Date: 19981230 Docket: C.A. 146791

NOVA SCOTIA COURT OF APPEAL
Cite as: Johnson v. Nova Scotia (Attorney General), 1998 NSCA 204
Pugsley, Flinn and Cromwell, JJ.A.

BETWEEN:

STANLEY JOHNSON, ROBERT JOHNSON JOHNSON, GENEVIEVE JULIAN and JOHN BERNARD Appellants	)	Bruce W. Evans and for the Appellants
- and -	)	
THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in Right of the Province of Nova Scotia Respondent	)	John W. Traves and Alexander Ikejiani for the Respondent
	)	Appeal Heard: November 17, 1998
	)	Judgment Delivered: December 30, 1998

THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A. ; Pugsley and Cromwell, JJ.A. concurring.

FLINN, J.A.:

Introduction:

The issues in this appeal involve taxation of the consumption and use of tobacco products, between the years 1985-1989, under the **Health Services Tax Act,** R.S.N.S. 1967, c. 126 (as amended). The Act was provincial legislation which imposed a direct tax on the consumer and user of tobacco products, as well as on other "tangible personal property."

Specifically, this appeal involves a claim by the appellants against the Province of Nova Scotia for the return of $436,382.10 plus interest. These monies were paid by the appellants (between 1985-1989) in conjunction with the purchase, for re-sale, of tobacco products. The monies were paid to various tobacco wholesalers in the Province, and remitted by those wholesalers to the Provincial Tax Commission. The monies were paid pursuant to a collection system, set up under the **Act**, whereby the tax on the consumer and user of tobacco products was pre-collected at the wholesale level. In this case the payments were made following an amendment to the **Act** (s.10A) which was passed in 1985.

The appellants' claim initially came on for trial in 1989, before Justice Davison of the Supreme Court of Nova Scotia. The main focus of that trial was on the validity of the system whereby tax was pre-collected at the wholesale level, and also on whether certain provisions of the **Act** were *ultra vires*. Justice Davison decided, among other things, that the pre-collection system was valid and properly authorized under the **Act**. On appeal, the

majority of this Court decided that the Province did not have the legislative authority under the **Act** to implement the collection system whereby the tax on the consumer and user of tobacco products was pre-collected at the wholesale level. (see **Johnson et al v. Nova Scotia (Attorney General)** (1990), 96 N.S.R. (2d) 140) As to whether the appellants were entitled to restitution of the monies, paid to the Provincial Tax Commission through the wholesalers, this court remitted that matter to the trial judge, saying that such a decision involved a factual determination.

On the remittance to Justice Davison, which was heard in 1997, the appellants claimed that they were entitled to a return of the monies as a statutory rebate; or, alternatively, under the terms of an implied in fact contract; or, alternatively, that the appellants were entitled to restitution.

Justice Davison dismissed the appellants' claims on all three alternative bases. The appellants' appeal of that ruling is what brings the matter before this court at this time.

Since the institution of this appeal, the appellant Stanley Johnson has died. His appeal is being continued by his executor on behalf of his estate. Reference to the appellants in these reasons is to Stanley Johnson, Robert Johnson, Genevieve Julian and John Bernard. At the relevant times they were all status Indians, and were all retail vendors in the Province of Nova Scotia.

Legislative and Factual Background:

In order to put the issues which are the subject of this appeal in their proper perspective, it is helpful to review both the legislative and factual backgrounds which give rise to those issues.

As I have indicated, between the years 1985 - 1989, which is the relevant time period for the purpose of this appeal, direct taxation on consumers and users of tobacco products was imposed by the **Health Services Tax Act (supra)**. I will review its relevant provisions. Under s. 3(1) every person in the Province who acquires tobacco products for his own consumption and use (and not for resale) is required to pay a tax at certain set rates on tobacco products. Under s. 11, every person in the Province who sells tobacco products at a retail sale is deemed to be an agent for the Minister and is obligated to levy and collect the tax imposed by the **Act**. Section 12 mandates that the tax be collected at the time of the sale and be remitted to the Minister at the times and in the manner prescribed by the **Regulations**. Section 9(1) provides that no vendor shall sell tangible personal property (which would include tobacco products) at a retail sale unless that retail vendor has been granted a certificate of registration under the **Act**. Retail vendors are required to keep records, in the form prescribed by the **Regulations**, of all purchases and sales (s. 15).

