Leasing company's battle with Revenue Canada

Inching toward resolution

by Scott Smith

HAMILTON -- A gruelling ten year wrangle between a Six Nations-based employee leasing company and Revenue Canada over whether or not off-reserve Aboriginal workers can benefit from the same income-tax exemption under section 87 of the Indian Act as their on-reserve counterparts, is inching towards a finale.

Roger Obonsawin, an Abanaki businessman and status Indian, along with partner Ljuba Irwin, also a status Indian, in 1987 pioneered a unique -- and some might say cunning -- new employment concept that has given the federal government and Revenue Canada fits ever since.

The pair formed OI Employee Leasing through their parent company, The OI Group, in 1987, thinking they could successfully pair a US concept of leasing employees to third party companies together with a Canadian income tax exemption benefitting native peoples.

Four years earlier, in 1983, the Supreme Court had liberally interpreted the right of a status Indian to work off the reserve and not pay income tax, as long as the head office of the company was located on a reserve.

In a decision known as Nowegijick, the court ruled in favour of BC status Indian living on reserve and working for a logging company also located on the reserve. Periodically, Mr. Nowegijick's logging activities took him off the reserve to cut, and Revenue Canada told him he

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OI Group partners Ljuba Irwin and Roger Obansawin are readying an income tax test case to determine the extent to which exemptions apply to natives working off the reserve.

would have to pay income tax for that portion of the time he spent working off reserve.

The high court disagreed with that narrow interpretation, however, and a precedent was set enabling legitimate employers situated on reserve to employ people and have them work off reserve.

Expanding on that notion further, if any of those people happened to be status Indians, argued Mr. Obonsawin and his lawyers, then they should be eligible to receive a tax-free salary through a reserve-based company -- no matter where they worked.

This combination of employment innovation, legal challenges and subsequent court decisions, combined with employment trends that favoured natives willing to move off the reserve for higher paying jobs, have allowed Mr. Obonsawin and his company to flourish. He now counts some 500 clients in his native leasing subsidiary, Native Leasing Services -- and there are other such services run by other companies, too -- all of whom are taking advantage of what Revenue Canada is now calling a loophole, enabling them to work off reserve tax free as long as the company that is leasing them, like the OI Group, has its head office located on a reserve.

Needless to say, the government and Revenue Canada have not taken all this lying down. They have sought to develop guidelines within Revenue Canada, with the support of the Justice Department, that limit these rights through what are called 'connecting factors'.

These connecting factors attempt to distinguish or quantify various levels of residency or 'connectedness' to a reserve for the purposes of establishing whether a certain individual should be tax-exempt or not.

In general, the two ends of the spectrum are native people working and living on reserve, who are tax exempt, and native people living and working in the commercial sector off the reserve, who must pay taxes. For the vast grey area in between, there are The Guidelines.

It is this last Indian Act Exemption for Employment Income Guidelines paper, distributed in June of 1994, which Mr Obonsawin and his lawyers have taken exemption to. In particular, they object to sections of the policy which apply to organizations like Indian friendship centres, where many if not most of the employees are native status Indians, are working for the benefit of other native people, and may even have a house on a reserve which could contribute to the requirement of residency, but do in fact not qualify because they "live" off the reserve.

Unlike the Assembly of First Nations employees and other native people working for similar provincial, regional or tribal native organizations, who do qualify as tax exempt in this circumstance, friendship centre employees are deemed to be taxable because their income is judged to be insufficiently connected to a specific reserve.

Leslie Pinder, a partner at Mandell Pinder, the BC law firm representing Mr. Obonsawin, is eager to launch a test case to establish the validity of some of these connecting factors. So eager, in fact, that they've been trying to get a case to court for the last three years but have been stymied, they say, by government lawyers and Revenue Canada bureaucrats who don't want to go to court just yet because they afraid they're going to lose.

