first two weeks of July by retailers on the reserve far exceeds the quantity reasonably required for resale there in any calendar month. In the meantime, I am working with the Chief to establish a revised system acceptable to both him and the government and as soon as possible you will be advised and tax-exempt

sales may then resume."

The ministry says the number was based on the reserve's population at the time.

As a result each permit holder was only able to purchase 34,700 cigarettes tax-exempt each month. Wholesale suppliers in the region were notified of the change.

But Ontario soon learned it had imposed an illegal limitation on First Nations when two Six Nations men, charged with selling cigarettes wholesale, with the backing of the Six Nations elected Council took on Ontario and its quota system and won.

The late Victor Bomberry, owner of Chiefswood Gas Bar and the late Richard "Dick" Hill, owner of Dick's Smoke Shop challenged Ontario's provincial system of tobacco tax collection in court charging:

- 1) Quotas imposed an unconstitutionally prohibited indirect tax instead of a direct tax
- 2) That the Indian tobacco quota is not authorized by the Tobacco Tax
- 3) That the Indian tobacco quota represents an administrative overreach of provincial power into jurisdiction constitutionally reserved to the Dominion and exercised by Parliament in s.87 of the Indian Act which exempts from taxation the personal property

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Two First Nations taking on Ontario and Canada

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of an Indian situated on a reserve.

Ontario's Tobacco Tax Act imposes a tax on consumers of tobacco and imposes an obligation on a retailer to collect the tax.

The act states retailers on a reserve are not required to collect tax from Indians purchasing tobacco products for their own use on the reserve.

The case argued while the Tobacco Tax Act was valid as direct taxation, nothing in the act authorized the creation of the quota system.

Over \$300,000 later Six Nations won the 1989 case.

The court had said the quota treaded on an area of federal jurisdiction.

Evidence presented showed the provincial quota "exceeded the constitutional authority of the province by intruding into an area of federal jurisdiction."

Former elected chief Bill Montour said "we proved Ontario has no business legislating against us. That was clearly proven."

But before any First Nations community could celebrate the victory Ontario moved again.

The province, under the guise of a moratorium changed the name of its system from quota to allocation.

That name change meant a game change. Six Nations would be forced to go back to court again, with limited funds, to fight Ontario's move.

Former Elected Chief Bill Montour said Ontario's Bob Nixon asked for a moratorium in 1991 just as Montour was leaving office. "Bob Nixon asked for a moratorium to fix the quota system. They fixed it alright. They used the time to

come up with an allocation system but it's the same thing and council didn't follow through on it so it is still unconstitutional."

He said Six Nations Band Council has had several visits from Ontario's Minister of Finance and Ontario's Minister of Aboriginal Affairs over the years wanting the band council to help them fix the system.

"We said no. No damn way. It denies our people the right to retail or wholesale. They want us to take it over but they want to set rules, make sure we are only selling to ourselves or collecting tax for them."

Unlike several First Nation communities in Ontario, Six Nations Band Council refused to take over the quota system.

"Every year they send a list of who is getting a quota and a letter to council saying if we take it over they will increase the allocation by 20 percent and give us another 10% for pow wow time. We say no we do not support a system that ghettoizes our people."

He says "it is unconstitutional. The court has told us that but Ontario continues."

He said Ontario is strong arming Six Nations businesses.

"Now they are asking people to be more accountable, what kind of business do they have, how many are they selling. But I still maintain it is unconstitutional and should be challenged."

He said Ontario and Canada are pushing for economic development in First Nations, but on their terms.

"They are telling us to get in business but they want to decide what kind of business we can get into, who we can deal with, and they will determine who is a bona fide Indian, and they want us to collect taxes for them.

"And I say no damn way. Why should we be tax collectors for any other government."

But Ontario's allocation system is still in place. At least for now.

Wabigoon First Nation has joined forces with the Chapleau Cree First Nation

**"What really pisses me off is tobacco is a product we have traded for eons. Now they (Ontario and Canada) come along and say they are going to control it. I say oh no you don't. We never gave them that right."
Former Elected Chief Bill Montour**

and First Nations tobacco manufacturing giant Grand River Enterprises (GRE) to challenge the Ontario government's tobacco allocation system claiming it is unconstitutional.

