

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Lewis*, 2018 NSPC 37

Date: 20181026

Docket: Sydney No. 8115643 / 8115644

Registry: Sydney

Between:

Her Majesty the Queen

v.

Robert Joseph Lewis

LIBRARY HEADING

Judge: The Honourable Judge Diane Lynn McGrath

Heard: Sydney, Nova Scotia

October 9, 10, 11 and 12, 2018

Submissions: October 12, 2018

Written Decision: October 26, 2018

Corrected Decision: The text of the original decision has been corrected according to the attached erratum dated **November 1, 2018**

Subject: Revenue Act
Revenue Act Regulations
Unstamped Tobacco

Summary: The accused was charged with offences under s.39(a) and s. 40 of the Revenue Act. He pled not guilty and argued that as a First Nations person employed by a designated retail vendor he was entitled to be in possession of unstamped tobacco in excess of the limits for personal consumption.

Issues: Did the accused establish he was an employee of a designated

retail vendor? If employed by a designated retail vendor, is the accused afforded a Defence by virtue of s. 76 of the Revenue Act Regulations?

Result:

The accused has not established the existence of any employer – employee relationship. An interpretation of s. 76 of the Revenue Act Regulations in accordance with established principles of statutory interpretation does not afford the accused any defence. No due diligence has been shown and the accused having admitted the *actus reus* of the offences is convicted on both counts.

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Written Decision:	October 26, 2018
Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated November 1, 2018
Charge:	s. 40 and s. 39(1) Revenue Act
Counsel:	James E. Clarke, for the Crown Rosalie Francis, Counsel for Defence

By the Court:

Introduction

[1] Robert Joseph Lewis was charged in an information dated June 12, 2017 that he did:

On or about the 17th day of May, 2017 at, or near Sydney Forks, Province of Nova Scotia transport tobacco without being in possession of a bill of lading, waybill or document showing the origin and destination of the tobacco, in contravention of section 40 of the Revenue Act S.N.S. 1995-96, C. 17, as amended and thereby committed an offence contrary to section 85 of the Act;

AND FURTHER on the 17th of May 2017 at or near Sydney Forks, in the Province of Nova Scotia did have in his possession tobacco, on which tax had not been paid, in contravention of section 39(1)(a) of the Revenue Act S.N.S. 1995-96, C. 17, as amended and thereby committed an offence contrary to section 85 of the Act;

[2] On July 30, 2018 an Agreed Statement of Facts was signed by Mr. James Clarke on behalf of the Crown and Ms. Rosalie Francis on behalf of Mr. Lewis.

The Agreed Statement of Facts was entered at trial as Exhibit #1 and is appended to this decision as Appendix “A”.

[3] Mr. Lewis is not prepared to admit the Agreed Statement of Facts establishes a prima facie case, nor is he prepared to admit the Agreed Statement of Facts proves the *actus reus* of the offences in question.

[4] On October 9 to October 12, 2018 the Court heard evidence and argument in relation to the offences as charged in the June 12, 2017 Information.

[5] At the conclusion of evidence Defence argued for an acquittal on all charges while the Crown argued that convictions should be entered against Mr. Lewis.

[6] Both Crown counsel and Defence counsel provided the Court with numerous cases for assistance and guidance. I have reviewed all the cases provided and find they are of little assistance at this stage of the proceedings, with the exception of one. They may, however, become important if the matter proceeds further. At this stage what the Court must do is apply the facts as admitted, and as I may find them, to the existing legislative framework.

[7] The Defence position is that s. 76(13)(a) of the Regulations enacted pursuant to the **Revenue Act** offers Mr. Lewis a defence. They argue he was acting within the scope of his employment for a designated retail vendor who was permitted to purchase unstamped tobacco when he was stopped by police and compliance officers on May 17, 2017, and the tobacco products in question were seized.

[8] Defence has made it clear they are not challenging the legality or constitutionality of the “quota” system that has been established for the distribution of unstamped tobacco products within the Province of Nova Scotia.

[9] The Crown position is that Mr. Lewis should be convicted of both charges as he has not established he was operating within the scope of any employment relationship at the relevant time and, even if he was, he is still in contravention of the Act and Regulations.

[10] In the event Mr. Lewis is found guilty of these charges Defence has given notice of their intention to challenge the constitutionality of s. 39(1)(a) and s. 40 of the **Revenue Act**. Their position, as set out in the Notice, is that those sections conflict with s. 87 of the **Indian Act**, “thereby rendering them constitutionally inoperative when applied to a status Indian who possesses and transports “quota” tax exempt tobacco as their personal property”. Dates for that Application have been set in the event they are required.

