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I can clarify it somewhat.

THE COURT: Is this the *Club 924 Social Club*?

MR. LINDSEY: Yes.

THE COURT: Thank you.

MR. LINDSEY: On page four.

THE COURT: Yes, thank you.

MR. LINDSEY: The trial judge said,

"It is the conclusion of this court that the presentation of this establishment as a not for profit operation that does not fall within the provisions of the charging Act is a bold faced attempt to circumvent legislation."

With respect, I don't think that necessarily applies in the sense that there is not an attempt to circumvent legislation here, but I think it applies that if one is a not for profit operation that you would fall outside the parameters of the legislation, and in effect what the judge is saying here is you didn't do it good enough. In our particular situation, as I've noticed in my written argument, there is nothing else Mr. Kennedy could do. He has complied with everything that could be done to be a not for profit private club, private organization that is outside the boundaries of the legislation. And I think that case recognizes that one of the elements is being not for profit. And if you were not for profit you would fall outside the legislation.

THE COURT: So what you are saying is you are advancing the proposition as you have been

throughout, that there is room here for a private club?

MR. LINDSEY: Yes.

5 THE COURT: And when the court is to decide what is the appropriate indicia you look at, you look at a number of factors, the membership, the rules, who is targeted to, those types of things, the people. And also you look at -- one of the factors you look at is whether or not it is for profit or not, that a factor to be looked at as well.

10 MR. LINDSEY: Yes.

15 THE COURT: As opposed to saying that all non-profit clubs, like every service club that we know would not meet the definition of -- at their various halls of being an enclosed public place?

MR. LINDSEY: Its one factor to be considered.

THE COURT: One factor to be considered?

MR. LINDSEY: That's correct.

THE COURT: Okay, thanks.

20 MR. LINDSEY: I mentioned earlier the fact that there is no prohibition for somebody setting themselves up as a private club to be outside this jurisdiction. The principle came to me a while ago during the break, I believe its called not  
25 fundamentally illegal. In other words there is no prohibition for doing so, and that was in the Ontario Court of Appeal in the *Thompson* case, *Thompson v. Thompson*, that that provision was upheld. And I apologize, it just came to me during lunch what the principle was, its not fundamentally illegal for Mr  
30 Kennedy to set himself up as a private corporation

outside the jurisdiction of the law.

5 If I can direct your attention in response, one of my  
final points, at page 86 of the transcripts Your  
Honour. Mr. Oglaza was also in the capacity of a  
Health Inspector and at page 86 starting at line 17  
- whose evidence is this? I'm sorry?

MR. KENNEDY: Myself.

MR. LINDSEY: This is Mr. Kennedy's evidence.

10 "ANSWER: I contacted the counsellor for the  
establishment, which is Mrs. Dawn Quinn. I asked her  
about zoning permits for that location to operate as  
a private club. Mrs. Quinn informed me that there  
15 were no permits required for private clubs and she  
would get an assistant of hers to check into the  
zoning and call me back. She said there were no  
problems considering the facility was approved.  
Further to that, I spoke over the phone, not in  
20 person with Mrs. Staples (sic) -- not in person this  
time with Mr. Dennis Staples, who is the Town's Mayor  
and I was just getting second verification in the  
Town of Smiths Falls, if you want to operate as a  
private club you do need a food premise -- I'm sorry  
do you need a food premise licence or a meeting hall  
25 licence. The only question he had was, are you going  
to be serving the public at any time? And I said no.  
He said no permits are required."

30 Mr. Kennedy had no permits and no charges were laid  
against him for not having those permits by Mr.  
Oglaza. Which, in our respectful submission, is a

recognition that it was private, otherwise why did not Mr. Oglaza, who had the power to do so, lay charges for not having food licence as required by legislation?

