

Court File No.

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

MIKE KENNEDY

Applicant (Appellant/Defendant)

v.

LEEDS GRENVILLE AND LANARK DISTRICT HEALTH UNIT

Respondent (Prosecution)

RESPONDENT'S MEMORANDUM OF ARGUMENT
(Pursuant to Rule 27, Rules of the Supreme Court of Canada)

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Summary

1. The Applicant seeks Leave to Appeal to this Honourable Court from the Court of Appeal For Ontario where convictions for violations of the *Smoke Free Ontario Act* that were entered by a Justice of the Peace, were confirmed on appeal by the Ontario Court of Justice, and further confirmed by the Court of Appeal For Ontario. The Applicant now seeks leave to appeal on the basis that there is uncertainty in the application of the term "enclosed public place".
2. There is no serious issue for consideration on appeal to this Court in this case as the Applicant is merely disappointed by his lack of success at any of the earlier stages of appeal.
3. The Respondent submits that the appropriate standard of review in this appeal of the appellate court's decision is one of correctness.

4. The narrow issue relating to all the convictions is whether the premises upon which the Applicant conducted the business of serving drinks, serving food, providing entertainment as well as permitting patrons to smoke was an “enclosed public place”. All of the courts below have stated that this may have been a private club that required a \$4.00 per month membership, but it was indeed a public place. No smoking is permitted in an “enclosed public place”. There is no serious question of law to be determined in this case. The Applicant is merely dissatisfied with the result of a properly decided trial decision that has been affirmed by two subsequent levels of judicial appeal. Different jurisdictions may allow for private smoking clubs; Ontario does not.

PART I - STATEMENT OF FACTS

5. The Respondent generally accepts the Applicants facts as stated in paragraphs 4-22 of the Applicant’s Memorandum.
6. In addition to the facts at paragraph 3 of the Applicant’s Memorandum of Argument, the Respondent states that second-hand smoke causes smoking-related diseases in smokers as well as non-smokers. The enactment of the *Smoke Free Ontario Act* was aimed at reducing smoking amongst smokers as well as reducing the number of young people from taking up smoking to improve the general health of the public and reduce public health costs.

**Official Report of Debates (Hansard), Legislative Assembly of Ontario,
First Session, 38th Parliament, Volume 6, pp. 4961-4963 (Appendix I)**

7. In addition to the comments at paragraph 5 of the Applicant's Memorandum of Argument, the Respondent states that the legislative purpose is not limited to places where non-smokers can reasonably be expected to frequent or have a right to do so. Some non-smokers may feel compelled to work for personal economic reasons, and as such there may be no real choice between working in a smoke-filled environment or not working at all. It is overly simplistic to simply say that the legislative purpose is to increase public health by reducing involuntary exposure to second-hand smoke. The Ontario legislature has chosen to reduce **everyone's** exposure to second-hand smoke, whether voluntary or not.

**Decision of the Court of Appeal, at para 45, page 16
Hansard, December 15, 2004, p. 4963 (Appendix I)**

PART II – QUESTIONS IN ISSUE

8. Does this case raise a question of public importance or is there any issue of such importance that it ought to be decided by the Supreme Court?
9. Do the decisions of the courts below lack clarity in distinguishing public places from private places leading to the unpredictable application of legislation which relies on the distinction between public and private places to achieve its purpose?

PART III – ARGUMENT

Issue I

Does this case raise a question of public importance or is there any issue of such importance that it ought to be decided by the Supreme Court?

10. The Respondent respectfully submits that this Application for Leave to Appeal is not of such public importance nor is there any issue of significance that should attract the attention of this Honourable Court. The Applicant's issue is personal to him and simply reflects his dissatisfaction with the result of being convicted. His attempt to circumvent the SFOA by the masquerade of a private smoker's club has not been accepted by the trial Justice of the Peace nor the two subsequent levels of appeal. The SFOA is unique to Ontario. There is no evidence that the term "enclosed public place" in the SFOA is the same as in similar statutes of other provinces or that there is any confusion by the lower courts' interpretation of that term. There is no confusion about the places where smoking is not permitted pursuant to the *Smoke Free Ontario Act*. In this respect, the Appellants have not met the test set out in s. 40 of the *Supreme Court of Canada Act*.

Supreme Court Act, s. 40(1), at page - 16 - of this Memorandum

11. This Honourable Court has stated that Applications for Leave to Appeal to the Supreme Court should be granted only in the rarest of cases.

But I wish to stress that this is a jurisdiction which, for obvious reasons of policy and comity, we should exercise most sparingly, in those very rare cases where, as in this case, there is a risk that a question of major constitutional importance might otherwise be put beyond the possible review by this Court.

