

NOVA SCOTIA COURT OF APPEAL

Roscoe, Jones and Bateman, J.J.A.

Cite as: Union of Nova Scotia Indians v. Nova Scotia (Attorney General),
1998 NSCA 131

BETWEEN:

UNION OF NOVA SCOTIA INDIANS, a body)
corporate under the *Societies Act*, R.S.N.S.)
1989, c. 435, on behalf of all registered Indians)
in Nova Scotia, and **PAUL KENNETH FRANCIS**)
on his own behalf and on behalf of all registered)
Indians in Nova Scotia)

Bruce H. Wildsmith, Q.C.
for the Appellants

William M. Wilson, Q.C.
for the Respondent

Appellants)

- and -)

ATTORNEY GENERAL OF NOVA SCOTIA,)
representing Her Majesty the Queen in Right)
of the Province of Nova Scotia)

Respondent)

Appeal Heard:
May 26, 1998

Judgment Delivered:
July 21, 1998

THE COURT: Appeal dismissed, per reasons for judgment of Bateman,
J.A.; Roscoe, J.A., concurring; Jones, J.A. concurring by
separate reasons.

JONES, J.A.:

This is an appeal from the dismissal of an application in the Supreme Court for a declaration that Indians have the right to purchase and sell tobacco and tobacco products on Indian reserves to Indians without complying with the provisions of the Nova Scotia **Revenue Act**, S.N.S. 1995-96, c. 17 and **Regulations**.

The appellant Paul Francis is a registered Mi'Kmaq Indian and a member of the Eskasoni Band. He resides on the Eskasoni Indian Reserve in Cape Breton. The application was based on affidavit evidence filed by the parties to the application. Mr. Francis wishes to purchase tobacco products from Indians on a reserve at Pointe-Bleue, Quebec. He intends to transport the products to reserves in Nova Scotia and resell them to other registered Indians acting as retailers. The products would be marked "For sale only to registered Indians on reserves in Canada".

Initially Mr. Francis applied to the Provincial Tax Commission for a permit to act as a wholesale vendor under the **Revenue Act**. He proposed to restrict his sales to registered Indian retailers operating on reserves in Nova Scotia. The **Revenue Act** provides for the issuance of licenses for the wholesale and retail sale of tobacco products which may, under certain conditions, permit the sale of tobacco products to Indians on reserves in Nova Scotia.

The **Act** and **Regulations** apply to the purchase and sale of all tobacco products in Nova Scotia. The Province, as a matter of policy, has established a quota system for the amount of tax free tobacco products that may be sold to Indians on

reserves in Nova Scotia. The quota for each reserve is sold through licensed wholesalers and retailers approved by resolution of the Band Council for each reserve. The appellants dispute whether the quota system was devised with the consent of the Indians. There is no real dispute that it exists and how it operates. The parties agree that it is essentially the same as the quota system in British Columbia. As the appellant Francis failed to comply with the provisions of the **Act** and the quota system, his application for a wholesaler's permit was rejected.

The appellant Francis filed the present application in the Supreme Court. He applied for an order in the following form:

WHEREAS Paul Kenneth Francis is a registered Indian who intends to purchase tobacco products from other registered Indians on Indian reserves in Canada,

AND WHEREAS the tobacco products in question are manufactured, possessed and offered for sale on reserve in Canada in compliance with the *Excise Tax Act (Canada)*, as it may be amended from time-to-time,

AND WHEREAS the tobacco products will be marked in large, readable print "For sale only to registered Indians on reserves in Canada",

IT IS DECLARED that, in these circumstances, Paul Kenneth Francis and all other registered Indians in Nova Scotia, and their servants, employees, and agents, have the right, as wholesale and/or retail vendors, to:

1. purchase the tobacco products on an Indian reserve anywhere in Canada,
2. transport those tobacco products to an Indian reserve or reserves in Nova Scotia, from reserve-to-reserve within Nova Scotia, and from a reserve in Nova Scotia to a reserve elsewhere in Canada, and
3. store, possess, offer for sale, and sell on an Indian reserve in Nova Scotia those tobacco products to other registered Indians,

all without being registered or designated as a wholesale or retail vendor, or paying or collecting provincial tax, or otherwise complying with the provisions of the *Revenue Act (Nova Scotia)* and the *Revenue Act Regulations* and any other regulations under that *Act*, as they may be amended from time-to-time, or any administrative directions or quotas imposed by the Province of Nova Scotia,

PROVIDED that:

- a) an Indian tobacco wholesale or retail vendor who offers for sale or sells to non-Indians any tobacco products to which this declaration applies is subject to the provisions of the *Revenue Act (Nova Scotia)* and the *Revenue Act Regulations*.

The application was heard by Mr. Justice Tidman. Mr. Justice Tidman dismissed the application. He held that all of the issues raised on this application were dealt with by the Court of Appeal in **R. v. Murdock (M.) and Johnson (S.G.)** (1996), 154 N.S.R. (2d) and that he was bound by that decision.

The appellant has appealed from that decision. The notice of appeal contains nine grounds of appeal. The appellants' factum states the issues as follows:

1. This case raises one central question: Can a Province, for the purpose of collecting tax from non-exempt consumers, lawfully impair the federally-mandated status, capacity and right of Indians to be free of taxation in respect of their personal property situated on Indian reserves, by setting limits, terms and conditions under which tax-free trade may take place between Indians on their reserves?
2. Under the *Revenue Act*, S.N.S. 1995-96, c. 17, as amended by S.N.S. 1976, c. 6, ss. 37, 38, and 39, and the *Revenue Act Regulations*, N.S. Reg. 63/96, O.I.C. 96-230, ss. 77-79, extensive controls are placed on the importation, sale and possession of tobacco in Nova Scotia. That legislation creates an exclusive system of wholesale and retail vendors, and a series of prohibitions against acquiring and selling tobacco outside that system. Anyone possessing tobacco in Nova Scotia must acquire it in conformity with the *Act*, and a retail vendor must obtain its tobacco from a wholesale vendor holding a provincial permit. With respect to tax-free tobacco for Indians on Indian reserves, the Province **by administrative direction** authorizes a limited quantity (or, quota) of such tobacco to be sold by licensed wholesalers to designated retailers on each reserve, and requires the Indian wholesale and retail vendors of such quota

tobacco to enter into agreements specifying additional terms and conditions [all of which is referred to herein collectively as the "Indian tobacco quota system"]. Thus, the effect of what was said to Mr. Francis is that, unless he opted in and complied with the existing policy-based, administrative Indian tobacco quota system, he could not be a wholesale vendor in Nova Scotia and would not be able to wholesale tax-free tobacco to other Indians acting as retailers in Nova Scotia. Is that legally correct?