5 THE COURT: It could be it is different legislation. I mean, it could be different requirements in the legislation than there is in the Smoke Free, and I see that I note that at that point in time Mr. O'Shaughnessy was not objecting to the evidence because this is all hearsay, but in any event -- and understand as well, this is reply, okay? This is not to bring up new points that we have not heard from before because then in fairness Mr. O'Shaughnessy has not had a chance to respond to them. You know, this is just to deal with issues that....

10 MR. LINDSEY: Okay.

15 THE COURT: You know, I have heard Mr. O'Shaughnessy's position, this is really to respond to his position and show me where he is in error in his submissions.

20 MR. LINDSEY: I guess my intent was in response to Mr. -- the prosecutor's comment that Mr. Kennedy was serving the public and it was basically in response to that, to show that he was not serving the public and that would have been in response to Your Honour.

25 THE COURT: Okay.

30 MR. LINDSEY: In summary then -- oh, I am sorry, there is one other point. The Crown referenced in the Smoke Free Ontario Act at tab 1, page 6.

THE COURT: Yes.

MR. LINDSEY: This is restricted exclusively to two separate areas, bar and restaurant patios, and I point out the opening paragraph,

5 "A place or area is prescribed if it meets all of the following conditions...."

10 And this section does not go and list every single available option or possibility that could have existed, its lists two: bar and restaurant and smoking shelters. And I point out that the definition at paragraph one is virtually the same as in the Act itself, and the word is it has to meet all of the following conditions, not just one or two of them, all of them have to be met. And its got no relevance to the issue that's in question here. Mr. Kennedy's private club was not a bar or restaurant, nor was it a smoking shelter, and quite clearly it would not apply in any event. And that goes back to my previous argument that the legislation is a  
15 restriction on uses that are already permitted by law and therefore is interpreted restrictively as the word means is in there, implies.  
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25 So to summarize, Mr. Kennedy has attempted for some time now to establish a private place where him and members of his private club can socialize and do certain things, one of those includes smoking. To read the legislation in the manner advocated by the prosecution in our respectful submission would take us back to the stone age days when might is right and  
30 whoever owns property can just come in and do what

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they want. I don't think the legislation, and in my respectful submission, is a legislation is not worded in a manner that can permit such a broad interpretation when the word "means" is used therein and to interpret it in the manner advocated by the Crown is non-supportable. It's interesting he mentions that there is no legislation -- you mentioned earlier this may be a precedent setting case -- and under that context one has to look at the legislation to see, did the legislature from the words that are in there attempt to make it apply to every single establishment out there except one's home? And if that was the case I would like to see where the words are that could bear it in the legislation, because respectfully, the words are not there that could bear that interpretation. And it cannot be deemed into the legislation to exist.

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Mr. Kennedy respectfully urges that the decision of the Justice of the Peace be overturned, that he be acquitted on the charges and a finding that his private establishment, his private club was outside the definition of an enclosed public place as defined in the legislation.

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Subject to any further questions I have no further submissions, I would just say one thing. Mr. Kennedy has informed me that on a personal basis he would like to make some comments to you. I have not vetted or understood anything that he is saying to you. He asked me if he could make some comments to you and

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mentioned to him he would have to seek your permission and he simply asks your permission if he could make some personal comments to you. Again, I have not seen them, I just point that out to you. I leave that to Your Honour's discretion if you wish to hear that. I myself, subject to your questions, I am finished.

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THE COURT: Mr. Kennedy, I am very reluctant. I mean, you have Mr. Lindsey here assisting you, and I will say -- and one of the reasons at the start when I was -- when the question about his qualifications, I had read his written argument and quite frankly I was quite impressed by it, so that was one of the reasons that I had a sort of short discussion about whether or not he was qualified to act and he has made excellent submissions on your behalf today, but I am not -- so I am -- this is not, I mean, this is not a soapbox opportunity. I do not know if there is something that Mr. Kennedy -- sorry, that Mr. Lindsey has not been able to say in terms of the submissions, but I am not really interested in anything other than that, other than submissions that go -- I mean the real issue -- and the issue, although I had expanded it to ask Mr. O'Shaughnessy how wide is this legislation, that is really not the issue that is before me. The issue before me is on the facts of your case, you know, is the decision of Justice Bartraw, is it justifiable or not in terms of the facts or is there an error in law on the particular facts of your case. I was asking the wideness, the legislation submission, just from the

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perspective I was interested in his opinion on that, though it does not really -- that is not what I am deciding at this point in time, I am only deciding the particular facts of your case. So what is it you want to tell me that is going to relate to the appeal?

