C.A.C. No. 02961
C.A.C. No. 02948
C.A.C. No. 02949
C.A.C. No. 02967

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Johnson, 1995 NSCA 83

Hallett, Freeman and Pugsley, JJ.A.

BETWEEN:

STANLEY GORDON JOHNSON	)	Joseph A. MacDonell
	)	for the Appellant
and	)	
	)	
DAVID CALVIN NAUGLE	)	
	)	
Appellants	)	
- and -	)	
	)	
	)	David M. Meadows
	)	for the Respondent
	)	
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	
	)	
	)	Appeal Heard:
	)	March 24, 1995
	)	
	)	Judgment Delivered:
	)	May 11, 1995
	)	
	)	
	)	

THE COURT: The appeal is dismissed in the cases of C.A.C. Nos. 02961, 02948 and 02949 (Johnson v. Queen); in C.A.C. No. 02967 (Naugle v. Queen) the appeal is allowed, the conviction is quashed and a new trial is ordered per reasons of Pugsley, J.A., Hallett and Freeman, JJ.A. concurring.

CAC NO. **02961**

Pugsley, J.A.:

Stanley Johnson appeals from his conviction by a Provincial Court Judge that, on the 22nd of June, 1992, not being a licensed tobacco manufacturer, he unlawfully had possession of tobacco, not put up in packages and stamped in accordance with the **Excise Act**, R.S.C. 1985, Chapter E-14 (The Act) and did thereby commit an offence contrary to s. 240(1) of the Act.

Counsel for Mr. Johnson submits the trial judge committed the following errors:

1. He erred in law in finding that Mr. Johnson was in possession of the tobacco;
2. He erred in convicting Mr. Johnson on the uncorroborated evidence of Fontaine Hughes, a Crown witness;
3. He erred in not concluding that bags of tobacco seized from the trunk of Mr. Hughes' car, constituted a breach of Mr. Johnson's rights under s.8 of the **Charter,** and should have been excluded from evidence under s. 24(2) of the **Charter**.

Background

S/Sgt. Peter Woolridge, a member of the RCMP, testified that:

- As a result of information obtained from a wire tap, he went to Moncton on June 21 to conduct surveillance "waiting for someone to come and pick up a load of tobacco";
- Shortly after 9:00 a.m. on June 22, a white Pontiac occupied by a driver and one passenger, entered a fenced-off storage area where it remained for approximately five minutes before departing;
- After determining the identity of the registered owner (i.e. Mr. Hughes) through the license number, he telephoned Cst. Briggs, who served with the Customs

& Excise Enforcement section in Halifax, and instructed him to go to the Truro area, await the arrival of the Pontiac, and check it for tobacco.

Cst. Briggs testified that:

- He was instructed by S/Sgt. Woolridge to proceed to the Truro area, to be on the lookout for the car, (identified by make, and license number) that it "could possibly be carrying illegal tobacco";
- He proceeded to Truro, saw the vehicle, beeped his horn, and the vehicle pulled over;
- He asked for the driver's license and registration, and mentioned that he could smell tobacco in the vehicle, to which the driver, Mr. Hughes, responded: "It's in the trunk." Mr. Hughes then got out of the vehicle, opened up the trunk, and Cst. Briggs located seven garbage bags of loose 200-gram pouches of tobacco;
- Mr. Hughes was placed under arrest, read the police warning, and given a right to counsel;
- Five 200-gram bags of tobacco, representative of the bags seized from the trunk of Mr. Hughes' vehicle, were introduced into evidence by Cst. Briggs.

John Kennedy, a Regional Excise Duty Officer for Atlantic Canada, was qualified as an expert, to give opinion evidence "in the area of description and identification of tobacco, the description and identification of excise stamps and other markings on tobacco products, as required by the Act, duties payable under the Act, and the consequences resulting from an absence of markings".

Mr. Kennedy testified that:

- He was in charge of the provincial department issuing licenses to those who wished to become licensed manufacturers of tobacco;
- Mr. Johnson did not have a license permitting him to be a manufacturer of tobacco;
- Those products on which no duty is paid would have an indentation on the package to that effect, such as "for sale outside of Canada only";
- The five 200-gram bags of tobacco introduced through Cst. Briggs did not have a stamp permitting sale in Canada; the contents of the exhibits by smell, taste and feel constituted manufactured tobacco.

Fontaine Hughes, a taxi driver residing in Truro, testified that:

- He was hired by Mr. Johnson to go to Dieppe, New Brunswick on June 22, 1992 to pick up some bags of tobacco in a storage area. The code to the security gate was given to him either by Mr. Johnson or another person. Mr. Johnson gave Mr. Hughes the key to the storage area. Mr. Johnson paid Mr. Hughes $120 for the trip and instructed him to deliver the bags of tobacco to a location in the Millbrook Reserve at Truro;
- On his return to Truro, his vehicle was stopped by Cst. Briggs. The constable, asked Mr. Hughes if he could smell tobacco. Mr. Hughes responded that he could not. Constable Briggs then asked him to open up the trunk. Mr. Hughes responded that he didn't have a key but his son, who was a passenger in the vehicle, pushed a button in the glove compartment and the trunk opened;
- Upon discovery of the bags of tobacco in the trunk by Cst. Briggs, Mr. Hughes was arrested. He was never charged although he was advised that charges "were pending".

Mr. Johnson did not testify, and no witnesses were called on his behalf.

First Ground of Appeal

It was argued on behalf of Mr. Johnson that there was no evidence that he knew that:

(a) the storage area contained contraband tobacco,

(b) Mr. Hughes was transporting contraband tobacco,

(c) that he put Mr. Hughes in possession of the tobacco,

(d) that he received, or took possession, of the tobacco from Mr. Hughes.

The trial judge referred to S. 2 of the Act which reads:

> "Possession" means not only having in one's own personal possession, but also knowingly
>
> (a) having in the actual possession or custody of any other person, and
>
> (b) having in any place, whether belonging to or occupied by one's self or not, for the use or benefit of oneself or of any other person;

After reviewing the evidence, the trial judge determined:

> We still have the evidence of Mr. Hughes to the effect that the key to the facility was given to him by Mr. Johnson, and I think that is conclusive of the fact that Mr. Johnson knew what was in the facility to be picked up by Mr. Hughes, and that the items which were in the trunk of Mr. Hughes' car were in the constructive possession of Mr. Johnson.

