

Court File No.:

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

BETWEEN:

**MIKE KENNEDY**

Applicant

(Appellant/Defendant)

- and -

**LEEDS, GRENVILLE AND LANARK DISTRICT HEALTH UNIT**

Respondent

(Respondent/Prosecution)

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**MEMORANDUM OF ARGUMENT**

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## PART I – STATEMENT OF FACTS

### Overview

1. This application involves the demarcation between public and private places. Government regulation touches almost every aspect of the lives of Canadians, and most everyday activities are shaped by regulation. But government regulation is not applied arbitrarily; the reach of government regulation is circumscribed and informed by the legislative purpose behind it. Regulation intended to provide a public benefit often ensures targeted application by drawing a distinction between public and private places. This distinction provides structure and predictability to the application of government regulation.
2. As recent decisions of provincial Courts of Appeal – including the decision of the Ontario Court of Appeal in this case – indicate, there is need for a pragmatic and purposive approach to the categorization of places as either public or private. Without a reasoned and logical method of distinguishing public places from private ones, the application of government regulation loses its focus and leads to unpredictable and unfortunate results, such as the decision from which this application seeks leave to appeal. Guidance from this Court would enable the construction of a flexible and logical framework for the demarcation between public and private places that could be applied in a predictable way to the various provincial regulations which depend on such a definition for their proper operation.

### Regulating Tobacco Smoke

3. The statute at issue in this proceeding, the *Smoke-Free Ontario Act* (the “SFOA”), was enacted by the Ontario legislature with the purpose of curbing the effects of environmental tobacco smoke (ETS), or second-hand smoke which has been established as a cause of smoking-related diseases in non-smokers. In an effort to curb the adverse health effects caused by ETS the SFOA prohibits smoking in “enclosed public places” and “enclosed workplaces”.

U.S. Environmental Protection Agency, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, EPA/600/6-90/006F (1992).

*Smoke-Free Ontario Act*, S.O. 1994, c. 10.

4. The legislatures of all of the other provinces have enacted legislation which seeks to reduce the harm caused by public smoking.

*Smoke-free Environment Act*, 2005, S.N.L. 2005, c. S-16.2

*Smoke-free Places Act*, R.S.P.E.I. 1988, c. S-4.2

*Smoke-free Places Act*, S.N.S. 2002, c. 12

*Smoke-free Places Act*, S.N.B. 2004, c. S-9.5

*Tobacco Act*, R.S.Q. c. T-0.01

*The Non-Smokers Health Protection Act*, C.C.S.M. c. N92

*Tobacco Control Act*, S.S. 2001, c. T-14.1

*Tobacco Reduction Act*, S.A. 2005, c. T-3.8

*Tobacco Control Act*, R.S.B.C. 1996, c. 451

*Smoke-Free Places Act*, S.Y. 2008, c. 8

*Tobacco Control Act*, S.N.W.T. 2006, c. 9

*Tobacco Control Act*, S.Nu. 2003, c. 13

### **Public Place Smoking Regulation**

5. Each provincial statute effects varying degrees of regulation on smoking in public places. The legislative purpose behind these regulations is to increase public health by reducing involuntary exposure to ETS. While each provincial statute defines “public place” in a different way, the places in which smoking is regulated across the provinces are generally places where non-smokers can reasonably be expected to frequent or to have a right to do so.
6. The SFOA defines “enclosed public place” as a place “to which the public is ordinarily invited or permitted access, either expressly or by implication, whether or not a fee is charged for entry”

*Smoke-Free Ontario Act*, S.O. 1994, c. 10, s. 1(1).

7. The SFOA focuses on regulating smoking in enclosed rather than open places and public rather than private places in order to further its purpose of eliminating involuntary exposure to ETS. The SFOA does not prohibit smoking.
8. When the SFOA was before the Ontario Legislature, the Health Minister at the time, the Honourable George Smitherman, stated that it was the intention of the Government of Ontario that “unless Ontarians want to be exposed to cigarette smoke, they won’t be.”

Ontario Hansard, issue L103, p. 10, para. 5.

### **The Charges**

9. The Applicant, Mike Kennedy rented the premises formerly known as “Dolittle’s Sports Bar and Grill” (the premises) in Smiths Falls, Ontario, and operated a private club where members could smoke while socializing, eating and drinking.

Decision of March J. in *Leeds, Grenville and Lanark District Health Unit v. Kennedy*, 2008 ONCJ 771, [2008] O.J. No. 5796 (March Decision) at para. 2.

