

Ontario Superior Court of Justice

Between:

HER MAJESTY THE QUEEN

-v-

MIKE KENNEDY

Accused, Appellant

Written Argument of Mike Kennedy

Mike Kennedy
2052 St. Marie, Ontario
K0A 1W0
613 443-1964

Michael J. O'Shaughnessy
21 Courthouse Ave.
P.O. Box 2121
Brockville, Ontario K6V 6V5
613 342-4491
fax 613 342-8570
mike@courthouse.ca

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Part 1 Summary of Evidence at Trial

1. A summary of the evidence provided before the Learned Justice of the Peace, hereinafter the JP, supports and confirms a finding of innocence/not guilty should have been found by the JP and he was in error in failing to so do.
2. The first witness was Inspector Oglaza, hereinafter Oglaza, at page 11 of the Transcripts.
3. Oglaza testifies that the Health Unit for which is the department of the Ontario government he is employed with and which is entrusted with the solemn power to enforce the by-laws in relation to this case, received a complaint that the premises known as Dolittle's Sports Bar and Grill, hereinafter Dolittle's, was permitting smoking on site.¹
4. On September 8, 2006, Oglaza along with another inspector, Andrew Dunn, hereinafter Dunn, arrived at Dolittle's at 3:20 pm for an inspection, in response to this complaint.^{1a} Kennedy was never informed of who the complainant was, nor given a copy of any complaint, nor was the complainant put upon the stand in chief by the Crown.^{1b}
5. Oglaza was met by the defendant, Mike Kennedy, hereinafter Kennedy, the operation manager,^{1c} at the front door who was kind enough to permit Oglaza to enter the premises known as "*Smokers Choice/Non Smokers Choice*"^{1d}, hereinafter the Club, to make visual observations.^{1e}
6. Oglaza testifies he saw ashtrays, which Kennedy concedes to being present.^{1f} Oglaza then entered into conversation with Kennedy.

¹ Transcripts, March 7, 2007, page 14 line 15-17

^{1a} Transcripts, March 7, 2007, page 15 line 3-13; page 20 line 12-15

^{1b} Transcripts, March 7, 2007, page 122 line 1-6

^{1c} Transcripts, March 7, 2007, page 25 line 7, 8

^{1d} Transcripts, March 7, 2007, page 25 line 8-9

^{1e} Transcripts, March 7, 2007, page 15 line 8-13; page 16 line 3-7

^{1f} Transcripts, March 7, 2007, page 19 line 10-11, 19-20

^{1g} Transcripts, March 7, 2007, page 21 line 1-7, 8-10, 17-22

7. Kennedy at this time noticed Oglaza that the premises are not a public place, that there are no employees working there, and provided to Oglaza a copy of the mandatory membership cards and forms which Kennedy willingly provided to Oglaza. A copy of this card is at Tab 3 of the Crown's Exhibit Book.^{1g} Oglaza later confirms that the Club was diligent in ensuring to check all members to ensure that they were in possession of their membership card at all times as a condition of entry.^{0h}
8. Kennedy noticed Oglaza that his place was in full compliance with the legislation, and included a membership fee of \$4/month and smoking was permitted.¹ⁱ
9. Oglaza then left the premises and returned on September 13, 2006 to continue his investigation and obtain more information, more specifically with respect to who was listed on the liquor licence, who served the alcohol and with respect to clean up issues.^{1j}
10. Oglaza was stopped by a doorman and was prohibited from entry upon the premises at this time.^{1k} Subsequent conversations with Kennedy took place outside the premises.
11. Oglaza testified he asked Kennedy to post non smoking signs which Kennedy refused, claiming that the premises were private members club only and not a public place, therefore the *Smoke Free Ontario Act* did not apply.^{1l}
12. Oglaza then requested to enter the premises and Kennedy refused him access, noticing Oglaza that it is a private club and only members are permitted entrance.^{1m}
13. Oglaza then attempted to enter upon the premises three days later at the grand opening of *Smokers Choice/Non Smokers Choice*, however he admits to be refused at the front registration desk.¹ⁿ Oglaza did not possess at this time a valid membership with the club.

⁰ Transcripts, March 7, 2007, page 32 line 12-20
¹ⁱ Transcripts, March 7, 2007, page 22 line 17-20; page 23 line 1-3
^{1j} Transcripts, March 7, 2007, page 23 line 12, 19-25
^{1k} Transcripts, March 7, 2007, page 52 line 17-25 ---- page 53 line 1-3
^{1l} Transcripts, March 7, 2007, page 25 line 17-20
^{1m} Transcripts, March 7, 2007, page 25 line 17-23
¹ⁿ Transcripts, March 7, 2007, page 26 line 6-7, 15-25; page 27 line 8-9
^{1o} Transcripts, March 7, 2007, page 27 line 6-8, 10-15, 16-20

There is no evidence on the record that this grand opening (nor any other time) was advertised to the public.

14. Oglaza evidences that he saw one person smoking in the Club premises at that time, to which Kennedy concedes.^{1o}
15. .Oglaza attended for the third time to the Club premises on September 20, 2006. Oglaza took pictures at this time. He again attempted to obtain permission to enter the Club premises and was denied by Kennedy.^{op}
16. During conversation at this time, Oglaza evidences that Kennedy did in fact notice him of the process required to become a member of the Club. Kennedy presented Oglaza with a copy of a membership form with the requirement to be completed, and the requirement to agree to the terms and conditions listed thereon, as well as the payment of a membership fee. Only upon agreement and compliance with these procedures and conditions, can one become a member and thereafter able to access the Club premises.^{1q} In fact, it was admitted that Kennedy even went so far as to post warning signs on the front of the premises warning the public that only those who choose to agree to all conditions of membership, including acknowledgment of the hazards of second hand smoke, may join and thereafter enter the Club.^{1r} Kennedy also provided Oglaza with the business number of the not for profit, corporation.^{1s}
17. Oglaza goes so far as to concede that those wishing to enter the Club premises, must first become a member and can only so do by agreeing to the conditions and rules of entry.^{1t}
18. It was conceded that the premises meets the requirement of being enclosed.^{1u}