While constructive possession may be rebutted by "credible evidence that goes to either the issue of knowledge or the issue of consent, with its intended element of control", there is no evidence to rebut the finding of the trial judge that constructive possession rested in Mr. Johnson (**R. v. Croft** (1979) 35 N.S.R. (2d) 344 (N.S.C.A.).

S. 236(1) of the Act provides:

> The absence of the proper duty-paid stamp on any package of tobacco or cigars sold, offered for sale, kept for sale or found in possession of any person, other than a licensed manufacturer and in his manufactory or a licensed bonding warehouse man and in his licensed bonding warehouse, is notice to all persons that the duty has

> not been paid thereon and is, in the absence of evidence to the contrary, proof of the non-payment thereof.

The expert evidence of Mr. Kennedy establishes that none of the five exhibits of tobacco, chosen at random by Cst. Briggs, possessed duty-paid stamps or other markings required by the act. Mr. Kennedy further testified that Mr. Johnson was not a licensed manufacturer of tobacco.

The absence of the required markings on the seized tobacco was *prima facie* proof of the contraband nature of the tobacco.

No evidence to the contrary was presented.

In my opinion, the trial judge committed no error when he determined that the tobacco located in Mr. Hughes' vehicle was contraband tobacco in the constructive possession of Mr. Johnson.

I would, accordingly, dismiss the first ground of appeal.

Second Ground of Appeal

It is submitted that the trial judge erred in convicting Mr. Johnson on the uncorroborated evidence of Mr. Hughes who, although arrested, was never charged.

It is pertinent that the trial was before a judge alone, there was no evidence that Mr. Hughes had a criminal record, or that he was not worthy of belief for any reason other than being found in possession of the tobacco in question.

The decision of Dickson, J. (as he then was) in **Vetrovec v. The Queen,** [1982] 1 S.C.R. 11 makes it clear that there is no special category for "accomplices".

I agree with the Crown's submissions that there was "nothing inherently unreliable about the evidence of Fontaine Hughes and no requirement for the trial judge

to warn himself about the evidence nor to find corroborative evidence directly linked to the accused."

I would, accordingly, dismiss the second ground of appeal.

Third Ground of Appeal

The relevant Charter provisions are as follows:

> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The trial judge determined that Mr. Hughes stopped his vehicle as a consequence of a wave or horn blow from Cst. Briggs, that

> the passenger in the vehicle opened the trunk, and inside the trunk were the bags of tobacco. So I don't think the search of the vehicle was unlawful. It would appear that Mr. Hughes and the passenger agreed and acquiesced certainly in the search.

I, respectfully, do not agree with this conclusion.

The vehicle was not stopped for purposes connected with highway safety.

Cst. Briggs testified that he was instructed by S/Sgt. Woolridge to "be on the lookout for a white Pontiac 6000, number CDH 126, supposedly being operated by Fontaine Hughes... It could possibly be carrying tobacco, illegal tobacco". This

possibility, in my opinion, does not constitute reasonable grounds for stopping the vehicle.

Cst. Briggs, of course, would be entitled to rely upon a request from S/Sgt. Woolridge, a superior officer, to stop and search a vehicle, without any reason being offered at all, provided that S/Sgt. Woolridge had reasonable grounds to believe that Mr. Hughes had contraband tobacco in his possession (**R. v. Debot** (1986), 30 C.C.C. 207 per Martin, J.A. at 221 (Ontario C.A.) approved by S.C.C. (1990) 52 C.C.C. (3d) 193.

To establish the search was not arbitrary, but justified, in those circumstances, it would in my opinion be necessary for S/Sgt. Woolridge to give evidence in support of his belief that reasonable grounds existed.

S/Sgt. Woolridge testified that "as a result of information off a wire tap" he instructed Cst. Briggs to go to Debert and "await the arrival of a car" "and to check it for tobacco." No details were offered by S/Sgt. Woolridge as to the nature of the information that he received from the wire tap. There was, therefore, no evidence to establish the search was not arbitrary (see remarks of Dubin, A.C.J. (as he then was) in **Regina v. McComber** (1988) 44 C.C.C. (3d) 241).

The trial judge does not make an explicit finding as to whether he accepted Mr. Hughes' evidence (the trunk was opened by his son after the Constable requested the trunk to be opened) or Cst. Briggs' evidence (that Mr. Hughes got out of the vehicle and opened the trunk after Cst. Briggs stated he could smell tobacco).

Whether Mr. Hughes opened the trunk in response to Cst. Briggs' comment or in response to Cst. Briggs' request, is, in my opinion, of no consequence.

It is a reasonable inference that Mr. Hughes would have felt compelled to respond to a comment from a police officer, as well as a request.

In **R. v. Mellenthin** (1992) 16 C.R. (4th) 273 (S.C.C.), Justice Cory, on behalf of the Court, stated at p. 281:

> As a result of that detention, it can reasonably be inferred that the appellant felt compelled to respond to questions put to him by the police officer. In those circumstances it is incumbent upon the Crown to adduce evidence that the person detained had indeed made an informed consent of the search based upon an awareness of his rights to refuse to respond to the questions or to consent to the search. There is no such evidence in this case. ... A check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over. Unless there are reasonable and probable grounds for conducting the search, or drugs, alcohol or weapons are in plain view in the interior of the vehicle, the evidence flowing from such a search should not be admitted (284).

The stopping of Mr. Hughes' vehicle did not arise from a random stop authorized under any relevant provincial legislation. Further, the "smell" of tobacco determined by Cst. Briggs while placing his head into the driver's side of the vehicle, does not come within the plain view exception noted by Justice Cory.

The search and seizure made was, therefore, unreasonable, as far as Mr. Hughes was concerned.

There still, however, remains the question as to whether Mr. Johnson's **Charter** rights have been violated.

The trial judge commented on this issue:

> Even if it were unlawful, I think it's quite clear that Mr. Johnson could not take any benefit from an unlawful search because of his **Charter** right which is personal to Mr. Hughes, and is not a right *in rem* ...

The issue has been recently considered by the Courts of Appeal of Ontario, British Columbia and Alberta.