10. In order to gain entry to the premises, one was required to hold a membership in the non-profit club which Mr. Kennedy created named Smokers’ Choice/Non-Smokers’ Choice (the club). The club was governed by a Constitution and Bylaws and was operated by a Board of Directors.

March Decision at paras. 3,4.

11. Among the conditions of membership, members of the club were required to promise not to permit entrance to the premises by the general public.

March Decision at para. 5.

12. Advertising for the club was directed at smokers only. Recruiters would hand pamphlets to people on the street whom they saw smoking. There was no advertising to the general public.

March Decision at para. 8.

13. Mr. Kennedy was charged with five counts under the *Smoke-Free Ontario Act*, S.O. 1994, c. 10 (SFOA) for offences connected to his operation of the premises, including allowing a person to smoke in an “enclosed public place”, failure to remove ashtrays from an “enclosed public place” and failure to display “no smoking” signage in an “enclosed public place”.

Decision of Armstrong J.A. in *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685 (Appeal Decision) at para. 13.

### **Procedural History**

14. At the hearing before Justice of the Peace Bartraw, Mr. Kennedy argued that the charges were laid in error, because the premises did not fall under the definition of “enclosed public place” in the SFOA. Kennedy admitted that the premises were enclosed, but argued that they were not public.
15. The Justice of the Peace held that the club was a place to which the public was ordinarily admitted because persons smoking in Mr. Kennedy’s establishment remained members of the public for the purposes of the SFOA, despite that fact that they had obtained a membership and had been individually invited.

Transcript of decision of Bartraw, J.P. (Bartraw decision) at 130.

16. On appeal, Justice March held that, because it was intended to protect the public from the effects of cigarette smoke, the term “public” in the SFOA should be given a broad and liberal interpretation. Justice March held that the interpretation offered by Mr. Kennedy was too narrow.

March Decision at para. 40.

17. Justice March applied the reasoning of the Ontario Court of Appeal in *R. v. D’Angelo* and determined that the test for identifying a place as a “public place” involved and examination of (a) the purpose of the legislation, (b) the ordinary use of the words and (c) the facts of the case.

March Decision at para. 38

18. In examining (b) above, Justice March held that the case of *Toronto (City) v. Original Playhouse Café Ltd.* did not apply because that case was based on the City of Toronto's No Smoking Bylaw, which defined "private club" as well as "public place". Justice March held that the SFOA's lack of a separate definition for "private club" was a significant difference between the SFOA and the Toronto Bylaw.

March decision at para 41.

19. Justice March held that the decision of the Justice of the Peace was not unreasonable and that it was clearly open to him to find that "a group of people with approximately 578 members who are prepared to accept the hazard of second hand smoke are still members of the public and therefore covered by the SFOA."

March Decision at para. 48.

20. Mr. Kennedy then applied for leave to appeal to the Ontario Court of Appeal under section 131 of the *Provincial Offences Act*. In granting leave, Justice Blair held that the issues raised in the appeal were of sufficient public interest to warrant granting leave, particularly because the appeal dealt with the definition of "public place".

*Kennedy v. Leeds, Grenville and Lanark District Health Unit*, (May 20, 2009), C49015, Perth, ON (Decision of Blair J.A. granting leave to appeal) at 2.

21. The sole ground of appeal on the merits of the conviction was whether the premises were a place "to which the public is ordinarily invited or permitted access, either expressly or by implication, whether or not a fee is charged for entry" as set out in s. 1(1)(a)(ii) of the SFOA.

Appeal Decision at para. 30.

22. The Ontario Court of Appeal upheld the decision of March J. and held that the public welfare nature of the SFOA militated in favour of a liberal interpretation. The Ontario Court of Appeal held that members of Smokers' Choice/Non-Smokers' Choice were still

members of the public for the purposes of the SFOA, and the fact that the club members were invited into the club rendered the premises a “public place”.

Appeal Decision at paras. 45-46.

## **PART II – ISSUES**

23. Whether the need for clarity in distinguishing public places from private places is a matter of national and public importance, such that it warrants the guidance of this Court.
24. Whether, because of the existence of similar smoking regulation in each jurisdiction in Canada, the proper interpretation of such statutes is a matter of public and national importance such that guidance from this Court is warranted.

## **PART III – ARGUMENT**

### **Background**

25. This case turns on a question of statutory interpretation. At issue is the meaning the term “enclosed public place” in the *Smoke-Free Ontario Act*. The decision of the Ontario Court of Appeal was based on that Court’s interpretation of the term “public place”.
26. The Applicant submits that by adopting the interpretation it did, the Court of Appeal has effected an absurd result that extends the application of the SFOA beyond that intended by the Ontario Legislature.