The rate of tax payable by the ultimate consumer for tobacco products is different than the rate of tax payable by the ultimate consumer for other tangible personal

property. In order to avoid confusion at the retail sale level, with respect to these various rates of tax, a system was set up to pre-collect the tobacco tax at the wholesale level, while at the same time recognizing that the ultimate responsibility for the tax was on the person who purchased for his own consumption and use. A system was set up, by **Regulation**, whereby Nova Scotia tobacco wholesalers were registered under the **Health Services Tax Act** as vendors. When a tobacco wholesaler purchased tobacco products from a Canadian tobacco manufacturer, the wholesaler would compute the amount of tax that would be payable by the ultimate consumer. That tax was remitted on a monthly basis to the Provincial Tax Commission. When the wholesaler sold that tobacco to the retailer, the retailer would acquire the tobacco at a price which included the amount of tax to be paid, ultimately, by the final consumer. The retailer, when he sold tobacco products to the final consumer, would recover the amount of tax, because it would be built into the price.

That same collection system with respect to tobacco tax was in force in all provinces of Canada.

In 1979, as a result of discussions which the Provincial Tax Commission had with representatives of the Indian Band Councils (who had been contending that a status Indian should not be required to pay tax on tobacco products for their own consumption and use), an administrative measure was agreed upon. The decision was made to allow an individual status Indian, who had a Band I.D. card, to go to a tobacco wholesaler, display his Band ID Card, sign a certificate that he was purchasing for his own consumption and

use, and the tobacco wholesaler was permitted to sell the status Indian up to ten cartons of cigarettes, tax exempt.

After about a year and a half, the Tax Commission determined that some status Indians were purchasing between 50 and 100 cases of cigarettes, tax exempt, pursuant to this administrative measure. (A "case" of cigarettes contains 50 cartons. Each carton contains 10 individual packages of 20 cigarettes.) As a result, in 1983, the **Regulations** under the **Health Services Tax Act** were amended. The amendments provided that no tobacco wholesaler could sell tobacco products to any one who did not have a Certificate of Registration under the **Health Services Tax Act**; and, further, that no retail vendor could purchase tobacco products from any one other than a registered wholesaler. Further, exemptions to status Indians buying cigarettes directly from a wholesaler were abolished. However, provided the wholesaler delivered the tobacco products to a Reserve, for the personal consumption and use of status Indians, the exemption still applied.

In the following two year period (1983-1985), two further problems developed, which the Provincial Tax Commission termed as "abuses" in the tax collection system then in force. Firstly, it was determined that large quantities of tobacco products were being purchased, tax exempt, by status Indians, from wholesalers, and from outside the Province of Nova Scotia, and were being distributed within the Province for resale without the tax being remitted on the resale of these products to consumers. The Tax Commission

considered that the quantities involved could not be justified on the basis of personal consumption and use. Secondly, the Commission learned that large purchases of tobacco products were being made, at the wholesale level, ostensibly for shipment out of the Province. In many cases, these tobacco products did not leave the Province, and were sold to retailers within the Province, who in turn sold them to consumers and, as a result, no tax was collected or remitted to the Province. The Tax Commission estimated that, as a result of these abuses, the Province lost approximately $30 million in tax revenue.

To counteract these “abuses” the **Health Services Tax Act** was amended in 1985 to include s. 10A which provides as follows:

> 10A Where a person purchases tobacco in any form which is exempt from the tax on tobacco imposed by this Act, that person shall
>
> (a) pay to the vendor or Her Majesty the Queen in the right of the Province an amount equal to the tax that would be payable if the tobacco were not exempt, unless otherwise determined by the regulations; and
>
> (b) be paid a rebate of that amount by the Commissioner upon application in accordance with the regulations.

It is this amendment which gives rise to the issues which are the subject of this appeal.

