

ONTARIO COURT OF JUSTICE  
(Provincial Offences Act)

HER MAJESTY THE QUEEN

V.

MICHAEL KENNEDY

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**EXCERPT FROM PROCEEDINGS  
ON APPEAL  
COUNSEL SUBMISSIONS**

**BEFORE THE HONOURABLE MR. JUSTICE S. MARCH**

**on January 3, 2008, at PERTH, Ontario**

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CHARGE:

- Section 9(6)(c) Smoke Free Ontario Act - Fail to Post Signs
- Section 9(6)(d) Smoke Free Ontario Act - Fail to Comply
- Section 9(6)(a) Smoke Free Ontario Act - Fail to Comply
- Section 14(16) Smoke Free Ontario Act - Obstruct Inspector
- Section 9(1) Smoke Free Ontario Act - Smoke Enclosed  
Public Place

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APPEARANCES:

M. O'Shaughnessy, Esq.  
M. Kennedy, Mr.

Counsel for the Crown  
Self-Represented

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COUNSEL SUBMISSION

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Transcript Ordered

Transcript Completed

Ordering Party No

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THURSDAY, JANUARY 3, 2008:

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

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THE COURT: Yes?

MR. LINDSEY: Yes, I've had discussions with Mr. Kennedy and discussed his options that are available and we are prepared to proceed.

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THE COURT: Okay, on the basis of the transcript is accurate?

MR. LINDSEY: Yes, Your Honour.

THE COURT: Thank you.

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MR. LINDSEY: Well, on the basis of the transcript we have before us today, yes. We can't confirm anything so, we just....

THE COURT: Okay.

MR. LINDSEY: We're prepared to go on the basis of what is before the court.

THE COURT: Okay.

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MR. O'SHAUGHNESSY: Yes, Your Honour, I would point out that in the application that was before you on November the 7<sup>th</sup>, that the allegation in paragraph seven of that application was that there was an erroneous....

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THE COURT: Just let me get it in front of me please.

MR. O'SHAUGHNESSY: Yes, this is the...

THE COURT: This is the....

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MR. O'SHAUGHNESSY: ...the Motion Record of Applicant. Your Honour, I have the part that I am going to refer to, I will give it to Madam Clerk.

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And the part I wish to draw your attention is that in the application that was before you on November the 7<sup>th</sup> it was to correct an error, the word erroneous is used, you can see that. That we attended to the court on November the 14<sup>th</sup> and that on that date we listened to the questioned part, and it was confirmed that it was accurate, that there was no error, and Mr. Kennedy, in the transcript that I have provided to you, confirmed that it was accurate and that there was no need to hear the tape today, there was going to be no further application brought. And then today, in the face of the court, Mr. Lindsey says to Your Honour that there was tampering, that the tape was tampered with or that there was dubbing when it was done.

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So we move, Your Honour, from an application before you dealing with an error in transcribing to an allegation that is -- you cannot think of more serious allegations than tampering and dubbing of court records. That is what he is saying. And in my respectful submission, either he says that didn't occur, or if it did occur, then we have some serious -- it didn't occur. I mean, I remain mute in terms of the transcript. The transcript is accurate. That the allegation is egregious and can't be lightly made. And if he says he is proceeding today on the transcript, he's proceeding based on a transcript that is accurate. Thank you.

THE COURT: Okay, well that is what I am understanding, we're proceeding today on the basis

the transcript is accurate, is that correct Mr. Lindsey?

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MR. LINDSEY: Mr. Kennedy has advised me that he is unable to wait any longer for this to be heard or the consequences, the financial -- so we will -- we will prepare -- sorry, we will proceed on the basis that its accurate.

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THE COURT: I accept what you have said and you are proceeding on the basis the transcript is accurate. So then if we could then commence with submissions please.