3. To properly analyse this situation, several subordinate issues must be considered:

1. Is the Province's Indian tobacco quota system, by limiting and controlling intra-Indian trade (meaning trade between Indians on Indian reserves) in a lawful product constitutionally invalid, since it impairs the status and capacities of Indians and regulates Indians *qua* Indians, contrary to s. 91(24) of the *Constitution Act, 1867*?

2. Does the Province's Indian tobacco quota system conflict with s. 87 of the *Indian Act*, in that it

(i) prohibits unlicensed intra-Indian, on-reserve trade,

(ii) limits quantities of tax-free tobacco and imposes other restrictions;

(iii) does not provide for a license directed to purely intra-Indian, on-reserve trade, and

(iv) requires licensees to post a bond and enter into a contractual agreement specifying further terms with which the licensee must abide.

3. If the Province may operate an Indian tobacco quota system as in this case, must the Province's Indian tobacco quota system be authorized by legislation?

4. In addition, to these three issues, a fourth issue is the evidentiary ruling. Was the "without prejudice" Tripartite MOU properly admitted into evidence?

Counsel for the appellants conceded that the issues are contained in the proposed order as set forth above, which he filed with the application.

With respect to the admission of the evidence relating to the Tripartite Memorandum of Understanding it appears to have no significant relation to the issues

raised on the appeal except that the affidavit refers to the operation of the quota system which in my view is relevant to the grounds raised on the application.

The respondent raised the issue as to whether this is an appropriate case in which to grant declaratory relief because there is no factual foundation on which to answer the issues raised. While there is considerable merit in that argument, I do not think it is necessary to deal with it as I agree with the conclusions reached by the trial judge.

The main thrust of the appellants' argument is that the **Revenue Act** and **Regulations** do not apply to the purchase and sale of tobacco products by Indians for resale to Indians on Indian reserves. Counsel submitted that s. 87 of the **Indian Act** protects the property of Indians on reserves from taxation and accordingly Indians can trade in tobacco products from reserve to reserve and sell those products on reserves to Indians for their own consumption and use without complying with the **Revenue Act**. Counsel distinguished the case of **R. v. Johnson (S.G.)** (1993), 120 N.S.R. (2d) 414 and the subsequent cases on the basis that Johnson was engaged in the commercial sale of tobacco to non-Indians. Counsel also argued that the provisions of the **Revenue Act** and **Regulations** were unconstitutional as they conflict with the rights of Indians under s. 87 of the **Indian Act** as they impair those rights. This refers particularly to the tobacco quota system. The following is from the appellants' brief:

In sum, the vital distinction between the case at bar and all other s. 87 cases, including those from this Honourable Court, is the absence of non-Indian retailers and consumers.

The appellants also contend that the quota system is not authorized by the **Act** and **Regulations**.

The respondent contends that the **Revenue Act** and **Regulations** are valid Provincial legislation under s. 92(2) of the **Constitution Act**. The respondent in particular maintains that the substantive issues involved in this appeal have been addressed by this Court in **R. v. Johnson** and **R. v. Murdock (M.) and Johnson (S.G.)**.

Sections 87 and 88 of the **Indian Act** provide as follows:

87(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to s. 83, the following property is exempt from taxation, namely,

(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.

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs 1(a) or (b) 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, c. 89 of the Revised Statutes of Canada, 1952, or the tax payable under the Estate Tax Act, c. E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian. R.S., c. I-6, s. 87; 1980-81-82-83, c. 47, s. 25.

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or bylaw made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act. (Emphasis added)

Section 34(1) of the **Revenue Act** provides that every consumer of tobacco products shall pay a tax at the rates prescribed by that Section.

Sections 35, 37, 38, 39 and 40 provide as follows:

35 Every person who

(a) brings tobacco into the Province:

(b) receives delivery in the Province of tobacco acquired by that person for value

(i) for that person's own consumption in the Province, or for the consumption in the Province of other persons at that person's expense, or

(ii) on behalf of, or as agent for, a principal who desires to acquire the tobacco for consumption in the Province by such principal or other persons at the principal's expense,

shall immediately

(c) report the matter in writing to the Commissioner;

(d) supply to the Commissioner the invoice and all other pertinent information as required by the Commissioner in respect of the consumption of the tobacco; and

(e) pay to Her Majesty the same tax in respect of the consumption of the tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province.

37 No person shall sell or agree to sell tobacco to a consumer at a retail sale, by any means, including vending machines, unless the person has been granted, upon application in the manner required by the Commissioner, a retail vendor's permit and such permit is in force at the time of the sale.

38 The Commissioner may issue a wholesale vendor's permit upon application to the Commissioner by a person in the manner and form required by the Commissioner.

39(1) No person shall be in the possession of tobacco

- (a) on which tax has not been paid;
- (b) not bearing a prescribed mark; or
- (c) not purchased from a retail vendor who holds a valid retail vendor's permit, where the person in possession is a consumer.

(2) No retail vendor shall be in possession of tobacco other than tobacco purchased by the retail vendor from a wholesale vendor who, at the time of purchase, held a wholesale vendor's permit that was issued pursuant to this Part and that, at the time of purchase, was in force.

(3) No person shall distribute, sell, barter or offer for sale or as a gift tobacco except as permitted by this Part of the regulations.

40 No person shall transport tobacco unless, at the time the tobacco is being transported, that person is in possession of a bill of lading, waybill or other document showing the origin and destination of the tobacco.

Sections 76(1)(d) and 76(13)(a) of the **Regulations** provide:

76(1) In this Section,

.....