For Wabigoon First Nation councillor Lana Kooshet it's discriminatory.

"I don't see Ontario telling Canadian Tire how many tires they can sell or telling Walmart how much bread they can sell or the 7-11 in Dryden, which is not far from us, how many cigarettes they can sell," she says

It's particularly difficult for Wabigoon, she says because they do service so many northern First Nation communities.

"We service more than just our First Nation. We have First Nations that are close by us. They utilize our store to buy their tobacco products and because of that quota or allocation we are given by Ontario it is not sufficient. We run out before the year end and have to try to limit our commu-

nity members to how many cartons or packs they can buy."

When ever the community has an event, she said they are inundated with north-erns.

"They come from Sioux Lookout and as soon as the ice road is ready, we get them from Red Lake or Sachigo Lake or other communities They all come here because our products are a lot cheaper. They pay three times the rate they would pay in Wabigoon."

The result, she says is "we have a huge indigenous customer base who are entitled to buy these tobacco products, tax free. They all come with their tax cards, and we have to sell to them we can't discriminate against them but with the allocation or quota system Ontario imposes on us, we run out before the year end and we have to buy tobacco products full price with taxes."

Councillor Lana Kooshet, has been a band councillor since last fall. Before that she managed the community owned store for the community of 600.



Wabigoon Lake Councillor Lana Kooshet

She said the store does get more quota than their demographics show, receiving 7,000 when it should only 5000, but servicing other communities means they still run short.

"Why are we limited? Why can't First Nations sell as much as they want to, like any other business in Ontario. Why are we being

discriminated against," she says.

She says Ontario's allocation or quota system is confusing, chaotic and unfair.

"It doesn't even make sense. Some communities have no stores at all so they get a quota or allocation, assigned to them but they can't get the products so they come to our store."

She says the Ontario's Ministry of Finance "is a headache. When I managed our store they would call and ask why I sold so much gas on a particular weekend. Well, that was a weekend; we had the northern hockey tournament so everyone was here and buying gas. They have their gas card so we can't refuse them."

She said they don't just buy cigarettes. "A lot of the northern communities come here to buy tobacco for their ceremonies."

Wabigoon First Nation, the Chapleau Cree First Nation and GRE are gearing up for a fight charging Ontario's "Allocation System" is unconstitutional, that Ontario does not have the jurisdiction to impose taxation on First Nation territories.

Grand River Enterprises has every reason to oppose the allocation system. Ontario is now trying to draw First Nations manufacturers under the same "Allocation System," limiting their First Nation to First Nation sales.

That could mean millions in lost sales for the First Nation company. In addition GRE is also facing the loss of as much as \$150 million in a lost excise tax court case in 2013.

The company failed in a legal challenge to argue that tobacco products manufactured on a reserve for sale to natives should be exempt from excise taxes.

The Supreme Court of Canada refused to review a lower court judgement against GRE Six Nations Ltd., that excise taxes were still applicable. That ruling ended the challenge.

Courts had held that GRE was responsible for 23 assessments for 'excise duty and related interest' on tobacco products it manufactured from September 2005 to July 2007 and sold to retailers on reserves in Ontario.

The case was lost by the Hamilton law firm of Hammond Inch and Monture. Lawyer John F.C. Hammond said at the time that a separate legal action was dealing with whether those taxes should be paid but Revenue Canada officials told Turtle Island News discussions are underway.

Hammond had argued that native-to-native sales of tobacco products should be exempt from excise taxes because natives are not "members of the general public." He said "excise-taxable products are intended for members of the general public. The court ruled drafters of the legislation could not have possibly meant to exclude (natives) from the taxes."

Former Six Nations elected chief Bill Montour said GRE did make the same offer to Six Nations Band Council to join the new fight against the allocation system.

"Our council would not join on to GRE when they made a presentation to council. Ontario is questioning whether GRE could continue their nation to nation trade. I still believe that GRE or any one of our people has the right to engage in nation-to-nation trade."

Meanwhile current Elected Chief Ava Hill says a community meeting will be held.