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MR. LINDSEY: Good morning, Your Honour. This is a case with respect, Your Honour, that is very fact specific and accordingly, I will deal for a few minutes with the factual underpinning of the case. And the way I have outlined it is by way of the evidence of the witnesses beginning with Mr. Oglaza, along with the witness of Mr. Decoste, Mr. Dunn, on behalf of -- is it accurate to refer to him as the Crown, would that be accurate?

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THE COURT: Um....

MR. O'SHAUGHNESSY: I would prefer to be called the prosecutor.

THE COURT: The prosecutor, okay. Thank you.

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MR. O'SHAUGHNESSY: Thank you.

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MR. LINDSEY: Okay. I will refer to you as the prosecutor then. And then finalizing with the evidence given by Mr. Kennedy. Mr. Oglaza was an official for the Health Unit with the Department of Ontario, entrusted with the solemn power of enforcing legislation questioned here.

THE COURT: I do not like to interrupt, but what I would like to get from you, and I have read your factum.

MR. LINDSEY: Thank you.

THE COURT: Your written argument. Just give me an overview of what you see the issue is and then you can go -- that will help me in terms of hanging the factual aspect to it. As I have read the materials, I mean, it's the issue of the definition of -- I have read it so many times I hesitate to....

MR. LINDSEY: Its at paragraph 40 of our factum.

THE COURT: Thank you. It's the enclosed public place.

MR. LINDSEY: Yes, Your Honour.

THE COURT: That is the issue that we are dealing with, and it is going to be your position -- and you have also reproduced for me in here the -- what the powers of the court is on an appeal under the Provincial Offences Act, so you are aware of what tests have to be met in terms of....

MR. LINDSEY: Yes.

THE COURT: If you wish to be successful in your appeal. You have made a number of other submissions in terms of in your documents about a bias issue and some other issues that you have dropped in to -- just so I am clear at the start, what you are going to be submitting today is the same thing that is really -- that is in your written argument is what you are going to be....

MR. LINDSEY: Yes, and of course in response to the prosecutor.

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THE COURT: Okay. Yes, I have not had a chance to read that, but in the written argument aspect of it, I mean, I have read the evidence. I guess what I am trying to say is you do not -- do not read to me your written argument.

MR. LINDSEY: Yes.

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THE COURT: You can sort of highlight or summarize evidence. I have a sense that, and maybe I am mistaken, that the evidence was fairly straight forward in terms of what the facts were. It's the issue as to, you know, whether or not that meets the definition or not of enclosed public place and I guess it is really a different test, as you know, from my perspective. I am not the trier of fact, I am the appeal judge, so it is a different test that I have to apply to it as opposed to what the trial judge applies to it.

MR. LINDSEY: Okay. I, um....

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THE COURT: I am not trying to interrupt you again, but if you can just kind of give me a quick overview and then focus...

MR. LINDSEY: Sure.

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THE COURT: ...on the points you wish to focus on, but as I say, from a factual basis it strikes me that a lot of the stuff is being agreed on in terms of the facts.

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MR. LINDSEY: I think for the most part the facts can be agreed on. I only intend to highlight a certain number of facts, and basically are that an investigation was done by Mr. Oglaza. He admits that Mr. Kennedy was diligent in ensuring that only

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members could attend into the club. There was five conditions that all members had to meet in order to be a member of the club. Mr. Kennedy did do some restrictive advertising. As I point out in my argument, approximately at paragraph 37, roughly 20 to 25 percent, or if I can rephrase that, roughly 75 to 80 percent of the population are non-smokers. So Mr. Kennedy's advertising was directed toward a very restricted portion of society, approximately 20 to 25 percent of the people who are smokers.

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At the location itself there was a vestibule where people would have to come through and a registration desk was set up at the front. Nobody could get in to the building without being a member, having agreed to the requirements and they were just in the process of setting up the computer system with photo identification so that, similar to a driver's licence, you could not get in unless you proved that you were a member and had agreed to those.

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Warning signs were posted by Mr. Kennedy on the front, advising that it was a club and the agreement the conditions that had to be met. Noteworthy is that Mr. Oglaza was refused entry on several occasions because he was not a member of the club. At no time in any of the evidence, Your Honour, was any evidence provided that any member of the public was seen in the club at any time.