- (d) "designated retail vendor" means a retail vendor designated by the Commissioner who sells tobacco in the Province to a consumer at a retail sale on a reserve, as defined in the Indian Act, being Chapter I-5 of the Revised Statutes of Canada, 1985;

76(13) The Commissioner may, provided the application is not a person described in clauses (8)(a) or (b), issue a permit to purchase and sell unmarked tobacco to an applicant if the applicant requires unmarked tobacco

- (a) for sale in the Province to designated retail vendors situated on a reserve, as defined in the Indian Act, being Chapter I-5 of the Revised Statutes of Canada, 1985;

The **Revenue Act** is a revised consolidation of several statutes including the former **Tobacco Tax Act**, R.S.N.S. 1989, c. 470. The above provisions are identical to those referred to in **R. v. Murdock (M.) and Johnson (S.G.), infra**.

In **R. v. Johnson (S.G.)** (1993), 120 N.S.R. (2d) 414 there were three main issues on the appeal. Issue 2 was whether s. 87 of the **Indian Act** exempted the appellant from the application of s. 25(2) of the **Tobacco Tax Act** (now s. 39(2) of the **Revenue Act**). In the **Johnson (S.G.)** case, I reviewed the authorities relating to the importation and taxation of property on reserves under s. 87 of the **Indian Act**. This Court followed the decision of the British Columbia Court of Appeal in **Tseshah Indian Band v. British Columbia** (1992), 15 B.C.A.C. 1; 27 W.A.C. 1; 94 D.L.R. (4th) 97. I concluded by stating:

Section 87 of the **Indian Act** exempts the personal property of an Indian on a reserve from taxation. The exemption extends to ownership, occupation, possession or use of personal property on a reserve. The cases make it clear that the exemption applies to personal property on a reserve and the sale of personal property to an Indian on a reserve. The **Tobacco Tax Act** can only apply to Indians on reserves to the extent that it does not conflict with the provisions of the **Indian Act** or any treaty. The general provisions of the **Tobacco Tax Act** which do not conflict with s. 87 apply to reserves and Indians. I agree with the reasoning in the **Tseshah Indian Band** case and of Krever, J., in **Re Hill**. Section 87 does not exempt Indians from prepaying the tax to wholesalers on purchases made off the reserve as contended by the intervenor. While s. 25(1)(a) of the **Act** may not apply to the possession of tobacco on a reserve, s. 25(2) is a provision of general application designed for the effective collection of the tax and applies to retail vendors on reserves. It follows therefore that the conviction on the second count is valid.

In **R. v. Murdock (M.) and Johnson (S.G.)** (1996), 154 N.S.R. (2d) 1; 452 A.P.R. 1 Hallett, J.A., in delivering the judgment of this Court, stated at p. 12:

Ground 1 of that Notice of Appeal states:

"1. **THAT** the learned trial judge erred in finding that the **Tobacco Tax Act**, R.S.N.S. 1989, c. 470 and **Regulations** made pursuant thereto, O.I.C. 90-38, N.S., was constitutional and validly enacted provincial legislation applicable to Indians and property of Indians on reserves and in particular the learned trial judge erred in finding:

(a) That the **Tobacco Tax Act** and the **Regulations** made under the Act are intra vires the legislature of the Province of Nova Scotia on the grounds that the **Act** and **Regulations** are not in pith and substance and in legal and practical effect legislation in relation to Federal Indian matters falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(24) of the **Constitution Act**, 1867.

(b) That the **Tobacco Tax Act** and the **Regulations** do not impose limitations on tobacco and do not affect a significant element of traditional Indian ways, and that the **Act** is inapplicable to Indians as it is a law of general application pursuant to s. 88 of the **Indian Act**, R.S.C. 1985, c. 1-5.

(c) That the Mi'kmaq are unrestricted in their ability to gather wild tobacco or grow their own tobacco for spiritual, ceremonial, and cultural practices.

(d) That the **Tobacco Tax Act** with its **Regulations** and any administrative directives issued pursuant to it, nor any sections of it, is a provincial law that does not single out Indians for specific treatment and cannot be classified as a law in relation to Indians, thereby not usurping federal jurisdiction, and has full force and effect over Indians with status under the **Indian Act**.

(e) That there are in existence agreements between Mi'kmaq Band Councils in Nova Scotia and the Government of Nova Scotia restricting the quantity of tax exempt tobacco available on Indian reserves, when no evidence was adduced in the trial that any such agreement had ever been reached and the finding was contrary to Crown submissions to the court."

Counsel for the intervenor, in his factum, states under the heading "Points in Issue":

"The charge alleges as essential ingredients two facts that are said to be germane on the basis that the **Tobacco Tax Act** (Nova Scotia) applies in the circumstances of this case to the Indian appellants. Johnson and Murdock (collectively, the 'appellants') are said to be required to: 1) hold wholesale vendor's permits; and 2) pay tobacco tax as and when they bring tobacco into Nova Scotia. The first requirement is allegedly imposed by s. 14(1)(a) and the second by s. 6(c) of the **Tobacco Tax Act** (Nova Scotia).

"The Intervenor submits that these two requirements do not apply in the circumstances because the tobacco in question was sold from one registered Indian to another and transported from one Indian reserve to another for resale on-reserve there. While the Intervenor submits that three constitutional bases support this proposition, it does not in light of Justice Bateman's decision on the Intervenor's Motion for Leave to Intervene propose to argue in its Factum the issues of indirect taxation and extraprovincial trade. Therefore, the sole basis argued herein is the tax exemption created by s. 87 of the **Indian Act** (Canada). The issue may be stated as follows:

Are ss. 6(c) and/or 14(1)(a) of the **Tobacco Tax Act**, R.S.N.S. 1989, c. 470, which on their face require that registered Indians who for resale bring tobacco into Nova Scotia from outside the Province hold a wholesale vendor's permit [s. 14(1)(a)] and pay tobacco tax in respect of such tobacco as and when brought into Nova Scotia [s. 6(c)], constitutionally inapplicable in respect of the appellants as being inconsistent with s. 87 of the **Indian Act**, R.S.C. 1985, c. I-5 when regard is had to all or some of the following facts:

- a) the tobacco is Indian property bought by a registered Indian on an Indian reserve outside Nova Scotia from another registered Indian,
- b) the tobacco is Indian property brought or intended to be brought to an Indian reserve in Nova Scotia, and/or
- c) the tobacco is Indian property sold or intended to be sold on an Indian reserve by a registered Indian?"

