

COURT OF APPEAL FOR ONTARIO

BETWEEN:

MIKE KENNEDY

Appellant

v.

LEEDS, GRENVILLE AND LANARK DISTRICT HEALTH UNIT

Respondent

RESPONDENT'S FACTUM

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- and -

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RESPONDENT'S FACTUM

PART I – RESPONDENT'S STATEMENT AS TO FACTS

1. The Appellant was charged with, and convicted of, various violations of the *Smoke Free Ontario Act*. The convictions were for:
 - (i) Smoking in an enclosed public place [s. 9(1)]
 - (ii) As proprietor, not ensuring compliance with the smoking ban in the enclosed public place [s. 9(6)(a)]
 - (iii) As proprietor, not posting the No Smoking signs [s. 9(6)(c)]
 - (iv) As proprietor, not ensuring that there are no ashtrays in the enclosed public place [s. 9(6)(d)]
 - (v) Obstructing an inspector [s. 14(16)].

**Reference: *Smoke Free Ontario Act, 1994, C.10 ("SFOA")*,
Schedule "B", pages 32 to 41**

2. At all material times the appellant was the proprietor of an establishment located at 33 Centre Street in Smith Falls, Ontario (the "premises"). This location housed a hotel, The Comfort Inn. A portion of that hotel was occupied by Do Little's Bar and Grill ("Do Little's"). Do Little's had ceased operations and the Smokers' Choice/Non-Smokers' Choice (a not-for profit club) leased the space that was formerly occupied by Do Little's in order to run this club. Mr. Kennedy was the proprietor of this club.

Reference: Trial Transcript of Evidence, Submissions and Judgment, dated March 7, 2007 ("Transcript"), Transcript Book of the Appellant, pages 6-7, 14, 83, 94-95 and 98

3. The interior of the premises had not changed since the establishment was Do Little's except that every table now had an ashtray on it.

Reference: Transcript, Transcript Book of the Appellant, pages 16 and 19

4. Do Little's signs were still present and posted at the premises. There was a sign in the window below the Do Little's sign, lit at all times during inspections, which read "OPEN". There were no displayed signs prohibiting the entry of the public. The only warning was a sign that indicated not to enter if sensitive to second-hand smoke.

Reference: Transcript, Transcript Book of the Appellant, pages 33-34 and 55

5. Patrons of the establishment could still purchase food and alcoholic beverages at the premise; however, the Appellant now allowed them to smoke while in the premises.

Reference: Transcript, Transcript Book of the Appellant, pages 99-100 and 104

6. Membership to Smokers' Choice/Non-Smokers' Choice was solicited. The recruiters approached members of the public who were smokers and supplied them with material regarding the organization.

Reference: Transcript, Transcript Book of the Appellant, pages 84, 97 and 105

7. There were application forms at the door of the club so that a member of the public could apply for membership at the door, pay \$4.00 and gain access to the space.

Reference: Transcript, Transcript Book of the Appellant, page 105

8. Approximately 280 people from the community of Smith Falls, 140 from Ottawa, 40 from Lanark County and 30 from the Perth area signed the membership application form; the club had a total of about 578 members.

Reference: Transcript, Transcript Book of the Appellant, pages 97-98

9. On September 8, 2006 Inspector Piotr Oglaza, with the Lanark Leeds Grenville District Health Unit, attended at the premises for the purpose of conducting an inspection as a result of a complaint received.

Reference: Transcript, Transcript Book of the Appellant, pages 11, 14 and 15

10. When the inspector attended on that date he found that there were no "No Smoking" signs posted and that ashtrays were placed on the tables.

Reference: Transcript, Transcript Book of the Appellant, pages 16-19

11. The only restrictions on entry to the premises were: members had to agree to abide by the rules of the premises; a membership form had to be completed; and, the membership fee of \$4.00 per month had to be paid. Membership cards were provided to members and checked by a staff member at the door of the premises.

Reference: Transcript, Transcript Book of the Appellant, pages 21-22, 30, 32, 35, 45-16, 85, and 102

12. The inspector returned to the premises on September 13, 2006 for further inspection. On that date he witnessed, through the window of the premise, a person sitting in the area of the bar holding lighted tobacco. He also observed noticeable tobacco smoke on the premises.

Reference: Transcript, Transcript Book of the Appellant, pages 23 and 27

13. While Mr. Kennedy would not allow the inspector to enter the premises on September 13th he did state that the grand opening would be on September 15, 2006 and invited a representative of the Health Unit to attend.

**Reference: Transcript, Transcript Book of the Appellant,
pages 26**

14. The inspector returned for a third time on September 20, 2006 to continue his inspection. During this inspection the inspector witnessed the defendant emerging from the premises with a cigarette, which had been partially smoked, in his hand.

**Reference: Transcript, Transcript Book of the Appellant,
pages 28 and 29**

15. The inspector presented his designation and advised the defendant of the relevant statutory provisions that authorized his entry. He further advised that he was entering for the purpose of conducting an inspection under the SFOA. The defendant again refused entry to the inspector.

**Reference: Transcript, Transcript Book of the Appellant,
pages 28 and 29**

16. The inspector subsequently laid an information containing the following five counts against the defendant under the SFOA:

- (i) Smoking in an enclosed public place [s. 9(1)]

- (ii) As proprietor, not ensuring compliance with the smoking ban in the enclosed public place [s. 9(6)(a)]
- (iii) As proprietor, not posting the No Smoking signs [s. 9(6)(c)]
- (iv) As proprietor, not ensuring that there are no ashtrays in the enclosed public place [s. 9(6)(d)]
- (v) Obstructing an inspector [s. 14(16)].

**Reference: SFOA, *supra* paragraph 1
Information, Appeal Book, page 74**

17. A trial was held before His Worship D. Bartraw in Perth, Ontario on March 7, 2007. The Appellant was found guilty of all five offences as charged. In his ruling, His Worship Bartraw stated:

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

So whether you are signing a membership card or not, you are still a member of the public of the Province of Ontario. You should not have to be put into a situation where your health is at risk through smoking and that is why they put in these laws. So clearly when they made the definition under sub-section 1 of this Act, regarding the enclosed public place and when they say it is covered which is

not an issue to which the public is ordinarily invited or permitted access either expressly or by implication, whether or not a fee is charged, they are speaking of all members of the public whether you are a member of a club or not.”

Reference: Transcript, Transcript Book of the Appellant, pages 131-132 at line 3

18. The Appellant appealed that decision to a Judge of the Ontario Court of Justice. On April 8, 2008, Justice March upheld the trial decision of His Worship Bartraw:

“This decision is based on the facts before it and on these facts, the Justice of the Peace was entitled to reach the conclusion he did that the operation of the premises by the Appellant was included in the definition of “enclosed public place”.

Reference: Appeal Decision of Justice S. March, Appeal Book, page 34 at paragraph (ii)

19. The Appellant was granted Leave to Appeal on two questions from that decision to the Court of Appeal for Ontario by His Honourable Justice Blair on June 17, 2008.

Reference: Endorsement, Appeal Book, page 8

20. The Crown does not agree with the Appellant that this premise was exempt from the *SFOA*.

PART II – RESPONSE TO APPELLANT’S ISSUES

Issue #1: Do the premises regarding which the charges were laid constitute an “enclosed public place” within the meaning of s. 9(1) of the SFOA?

21. “Enclosed public place” is defined within the SFOA as:

- (i) the inside of any place, building or structure or vehicle or conveyance or a part of any of them,
- (ii) that is covered by a roof, and
- (iii) to which the public is ordinarily invited or permitted access, either expressly or by implication, whether or not a fee is charged for entry, or
- (iv) a prescribed place.

Reference: SFOA, s. 1, Schedule “B”, page 27

22. There is no dispute that the premise is “enclosed” or that it is a “place”. The remaining question for this Court to determine is whether this was a place “to which the public is ordinarily invited or permitted access, either expressly or by implication”.

23. Membership to the Appellant’s premises was solicited. Recruiters approached members of the public who were smokers and supplied them with material regarding the organization. Those people were invited to join this club and attend at the premises,

Reference: Transcript, Transcript Book of the Appellant, pages 84, 97 and 105

(a) STATUTORY INTERPRETATION

24. This Honourable Court has repeatedly stated that public welfare statutes designed to promote public health and safety are to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

"Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided."

