

1 The accused before the Court is charged with five  
2 charges under the Smoke Free Ontario Act. Most of the  
3 evidence on all these charges is admitted by the defence  
4 that on the dates, times and place in question that, as  
5 far as count number one is concerned, Mr. Kennedy was the  
6 proprietor of an enclosed place. He is not admitting to  
7 the public part and the signs were not up as required.  
8 Count number two, again, it is admitted that the place was  
9 enclosed and that there were ashtrays in the area. As far  
10 as count three is, again, it was enclosed and people were  
11 smoking inside. Count number four, well that is somewhat  
12 different. That's under s.14, there is no evidence to the  
13 contrary that the inspectors were not allowed in to do an  
14 inspection on the date, time and place in question. And  
15 count number five, again, in the enclosed place, the  
16 people were smoking inside.

17 The only question that is to be determined here to  
18 day on the evidence is as to whether or not this is a  
19 public place or a private club which Mr. Kennedy feels  
20 because it is a private members only club that it is  
21 exempt from this legislation.

22 The definitions under the Smoke Free Ontario Act,  
23 under s.1, definitions section for enclosed public place  
24 means (a) the inside of any place, building or structure  
25 or vehicle for convenience or part of them that is covered

1 by a roof, all that part is agreed about and then (ii) to  
2 which the public is ordinarily invited or permitted access  
3 either expressly or by implication whether or not a fee is  
4 charged for entry.

5 What we have heard here today is that the only  
6 people that are allowed to enter into this premises are  
7 people who have chosen to be a member of the Smokers'  
8 Choice/Non-Smokers' Choice by filling out a membership  
9 application form which is part of Exhibit No. 1, at tab 3  
10 and it indicates, as a member, I agree to comply with the  
11 following rules. I accept second hand smoke at private  
12 functions. I will not engage in the use of drugs. I will  
13 not permit entry to the general public. I will not enter  
14 if intoxicated. I will not jeopardize the enjoyment of  
15 other members. And you just have to say that I accept the  
16 above terms and conditions, sign your name, fill in the  
17 name, address, postal code, city/town, phone number and  
18 email address and you are allowed in. Apparently, at some  
19 point this has changed a little bit. Identification has  
20 to be given but there is no indication that identification  
21 had to be given back at that time, initially.

22 Upon filling out that form, you are given a  
23 membership card which is on the next page, which you put  
24 your signature on. You are given a membership number and  
25 to get in to this particular premise, apparently all you

1 have to do is come there and show a card with a signature  
2 on it and you are allowed into the premise.

3 Members were located in a few different ways. We  
4 have heard today there were recruiters that we heard that  
5 would walk the streets and see if there were people who  
6 were smoking and they would be given a pamphlet and told  
7 that this might be something they may want to join, or a  
8 person could show up at the door where there were  
9 applications available and they could sign the application  
10 form and enter the premise if they agreed with the rules  
11 listed in the member application form.

12 And what we have heard today that any member of  
13 the public that isn't going to agree with these rules, can  
14 become a member and be allowed in.

15 The question here is whether or not that this is a  
16 public place or a private place. I think the legislature  
17 has been very careful in drafting this Smoke Free Ontario  
18 Act. The legislation, when they put in whether or not a  
19 fee is charged for entry, well, this is a fee. It is a  
20 membership application form. You have to pay the \$4.00  
21 fee which is not listed on the application form but was  
22 mentioned somewhere in the pamphlet that there is a \$4.00  
23 or \$48.00 a year, as Mr. Kennedy has indicated here today.  
24 Clearly, it is the intent of the legislature in making  
25 this Smoke Free Ontario Act was to save lives. I don't

1 think you have to be a rocket scientist to realize the  
2 whole purpose of the Act.

3 Court can take judicial notice that smoking and  
4 second hand smoke does, in fact, kill and cause medical  
5 issues for a number of people and otherwise they wouldn't  
6 be making this law. Clearly, when they made the law it  
7 was to protect these people of Ontario, members of the  
8 public or any other persons that is residents of the  
9 Province of Ontario to hopefully have a better life  
10 because of the concerns of smoking and second hand smoke.  
11 And when they made the legislature indicating enclosed  
12 public place, whether you are a member of an organization  
13 called Smokers' Choice/Non-Smokers' Choice you are still a  
14 member of the public of the Province of Ontario. It may  
15 very well be that you are a member of an organization but  
16 that does not stop you from being a member of the public  
17 of the Province of Ontario and the legislature's intent  
18 was to protect members of the public of the Province of  
19 Ontario from second hand smoke and smoke and that is why  
20 they have made these laws.