### **Distinction Between Public and Private Places**

27. The difficulty the Ontario Court of Appeal had in arriving at a definition of “public place” for the purposes of the SFOA is indicative of a larger issue.
28. As government regulation touches more aspects of everyday life, the distinction between public and private becomes increasingly important in circumscribing and defining the reach of that regulation. Public and private are the “organizing conventions” by which we experience the world.

Nicholas Blomley, “Flowers in the bathtub: boundary crossings at the public–private divide”, (2005) *Geoforum* 36, 281–296 at 284.

29. The distinction between “public” and “private” is not as intuitive or straightforward as it first appears, and the terms are often employed in different ways for different purposes. The increasingly widespread invocation of “public” and “private” as organizing categories is not usually informed by careful consideration of the meaning and implications of the concepts themselves.

J. Weintraub, “The Theory and Politics of the Public/Private Distinction,” in J. Weintraub and K. Kumar, eds., *Public and Private in Thought and Practice* (Chicago: University of Chicago Press, 1997), 1 at 1-2.

30. This Court has addressed the meaning of the term “public place” before in the context of sexual offences in the Criminal Code. In each of these cases, this Court employed a purposive approach to establishing a demarcation between public and private places.

*R. v. Heywood*, [1994] 3 S.C.R. 761.

*R. v. Labaye*, [2005] 3 S.C.R. 728.

*R. v. Clark*, [2005] 1 S.C.R. 6.

31. The Applicant respectfully submits that the decision of the Ontario Court of Appeal involved in this application failed to follow the direction of this Court on the purposive approach to defining “public place” and, as such, this case presents an appropriate occasion for this Court to provide guidance on the distinction between public and private places in the context of provincial regulatory legislation.

### **Divergent Approaches Taken by Provincial Courts of Appeal**

32. The difficulty in establishing a clear and flexible approach to distinguishing public places from private places in provincial regulatory statutes extends beyond the Ontario Court of Appeal. Courts of Appeal in other provinces have also struggled with establishing such an approach.
33. The Alberta Court of Appeal was divided on whether a rented residential apartment was considered a “public place” for the purposes of the *Housing Regulation*, Alta. Reg 173/99 enacted pursuant to the *Public Health Act*, R.S.A. 2000, c. P-37.

*BPCL Holdings Inc. v. Alberta*, 2008 ABCA 153

34. In *BPCL Holdings*, the Alberta Court of Appeal was faced with the issue of whether the term “public place” should include the residential units in rental accommodations. The majority of the Court held that the objective of the *Public Health Act*, that is, the preservation of public health dictated a broad approach to the definition of “public place”

*BPCL Holdings*, at para. 12.

35. Justice Berger, dissenting in part, held that the term, “public place” should only apply to common areas of rental accommodations and not the tenants’ private residences. Justice Berger pointed to other provisions in the Act which distinguished between public and private as informative on how those terms should be applied.

*BPCL Holdings*, at paras. 35-39.

36. The British Columbia Court of Appeal took a different approach to establishing the line between public and private in a case involving a human rights challenge to the denial of entry to the Men’s Lounge area of a golf club.

*Marine Drive Golf Club v. Buntain et al and B.C.Human Rights Tribunal*, 2007 BCCA 17, leave to appeal refused, J.S.C.C. No. 31907.

37. In *Marine Drive*, the British Columbia Court of Appeal was faced with the issue of whether the respondent golf club was entitled to refuse access to the Men’s Lounge facility to the female appellants because the services offered by the facility were not “customarily available to the public” pursuant to section 8 of the British Columbia Human Rights Code, R.S.B.C. 1996, c. 210.

*Marine Drive*, at paras. 36-42.

38. In dismissing the appeal, Justice Thackray, writing for the Court, held that the intention of the legislature and the purpose of the Code dictated where the line between public and private should be drawn. Justice Thackray held that section 8 of the *Code* was not intended to apply to highly personal or intimate relationships such as are found in private

book clubs and that the relationship between the service-user and the service-provider here was such a relationship.

*Marine Drive*, at paras. 44, 49.

39. This lack of predictability involved in drawing a line between public and private places is highlighted by conflicting decisions from the British Columbia Court of Appeal and the Ontario Court of Appeal. Both cases involved prohibition orders made pursuant to s. 160(1)(a) of the *Criminal Code*. In both cases, the accused was charged with “attending at a public park or public swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre.”