Reference: *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.), Respondent's Book of Authorities, Tab 4

Also:

"The *Occupational Health and Safety Act* is a public welfare statute. The broad purpose of the statute is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. It should be interpreted in a manner consistent with its broad purpose."

Reference: *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 at 27 (C.A.), Respondent's Book of Authorities, Tab 12

25. The Respondent submits that the court should give a fair, large and liberal interpretation to the relevant statutory provisions so as to best attain the purpose of the *SFOA*.
26. Further, the Supreme Court has said that the proper construction of a

statutory provision flows from reading the words of the provision in their grammatical and ordinary sense and in their entire context, harmoniously with the statute as a whole, the purpose of the statute, and the intent of Parliament.

Reference: *R. v. Gladue*, [1999] 1 S.C.R. 688 at 704, Respondent's Book of Authorities, Tab 9

27. Courts in Ontario have routinely followed this pronouncement by the Supreme Court of Canada. This Honourable Court has said,

"The modern approach to statutory interpretation calls on the court to interpret a legislative provision in its total context... The court's interpretation should comply with the legislative text, promote the legislative purpose, reflect the legislature's intent, and produce a reasonable and just meaning."

Reference: *Ontario (Minister of Transportation) v. Ryder Truck Rental Canada Ltd.* (2000), 47 O.R. (3d) 171 at 174 (C.A.), Respondent's Book of Authorities, Tab 5

28. The Respondent submits that the *SFOA* is protective legislation designed to promote public health and safety and as such should be generously interpreted in a way that upholds the objectives of the legislation.
29. Section 10 of the *Interpretation Act* (then in force) provides guidance as to the manner in which to interpret Ontario's legislation. Specifically, the section states that statutes should be liberally construed in a way that will best achieve the true object of the particular statute.

Reference: *Interpretation Act*, R.S.O. 1990, c. I-11, s. 10 (in force at time of offences – repealed July 25, 2007), Schedule “B”, page 50

(b) LEGISLATIVE INTENT AND PURPOSE OF SFOA

30. In determining the objective of the legislation, the court may look to the legislative intent. Statements made about a statute in the legislature, especially by Ministers introducing or defending it, are admissible and may be considered sufficiently reliable to serve as direct or indirect evidence of legislative purpose. The courts have often considered excerpts from Hansard to determine legislative intent.

Reference: Sullivan and Driedger, On the Construction of Statutes, 4th Edition, pages 211, 490-499,
Respondent’s Book of Authorities, Tab 15

31. The Respondent respectfully seeks to adduce further evidence in the form of Hansard excerpts that were not before the trial judge or the appeal judge.¹ This Court has authority to receive further evidence in a proper case.

Reference: *Courts of Justice Act*, R.S.O. 1990, Chap. C.43, section 134(4)(b), Schedule “B”, page 51

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 61.16(2), Schedule “B”, page 53

¹ The Respondent has filed a motion to be heard by the panel hearing the appeal to receive further evidence under clause 134(4)(b) of the *Courts of Justice Act* to allow further evidence consisting of Hansard excerpts which were not before the trial judge or appeal judge. The Hansard excerpts cited in this factum are contained under sealed envelope accompanying the motion materials.

32. The Respondent respectfully submits that this is a proper case to allow limited further evidence. The Hansard excerpts assist in establishing the legislative intent. The issue in this case is the correct statutory interpretation of section 1 and 9(1) of the *SFOA*. Consideration of this legislative evidence may assist the court in determining the appeal.
33. The legislative purpose and intent in enacting the *SFOA* was clearly stated in the Official Report of Debates (Hansard) upon the introduction of the legislation to the legislature. Those excerpts make it clear that the legislative purpose in enacting the *SFOA* is to protect the citizens of Ontario, from the harmful effects of smoking tobacco products as well as the dangerous effects of second hand smoke.

Reference: Official Report of Debates (Hansard), Legislative Assembly of Ontario, First Session, 38th Parliament, December 15, 2004, Volume 6, pp. 4961-4963²

34. The broad scope of this legislation was made obvious upon its introduction and its intended application to private clubs was made clear at that time.

Reference: Official Report of Debates (Hansard), Legislative Assembly of Ontario, First Session, 38th Parliament, December 15, 2004, Volume 6, p. 4962³

35. While these excerpts come from statements made by the government on first and second reading, the legislature carried through with this intent in

ultimately passing the legislation. Although upon passing of the legislation certain exemptions were identified, in particular for Residential Care Facilities, Psychiatric Facilities, facilities for Veterans, guest rooms in hotels, motels or inns and scientific testing research facilities, the exceptions are narrowly stated and do nothing to negate the intention to have a law that was broad in its scope. These narrow exceptions are all places where people live. More particularly, the legislature **did not** make an exemption for private clubs.

36. The Appellant submits that the purpose of the legislation is to protect the members of the public who do not wish to be subjected to second-hand smoke and that one can waive their right to that protection. The reasons the Respondent does not agree with this submission are two fold:
- a. The legislation is meant to protect all members of the public from the evils of second-hand smoke, smokers and non-smokers alike; and,
 - b. The evil that the legislation is trying to avoid is not just the personal health effects of second-hand smoke on members of the public but the cost that tobacco related diseases put on the public.
37. While the main purpose of the legislation is to protect those who do not wish to be subjected to second hand smoke (most of whom may be non-

² See Respondent's Factum (motion to receive further evidence), page 9, paragraph 24

smokers), there is a secondary purpose. That is, the protection of the health of all Ontarians. It is clear that the dangers of second hand smoke and the corresponding health consequences that arise affect both non-smokers and smokers like. While smoking itself will have ill health effects, the effects of being exposed in a social environment to the second-hand smoke of others increases the health risks and the consequences.

38. All Canadians contribute to, and have access to, the health care system. Therefore, the cost of tobacco-related illnesses (caused not only by smoking but also by exposure to second-hand smoke) affects everyone. The members of this club continue to be members of the public when meeting inside the premises.

(c) "ENCLOSED PUBLIC PLACE"

39. When interpreting legislation courts often look to the dictionary definition of the words found therein. The Appellant has put forth a dictionary definition of the word "public" in paragraph 63 of his Appeal Factum. The Respondent agrees that this definition is helpful. In particular, the Respondent relies on the later part of that definition which states:

... the word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few.

³ *ibid.*, page 9, paragraph 25

Reference: Appellant's Factum, paragraph 63

40. The public nature of this club was detailed in the following exchange with the defendant at trial:

Q. Could anyone become a member of this organization?

A. Well, I guess it is fair to say that anyone that believes in our beliefs, who is willing to comply with our rules and regulations, to pay the annual fee of \$48.00, based on \$4.00 a month, yes. Anyone that wishes to join us can, if they live by our rules and regulations.

Reference: Transcript, Transcript Book of the Appellant, page 85

41. Further, evidence that the public was ordinarily invited or permitted access is based on the following facts found at trial:

1. Membership was solicited. Recruiters approached members of the public who were smokers and supplied them with material regarding the organization.

Reference: Transcript, Transcript Book of the Appellant, pages 84, 97 and 105

2. There were application forms at the door of the club so that a member of the public could apply for membership at the door, pay \$4.00 and gain access to the premises.

Reference: Transcript, Transcript Book of the Appellant, page 105

3. Approximately 280 people from the community of Smith Falls, 140 from Ottawa, 40 from Lanark County and 30 from the Perth area signed the membership application form; there were a total of some 578 members.

Reference: Transcript, Transcript Book of the Appellant, pages 97-98

4. The only restrictions imposed were that a person was required to sign a membership form, agree to abide by the organization's rules, and pay \$4.00 per month for membership.

Reference: Transcript, Transcript Book of the Appellant, page 103

42. This evidence clearly establishes that a sufficient number of people were invited and/or permitted access to the club to contradistinguish them from a few, making them members of the public.
43. Although Black's Law Dictionary defines "public", in part, as "The people of a nation or community as a whole", it was not the intention of the legislature that every member of the province had to be invited and/or permitted to enter before a place was considered public under the SFOA. This would lead to the illogical conclusion so as to exclude every licensed establishment from being a "public place" since minors, while being

members of a community and/or nation, are neither invited nor permitted entry to those establishments.