With reference to the first two issues he referred to the decision in **R. v. Johnson (S.G.) (supra)** and stated at p. 42:

In my opinion the following issues expressly or impliedly were resolved by this court by the decision in (1993) **R v. Johnson**: (i) Section 25(2) of the **Tobacco Tax Act** is valid provincial legislation; (ii) s. 87(1)(b) of the **Indian Act** does not exempt an Indian retail vendor from prepaying the tax to wholesalers on purchases of tobacco made off reserve as required by s. 25(2) of the Act; (iii) s. 25(2) is a provision of general application designed for the effective collection of tax and applies to "retail vendors on reserves"; (iv) that the **Tobacco Tax Act** imposes a direct tax; (v) that the quota system in force in this Province is a means by which the Province as a matter of policy delivers the tax exemption Indian consumers claim that they are entitled to pursuant to the obligations created under s. 87 of the **Indian Act**; (vi) by adopting the reasoning of the courts in **Hill v. Ontario** and in the **Tseshaht Indian**

Band v. British Columbia this court rejected the reasoning in **Bomberry and Hill v. Ontario** that the quota system was ultra vires the Ontario government as it was not authorized by the Ontario **Act**; (vii) despite the fact that there is nothing in the British Columbia or Nova Scotia **Tobacco Tax Act** that expressly authorize the creation of a quota system by regulation, the creation of such a system is a valid exercise of the power to make **Regulations** conferred on the Governor-in-Council by s. 44 of the **Act**; and (viii) there is nothing in s. 4 of the **1752 Treaty** which exempts Indians from complying with the general provisions of the **Tobacco Tax Act** regarding the collection and payment of tobacco tax ((1993) **R. v. Johnson** at para. 35).

Do ss. 6 and 14(1)(a) of the **Tobacco Tax Act** offend the s. 87(1)(b) tax exempt status of Indians with respect to property on a reserve?

A "vendor" is defined in the **Tobacco Tax Act** as:

"'vendor' means a retail vendor or a wholesale vendor;"

A "wholesale vendor" means:

"2 (m) 'wholesale vendor' means a person who sells tobacco in the Province for the purpose of resale and who purchases not less than ninety per cent of the person's tobacco products for resale from Canadian tobacco manufacturers."

A "retail vendor" means:

"2(h) 'retail vendor' means a person who sells tobacco in the Province to a consumer at a retail sale;"

Section 6 of the **Tobacco Tax Act** provides that every person who brings tobacco into the Province or who received delivery in the Province of tobacco acquired by that person for value for that person's own consumption shall immediately report the matter in writing to the Commissioner, supply the Commissioner with invoices and other pertinent information respecting the consumption of the tobacco and pay to the Province the same tax in respect of the consumption of the tobacco as would have been payable if the tobacco had been purchased at a retail sale.

Section 14(1)(a) provides that no person shall import or bring tobacco into the Province unless that person holds a wholesale vendor's permit that is issued pursuant to the Act.

Sections 6 and 14(1)(a) are clearly designed to create a system whereby tobacco cannot be brought into the Province without the person paying the sales tax levied as if it were a purchase at a retail sale (s. 6) or the person bringing the tobacco into the Province is a person that holds a wholesale vendor's permit (s. 14). The **Tobacco Tax Act** was amended subsequent to the decision of Burchell, J., in **Union of Nova Scotia Indians et al. v. Nova Scotia (Attorney General)** (*supra*). The amended scheme was found by Justice Jones to have the

effect of bringing the Nova Scotia tobacco tax collection system in line with similar legislation in Ontario and British Columbia.

With respect to the validity of the **Tobacco Tax Act** and the quota system in place in Nova Scotia, Jones, J.A., in (1993) **R. v. Johnson** (supra) at paragraph 32 (previously quoted) approved the reasoning of the British Columbia Court of Appeal in **Tseshah** (supra).

He continued at p. 44:

The Parliament of Canada has exercised its legislative power to enact laws with respect to Indians and Indian bands by the enactment of the **Indian Act**. By s. 88 of that **Act** Parliament has stated that provincial laws of general application apply to Indians except to the extent that these laws are: (i) inconsistent with the **Indian Act** or (ii) make provision for any matter for which provision is made by or under the **Indian Act**.

In my opinion, this court, having decided that s. 25(2) of the **Tobacco Tax Act** is valid provincial legislation for the effective collection of tobacco tax and applies to Indian retail vendors on reserve, it follows that ss. 6 and 14(1)(a) of the **Act** are similarly valid as these sections are simply part of the necessary tax collection regime established by the **Tobacco Tax Act**. Sections 6 and 14(1)(a) are provisions of general application like s. 25(2) designed for the effective collection of tax and apply to retail vendors on reserves. Sections 6 and 14(1)(a) of the **Tobacco Tax Act**, like s. 25(2) of the **Act**, enable the Province to exercise control over the importation of tobacco into the Province as the necessary incidence of an effective collection system.

I do not agree with the argument made by counsel for the intervenor that the burdens imposed on Indians by the **Tobacco Tax Act** respecting quotas, etc. are significant in that they restrict the source from which cigarettes may be obtained and the quantity that may be obtained tax free. Counsel asserts that the **Act** and **Regulations** "restrict competition for Indian retailers and for Indian consumers" and, therefore, interfere with the freedom of Indian retailers to obtain and offer for a sale on reserve tax free personal property and as a result erode the benefit conferred on Indians by s. 87 of the **Indian Act**. He argues that accordingly the burdens are inconsistent with the s. 87 rights of the Indians and inapplicable to the appellants. This argument is based on a decision of the New York Court of Appeal in **Milhelm Attea & Brothers Inc. v. Department of Taxation and Finance of New York** (1993), 599 N.Y. Supp.2d 510 (N.Y.C.A.).