MR. KENNEDY: Well, I understand and I thank you for hearing this today. I just -- this has been a very long and painful process for me and I feel that there may be one or two things that have not been touched that may not relate directly to as Dave has done today, I believe, an excellent job on reporting the law on this, but I think that he may have missed on....

THE COURT: Okay, well, what I am going to do is I am going to give you a few....

MR. KENNEDY: One moment of time would....

THE COURT: I will give you a few minutes to speak to Mr. Lindsey about it, okay? And let me know -- now -- because first of all you may be saying something that damages your case and not assist your case.

MR. KENNEDY: Right.

THE COURT: So I would like you to go through Mr. Lindsey and I am going to -- I am only going to hear through Mr. Lindsey. You may speak to him, there may be further things that he is prepared to say and I will give you a few minutes to do that.

MR. KENNEDY: Well, we wouldn't even require a few moments. I can quickly....

THE COURT: I will just wait out back here.

MR. KENNEDY: Oh, no need for you to leave, Sir.

THE COURT: I am because I do not want to be -- I do not want to be overhearing things I should not be hearing, but I will just be out back, let me know.

MR. LINDSEY: Thank you, Your Honour.

**R E C E S S**

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

MR. LINDSEY: Thank you, Your Honour.

THE COURT: Yes?

MR. LINDSEY: I have talked to Mr. Kennedy. I will just point out that Mr. Kennedy had some excellent comments that he made to me, however, it is my view that they would not add materially that to what's before the court so our position is essentially over today. He did have some good comments, but we will leave it at that.

THE COURT: Okay.

MR. LINDSEY: And I would just say, like myself to say thank you for your kind words today and for your patience in respect to us today Your Honour. Thank you.

THE COURT: Thank you. I am going to reserve on this matter. I assume it was probably obvious to counsel this is an interesting case and I am understanding that there is not any guidance for me in terms of other courts that have interpreted this other than in Provincial Offences court and I am probably going to order a transcript of what I heard in terms of submissions so that I do -- because I

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want to have an opportunity to fully understand all of the submissions that have been made and make sure I do justice to them in terms of giving a decision. So, my first question is going to be for the monitor, for the reporter, about how long you think it would take for me to get a transcript.

COURT REPORTER: That I am going to have to check.

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THE COURT: Probably a couple of weeks anyway I would think. Okay, so if we say about a month from today is probably an appropriate day to give a decision, which would take us -- I am going to suggest around the 11<sup>th</sup> of February. Normally I deal with these on a Monday, but I am thinking I might not -- which is our plea day and I will deal with then, but I am actually thinking it might be -- there is a lot of people here and I am not sure how long I am going to be. It might be better to deal with this on another day of the week, that if I deal with it at nine o'clock and I can give my decision before I start court at ten.

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MR. O'SHAUGHNESSY: Is Your Honour of the view that you must give your decision orally, or is Your Honour of the view that you can also give it in a written manner?

THE COURT: Typically -- that is a good question, I have never -- typically I always give them orally and I understand some judges will give them in these cases just provide their reasons, is that....

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MR. O'SHAUGHNESSY: I am in Your Honour's hands, I just draw that to your attention.

THE COURT: Yes. Yes.

MR. O'SHAUGHNESSY: However you feel should proceed....

THE COURT: At this point in time I think I am probably going to give it orally.

MR. O'SHAUGHNESSY: Yes.