**Reference: Blacks Law Dictionary, 7th Edition, p. 1242,
Respondent's Book of Authorities, Tab 2**

44. This Honourable Court has cited the Supreme Court of Canada for the proposition that an interpretation of statutes that leads to an absurd result should be avoided if possible.

"It is a well established principal of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Cote, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp.378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations that defeat the purpose of a statute or render some aspect of it pointless or futile."

Reference: *Ontario (WSIB) v. Hamilton Health Sciences Corp.*, (2000), 51 O.R. (3d) 83 (C.A.), Respondent's Book of Authorities, Tab 6

***Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 43, Respondent's Book of Authorities, Tab 13**

45. The construction of a statute that produces the greatest harmony and the least inconsistency should prevail.

**Reference: CED (Ontario), Title 136 – Statutes, para. 81,
Respondent's Book of Authorities, Tab 3**

46. The Respondent submits that the Appellant's request of this Court to interpret the meaning of public place in such a manner as to exclude his premises would lead to an absurd result not consistent with the purpose of the legislation and the intention of the legislature.
47. The Appellant's inclusion of only those members of the public willing to accept the risk of second-hand smoke does not change the public nature of the premise.
48. The Appellant relies on the decision in *R. v. Colet* to stand for the proposition that the statute is subject to strict construction, however, that case is distinguishable from the present circumstances for the following reasons:
 - a. The facts of the case relate to a prosecution under the Criminal Code of Canada, not a regulatory/ public welfare statute, and
 - b. The *Colet* case specifically deals with rights protected in one's private residence or home. At no time does that case speak to the issue of private property outside of one's residence. The SFOA is not intended to regulate smoking in one's private residence (subject to the narrow exception such as when a day-care is run in one's private residence or when a person receives home care services and a request is made by the service provider that someone not smoke).

Reference: *R. v. Colet* [1981] 1 S.C.R. 2, Appellant's Factum, at paragraph 152

SFOA s. 9(2)5 at page 32 and s. 9.1 at page 36 herein.

49. The issue of whether an establishment is "an enclosed public space" has been addressed by His Worship Seneshen in *R. v. Club 924 Social Club*. In that case, the Defendant's evidence was that volunteers did the serving of liquor and that the club was a private place. The Court found 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 compliance"**. So too is it in this case. The conclusion and analysis of the lower courts in this case is consistent with *R. v. Club 924 Social Group*.

Reference: *R. v. Club 924 Social Club*, [2007] O. J. No. 2857, para 7, Respondent's Book of Authorities, Tab 8

50. The Saskatchewan Court of Appeal considered the interpretation of "enclosed public place" under a Municipal By-Law where it was not a defined term. The appellants in that case argued that their restaurant was not a public place because they had the right to refuse entry to anyone they choose. They asked the court to find that this term only applied to places where the public had a right of access. The court stated:

We cannot agree with their argument. The term "public place" as used in s. 142 is modified by the words which follow:
"including...any building or part of a building that is open to the

public." The words "open to the public", in their plain and ordinary meaning, include places to which "members of the public are customarily invited and admitted" as described in para. 6 of the agreed statement of facts. The reservation of the right to deny access to anyone, or to remove anyone, does not alter the fact of the general invitation of the public. In sum, a place to which the public is invited is clearly "open to the public". If the legislators had intended to restrict the scope of s. 142 to places to which the public had a right of access, as opposed to a revocable invitation to enter, they would have said so.

Furthermore, this interpretation conforms with the obvious purpose of s. 142: to permit a municipality to protect public health by regulating smoking in places where the public gathers, and to thereby protect the public from the deleterious effects of second hand smoke. To confine the municipality's power to legislate to places to which the public has a right of access would render the legislation almost meaningless.

Reference: *Albertos Restaurant v. Saskatoon (City)* [2000] S.J. No. 725 (C.A.), Respondent's Book of Authorities, Tab 1

51. The Appellant has not provided the court with any case interpreting the words "enclosed public space" which support his position.

52. Justice March's decision dealt with the issue raised by the Appellant and found that "the Justice of the Peace was entitled to reach the conclusion he did that the operation of the premises by the Appellant was included in the definition of "enclosed public place".

Reference: Appeal Decision of Justice S. March, Appeal Book, page 34 at paragraph (ii)

53. If the Appellant's argument was to be followed, every private club (including every golf club, fitness club, ski club, etc) would be exempt from this legislation. This is the absurd result that would follow.
54. Individual words are not considered in isolation and should be considered in the context of the whole *Act*. In this case, the legislature has made it very clear that the hazards of smoking are so great that this activity will not be permitted in any enclosed public space. The health of the public (smokers and non-smokers) is of such concern that legislation was passed to protect workers and visitors in enclosed public places. To fabricate a scheme of a purported private smoker's club that appears in every way identical to a conventional restaurant or bar, then argue that it is exempt from the SFOA, is specious at best.

Issue #2: Is the definition of "enclosed public place" in the *Smoke Free Ontario Act* general, vague, ambiguous and/or uncertain in its scope and application?

55. The Crown submits that there is nothing general, vague, ambiguous or uncertain in the scope and application of the definition of enclosed public space in section 1 of the *SFOA*. Further, the appellant has not identified any particular portion of the definition that it submits is general, vague, ambiguous or uncertain instead it seems to be relying on the definition as a whole.
-

56. Sullivan and Driedger have said the following regarding vagueness in statutory language:

...since even penal laws must be drafted in general terms, a certain degree of vagueness is unavoidable. As the Supreme Court of Canada has explained, the vagueness doctrine does not require that legislative language be perfectly certain and precise; the test is whether the legislation can be given a sensible meaning through interpretation, whether it provides an adequate framework for resolving interpretative doubt through reasoned legal analysis.

Reference: Sullivan and Driedger On the Construction of Statutes, Fourth Ed., pages 385-386, Respondent's Book of Authorities, Tab 15

Reference relying on *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* (1990) 1 S.C.R. 1123 and *R. v. Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606, Respondent's Book of Authorities, Tabs 14 and 11

57. In *R v. Nova Scotia Pharmaceutical Society* Justice Gonthier stated it this way:

Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk.

Reference: *R v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pages 638-640, Respondent's Book of Authorities, Tab 11

58. In the Crown's submission the language found in the statute is not unreasonably vague and can be given a sensible meaning. The Justice of

the Peace at trial, as well as the appellate judge applied that sensible meaning.

Reference: *Supra* at paragraphs 17 and 18

59. If the court finds that there is vagueness in the definition then the “defect”, if any, can be rectified by the courts. The Supreme Court of Canada has held that where a term is vague that the courts may work with the term over time in the context of successive cases, the court may give a term that was vague a meaning that is clear and complete; Indeed, the Supreme Court did just that with the term sexual assault in *R v. Chase*.

Reference: Sullivan and Driedger On the Construction of Statutes, Fourth Ed., page 513, Respondent’s Book of Authorities, Tab 15

***R v. Chase* (1987), 2 S.C.R. 293, Respondent’s Book of Authorities, Tab 7**

60. In *R. v. Chase*, the court dealt with the term “sexual assault”. That term did not have a precise definition set out in the legislation. In this case, the legislature has defined to the term “enclosed public space”. It is submitted that it is not necessary to further define the term.
61. The appellant relies on the Supreme Court of Canada decision in *R. v. Kelly* to stand for the proposition that all laws must be fixed and certain to give notice of the prohibited conduct. However, it should be noted that

this decision deals with a prosecution under the Criminal Code of Canada, not a regulatory/public welfare statute. Further, the Court states:

It is a fundamental proposition of the criminal law that the law be certain and definitive. This is essential, given the fact that what is at stake is the potential deprivation of a person of his or her liberty and his or her subjection to the sanction and opprobrium of criminal conviction. This principle has been enshrined in the common law for centuries, encapsulated in the maxim *nullum crimen sine lege, nulla poena sine lege* – there must be no crime or punishment except in accordance with law which is fixed and certain. A crime which offends this fundamental principle may for that reason be unconstitutional.