In my opinion the quota system in Nova Scotia does not impose restrictions on a retail vendor of tobacco products beyond those necessary to ensure as a matter of policy that the volume of tax exempt products on a reserve do not exceed the reasonable requirements of the Indians on reserves. In my opinion the **Regulations** which allow for the designation of a retail vendor to deal with quota tobacco on a reserve is simply part of the necessary administrative machinery to effectively control and collect tax on tobacco products in the Province

of Nova Scotia. Under the present collection regime there is no erosion of the Indian consumers' alleged right to purchase tax free tobacco. The Indian consumers on the reserve have the benefit of the quota system which, by implication, was found by Jones, J.A., in (1993), **R. v. Johnson**, accommodates the Indians' claim to have tobacco situated on a reserve exempt from taxation.

He went on to consider the most recent decision of the New Brunswick Court of Appeal in **Union of New Brunswick Indians and Tomak v. New Brunswick (Minister of Finance)** (1996), 178 N.B.R. (2d) 1; 454 A.P.R. 1. In that case the majority held that the **Social Services** and **Education Tax Act** of New Brunswick does not apply to the acquisition of chattels destined for use or for consumption on a reserve by an Indian by virtue of the exemption provided in s. 87(1)(b) of the **Indian Act**. This Court expressly adopted the reasoning of the minority decision of Chief Justice Hoyt.

The Supreme Court of Canada on appeal in that case, **Union of New Brunswick Indians v. New Brunswick (Minister of Finance)** (unreported File No: 25427, dated 1998: June 18) has held that s. 87 of the **Indian Act** does not apply to exempt Indians from paying sales tax on off reserve purchases. That ruling is not inconsistent with the decisions in this Court in the **Johnson** cases. See also **R. v. Johnson (S.G.)** (1997), 156 N.S.R. (2d) 65.

I have referred to the decisions in **R. v. Johnson (S.G.)** and **R. v. Murdock (m.)** and **Johnson (S.G.)** at length to show that essentially the same issues were raised

in those cases which are being put forward in this case with some slight variations. In the **Johnson** cases, the appellants were importing tobacco products from reserves outside the Province for sale to Indians and non-Indians on reserves. The appellants in those cases argued that the provisions of the **Tobacco Tax Act** did not apply to Indians and lands reserved for Indians and that s. 87 of the **Indian Act** exempted sales to Indians on reserves. As pointed out in **R. v. Johnson (S.G.) and R. v. Murdock (M.)** the situation was out of control. The current provisions were enacted to control the illicit sale of tobacco products in the Province and to protect the revenue. The Court held that the provisions were constitutionally valid as being of general application and did not offend s. 87 of the **Indian Act**. They applied to all with respect to the importation and sale of tobacco products. It is immaterial that the product is imported from a reserve outside the province by Indians for sale solely to Indians on reserves in Nova Scotia. Those cases did not turn solely on the fact that sales were also being made to non-Indians. No authorities have been cited for the proposition that Indians are free to trade between reserves exempt from restrictions imposed by provincial laws of general application. With respect, the decisions of the Supreme Court of Canada in **Francis v. The Queen**, [1956] S.C.R. 618 and **Mitchell and Milton Management v. Peguis Indian Band**, [1990] 2 S.C.R. 85 do not support the claim that Indians have the right to purchase and transport tobacco products from reserve to reserve for the purpose of resale.

With respect, I see no error on the part of the trial judge and I would dismiss the appeal without costs.

Jones, J.A.

BATEMAN, J.A.: (Concurring by separate reasons)

I agree with the result reached by my colleague Jones, J.A. I share his concerns regarding the propriety of declaratory relief in these circumstances. I agree, as well, that the appeal of the trial judge's evidentiary ruling should be dismissed. I wish to more specifically address some points raised by the appellant.

The relevant facts are set out in the reasons of Jones. J.A. Summarizing, the appellant, Paul Kenneth Francis, a registered Mi'Kmaq, sought a declaration in the Supreme Court to the effect that all registered Indians in Nova Scotia have the right as wholesale vendors and/or retail vendors to purchase tobacco products on an Indian reserve anywhere in Canada, transport those products to an Indian reserve in Nova Scotia and sell those products to other registered Indians, without being registered or designated as a wholesale vendor or retailer or paying or collecting provincial sales tax or otherwise complying with the provisions of the **Revenue Act**, S.N.S. 1995-96 c.5, as amended.

The **Revenue Act** and **Regulations** require that anyone who brings tobacco into the Province, or holds out tobacco for resale, possess a wholesale vendor's permit. Wholesalers may not sell tobacco to anyone but a retail vendor holding a certificate issued under the **Act**. Retail vendors may only possess tobacco purchased from a wholesale vendor holding the required permit. Only a person holding a retail vendor's permit may sell tobacco to a consumer. A "consumer" is, in general terms, the end user of the tobacco. Under the **Regulations**, the wholesaler is deemed to be an agent of the

Minister and, as such, is responsible for collecting the tax on the tobacco product and remitting it to the Province. This tax burden is passed along by the wholesaler to the retail vendor and, in turn, to the consumer.

The **Revenue Act** revised and consolidated several Acts including the former **Tobacco Tax Act**, R.S.N.S. 1989 c.470. Under the predecessor **Tobacco Tax Act** the Province established a quota system which permitted the sale of a certain amount of tax-free tobacco products to Indians on reserves in Nova Scotia. This quota system is intended to satisfy the provisions of the **Indian Act**, R.S.C. 1985, c. I- 5 which provides in relevant part:

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

(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 (a) or (b) or is otherwise subject to taxation in respect of any such property.

...

88. Subject to the terms of any treaty and any other Act of Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.
(Emphasis added)

Pursuant to the quota system, a specified amount of tax-free tobacco may be sold by wholesalers to designated Indian retailers who may sell to Indian consumers, free from the requirement that the wholesaler collect the tax. A wholesaler may only receive a

share of this quota (tax-free) tobacco for sale to a retailer on a reserve if that wholesaler obtains a Band Council Resolution designating him/her to be a wholesaler for that reserve and specifying the portion of the quota allotment which he/she may sell to the retailer.

