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enough. Whoever else might be in the truck would be incurring the risk, that's a problem. So, my respectful submission to the court is that it is broad legislation that the province has the full jurisdiction to pass and has.

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And the only case that we have been able to find is the Justice of the Peace case, the 924 Club, and, you know, that clearly recognizes -- the Justice of the Peace recognizes -- and I am fully aware that this doesn't bind Your Honour as the decision of Justice Bartraw doesn't bind you. However, it is a decision that was based on this legislation and it recognizes that the Act was written very broadly and captures those places which the public has a revokable invitation to enter. That is in paragraph 33.

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So that's the position of the prosecution and it is the position of the prosecution that all the efforts that Mr. Kennedy went through, which he outlines on page 22, A through Q, doesn't take him out of the broad definition of the legislation. And as I said earlier, the only question that I had with respect to A through Q, the evidence would disclose that there was some public advertising, however, to a particular part of the population, that 20 to 25 percent of the population smoke.

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So, rather than repeat what I have said in the factum I will leave it to Your Honour on that basis that the legislation is broad and all encompassing and that it

attaches to Mr. Kennedy.

THE COURT: Well, I mean, because of the  
appeal.

MR. O'SHAUGHNESSY: Yes.

THE COURT: So, that Justice  
saying is he did not make any

MR. O'SHAUGHNESSY: Well, he  
applied the law.

THE COURT: He made his decision based on  
particular facts it met the parameters of

MR. O'SHAUGHNESSY: Correct.

THE COURT: Leaving aside the question of  
not think I am called upon to determine

how wide the legislation is or whether it

MR. O'SHAUGHNESSY: No.

THE COURT: It is really just a question of  
fact situation.

MR. O'SHAUGHNESSY: Oh, the same question.

THE COURT: But I was asking you to  
you...

MR. O'SHAUGHNESSY: Oh, yeah.

THE COURT: ...because I was asking you  
your position was because Mr. Kennedy's

certainly different, that there is a  
enclosed public place definition

and for people to be able to see the sign  
they can smoke.

MR. O'SHAUGHNESSY: And the legislation says  
that. There is no place in the legislation

says that you can do this to do this  
legislation says if it's a public place

are ordinarily invited or members of the public that's a public place.

5 THE COURT: And so by putting restrictions on what the public does in terms of coming in, the restrictions that are set out here, any other kind of restrictions put on it to only allow those people in who want to smoke and are not bothered by secondhand smoke, you are saying it makes no difference?

10 MR. O'SHAUGHNESSY: It makes no difference. Smoking in enclosed places is not allowed. And when you go into the reasons, the policy reasons why that is, but I don't think we have to because that is what the legislation says in my respectful submission, that we don't have to go into the policy issues, and that 15 Justice Bartraw listened and gave his reasons, they were full reasons and he outlined them. The only place where he made an error isn't significant in my respectful submission and is not a miscarriage and based on the facts that he had before him he applied 20 the law properly and properly convicted Mr. Kennedy on all counts. Thank you.

25 THE COURT: Just give me a moment, I just want to review my notes to make sure I have not -- because I may have some other questions for Mr. O'Shaughnessy.

MR. O'SHAUGHNESSY: Yes, Sir.

30 THE COURT: I just want to make sure I have not missed anything. So, Mr. O'Shaughnessy, you have probably answered this already, I am just going to phrase it in a different question, I am sort of referring to the submissions that were made by Mr. Lindsey when he was saying that the public was not

5 permitted access to this -- the public generally, you  
had to be a member and that the members of this  
particular -- the smokers who were in there, part of  
their obligation was to make sure that the actual  
public did not come in so, therefore, it does not  
meet the definition of the public being ordinarily  
invited or permitted access. That was his  
submission. I take it what your -- well, what is  
your response to that?

10 MR. O'SHAUGHNESSY: My response is, is that they are  
the public and you cannot say I am no longer a member  
of the public. I cannot stand before you and say  
that I am no longer a human, I am a rabbit. I mean,  
there are certain things that you are, and that is  
15 what you are and nothing can change that, and being  
member of the public that is what we are and there is  
nothing that we can do to change that.

20 THE COURT: It is you cannot contract out --  
sorry....

COURT REPORTER: I am sorry Your Honour, there seemed  
to be an interference with the equipment. I am  
getting very up and down....

25 THE COURT: Okay, should we just take a moment then  
you and can check?

COURT REPORTER: I would appreciate that.