Reference: *R. v. Kelly* [1992] 2 S.C.R. 170, at paragraph 84 (QL), Respondent's Book of Authorities, Tab 10

62. In this case there is no risk of deprivation of liberty. The legislation does not contemplate the sanction of a jail term for the offence. The only possible penalty is a fine. There is no possibility of a criminal conviction; the courts have said that a conviction under the *Provincial Offences Act* does not have the same stigma as a criminal conviction.
63. The *SFOA* is penal legislation in that a fine may be imposed, however, the Crown submits that the courts have still recognized that a different standard in interpreting public welfare legislation applies. This court noted that the *Occupational Health and Safety Act* was penal legislation while still maintaining that a generous interpretation in keeping with the legislative scheme shall prevail.

Reference: *Supra* at paragraphs 29 and 27.

PART III – ADDITIONAL ISSUES

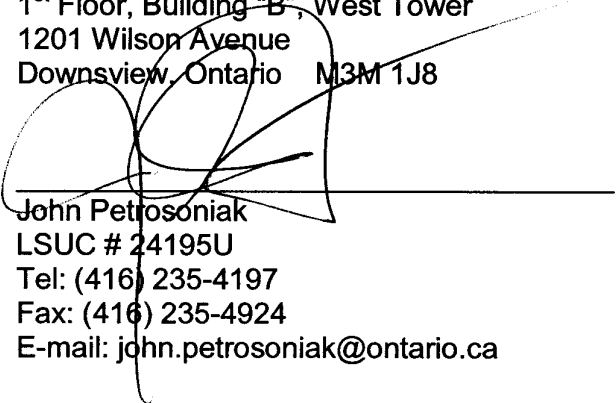
None.

PART IV - ORDER REQUESTED

64. The Respondent respectfully requests that this appeal to the Court of Appeal be dismissed and the conviction upheld.

All of which is respectfully submitted this 12th day of December, 2008,

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SCHEDULE "A" - AUTHORITIES TO BE CITED

TAB

1. *Albertos Restaurant v. Saskatoon (City)* [2000] S.J. No. 725 (C.A.)
2. Black's Law Dictionary, 7th Ed.
3. CED (Ontario), Third Ed., Ontario Volume 31, Title 136 – Statutes
4. *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.)
5. *Ontario (Minister of Transport) v. Ryder Truck Rental Canada Ltd.* (2000), 47 O.R. (3d) 171 (C.A.)
6. *Ontario (WSIB) v. Hamilton Health Sciences Corp.* (2000), 51 O.R. (3d) 83 (C.A.)
7. *R. v. Chase* (1987), 2 S.C.R. 293
8. *R. v. Club 924 Social Club*, [2007] O. J. No. 2857
9. *R. v. Gladue*, [1999] 1 S.C.R. 688
10. *R. v. Kelly* [1992] 2 S.C.R. 170
11. *R. v. Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606
12. *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (C.A.)
13. *Re Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27
14. *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* (1990) 1 S.C.R. 1123
15. Sullivan and Driedger, On the Construction of Statutes, 4th Edition

SCHEDULE "B" – RELEVANT LEGISLATIVE PROVISIONS

Smoke-Free Ontario Act, 1994, C. 10

Definitions

1. (1) In this Act,

"employee" means a person who performs any work for or supplies any services to an employer, or a person who receives any instruction or training in the activity, business, work, trade, occupation or profession of an employer;

"employer" includes an owner, operator, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it;

"enclosed public place" means,

- (a) the inside of any place, building or structure or vehicle or conveyance or a part of any of them,
 - (i) that is covered by a roof, and
 - (ii) to which the public is ordinarily invited or permitted access, either expressly or by implication, whether or not a fee is charged for entry, or
- (b) a prescribed place;

"enclosed workplace" means,

- (a) the inside of any place, building or structure or vehicle or conveyance or a part of any of them,
 - (i) that is covered by a roof,
 - (ii) that employees work in or frequent during the course of their employment whether or not they are acting in the course of their employment at the time, and
 - (iii) that is not primarily a private dwelling, or
- (b) a prescribed place;

"Minister" means the Minister of Health and Long-Term Care, unless otherwise specified;

"prescribed" means prescribed by the regulations;

"regulations" means the regulations made under this Act.

Private dwelling

(2) For greater certainty, and without restricting the generality of the expression, the following are primarily private dwellings for the purposes of the definition of "enclosed workplace" in subsection (1):

1. Private self-contained living quarters in any multi-unit building or facility.
2. Any other prescribed place. 2005, c. 18, s. 3 (2).

Application

2. This Act applies to tobacco in any processed or unprocessed form that may be smoked, inhaled or chewed, including snuff, but does not apply to products intended for use in nicotine replacement therapy. 1994, c. 10, s. 2.

Provision of Tobacco to Persons under 19

Selling or supplying to persons under 19

3. (1) No person shall sell or supply tobacco to a person who is less than 19 years old. 1994, c. 10, s. 3 (1).

Apparent age

(2) No person shall sell or supply tobacco to a person who appears to be less than 25 years old unless he or she has required the person to provide identification and is satisfied that the person is at least 19 years old. 2005, c. 18, s. 4 (1).

Defence

(3) It is a defence to a charge under subsection (1) or (2) that the defendant believed the person receiving the tobacco to be at least 19 years old because the person produced a prescribed form of identification showing his or her age and there was no apparent reason to doubt the authenticity of the document or that it was issued to the person producing it. 1994, c. 10, s. 3 (3).

Vicarious liability

(4) The owner of a business where tobacco is sold shall be deemed to be liable for any contravention of subsection (1) or (2) on the premises where the contravention took place, unless the owner exercised due diligence to prevent such a contravention. 2005, c. 18, s. 4 (2).

Improper documentation

(6) No person shall present as evidence of his or her age identification that was not lawfully issued to him or her. 1994, c. 10, s. 3 (6).

Display and Promotion

Display

3.1 (1) No person shall,

- (a) display or permit the display of tobacco products in any place where tobacco products are sold or offered for sale by means of a countertop display; or
- (b) display or permit the display of tobacco products in any place where tobacco products are sold or offered for sale in any manner that permits the purchaser to handle the tobacco product before purchasing it. 2005, c. 18, s. 5 (1).

Same

- (2) No person shall display or permit the display of tobacco products in any place where tobacco products are sold or offered for sale in any manner that will permit a consumer to view any tobacco product before purchasing the tobacco product. 2005, c. 18, s. 5 (2).

Promotion

- (3) No person shall, in any place where tobacco products are sold or offered for sale, promote the sale of tobacco products through product association, product enhancement or any type of promotional material, including, but not limited to,
 - (a) decorative panels and backdrops associated with particular brands of tobacco products;
 - (b) backlit or illuminated panels;
 - (c) promotional lighting;
 - (d) three-dimensional exhibits; or
 - (e) any other device, instrument or enhancement. 2005, c. 18, s. 5 (1).

Regulations

- (4) The Lieutenant Governor in Council may make regulations governing what constitutes promotional material for the purposes of this section. 2005, c. 18, s. 5 (1).

Interpretation

- (5) In this section, "tobacco product" includes the package in which tobacco is sold. 2005, c. 18, s. 5 (1).

Places of entertainment

- 3.2** (1) No person shall employ or authorize anyone to promote tobacco or the sale of tobacco at any place of entertainment that the person owns, operates or occupies. 2005, c. 18, s. 6.

Definition

(2) In this section,

“place of entertainment” means 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, and which is primarily devoted to eating, drinking or any form of amusement. 2005, c. 18, s. 6.

Prohibition of Sale in Designated Places

Sale in designated places

4. (1) No person shall sell tobacco in a designated place. 1994, c. 10, s. 4 (1).

Designated places

(2) The following are designated places:

1. A hospital as defined in the *Public Hospitals Act*.
2. A private hospital as defined in the *Private Hospitals Act*.
3. A psychiatric facility as defined in the *Mental Health Act*, except, in the case of a facility that is designated under the *Mental Hospitals Act*, a part of the facility where the sale of tobacco is authorized by the regulations.

4. A nursing home as defined in the *Nursing Homes Act*.

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 4 is repealed by the Statutes of Ontario, 2007, chapter 8, subsection 227 (1) and the following substituted:

4. A long-term care home within the meaning of the *Long-Term Care Homes Act, 2007*.

See: 2007, c. 8, ss. 227 (1), 232 (2).

5. An approved charitable home for the aged under the *Charitable Institutions Act*.

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 5 is repealed by the Statutes of Ontario, 2007, chapter 8, subsection 227 (1). See: 2007, c. 8, ss. 227 (1), 232 (2).