In **R. v. Pugliese** (1992) 71 C.C.C. (3d) 295 the Crown sought to lead evidence obtained as a result of the execution of the search warrant resulting in the seizure of narcotics at the apartment of one Donald McInnis, who was the tenant of Mr. Pugliese. Quite naturally, Mr. Pugliese asserted no proprietary interest in the articles

that were seized but as landlord, he argued that he had a constitutionally protected right to insist that the search and seizure be carried out in accordance with the law.

Finlayson, J.A. on behalf of the court, after referring to **Hunter v. Southam** (1984) 14 C.C.C. (3d) 97 (S.C.C.) stated at page 301:

> Accordingly, s.8 [of the **Charter]** is available to confer standing on an accused person who had a reasonable expectation of privacy in the premises where the seizure took place, even though he had no proprietary or possessory interest in the premises or in the articles seized.

The court concluded, however, that the burden of providing an evidentiary basis for a **Charter** violation rested with Pugliese and that he failed to establish that he had a reasonable expectation of privacy in the apartment leased to McInnis.

Pugliese also argued that since he was the "target" of the search at the apartment, that he acquired a right under s. 8 as a consequence. The court concluded that the target theory had never been accepted in Ontario, had been specifically rejected in the United States and that a "constitutional right to privacy is not created merely by reason of a person becoming the target of a search" (at 302). See also **R. v. Edwards** (1994) 91 C.C.C. (3d) 123 (Ont. C.A.).

The same approach was taken by the British Columbia Court of Appeal in **R. v. Sandhu** (1993) 82 C.C.C. (3d) 238.

Mr. Sandhu was charged, together with Mr. Ahmed and one other, with the possession of narcotics for the purpose of trafficking.

The key piece of evidence on which the Crown relied in support of a conviction of both Mr. Ahmed and Mr. Sandhu was a warrantless search of a grey bag containing two kilos of cocaine at the Vancouver International Airport. The Crown conceded there was evidence that Mr. Ahmed had a privacy interest in the bag, but argued that Mr. Sandhu could not rely on the alleged breach of Mr. Ahmed's privacy rights as a basis for challenging the search and seizure.

Prowse, J.A. in pointing out that s. 24 does not confer rights but only remedies, stated that the wording of s. 24(1) "make it clear that it is only the person whose rights or freedoms have been infringed who may apply for remedy." Justice Southin, in a concurring judgment, pointed out that the **Charter** does not say "everyone has the right not to be incriminated by chattels unlawfully seized, whether from himself or any other person". (emphasis added)

A motion for leave to appeal to the Supreme Court of Canada was dismissed.

In **R. v. Montoute** (1991) 62 C.C.C. (3d) 481 (Alta. C.A.) Montoute and three others, including one Riviera, were charged with several offences including unlawfully conspiring to traffic in cocaine.

Prior to trial, the other three were severed from the indictment. Montoute was convicted primarily because of intercepted private communications in Calgary and Edmonton, in which Riviera was a participant.

There was no lawful order to intercept the private communication of Riviera, consequently, relying on the decision of the Ontario Court of Appeal in **R. v. Duarte** (1987) 38 C.C.C. (3d) 1, the Crown conceded the intercept was made in violation of Mr. Riviera's right to be free from unreasonable search and seizure.

The Crown contended, however, that Mr. Montoute was not entitled to rely on the breach of the **Charter** rights of his co-conspirator Riviera, and in any event the evidence ought to be excluded under s. 24(2) of the **Charter**.

Stratton, J.A. would not exclude the subject evidence under s. 24(2) and consequently did not decide whether Montoute was entitled to rely on the breach of the **Charter** rights of Riviera.

Harrandence, J.A. with whom Belzil, J.A. concurred, stated:

> In my opinion, the evidentiary exception in a conspiracy charge adds a new dimension to the consideration of the first of the two problems posed by Lamer, J. ... I hold in this appeal the appellant was entitled to raise and rely on the infringement of Riviera's rights protected by s. 8 of the **Charter**.

It might be argued that it is a relatively short step from permitting an accused to take advantage of the breach of a s. 8 **Charter** right of a co-conspirator, to permitting, in the circumstances of this case, Mr. Johnson to take advantage of a theoretical breach of Mr. Hughes' s. 8 **Charter** rights, had Mr. Hughes been charged.

I adopt the words of Prowse, J.A. in **Sandhu** at p. 255:

> In my view, **Montoute** does not stand for any general proposition that an accused has status to challenge the admissibility of evidence obtained by an infringement of the rights of a co-accused or a third party. Although the language in some parts of the decision is broad, the main focus of the court was the fact that a conspiracy was charged and that the impugned evidence consisted of statement made in furtherance of the conspiracy which were admissible against Mr. Montoute under the co-conspirator exception to the hearsay rule. To the extent that **Montoute** can be read as giving all accused the right to challenge the admissibility of evidence based on the breach of the **Charter** rights of a third party, it is inconsistent with the other decisions to which we have been referred and I would not follow it.

Cases involving co-conspirators, are, in my opinion, subject to different considerations.

Counsel, on behalf of Mr. Johnson, submits in the alternative that his client, was acting in a principal-agent relationship with Mr. Hughes, and should therefore, have standing to "challenge the search and seek the protection of the **Charter**".

Mr. Hughes had a legitimate right to privacy in the vehicle arising out of his status of owner and operator. His permission was required before any search of the vehicle was undertaken.

Mr. Johnson's rights, however, were not infringed because he did not establish that he had a reasonable expectation of privacy in the contents of Mr. Hughes' trunk. Mr. Johnson did not assert any right to control, let alone any interest, or claim to, the

tobacco in the trunk; indeed, it was argued on his behalf that he had no knowledge, let alone possession or control, of the tobacco. In short, Mr. Johnson's position is that he had no proprietary interest in the tobacco. He has not, in my opinion, satisfied the burden that his personal constitutional rights have been violated, and accordingly he has not status to invoke the provisions of s. 24(2). (**R. v. Paolitto** (1994) 91 C.C.C. (3d) 75 (Ont. C.A.)).

I would accordingly dismiss this ground of appeal.

Disposition

For the foregoing reasons, the appeal should be dismissed.

Pugsley, J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.