^o 1p Transcripts, March 7, 2007 page 28 line 24-25 --- page 29 line 1-13; page 36 line 3-5; page 53 line 13-14

^{1q} Transcripts, March 7, 2007, page 29 lin 23-25 — page 30 line 1-11

^{1r} Transcripts, March 7, 2007, page 33 line 22-23; page 34 line 14-18

^{1s} Transcripts, March 7, 2007, page 55 line 8-17; page 94 line 21-22

^{1t} Transcripts, March 7, 2007, page 34 line 21-24; page 35 line 11-16

^{1u} Transcripts, March 7, 2007, page 31 line 23-25 ---- page 32 line 1-6

^{1v} Transcripts, March 7, 2007, page 37 line 5-23

19. In response to the second and most important part of the test, being a public place to which the public is ordinarily invited or permitted access, Oglaza's only evidence is that noted herein at para. 15 above, and which in fact, supports the Defendant Kennedy's position that the Club was not open to the public but rather was a private premises.
20. One of the conditions and rules of entry is an express agreement that one shall not jeopardize the enjoyment of others. Oglaza evidences that he was refused entry because he could not comply with the rules of the Club.^{1v}
21. Oglaza's evidence is contradictory. Initially, he testifies that he made the determination that the premises was public (though at no time does he evidence the facts he relies upon to support this conclusion).⁰ Subsequently, he admits that he himself (and by clear inference, the general public which Oglaza admits to being a member of) is prohibited from entering the premises because he cannot comply with all the qualifications to become a member of the Club, ie: that it is not a place to which the public are ordinarily invited or permitted access.^{1x}

Witness evidence of Mr. Decoste

22. Mr. Decoste, hereinafter Decoste, is the tobacco coordinator for the area for which the Club was located.^{1y}
23. Decoste defines a public place as simply being "*..with more than two walls and a roof..*",^{1z} and completely ignores the qualifications that it must also be where the public are ordinarily invited or permitted access. When compared to his testimony on **page 64** with respect to his disagreements with the Health Minister on this issue,^{1a} and further on **page 65 line 14-15**, it

⁰ ^{1w} Transcripts, March 7, 2007, page 45 line 22-23

^{1x} Transcripts, March 7, 2007, page 47 line 7-11, 15-21

^{1y} Transcripts, March 7, 2007, page 59 line 17-18

^{1z} Transcripts, March 7, 2007, page 63 line 6-8

^{1a} Transcripts, March 7, 2007, page 64 line 7-20

^{1b} Transcripts, March 7, 2007, page 77 line 13-24

^{1c} Transcripts, March 7, 2007, page 70 line 8-14

^{1d} Transcripts, March 7, 2007, page 73 line 13-25

^{1e} Transcripts, March 7, 2007, page 75 line 7-16

is clear that there exists a wide divergence of opinion within the department on the actual meaning of the definition of a public place, as was later confirmed by Dunn.^{1b}

24. In re-examination by Kennedy's lawyer, Decoste evidences that one can have a private club that is not a bar and a restaurant.^{1c}

Witness evidence of Mr. Dunn

25. Mr. Dunn, hereinafter Dunn, who first arrived with Olgaza on September 8, 2006, testifies that Kennedy had set up a table *outside* the actual premises.^{1d}
26. Dunn confirms Olgaza's evidence that Kennedy did notice them that this was a private club.^{1e}
27. Kennedy, in his comments to Dunn, elaborated further on the exclusiveness of his Club by clarifying that, as compared to Legions, only card carrying members of the club were permitted access; members could not bring guests.^{0f}
28. Dunn also concedes in evidence that whether or not the property is leased or owned directly is of no consequence to the issue of the premises being a public place.^{1g}

Defendant witness evidence of Mike Kennedy

29. Kennedy has outlined the structure of this private Club, the governance being an Executive of three members, a Board of Directors for the Region, and a local Board for the specific facility.^{1h}
30. The Club has a Charter consisting of a set of mandatory rules, regulations and a constitution.¹ⁱ The constitution and by-laws refer primarily to election strategies.

⁰ ^{1f} Transcripts, March 7, 2007, page 76 line 18-24

^{1g} Transcripts, March 7, 2007, page 80 line 11-15

^{1h} Transcripts, March 7, 2007, page 81 line 22-25

¹ⁱ Transcripts, March 7, 2007, page 82 line 5-20

^{1j} Transcripts, March 7, 2007, page 83 line 12-16

^{1k} Transcripts, March 7, 2007, page 85 line 2-3, 4-9; page 89 line 10-19

^{1l} Transcripts, March 7, 2007, page 92 line 25

^{1m} Transcripts, March 7, 2007, page 85 line 20-25 ---- page 25 line 1-3; page 102 line 8-11

31. The Club had leased the private premises as a meeting hall for the exclusive use of its members only.^{1j} Only those people who share the views of the Club and are prepared to comply with the rules and regulations, can become members. The Club was never open to the public and the public are expressly excluded from entry.^{1k} The Club was not a sports bar.^{1l} The criteria to become a member is five fold:
- a) you are prepared to accept the hazards of second hand smoke;
 - b) you will not become involved in drugs;
 - c) you will not be intoxicated;
 - d) you will not jeopardize the enjoyment of others; and,
 - e) you must keep an eye on the door to prohibit non members from entering the private premises.^{1m}
32. .Members of the public have been refused entry for complaining that they did not wish to abide by the rules and regulations of the Club. They were told to leave and notwithstanding all future attempts to re-enter by agreeing to pay the fee, they were denied entry. The Club requires that anyone wishing to become a member must agree to all rules and regulations, and simply payment of a fee is insufficient if they disagree with the remaining criteria.⁰ⁿ Failure to comply with these rules and regulations can result in expulsion from the premises.^{1o}
33. Kennedy concedes to spending an inordinate amount of time researching the law and issues involved prior to opening his club and to do so in a manner which complied with the law.^{1p}
34. Although food and beverages were sold, the Club received no kickbacks from same. All work was done by volunteers in compliance with the *Health Protection Promotion Act*. No charges were laid pursuant to this Act. Oglaza testifies that he did not appear in his capacity