30 THE COURT: So I will just take a short recess and  
give the Reporter an opportunity to correct the  
problem.

**R E C E S S**

**U P O N R E S U M I N G :**

THE COURT: Yes, Madam Reporter, it is working now  
is it?

COURT REPORTER: Yes, Your Honour.

THE COURT: Thank you. Yes, Mr. O'Shaughnessy,  
think you have answered the question.

MR. O'SHAUGHNESSY: I believe I had answered the  
question.

THE COURT: Okay, thank you. Yes, Mr. Lindsey?

MR. LINDSEY: Good afternoon, Sir.

THE COURT: Good afternoon.

MR. LINDSEY: Basically our position is that the  
Crown's -- I'm sorry, the prosecutor's argument that  
its an all or nothing situation, where the  
legislation basically applies to everything outside  
of the house is not maintainable.

If I can direct your attention in response to that  
page 41 of the transcripts. I am referencing lines  
two to about six or seven where the question is asked  
of Mr. Oglaza,

"QUESTION: But you just -- and I want to make sure  
we are correct here -- you just told me that the only  
place you can think of that is not a public place  
would be a residence?"

And he states,

"ANSWER: That's my understanding...."

In which case he could go into any place, other than  
your home, as a public officer of the state and just  
walk right in. And with respect, that is a position

the prosecutor is arguing is absolutely non-maintainable.

5 One has to have a starting point and the starting point is the Supreme Court of Canada's recognition in *Harrison v. Carswell* of the absolute right to enjoyment of property to every individual.

THE COURT: Sorry, what -- is that in your factum?

MR. LINDSEY: Yes, it is.

10 THE COURT: Thank you.

MR. LINDSEY: I will tell you that right now it is 15 of my Book of Authorities.

THE COURT: Okay, it is in your factum....

MR. LINDSEY: And if you like I can give you 15 a paragraph that I reference to that. I referenced it a couple of times, but I will direct you to paragraph 94 of my factum, of my written argument at page 94 with the specific quote:

20 "Anglo-Canadian jurisprudence has traditionally recognized as a fundamental freedom, the right of the individual to the enjoyment of property and not to be deprived....save by due process of law."

25 And the starting point is the absolute right of ownership, enjoyment and ownership of property. If the province provincial legislature is going to pass legislation it is in subordination, of course, to that right, they can regulate of course. However, as a starting point I would say that it would have to be so expressly stated in the legislation that the

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5 no room for inference or deeming or having to assume  
that this is what they meant. The Act as its worded  
if it was applied to everything outside of the home  
would have expressly stated that. It would have said  
an enclosed public place is every place outside of  
one's personal residence. That would have been  
sufficient. Clearly, use of the word "public" means  
something other than a private residence or a private  
10 place of property. And because it's -- the use is of  
the word "public" there is obviously a correlative  
and the correlative is private. And that is where I  
have used the word private property or private place  
in the sense that anything that the legislation has  
not expressly stated is the way it was in the first  
15 place, private, because that is what we started from,  
was the ownership of property, private property. So  
everything else that is listed in the definition is  
public, everything else remains as it was, which is  
private.

20 And I point out that private property does not -- or  
private places do not become an enclosed public place  
by omission within the legislation as the prosecutor  
would have you believe.

25 THE COURT: So your point is -- I am repeating it  
back so I am making sure that I have it correctly --  
by the use of the word public you are saying it  
should be said if they wanted it to mean everyone  
they should have said everyone?

30 MR. LINDSEY: Yes.

THE COURT: Everybody, something like that. By

using the word "public" there is a presumption that they are not including everyone, they must have -- they must mean -- as you are saying it must be private, there must other rights...

MR. LINDSEY: That's correct.

THE COURT: ...that are there that are not being covered?

MR. LINDSEY: That's correct. And I think in addition to that, one aspect that the prosecutor has confused, I believe, is the term capacity. As a member of the public we all have certain rights and duties. In the private realm we all have differing rights and duties. And one is not a member of the public for every single aspect of our life, from birth to death. There are many instances when one is not a member of the public. Public groups -- your own private residence for example, you are not a member of the public when you are in your own home. I am not sure where the Crown, what authority he relies upon for the fact that -- for his allegation that simply because we live here we are all part of the public for all intents and purposes in every aspect of our life in every capacity. I am unclear where he gets any authority for that type of argument.