THE COURT: What I would like to do is I am going -- my schedule is on my computer in my office, I am going to go down and then communicate through the Clerk and work it out with counsel in terms of what dates are available. I am thinking the week of the 11<sup>th</sup> of February.

MR. O'SHAUGHNESSY: The week of the 11<sup>th</sup> would be a particularly good week for me, but the week of the 18<sup>th</sup> would.

MR. LINDSEY: With respect, Your Honour, I was going to say likewise, the 11<sup>th</sup> I would not be available. The 15<sup>th</sup> I would be or the 18<sup>th</sup> and 19<sup>th</sup> I would be available. The rest of the week I am unavailable with respect, I live out of town.

THE COURT: Sorry, so Mr. O'Shaughnessy, you are saying the week of February the 18<sup>th</sup>?

MR. LINDSEY: Yeah, I'm available the 15, 18 and 19.

MR. O'SHAUGHNESSY: I'm available the 15<sup>th</sup> and 18<sup>th</sup>.

THE COURT: Okay.

MR. LINDSEY: I just point that out Your Honour because I have to fly in for it, and I am here on other matters at that time so that is why I am just trying to squeeze it in at that point.

THE COURT: Okay, I will be coming back up to actually adjourn it over to the date and I am just going to....

MR. LINDSEY: Sure.

THE COURT: I will confirm with my computer and  
schedule and I will call up to you and you can s  
to counsel.

MR. O'SHAUGHNESSY: Thank you.

MR. LINDSEY: Thank you, Your Honour.

**R E C E S S**

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

THE COURT: Okay, in terms of dates then, bear  
me, this may be more trouble than it is worth.  
Okay, just give me a moment here to hook it back  
So I was suggesting the 21<sup>st</sup> of February.

MR. O'SHAUGHNESSY: That would be agreeable.

THE COURT: And Mr. Lindsey, how is that with y  
schedule?

MR. LINDSEY: Unfortunately, Sir, I am schedule  
be in Port Huron, Ontario on the 21<sup>st</sup> and 20<sup>th</sup>. U  
can -- anytime after that is fine for me.

THE COURT: Unfortunately, my schedule gets  
difficult after that. The week before the week  
the -- unfortunately the 18<sup>th</sup> is a statutory holi  
now on February the 18<sup>th</sup>.

MR. LINDSEY: You know what....

MR. O'SHAUGHNESSY: Oh, is that a holiday now?

THE COURT: That is the new....

MR. LINDSEY: Your Honour, we will have to rebo  
the flight, but that is fine, if you want to mak  
before the 14<sup>th</sup>, or on the 14<sup>th</sup>, then I will -- oh  
shoot, I can't. I can't.

THE COURT: Okay, what I may well do is -- how far are you coming from Mr. Lindsey?

MR. LINDSEY: I am coming from out west.

5 THE COURT: Okay. Maybe I will give written reasons and that will just save that whole problem of you having to come back and do that. I think that it is probably -- and I am going to aim for by the 21<sup>st</sup> of February in terms of having the written reasons...

MR. O'SHAUGHNESSY: Very good.

10 THE COURT: I think it is the easiest way to do it, do it in that manner.

MR. LINDSEY: I offer my apologies, I just....

15 THE COURT: No, that is fine. No, I try to convenience people as much as we can in these situations. Okay, so that is it then, we are finished for the day?

MR. LINDSEY: Yes, Your Honour.

MR. O'SHAUGHNESSY: Yes.

20 THE COURT: Okay, just close court.

**M A T T E R   A D J O U R N E D**

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5 I, LORI JELEN, certify that this document  
is a true and accurate transcript of the  
recording of Bev Hodgins, Court Monitor,  
in the matter of R. v. Michael Kennedy,  
in the Ontario Court of Justice held at 43 Drummond  
Street East, Perth, Ontario, taken from  
10 Recording No. P2-02-08, P2-03-08 and  
P2-04-08, as certified in form 1.

Date: March 22, 2008



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L. Jelen

Court Reporter

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