⁰ ¹ⁿ Transcripts, March 7, 2007, page 85 line 13-24

^{1o} Transcripts, March 7, 2007, page 102 page 21-24

^{1p} Transcripts, March 7, 2007, page 87 line 15-22; page 89 line 20-25 — page 90 line 5

^{1q} Transcripts, March 7, 2007, page 51 line 15-17

^{1r} Transcripts, March 7, 2007, page 105, line 13-14

^{1s} Transcripts, March 7, 2007, page 97 line 1-12

^{1t} Transcripts, March 7, 2007, page 97 line 13

^{1u} Transcripts, March 7, 2007, page 97 line 15-18

^{1v} Transcripts, March 7, 2007, page 107 line 14-24

under this latter *Act*.^{1q} Nor did any other official; nor in relation to enforcement of liquor laws. Oglaza's evidence that he wanted to examine the liquor licence to see who the owner was purportedly while he was attempted to enforce the smoking by-law and was wholly unrelated to liquor issues or concerns.

35. Advertising for the Club was directed to a selected segment of the community only - only upon becoming a member could people thereafter enter the premises.^{1r} The advertising was neither intended to be directed to the public nor done so.^{1s} The Crown concedes that this “..makes sense, doesn't it?”^{1t} It was only these selected people who later became members.^{1u}
36. So serious was the Club on being private, that it had just began to take photo identification to be kept on computer to verify that only members could enter.^{1v} Anyone whose picture was not in the computer database would be refused entry.
37. Judicial notice should be taken to the fact that about 80% or more of the public population are non smokers. Thus the selected audience for advertising was extremely restricted.
38. .The premises is licenced and alcohol is available for sale.^{0w} As noted above, without kickbacks.

Issues upon this Appeal

39. a) Is the premises at which the charges were laid an “*enclosed public place*” within the meaning of subsection 9 (1) of the *Tobacco Control Act*, 1994 S.O. 1994, c. 10 as amended, now known as the *Smoke Free Ontario Act*, at the date of the charge, September 8, 2006?

Tab 1 – Transcripts, Reasons for Judgment, Bartraw J., p. 128 line 17-21

ii) alternatively, was there a reasonable apprehension of bias?

iii) alternatively, the definition of ‘enclosed public place’ in the *Smoke Free Ontario Act* is general, vague, ambiguous and/or uncertain in its scope and application.

Applicable definitions and law

3. This from the *Smoke Free Ontario Act*:

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.*²

Argument

4. .Kennedy has attempted for years to establish a private club for smokers. Several JP’s including herein, have, it is alleged, gone proactive to thwart every such attempt. Kennedy alleges a possible conspiracy amongst the JP’s to deny his attempts. Comments by the JP herein as well as in previous cases, coupled with his open admission to having no idea as to what a private place is and then ruling upon this same issue,³ leads Kennedy to the inescapable conclusion that the JP’s are completely biased against him to the point of intentionally either misinterpreting the law and/or purposely ignoring and failing to consider evidence upon the record,^A such that they should not have been ruling upon these issues, especially JP Bartraw herein. Kennedy prays for justice from this Honourable Court herein.

² *Smoke Free Ontario Act* 1994 S.O. c. 10, s. 1

³ *R v 1395075 Ontario Inc.* 2002 Ottawa JP Bartraw page 8 line 30-32 – page 9 line 3-12; page 7 line 14-17

^A Many such instances are positively identified herein, see para. _____

5. The JP respectfully references no evidence of facts upon the record in his judgment to support his finding that the Club's premises is an enclosed public place as defined in the legislation. Enclosed is admitted, but a public place, there is no such evidence upon the record nor considered nor relied upon by the JP, nor referenced to in his judgment.
6. .A further error in fact by the JP, which may have some significance, is his finding that there is a fee involved.^{0x} This finding remains evidentially unsupported upon the record. Indeed, Kennedy evidences un rebutted that there are membership dues to pay, \$4/month,^{1y} however there are no actual fees to pay upon entry. This monthly dues enables a member to attend once/month of 30 x/month, as the case may be. The JP has erroneously confused the monthly dues with being a fee, to which it is not.
7. In order to find that the Club premises was an enclosed public place, there must be evidence tending to show the following facts beyond a reasonable doubt:
 - a) that there was a place;
 - b) that the place was enclosed;
 - c) that the enclosed place was a place where the public is ordinarily invited or permitted access, whether a fee is charged or not being irrelevant.⁴
8. Kennedy has conceded both that there was a place and this place was enclosed. The issues turns then upon point c) above. The regulations are of no relevance to the facts herein, and the Defendant has put forth no position in respect of same.
9. There are several elements to this point, all of which required evidence proving them beyond a reasonable doubt:
 - a) there must be a public;