*R. v. Lachapelle*, 2009 BCCA 406 at para 1.

*R. v. Perron*, 2009 ONCA 498 at para. 1.

40. In *R. v. Lachapelle*, the accused attended at the carnival which visits the town of Gitanmaax once a year. The carnival is held on a piece of private property and features rides, food and games.

*R. v. Lachapelle*, at para. 2.

41. In *R. v. Perron*, the accused attended at the Super Ex at Landsdowne Park in Ottawa. The Super Ex included mid-way rides, game booths, concert areas, food courts and a petting zoo.

*R. v. Perron*, at para. 7.

42. The British Columbia Court of Appeal held that the accused in *R. v. Lachapelle* had not violated his prohibition order. In coming to this conclusion, the Court of Appeal focused on the word “playground” in s. 160(1)(a) of the *Criminal Code*, and held that to call the carnival a “playground” would overwhelm the ordinary grammatical meaning of the word.

*R. v. Lachapelle*, at para. 31.

43. In contrast, The Ontario Court of Appeal, in *R. v. Perron*, held that the accused had violated his prohibition order, but focused on the word “park”. The Court of Appeal took a purposive approach to the word “park” and held that since children could reasonably be expected to be present, the term “park” included the Super Ex fairgrounds. The Court of Appeal held that the proper approach to the interpretation of the prohibition order was to look to the purpose of the prohibition order to inform its interpretation.
44. The Ontario Court of Appeal held in *R. v. Perron*, that the legislative purpose of the section was best served by reading the prohibition to apply to discrete locations that are accessible to the public for recreational use that involves or is reasonably likely to involve children under the specified age.

*R. v. Perron*, at para. 20.

45. The Ontario Court of Appeal in *R. v. Perron* employed the legislative purpose behind the prohibition – the protection of children – to inform its interpretation of the term “public”. The Court then used this purpose-driven definition of “public” to inform the meaning of “park”. In doing so, the Ontario Court of Appeal arrived at an interpretation of the legislative provision which circumscribes the prohibited behaviour in a logical and coherent manner.
46. The Applicant submits that the purposive approach applied by the Ontario Court of Appeal in *R. v. Perron* to statutes which regulate behaviour based on a demarcation between public and private is the correct approach to the interpretation of such statutes. This purposive approach was not applied by the Ontario Court of Appeal in the decision from which leave to appeal is sought in this application.

### **The Purposive Approach**

47. The purpose of the SFOA is to ensure that people are not involuntarily exposed to ETS. In the context of the SFOA, the line between public and private should be drawn in accordance with this purpose.

48. The establishment at issue in this application is not a place where there is a possibility of a non-smoker involuntarily encountering ETS. Only smokers were invited to join the club and only club members attended at the premises.
49. English and US authority on the proper approach to the interpretation of “public” runs counter to the approach taken by the Ontario Court of Appeal. The House of Lords has held that to interpret the term “public” to include everyone renders the term meaningless and results in an absurdity.

*Dockers Labour Club and Institute Ltd. v. Race Relations Board* [1974] 3 All ER 592 per Viscount Dilhorne at 597.

50. Similarly, the Supreme Judicial Court of Massachusetts has held that regulations prohibiting smoking in establishments “in which food is served to the public” do not apply to private clubs. The SJC held that the social area of the applicant club, which was accessible to members only, was not open to the public for the purposes of the smoking regulation.

*Loyal Order Of Moose, Incorporated, Yarmouth Lodge # 2270 v. Board Of Health Of Yarmouth & another*, 439 Mass. 597, 790 N.E.2d 203 (2003) at 602.

51. The Applicant submits that a purposive approach to the interpretation of the term “enclosed public place” in the SFOA leads to the conclusion that “public place”, for the purposes of the SFOA, means a place where there is a reasonable possibility that a person could be involuntarily exposed to ETS.
52. Every province has enacted legislation which, in some way, restricts tobacco use in enclosed public places. Some provinces have used language which includes private clubs, but excludes private residences. Some provinces have, like Ontario, used expansive language which, if interpreted in the same way the Court of Appeal interpreted the SFOA, would include any place to which a member of the public may be invited, including private residences.
53. Unless the proper approach is employed in interpreting these statutes, smokers and non-smokers alike will be unable to predict how the smoking regulation in their province will

be applied and will be unable to conduct themselves in such a way as to fully avail themselves of the intended benefits of the legislation.