6. Repealed: 2005, c. 18, s. 7 (1).

7. A home as defined in the *Homes for the Aged and Rest Homes Act*.

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 7 is repealed by the Statutes of Ontario, 2007, chapter 8, subsection 227 (1). See: 2007, c. 8, ss. 227 (1), 232 (2).

8. A pharmacy as defined in the *Drug and Pharmacies Regulation Act*.

9. An establishment where goods or services are sold or offered for sale to the public, if,

i. a pharmacy as defined in the *Drug and Pharmacies Regulation Act* is located within the establishment, or

ii. customers of such a pharmacy can pass into the establishment directly or by the use of a corridor or area used exclusively to connect the pharmacy with the establishment.

10. A place that belongs to a prescribed class. 1994, c. 10, s. 4 (2); 2005, c. 18, s. 7 (1).

(3) Repealed: 2005, c. 18, s. 7 (2).

Packaging, Health Warnings and Signs

Packaging requirements

5. (1) No person shall sell or offer to sell tobacco at retail or for subsequent sale at retail or distribute or offer to distribute it for that purpose unless,

(a) the tobacco is packaged in accordance with the regulations; and

(b) the package bears or contains a health warning and other information in accordance with the regulations. 1994, c. 10, s. 5 (1).

Same, cigarettes

(2) No person shall sell or offer to sell cigarettes at retail or for subsequent sale at retail or distribute or offer to distribute them for that purpose unless the cigarettes are contained in packages of at least 20 cigarettes or such greater number as may be prescribed by regulation. 1994, c. 10, s. 5 (2).

Signs

6. No person shall, in any place, sell or offer to sell tobacco at retail unless signs bearing health warnings and other information and referring to the prohibitions imposed by section 3 are posted at the place in accordance with the regulations. 1994, c. 10, s. 6.

Vending Machines

Vending machines: general prohibition

7. (1) No person shall permit a vending machine for selling or dispensing tobacco to be in a place that the person owns or occupies. 1994, c. 10, s. 7 (1).

Exceptions

(2) Subsection (1) does not apply with respect to a vending machine that contains no tobacco and,

(a) is in a place to which the public does not have access; or

(b) is inoperable. 1994, c. 10, s. 7 (2).

(3) Repealed: 2005, c. 18, s. 8.

Reports from Wholesalers and Distributors

Reports

8. A person who, in Ontario, sells or distributes tobacco for subsequent sale at retail shall submit reports to the Minister in accordance with the regulations. 1994, c. 10, s. 8; 2005, c. 18, s. 2.

Controls Relating to Smoking Tobacco

Prohibition

9. (1) No person shall smoke tobacco or hold lighted tobacco in any enclosed public place or enclosed workplace. 2005, c. 18, s. 9.

Other prohibitions

(2) No person shall smoke or hold lighted tobacco in the following places or areas:

1. A school as defined in the *Education Act*.
2. A building or the grounds surrounding the building of a private school, where the private school is the only occupant of the premises, or the grounds annexed to a private school, where the private school is not the only occupant of the premises.
3. Any common area in a condominium, apartment building or university or college residence, including, without being limited to, elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, lobbies and exercise areas.
4. A day nursery within the meaning of the *Day Nurseries Act*.
5. A place where private-home day care is provided within the meaning of the *Day Nurseries Act*, whether or not children are present.
6. The reserved seating area of a sports arena or entertainment venue.
7. A prescribed place or area. 2005, c. 18, s. 9.

Employer obligations

(3) Every employer shall, with respect to an enclosed workplace or a place or area mentioned in subsection (2) over which the employer exercises control,

- (a) ensure compliance with this section;
- (b) give notice to each employee in an enclosed workplace or place or area that smoking is prohibited in the enclosed workplace, place or area in a manner that complies with the regulations, if any;
- (c) post any prescribed signs prohibiting smoking throughout the enclosed workplace, place or area over which the employer has control, including washrooms, in the prescribed manner;

- (d) ensure that no ashtrays or similar equipment remain in the enclosed workplace or place or area, other than a vehicle in which the manufacturer has installed an ashtray;
- (e) ensure that a person who refuses to comply with subsection (1) or (2) does not remain in the enclosed workplace or place or area; and
- (f) ensure compliance with any other prescribed obligations. 2005, c. 18, s. 9.

Prohibition

- (4) No employer or person acting on behalf of an employer shall take any of the following actions against an employee because the employee has acted in accordance with or has sought the enforcement of this Act:
 1. Dismissing or threatening to dismiss the employee.
 2. Disciplining or suspending the employee, or threatening to do so.
 3. Imposing a penalty upon the employee.
 4. Intimidating or coercing the employee. 2005, c. 18, s. 9.

Complaint

- (5) The Lieutenant Governor in Council may make regulations specifying provisions of another Act or any regulations that apply, with necessary modifications, where an employee complains that subsection (4) has not been complied with. 2005, c. 18, s. 9.

Proprietor obligations

- (6) Every proprietor of an enclosed public place or a place or area mentioned in subsection (2) shall,
 - (a) ensure compliance with this section with respect to the enclosed public place, place or area;
 - (b) give notice to each person in the enclosed public place, place or area that smoking is prohibited in the enclosed public place, place or area in accordance with the regulations, if any;
 - (c) post any prescribed signs prohibiting smoking throughout the enclosed public place, place or area, including washrooms, in the prescribed manner;
 - (d) ensure that no ashtrays or similar equipment remain in the enclosed public place, place or area, other than a vehicle in which the manufacturer has installed an ashtray;
 - (e) ensure that a person who refuses to comply with subsection (1) or (2) does not remain in the enclosed public place, place or area; and
 - (f) ensure compliance with any other prescribed obligations. 2005, c. 18, s. 9.

Exception, residential care facility

- (7) Subsection (1) does not apply to a person who smokes or holds lighted tobacco in an indoor room in a residence that also serves as an enclosed

workplace if the conditions set out below are met, and the obligations under subsections (3) and (6) do not apply to a proprietor or employer with respect to such a room if the proprietor or employer complies with any prescribed requirements respecting the maintenance of the room:

1. The residence is,

i. a nursing home as defined in the *Nursing Homes Act*,

Note: On a day to be named by proclamation of the Lieutenant Governor, subparagraph i is repealed by the Statutes of Ontario, 2007, chapter 8, subsection 227 (2) and the following substituted:

i. a long-term care home within the meaning of the *Long-Term Care Homes Act, 2007*,

See: 2007, c. 8, ss. 227 (2), 232 (2).

ii. an approved charitable home for the aged under the *Charitable Institutions Act*,

Note: On a day to be named by proclamation of the Lieutenant Governor, subparagraph ii is repealed by the Statutes of Ontario, 2007, chapter 8, subsection 227 (2). See: 2007, c. 8, ss. 227 (2), 232 (2).

iii. a home as defined in the *Homes for the Aged and Rest Homes Act*,

Note: On a day to be named by proclamation of the Lieutenant Governor, subparagraph iii is repealed by the Statutes of Ontario, 2007, chapter 8, subsection 227 (2). See: 2007, c. 8, ss. 227 (2), 232 (2).

iv. a residential facility that is operated as a retirement home and that provides care, in addition to accommodation, to the residents of the home, or

v. a supportive housing residence funded or administered through the Ministry of Health and Long-Term Care or the Ministry of Community and Social Services.

2. The room has been designated as a controlled smoking area.

3. A resident who desires to use the room must be able, in the opinion of the proprietor or employer, to smoke safely without assistance from an employee. An employee who does not desire to enter the room shall not be required to do so.

4. Smoking in the room is limited to residents of that facility.

5. The room is an enclosed space that,

i. is fitted with proper ventilation in compliance with the regulations,

ii. is identified as a controlled smoking area by means of prescribed signs, displayed in the prescribed manner, and

iii. meets any other prescribed requirements. 2005, c. 18, s. 9.

Psychiatric facility

(8) Subsection (1) does not apply to a person who smokes or holds lighted tobacco in an indoor room in a psychiatric facility that also serves as an enclosed workplace if the conditions set out below are met, and the obligations under subsections (3) and (6) do not apply to a proprietor or employer with respect to such a room if the proprietor or employer complies with any prescribed requirements respecting the maintenance of the room:

1. The psychiatric facility is designated in the regulations.

2. The room has been designated as a controlled smoking area.

3. A patient of the facility who desires to use the room must be able, in the opinion of the proprietor or employer, to smoke safely without assistance from an employee. An employee who does not desire to enter the room shall not be required to do so.