With respect to the evidence of Mr. Decoste -- I'm on

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page four of my argument -- the only thing I wish to  
qualify about that is that -- and I will get into it  
a little into my argument on the fixed and certain  
aspect of it -- was that there are discrepancies,  
even among their own people, as to what constitutes  
an enclosed public place and the facts required to do  
that. Even within their own organization nobody  
seems to know.

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Mr. Dunn was also present with Mr. Oglaza and his  
primary evidence is that whether the property is  
leased or not or owned by Mr. Kennedy is of no  
consequence.

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The primary evidence is that of Mr. Kennedy himself.  
If I can direct your attention, Your Honour, to  
paragraph 29, I will summarize this very quickly.  
Smoker's Choice, Non-Smoker's Choice is the name of  
the private club. It has an executive of three  
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members, a board of directors and a local board for  
the specific area. It has a charter with mandatory  
rules, regulations and a constitution and by-laws.  
The private property was leased, it was never open to  
the public. As I said, it was not a sports bar. At  
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paragraph 31 are the five conditions of being a  
member that were required. The evidence shows that  
Mr. Kennedy had refused entry to people even if they  
disagreed with one of those requirements. They were  
not allowed entry. They had to agree to all five of  
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them.

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At paragraph 35 I wish to point out the Crown's recognition of the logic of Mr. Kennedy's selective advertising to smokers only. And the Crown -- I'm sorry, the prosecutor stated at the previous trial this makes sense. So there has been a recognition by the prosecutor that Mr. Kennedy's advertising directed towards smokers was legitimate and logical.

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The issues then turn upon whether Mr. Kennedy's private establishment falls within the definition of enclosed public place, and I move onto the next part which will be my argument in this matter.

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Mr. Kennedy has been trying for a number of years, this is not the first time he has been in court on this matter, to attempt to get a private establishment for private members only where they could socialize and have their private group, including the smoking. And in concert with other cases this is a step where Mr. Kennedy has complied with all the comments of other Justices of the Peace in previous courts who have set out requirements necessary to be a private club.

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At paragraph 44, I point out that the essential elements of this offence that there has to be a place, the place has to be enclosed and Mr. Kennedy consents to those two. Everything turns on point C, which is the definition of that enclosed public place within the Act. And at paragraph 46, I just outlined the essential elements of that point. There must be  
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5 a public, the public must be ordinarily invited  
the place, expressly or by invitation, or, an  
emphasize the word "or" as opposed to "and",  
public is ordinarily permitted access to the  
expressly or by invitation. And there is a  
difference between being invited and being pe  
access.

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at the definition which I have outlined in pa  
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has the definition. Accordingly, its to be g  
restricted application as opposed to the word  
"includes", which is, as Your Honour is aware  
15 be giving it a much broader, possibly unlimit  
application. The legislature as you know is  
to know its intentions when its passing legis  
The word "means" was put in there for a reaso  
with respect, it implies an obligation, statu  
20 to construe the definition in a restrictive m  
And I will get into the reasons for that shor

25 The Justice of the Peace's findings that at p  
48, "...whether you're signing a membership c  
not, you are still a member of the public..."  
error. Once you have signed the membership c  
are no longer a member of the public, you are  
part of a private club. And saying that it a  
to all clubs basically shows me that, in my  
30 interpretation, that the Justice of the Peace  
not understand this definition. And I will p

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that out in another case shortly to substantiate that comment. It's a bit of an oxymoron that by signing a membership card you are still a member of the public. You can't be both. There can't be membership at the club and a member of the public at the same time, and there has to be a dividing line for the law to be fixed and certain.

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I emphasize one of the duties of being a member is that they have a duty to keep the public out. And I don't think any public restaurant or any public facility imposes any duty upon its members to make sure no other member of the public can enter its establishment and I think that's a significant criteria that must be considered.