Issue

[11] The issue the Court must decide at this juncture is whether Mr. Lewis has committed offences pursuant to s. 39(1)(a) and s. 40 of the **Revenue Act**.

Applicable Legislation and Regulations

[12] s. 39(1)(a) and s. 40 of the **Revenue Act** state as follows:

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

(a) on which tax has not been paid;

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.

[13] In addition to those sections, s. 78 of the **Revenue Act Regulations** is of importance. S. 78 states:

78 (1) No consumer shall purchase, agree to purchase or hold

(a) a quantity greater than

(i) 1000 cigarettes, or

(ii) 5 cartons of cigarettes; or

(b) a quantity greater than 1000 g of fine cut or other tobacco or a combination of cigarettes, fine cut or other tobacco that exceeds 1000 g.

(2) A person who holds

(a) a quantity greater than

(i) 1000 cigarettes, or

(ii) 5 cartons of cigarettes; or

(b) a quantity greater than 1000 g of fine cut or other tobacco or a combination of cigarettes, fine cut or other tobacco that exceeds 1000 g.

is deemed, in absence of evidence to the contrary, to hold the tobacco for sale in the Province

(3) No retail vendor shall sell tobacco to a consumer in

(a) a quantity greater than

- (i) 1000 cigarettes, or
 - (ii) 5 cartons of cigarettes; or
- (b) a quantity greater than 1000 g of fine cut or other tobacco or a combination of cigarettes, fine cut or other tobacco that exceeds 1000 g.

[14] The limits set under the Regulations are applicable to all consumers. There is nothing in the Act that defines consumer or differentiates consumers of stamped tobacco from consumers of unstamped tobacco. Thus, in accordance with accepted principles of statutory interpretation, the word consumers should be given its ordinary meaning.

Evidence

The “quota” tobacco system

[15] An explanation of how the “quota” tobacco system works was presented through the Crown’s case. This system was put in place in response to the Supreme Court of Nova Scotia decision in *Union of Nova Scotia Indians, a body corporate, and Albert Julian, on his own behalf and on behalf of all other Indians residing in the Province Nova Scotia v. The Attorney General of Nova Scotia In Right Of The Province of Nova Scotia, and the Honourable Greg Kerr* [1986] S.H. No. 57123. That decision struck down the previous regime which required those entitled to

purchase unstamped tobacco to pay an amount equivalent to the tax at point of purchase and later apply to the government for a rebate. The present system establishes a mechanism that allows First Nations persons in Nova Scotia to purchase unstamped tobacco free from any provincial tax upfront. The framework for that system is set out in the **Revenue Act** and its Regulations. There is also in place a negotiated agreement between the Province of Nova Scotia, the Union of Nova Scotia Indians and the Confederacy of Mainland Mi'Kmaq which sets out some of the details of the current system.

[16] It is pursuant to the tripartite agreement that each Band is granted a per capita amount of tax-exempt tobacco, referred to as “quota” tobacco or unstamped tobacco, based on total Band population.

[17] Unstamped tobacco refers to the fact the product does not bear a pantone purple stamp indicating Provincial tax has been paid. It does however bear a pantone peach stamp indicating that Federal tax has been paid.

[18] The tobacco entitlement of each Band is calculated and set out in an agreement between Service Nova Scotia on behalf of the Provincial Government and each Band Council.

[19] These agreements also establish a designated wholesale vendor for each Band. The designated wholesale vendor varies from Band to Band.

[20] Each individual Band determines who is entitled to offer tax exempt or quota tobacco for sale in their community. These are the designated retail vendors. Each designated retail vendor must be approved by a Band Council Resolution which sets the amount of quota tobacco they are entitled to receive from the Band wholesaler per week. These Band Council Resolutions, once approved, are forwarded to Service Nova Scotia.

[21] Once approved by Band Council each individual designated retail vendor must then apply to Service Nova Scotia for a retail vendor permit. It is the Band Council Resolution together with the retail vendor permit which allows the retailer to offer quota tobacco products for sale to status First Nations persons.

[22] The designated wholesale vendor for each Band is the entity that obtains the quota tobacco and in turn sells it to the designated retail vendors.

Crown Evidence

[23] At trial the Crown called evidence in accordance with the Agreed Statement of Facts. There was no challenge to the evidence led by the Crown. Cross-

examination of Crown witnesses focused on an attempt to establish other facts which the Defence considered relevant to the position they were advancing.