C.A.C. NO. 02948

Pugsley, J.A.:

Stanley Johnson appeals from his conviction by a Provincial Court Judge, that on June 7, 1991, while carrying on business at three different establishments located in Truro, Nova Scotia, (1752 Treaty Truck House, Abenaki Food Store, and Crafts and Butts), and not being a licensed tobacco manufacturer, he unlawfully had possession of manufactured tobacco, not put up in packages and stamped in accordance with the **Excise Act,** R.S.C. 1985 Chap. E-14 (the Act), and did thereby commit an offence, contrary to s. 240(1) of the Act.

Mr. Johnson also appeals from his convictions for committing the same offence at the same three locations on September 18, 1991.

There are two main grounds of appeal:

1) the Crown has failed to establish that Mr. Johnson had possession of the tobacco;

2) a letter of agreement pre-dating the trial, signed by counsel, including Crown counsel, requires this Court to remit the case to the trial judge to hear evidence regarding Mr. Johnson's status under s.87 of the **Indian Act**, R.S.C. 1985, C.I -6 and/or Article 4 of the **Treaty of 1752**. A similar submission is raised in another case involving Mr. Johnson (C.A.C. 02949). The consideration of this issue in this opinion will apply to C.A.C. 02949.

Background

Cst. Briggs, employed with the Customs and Excise Enforcement section of the RCMP, testified that:

- On June 6, 1991, he made several purchases of tobacco from each of the three stores;
- The articles purchased from each contained tear strips marked "only for sale outside Canada" but otherwise not properly marked in accordance with the Act;
- As the result of his observations and purchases, warrants were obtained on June 7. Before exercising the search warrants, Cst. Briggs attended again at each of the three premises to verify that there was all kinds of tobacco "on the shelves not properly marked";
- The searches pursuant to the warrant were carried out on June 7 by three teams of RCMP members and Provincial Tax employees;
- He attended at the Abenaki Food Store and seized all the tobacco that was in the store, some contained in cartons and some loose. Tobacco was located behind glass counters, behind shelving, behind a door leading to a small storeroom, and in a room in the basement accessed by a trap door. It was necessary to employ two station wagons to transport the tobacco back to RCMP headquarters;
- Simultaneous searches were carried out at the other two locations and the tobacco seized was placed in three separate rooms at RCMP headquarters;
- The tobacco was sorted out into piles - tobacco that was not properly marked, and tobacco that was properly marked. This sorting arrangement commenced at 1:55 p.m. and was not finished until 12:30 a.m. on June 8,
- He brought to court a sample of the products seized because "if we had brought everything to court it wouldn't fit in this room";
- On September 18, 1991, three additional search warrants were obtained for the same premises. As before, three separate search teams took part in

executing the warrants. The same procedure was followed and the process of sorting was not completed until September 20;

Evidence given by others involved in executing the warrants on June 7 and September 18 at the three locations established that:

- purchases of tobacco, not bearing the proper markings, were also made at the three stores on August 22 and September 16;
- A male employee at the premises of Crafts & Butts, on June 7, produced a document (a customs form B-15) in the name of S. Johnson;

At the commencement of the trial, counsel for Mr. Johnson,admitted that his client was the owner and operator of the three establishments.

Mr. Johnson did not testify, nor were any witnesses called on his behalf.

First Ground of Appeal

In the course of determining that the evidence of the police officers was credible, the trial judge commented

> The arguments put forward by the defence essentially are, first, that the matter of possession, the argument very briefly is that Mr. Johnson, although it is admitted he is the owner and operator of three establishments, that the fact of ownership and operation is not proof of possession. I am satisfied that he was in possession. I think it can be inferred from the fact of his ownership and operation that he was in possession, and indeed the possession definition as set out in the **Excise Act** says,
>
> > Possession means not only having in one's own personal possession, but also knowingly having in the actual possession and custody of another, and having in any place whether belonging to or occupied by oneself or not, for the use or benefit of oneself or of any other person.
>
> In my view that section clearly makes the owner and operator the person who is in possession.

It is submitted on behalf of Mr. Johnson that proof of "knowledge and control" are essential elements in establishing possession of tobacco under the Act and that the evidence does not disclose any knowledge or control of the tobacco on Mr. Johnson's part.

It is further argued that the acknowledgement at trial that Mr. Johnson was the owner and operator of the establishments is not sufficient to prove knowledge and control beyond reasonable doubt.

I agree that counsel's acknowledgment was not sufficient to establish beyond a reasonable doubt that Mr. Johnson was in possession of the tobacco, hence, with respect, the trial judge has erred when so ruling.

It is, however, an error in my opinion, that could not have affected the verdict.

Counsel's admission was supplemented by the evidence at trial which established:

1. Illegal tobacco products in the three establishments were easily accessible, viewable and available for purchase on five separate occasions between June 6 and September 18, 1991;
2. The presence in two of the establishments of multiple photocopies of a single document entitled "Casual Goods Accounting Department" in the name of "S. Johnson";
3. Tobacco in the three establishments was found not only on the counter, but behind the counter, in a back room, and in a basement room accessible by a trap door;
4. Tobacco was found in very large quantities in all three establishments as evidenced by the necessity of employing two vehicles to transport the tobacco to RCMP headquarters.

The additional evidence to which I have referred. together with the admission that Mr Johnson was the owner and operator of the three establishments, leads to the inescapable inference that Mr. Johnson was in possession of the contraband tobacco.

I infer guilt beyond a reasonable doubt on the totality of the evidence.

The absence of any explanation from Mr. Johnson "merely failed to provide any basis to conclude otherwise" (Sopinka, J. on behalf of the majority in **R. v. LePage**, No. 23974 February 23, 1995, S.C. of C. at p. 15).

I am satisfied the verdict would have necessarily been the same if the error had not occurred (**Colpitts v. R.**, [1965] S.C.R. 739).

S. 686(1)(b)(iii) of the **Criminal Code** should be applied.

It reads:

On the hearing of an appeal against a conviction the Court of Appeal

(b) may dismiss the appeal where ...

(iii) notwithstanding that the Court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred. ...

While s. 686(1)(b)(iii) is only to be used in exceptional cases, in my opinion this case falls into that category.

I would therefore dismiss the first ground of appeal.