She argues that these connecting factors are arbitrary in nature and that the government is trying to intensify the differences between those Indians living on a reserve and those living off; to in effect undermine the rights of natives once they step off the reserve.

"The guidelines focus on where the person lives and where the work is performed," Ms. Pinder explains. "Canada wants to make a distinction between those that live on and those that don't.

"We're saying that native people live on the reserve sometimes, and sometimes they live off. They have to go off for services like school, and then they come back.

"The most important thing for the government to consider is whether people are staying connected to their communities," she says.

It shouldn't be too difficult for the government to determine if an individual is still connected to their community or not, Ms. Pinder asserts, but she does allows that her legal strategy is to argue for a return to a simple set of guidelines based on the Nowegijick decision, where it is just a question of a) Is the person a status Indian? and b) Is the company they're working for based on a reserve?

"The test should be simple," she says.

"But if the government is going to make it complicated, if they're going to look at these connecting factors, then at least those connecting factors have to be real ones, ones that make sense to the natives themselves and not just the ones that are convenient for the bureaucracy."

"The main point is that if you're connected to your reserve, you should have the benefit of tax exemption."

That kind of a decision would be great for her client, Mr. Obonsawin, who is accusing Revenue Canada bureaucrats of going back on a promise they made in January of 1995 to hold in abeyance the tax files of his clients until a definitive court decision was reached.

"We had an agreement from a deputy minister!" recalls Mr. Obonsawin incredulously. He was one of the principal organizers of an occupation of a Revenue Canada office in downtown Toronto in December of 1994. In the beginning of 1995, he says he received a signed letter from Deputy Minister Pierre Gravelle stating that Revenue Canada would hold his clients files in abeyance until the case was decided.

"We certainly feel if they made an agreement, it is their fiduciary obligation to stick to it."

"But now they're harassing people and making their lives difficult," alleges Mr. Obonsawin. "They're freezing peoples bank accounts and harassing them at home, just trying to wear them down so they'll get fed up and walk away from it.

"It's a constant battle trying to get Revenue Canada to cooperate. We've got clients who want to fight, who may be married to non-natives, for example, but still believe in their right.

"But then they go after the spouse and try to make them pay the tax. Well, you can see how that starts the marital discord within the family and leads to all sort of other problems.

"They know what they're doing and that's why they're doing it, trying to wear people down."

Both Pinder and Obonsawin have taken comfort in a Court of Appeal case last year involving Marianne Folster, because they feel that case has important implication for their own upcoming court fight.

Ms. Folster is a status Indian from the Norway House First Nation in Manitoba. She was employed as the administrator for the nearby Norway House Indian Hospital, located off the reserve but serving the reserve population.

Her income was being taxed and she decided to take her case to court, arguing her work was for the betterment of Native people and she lived on reserve, fulfilling the connecting factor criterion even though the actual hospital was located off the reserve.

She lost her case initially in a lower court but later won on appeal. Of importance to Roger Obonsawin and OI Group clients is the fact that Revenue Canada decided not to appeal this case. They had a limited time to do so and did not, so the precedent stands.

"So we're saying now, with Folster, it's already settled, that we don't need to go to court.

"All we really need to do is negotiate the guidelines, but they don't want to do it that way."

Ms. Pinder believes the Folster decision has sent the message that there is more to the question of deciding income tax exemption that simply asking where does the person live and where is the work performed.

"A purposive approach asks, What is the purpose of the exemption? The purpose is to protect native people who are living as native people, and to protect their property.

"In Folster, the purposive approach is to ask whether the work is for the benefit of native people. The guideline just says, Where do you work. Folster says it's not simply where you work, it's does your work support native communities in their endevours?

"So we're moving away from just a straight-line approach," she says.

An Ontario Court judge has given Pinder and her Revenue Canada counterpart until next week to come up with a mutually acceptable statement of facts and an agreement on the points of law they wish to argue so the case can get under way as soon as possible.