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The word "public", as I have outlined at paragraph -- on page 10, basically refers to everybody, all the public, its not used in a restricted capacity. And its important that we deal with the public as a whole. And the Crown's definition that is provided basically mirrors mine. It has to deal with the whole public. And the Justice of the Peace found at paragraph 52 of my argument, "...any member of the public...", he said, "...that isn't going to agree with these rules, can become a member...". With respect, Sir, that comment is factually unsupported by the evidence. If Your Honour reads the evidence, you will find there is no evidence -- I'm sorry, the transcripts -- you will find there is no evidence that any member of the public has ever been accepted

into the club or appeared in the club.

Significantly, it was even put on the record that no guests are allowed in the club, which was something that was found in some of the other court cases.

Toronto has its own similar type of by-law -- and I'm on page 11 of our argument right now. Admittedly its not identical. However, the court held with respect to this case, which I believe was the....

THE COURT: The *Playhouse*....

MR. LINDSEY: Yes.

THE COURT: The *Original Playhouse Café*.

MR. LINDSEY: Thank you, yes. That one of the significant aspects to determining whether a club is public or private is the degree and the nature of advertising. Now, at this point, whether public is accessed as of right or by invitation or permitted access, that part of the definition differences between the Toronto by-law and Ottawa are irrelevant. The difference is, is it a public place.

THE COURT: Sorry, just give me that sentence, I just missed the first part of that.

MR. LINDSEY: Sure. We're focussing here at this point on that there is a difference between the Toronto and Ottawa -- or the municipal by-law here. And where the Toronto by-law says, "...has access as of right, express or implied.", and the by-law in question here says, "...ordinarily invited or permitted access.", in determining whether it's a public place, nothing will turn on that aspect of it in the sense that advertising is a very important

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aspect of it. And the prosecutor's recognition of Mr. Kennedy's restricted advertising, there was no flyers put on public poles, no newspaper advertisements, no television advertisements, this sort of thing, it was simply walking down the street, seeing people who smoked, asking if they wanted to join the club, and through family and friends if they wished to join, and essentially that was it.

The karaoke function, however, that was at issue in this club was admittedly advertised to the public. And the public -- or sorry, the restaurant was open outside of hours as a daily restaurant as well. And that is not the case here. The club's premises is never open to the public in this particular case, its always private. And what the learned Justice of the Peace found that in determining a public place the primary consideration is contextual, i.e., its conditioned upon its intention of use. And at paragraph 58 I've outlined his comment on that where he says the "...function will depend upon whether the event has been advertised to the general public." And again, there is no evidence on the record that that has been so in this particular case.

Moving on to paragraph 63 of our argument, I turn to the word -- meaning of the word "ordinarily", which is defined here and the Crown has defined it at paragraph 21 of his argument with a similar meaning. The words "ordinarily invited" have a different meaning than permitted access, which is why the word

R. v. M. Kennedy  
Counsel Submissions

5 "order" is used in there. Ordinarily invited, if I can turn your attention to paragraph 65, means that there has to be an intention by the owner to solicit or advertise attendance upon the premises. And I've given a definition of the word "invite" in that paragraph: to request courteously to come, to solicit courteously. And when the terms "ordinarily invited" are utilized there has to be evidence upon the record that somebody advertised to the entire public, going back to our definition of public, not restricted portion of it.

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15 Now, the words "permitted access" have a different meaning. At paragraph 67 I begin to get into that aspect. And what that means as opposed to the advertising aspect, ordinarily permitted access means the public can just show up at the door and walk in and they are permitted access, ordinarily as a customer they just walk in and in they come. So where one is devoted to the advertising context, the other is devoted to specifically even if the people, general public, doesn't hear your advertising if you allow the public to just walk in its still considered a public place.

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30 And Mr. Kennedy's evidence, unrebutted upon the Record, demonstrates that the public, not only was not ordinarily permitted access, they weren't permitted access at all. And every member had an obligation to make sure that people, members of the public did not enter the premises. So his