21 So whether you are signing a membership card or  
22 not, you are still a member of the public of the Province  
23 of Ontario. You should not have to be put into a  
24 situation where your health is at risk through smoking and  
25 that is why they put in these laws. So clearly when they

1 made the definition under sub-section 1 of this Act,  
2 regarding an enclosed public place and when they say it is  
3 covered which is not an issue to which the public is  
4 ordinarily invited or permitted access either expressly or  
5 by implication, whether or not a fee is charged, they are  
6 speaking of all members of the public whether you are a  
7 member of a club or not.

8 There are some exemptions, in a private dwelling  
9 where you are allowed to smoke in your own private  
10 dwelling. I don't know why anyone would, but that is  
11 certainly an exemption or any other prescribed place. And  
12 there is nowhere that I have seen that a prescribed place  
13 would be a type of club that this is operating where they  
14 are renting floor space and people are going in and still  
15 paying regular bar prices at a bar and getting their food.  
16 While it may be cooked by volunteers, the indication was  
17 the food was not being given away and that would be  
18 ridiculous because if it was this place could not exist.  
19 Maybe that is why it doesn't exist now, I don't know.

20 But in any event, I am satisfied on the evidence  
21 that this was, in fact, a public place and it was, in  
22 fact, a covered public place and as a result of that, I am  
23 satisfied on all the charges. They have been met out and  
24 because it is a public place, the inspectors had a right  
25 to enter to do an inspection as allowed by the Act and

1 they were not allowed. That is count number 4. I am  
2 satisfied all counts have been met out. There will be  
3 convictions on all four.

4 THE CROWN: Your Worship, with respect to penalty,  
5 our starting point is contained at tab 3 --

6 THE COURT: You are referring to the penalty  
7 section?

8 THE CROWN: Yes, it is at page 15 of 19 and you  
9 will see that with respect to the count under 14(16), the  
10 maximum fine for an individual is \$2,000.00 and that for  
11 Section 9 offenses, the maximum fine is \$1,000.00.

12 Now, I have also included for Your Worship, the  
13 ticket at tab 2, the ticket fine for these offenses. So  
14 the ticket fine is --

15 THE COURT: Where is that; at tab 2?

16 THE CROWN: At tab 2.

17 THE COURT: Yes.

18 THE CROWN: So if this was a ticket as opposed to  
19 a Part 3 information --

20 THE COURT: Three, zero, five?

21 THE CROWN: You will see a 305 or 365 for nine,  
22 six. And that, you know, the range of the ticket is 305  
23 to 365. In my respectful submission, the obstruction  
24 charge bears the greatest maximum fine, the others  
25 \$1,000.00. I would suggest that it would be appropriate

1 in all the circumstances of the case that for the Section  
2 9 offenses, the fine be in the range of \$500.00 to \$600.00  
3 and that for the Section 14(16) offence that the fine be  
4 in the range of \$1,000.00 to \$1,200.00.

5 THE DEFENCE: The (inaudible) with my friend with  
6 respect to the quantum of the fines because we all know  
7 that Provincial Offenses Act offenses grant leeway for the  
8 judge. Certainly because Mr. Kennedy took this case, he  
9 brought it forward as a test case. He wants to test the  
10 law, as is his right. I would suggest to the Court that  
11 the Court impose a nominal fine in the amount of \$1.00 on  
12 each count. In the event that the Court is not prepared  
13 to do that, I would be asking the Court to simply issue  
14 the set fines and to keep in mind, that (inaudible) to the  
15 five charges and the quantum of the fines (inaudible).

16 THE CROWN: Yes, Your Worship. I would be remiss  
17 if I didn't mention this that in this process, there was a  
18 pretrial in front of the Justice of Peace and as a result  
19 of that, Mr. MacDonald and Mr. Kennedy reduced what would  
20 have been a very lengthy trial to a trial that has been in  
21 a morning and I should comment on that. It has allowed  
22 the issues to be freely and openly presented in the Court  
23 so I do make that comment.

24 THE COURT: Thank you.

25 DISPOSITION BY JUSTICE OF THE PEACE BARTRAW

1 THE COURT: As far as penalty is concerned in this  
2 case, we don't have a one day offence. What we have is an  
3 offence taking place over three separate days, three  
4 separate times the inspectors have to attend at the place  
5 in question. The first appearance of the inspectors was  
6 the 8th of September. Mr. Kennedy was well aware of what  
7 he was attempting to do and he was well aware of the  
8 inspectors' visit. He chose instead of ceasing and  
9 desisting at that time and following the laws the  
10 inspectors are indicating, he chose to continue and then  
11 again, there were two further inspections on the 13th and  
12 20th of September.