The effect of s. 10A was to remove from vendors who sell tobacco products, the ability to determine the exempt status of the purchasers to whom they sell. The exempt status is determined by the Provincial Tax Commissioner, upon application to him of those persons who claim to be exempt under the **Act** and entitled to a rebate. As a result, on

transactions involving the purchase of tobacco products for export out of the Province, and purchases of tobacco products for delivery to a Reserve, for the personal consumption and use of status Indians (both tax exempt under the **Act**), an amount equivalent to the tax that would be paid if the transaction was not exempt, was required to be paid at the wholesale level. Those persons entitled to an exemption, who paid the tax, could apply for a rebate of the tax paid.

In testimony, an official of the Provincial Tax Commission testified that this measure effectively stopped the "abuses". Between the time of the passing of this amendment to the **Health Services Tax Act** (1985), and the first trial of this proceeding in 1989, the Tax Commission had not received one application for a rebate from a person claiming that he had legitimately purchased cigarettes and exported them out of the Province. Further, there were thousands of applications for rebates from status Indians who purchased for their own consumption and use. They paid the tax on purchase, and received a rebate following application under s. 10A(b).

The appellants claim that, under this collection system, they purchased various tobacco products on which they paid (pursuant to s. 10A) amounts "equal to the tax that would be payable if the tobacco were not exempt" of some $436,382.10.

There are certain facts which are not in dispute, and which are relevant to this matter. The appellants, while carrying on business as retail vendors on a Reserve, sold

tobacco products to the general public, not only to status Indians. Further, none of the appellants kept any records of their sales of tobacco products; nor did any of the appellants ever register as retail vendors under the **Health Services Tax Act**.

The appellants, as status Indians, took the position that they were exempt from the payment of tax under the **Health Services Tax Act** and applied to the Commission for a rebate under s. 10A(b). The Commission took the position that the appellants were purchasing the tobacco products for resale, and not for their own consumption and use. That being the case, the transaction was not tax exempt. Not being tax exempt, the appellants were not entitled to a rebate under s. 10A(b).

The appellants then commenced the proceeding which is the subject of this appeal.

The initial position taken by the appellants, in the original Statement of Claim, was that the **Health Services Tax Act** can have no application to the appellants, as status Indians, and, to the extent that it purports to apply to status Indians, it is ***ultra vires,*** as being contrary to the **Indian Act**, R.S.C. 1970, c. I-6.

Prior to the first trial of this proceeding in 1989, s. 10A of the **Health Services Tax Act** received some judicial interpretation in an unrelated case. In **Union of Nova Scotia Indians et al v. Nova Scotia (Attorney General)** (1988), 89 N.S.R. (2d) 121,

Justice Burchell decided that with respect to status Indians purchasing tobacco products, on a Reserve, for their own consumption and use, s. 10A of the **Health Services Tax Act** was in conflict with s. 87 of the **Indian Act**. As a result, status Indians purchasing tobacco products on a Reserve for their own consumption and use, were not required to submit to the rebate system contemplated under s. 10A of the **Health Services Tax Act**. Justice Burchell made a declaratory order to that effect; however, in that Order he made it clear that:

> ..... this declaration is not intended to extend to any purchase made for the purpose of resale.

Prior to trial, in 1989, the appellants amended their Statement of Claim. They included the additional claim that there was no legislative authority in the **Health Services Tax Act** (which imposes a tax on the ultimate consumer) to provide for the collection system, which pre-collected that tax at the wholesale level.

As I have previously indicated, the issue as to the validity of certain sections of the **Act** was dealt with in a trial in 1989 and subsequent appeal to this Court. (see **Johnson et al. v. Nova Scotia (Attorney General), supra**). On the appeal to this Court, Justice Jones, writing for the majority, agreed with the appellant's submission that the **Health Services Tax Act** and **Regulations** did not authorize the collection system, whereby health services tax was pre-collected at the wholesale level. Justice Jones further decided that whether restitution should be made to the appellants in this case depends on the facts. The matter was, therefore, remitted to the trial judge for determination of the

matter of restitution.

