

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)**

BETWEEN:

MIKE KENNEDY

Applicant
(Appellant on Appeal/Defendant)

- and -

LEEDS GRENVILLE AND LANARK DISTRICT HEALTH UNIT

Respondent
(Respondent on Appeal/Prosecution)

REPLY

Martin W. Mason
Gowling Lafleur Henderson LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: (613) 786-0159
Fax: (613) 788-3451

Counsel for the Applicant

John Petrosniak
Legal Services Branch
Building B, 1st Floor
1201 Wilson Avenue
Downsview, ON M3M 1J8
Tel: (416) 235-4197
Fax: (416) 235-4924

Counsel for the Respondent

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APPLICANT'S REPLY

PART I - FACTS

1. The Respondent's submission is based on the same error as that made by the courts below: that the "large, liberal" approach to the interpretation of public health statutes authorizes an reading of the phrase "public place" that extends beyond the plain meaning of the words and the intention of the legislature. In this case, the courts below have adopted a construction of the term "public place" which results in absurdity. Taken to its logical conclusion, the decision of the courts below would render a private dwelling as a "public place" if more than one person is present. The Respondent and the courts below have mistaken the direction to apply a broad interpretation to public health statutes as a licence for this absurdity.

Decision of Armstrong J.A. in *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 81 [Appeal Decision] at paras. 14, 45.

2. At paragraph 6 of its submission, the Respondent refers to the Hansard of the Ontario Legislature as support for the proposition that the Smoke Free Ontario Act (SFOA) was intended to, among other things, reduce smoking amongst smokers as well as discourage young people from taking up smoking. While these are indeed two purposes of the SFOA, they are completely outside the subject-matter of this application. The passage from the Hansard cited by the Respondents indicates that reduction of smoking among smokers and young people was to be accomplished by cigarette sales restrictions contained in section 3 to 8 of the SFOA. This application is concerned with the interpretation of the section restricting the smoking of cigarettes in an enclosed public place, not sales restrictions.
3. At paragraph 1 of page 4962 of the portion of the Hansard excerpted in Appendix I of the Respondent's submission, Minister Smitherman outlines the three pillars of Ontario's tobacco policy: protection, prevention and cessation. He outlines how prevention is to be accomplished by an anti-smoking campaign geared to youth and (later on the same page) sales and retail display restrictions. The cessation objective is to be accomplished through a separate initiative. The Minister then goes on to describe how the SFOA relates to the protection objective by making all workplaces and enclosed public places smoke-free.

The Minister is careful to point out that the SFOA will not prohibit smoking outdoors or in private residences.

Official Report of Debates (Hansard), Legislative Assembly of Ontario, First Session, 38th Parliament, Volume 6, pp. 4961-4963 (Appendix I to Respondent's Memorandum of Argument) at 4692.

PART II - ARGUMENT

4. The Respondent argues, at paragraph 10 of its submission, that the issues raised by the Applicant are not of national and public importance and the issues are simply personal to the Applicant. The issues raised by the Applicant go far beyond a personal dispute over a \$3500 fine and concern the meaning of "public place" and the potential for the decisions of the courts below to unduly extend the reach of the SFOA to other private places, such as residences. The issues of general and public importance arise from the confusion exhibited by the courts below on the distinction between public and private places, and the chilling effect that this confusion may have on individual liberties. The Applicant submits that these are issues of national and public importance, warranting the attention of this Court.

5. The general and public importance of the distinction between public and private in the context of provincial health regulation was illustrated in the recent decision of the Ontario Court of Justice in *R. v. Schmidt*, a case about the distribution of raw (unpasteurized) milk. In that case, Justice of the Peace Kowarsky referred to the decision of the Ontario Court of Appeal from which leave to appeal is sought. Justice of the Peace Kowarsky came to a different conclusion regarding the application of public health regulation to private arrangements. He held that prohibitions on selling unpasteurized milk to the public did not apply the defendant because he operated his farm as a cooperative and the cows were owned by members of the cooperative. The discrepancy between the interpretation of the term "public" in these two cases serves to highlight the need for guidance from this Court on this issue.

R. v. Schmidt (21 January, 2010), Newmarket 07-3084, (Ont. Ct. J.), decision of Justice of the Peace Kowarsky, delivered orally, at paragraphs 134-137.