MacDonald v. City of Montreal, [1986] 1 S.C.R. paragraph 132, page 503

That same Court (in dissent, but agreed with by the majority) quoted previous decisions to further define the parameters of this Honourable Court's interest in intervening in a matter:

The function of this court is ...to settle questions of law of national importance in the interests of promoting uniformity in the application

of the law across the country, especially with respect to matters of federal competence.

And later:

While the court should maintain an attitude of deference to the exercise of judicial discretion by intermediate appellate courts, it undoubtedly has the jurisdiction and should not hesitate to interfere with discretionary decisions on those rare occasions when it perceives legal principles of national, and more particularly constitutional, significance to be at stake.

**MacDonald v. City of Montreal, [1986] 1 S.C.R.,
paragraphs 143 and 145 (pages 509 and 510)**

12. There is no Federal statute involved in this case. Neither is there a Constitutional issue raised.
13. In this case, the Applicant has mixed the need for national guidance in the interpretation of statutes generally or of a Federal statute (or of provincial statutes where they are all identical) with the desire to have yet another forum to espouse his position that a private smoker's club is not a public place in Ontario. This is not one of those rare occasions where a legal principle of national importance, and more particularly of constitutional significance, is at stake.
14. There is no absurd result that has been established in Ontario by the lower courts' interpretation of the term "enclosed public place".
15. The Applicant has only provided examples of a human rights challenge in British Columbia dealing with whether men's lounge facilities should be accessible to women, or whether (in the Criminal Code context) the term "public place" ought to be expansive or restrictive when dealing with prohibition orders against individuals convicted of certain sexual offences.

16. This case involves a violation of a provincial statute against smoking in public places and should not be used to revisit provincial appellate decisions that could have been individually appealed to this Court. Indeed in the Applicant's own materials, the Court of Appeal of Alberta held that the objective of the *Public Health Act* and its purpose of the preservation of public health dictated a broad approach to the definition of "public place".

Applicant's Memorandum of Argument, paragraph 34.

Issue II

Do the decisions of the courts below lack clarity in distinguishing public places from private places leading to the unpredictable application of legislation which relies on the distinction between public and private places to achieve its purpose?

17. The lower court decisions are not only consistent with one another, but they properly apply the modern rule of statutory interpretation. The Court of Appeal below in this case stated:

I agree with the respondent that the Act is public welfare legislation designed to promote public health and safety. Such legislation attracts an interpretation that is consistent with its objective.

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18. In one of its seminal cases, this Honourable 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.

***R. v. Gladue*, [1999] 1 S.C.R., paragraph 25, page 704.**

19. In Ontario, section 64(1) of the *Legislation Act*, S.O. 2006, Chapter 21 states:

An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

Legislation Act, S.O. 2006, C-21, s. 64(1) at page 17 of this Memorandum

20. Ontario's Court of Appeal 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."

***Ontario (Ministry of Labour) v. Hamilton (City) (2002),
58 O.R. (3d) 37 (C.A.), paragraph 16***

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."

R. v. Timminco Ltd. (2001), 54 O.R. (3d) 21 at 27 (C.A.) paragraph 22

21. The Respondent submits that the courts should (as they have) give a fair, large and liberal interpretation to the relevant statutory provisions so as to best attain the purpose of the SFOA.
22. Courts in Ontario have routinely followed this pronouncement by the Supreme Court of Canada. The Ontario Court of Appeal 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.”

Ontario (Minister of Transportation) v. Ryder Truck Rental Canada Ltd. (2000), 47 O.R. (3d) 171 at 174 (C.A.), paragraph 11

23. 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.

24. 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.

**Sullivan on the Construction of Statutes,
5th Edition, pages 609 and 610**

25. 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.

**Official Report of Debates (Hansard), Legislative Assembly of Ontario,
First Session, 38th Parliament, Volume 6, pp. 4961-4963 (Appendix I)**

26. The legislative intent, in particular regarding the intent of this legislation to have a broad scope including its application to private clubs, was also made clear. In

introducing the legislation on first reading the Honourable George Smitherman

(Minister of Health and Long-Term Care) stated:

I am proud to say that this is a law with no exceptions, no exemptions. As I've stated before, it would apply to Legion halls, it would apply to **private clubs**, it would apply to bingo halls and to casinos, and it would eliminate so-called designated smoking rooms. One hundred per cent smoke-free means 100% smoke-free, and that's what this legislation would do. **(emphasis added)**

Let me take a moment to tell you what it does not do. It doesn't deal with smoking in the home. I look forward to the day when nobody smokes anywhere in Ontario, but I'm someone who believes that the state has no place in the bedrooms or the rec rooms of the nation. So we're saying to Ontarians, if you want to smoke at home, we're not going to stop you.

