

NOVA SCOTIA COURT OF APPEAL

**Cite as: R. v. Johnson, 1996 NSCA 248
Freeman, Bateman and Flinn, J.J.A.**

BETWEEN:

STANLEY GORDON JOHNSON)	
)	
	)	the appellant did not
	)	appear
Appellant)	
- and -)	
	)	Robert E. Lutes, Q.C.
	)	James E. Clarke
	)	for the Respondent
HER MAJESTY THE QUEEN)	
)	
	)	Bruce H. Wildsmith, Q.C.
	)	for the Intervenor
Respondent)	
- and -)	
	)	Appeal Heard:
	)	November 25, 1996
)	
	)	Judgment Delivered:
	)	December 6, 1996
THE UNION OF NOVA SCOTIA INDIANS)	
)	
Intervenor)	

THE COURT: Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Freeman, J.A.; Bateman and Flinn, J.J.A. concurring.

FREEMAN, J.A.:

The appellant was convicted in Provincial Court before Judge R.A. Stroud on three charges of having in his possession tobacco not purchased from an authorized

wholesale vendor contrary to s. 25 (2) of the **Tobacco Tax Act** R.S.N.S. 1989, c. 470. and before Judge Ross Archibald on four charges of possession of tobacco not bearing a prescribed mark pursuant to s. 7 of the **Tobacco Marking Regulations**, contrary to s. 25 (1) (b) and s. 40 of the **Tobacco Tax Act** R.S.N.S. 1989, c. 470.

The convictions were appealed together to summary conviction appeal court and upheld by Justice Nathanson of the Supreme Court of Nova Scotia. He found there was sufficient evidence and of such a quality that a properly instructed jury would have reached the same conclusions as the two trial judges. He dismissed the appeals.

The appeal from Justice Nathanson's decision with respect to the convictions before Judge Stroud is on the ground that "the Learned Trial Judge erred in law in his interpretation of the Tobacco Tax Act and Regulations in determining whether the Appellant was a retail vendor." The evidence clearly supports the finding that Mr. Johnson was selling tobacco at retail within the meaning of the **Tobacco Tax Act**.

The appeal with respect to the convictions by Judge Archibald asserts that the trial judge's finding that "the appellant was in possession of tobacco in contradiction of the **Tobacco Tax Act** was so perverse as to amount to an error of law." Substantial quantities of tobacco were seized, none with the prescribed markings required for sales to non-Indians. This created a strong *prima facie* case, requiring explanation. Mr. Johnson did not testify on his own behalf, a fact of which we are entitled to take notice. The trial judge made findings of fact based on an abundance of relevant evidence; no question of law arises.

It is also asserted that the summary conviction appeal court judge should have remitted the matters heard by Judge Archibald for further evidence in support of defence arguments under the **Indian Act**, R.S.C. 1985, c. I-5 and a Treaty of 1752. Counsel in the matters before Judge Archibald had filed an agreement that in the event

of a conviction that was appealed on the basis of aboriginal treaty rights, both sides would request the court to remit the matter to the Provincial Court to permit additional evidence to be called. Justice Nathanson expressed doubts as to his jurisdiction to entertain the request, and refused it. It was within his discretion to do so: the appellant's defences should have been asserted at his trial. In any event the issues to which such evidence would have related have become moot.

The Union of Nova Scotia Indians was granted intervenor status and raised arguments based on s. 87(1)(b) of the **Indian Act**, which exempts the personal property of Indians on reserves from taxation. Mr. Johnson is a status Indian and the stores in which the offences took place are on reserve lands, but he cannot claim the protection of s. 87(1)(b) nor any protection provided by the Treaty because he sells tobacco to non-Indians. Mr. Johnson was not present and not otherwise represented on the appeal.

The Union of Nova Scotia Indians took a position only with respect to the three convictions entered by Judge Stroud on the ground that there was no evidence of sales to non-Indians in those matters. That evidence was called in a *voir dire* respecting search warrant evidence, not in the main trial. However counsel had agreed that if the search warrant evidence subject to the *voir dire* were found admissible, as it was, the *voir dire* evidence would be adopted as part of the evidence in chief. This is a common and acceptable practice. There was evidence before both Provincial Court judges that the appellant sold tobacco to non-Indians.

Similar arguments were dealt with by Justice Jones in **R. v. Johnson** (1993), 120 N.S.R. (2d) 414 which was followed by Justice Nathanson. Since the summary conviction appeal, which was heard and decided April 5, 1995, this court heard **Murdock and Johnson v. R.** (Unreported) on June 10, 1996 and issued its decision on

August 19, 1996. In that case similar aboriginal treaty and **Indian Act** issues were argued on behalf of the same appellant.

Justice Hallett found that "the Tax imposed under the **Tobacco Tax Act** does not dispossess Johnson of property which he held as an Indian. The **Tobacco Tax Act** imposed a tax on the persons who purchase cigarettes from him as a retail vendor. "

He held:

Indian retail vendors who sell tobacco products on reserves to non-natives (as does Johnson) deal with the tobacco on the same basis as all other retail vendors. Johnson, as a retail vendor, does not have a s. 87(1)(b) exemption with respect to sales to non-natives as Parliament could never have intended that an Indian dealing in the commercial mainstream, as does Johnson, would not do so on the same basis as other Canadians. Johnson, a retail vendor who sells to non-natives, must purchase tobacco from a wholesaler and pay an amount equivalent to the tax that is levied on the consumer unless he has quota under the quota system. If he imports he must have a wholesale vendor's permit. Johnson did not acquire the tobacco in question as an Indian consumer on a reserve but as a retail vendor who sells to non-natives. He paid no tax on the tobacco seized from his store.

The **Tobacco Tax Act** imposes a tax on a purchaser of tobacco at a retail sale. 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.

The tax levied by the **Tobacco Tax Act** is payable by the consumer. Therefore, an Indian retailer of tobacco products who is required to pay a wholesaler an amount equal to the tax cannot benefit from s. 87(1)(b) of the **Indian Act** as the retail vendor is not the consumer and, therefore, not the taxpayer.

The evidence showed that sales from Mr. Johnson's stores were to natives and non-natives alike. By selling in the commercial mainstream to non-Indian consumers, Mr. Johnson made himself liable to collect and remit the tax owed by those consumers under the **Tobacco Tax Act**. He thereby became a retail vendor to whom all provisions of the **Tobacco Tax Act** applied with respect to all such transactions. Therefore the convictions under appeal do not relate to a tax imposed on the personal property of an Indian on a reserve within the meaning and intent of s. 87(1)(b) of the **Indian Act**. Mr. Johnson was required to comply with s. 25 (2), s. 25 (1) (b) and s. 40 of the **Tobacco Tax Act** and 7 of the **Tobacco Marking Regulations**.

Leave to appeal is granted but the appeal is dismissed.

Freeman, J.A.

Concurred in:

Bateman, J.A.

Flinn, J.A.

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- and -

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REASONS FOR
JUDGMENT BY:

FREEMAN,
J.A.