54. Because of the divergent approaches taken by provincial Courts of Appeal to establishing the division between public and private places, guidance from this Court is necessary to ensure that these provincial statutes, which are intended to protect the public from involuntary exposure to ETS, are applied in a predictable, coherent fashion. To avoid an unpredictable application of these statutes, this Court should provide guidance on how the line between public places and private places should be drawn.
55. This is not a situation where there is merely the potential for the provision to be applied in an overly expansive way – the Ontario Court of Appeal has already done so. If a statute may be interpreted in such a way that avoids absurd results and over-expansive application, then the guidance of this Court is that the statute should be interpreted in such a way as to avoid the absurdity. The Ontario Court of Appeal did not follow this guidance.

*Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031

56. Mr. Kennedy was convicted under the SFOA because of the interpretation of the term “public place” by the courts below. With respect, this interpretation is incorrect and is symptomatic of a lack of clarity surrounding the demarcation between “public” and “private” in provincial regulatory statutes.
57. This lack of clarity surrounding a distinction which touches on most aspects of everyday life is an issue of sufficient national and public importance which warrants the consideration of this Court.

#### **PART IV – SUBMISSION RE COSTS**

58. The Applicant submits that the Court, if it grants leave, should follow its usual practice and grant leave with costs in any event of the cause.

**PART V – ORDER DESIRED**

59. The Applicant respectfully requests an order granting leave to appeal from the decision of the Ontario Court of Appeal dated September 28, 2009, with costs in any event of the cause.

All of which is respectfully submitted this 27th day of November, 2009.

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**Counsel for the Applicant**

## PART VI – TABLE OF AUTHORITIES

	<b>Authority</b>	<b>Citing Paragraphs</b>
1.	<i>BPCL Holdings Inc. v. Alberta</i> , 2008 ABCA 153.	33,34,35
2.	<i>Dockers Labour Club and Institute Ltd. v. Race Relations Board</i> , [1974] 3 All ER 592 per Viscount Dilhorne.	49
3.	J. Weintraub, “The Theory and Politics of the Public/Private Distinction,” in J. Weintraub and K. Kumar, eds., <i>Public and Private in Thought and Practice</i> (Chicago: University of Chicago Press, 1997).	29
4.	<i>Loyal Order Of Moose, Incorporated, Yarmouth Lodge # 2270 v. Board Of Health Of Yarmouth &amp; another</i> , 439 Mass. 597, 790 N.E.2d 203 (2003).	50
5.	<i>Marine Drive Golf Club v. Buntain et al and B.C.Human Rights Tribunal</i> , 2007 BCCA 17, leave to appeal refused, J.S.C.C. No. 31907.	36,37,38
6.	Nicholas Blomley, “Flowers in the bathtub: boundary crossings at the public–private divide”, (2005) <i>Geoforum</i> 36, 281–296 at 284.	28
7.	<i>Ontario v. Canadian Pacific Ltd.</i> , [1995] 2 S.C.R. 1031.	55
8.	<i>R. v. Clark</i> , [2005] 1 S.C.R. 6.	30
9.	<i>R. v. Heywood</i> , [1994] 3 S.C.R. 761.	30
10.	<i>R. v. Labaye</i> , [2005] 3 S.C.R. 728.	30
11.	<i>R. v. Lachapelle</i> , 2009 BCCA 406.	39,40,42
12.	<i>R. v. Perron</i> , 2009 ONCA 498.	39,41,43,44,45,46

## PART VII – STATUES RELIED ON

1. *Smoke-Free Ontario Act*, R.S.O. 1990, c. 10
2. *Smoke-free Environment Act*, 2005, S.N.L. 2005, c. S-16.2
3. *Smoke-free Places Act*, R.S.P.E.I. 1988, c. S-4.2
4. *Smoke-free Places Act*, S.N.S. 2002, c. 12
5. *Smoke-free Places Act*, S.N.B. 2004, c. S-9.5
6. *Tobacco Act*, R.S.Q. c. T-0.01
7. *The Non-Smokers Health Protection Act*, C.C.S.M. c. N92
8. *Tobacco Control Act*, S.S. 2001, c. T-14.1
9. *Tobacco Reduction Act*, S.A. 2005, c. T-3.8
10. *Tobacco Control Act*, R.S.B.C. 1996, c. 451
11. *Smoke-Free Places Act*, S.Y. 2008, c. 8
12. *Tobacco Control Act*, S.N.W.T. 2006, c. 9
13. *Tobacco Control Act*, S.Nu. 2003, c. 13