

CASE NO. **VOLUME** **PAGE**
Cite as: R. v. Sobey's Inc., 1998 NSCA 237

HER MAJESTY THE QUEEN
as represented by the Attorney
General of Nova Scotia

SOBEY'S INCORPORATED
a body corporate

- and -

(Appellant)

(Respondent)

C.A.C. No. 148131

Halifax, N.S.

CROMWELL, J.A.
(orally)

APPEAL HEARD: December 2, 1998

JUDGMENT DELIVERED: December 2, 1998

WRITTEN RELEASE OF ORAL: December 4, 1998

SUBJECT: **Constitutional Law - Division of Powers - Whether Provincial legislation prohibiting sale of tobacco to persons under 19 is *intra vires* the Legislature**

Provincial Offences - Defences - Due Diligence

SUMMARY: Sobey's was charged with selling tobacco or a tobacco product to a person under the age of 19 contrary to s. 5(1) of the **Tobacco Access Act**, S.N.S. 1993, c. 14. The *actus reus* of the offence was clearly proved at trial. The trial judge acquitted as a result of his finding that the **Act** was *ultra vires* the Province. The trial judge also opined that, had the **Act** been constitutional, he would have convicted because he did not accept the accused's defence of due diligence. The Crown appealed and the accused cross-appealed.

ISSUES:

- (1) Is the **Tobacco Access Act** of Nova Scotia *intra vires* the provincial Legislature?
- (2) Did the judge err in law in his consideration of the defence of due diligence?

RESULT: Appeal allowed and matter remitted to the Provincial Court for trial. The **Tobacco Access Act** is legislation in relation to health. Sections 5 and 12 of that **Act** do not conflict with Federal tobacco legislation. The trial judge, therefore, erred in finding that the provincial **Statute** was unconstitutional.

The trial judge also erred in law with respect to the defence of due diligence. The question is not, as the trial judge thought, whether the employee who sold the tobacco product was duly diligent, but whether the accused, her employer, exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

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DECISION, QUOTES MUST BE FROM THE DECISION, NOT FROM THE COVER
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