This quota system is discussed in greater detail in two decisions of this Court which are particularly relevant here: **R. v. Johnson (S.G.)** (1993), 120 N.S.R. (2d) 414 [referred to hereafter as **Johnson, supra**] and **R. v. Murdock (M.) and Johnson (S.G.)** (1996), 154 N.S.R. (2d) 1 [referred to hereafter **Murdock, supra**].

It is Mr. Francis' position that **s.87** of the **Indian Act** entitles him to purchase tobacco products on the Indian reserve at Pointe-Bleue, Quebec, transport those products to a reserve in Nova Scotia and resell the product as a wholesaler to Indian retailers, free from the constraints of the **Revenue Act**. Pursuant to the **Revenue Act** he must acquire a wholesale vendor's permit, and, as a wholesaler, pay the equivalent of the tax on the product which he may then collect from the retailer to whom he sells the tobacco. Mr. Francis argues that because the product will ultimately be sold to Indian consumers on a reserve, the tax burden cannot be passed along. In the result, he submits, he is effectively required to pay tax on his personal property (the tobacco product) situate on a reserve, contrary to **s.87** of the **Indian Act**. In the context of this argument, the appellant frames several issues which are set out in the reasons of Jones, J.A.

The respondent says that this Court in **Johnson, supra** and **Murdock, supra** has settled the issues raised by the appellant. In **Johnson**, the Indian retail vendor was convicted of possession of tobacco not purchased from a wholesale vendor holding a wholesale vendor's permit, contrary to **s.25(2)** of the **Tobacco Tax Act**. He paid no taxes on the tobacco product. He unsuccessfully appealed his conviction. In **Murdock**, both **Murdock** and **Johnson** were status Indians living on reserves in Ontario and Nova Scotia, respectively. **Murdock** sold and delivered tobacco products to **Johnson** who sold them out of his retail stores on the Nova Scotia reserve. Neither of them held a wholesale nor a retail vendor permit. Tax was not paid on the tobacco. Both failed on appeal to reverse their convictions for conspiracy to defraud the Nova Scotia government of revenue payable under the **Tobacco Tax Act**. Hallett, J.A., writing for the Court in **Murdock**, said at p.42:

In my opinion the following issues expressly or impliedly were resolved by this Court by the decision in (1993) *R v. Johnson*:

- (I) *Section 25(2)* of the *Tobacco Tax Act* is valid provincial legislation;
- (ii) *s. 87(1)(b)* of the *Indian Act* does not exempt an Indian retail vendor from prepaying the tax to wholesalers on purchases of tobacco made off reserve as required by *s. 25(2)* of the *Act*;
- (iii) *s. 25(2)* is a provision of general application designed for the effective collection of tax and applies to "retail vendors on reserves";
- (iv) that the *Tobacco Tax Act* imposes a direct tax;
- (v) that the quota system in force in this Province is a means by which the Province as a matter of policy delivers the tax exemption Indian consumers claim that they are entitled to pursuant to the obligations created under *s. 87* of the *Indian Act*;
- (vi) by adopting the reasoning of the courts in *Hill v. Ontario* and in the *Tseshah Indian Band v. British Columbia* this court rejected the reasoning in *Bomberry and Hill v. Ontario* that the quota

system was ultra vires the Ontario government as it was not authorized by the Ontario Act,

- (vii) despite the fact that there is nothing in the British Columbia or Nova Scotia *Tobacco Tax Act* that expressly authorizes the creation of a quota system by regulation, the creation of such a system is a valid exercise of the power to make *Regulations* conferred on the Governor-in-Council by s. 44 of the Act, and
- (viii) there is nothing in s. 4 of the 1752 *Treaty* which exempts Indians from complying with the general provisions of the *Tobacco Tax Act* regarding the collection and payment of tobacco tax ((1993) *R. v. Johnson* at para. 35).

Section 25(2) of the **Tobacco Tax Act**, referred to by Hallett, J.A. is now **s.39(2)**

of the **Revenue Act** and provides:

39(2) No retail vendor shall be in possession of tobacco other than tobacco purchased by the retail vendor from a wholesale vendor who, at the time of the purchase, held a wholesale vendor's permit that was issued pursuant to this Part and that, at the time of the purchase, was in force.

While not conceding the correctness of this Court's prior rulings on the above issues, the appellant agrees that there is no factual distinction between this case and those previously decided on issues (i), (iii), (iv), (vi), (vii) and (viii) identified by Hallett, J.A. in **Murdock**.

In relation to issue (ii), the appellant maintains that this finding is not binding in that we are here dealing with "on reserve" purchases of tobacco products, not "off reserve" purchases. With respect to issue (v), he submits that Hallett, J.A., in reaching this conclusion, relied upon the law as stated in **R. v. Nikal** (1996), 105 C.C.C. (3d) 481 (S.C.C.), which law has since been refined and developed.

In expressing approval of the quota system, Hallett, J.A., in **Murdock**, at p.44, made further specific findings:

- (i) ss. 6 and 14(1)(a) of the *Tobacco Tax Act* are valid as a part of the necessary tax collection regime established by the *Tobacco Tax Act* which enables the Province to exercise control over the importation of tobacco into the Province as the necessary incidence of an effective collection system.
- (ii) the burdens imposed on Indians by the *Tobacco Tax Act* respecting quotas insofar as they restrict the source from which tobacco products may be obtained and the amount of available tax free product and restrict competition for Indian retailers and consumers are not significant.
- (iii) the quota system in Nova Scotia does not impose restrictions on a retail vendor of tobacco products beyond those necessary to ensure as a matter of policy that the volume of tax exempt products on a reserve do not exceed the reasonable requirements of the Indians on reserves. The regulations which allow for the designation of a retail vendor to deal with quota tobacco on a reserve is simply part of the necessary administrative machinery to effectively control and collect tax on tobacco
- (iv) Under the present collection regime there is no erosion of the Indian consumers' alleged right to purchase tax free tobacco.

Sections 6 and 14(1) of the **Tobacco Tax Act** referred to above are now incorporated into the scheme of the **Revenue Act**. Their effect is to require that: (i) persons who bring tobacco into the Province for personal consumption (or for the consumption of others at the importer's expense) pay tax on the tobacco and, (ii) no one shall import into the Province tobacco for resale unless that person holds a wholesale vendor's permit.