Second Ground of Appeal

Mr. Johnson raises a further issue, namely that the case be remitted to the trial judge to hear evidence regarding Mr. Johnson's status under s. 87 of the **Indian Act (Canada)** and/or Article 4 of the **Treaty of 1752**.

The request relates to a letter of May 4, 1993, prepared by the Crown, and forwarded to Mr. Johnson's former counsel, respecting an earlier prosecution of Mr. Johnson.

The letter concludes with the following note:

> With respect to all matters contained in the attached letter which bear upon us, we the undersigned hereby confirm our consent and acceptance to the contents thereof.

Thereafter appear signatures of counsel for the Attorney General of Canada, Robert A. Caruthers, as counsel for Mr. Johnson and others, as well as the signature of Mr. Johnson.

S. 5 of the letter provides as follows:

> 5. With respect to the aboriginal and treaty issues, it has been agreed as follows:
>
> > a) at the newly scheduled trial you will file a copy of the Treaty of 1752 with the Court (we can make arrangements for an archival copy to be available when the time comes);
> >
> > b) you will advise the Court on behalf of your clients that notwithstanding your filing of the Treaty with the Court, it is you[r] opinion that the recent Nova Scotia Court of Appeal decision in **R. v. Johnson** is binding on the Court. As such, you will indicate to the Court that, therefore, your clients have no available defence under s. 87 of the **Indian Act** or under the s. 4 of the Treaty subject to a reversal of the Court of Appeal's decision in **R. v. Johnson** by the Supreme Court of Canada;
> >
> > c) if Judge Archibald agrees with your assessment of the Court of Appeal's decision and its applicability to these charges, then we will indicate to the Court that we will not call relevant historical evidence on, inter alia, the interpretation of the Treaty which we would otherwise have called had you not made the previously mentioned concession;
> >
> > d) both the Crown and the defence will also advise the Court that should any of the defendants appeal on the basis of the Treaty any convictions entered against them in any of these proceedings (assuming convictions have been entered), then both the Crown and the defence would agree to jointly request of the Court of Appeal that the matters be remitted to

> the Provincial Court in order to allow the Crown to call such relevant historical evidence as was thought appropriate to the Treaty issues. This would ensure that the Court of Appeal (or the Supreme Court of Canada, should the matter ever get to that stage) would not have to determine such important issues in a vacuum.

Since the letter was written, the Supreme Court of Canada on October 4, 1994, refused an Application for Leave to Appeal brought on Mr. Johnson's behalf (S.C.C. No. 23593).

The Court of Appeal decision referred to in s. 5(b), i.e. (1993) 120 N.S.R. (2d) 414) has therefore not been reversed.

Counsel for Mr. Johnson is therefore obliged, pursuant to the agreement made by his predecessor, to acknowledge that Mr. Johnson has no available defence under s. 87 of the **Indian Act** or under s. 4 of the Treaty.

The matter, in my opinion, is therefore moot.

Counsel for Mr. Johnson, however, also refers to s. 5(d) in support of his request the matter be referred to the trial court to hear further evidence.

Counsel asserts that since Mr. Johnson has appealed his conviction to this Court, the convictions must be stayed, and the matter be referred back to the trial court in order to permit the Crown to call such relevant historical evidence as it deems appropriate.

Neither the language nor the intent of those who agreed to s. 5 is clear.

Crown counsel had advised this Court that it does not wish to call any relevant historical evidence in view of the conviction having been entered.

There is, therefore, no joint request before this Court as contemplated by s. 5(a).

I would further add that I am not convinced this Court should accept a request (even if both counsel concurred) to refer an issue back to the trial court to consider further evidence after a conviction has been affirmed.

I would accordingly dismiss this ground of appeal.

Disposition

I would dismiss the appeal.

Pugsley, J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.

C.A.C. **02949**

Pugsley, J.A.:

Stanley Johnson and David Naugle appeal from their conviction on October 5, 1993, by a Provincial Court Judge, that they were unlawfully in possession of manufactured tobacco, not put up in packages and stamped in accordance with **The Excise Act**, R.S.C., 1985 Chap. E-14 (the Act), and did thereby commit an offence contrary to s. 240(1) of the Act.

There are three main grounds of appeal:

1. the trial judge erred in concluding that Messrs. Johnson and Naugle were in possession of the tobacco;
2. the trial judge erred in concluding that the Crown had established continuity of the tobacco seized; and
3. a letter of agreement pre-dating the trial, signed by counsel, including Crown counsel, requires this court to remit the case to the trial judge to hear evidence regarding Mr. Johnson's status under s. 87 of the **Indian Act**, R.S.C. 1985, c. I-6 and Article 4 of the **Treaty of 1752**. A similar submission was raised in **R. v. Stanley Gordon Johnson** (C.A.C. No. 02948).

Background

Frederick Moore, a deputy sheriff of Washington County, in the State of Maine, testified that:

- While he was acting in an undercover capacity, he transported by speed boat, together with one Jake Boots, sixty cases of tobacco from a coastal area in Maine to a deserted location near St. Andrew's, New Brunswick, on the evening of May 17, 1992;

- Mr. Johnson, whom he had met on a previous occasion, met the boat on arrival shortly before midnight;
- Mr. Johnson removed a small, white shopping type plastic bag from the passenger seat of a Ford truck parked on the shore, and handed it to Mr. Boots. Mr. Boots subsequently removed bundles of Canadian money from the bag and gave $600 to Mr. Moore;
- The tobacco had been packaged in small, sealed, clear plastic bags which were placed in 50 or 60 large dark green or dark brown garbage bags;
- Mr. Moore, Mr. Boots and Mr .Johnson, all assisted in removing the tobacco from the speed boat and placing the bags in the back of the pick-up trucks.