He further argues that you can't agree out of the legislation. I know I addressed it earlier, I will just add one point. Basically you can't simply change the words to describe the same set of facts. What you can do is change the facts. And that's what

Mr. Kennedy has done and he is entitled by law to change the facts. To put it more appropriately, to avoid the legislation.

5 I'd like to point out at page 49 of the transcripts -  
- and just to clarify I don't anticipate being more than about another seven to ten minutes Your Honour.

THE COURT: No, that is fine. Take as long -- we have the rest of the day, so I am fine.

10 MR. LINDSEY: Okay.

THE COURT: Sorry, page?

MR. LINDSEY: Seven -- or page 49, I am sorry.

THE COURT: Thank you.

MR. LINDSEY: Of the transcripts.

15 THE COURT: Yes.

MR. LINDSEY: The prosecutor continues to reference Mr. Kennedy as the proprietor. However, the evidence shows that that is not the case. Mr. Oglaza.

20 THE COURT: I am sorry, you just better tell me -- sorry, who -- it does not say at the top who the witness is. Who is the witness?

MR. LINDSEY: This, I believe, is still Mr. Oglaza. Yes, it is.

THE COURT: Okay, thank you.

25 MR. LINDSEY: And he states starting at line seven to 18,

"QUESTION: Would you agree....at the time you did not know who the proprietor [is]?"

And he said,

30 "ANSWER: [Yes, I don't]....I had contradictory information."

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And he goes on to admit he didn't know who the proprietor is. And continuing....

5 MR. O'SHAUGHNESSY: I have to stop here for a moment. I cannot allow that to pass when I know a trial counsel that that was expressly admitted.

MR. LINDSEY: Um....

MR. O'SHAUGHNESSY: And to suggest that I have misled....

10 THE COURT: Wait until I hear the rest of the submissions and then I will....

MR. O'SHAUGHNESSY: I am not going to re-rebutt, is just....

THE COURT: Mr. O'Shaughnessy, I am going to hear the full submissions...

15 MR. O'SHAUGHNESSY: Thank you.

THE COURT: ...on this issue because I am not sure where its going and then we will come and deal with it.

MR. O'SHAUGHNESSY: Thank you.

20 MR. LINDSEY: With respect, Your Honour, this was an admission by the prosecution's witness. This was an admission by Mr. Kennedy at this point. Um, I refer to point out....

25 THE COURT: Okay, I just want to make sure I have understood, I thought there was an admission at the start when I read the transcript that it was admitted that Mr. Kennedy was the proprietor of the particular establishment.

30 MR. LINDSEY: Mr. Kennedy has informed me that -- can I pause for one second Your Honour.

THE COURT: Okay.

MR. KENNEDY: We won't be but a moment, just  
for the Smoke Free Ontario Act.

5 THE COURT: I guess the question is, it is s.9  
that, you know, some of the charges are under  
s.9(6)(c), (d) and I think its (a), and so s.9  
the Smoke Free Ontario Act uses the expression  
proprietor of an enclosed public place.

MR. LINDSEY: Yes. And....

10 THE COURT: So are you taking the position that  
Kennedy was not the proprietor?

MR. KENNEDY: Um, Your Honour....

THE COURT: Well, I may hear from -- I will  
hear from one person.

15 MR. LINDSEY: With respect, it is Mr. Kennedy's  
position that minimally there may be a divergent  
opinion on the definition of proprietor, and I  
point out in the transcripts where that was re-  
to by him in his counsel with Mr. Oglaza. I po-  
Your Honour, to page 49 for example, Mr. Oglaza  
20 comments that he wasn't sure who the proprietor  
If I can just turn the page, page 50, starting  
line 6 Mr. Oglaza says,

25 "ANSWER: Well according to the first statement  
Mr. Kennedy I received on the 8<sup>th</sup>, he confirmed  
the -- well, he said he was the operation manag-  
charge of the premises. I assumed that that me-  
definition of proprietor and allowed me to pro-  
with charges later on. But then there was some  
information that it might still be run by Mr. K.

30 And finally, I will direct your attention to pa-

of the transcripts, line 8 to 18,

"QUESTION: Mr. Kennedy said that it was a not profit organization.

ANSWER: Yes, he did mention that.

QUESTION: Mr. Kennedy also gave you the number that corporation?

ANSWER: Yes, I received the number....

QUESTION: And so you were well aware that Mr. Kennedy was indicating that the proprietor of the was Ontario Number 0-0-1-6-0-3-4-3-7...."