⁰ ^{1x} Transcripts, March 7, 2007 page 130 line 15-19

^{1y} Transcripts, Marcy 7, 2007 page 85 line 6-9

⁴ *Toronto v Original Playhouse Café Ltd.* 2005 OJ #1721 para. 60

- b) the public must be ordinarily invited to the place, expressly or by invitation;
 - c) or the public is ordinarily permitted access to the place, expressly or by invitation.
10. .The use of the word, “*means*” in this definition, proclaims the Legislature’s intention that it can only apply to the stated words therein, and is required pursuant to the principles of statutory interpretation, as being restrictive in its scope and application to these stated words.⁵ Any attempt therefore to give this definition a broad or expansive meaning beyond that of the express words therein, as the Crown is purporting to so do,^{1z} will run afoul of these fundamental and mandatory interpretive principles and was an error by the JP to so assign such a broad definition thereto.^{1a}
11. The JP’s findings that, “*So whether you are signing a membership card or not, you are still a member of the public of the Province of Ontario... So clearly when they made the definition under sub-section 1 of this Act.....they are speaking of all members of the public whether you are a member of a club or not.*”,^{1b} is inconsistent with the wording of the definition and is merely an assumption by the JP.
12. Upon signing the membership card, one is no longer a member of the public, but rather of this private club. The rights and duties have changed, as evidenced by the rules and regulations one must abide by to be a member.^A

^A See **para. [redacted]** herein,

13. The word ‘public’ is not defined in the Act and is given its ordinary meaning. Generally speaking, the word connotes the community at large as opposed to a certain or restricted segment of the community.

Public: In one sense, everybody; and accordingly the body of the people at large; the community at large, without reference to the geographical limits of any corporation like a city, town or county; the people. In another sense the word does not mean all the people, nor most of the

⁵ Interpretation of Statutes in Canada, Cote 3rd page 62

^{1z} Transcripts, March 7, 2007, page 125 line 19-20

^{1a} Transcripts, March 7, 2007, page 132, line 5-7, 20-21

^{1b} Transcripts, March 7, 2007, page 131 line 21-23; page 132 line 1-7

people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few.⁶

Public: Concerning the people as a whole.⁷

Private: Not open to the public. One's own, as my goods, property; individual, personal, not affecting the community.^{7 1c}

14. The restricted nature of the Club, being targeted as evidenced only to smokers, takes it out of the realm of the public and into the private. Oglaza's evidence that he was prohibited from entry, and Kennedy's evidence to prohibiting others who refused to accede to all the rules of the Club, prove that this Club was private and not public.^A

^A **See para. ____ herein, evidence on Oglaza denied entry, and Kennedy evidence**

15. The JP's findings that "*..any member of the public that isn't going to agree with these rules, can become a member and be allowed in.*"^{1d}, is wholly unsupported upon the evidentiary record. To the contrary, all evidence reveals that anyone who isn't going to agree with the rules, is prohibited from both membership and entry.^{1e} The JP's reliance upon this error of fact seems to form the basis of his further erroneous finding that the Club's premises was a public place.
16. This leads into the next point: was the public "*ordinarily invited or permitted access.*" The evidence already establishes that Kennedy's advertising for the Club was restricted to a very limited portion of society, ie: smokers.^A

^A **See para. ____ herein, advertising evidence of Kennedy**

⁶ Black's Dictionary of Law, 4th p. 1393

⁷ Concise Oxford Dictionary, 1956

^{1c} Transcripts, March 7, 2007, page 89 line 12-19; page 97 line 1-9

^{1d} Transcripts, March 7, 2007 page 130 line 12-14

^{1e} Transcripts, March 7, 2007 page

17. In a case remarkable similar to the instant case, a JP had occasion to rule upon a whether a private function one evening was encompassed within the City of Toronto by-law for non smoking. The material wording of this by-law is functionally similar to that herein:

*Public place: the whole or part of an indoor area, whether covered by a roof or not, to which the public has access as of right, expressed or implied.*⁴

18. This was a case where the defendant had advertised with respect to a Karaoke function at its establishment. The JP in this case has done an exhaustive review of the facts and law. The nature of the advertising was outlined at **para. 16**, whereby the establishment distributed flyers to the public to attend a private Karaoke party. This establishment was conceded to be open to the public daily as a restaurant outside the hours of this party. Such is not the case herein, to Kennedy's benefit.
19. Undercover officers attended on occasions and witnessed smoking on the premises. Charges were laid.
20. .This was a place that was generally open to the public however for this function, it claimed it was not and therefore the JP had to decided if it was a public place *during this time period* so as to fall or not fall within the ambit of the legislation. In so doing, the JP did an excellent analysis of what a public place is and how the court's have recognized this.^{0b}
21. A public place then, is, for the most part, contextual, ie: conditioned upon intention of use. The JP appropriately illustrated a wide continuum of instances where at one end will be instances so blatantly private as to cause no contrary argument, where at the other end, there will be instances where it is not so obvious and the lines will be blurred. To determine then whether it is public or private, the JP correctly found that the decisive factor is the advertising.

⁴ *Toronto v Original Playhouse Café Ltd.* para. 60

^{4b} *Toronto v Original Playhouse Café Ltd.* para. 68-76, 80-84

“Because of the prime importance of public health, the consideration of whether the event is a private or public function will depend on whether the event has been advertised to the general public. If it has, then it is a public function where the general public has access and is therefore subject to the prohibition against smoking.”⁰

22. .Now whether one refers to a single event or a series of single events as was the issue in this case^{0a} as these private parties were occurring regularly on Tuesday nights, or privately run every day, is of no consequence. The primary considerations are intention and advertisement.
23. .The nature or interest of the group, ie: its *raison d’etre* for meeting, as well was found to be of no consequence.^{0b}
24. .The JP did make a finding of guilt, however only because he found that the advertising from the establishment was directed towards the general public. A further factor was the discretion to permit uninvited guests to attend. Neither of these facts arise herein. All advertising was directed towards smokers and anyone who was not a member, was prohibited from entry. Guests were not permitted to enter.^{0c} None of these facts exist herein.
25. These findings were made in respect of the specific wording of the Toronto by-law. The wording in Toronto was, “*..to which the public has access as of right.*”, where here it is, “*..which the public is ordinarily invited or permitted access.*” Herein this case, the public do not have access as of right to the Club nor its premises - prospective must agree to all conditions of membership to become a member and enter upon the premises.