Stanley Gabriel, a resident of Truro, testified that:

- Mr. Johnson paid him to "haul a load" from an area near St. Stephen, New Brunswick to a house at Hilden near Truro, Nova Scotia; while Mr. Gabriel described the location as "St. Stephen", the evidence of all other witnesses makes it clear it was, in fact, near St. Andrew's, New Brunswick;
- Mr. Gabriel met Mr. Johnson on May 17, 1992 at the race track in Saint John. The two, together with one Charlie Murray, left Saint John in Mr. Gabriel's 1980 Ford half-ton vehicle, operated by Mr. Gabriel. Mr. Gabriel drove to a location by the water near St. Andrews, New Brunswick. Mr. Gabriel had never been to the area before. When a boat arrived, Mr. Gabriel remained in the truck. Mr. Murray was sleeping but Mr. Johnson got out of the truck and helped place plastic bags into the truck;
- Mr. Gabriel fell asleep, was awakened and drove to Saint John, New Brunswick where he, Mr. Johnson and Mr. Murray spent the night at a motel. The following morning, accompanied by Mr. Murray, Mr. Gabriel drove his truck to

Truro, Nova Scotia. Mr. Johnson followed in "his van"; Mr. Gabriel drove to a house, backed up his truck and unloaded the garbage bags into the cellar of the house. Mr. Johnson arrived 15 minutes later.

The Crown called a number of members of the RCMP who were part of a surveillance team (involving four vehicles) which followed Mr. Gabriel's Ford from the location of transfer at the shore near St. Andrew's to Mr. Naugle's residence in Truro the following day.

These witnesses established that:

- Mr. Johnson and Mr. Gabriel checked into the Park Plaza motel in Saint John, New Brunswick in the early hours of the morning of May 17 and remained there until approximately 8:00 a.m. Mr. Johnson then drove his own vehicle, a 6-door stretch Cherokee (a very unique vehicle according to the evidence) from Saint John to a residence in Truro;
- The residence was identified as the residence of Mr. Naugle. Mr. Naugle was observed leaving the residence after the transfer of tobacco to his cellar was completed; He was also found at the residence in September 1993 when he opened the front door and was served with court documents;
- Later in the afternoon of May 17, 1992, Mr. Naugle's residence was searched by the RCMP under the authority of a search warrant. A large amount of tobacco, packaged in approximately 57 green and black garbage bags full of 200 gram pouches of tobacco, was seized from the basement of the residence. The contents were analyzed, and a qualified expert testified that they were analytically consistent with manufactured tobacco; the tobacco was not properly marked in accordance with the Act;
- Neither Mr. Johnson nor Mr. Naugle were licensed tobacco manufacturers.

Neither Mr. Johnson nor Mr. Naugle testified. No witnesses were called on their behalf.

First Ground of Appeal

In concluding that the Crown had established beyond a reasonable doubt all elements of the offence, the trial judge referred to the definition of possession under s. 2 of the Act which reads:

> Possession means not only having in one's own personal possession, but also knowingly having in the actual possession or custody of another person, and having at any place whether belonging to or occupied by one's self or not, for the use or benefit of one's self or any other person.

The trial judge then went on to say:

> I think it can fairly be said that the actual possession at Hilden was in the possession of Mr. Naugle, and that by the definition in the Act, that the goods were knowingly in the possession or custody of Mr. Naugle, but that Mr. Johnson had them in the custody of Mr. Naugle, and they were there for, from the evidence at St. Stephen, belonged to or were for the use or benefit jointly or otherwise of Mr. Johnson. So therefore that section in my view catches Mr. Johnson as well.

The evidence demonstrates that Mr. Johnson was the controlling director throughout:

- Mr. Johnson arranged for the transportation of the contraband through the agency of Mr. Gabriel's vehicle;
- Mr. Johnson paid those who operated the speed boat;

- It is a reasonable inference from the evidence that it was Mr. Johnson who directed Mr. Gabriel as to where the cargo should be picked up, and where it should be dropped;
- The arrangement surrounding the pick up suggest illegal activities.

With respect to the failure of Mr. Johnson and Mr. Naugle to testify, the following passage from **R. v. Johnson** (1993), 12 O.R. (3d) 340 (C.A.) at p. 347-8 is apposite:

> No adverse inference can be drawn if there is no case to answer. A weak prosecution's case cannot be strengthened by the failure of the accused to testify. But there seems to come a time, where, in the words of Irving J.A. in *R. v. Jenkins* (1908), 14 C.C.C. 221 at p. 230, 14 B.C.R. 61 (C.A.), "circumstantial evidence having enveloped a man in a strong and cogent network if inculpatory facts, that man is bound to make some explanation or stand condemned". That point, it seems to me, can only be the point where the prosecution's evidence, standing alone, is such that it would support a conclusion of guilt beyond a reasonable doubt. Viewed that way, it would be better said that the absence of defence evidence, including the failure of the accused to testify, justifies the conclusion that no foundation for reasonable doubt could be found on the evidence. It is not so much that the failure to testify justifies an inference of guilt; it is rather that it fails to provide any basis to conclude otherwise. When linked in that fashion to the strength of the Crown's case, the failure to testify is no different than the failure to call other defence evidence.....If the Crown's case calls out for an explanation, an accused must be prepared to accept the adverse consequences of his decision to remain silent: **R. v. Boss**, (1988), 46 C.C.C. (3d) 523...."

This passage has been cited with approval by the Supreme Court of Canada in **R. v. Francois**, [1994] 2 S.C.R. 827 as well as **R. v. LePage** (February 23, 1995, No. 23984).

I agree with the decision of the trial judge concerning this issue and would dismiss the first ground of appeal.

Second Ground of Appeal

The only break in continuity from the time the tobacco was loaded by Mr. Johnson into the back of Mr. Gabriel's truck until delivery at Mr. Naugle's home in Hilden were extremely brief and occurred under circumstances in which it was highly unlikely that anyone had tampered with the garbage bags in which the tobacco was doubly wrapped.

The trial judge observed:

> There were two brief gaps in the observation of that truck by the Nova Scotia team which consisted of four vehicles and a number of officers. One gap occurred at Petitcodiac where the half-ton vehicle was out of sight for a minute or two, and subsequently in the Springhill area, on the Number 4 Exit at Amherst, where the half-ton went down a dirt road and came back a couple of minutes later with some bales of what appeared to be peat moss.

I agree with the Crown's position that there must be some evidence other than mere speculation that exhibits were tampered with before a breach in the continuity of exhibits may be found.

The comments of Evans, J.A. speaking for the Ontario Court of Appeal in **R. v. Torrie** (1967), 3 C.C.C. 303 are pertinent:

> I recognize that the onus of proof must rest with the Crown to establish the guilt of the accused beyond a reasonable doubt, but I do not understand this proposition to mean that the Crown must negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused. (at 306)

There is no suggestion in any of the evidence that anyone tampered with the load of tobacco while in transport, or while resting in Mr. Naugle's basement.