6. The accusation at paragraph 10 of the Respondent's submission serves to illustrate the effect of this confusion about the distinction between public and private places. The Respondent accuses the Applicant with attempting to "circumvent" the law by "masquerading" as a private club. In fact, the Applicant has made every effort to comply with the law by operating a facility that does not engage in the mischief at which the SFOA is aimed. When citizens like the Applicant cannot, through reasonable effort, predict the operative scope of a regulatory law, the proper interpretation of that law becomes an issue of public importance.

7. At paragraph 11 of its submission, the Respondent refers to the decision of this Court in *MacDonald v. City of Montreal* for the proposition that leave to appeal to this Court should be granted only in the rarest of cases. The case referred to as authority for this proposition does not deal with ordinary applications for leave from the decision of a provincial Court of Appeal, but rather an appeal of a refusal by the Quebec Court of Appeal to grant leave to appeal. It is specifically in the situation where the applicant seeks to bypass the Court of Appeal that Beetz J. counseled caution for "reasons of policy and comity."

MacDonald v. City of Montreal, [1989] 1 S.C.R. 460 at paras. 131, 132.

8. The Respondent states, at paragraph 12 of its submission, that there is no federal statute involved in this case, and no constitutional issue is raised as though either of these conditions is a precondition for this Court to grant leave to appeal, pursuant to section 40(1) of the *Supreme Court Act*. This is clearly not the case.

Supreme Court Act, R.S.C. 1985, c. S-26.

9. At paragraph 15 of its submission, the Respondent frames the issue involved in this application as whether the construction of the term "public place" ought to be "expansive" or "restrictive". The Applicant submits that this argument misses the point. The issue involved in this case is about the failure of the courts below to adopt a construction of the term "public place" that is consistent with the purpose of the SFOA. The cases to which the Applicant refers at paragraphs 39-46 of his submission serve to

illustrate the unpredictability and absurdity which can result when courts abandon the purposive approach to the interpretation of the term “public place”.

Application for Leave to Appeal, at paras. 39-46.

10. The Respondent emphasizes, in paragraphs 18 to 21 of its submission, the principle that the proper construction of a statutory provision requires that words be read in a manner that is in keeping with the purposes and objectives of the legislative scheme. The legislative scheme of the SFOA has three purposes (mentioned above): encouraging smokers to quit, preventing young people from taking up smoking, and protecting non-smokers from second-hand smoke. The transcripts from Hansard relied upon by the Respondent indicate a clear intention by the Legislature that the SFOA would *not* prohibit smoking in private residences. However, the decision of the courts below would have precisely this effect. The generalized public health object of the SFOA is not a reason to adopt an interpretation of the term “public place” that stretches the aegis of the Act’s function beyond reason.

Official Report of Debates (Hansard), Legislative Assembly of Ontario, First Session, 38th Parliament, Volume 6, pp. 4961-4963 (Appendix I to Respondent’s Memorandum of Argument) at 4692, paras. 4-9.

11. At paragraph 29 of its submission, the Respondent asserts that the Ontario Legislature intended that the protection from second-hand smoke would extend to smokers as well as non-smokers. In addition to being logically suspect, this assertion lacks support in the passages of Hansard referred to by the Respondent. At page 5065 of Appendix II to the Respondent’s submission, the Hon. George Smitherman, Minister of Health and Long-Term Care explains that the purpose behind the SFOA is to protect non-smokers from the effects of second-hand smoke:

Our objectives are threefold: prevention, cessation and protection. We want to prevent young people from taking up the tobacco habit, we want to provide help, encouragement and support to those smokers who want to quit, and we want to protect *non-smokers* from the deadly effects of second-hand smoke.

The Smoke-Free Ontario Act is the cornerstone of our protection efforts.

Official Report of Debates (Hansard), Legislative Assembly of Ontario, First Session, 38th Parliament, Volume 6, February 15, 2005 (Appendix II to Respondent's Memorandum of Argument) at 5065.

12. The Respondent, like the courts below, ascribes to the Ontario Legislature an overly broad purpose in enacting the SFOA that is not supported by either the language of the statute or the evidence of the Legislature's intent as offered by the Respondent. The issue at the root of this application is the overbroad, and potentially absurd, interpretation of the term "enclosed public place" which is a result of this failure to properly assess the purpose of the SFOA.

All of which is respectfully submitted, Monday, January 25, 2010.

Martin W. Mason
Gowling Lafleur Henderson LLP

Counsel for the Applicant