define ordinarily –

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⁰ *4 Toronto v Original Playhouse Café Ltd.* para. 84

⁰ *4a Toronto v Original Playhouse Café Ltd.* para. 52

⁰ *4b Toronto v Original Playhouse Café Ltd.* para. 86

⁰ *4c Toronto v Original Playhouse Café Ltd.* para. 86

^{1f} Transcripts, March 7, 2007, page 89 line 12-19; page 97 line 1-9

^{1g} Transcripts, March 7, 2007, page 97 line 13

26. The latter words “*ordinarily invited*” expressly refer to an intention by the owner to solicit (or advertise) attendance, or ask the public to enter the premises. So there would have to be clear evidence upon the record that Kennedy solicited or asked the public to enter his private premises in order to be encompassed within this portion of the definition. There is no such evidence. In fact, the evidence of Kennedy, unrebutted, remains that solicitation to attend was directed virtually exclusively at smokers,^{1f} a fact which even the Crown admitted was logical.^{1g} Smokers are a minority in society, a fact which judicial notice can be taken thereof.

“Invite: Request courteously to come; solicit courteously..”⁷

27. This advertisement was further performed by way of word of mouth to sign up friends and families.^{1h} This is substantially different and far removed from having a TV ad, newspaper ad, flyers on public poles, or similar advertising campaign directed to the general public.

28. The remaining words, “*ordinarily.. permitted access*”, refer to a different condition. Notice can be taken of the use of the word “*or*” in this definition, imparting the intention of existence of either criteria, for which the Defendant addresses both herein. Whereas the previous words refer to the act of solicitation, these words refer to the act of actually letting the public onto (or into as the case may be) the private premises.

“Permit: to suffer; allow, consent, let; to give leave or license,; to acquiesce by failure to prevent, or to expressly assent or agree to the doing of an act.”⁷

29. Is the public ordinarily permitted access to the Club’s premises? All evidence given, including the admissions of inspectors that they could not enter^A and that of Kennedy evidencing his evictions of certain people and refusal to let others join and/or enter the premises,^B proves that this is an unqualified no.

^A **Transcripts, March 7, 2007, para. 10, 13, 15, 20, 21 herein**

^B **See para. 33 herein**

⁷ Concise Oxford Dictionary of Law, 1956 p 629

^{1h} Transcripts, March 7m, 2007, page 98 line 1-6

⁷ Concise Oxford Dictionary of Law, 1956 p 1298

30. To permit access then requires that anyone from the public can ordinarily enter upon the premises. Not only is the public not ordinarily permitted access to the premises herein, they are not permitted access at all. There is no evidence upon the court record that would prove beyond a reasonable doubt (or to any threshold) that any members of the public entered, were caught entering, were found to be on, or have admitted to entering upon, or were advertised that they could enter upon, the premises.

31. The word ‘ordinarily’ now becomes important. This word imparts the fact that there would be no restrictions upon entering, for example, that the public did not have to become a member of a club to enter.

“Adj. Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterize by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual.”⁶

32. Thus the term ordinarily when used in reference to invited or permitted access, tends to show that the owner of an establishment would have to regularly or usually permit the public to enter or would have to be advertising to the public of this fact. Again, there is no evidence upon the record of either of these requirements as noted above at para. 64 herein. The JP erred in failing to give notice and application to this requirement in his judgment. Applying this law to the facts clearly shows once again that the Club is a private establishment and premises.

33. The JP herein gives no indication of consideration of any case law or authorities on the issues in question. In the case of *R v Labaye*, the SCC gave some guidance on factual circumstances which, if present, demonstrate the a club is private. Although not directly on point therein, the issue of determination of a private club v public was an incidental decision that was required to be, and was made, in the course of this judgment.[**para. 65**] McLaughlin C.J., outlined the nature of the applicable test in this case, which, in its first

⁶ Black’s Dictionary of Law, 4th P. 1249

part, involved an analysis of whether or not the “..conduct at issue causes harm or presents a significant risk of harm to individuals or society;..” [para. 62]

34. Significantly, in applying this test, McLaughlin C.J. was required to first determine the nature of the area where the alleged offence took place. It is noteworthy that the definition of a “public place” in s. 197 of the *Criminal Code* is a combination of the wording of the *Smoke Free Ontario Act* and the City of Toronto by-law, as follows: “any place to which the public have access as of right or by invitation, express or implied.” [Criminal Code, s. 197]

35. .In finding that the club L’Orage was indeed a private club,⁸ the SCC considered the following factors:

- a) only members could enter; **para. 5 [R v Labaye]**
- b) guests could still enter if accompanied by members; **para. 5**
- c) prospective members were made aware of the nature of activities; **para. 5'**
- d) applicants who did not share the same views were excluded; **para. 5**
- e) there was an annual membership fee; **para 5**
- f) the front door to all areas was manned by a doorman who ensured that only members and their guests entered the club; **para. 6**
- g) on the third floor, doors were marked private. **para. 65**

36. In reaching the Court’s conclusion, McLaughlin C.J., **at para. 66**, did a confirmative, *ex post facto* analysis of the results of this finding of a private club [**at para. 65**] and determined that it was private because, “*On the evidence, only those already disposed to this sort of sexual activity were allowed to participate and watch.*” (my emphasis) In other words, only those members of this private club could participate and watch (and, by clear inference, attend upon the premises).