4. Smoking in the room is limited to patients of that facility.

5. The room is an enclosed space that,

i. is fitted with proper ventilation in compliance with the regulations,

ii. is identified as a controlled smoking area by means of prescribed signs, displayed in the prescribed manner, and

iii. meets any other prescribed requirements. 2005, c. 18, s. 9.

Facilities for veterans

(9) Subsection (1) does not apply to a person who smokes or holds lighted tobacco in an indoor room in a facility for veterans that also serves as an enclosed workplace if the conditions set out below are met, and the obligations under subsections (3) and (6) do not apply to a proprietor or employer with respect to such a room if the proprietor or employer complies with any prescribed requirements respecting the maintenance of the room:

1. The facility for veterans is designated in the regulations.

2. The room has been designated as a controlled smoking area.

3. A resident of the facility who desires to use the room must be able, in the opinion of the proprietor or employer, to smoke safely without assistance from an employee. An employee who does not desire to enter the room shall not be required to do so.

4. Smoking in the room is limited to residents of that facility.

5. The room is an enclosed space that,

i. is fitted with proper ventilation in compliance with the regulations,

ii. is identified as a controlled smoking area by means of prescribed signs, displayed in the prescribed manner, and

iii. meets any other prescribed requirements. 2005, c. 18, s. 9.

Hotels, motels, inns

(10) Subsection (1) does not apply to a person who smokes or holds lighted tobacco in a guest room in a hotel, motel or inn if the conditions set out below are met, and subsections (3) and (6) do not apply to a proprietor or employer with respect to a guest room described in paragraphs 2 to 5 if the proprietor or employer complies with any prescribed requirements respecting the maintenance of the guest room:

1. The person is a registered guest of the hotel, motel or inn, or the invited guest of a registered guest.

2. The guest room is designed primarily as sleeping accommodation.

3. The guest room has been designated as a guest room that accommodates smoking by the management of the hotel, motel or inn.

4. The guest room is fully enclosed by floor-to-ceiling walls, a ceiling and doors that separate it physically from any adjacent area in which smoking is prohibited by this Act.

5. The guest room conforms to any other prescribed requirements. 2005, c. 18, s. 9.

Scientific research and testing facilities

(11) Subsection (1) does not apply to a person who smokes or holds lighted tobacco in a scientific research and testing facility for the purpose of conducting research or testing concerning tobacco or tobacco products, and subsections (3) and (6) do not apply to a proprietor or employer with respect to the research and testing carried on in such a facility. 2005, c. 18, s. 9.

Definition

(12) In this section, "proprietor" means the owner, operator or person in charge. 2005, c. 18, s. 9.

Protection for home health-care workers

9.1 (1) Every home health-care worker has the right to request a person not to smoke tobacco in his or her presence while he or she is providing health care services. 2005, c. 18, s. 9.

Right to leave

(2) Where a person refuses to comply with the request not to smoke, the home health-care worker has the right to leave without providing any further services, unless to do so would present an immediate serious danger to the health of any person. 2005, c. 18, s. 9.

Restriction

(3) A home health-care worker who has exercised his or her right to leave shall comply with any procedures set out in the regulations. 2005, c. 18, s. 9.

Regulations

(4) The Lieutenant Governor in Council may make regulations setting out procedures that must be followed if a home health-care worker has exercised his or her right to leave. 2005, c. 18, s. 9.

Definition

(5) In this section,

“home health-care worker” means a person who provides health-care services in private homes, that is provided or arranged by,

(a) a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*, or

(b) an entity that receives funding from the Ministry of Health and Long-Term Care or a local health integration network as defined in section 2 of the *Local Health System Integration Act, 2006*. 2005, c. 18, s. 9; 2006, c. 4, s. 54.

Signs

10. The person who owns or occupies a place described in section 9 shall ensure that signs referring to the prohibition imposed by that section are posted in accordance with the regulations. 1994, c. 10, s. 10.

11. Repealed: 2005, c. 18, s. 10.

Conflict with other legislation

12. If there is conflict between sections 9 and 10 of this Act and a provision of another Act, a regulation or a municipal by-law that deals with smoking, the provision that is more restrictive of smoking prevails, subject to subsection 13 (3). 1994, c. 10, s. 12.

Traditional Use of Tobacco by Aboriginal Persons**Purpose**

13. (1) The purpose of this section is to acknowledge the traditional use of tobacco that forms part of Aboriginal culture and spirituality. 1994, c. 10, s. 13 (1).

Non-application of s. 3

(2) Section 3 does not prohibit a person from giving tobacco to an Aboriginal person who is or appears to be less than 19 years of age or 25 years of age, as the case may be, if the gift is made for traditional Aboriginal cultural or spiritual purposes. 1994, c. 10, s. 13 (2); 2005, c. 18, s. 11 (1).

Non-application of smoking prohibitions

(3) No provision of an Act, regulation or municipal by-law that prohibits smoking in a place, including section 9 of this Act,

- (a) prohibits an Aboriginal person from smoking tobacco or holding lighted tobacco there, if the activity is carried out for traditional Aboriginal cultural or spiritual purposes;
- (b) prohibits a non-Aboriginal person from smoking tobacco or holding lighted tobacco there, if the activity is carried out with an Aboriginal person and for traditional Aboriginal cultural or spiritual purposes. 1994, c. 10, s. 13 (3).

Place for traditional use of tobacco

(4) At the request of an Aboriginal resident, the operator of a hospital, facility, home or other place set out below shall set aside an indoor area, separate from any area where smoking is otherwise permitted, for the use of tobacco for traditional Aboriginal cultural or spiritual purposes:

1. A hospital as defined in the *Public Hospitals Act*.
2. A private hospital as defined in the *Private Hospitals Act*.
3. A designated psychiatric facility.
4. A nursing home as defined in the *Nursing Homes Act*.

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 4 is repealed by the Statutes of Ontario, 2007, chapter 8, subsection 227 (3) and the following substituted:

4. A long-term care home within the meaning of the *Long-Term Care Homes Act, 2007*.

See: 2007, c. 8, ss. 227 (3), 232 (2).

5. A home for special care under the *Homes for Special Care Act*.
6. An approved charitable home for the aged under the *Charitable Institutions Act*.

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 6 is repealed by the Statutes of Ontario, 2007, chapter 8, subsection 227 (3). See: 2007, c. 8, ss. 227 (3), 232 (2).

7. A home as defined in the *Homes for the Aged and Rest Homes Act*.

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 7 is repealed by the Statutes of Ontario, 2007, chapter 8, subsection 227 (3). See: 2007, c. 8, ss. 227 (3), 232 (2).

8. A place that belongs to a prescribed class. 2005, c. 18, s. 11 (2).

Inspection

Inspectors

14. (1) The Minister may appoint inspectors for the purposes of this Act. 1994, c. 10, s. 14 (1); 2005, c. 18, s. 2.

Inspection

- (2) For the purpose of determining whether this Act is being complied with, an inspector may, without a warrant, enter and inspect places referred to in

subsection 4 (2) and section 9 and the establishments of tobacco wholesalers and distributors. 1994, c. 10, s. 14 (2).

Restricted appointments

(3) The Minister may, in an appointment, restrict the inspector's powers of entry and inspection to specified places or kinds of places among those referred to in subsection (2). 1994, c. 10, s. 14 (3).

Time of entry

(4) The power to enter and inspect a place without a warrant may be exercised only during the place's regular business hours or, if it does not have regular business hours, during daylight hours. 1994, c. 10, s. 14 (4).

Dwellings

(5) The power to enter and inspect a place without a warrant shall not be exercised to enter and inspect a part of the place that is used as a dwelling unless reasonable notice has been given to the occupier of the dwelling. 1994, c. 10, s. 14 (5).

Use of force

(6) An inspector is not entitled to use force to enter and inspect a place. 1994, c. 10, s. 14 (6).

Identification

(7) An inspector conducting an inspection shall produce, on request, evidence of his or her appointment. 1994, c. 10, s. 14 (7).