[24] The accused in this matter, Robert Lewis is a member of the Eskasoni Band residing in the First Nations Community of Eskasoni. (See paragraph 1 Agreed Statement of Facts)

[25] The Agreed Statement of Facts provides in paragraph 3:

...The Crown and defendant agree that the three-hundred and fifty [350] cartons of cigarettes and ninety-six [96] tubs of fine cut tobacco products which were seized from Mr. Lewis contained a tobacco stamp meaning an excise stamp as defined under Section 2 of the Excise Act 2001 (Canada) that includes the letters “CAN” and a background colour of pantone peach. The markings identify tobacco products on which Federal Excise Tax has been paid.

[26] The parties agree Robert Lewis is not a designated retail vendor designated to sell quota tobacco products on the Eskasoni Reserve and that he did not have a retail vendor permit in his name issued by Service Nova Scotia. This fact is admitted in paragraph 4 of the Agreed Statement of Facts.

[27] During the trial the Crown called evidence to establish that Eskasoni Tobacco Wholesale, the designated wholesaler for the Eskasoni Band, only sells Eskasoni’s quota tobacco or unstamped tobacco to designated retail vendors located on the Eskasoni Reserve.

[28] In addition, evidence was led by the Crown at trial that Mr. Robert Lewis is not listed as a purchaser in the records of Eskasoni Tobacco Wholesale as having purchased any tobacco from them during the relevant time frame.

[29] The Agreed Statement of Facts establishes that on the date in question Mr. Lewis was in possession of more than the permitted amount of tobacco that any individual is permitted to possess pursuant to s. 78 of the **Revenue Act Regulations**. Those limits as set out above are 1000 cigarettes, or 5 cartons of cigarettes, or 1000g of fine cut tobacco or a combination of cigarettes, fine cut or other tobacco to a limit of 1000g.

[30] On May 17, 2017, as set out in paragraph 3 of the Agreed Statement of Facts, Mr. Lewis had in his possession 350 cartons of cigarettes and 96 tubs of fine cut tobacco, all of which was quota or unstamped tobacco. Through evidence led at trial it was established that the tubs of fine cut tobacco were 200g tubs.

[31] The undisputed evidence at trial establishes that at the time of his arrest Mr. Lewis was not in possession of documentation indicating the origin or destination of the tobacco in question as required in s.40 of the **Revenue Act**.

[32] The evidence has also established that there are markings on the boxes seized that identify them as originating from Eskasoni Tobacco Wholesale as part

of the Eskasoni allotment of quota tobacco. Since the time of seizure, no way bill or bill of lading has been produced.

Defence Evidence

[33] Defence chose to call evidence in answer to the Crown's case. Defence called evidence to establish that an individual by the name of Robin GooGoo is a designated retail vendor in the First Nations Community of Membertou where he operates a business under the name of Mi'kmaq Gas and Convenience. There was evidence led to establish that in 2017 Robin GooGoo was entitled to an allotment of 80 cartons of tobacco and 5,320g of fine cut tobacco from the Membertou Tobacco Shop (Exhibit #14).

[34] The Membertou Tobacco Shop is the sole designated wholesale vendor for the acquisition and distribution of the monthly allotted tobacco for Membertou for the calendar year 2017. (Exhibit #14)

[35] Defence called further evidence to establish that the Membertou Band Council has not set any policy with respect to the sale of quota tobacco from designated retail vendor to designated retail vendor nor have they set any policy with respect to where designated retail vendors can obtain their quota tobacco.

[36] In addition, Defence called evidence to attempt to establish that Mr. Lewis was an employee of Robin GooGoo and that he was delivering the tobacco in question to Robin GooGoo for sale in his business. In other words, the tobacco did not belong to Mr. Lewis but to his employer.

[37] In arguing for an acquittal, Defence referred the Court to subsection 76(13)(a) of the **Revenue Act Regulations**. The argument as the Court understands it, is that Robin GooGoo, as a designated retail vendor, is entitled to obtain such unstamped tobacco as he requires and that Mr. Lewis, as his employee, was doing just that.

Analysis of s. 76(13)(a) Revenue Act Regulations Argument

[38] A proper reading of s. 76, in context, and a contextual reading of subsection 76(13) does not support the Defence argument advanced for the reasons that follow.

[39] S. 76 of the **Revenue Act Regulations** deals with markings on tobacco products for sale. That section is entitled “Tobacco Markings”.

[40] Subsection 76 (13)(a) must be read in context of the entire section. S.76 establishes a process for the stamping and distribution of stamped tobacco and the distribution of unstamped or quota tobacco.

[41] When read and taken in context, as a whole, subsection (13) does not refer to designated retail vendors as defence has attempted to argue.