It is important to note, for the purpose of this appeal, that while this Court declared that the pre-collection system (at the wholesale level) was not properly authorized in the Statute, the liability of the ultimate consumer for health services tax, and the statutory responsibility of retail vendors to collect that tax from the ultimate consumer, was in no way affected by the ruling. Therefore, while the pre-collection system was unauthorized, it imposed no financial burden on the retail vendor. The retail vendor could, simply, add his mark-up to the price he paid for tobacco products from the wholesaler; and, when he sold to the ultimate consumer, the tax component would be included. As a result, the retail vendor would suffer no loss. Indeed, the retail vendor was under a statutory obligation to charge this tax to the ultimate consumer.

The appellants' claims:

At the remittance from this Court, before Justice Davison in October of 1997, (which was supplemented with evidence taken from the prior proceeding in 1989), the appellants argued that they were entitled to a return of the monies on three bases:

(i) the appellants claimed they were entitled to a full statutory rebate under s. 10A(b) of the **Health Services Tax Act**; alternatively,

(ii) the appellants claimed an implied, in fact, contract between themselves and the Province through the agency of the tobacco wholesalers acting on behalf of the Province. The alleged contract was that the amounts

equal to the tax would be rebated to the appellants under s. 10A(b); alternatively,

(iii) the appellants seek restitution as a result of being deprived of the monies, relying upon the principle of unjust enrichment, to prevent a windfall profit to the Province at the expense of the appellants.

The decision of the Trial Judge:

The trial judge dealt with these three issues as follows:

Firstly, he dismissed the claim for a statutory rebate under s.10A(b) on the basis that the purchases by the appellants, which attracted payment of these amounts equal to tax, were purchases by the appellants in their capacity as retail vendors, for the purpose of resale. As such, the transactions are not tax exempt; and, therefore, would not properly be the subject of an application for a rebate under s.10A(b).

Secondly, as to the claim of the appellants to an implied, in fact, contract between themselves and the Province, the trial judge said the following:

> I find no contract, implied or express, existed between the parties with respect to the collection of tax or amounts equal to tax. There is no evidence that they intended to enter a contractual relationship. There is none of the requirements or essential elements of a contract in the evidence by implication or otherwise.

Thirdly, as to the appellants' claim for restitution, relying on the principle of unjust enrichment, the trial judge, firstly, referred to the tripartite approach enunciated by the Supreme Court of Canada in **Pettkus v. Becker,** [1980] 2 S.C.R. 834. **Pettkus** stands

for the principle that the elements of unjust enrichment are three-fold;

(i) the defendant has been enriched by the receipt of a benefit;

(ii) the defendant has been so enriched at the plaintiff's expense; and

(iii) there is no juristic reason - such as a contract or position of law - for the enrichment.

As to whether the Province has been enriched by the receipt of a benefit, the trial judge said the following:

> I find there is not evidence before me that the defendant has received a benefit by using wholesalers to remit money. Any taxes or amounts equal to tax collected in an unauthorized fashion through wholesalers or otherwise were properly due and owing upon sales to non-exempt consumers. Under the **Act** the plaintiffs, as vendors of tobacco products sold at retail sales, are required to levy and collect the tax which was properly due to Her Majesty the Queen upon subsequent sale to consumers. So no benefit was received where the plaintiffs were required to levy and collect these sums in any event. The defendant was and remains properly entitled to the monies which the plaintiffs were required by law to collect.

In considering whether the Province had been enriched at the appellants' expense, the trial judge reviewed various cases dealing with the burden of tax. He said the following:

> The situation of passing the burden of overpaid taxes to customers arose in **Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)** (1995), 137 N.S.R. (2d) 197. At p. 207 the court referred to **Allied Air Conditioning Inc. v. British Columbia et al. (No. 2)** 87 B.C.L.R. (2d) 207; [1994] 5 W.W.R. 62 (C.A.). In that case sale tax had been paid by mistake on purchases of equipment that was exempt. The court held the contractors were not entitled to recover the overpaid tax because they had not proven they had borne the burden of the tax. Immediately after reference to this case, Roscoe, J.A. commented at p. 208:
>
> It is within the context of these cases that the facts of the present case must be examined. It must also be kept in mind that the question of whether the tax was passed on to the customers is one of fact (See **Truro Carpet Factory Outlet Ltd. v. Nova Scotia et al.** (1991), 103 N.S.R. (2d) 214; 282 A.P.R. 214 (C.A.))