37. Kennedy points out that all factors save for b) above exist in this case. The non existence of factor b) above is substantially to Kennedy’s benefit in confirming the private nature of the Club. Factor g) is present as well, only performed in a different manner, ie: by the doorman

⁸ *R v Labaye* 2005 SCJ #83, page. 65

and advertising at the door and on flyers, advising smokers that this was private club open only to members.^A

^A Transcripts, March 7, 2007, page 10, 13, 15, 20, 21 herein

38. Based upon this test illustrated by the SCC, the Club herein is definitely classified as private.
39. .Moreover, referencing again to the *Criminal Code*, this time s. 319,⁹ “*Public incitement of Hatred*”, its definition of public place is the same as noted above to s. 197. This section makes it an offence to, *inter alia*, communicate statements in a public place that incites hatred against any identifiable group. Applying the test from the SCC in *Original* case above, could it be said that the Members of this Club could be charged if they were to enter into discussions on issues outlined in s. 319 of the *Criminal Code*? It is not possible. To extend the Crown’s argument that the premises is a public place, would make public every private club in the province and criminalize tens of thousands of people from their private conversations. This clearly reveals the absurdity of the Crown’s argument herein.
40. ‘The JP seems to equate being a member of a private group with also being a member of the public and therefore subject to the legislation.’⁰ⁱ Clearly the JP is confusing capacities here on this point. For example in the *Original* case, the JP held, correctly, that if the advertising was directed to a segment of the population, not the public as a whole, it would be classified as being private. Similarly by the SCC in *L’Orage*, where the High Court held that even though it was members of the public who could enter, it was still a private premises because that was the intention of the owners as manifested through its actions and advertising. Members of the public could not simply walk in without agreeing to certain terms and conditions.
41. The JP seems further to be analyzing this issue subjectively rather than objectively. That one is a member of society does not mean that they are so for all purposes and at all times as

⁹ *Criminal Code*, s. 319

⁰ ⁱ Transcripts, March 7, 2007 page 131 line 14-20

^j Transcripts, March 7, 2007 page 131 line 3-25

^k Transcripts, March 7, 2007 page 64 line 18; page 65 line 6-10

the JP suggests. Rather it is, as the JP held in *Original*, a contextual issue, with the primary factors for consideration of this test outlined by the SCC in *L'Orage*.

42. The JP apparently has confused the alleged dangers of smoking and second hand smoke, to the extent that the Legislature has gone to prohibit smoking in public places.^{lj} There is no evidence upon the record that attending an establishment 1/week, or 1/month, or any other given time period constitutes a risk to one's health. Studies appear to have shown that over time, regular exposure does increase the dangers to one's health, however there is no evidence upon the record as to where the dividing line is, nor how many times people frequented the Club. It cannot be said that frequenting the Club one 1 night per month is a health threat, *a fortiori* to those who have already made the decision in their lives to smoke.
43. The JP erroneously assumes that "*You should not have to be put into a situation where your health is at risk..*". This finding directly conflicts with the admitted evidence that members are not compelled to join nor forced to do something against their will.^{lk} Moreover, the advertising was directed exclusively to people who already smoke and have made the choice to forego health concerns to satisfy their desire to smoke and only members who have made this voluntary choice can enter the premises. Therefore it cannot be said that the Club is putting people into this alleged situation - this is not a correct statement of fact.
44. .The JP gives judicial notice to the harmful effects of smoking and second hand smoke in his judgement and the desire to protect the public from these harmful effects, as being the purpose of the *Act*.⁰¹ The SCC in *Labaye* recognized that if the public is to be protected from similar dangers, ie: indecency, then,

*"..it is essential that there be a risk that members of the public either will be unwillingly exposed to the conduct or material, or that they will be forced to significantly change their usual conduct to avoid being so exposed. This makes relevant the manner, place and audience of the acts alleged to be indecent."*⁸

⁰ ii Transcripts, March 7, 2007 page 131 line 3 - 20, 23-25

⁸ *R v Labaye* 2005 SCJ #83, para. 42

45. Is there any evidence here that the public will be exposed against their free will to second hand smoke on or from the Club's premises? No, because the general public is not permitted entry.
46. Will the public be forced to significantly change their usual conduct to avoid being exposed to second hand smoke on or from the Club's premises? No, because they are not permitted entry. There is no advertising directed to the public for them to avoid.
47. .In anticipation of the Crown's possible reliance upon the *Barrymore's* case⁹, Kennedy submits that the differences between these case are so compelling substantial as to make this case irrelevant. More specifically, the Cue'N Cushion Club, one of the defendants in this case, admitted that:
- a) it had no board of directors;
 - b) no constitution or by-laws;
 - c) no requirement to subscribe to a set of beliefs;
 - d) anyone applying is admitted entry;
 - e) members have no access to financial records;
 - f) members have no ownership of the business;
 - g) all profits of the business go to the owners.
 - h) the owners are responsible for all operations of the club.

3. .Kennedy submits that, whether accepted as new evidence or not, judicial notice can be given to the press release issued by witness in this case, Decoste, the tobacco coordinator for the relevant area, and who has evidenced that he has previously issued press releases in relation to this issue.^{0m} Being the media liason officer in effect for the government, he is obviously issuing statements representative of the views of the government, for otherwise he would be unauthorized to so do - there is a presumption of regularity that would attach to this fact.

“The common law presumption of regularity is sometimes referred to by its Latin label omnia peasumptur rite esse act. In its narrower application, the presumption serves to regularize the appointment and acts of persons acting in an official capacity....Where a person is shown to have acted in an official

⁹ *Ottawa v Barrymore's Inc.* 2002 33 MPLR 43

⁰ ^m Transcripts, March 7, 2007 page 59, line 17-18; page 60 line 25 — page 61 line 2

*capacity it is supposed that the person would not intrude herself or himself into a public situation without authorization.”*¹⁰ (my emphasis)

4. Decoste issued a press release one week after the trial and judgment in this issue, wherein he admits that the Club’s premises was private and that the legislation does now cover private clubs as well as public, in clear reference to the judgment of the JP herein the court below. However the JP ruled, erroneously though he was and upon which this applies therefrom, that the Club’s premises was public. Decoste and the government knew all along the private nature of the Club and have now admitted this publically *after the case is over*, obviously believing that this was the end of the matter. Everyone knows and admits that the legislation covers public places and Decoste’s comment that it covers private clubs could only have been as a result of his recognition that the Club’s premises was indeed, private.