The tobacco was transported in 1,800 small, clear plastic bags which were sealed and then enclosed in approximately 50 to 60 larger garbage bags, dark brown or dark green in colour. Mr. Gabriel rejected the idea that he unloaded three or four

bags, maintaining that there were "quite a few". Cst. Briggs testified the RCMP seized 57 garbage bags "full of 200-gram pouches of tobacco".

The trial judge committed no error in concluding that the Crown had established continuity.

I would dismiss this ground of appeal.

Third Ground of Appeal

I would dispose of this ground for the reasons set forth in **R. v. Stanley Gordon Johnson**, C.A.C. No. 02948, a decision filed on even date.

Disposition

For the reasons advanced, I would dismiss the appeal.

Pugsley, J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.

C.A.C. 02967

Pugsley, J.A.:

David Naugle appeals from his conviction on November 8, 1993, by a Provincial Court Judge that he, not being a licensed tobacco manufacturer, did have possession of manufactured tobacco, not put up in packages and stamped in accordance with the **Excise Act,** R.S.C., 1989, Chap. E-14 (the Act) and did thereby commit an offence contrary to s. 240(1) of the Act.

Mr. Naugle was unrepresented at trial.

Counsel on the appeal raises on behalf of Mr. Naugle two main grounds:

1. The trial judge erred in failing to determine that Mr. Naugle's rights under s. 8 of the **Charter** were violated when certain items were seized by the RCMP from the trunk of his vehicle, and further that the trial judge erred in not excluding evidence of those items under s. 24(2) of the **Charter**;
2. A letter of agreement, predating the trial, signed by Crown counsel, as well as Mr. Naugle personally, requires this Court to remit the case to the trial judge to hear evidence regarding Mr. Naugle's status under s. 87 of the **Indian Act**, R.S.C. 1985 C.I. - 6, and/or Article 4 of the **Treaty of 1752**.

It will not be necessary to consider this issue, in view of the proposed disposition of the first ground of appeal.

Background

Cpl. David Seeley, a member of the RCMP attached to the Customs and Excise section, testified that:

- On June 11, 1992, (as the result of information received from S/Sgt. Peter Woolridge, that Mr. Naugle was going to the Keddy's Motor Inn in Shediac, New Brunswick to pick up a load of tobacco) observed Mr. Naugle operating an older style Lincoln Continental on a flat stretch of road on a marsh just over the New Brunswick border. He followed the vehicle for an hour while it went to Moncton. He noticed that it would "speed up and slow down, speed up and slow down." Mr. Naugle stopped at Keddy's Motel at Shediac for a number of minutes, and for the next quarter of an hour proceeded up and down the Shediac Road, first in one direction then in another until Mr. Naugle went into a Shell Service Station to make a telephone call. He lost sight of the vehicle as it headed toward the New Brunswick border.

Cpl. Barnett, assisting the Halifax Customs and Excise Section of the RCMP on June 11, 1992, testified that:

- As a result of information obtained during an investigation he proceeded together with S/Sgt. Peter Woolridge to the Springhill turnoff of the 104 Highway for the purpose of locating Mr. Naugle's vehicle, with which he was familiar. As the vehicle went past them, they took over surveillance of the vehicle to the Glenholme area. He stopped his vehicle at Streets Ridge to call Cpl. Brian Spencer, a member of the Bible Hill RCMP Highway Patrol, to instruct him to proceed to stop Mr. Naugle's vehicle;

Cpl. Brian Spencer, a member of the RCMP, testified that:

- On June 11 AT 5:40 p.m. as the result of a telephone call from Officer Barnett "advising me to be on the look out" for Mr. Naugle's vehicle, stopped the vehicle in the vicinity of Debert.

- "I advised Mr. Naugle at that particular time that there was no front license plate on the vehicle, and that was the reason for stopping the vehicle, because the other members involved in the investigation were not there at that time. So I checked the vehicle over, and went around to the back of the vehicle, and at the back of the vehicle I observed a lot of carbon monoxide soot around the back bumper and the back trunk. So I advised Mr. Naugle at that particular time that there was a possibility he might have a gas leak in the vehicle, would he mind opening up the trunk so I could have a look, for his own safety. He opened up the trunk, and in the trunk there was a large quantity of tobacco, and at that particular time Officer Barnett and Officer Woolridge arrived on the scene and took possession at the scene."
- He stopped the vehicle because "the real reason that I had reasonable and probable grounds, after being in conversation with Officer Barnett, that there was tobacco in the vehicle. I'd been involved with this investigation previously and on a previous occasion I was advised that there was a wire tapping involved, and I was fully advised of the investigation. So this particular time, the reason I used the excuse was that ... to protect the integrity of the wire because the other members weren't there."
- In response to questions as to whether the wire tap was still on going, he testified "to my knowledge at that particular time no."
- He testified that Mr. Naugle opened the trunk.

Additional RCMP witnesses, including those qualified as experts, testified that a license is required to manufacture tobacco in Nova Scotia and that Mr. Naugle did not possess such a license.

During the course of his cross-examination of Cpl. Spencer, Mr. Naugle in the course of framing his question, stated:

> "When the trunk was open, if you remember, I was not standing near the back of the vehicle, and it was you that removed the keys yourself, because you made me stand up by the front fender, because I .... well, I mean, no sense talking to you, because you fellas get it all together anyway, but ... because I had to step away from the front fender because the traffic was getting awful close to me, and I had to go around by the front bumper if you remember, so that I wasn't even near the vehicle when you opened the trunk. I did not open the trunk personally. You took it upon yourself and removed the keys, because you asked me, and I said no.

Mr. Meadows (Crown counsel): "Okay, if that's a question, maybe the witness could respond."

A: "I don't understand the question. When the vehicle ... you opened the trunk of the vehicle, you were standing by the trunk, when the other members arrived ..."

Q: "I did not open the trunk of the vehicle."

A: "Or the two of us were."

Q: "I did not open the trunk of the vehicle."

