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First Nations & Aboriginal Law News

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SPRING 2017

FIRST NATIONS EMPLOYMENT INCOME GUIDELINES

Submission by: Aaron B. Starr

The purpose of this article is to provide some general guidelines in relation to employment income earned by status First Nation individuals on Reserve. The governing authority is found under section 87 of the *Indian Act* (the "Act"). Section 87 of the Act states:

> 87 (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
> (b) the personal property of an Indian or a band situated on a reserve.
> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

"Income" is considered personal property and status First Nation individuals are exempt from taxation if the employment income is "situated" on a Reserve. The Supreme Court of Canada (the "SCC") has over the years clarified and provided direction as to the applicability of section 87 of the Act. In *R v Nowegijick*, ([1983] 1 S.C.R. 29 (S.C.C)), the SCC stated that any person looking to utilize the benefits afforded through section 87 of the Act must show that the employment has a clear connection to the First Nation Reserve. The SCC in *Williams v. Canada* ([1992]1 SCR 977) introduced the connecting factors that are considered relevant to the location

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FIRST NATIONS EMPLOYMENT INCOME GUIDELINES (CONT.)

of employment income which was confirmed applies to determine whether employment income is exempt from taxation. The connecting factors include:

1) the location or residence of the employer;
2) the residence of the employee;
3) the place where the employee is paid; and
4) the nature, location and surrounding circumstances of the work performed by the employee, including the nature of the benefit that accrued to the Reserve from it.

Following the *Williams* decision in 1994, Canada Revenue Agency (hereinafter "CRA") issued a set of instructional guidelines for applying the section 87 tax exemption. CRA prescribed 4 specific guidelines which are as follows;

1. GUIDELINE 1

If 90% or more of the employment duties are executed on a First Nation reserve then it is usually the case that the employment income will be tax exempt. When employment duties fall below 90% on reserve, and the income is not saved by any of the other Guidelines, then the taxable rate shall be prorated to the percentage amount for employment duties executed on reserve.

2. GUIDELINE 2

When the employee is a status First Nation individual living on reserve, and employed by an employer who is also a resident of the reserve, then the employment income will typically be seen as tax exempt.

3. GUIDELINE 3

If more than 50% of the employment duties are executed on reserve and the employer is normally a resident of the reserve, the employment income will generally be seen as tax exempt.

4. GUIDELINE 4

The last guideline pertains to employment where the employer is the Band, any affiliate of the Band, or an organization representing the Band. In this employment circumstance if the organization/employer is dedicated to the social, cultural, education or economic development of on reserve First Nation individual's lives, the employment income will usually be tax exempt. There is a caveat that this guideline also includes; the employment must not be in connection to the employer's commercial activity.

As a result of the above guidelines, the onus of proof is on the individual claiming the exemption to prove that the requirements have been met.

A note on terminology, the writer has used the term, "status First Nation individual" throughout the opinion as a legal term in reference to those individuals who are registered as status Indians under the Act.

DUTY TO CONSULT

Submission by: Kelsey O'Brien

The legal duty to consult stems from s. 35 of the Constitution and is grounded in the honour of the Crown. Several court cases have tried to outline how provincial and federal governments are supposed to fulfill that duty, and provincial and federal governments have created their own policies as to how consultation will occur.

The scope and extent of the duty to consult is constantly being refined and clarified in caselaw. Caselaw released in December of 2016 (*Canada (Governor General in Council) v Courtoreille*) examined whether the Crown has a duty to consult about the development of legislation. The Federal Court of Appeal found that Canada does *not* need to consult with affected First Nations when developing legislation, with a few exceptions. Rather, as a general rule Canada must ensure compliance with the constitution and then the Courts can review legislation if it impinges on Aboriginal rights. The Court did note that, although not required by law, it would be prudent for legislators to consult with Aboriginal peoples in advance of enacting legislation that may affect their rights.

Different levels and methods of consultation are required in varying circumstances, but it is always the Crown's responsibility to fulfill the duty to consult. That said, it is generally understood that Aboriginal participation is required in the consultation process. Saskatchewan's consultation policy specifically states that First Nations are responsible for:

- participating in the consultation process in good faith and a timely manner;
- making concerns known about adverse impacts on treaty and aboriginal rights and traditional uses; and
- responding to the government's attempts to consult.

Another Federal Court of Appeal decision, released this January, 2017, specifically commented on the reciprocal duty on First Nations to participate in the consultation process in the context of treaty rights. In that case (*Prophet River First Nation v Canada (Attorney General)*), the parties and the Court agreed that there was a duty to consult by the Crown regarding potentially significant adverse environmental effects from a hydroelectric dam project. The Court went on to say: "Aboriginal peoples have a reciprocal duty to collaborate and provide a factual basis for the determination of their traditional territories and/or, the scope of their treaty rights. The path toward reconciliation is a give and take process…"

It is important to note that there are often timeframes involved for a First Nation to respond to efforts at consultation. For example, the Saskatchewan guidelines state that if there is a permanent disturbance to land and/or change in resource availability for an affected First Nation (ie. if Level 5 consultation is required), the First Nation is given 45 days to respond to the consultation request. In some cases a response is requested within only 21 days.

To ensure that the concerns of First Nations in Saskatchewan are heard and considered, it is important that attempts by the government to consult are addressed promptly and thoroughly. Some First Nations achieve this by identifying a particular employee who will be responsible for receiving all consultation requests and ensuring a response is coordinated. If additional resources are required in order to provide a meaningful and informed response, it is important to identify a request for those resources via the First Nations and Metis Consultation Participation Fund at an early juncture.

First Nations & Aboriginal Law

Advancing the interests and well-being of First Nations.

McKercher has developed a deep understanding of the complex legal issues impacting First Nation governance and business operations. Our firm has represented First Nations around the province, particularly in litigation regarding specific claims, taxation, education, health and employment law. We also assist with jurisdictional issues in negotiations with all levels of government.

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