*“It does cover clubs of any nature, both public and private.”*¹¹

5. The use of the word “or” once again after ss. a) ii) and b) a prescribed place, indicates that the onus is upon the Crown to prove that the premises herein falls under a) or b).
6. Inasmuch as fornication when done behind private closed doors is private, so too is smoking.

Statutory Interpretation

7. Kennedy further tenders that the JP failed to apply the fundamental principles of statutory interpretation. In turning to statutory interpretative principles, the objective is to determine the intention, in this case, of the Legislature.¹²
8. Several Supreme Court of Canada cases have upheld the application of the ‘modern principle’ of statutory interpretation, advocated by Driedger:

¹⁰ The Law of Evidence in Canada, 2nd Sopinka p. 11, upheld *R v S.H.E.* 2007 OJ #2750, Ont. C.J.

¹¹ Copy of press release, Decoste, dated [REDACTED]

¹² *R v Multiform Manufacturing Co.* 1990 2 SCR 624, 630

*“Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.”*⁵

9. The words being defined are ‘enclosed public place’. Immediately one can see that this definition is directed towards defining a public place, not a private place, for which there could be dozens of examples. The Legislature in defining an enclosed public place, has left wide open what is to be a private place; other than those instances which fall squarely within the quoted definition, whatever is the residuum is considered to be private. This is in agreement with the restricted use of the word, “*means*” therein this definition.⁵
10. Generally speaking, anything other than Crown land is privately owned. Therefore this definition is a restriction upon private property, classifying some of it as public for purposes of this definition, where prior thereto, it was private property. As a result, it is only logical that this definition is interpreted restrictively, being an encroachment upon the constitutional rights of property owners to determine what may or may not occur on their property.

*“Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law.”*¹³

11. Decoste then went public, conceding the JP held that this was a private club which he alleges was now suddenly embraced by this definition. However, this is neither expressed nor implied therein the definition.
12. If private clubs were to be included, the Act would have expressly stated so, *a fortiori* upon such a divisive and controversial issue as that in question.

Expressio unius est exclusio alterius – expression of one thing is the exclusion of another. Co. Litt. 210a;...Mention of one thing implies exclusion of another.⁶

⁵ Interpretation of Statutes, Cote page 287

⁵ Interpretation of Statutes, Cote page 62

¹³ *Harrison v Carswell* 1976 2 SCR 200, 219

⁶ Black’s Dictionary of Law, 4th p. 692

13. The JP is attempting, without jurisdiction, to read into the act that which is not stated. He erroneously is attempting to include a private club in this definition. However the law is clearly established that this should not be done.

*“It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity, it is a wrong thing to do.”*¹⁴

14. The Legislature has clearly determined that there is a problem with respect only to those places where the public is ordinarily invited or permitted access, and no other. One cannot ‘deem’ it to extend further that this express manifestation of the will of the Legislature. Herein, the evidence, unrebutted, reveals that the Club’s private premises is not a public place to which the Legislature has directed its attention.

Trespassing

15. .An interesting test that should be used to determine public from private is the law of trespass, an issue completely ignored by the JP. This issue was raised as a consideration in the *R v Royal Canadian Legion* case.¹⁵
16. When a place is open to the public, or put another way when the public is ordinarily invited or permitted access, no charges of trespassing can be laid against those who enter. All are welcome. A private club is not such a case and Kennedy tenders that the JP herein is attempting, due possibly to his bias as outlined below and previously self admitted lack of knowledge on this issue, to deem every premises to be public *carte blanche*. There must be a dividing line and the Crown’s and JP’s position that this line is one’s own home is contrary to established constitutional jurisprudence with respect to property rights. In effect, the JP is finding, frighteningly, that under this Act, there is only one private place, your home. This ignores all fundamental property rights in our jurisprudence. Private property is not restricted to one’s own home, *a fortiori* when related to constitutional rights of assembly. For example, if a group of 50 people rent a hall for an evening and only they attend, this is a

¹⁴ *Thompson v Goold & Co.* 1910 A.C. 409, 420

¹⁵ *R v Royal Canadian Legion* 2003 Ottawa file no. 02-14321, page 2, line 20-21

private function, notwithstanding whether food or alcohol is served and smoking is permitted if they so desire. In effect, there is no difference herein to this case.

17. Kennedy tenders that the JP's hearing these cases are and have been in the past, making their own law.
18. The primary considerations to begin with are recognition and respect for the rights of Kennedy.

*“Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law.”*¹³

19. .Entering upon one's land without permission and absent statutory authority, is *prima facie* evidence of trespass.¹⁶ As the evidence herein indicates, no one is permitted access who is not a member; anyone entering the Club's premises without prior authorization, which can only be obtained by agreeing to all terms and conditions and becoming a member, is a trespasser and could be charged accordingly.
20. .The entering onto one's land is in the nature of a licence - the person wishing to enter onto private land must have permission to so do.¹⁷ Every member has an agreed upon obligation to ensure that no one enters the property without authorization and membership.
21. A proper examination of the law of trespass may afford an excellent insight into the nature of a private club. Herein, the Club could have charged the inspectors or anyone else from being upon the private property as they were warned they could not attend upon the property without prior authorization.

¹³ *Harrison v Carswell* 1976 2 SCR 200, 219, page 12, upheld by BC Court of Appeal, 281856 v K.R.O.B.T.U. 1986 BCJ #307

¹⁶ *Roback v Chiang* 2003 BCH # 3127 para. 9

¹⁷ Law of Torts in Canada, Fridman, p. 42

22. This case is differentiated from the instant case upon the facts; the Legion in this case was caught and did openly admit the public entry upon the premises. Moreover, it was also advertising and soliciting public attendance. Such is not the case herein.