The appellant submits that the **Act** and **Regulations** restrict competition for Indian retailers and for Indian consumers and, therefore, interfere with the freedom of Indian retailers to obtain and offer for sale on a reserve tax free personal property thereby eroding the benefit conferred on Indians by **s. 87** of the **Indian Act**. This same argument was presented to Hallett, J.A. in **Murdock** and rejected by him. I agree with his finding in that regard. In my view the appellant, in making this submission, attributes too broad a purpose to **s.87**. In **Williams v. Canada**, [1992] 1 S.C.R. 877, Gonthier, J., writing for the Court, confirmed the comments of LaForest, J. in **Mitchell v. Peguis Indian Band**, [1990] 2 S.C.R. 85, to the effect that the purpose of **s.87** of the **Act** “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 and creditors to seize” (at p.885, **Williams**). This view was recently confirmed by the majority of the Supreme Court of Canada in **Union of New Brunswick Indians v. New Brunswick (Minister of Finance)**, [1998] S.C.J. No. 50, (file No. 25427, June 18, 1998).

The appellant further submits that this case is materially different from the previously decided cases in that it deals only with “Indian to Indian” sales on a reserve. In both **Johnson, supra** and **Murdock, supra**, Mr. Johnson was selling tobacco to natives and non-natives at his retail outlets.

In support of his position that the fact that the tobacco products here are purchased on a reserve, for resale on a reserve, is an important distinction, the appellant points to the *obiter* comment of Hallett, J.A. in **Murdock, supra** at p.46:

. . . It may be that, if the consumer is an Indian on the reserve and the sale takes place on the reserve, the Indian purchase is exempt, by reason of s. 87(1)(b) of the *Indian Act*, from payment of the tobacco tax levied under Nova Scotia's *Tobacco Tax Act* even if purchased from a retailer who has not been designated by the Commissioner to sell on a reserve. . . I hasten to add that this *obiter* comment does not mean that an Indian retail vendor of tobacco products on a reserve can ignore the provisions of the *Tobacco Tax Act and Regulations*.
(Emphasis added)

In **Hill v. Ontario (Minister of Revenue)** (1985), 18 D.L.R. (4th) 537 (Ont.H.C.), Krever, J., as he then was, made a similar comment (at p.546). In both cases there was evidence that the tobacco was sold not just to natives but to non-natives as well.

In my view the above observation of Hallett, J.A. does not alter the fact that the wholesaler and retailer are subject to the requirements of the **Revenue Act**, even though the “purchase” by the consumer may be exempt of tax. Justice Hallett, in his comment, is speaking about the tax relief that may be available to the Indian consumer and is not addressing the obligation of the wholesaler and retailer to comply with the **Act**. Indeed, he specifically qualifies his remark by stating that an Indian retail vendor on a reserve cannot ignore the provisions of the **Act**. Additionally, his comment is clearly *obiter* and made without a factual context. The case before us suffers from that same defect. Notwithstanding the stated intentions of the appellant to sell the tobacco only to Indian retailers who will sell only to Indian consumers, he cannot know whether the retail vendor

will ultimately sell the tobacco product to a native or a non-native. Retail vendors on reserves are not restricted with respect to whom they sell their products. The tax exemption to the consumer is only available if the final purchasers are Indians on a reserve. On the proven facts before us we are concerned only with a wholesaler who intends to sell tobacco products to a retailer for resale. The liability for tax, if any, will not be known until the products are resold. In response to a similar argument concerning Indian retailers Hallett, J.A. wrote in **Murdock** at p 59:

The Indian consumer purchasing tobacco on a reserve is tax exempt under s. 87(1)(b) of the *Indian Act*. If the purchase is made from an Indian retailer that has not been designated to handle quota tobacco products the burden of the tax is left on the Indian retailer. Counsel for the appellant Murdock argues that a collection scheme which demands that tax be paid regardless of the fact that it cannot be legally passed on as a tax to the person intended to bear it, is, when so applied, indirect taxation. Counsel for the appellant submits that the *Tobacco Tax Act* should be read down so as not to apply to Indian retailers selling tobacco products on a reserve. Counsel submits that the approach of the Supreme Court of Canada in *Manitoba v. Air Canada and Canada (Attorney General) et al.*, [1980] 2 S.C.R. 303; 32 N.R. 244; 4 Man.R. (2d) 278 in which the court read down a provincial tax *Act* so as to exempt aircraft flying over the province from the tax should be applied to the interpretation of the *Tobacco Tax Act* of this Province with respect to the payment of tax on tobacco products on the reserve. This court is being asked to find that the legislation should be held inapplicable to an Indian retailer acquiring and possessing on a reserve tobacco for sale to "tax exempt Indian consumers."

In my opinion, an Indian retail vendor acquiring and possessing on a reserve tobacco for sale to tax exempt Indian consumers might warrant a reading down of the *Tobacco Tax Act* but that is not the factual situation that arises on this appeal. The evidence shows Mr. Johnson sells to nonnatives.

Although the regime created by the *Tobacco Tax Act* applies to both Indians and non Indians in that it required Johnson when he imported tobacco into the Province to comply with the requirement of the *Act* and pay the tax which he could not recoup from an Indian who purchases tobacco from him on the reserve, it does not mean that the tax has changed in nature from a direct tax to an indirect tax. It simply means that due to the exemption from tax granted Indians with respect to their personal property situate on the reserve, the Indian retail tobacco vendor who is not designated by the Commissioner and therefore cannot obtain quota tobacco, cannot recover the prepaid tax. That is not a reason to declare the *Act* invalid or inoperative with respect to Johnson (or other Indian retailers who sell to nonnatives) or to read down the *Act* so as to exempt Johnson from payment of the tax on imports of tobacco into the Province. This question could only be considered if it was unequivocally proven that the tobacco would be sold only to Indians on the reserve. To do otherwise would frustrate the objective of the *Act* of providing an effective method of tobacco tax collection merely for the purpose of allowing Johnson to disregard the law which has been developed and enacted to recognize the claim of

Indian consumers (by the adoption of the quota system) to tax exempt purchases of tobacco pursuant to their right created under s. 87(1)(b) of the Indian Act. Johnson is not a consumer of the tobacco products; he sells in his stores to anyone and, therefore, with respect to such sales does not have the benefit of the s. 87(1)(b) exemption. I would dismiss this ground of appeal.
(Emphasis added)

While it was established in **Murdock, supra**, that Johnson was selling tobacco to non-natives, the comments of Hallett, J.A. are equally applicable here. It has not been “unequivocally proven” that the tobacco imported by the appellant would be sold only to Indian consumers on a reserve.