Powers of inspector

(8) An inspector conducting an inspection may,

- (a) examine a record or other thing that is relevant to the inspection;
- (b) demand the production for inspection of a record or other thing that is relevant to the inspection;
- (c) remove for review and copying a record or other thing that is relevant to the inspection;
- (d) in order to produce a record in readable form, use data storage, information processing or retrieval devices or systems that are normally used in carrying on business in the place;
- (e) question a person on matters relevant to the inspection;
- (f) if he or she finds that an employer is not complying with subsection 9 (3), direct the employer or a person whom the inspector believes to be in charge of

the enclosed workplace to comply with the provision and may require the direction to be carried out forthwith or within such period of time as the inspector specifies; and

(g) if he or she finds that a proprietor is not complying with subsection 9 (6), direct the proprietor or a person whom the inspector believes to be in charge of the enclosed public place to comply with the provisions and may require the direction to be carried out forthwith or within such period of time as the inspector specifies. 1994, c. 10, s. 14 (8); 2005, c. 18, s. 12 (1, 2).

Same, vending machines

(9) An inspector conducting an inspection may open a vending machine for the selling or dispensing of tobacco if,

(a) the vending machine is operable or is in a place to which the public has access;

(b) the owner or operator of a place referred to in subsection 7 (1) refuses or is unable to open the machine; and

(c) the inspector has reasonable grounds to believe that there is tobacco in the machine. 1994, c. 10, s. 14 (9).

Exemption from liability

(10) No person is liable for damage done to the machine in connection with the opening. 1994, c. 10, s. 14 (10).

Seizure and forfeiture

(11) The inspector may seize any tobacco and money found in the machine; the tobacco is forfeited and shall be dealt with as the Minister directs, and the money is forfeited to the Minister of Finance. 1994, c. 10, s. 14 (11); 2005, c. 18, s. 2.

Written demand

(12) A demand that a record or other thing be produced for inspection must be in writing and must include a statement of the nature of the record or thing required. 1994, c. 10, s. 14 (12).

Obligation to produce and assist

(13) If an inspector demands that a record or other thing be produced for inspection, the person who has custody of the record or thing shall produce it

and, in the case of a record, shall on request provide any assistance that is reasonably necessary to interpret the record or to produce it in a readable form. 1994, c. 10, s. 14 (13).

Records and things removed from place

(14) A record or other thing that has been removed for review and copying,
(a) shall be made available to the person from whom it was removed, for review and copying, on request and at a time and place that are convenient for the person and for the inspector; and
(b) shall be returned to the person within a reasonable time. 1994, c. 10, s. 14 (14).

Copy admissible in evidence

(15) A copy of a record that purports to be certified by an inspector as being a true copy of the original is admissible in evidence to the same extent as the original, and has the same evidentiary value. 1994, c. 10, s. 14 (15).

Obstruction

(16) No person shall hinder, obstruct or interfere with an inspector conducting an inspection, refuse to answer questions on matters relevant to the inspection or provide the inspector with information, on matters relevant to the inspection, that the person knows to be false or misleading. 1994, c. 10, s. 14 (16).

Definition

(17) In this section,
"record" means any collection of information however recorded, whether in printed form, on film, by electronic means or otherwise and includes any data that is recorded or stored on any medium in or by a computer system or similar device as well as drawings, specifications or floor plans for an enclosed workplace. 2005, c. 18, s. 12 (3).

Offences

Offences

15. (1) A person who contravenes section 3, 3.1 or 3.2, subsection 4 (1), section 5 or 9 or subsection 13 (4), 14 (16), 16 (4), 17 (6), 18 (4) or (5) is guilty of

an offence and on conviction is liable to a fine determined in accordance with subsection (3). 2005, c. 18, s. 13 (1).

Same

(2) A person who contravenes section 6 or 10 or subsection 18 (1) is guilty of an offence and on conviction is liable, for each day or part of a day on which the offence occurs or continues, to a fine determined in accordance with subsection (3). 2005, c. 18, s. 13 (1).

Determining maximum fine

(3) The fine, or daily fine, as the case may be, shall not exceed an amount determined as follows:

1. Establish the number of times the defendant has been convicted of the same offence during the five years preceding the current conviction.
2. If the defendant is an individual, the amount is set out in Column 3 of the Table to this section, opposite the number of previous convictions in Column 2 and the section or subsection number of the provision contravened in Column 1.
3. If the defendant is a corporation, the amount is set out in Column 4 of the Table to this section, opposite the number of previous convictions in Column 2 and the section or subsection number of the provision contravened in Column 1. 1994, c. 10, s. 15 (3).

Sequence of convictions

(4) In establishing the number of times the defendant has been convicted of the same offence for the purposes of subsection (3), the only question to be considered is the sequence of convictions, and no consideration shall be given to the sequence of commission of offences or to whether an offence occurred before or after a conviction. 1994, c. 10, s. 15 (4).

Continuing offence, vending machine

(5) A person who contravenes subsection 7 (1) is guilty of an offence and on conviction is liable, for each day or part of a day on which the offence occurs or continues, to a fine of not more than \$2,000. 1994, c. 10, s. 15 (5).

Offence, failure to submit report

(6) A person who contravenes section 8 or a regulation made under clause 19 (1) (f) is guilty of an offence and on conviction is liable to a fine of not more than \$100,000. 1994, c. 10, s. 15 (6).

Duty of directors and officers

(7) A director or officer of a corporation that engages in the manufacture, sale or distribution of tobacco has a duty to take all reasonable care to prevent the corporation from contravening this Act. 1994, c. 10, s. 15 (7).

(8) Repealed: 2005, c. 18, s. 13 (2).

Offence

(9) A person who has the duty imposed by subsection (7) and fails to carry it out is guilty of an offence and on conviction is liable to a fine of not more than \$100,000. 1994, c. 10, s. 15 (9); 2005, c. 18, s. 13 (3).

Same

(10) A person may be prosecuted and convicted under subsection (9) even if the corporation has not been prosecuted or convicted. 1994, c. 10, s. 15 (10).

TABLE

Column 1	Column 2	Column 3	Column 4
Provision Contravened	Number of Earlier Convictions	Maximum Fine — Individual	Maximum Fine — Corporation
		\$	\$
3 (1), 3 (2), 3.1, 3.2	0	4,000	10,000
	1	10,000	20,000
	2	20,000	50,000
	3 or more	100,000	150,000
3 (6), 4 (1), 6, 10, 14 (16), 16 (4), 17 (6), 18 (1), 18 (4), 18 (5)	0	2,000	5,000
	1	5,000	10,000
	2	10,000	25,000
	3 or more	50,000	75,000
5	0	2,000	100,000
	1	5,000	300,000
	2	10,000	300,000
	3 or more	50,000	300,000
9 (1), 9 (2)	0	1,000	
	1 or more	5,000	
9 (3), 9 (6)	0	1,000	100,000

	1 or more	5,000	300,000
9 (4)	any	4,000	10,000
13 (4)	any	4,000	10,000

2005, c. 18, s. 13 (4); 2007, c. 10, Sched. J, s. 4.

Automatic Prohibition

Tobacco sales offences

16. (1) For the purpose of this section, the following are tobacco sales offences:

1. Contravening subsection 3 (1) or (2), section 5, 6 or 7, or subsection (4) of this section.
2. Contravening section 8 or 29 of the *Tobacco Tax Act*. 1994, c. 10, s. 16 (1).

Notice

(2) On becoming aware that all of the following conditions have been satisfied, the Minister shall send a notice of the prohibition imposed by subsection (4) to the person who owns or occupies the place and to all wholesalers and distributors of tobacco in Ontario:

1. Any person has been convicted of a tobacco sales offence committed in a place owned or occupied by the person.
 2. Any person was convicted of another tobacco sales offence in the same place during the five years preceding the conviction referred to in paragraph 1.
 3. The period allowed for appealing the conviction referred to in paragraph 1 has expired without an appeal being filed, or any appeal has been finally disposed of.
- 2005, c. 18, s. 14.

Date

(3) The notice shall specify the date on which it is to take effect. 1994, c. 10, s. 16 (3).

Sales, storage and deliveries prohibited

(4) During the applicable period,

- (a) no person shall sell or store tobacco in the place where the tobacco sales offences were committed; and
- (b) no wholesaler or distributor shall deliver tobacco to the place or have it delivered there. 1994, c. 10, s. 16 (4).