[42] The preceding subsection, 76(12) states:

(12) A wholesale vendor may apply to the Commissioner for a permit to purchase and sell unstamped tobacco.

[43] 76(13) goes on to state:

(13) The Commissioner may, provided the applicant meets the requirements of clauses (8)(a) and (b), issue a permit to purchase and sell unstamped tobacco to an applicant if the applicant requires unstamped tobacco

- (a) for sale in the Province to designated retail vendors situated on a reserve, as defined in the *Indian Act*, being Chapter 1-5 of the Revised Statutes of Canada, 1985;
- (b) for sale and delivery to those members of the Diplomatic Corps eligible for inclusion in the Diplomatic List and Representatives of other countries in Canada as published by the Department of Foreign Affairs and International Trade, if the tobacco so acquired is for their exclusive use, as follows:
 - (i) Heads of Missions, including Ambassadors, Ministers and Chargés d’Affaires of foreign countries stationed in Nova Scotia and Diplomatic Officers on their staff,

- (ii) High Commissioners representing countries of the British Commonwealth and Officers on their staff enjoying diplomatic status who are stationed in the Province,
 - (iii) Consuls-General, Consuls and Vice Consuls of career who are stationed in the Province,
 - (iv) Trade Commissioners and Assistant Trade Commissioners of career who are stationed in the Province;
- (c) for resale in a jurisdiction outside the Province in which the applicant is designated to writing to collect the tobacco tax levied by that jurisdiction.

[44] s. 76 (13)(a) is the paragraph pursuant to which designated wholesale vendors receive their authority to purchase unstamped tobacco and then sell that tobacco to designated retail vendors. This section has no application to designated retail vendors, other than permitting certain wholesale vendors to sell unstamped tobacco to them, when it is read in accordance with established principles of statutory interpretation.

[45] s. 76(14) goes on to provide:

- (14) A retail vendor, except as provided in subsection (13), shall not purchase, possess, store or sell unstamped tobacco in the Province.

[46] S. 76, when read in its entirety, clearly establishes a regulatory framework which permits wholesale vendors, who have been issued the appropriate certificate, and only such wholesale vendors, to purchase unstamped tobacco and in turn sell it

to designated retail vendors and others as provided for in s. 76(13). Pursuant to s. 76(14) designated retail vendors can only obtain unstamped tobacco from designated wholesale vendors. Similarly, under s. 76 retail vendors may not sell unstamped tobacco to other retail vendors unless they are in compliance with the rest of the section. They must be wholesale vendors who have applied for a permit under s. 76(12) and been granted such permit. That permit then permits them to sell unstamped tobacco as set out in s. 76 (13). In order to receive the necessary permit the wholesale vendor must also be in compliance with s. 76(8)(a) and (b).

[47] The prohibition that defence pointed out as not being contained in the Membertou Policy is actually contained in s. 76 of the Regulations.

[48] Based on the framework set out in the Regulations, even if Robin GooGoo, a designated retail vendor, was the intended purchaser or owner of the tobacco, there is nothing to indicate he was purchasing the tobacco from a wholesale vendor entitled to sell unstamped tobacco to him as required by s. 76 of the Regulations.

[49] The uncontradicted evidence is that the tobacco in Mr. Lewis's possession was part of the Eskasoni quota of unstamped tobacco. Mr. Lewis is not a designated retail vendor himself and Eskasoni unstamped tobacco, sold by Eskasoni Tobacco Wholesale, is only sold to designated retail vendors whose

businesses are located on the Eskasoni First Nations Reserve. In addition, there is no record of Robert Lewis having made any purchases from Eskasoni Tobacco Wholesale.

The Employer-Employee Relationship

[50] As mentioned previously, Defence called evidence to attempt to establish Mr. Lewis is employed by Robin GooGoo and at the relevant time was acting in the course of his employment.

[51] When considering whether an employer-employee relationship exists there are certain factors that a Court should consider as identified by the Supreme Court of Canada in the case of *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*

[2001] 2. S.C.R., 983.

[52] These factors include the level of control the employer has over the worker's activities, whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker and the worker's opportunity for profit in the performance of his or her tasks. These considerations are not meant to form an exhaustive list but are highlighted as factors for the court to consider.

[53] In the present case Defence called Angelo LaPorte, an employee of Mi'kmaq Gas and Convenience, to testify. Mr. LaPorte testified that he works for Robin GooGoo who owns Mi'kmaq Gas and Convenience. He works in the Employment Section of the business.