Official Report of Debates (Hansard), Legislative Assembly of Ontario, First Session, 38th Parliament, Volume 6, December 15, 2004, p. 4962 (Appendix I)

On Second Reading Minister Smitherman shared the floor with another member of his party, Deborah Matthews representative from London North Centre, who reiterated:

This bill will apply to legions, to **private clubs**, to offices, to factories, to bars, to restaurants. This applies to all workplaces. One hundred per cent smoke-free means just that: 100% smoke-free. We are not going to entertain exemptions to that. Once you create the exemption, you open the floodgates. **(emphasis added)**

The only place that was clearly meant to be exempt from the legislation was one's private residence.

Official Report of Debates (Hansard), Legislative Assembly of Ontario, First Session, 38th Parliament, Volume 6, February 15, 2005, p. 5067 (Appendix II)

27. The Court of Appeal accepted these excerpts from Hansard when it said:

Para 25. I do not perceive any unfairness in considering the Hansard material. First, both parties seek to rely on Hansard evidence to advance their case. Second, if Hansard evidence were admitted at trial is doubtful that either side could have done anything more with the evidence than they could do now on appeal. Hansard evidence is not comparable to the evidence of a live witness who would be subject to cross-examination and whose evidence is better heard by the trier of fact. It is difficult to see how either side would suffer any disadvantage in the admission of this evidence in the Court of Appeal.

Para 26. The Hansard references proffered by the respondent support its position and confirm the interpretation placed on s. 9(1) of the Act by the courts below to the effect that the legislature did not intend to exempt private clubs from the reach of the Act.

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28. 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 narrow and do nothing to negate the intention to have a law that was broad in its scope. More particularly, the legislature did not make an exemption for private clubs.
29. The government's objective and intention to protect all Ontario residents is also clearly stated in the Committee debates on the *SFOA* where Jim Watson (Minister of Health Promotion) spoke of the evils of second hand smoke, in that it causes heart disease and lung cancer in adults. He also spoke about the cost of tobacco related diseases, being \$1.7 billion to the Ontario Health Care system with a further \$2.6 billion in lost productivity for a total cost to the province of \$4.3 billion. He explained that the legislation is to "protect **everyone** from second-hand smoke" (**emphasis added**). His comments are not narrowed to speaking of the protection of non-smokers.

Committee-proceedings, Hansards, September 5, 2006, p. 4-5 (Appendix III)

30. The Honourable Minister George Smitherman put it this way when addressing the legislature:

Tobacco destroys lives. It rips families apart. It clogs our hospitals and damages our economy. This government will not stand idly by as this destruction continues. We have an obligation to protect and preserve the health of Ontarians.

**Official Report of Debates (Hansard), Legislative Assembly of Ontario,
First Session, 38th Parliament, Volume 6, December 15, 2004p. 4963**

31. The Applicant 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.

32. 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-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.

33. The Canadian health care system is one which all Canadians contribute to through their taxes and are able to use, the cost of tobacco related illnesses (caused not only by smoking but by exposure to second-hand smoke) affects not only those who smoke but all Canadians. Indeed, both Minister Watson and Minister Smitherman spoke of the cost to Ontario as one of the reasons for the legislation. The members of this club cannot simply waive their right to the protection of the law as it is not a right that is for their benefit alone.

34. All of these sentiments were expressed by the Court of Appeal in its decision, when it stated:

Para 45. Read as a whole, the Act is clearly designed to eliminate smoking in public places and thus protect members of the public from contact with second-hand smoke. The word "public" is not defined in the Act. There is no attempt to limit or restrict its application in any way. As I see it, people who join the club are as much members of the public as are members of a swimming club or tennis club.

Para 46. In this case members of the "smoking public" were approached and recruited to patronize the former sports' bar in the guise of joining a private club. While the club was said to be a non-profit operation it ran essentially as before, except that admission was restricted to those members of the public who paid four dollars a month and accepted the club's simplistic rules.

Para 47. If the appellant's position was accepted, everyone who belonged to a private club would be exempt from the Act, even if the club chose to operate in a public place. Such an interpretation of the Act would defeat its objective of protecting the public from second-hand smoke.

Para 48. If the legislature had intended to exempt private clubs from the application of the Act it clearly would have done so. It is significant that private clubs are not included in this list of exemptions.

Para 50. 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"... 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"... 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. (*Albertos Restaurant v. Saskatoon (City)* [2001] 6 WWR 214, cited in the decision)

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PART IV – SUBMISSION ON COSTS

35. The Respondent respectfully submits that this Application for Leave to Appeal is without merit and put the Respondent to the time and expense of responding to this Application.

PART V - ORDER SOUGHT

36. The Respondent respectfully requests that this Application for Leave to Appeal be denied with costs.

All of which is respectfully submitted this 12th day of January 2010,

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