13 As a result of him not stopping on the first date  
14 and continuing on, that has to be shown and taken into  
15 account when penalty is imposed because he continued to  
16 commit the offence for a number of weeks after the first  
17 inspection.

18 As a result, on the first two counts on the 8th of  
19 September, I am imposing the minimum -- I wouldn't say the  
20 minimum fine -- I am imposing the fine that would have  
21 been issued had the inspector issued a notice under Part 1  
22 of the Provincial Offenses Act, that being counts one and  
23 two, fine in the amount of \$365.00.

24 Because the inspectors had to go back and deal  
25 with this matter further on the 13th of September, the

1 fine would have to, at this point if they were imposing or  
2 charging right away, they probably would have not have  
3 went with a further Part 1 ticket and they would have went  
4 by Part 3, as they have in this case, and that has to be  
5 reflected. The result on count number three, the fine is  
6 \$600.00.

7 And again, on the 20th of September, again they  
8 have to go back and they have to deal with organization  
9 again and Mr. Kennedy and this time, while the inspectors  
10 are there and they are attempting to conduct their  
11 investigation, they are obstructed by not being allowed in  
12 to do what they are authorized by law to do. And again,  
13 that makes it quite a serious offence. In fact, the chart  
14 that is in the Act indicates that the fine under section  
15 14(16), the maximum fine is \$2,000.00 and the prosecution,  
16 Mr. O'Shaughnessy is asking for \$1,000.00 to \$1,200.00 and  
17 I think as a result of the blatant, the continuation of  
18 committing the offence after having been -- the inspectors  
19 having to go there previously -- that any time you  
20 obstruct an officer, provincial offenses officer who is in  
21 the line of his duty conducting an investigation and he is  
22 obstructed, that has to be frowned upon by the Court. As  
23 a result of that, it will be a fine of \$1,200.00.

24 And on the last count, again this is after two  
25 previous inspections, and they come back and there is a

1 continuation of the offence, that again has to be shown;  
2 that's the third time they have had to come now. As a  
3 result, the fine on that is \$1,000.00.

4 Time to pay, 90 days?

5 THE DEFENCE: Sir, I am going to ask for a little  
6 more. I understand Mr. Kennedy is not in a position to  
7 pay these probably within 90 days. I would ask for  
8 something more like six months.

9 MR. KENNEDY: I won't be able to do that.

10 (OFF RECORD DISCUSSION)

11 MR. KENNEDY: Your Worship Bartraw, I have done  
12 everything over the last six years to comply with your  
13 wishes, which is, made it very clear that I have not been  
14 able to bring in the same income in that time. I have had  
15 no income since this has come in. This has been a large  
16 cost to me and my wife to prepare this documentation.

17 You have obviously decided that for deterrence  
18 value, people like myself although we were being told over  
19 and over again that it can be done, we are going to shut  
20 them down. I will have to require at least a year to make  
21 payments on this because it appears to be over \$3,000.00.

22 THE COURT: Three thousand, five hundred and  
23 thirty.

24 MR. KENNEDY: And I am already about \$9,000.00 in  
25 on this project that I have had to use by refinancing my

1 home. There is very little equity left in my home,  
2 certainly not enough to cover this, sir. This has been a  
3 very long passage over the last six years and as designed,  
4 a very expensive one. So if I could get a year to put my  
5 life back in order, I might be able to put a dent into  
6 this, if that is possible.

7 THE COURT: You seem to be a very intelligent man,  
8 Mr. Kennedy. I would think that perhaps you should reach  
9 the point where a new project comes along for you and you  
10 can use the intelligence that I feel you have to get into  
11 another field that pays a lot more money. But in any  
12 event, those comments you just made, as far as time for  
13 payment, I will do as I do for every person that comes  
14 before my Court, I impose a time to pay of 90 days and if  
15 you can't pay the fine within that 90 day period, I  
16 certainly will take into account whether you make any  
17 partial payments as to whether a further extension of time  
18 to pay shall be granted. I find that if you give a year  
19 to pay, people come back in a year and they haven't paid  
20 any. I like to see money paid so make something monthly  
21 and it will probably be more than a year.

22 MR. KENNEDY: Sir, I do what I say and say what I  
23 do. I will make payments starting immediately.

24 THE COURT: Good for you. Thank you.

25 THE CROWN: Thank you, Your Worship.

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13

1 THE CLERK: All rise. This Court is closed.

2  
3 --THIS TRIAL ADJOURNED AT 12:49 PM, ON MARCH 7TH, 2007.

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5  
6 I HEREBY CERTIFY THAT the foregoing was  
7 transcribed to the best of my skill and ability,  
8 from digitally recorded proceedings.

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10 G R S / Melanie Gillespie

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