[54] Mr. LaPorte testified that he knows Robert Lewis and stated on direct examination that Robert Lewis is an employee of Mi'kmaq Gas and Convenience. On cross examination, however, it became clear that Mr. LaPorte had no knowledge of what agreement, if any, exists between Mr. GooGoo and Mr. Lewis. He did not know if an employment contract exists, what discussions had taken place between the parties with respect to the nature, length or duration of any purported employment. Nor was Mr. LaPorte aware of whether Mr. Lewis was in receipt of any employee benefits or subject to any employment related withholdings.

[55] Mr. LaPorte testified that Mr. Lewis delivers cigarettes to Mi'kmaq Gas and Convenience. He explained that when Mr. Lewis arrives with a delivery of tobacco, staff members count the quantity and have Mr. Lewis sign off on the count. The count is provided to Mr. LaPorte and at the end of the week; he pays Mr. Lewis one dollar for every carton of cigarettes delivered.

[56] Mr. LaPorte also indicated that on as many as 10 occasions during the year he has advanced sums of money to Mr. Lewis at the direction of Mr. GooGoo. There was no evidence led as to what this money was for or even if Mr. Laporte was aware of what it was for.

[57] It became apparent through Mr. LaPorte's testimony that all his dealings with Mr. Lewis were in cash. He testified that another manager, a female, dealt with all the cheques and he only dealt with cash.

[58] This evidence, together with a delivery slip book found in Mr. Lewis's truck at the time of his arrest, which was labeled "Robin's Delivery", is the extent of the evidence presented with respect to any employer-employee relationship. Given the absence of any evidence suggesting Mr. Lewis was employed by Mr. GooGoo in any true sense of the word, I am unable to find that such a relationship exists or ever existed.

Conclusion

[59] The offences with which Robert Lewis has been charged are strict liability offences. The uncontradicted Crown evidence, which I accept, there being no challenge to the evidence as led, together with the Agreed Statement of Facts as

signed by defence counsel on behalf of Mr. Lewis, establishes the *actus reus* of the offences as charged.

[60] On May 17, 2017 Robert Lewis was stopped by police and compliance officers for Service Nova Scotia. At the time he was in possession of unstamped tobacco which is tobacco on which Provincial tax has not been paid. He did not have a bill of lading or a way bill for the tobacco indicating its origin or destination, and to date has not produced any such documentation as required under s. 40 of the **Revenue Act**.

[61] While Mr. Lewis is entitled to be in possession of unstamped tobacco as a First Nations person, for his own personal use, there are limits to the amount he is entitled to possess at any one time. Those personal limits for all consumers, are set out in s. 78 of the **Revenue Act Regulations**.

[62] On the date in question the amount in Mr. Lewis's possession was well in excess of those limits. Because the amount in Mr. Lewis's possession exceeded the personal limits, as a result of the operation of s. 78(2) of the regulations, he is deemed to hold the tobacco in his possession for sale in the Province, there being no accepted evidence to the contrary. As Mr. Lewis, admittedly, is not a designated retail vendor, nor is there any evidence he is a designated wholesale vendor, he is

not entitled to sell unstamped tobacco. As a result, Mr. Lewis was not entitled to be in possession of the unstamped tobacco that was seized from him on May 17, 2017, putting him in contravention of s.39(1)(a) of the **Revenue Act**.

[63] Defence counsel argued that before the court could consider whether due diligence had been exercised by Mr. Lewis that s. 76(13)(a) of the **Revenue Act Regulations** had to be considered. Having found that s. 76(13)(a) of the **Revenue Act Regulations** has no applicability to this situation I move on to consider whether the accused in this matter has exercised due diligence in an attempt to comply with the regulatory scheme.

[64] The only evidence led by Defence Counsel was as it relates to Mr. Lewis's purported employment with Robin GooGoo and Mr. GooGoo's purported right to purchase quota tobacco from whomever he wished and in whatever quantities he wished. It is the finding of this Court that the **Revenue Act and Regulations** when read in accordance with accepted principles of statutory interpretation do not support this assertion. Not only is such an argument clearly, diametrically opposed to the regulatory regime which has been put in place, but there is no reading of the Act and Regulations that could support such an argument. In light of the absence of any evidence to suggest that Mr. Lewis took any steps to ensure he was in

compliance with the **Revenue Act** and **Revenue Act Regulations** I must find that the defence of due diligence is not available to him.

For the foregoing reasons find Mr. Lewis guilty of the offences as charged.

Diane L. McGrath, JPC

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Counsel:	James E. Clarke, for the Crown Rosalie Francis, Counsel for Defence

Erratum:

Paragraph 60: “s.39(1)(a)” has been changed to “s.40”

Paragraph 62: “s.40” has been changed to “s.39(1)(a)”