If the appellant wishes to deal in tax free tobacco he must comply with the quota system which, as Hallett, J.A. found in **Murdock**, is not an onerous requirement. In **Murdock** the transactions under scrutiny involved wholesale sales by Indian wholesalers to Indian retailers. Here, the appellant proposes to be a wholesale reseller to Indian retailers. He is subject to the **Act**. The quota system was developed specifically to ensure that Indians on a reserve who are free from taxation have access to a sufficient amount of tax-free tobacco. It has been found to adequately and validly achieve that purpose.

The appellants further submit that the quota system infringes the rights of all Indians to be free, not just from tax on personal property, but free from “tax-related burdens” including any restriction on importation, transportation, possession and sale. The appellant says that “a scheme of taxation is a system of restrictions and controls imposed to make the system of tax collection work, as well as the actual payment of tax”. To give effect to the intent of **s.87**, he submits, Indians must be free from the mechanism

of taxation, not just the tax itself. With respect, I disagree. The intent of **s.87** is not so far-reaching as is evident from the comments in **Mitchell, supra**, where LaForest, J. wrote at p.133:

. . . one must guard against ascribing an overly broad purpose to ss.87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusion and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements.

Hallett, J.A., in **Murdock**, determined that the quota scheme imposed only “an insignificant encroachment on the right of an Indian on a reserve to acquire tax exempt tobacco from an Indian retailer of choice” (at p.44). In response to the submission of the appellants that the quota system, insofar as it requires submission to the government licensing mechanism, constitutes a *prima facie* infringement of **s.87**, he quoted with approval the following passage from **R. v. Nikal (J.B.)**, [1996] 1 S.C.R. 1013 (at p.1057 per Cory, J.):

. . . It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group is **[sic]** necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. *Section 1* of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in *R. v. Agawa* (1988), 65 O.R. (2d) 505 (Ont. C.A.), at p. 524, are persuasive and convincing.

In **Nikal** the appellant, a Wet'suwet'en Indian of the Moricetown Band, took the position that the **Fisheries Act**, R.S.C., 1985, c. F-14 and **Regulations** did not apply to him because the licencing scheme infringed his aboriginal rights as provided in **s. 35(1)**

of the **Constitution Act, 1982**. The Court held that the mere requirement of a licence under **s.4(1)** of the **British Columbia Fishery (General) Regulations** did not infringe the appellant's constitutional rights. The Court found, however that the conditions attached to the licence may infringe the aboriginal rights. In making the latter determination, the critical issue was whether the particular conditions contradicted the right, which depended upon the nature of the right.

I reject the appellant's argument that Hallett, J.A.'s conclusions in **Murdock** should now be revisited in the face of the decisions in **R. v. Adams**, [1996] 3 S.C.R. 101 and **R. v. Côté**, [1996] 3 S.C.R. 139. According to the submission of the appellant, these cases have refined the reasoning in **Nikal**. Hallett, J.A.'s reliance upon the passage in **Nikal** was simply to support his view that in a complex modern society, individual and collective rights must be balanced, which necessitate, in some instances, coordination by the government of the interaction of those rights. This is unchanged by **Adams** and **Côté**. Independent of **Nikal**, he determined that the quota system was a valid means by which to deliver the tax exemption to the Indians.

The issue in **Adams** concerned the validity of the **Quebec Fishery Regulations**. It was held that **Regulation 4(1)** did infringe the aboriginal right to fish for food because the appellant's exercise of this right was left to the discretion of the Minister. The Court held that a government cannot adopt "an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". (The decision in **R. v. Côté** is to the same effect.)

Such an administrative regime will *prima facie* infringe an aboriginal right. I do not agree with the appellant, however, that the tobacco quota system is akin to an unstructured discretionary regime or that it offends **s.87**. The appellant here can obtain a wholesaler's license pursuant to the system set up under the **Revenue Act**, as can any applicant. The requirement that he obtain a Band Council Resolution to sell unmarked tobacco is not an uncertain one. The appellant's argument in this regard is faulty in that it is premised upon the erroneous view that a right to sell tobacco to Indian retailers free of regulation is necessarily incident to the **s.87** right to possess tax exempt personal property on a reservation.

The appellant says that the decision in **Union of New Brunswick Indians v. New Brunswick (Minister of Finance)**, *supra*, supports his position on this appeal. This case concerned the point of sale tax levied by the government of New Brunswick on items sold for consumption. The respondent Union brought a test case maintaining that the tax is not payable by Indians who buy items off reservation for use on the reservation. The trial judge determined that **s.87** of the **Indian Act**, which exempts goods on reserves from taxation, applies only to property actually situated on the reservation at time of sale. A majority of the Court of Appeal reversed this decision. On further appeal a majority of the Supreme Court of Canada restored the decision of the trial judge. The appellant submits that because Mr. Francis will purchase the tobacco product on an Indian reserve in Quebec, he will be beyond the reach of the **Revenue Act** and the product will be purchased tax free. The product, he submits, will then be moved "off reserve temporarily"

for transport to a Nova Scotia reserve. Because its paramount location remains on the reserve, the product is free of tax. This argument misses the point that the **Revenue Act** does not impose a tax on wholesalers and retailers, it simply requires them to collect, as agents of the government, any tax that will be payable by the consumer. The quota system, that has been previously approved by this Court, provides the tax relief required by **s.87** of the **Indian Act**. The point of sale issues raised in **Union of New Brunswick Indians v. New Brunswick**, are not helpful to the appellant here.

Disposition:

In summary, the submissions of the appellants do not persuade me that the declaration should be granted. I would dismiss the appeal.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