In the **Truro Carpet Factory** case, the carpet dealer claimed a refund of overpaid sales tax. In the course of the reasons for judgment, Hallett, J.A. said at p. 218:

> The appellant cannot succeed in its claim which is in the nature of a claim for restitution or, as it is sometimes referred to, a claim for unjust enrichment. I base this conclusion on the following statement of LaForest, J., in the **Air Canada** case **supra,** [[1989] 1 S.C.R. 11661] in which he reviewed the concept of restitution in the context of overpayment of taxes. He stated at paragraph 65:
>
> > 'While it will take some time for the courts to work out the limits of the developing law of restitution, it is useful on this point to examine the American experience. Professor George C. Palmer, in his work, **The Law of Restitution**, makes the following comment (1986 Supplement, at p. 254):
> >
> > 'There is no doubt that if the tax authority retains a payment to which it is not entitled, it has been unjustly enriched. It has not been enriched at the taxpayer's expense, however, if he has shifted the economic burden of the tax to others. Unless restitution for their benefit can be worked out, it seems preferable to leave the enrichment with the tax authority instead of putting the judicial machinery in motion for the purpose of shifting the same enrichment to the taxpayer.'
>
> In my view there is merit to this observation and if it were necessary I would apply it to this case as the evidence supports that the airlines had passed on to their customers the burden of the tax imposed upon them. The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the airlines' expense. <u>If the airlines have not shown that they bore the burden of the tax, then they have not made out their claim</u>. What the province received is relevant only in so far as it was received at the airlines' expense.'

<u>While in that case the issue involved a tax that was proven to have been unconstitutional, the statements of the court cover the whole spectrum of taxes paid by mistake: before there can be a refund based on restitutionary principles, the claimant must show that it bore the burden of the tax.</u> Justice LaForest, speaking for the majority of the Supreme Court of Canada, concluded that in the case before him the airlines had not done so. In short, the <u>airlines had not satisfied the Court</u> the burden of the tax had not been passed on to its customers. [emphasis added]

Following his review of the evidence, the trial judge concluded:

> At the hearing in October 1997, the plaintiffs say they did not pass along the tax. I agree with the submissions of Mr. Traves for the defendant. In the absence of any documentary evidence, and considering the evidence on examinations for discovery, I cannot accept the evidence at trial that the plaintiffs did not pass on to consumers the burden of tax. I find the plaintiffs, as testified on examination for discovery, used the price paid to the wholesalers, which included the amount equivalent to tax, applied a markup and sold to consumers.

The trial judge then concluded:

> I have found that, on the evidence, there was not a benefit received by the defendant. I have found there was not, on the evidence, a corresponding detriment to the plaintiffs. With those findings, the applications for recovery by way of restitution are to be dismissed.

The trial judge also addressed a further submission of counsel for the appellants; that quite apart from the tripartite approach to unjust enrichment, the Court should take into account the reasonable expectations of the parties, and make a determination as to what was fair in the circumstances. In addressing this, the trial judge said the following:

> If the defendant had received benefit at the expense of the plaintiffs, it is to be noted that s. 10A, as I have found, was passed to prevent or limit unfair and, on occasion, illegal infringements of the **Health Services Tax**. Except for circumstances giving rise to an exemption, all citizens of Nova Scotia are required to pay sales tax. The defendant ought to be allowed to rely on payments of money where there is a statutory obligation on the plaintiffs to collect tax from consumers, and it would be unjust to order the tax money, so collected, returned. The defendant caused a pre-collection of the taxes and issued rebates. Counsel for the defendant submits if the plaintiffs were successful, the defendant loses the tax money the plaintiffs were required to collect and also loses that which has been rebated on the basis the plaintiffs were collecting the taxes. This submission has merit. In my view, dismissal of these applications reconciles with legitimate expectations and what is fair.

The appellants appeal the trial judge's decision.