And Mr. Oglaza says, "Oh, yes.", at line 18. So there is an admission in the evidence that the proprietor was the actual numbered company, not profit company.

THE COURT: I am trying to understand where you going with this.

MR. LINDSEY: Um, the charges duly pursuant to section you quoted against the proprietor.

THE COURT: Yes.

MR. LINDSEY: And the prosecutor has attempted throughout the proceedings today to classify Mr. Kennedy as the proprietor. The actual proprietor the not for profit company.

THE COURT: But there is an admission at the start that Mr. Kennedy -- I mean, the trial did not proceed as I read the transcript that there was an admission clearly of....

MR. LINDSEY: And Mr. Kennedy's belief of proprietor simply meant caretaker, which is what he told -- which is what he told Mr. Oglaza, and obviously there was a difference in interpretation on the definition.

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of proprietor. Mr. Kennedy believed that he was simply the caretaker or the person looking after the place and that is what he based the admission on, if there was an admission, I don't have that in front of me.

THE COURT: If you look at....

MR. LINDSEY: Mr. Kennedy says there was an admission, so.

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THE COURT: There was an admission, yes, at paragraph

MR. LINDSEY: Yeah.

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THE COURT: Sorry, page three, as I am -- there may be others, but it says, starting at line 12, page three of the transcript, "Your Honour will note that this issue has been made in Clause 1 that Mr. Kennedy is the proprietor under the legislation."

20  
MR. LINDSEY: Yes, and his interpretation of that was that proprietor simply meant caretaker or the person looking after the place. The actual proprietor, which Mr. Oglaza even admits, was the actual numbered company.

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THE COURT: But the charge, as I read s.9(6), one of the elements is you have to establish that Mr. Kennedy is the proprietor.

MR. LINDSEY: Yes.

30  
THE COURT: As I am understanding this whole trial did not proceed on that issue because that was agreed to. It proceeded on the issue of was it an enclosed public place or not, that was the issue. You are now raising an issue that was not part of the trial, as I am understanding was acknowledged and, you know, was

not part of the factum or any of the submissions, so I am just -- that is why I am asking you, I wanted to hear what you are saying, so where are you going?

5 MR. LINDSEY: Okay, basically at this point I will agree that there is a divergence of opinion and I will move on.

THE COURT: Okay.

MR. LINDSEY: I'll move on.

10 THE COURT: Let me ask you this question so I can -- I want to ask it anyway to make sure that there is no misunderstanding.

MR. LINDSEY: Right.

15 THE COURT: That the whole trial proceeded on the issue of whether or not it was an enclosed public place or not, that was the issue. When the Justice of the Peace found that it was an enclosed public place then all the other required elements of the offences were consented to and were met. Am I correct on that?

20 Mr. LINDSEY: It would be. Mr. Kennedy did consent to the other -- the other essential elements, yes.

THE COURT: Yes. I just want to be clear...

MR. LINDSEY: Yes.

25 THE COURT: ...that we are proceeding solely on the basis as the trial proceeded on whether or not the Crown was able to provide sufficient evidence to establish that it was an enclosed public place or not, and once they did that all the other issues that are set out in various charges had been met, had been consented to?

30 MR. LINDSEY: Yeah. The prosecutor does repeatedly

5 refer to the term proprietor and obviously there was just simply a divergence of opinion on what that meant when Mr. Kennedy agreed. The fact is it is on the Record he agreed to it and we are prepared to move on.

THE COURT: Okay, thank you.

10 MR. LINDSEY: I would like to point out, however, that what I just said at page 55, it was a not for profit organization. That I would like to clarify, that it was not a for profit corporation where it could be possibly presumed or inferred that it was a business to make money which therefore would have been open to the public. It was just strictly a not for profit organization and there was a not for profit organization number that was admitted into the Record at page 55.

15 THE COURT: How does that impact then on whether or not it's the public are ordinarily invited or permitted access?

20 MR. LINDSEY: Well, a registered public corporation for example, any restaurant, any store, for example, may be able to presume that its open to the public. They are a business to make a profit, they are open to the public to come in otherwise how would they make a profit. And the not for profit company, they're not there to solicit the public to come into their premises the way the public is determined as being all of everybody in society. That's not what a not for profit group is there to do. And if it clarifies, I can direct your attention to a tab in the prosecutor's Book of Authorities at tab 8, maybe

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