Applicable period

- (5) For the purposes of subsection (4), the applicable period is,
- (a) the six months that follow the date specified in the notice referred to in subsection (2), if the person has been convicted of one other tobacco sales offence committed in the same place during the five years preceding the current conviction;
 - (b) the nine months that follow the date specified in the notice, if the person has been convicted of two other tobacco sales offences committed in the same place during the five-year period; and
 - (c) the 12 months that follow the date specified in the notice, if the person has been convicted of more than two other tobacco sales offences committed in the same place during the five-year period. 1994, c. 10, s. 16 (5).

Defence

- (6) It is a defence to a charge under subsection (4) that the defendant had not received the notice at the time the offence was committed. 1994, c. 10, s. 16 (6).

Exception

- (7) The prohibition on storing tobacco does not apply to small amounts of tobacco for the immediate personal use of persons who work in the place. 1994, c. 10, s. 16 (7).

Sequence of convictions

- (8) In establishing the number of times a person was convicted of another tobacco sales offence for the purposes of this section, the only question to be considered is the sequence of convictions, and no consideration shall be given to the sequence of commission of offences or to whether an offence occurred before or after a conviction. 1994, c. 10, s. 16 (8).

Seizure

17. (1) An inspector may seize, without notice or other process, tobacco that is stored in a place in contravention of section 16. 1994, c. 10, s. 17 (1).

Forfeiture

(2) Tobacco seized under this section is forfeited and shall be dealt with as the Minister directs. 1994, c. 10, s. 17 (2); 2005, c. 18, s. 2.

Vending machine

(3) The inspector's power of seizure includes power to open a vending machine in order to examine the contents, if the inspector suspects on reasonable grounds that the machine contains tobacco that is stored in a place in contravention of section 16, and no person is liable for damage done to the machine in connection with the opening. 1994, c. 10, s. 17 (3).

Money

(4) Any money found in a vending machine containing tobacco that is seized under this section is forfeited to the Minister of Finance. 1994, c. 10, s. 17 (4).

Application of subss. 14 (4) to (7)

(5) Subsections 14 (4), (5), (6) and (7) apply, with necessary modifications, to an inspector acting under subsection (1) or (3). 1994, c. 10, s. 17 (5).

Obstruction

(6) No person shall hinder, obstruct or interfere with an inspector acting under subsection (2). 1994, c. 10, s. 17 (6).

Signs

18. (1) The owner or occupier of a place that is subject to a prohibition imposed under section 16 shall ensure that signs are posted at the place in accordance with the regulations. 1994, c. 10, s. 18 (1).

Posting by inspector

(2) If signs are not posted as required, an inspector may enter the premises without a warrant and post signs in accordance with the regulations. 1994, c. 10, s. 18 (2).

Application of subss. 14 (4) to (7)

(3) Subsections 14(4), (5), (6) and (7) apply, with necessary modifications, to an inspector acting under subsection (2). 1994, c. 10, s. 18 (3).

Obstruction

(4) No person shall hinder, obstruct or interfere with an inspector acting under subsection (2). 1994, c. 10, s. 18 (4).

Signs not to be removed

(5) No person shall remove a sign posted under this section while the prohibition remains in force. 1994, c. 10, s. 18 (5).

Miscellaneous Provisions**Regulations**

19. (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing anything that is referred to in this Act as being prescribed;

(a.1) for the purposes of the definition of "enclosed public place" in subsection 1 (1),

(i) defining "inside",

(ii) prescribing places to be enclosed public places;

(a.2) for the purposes of the definition of "enclosed workplace" in subsection 1 (1),

(i) defining "inside",

(ii) prescribing places to be enclosed workplaces;

(a.3) exempting tobacconists from any or all of the requirements and prohibitions in section 3.1, defining tobacconists for the purposes of such an exemption, and making the exemption subject to one or more conditions provided for in the regulations;

(a.4) exempting retailers who sell tobacco at a duty free shop as defined in subsection 2 (1) of the *Customs Act* (Canada) from any or all of the requirements and prohibitions in section 3.1, and making the exemption subject to one or more conditions provided for in the regulations;

(a.5) exempting manufacturers and wholesalers of tobacco products from any or all of the requirements and prohibitions in section 3.1, defining manufacturers and wholesalers of tobacco products for the purposes of such an exemption, and

making the exemption subject to one or more conditions provided for in the regulations;

- (b) authorizing the sale of tobacco in a part of a psychiatric facility for the purposes of paragraph 3 of subsection 4 (2);
- (c) respecting the signs to be posted under sections 6, 10 and 18;
- (d) respecting the packaging requirements, health warning and other information referred to in section 5;
- (e) respecting the reports to be submitted under section 8;
- (f) requiring persons who sell tobacco at retail to submit reports to the Minister;
- (g) governing the giving of notice for the purposes of section 9;
- (h) governing proper ventilation for the purposes of paragraph 5 of subsection 9 (7);
- (h.1) defining "supportive housing residence" for the purposes of subparagraph 1 v of subsection 9 (7);
- (h.2) designating psychiatric facilities for the purposes of subsection 9 (8) and paragraph 3 of subsection 13 (4);
- (h.3) designating facilities for veterans for the purposes of subsection 9 (9).

Exception

(2) A regulation shall not be made under clause (1) (f) unless a report referred to in that clause is necessary in order to,

- (a) verify reports obtained under section 8; or
- (b) obtain information with respect to the sale of tobacco that cannot be obtained under section 8. 1994, c. 10, s. 19 (2).

Same

(3) A regulation made under clause (1) (c) may specify the wording and appearance of the signs and the locations where they are to be posted. 1994, c. 10, s. 19 (3).

Same

(4) A regulation made under clause (1) (d) may,

- (a) impose different packaging requirements for different forms of tobacco;
- (b) govern aspects of packaging, including labelling, colouring, lettering, script, size of writing or markings and other decorative elements;
- (c) prescribe a minimum package size to contain not fewer than the prescribed number of items or not less than the prescribed number of grams of tobacco;
- (d) require that the health warning be inserted inside the package, printed on or affixed to its outer surface, inserted between the package and the outer wrapping, or printed on or affixed to the outer wrapping;

(e) require that the other information be inserted inside the package, printed on or affixed to its outer surface, inserted between the package and the outer wrapping, or printed on or affixed to the outer wrapping. 1994, c. 10, s. 19 (4).

Same

(5) A regulation made under clause (1) (e) or (f) may prescribe the contents and frequency of the reports. 1994, c. 10, s. 19 (5).

Effect of subss. (3) to (5)

(6) Subsections (3), (4) and (5) do not restrict the generality of subsection (1). 2005, c. 18, s. 15 (10).

General or specific

(7) A regulation under this Act may be general or specific in its application, and may establish different categories or classes, and may provide for different obligations or responsibilities for different categories or classes. 2005, c. 18, s. 15 (10).

Crown bound

20. This Act binds the Crown.

Interpretation Act. R.S.O. 1990, c. I-11
(In force at time of offences - repealed July 25, 2007)

All Acts remedial

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. R.S.O. 1990, c. I.11, s. 10.

Courts of Justice Act, R.S.O. 1990, Chap. C.43**Powers on appeal**

134.(1) Unless otherwise provided, a court to which an appeal is taken may,

- (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
- (b) order a new trial;
- (c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

Interim orders

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

Power to quash

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

- (a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;
- (b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and
- (c) direct a reference or the trial of an issue, to enable the court to determine the appeal.

Scope of decisions

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal. R.S.O. 1990, c. C.43, s. 134 (3-5).

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

MOTIONS IN APPELLATE COURT

Rule 37 Applies Generally

61.16 (1) Rule 37, except rules 37.02 to 37.04 (jurisdiction to hear motions, place of hearing, to whom to be made) and rule 37.17 (motion before commencement of proceeding), applies to motions in an appellate court, with necessary modifications. O. Reg. 263/03, s. 6 (1).

Motion to Receive Further Evidence

(2) A motion under clause 134 (4) (b) of the *Courts of Justice Act* (motion to receive further evidence) shall be made to the panel hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.16 (2).

Court File No.: C49015

MIKE KENNEDY
Appellant

- and -

**LEEDS, GREENVILLE AND
LANARK DISTRICT HEALTH UNIT**
Respondent

COURT OF APPEAL FOR ONTARIO

RESPONDENT'S FACTUM

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