Analysis and Conclusion:

The appellants raise several grounds of appeal. Essentially, however, the basic issues are the same three issues that were before the trial judge; that is, a statutory rebate; alternatively, a rebate based on implied in fact contract; or, alternatively, restitution.

The first two issues can be dealt with together, because underlying both of those issues is a misinterpretation, by the appellants, of s. 10A of the **Health Services Tax Act**. The appellants claims to a rebate under s. 10A (either by Statute or by implied in fact contract) fail because the appellants are retail vendors. In no sense are the appellants, as retail vendors, exempt from payment of health services tax. Retail vendors are not taxed under the **Act**. It is the ultimate consumer who is taxed. Since, as retail vendors, the appellants are not taxed, they cannot claim to be exempt from tax so as to take advantage of the rebate provisions of s. 10A(b). It is only those who are exempt from tax, otherwise payable, that may take advantage of the rebate provisions of s. 10A(b). As Justice Burchell correctly provided, in the order that was issued in the **Union of Nova Scotia Indians** case, the exemption contemplated by s. 10A does not include purchases for resale. All of the tobacco products, which are the subject of the appellants' claims were purchased by them for resale.

Therefore, whether the appellants' claim is based on direct statutory rebate, or a rebate arising from an implied in fact contract, it must fail. In my opinion, the trial judge was correct in his conclusions with respect to these two issues, and I would, therefore,

dismiss the appellants' grounds of appeal relating to them.

The appellants raise several grounds of appeal with respect to the trial judge's decision on the issue of restitution. In view of the conclusion which I have come to in this appeal, it is only necessary that I refer to one of those grounds.

The appellants submit that the trial judge erred in finding, as a fact, that the appellants had suffered no loss, because they had passed on the burden of the tax to the ultimate consumer. The appellants contend that, in reaching this conclusion, the trial judge misinterpreted the evidence of the appellants, and ignored material evidence. Further, that the trial judge's finding is inconsistent with uncontradicted evidence; and that the overwhelming evidence warrants a finding that the appellants did suffer a loss, because they did not pass on the burden of the tax to the ultimate consumer.

The finding of the trial judge, that the appellants passed on the tax to the ultimate consumer, and, therefore, did not suffer a loss, is a finding of fact on the evidence before the trial judge, and based partly on findings of credibility. The reluctance of this Court to interfere with such findings, and the standard by which the Court would interfere with such findings, has been repeatedly stated. (See **Toneguzzo-Norvell (Guardian *Ad Litem* of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114 (S.C.C.) and **Travellers Indemnity Co. v. Kehoe** (1985), 66 N.S.R. (2d) 434 (N.S.C.A.)).

Quite apart from what a detailed review of the evidence would disclose - as to whether this Court should interfere with the trial judge's findings - the conclusion that the appellants are asking the Court to draw, here, is quite astounding. Even though the collection system (at the wholesale level) was found to be unauthorized, if the retail vendor sells to the ultimate consumer for the same price which he paid to the wholesaler, the vendor recovers the tax. He suffers no loss. To conclude that the appellants suffered a loss - by not collecting the tax from the ultimate consumer - means, of necessity, that the appellants sold the tobacco products to the consumer for less money than the appellants paid to the wholesalers - an absurd business decision, considering the amount of money involved.

In any event, even if I were to accept the appellants' submission that the trial judge ignored certain material evidence, and that other material evidence was misinterpreted, and, as a result, take the view of the evidence which counsel for the appellants advocates, the appellants still cannot succeed in their claim for equitable relief by way of restitution. I will demonstrate that point by taking counsel's position to its logical conclusion.

Counsel for the appellants submits that when all of the evidence is considered, it is clear that the appellants did not pass on the burden of tax to the ultimate consumer. Counsel submits the evidence shows that it was common knowledge that the appellants were openly defiant of the Government in matters relating to health services tax. The appellants took the position (wrongly, I might add) that the **Health Services Tax Act**

had no application to them, because they were status Indians. Counsel acknowledges that as part of this open defiance of Government, the appellants refused to collect the tax from the ultimate consumers, either status Indians or non-Indians. If these facts are taken together with facts that are not in dispute; namely, that the appellants refused to register as retail vendors under the **Act**; and they refused to keep records of all purchases and sales, as required under the **Act**, the appellants come squarely up against the maxim: "He who comes into equity must come with clean hands." This maxim, broadly stated, must be cautiously applied, because unlawful conduct, by itself, does not necessarily lead to the Court refusing to grant equitable relief. In **Equitable Remedies**, Spry, 5th edition, 1997, the author properly limits the application of the maxim as follows at p. 409-410:

> ...The court declines to intervene only if the inequitable conduct in question is shown to have "an immediate and necessary relation" to the relief sought, and the grant of that relief is unconscionable. It has been said that the principle on which the court acts is that protection is denied the plaintiff "where the right relied on, and which the court of equity is asked to protect or assist, is itself to some extent brought into existence or induced by some illegal or unconscionable conduct of the plaintiff", so that protection for what he claims involves protection for his own wrong: "No court of equity will aid a man to derive advantage from his own wrong, and this is really the meaning of the maxim." (emphasis added)

(See also **Snell's Equity**, 2nd edition, 1990, Baker & Langan at p. 31-32))

While status Indians may purchase tobacco products, on a Reserve, for their own consumption and use, without being required to pay health services tax, the appellants did not purchase the tobacco products in question for their own consumption and use. The tobacco products were purchased for resale, and were sold to the general public. The appellants, as retail vendors in Nova Scotia, are required to comply with the provisions of the **Health Services Tax Act**. The failure of the appellants to register as retail vendors,

their failure to keep records, and their failure to collect tax from the consumers of tobacco products, would be contrary to the provisions of the **Health Services Tax Act**. Each failure is an offence under the **Act** (s. 35) punishable on summary conviction.

This unlawful conduct, particularly the failure to collect tax, and the failure to keep records, would be the very foundation of the appellants' claim for equitable relief. The failure to collect tax would be the unlawful conduct that causes the loss for which the appellants claim restitution. The failure to keep records would be the unlawful conduct which prevents a proper quantification of that loss. Without records of sales it cannot be determined what sales were exempt from tax (for example, to status Indians for their own consumption and use) and what sales were taxable. Therefore, if the trial judge had found the facts to be as counsel for the appellant suggests, then to grant the appellants the equitable relief of restitution would be to order restitution of a loss which they caused by their own refusal to comply with the **Act**. The breach of their statutory obligations would be what caused their loss, not the unauthorized collection system.

The same result would ensue if the facts were analyzed under any one of the three approaches to equitable relief which counsel for the appellants advocated, here; namely, whether analyzed under the traditional tripartite approach to claims of unjust enrichment (**Pettkus v. Becker, (supra)**); whether it is analyzed by taking account of the legitimate expectations of the parties and what, in light of those expectations, is fair, as that was enunciated by Justice McLachlin in **Peel (Regional Municipality) v. Ontario** (1992),

144 N.R. 1; or whether it is analyzed under the more straightforward approach adopted by the House of Lords in **Woolwich Building Society v. Commissioners of Inland Revenue** (1992), 145 N.R. 163 (H.L.). Restitution for a loss, caused by the claimant's unlawful conduct, would not be ordered under any of these approaches.

I conclude, therefore, that it is not necessary for me to review the evidence, in detail, to determine if I should interfere with the trial judge's conclusions on that evidence. If the trial judge's conclusions stand, then the appellants have no loss. If, as they allege, the appellants have a loss, because they did not collect the tax from the ultimate consumer, then that loss was caused by their unlawful conduct, rather than from an unauthorized collection system. Either way, the appellants claim for restitution fails.

I would, therefore, dismiss this appeal. I would order the appellants to pay to the respondent its costs of this appeal which I would fix at $1,500.00 plus disbursements.

Flinn, J.A.

Concurred in:

Pugsley, J.A.

Cromwell, J.A.

C.A. No.146791

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

STANLEY JOHNSON, ROBERT JOHNSON, GENEVIEVE JULIAN and JOHN BERNARD	)	
Appellants	)	
- and -	)	REASONS FOR JUDGMENT BY:
THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in Right of the Province of Nova Scotia	)	FLINN, J.A.
Respondent	)	