Mr. Meadows: " Okay, well, there's obviously a difference, Your Honour, between these two. Mr. Naugle will get the opportunity, presumably, to testify should he wish to do so, but the witness can only answer the question."

Q: "No further questions."

The Court: "Okay. Just so long as you understand Mr. Naugle. You can ask him questions ..."

Mr. Naugle: "mmmmm...."

The Court: "But you can't argue with him."

Mr. Naugle: "Okay."

The Court: "You know, no sense you saying "you did this" and he'd say "no I didn't". Ask him any questions you want to about it, and then if you wish to later on, at the appropriate time, come up here and give your evidence. You're certainly going to be given that opportunity."

Mr. Naugle: "Sure."

Mr. Naugle did not testify, nor was any evidence called on his behalf. He did not raise, at trial, any suggestion that his **Charter** rights had been denied, or that

evidence should be excluded, nor was the attention of the trial judge drawn to these issues.

Decision of the Trial Judge

In the course of finding Mr. Naugle guilty of the offence, the trial judge stated:

> In regard to the matter of the seizure, whether you were at the front of the car or at the rear of the car, I don't think is of any great consequence. The officer stopped, he got into the trunk. He says that you let him in, and you seem to indicate otherwise. In any event, in the trunk was found the tobacco. You were the driver of the car, identified by a number of the officers, and I think it quite clear at law that you, being the person in possession of the vehicle, are deemed to be in possession also of its contents in the absence of any evidence to the contrary, of which there is none.
>
> So I think the Crown have in fact proved all the elements of the offence by way of the various evidence that they have put forward, and there is no evidence to the contrary, and therefore I have no alternative but to enter a conviction against you on this charge.

First Ground of Appeal

The relevant **Charter** provisions are as follows:

> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> 24(1) Anyone whose rights or freedoms, as guaranteed by this **Charter** have been infringed or denied may apply to a Court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under ss.(1), a Court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this **Charter**, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Cpl. Spencer advised Mr. Naugle that the reason for the initial stop was that Mr. Naugle's vehicle did not possess a front license plate. The evidence does not disclose whether the vehicle in fact possessed a front license plate.

Cpl. Spencer used the subterfuge (acknowledged by the Crown) that a lot of carbon monoxide soot was collected around the back bumper and trunk, that there was a possibility there might be a gas leak in the vehicle, and therefore Mr. Naugle was requested to open the trunk "for his own safety".

The trial judge did not make a finding as to whether Mr. Naugle opened the trunk in response to Cpl. Spencer's observation, or whether Cpl. Spencer opened the trunk himself (as suggested by Mr. Naugle in his cross-examination of Cpl. Spencer).

Even if Mr. Naugle did open the trunk, such an action did not arise in the context of an understanding of his right to object to the search.

Although acknowledging that a warrantless search is *prima facie* unreasonable, the Crown submits that such a search does not contravene s. 8 of the **Charter** where there are reasonable grounds to believe a vehicle contains contraband, relying on the decision of the Ontario Court of Appeal in **R. v. McCumber** (1988) 44 C.C.C. (3d) 241).

Although acknowledging that the Crown witnesses did not disclose the reasonable grounds on which Cpl. Spencer believed Mr. Naugle was in possession of tobacco, the Crown argues that the following evidence is sufficient to justify the search:

(a) the information on which the police relied came from a wire tap interception to the effect that Mr. Naugle would be going to a specified hotel in Shediac to pick up a load of tobacco;

(b) the information received was corroborated by Mr. Naugle's travel to Keddy's Motor Inn in Shediac, his attendance at the motel for half an hour, and his operation of a motor vehicle in a "surveillance conscious" manner.

In my opinion, the foregoing evidence does not establish reasonable grounds to believe Mr. Naugle's vehicle contained contraband.

Cpl. Spencer would, of course, be entitled to rely upon a request from his superiors to stop and search a vehicle without any reason being offered at all, provided the superior had reasonable grounds to believe that Mr. Naugle had contraband tobacco in his possession (**R. v. Debot** (1986) 30 C.C.C. 207 per Martin, J.A. at 221 (Ont. C.A.) approved by S.C.C. (1990) 52 C.C.C.(3d) 193).

To establish the search was not arbitrary, but justified, it would in my opinion be necessary for the superiors, and in particular in this case, for S/Sgt. Woolridge or Cpl. Barnett to give evidence in support of their belief that reasonable grounds existed. No such evidence was called.

I conclude that Mr. Naugle's s. 8 rights have been violated.

The onus is on Mr. Naugle to establish the evidence should have been excluded under s. 24(2) of the **Charte**r.

Mr. Naugle's counsel submits this onus has been satisfied and that an acquittal should be entered, citing in support the decision of the Supreme Court of Canada in **R. v. Mellanthin** (1992) 76 C.C.C. (3d) 481 at 491:

> The appellant was detained at a check stop. While he was so detained, he was subjected to an unreasonable search. To admit the evidence obtained as the result of an unreasonable search of a motorist in a check stop would render the trial of the appellant unfair. Admitting such evidence would thus bring the administration of justice into disrepute. The evidence derived from the unreasonable search cannot be admitted.

It is accepted that, in most cases, an objection to the introduction of Crown evidence must be made by the defence at the earliest opportunity (i.e. before or at the outset, of trial) (**R. v. Kutynec** (1992) 70 C.C.C. (3d) 289).

As pointed out, Mr. Naugle was not represented at trial.

The Crown, commendably, has not taken the position that it is too late for Mr. Naugle to raise the **Charter** issue on appeal.

Counsel for the Crown requests, however, that if the Court allows the appeal, that a new trial should be ordered to permit a full hearing on the issues.

He makes the point:

> While it is understandable that the accused, being unrepresented, did not address the onus upon him in this respect, neither did the Crown have an opportunity to address or call evidence to explain or rebut such allegations.

I agree with this last submission.

I would allow the appeal, quash the conviction, and order a new trial.

Pugsley, J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.

C.A.C. No. 02961
C.A.C. No. 02948
C.A.C. No. 02949
C.A.C. No. 02967

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

STANLEY GORDON JOHNSON -AND- DAVID CALVIN NAUGLE Appellants	)	
- and -	)	REASONS FOR JUDGMENT BY:
	)	Pugsley, J.A.
HER MAJESTY THE QUEEN Respondent	)	