Due Diligence efforts

23. .One of the factors considered in most every case on this issue, has been the attempts by the owners/proprietors at keeping the public out of the private club. This issue follows on the heels of the advertising issue. JP Stewart considered this factor in his previous judgment finding upon the facts of that case, that there was no due diligence at all to keep the public out.¹⁸
24. What steps did Kennedy take to ensure due diligence that the public were not permitted access? They are as follows, though possibly not all encompassing: (all para. are herein)
- ii) para. 8, 43 membership dues were mandatory, \$4/month, \$48/year. There were no daily or monthly fees
 - iii) para. 7 there were no employees, volunteers only
 - iv) para. 7 all members were required to have membership cards. Everyone was checked coming in to ensure they had their membership card on their person as a condition of entry.
 - v) para. 10, 31, 74

there was a positive duty, as a condition of membership, for all members to watch the single entrance to ensure that the public were not attempting to gain access to the Club's private premises
 - vi) para. 10,13
15, 20, 21, 31 a doorman was present at all times, prohibiting those without membership cards on their person, those who were not members, all the public, from entering
 - vii) para. 25 there was a table set up *outside* the entrance to the Club's private premises where the doorman was stationed. Non members were prohibited access

¹⁸ *R v 1443652 c.o.b. as the Quick Chef* 2002 Ottawa, page 1 line 20-24

- viii) para. 16 anyone wishing to join was required to sign a mandatory application form
 - ix) para. 16 in so doing, they must agree to ALL terms, rules and conditions of the Club. Anyone disagreeing with any of these, was not granted membership
 - x) para. 27 no guests were permitted access, only actual members of the Club
 - xi) para. 31 the 5 primary and mandatory requirements to be agreed upon are set out at para. 31 herein
 - xii) para. 32 any member who fails or refuses to comply with the rules, terms and conditions of the Club is prohibited from access
 - xiii) para. 36 the Club was in the initiation stages of ensuring that all members had photo ID with them to confirm membership
 - xiv) para. 16 all members were warned and made aware of the nature of the private club
 - xv) para. 16 warning signs were posted to keep the public out and to ensure that only members entered upon the premises
 - xvi) para. 30 the Club had a Board of Directors, a Constitution, by-laws, elections
 - xvii) para. 17 the Club was non profit
 - xviii) para. 35 the Club only advertised via word of mouth and flyers, directed exclusively to smokers, friends and families who shared their views.
There was no public advertising
 - xix) para. 34 there was no kickbacks from the sale of food and beverages
25. Kennedy ask the obvious question: what more could he have done? Kennedy's steps, in his view, are grossly in excess of what was required to be a private club, especially those as recognized in *Labaye* by the SCC. To hold otherwise would be to assign to this legislation an effect to ban groups of consenting adults assembling privately to do a lawful activity. The words of this Act do not come close to being able to bear this absurd definition.
26. One could not ask more of Kennedy in his performance of due diligence. This in addition to his admitted research upon the law in this area to ensure he was in compliance with same.

27. If one is going to consider due diligence as a factor in determining whether or not the Club was private, one cannot perform more due diligence than Mr. Kennedy has so done herein. Nor is there any evidence or argument upon the court record by the Crown or witnesses as to what else he could have done. Mr. Kennedy has performed due diligence in the most exemplary manner possible and the JP should have been accorded substantial weight for so doing and erred in failing to do so.

Fixed and certain

Fixed: made firm or permanent; firmly implanted; set or intent upon something; steadily directed; definitely or permanently placed; stationery; definite, not fluctuating or varying; occurring on the same date each year; put in order; arranged privately or dishonestly.¹⁹

Certain: Definitive. Free from doubt.²⁰

28. JP Bartraw in the *R v 1395075* case, had occasion to state in his reasons:

*“It is not the duty of the Court to explain to this organization what in fact is a private club which would allow smoking in it.”*³

29. To the contrary, the Supreme Court of Canada differed greatly, that the law must be fixed and certain.

*“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.”*²¹

¹⁹ Webster’s Dictionary [REDACTED]

²⁰ Canadian Dictionary of Law, 2nd p. 169

³ *R v 1395075 Ontario Inc.* 2002 Ottawa JP Bartraw page 7 line 14-17

²¹ *R v Kelly* 1992 2 SCR 170, para. 83, 84

30. The obvious reason is to give “*fair notice*”²⁰ of the prohibited conduct. The result of this Bartraw’s comments was to leave the defendant Kennedy in this case, also the defendant in *R v 1395075*, temporarily lost in the wilderness in his attempts to comply with the law. Notwithstanding this temporary loss, fortunately, as Kennedy managed to find his way home and comply with the law in this case. Others have not been so fortunate.
31. The fact that JP’s considerations have varied so widely in their considerations on this matter, leaves property owners and private clubs uncertain as to how they can comply with the law and maintain their constitutional rights to smoke privately. The legislation does not take away the rights of smokers to smoke as a private group. The JP’s finding in *R v 1395057 Ontario Inc.*, that the Court did not have to explain in its decision what a private club is, is a judicial error of serious proportions.
32. Moreover, it is the fundamental essence of judicial duty to ‘interpret’ the law, not make, or as in this case, ignore the law. Bartraw has in this case as well, failed to interpret the law he was applying.

“I disagree; the jury decides the facts and the judge decides and interprets the law.”²²

33. If someone is charged with an offence, with both parties claiming different interpretations of the law as being applicable, it is most incumbent and obligatory upon the JP to interpret the law as to how, when, why and where it applies. Failure to so do leaves the parties in a quagmire such as now becomes the case herein. Bartraw was clearly in error in both cases in refusing to interpret and then apply the law.
34. It is incumbent, with respect, for this Honourable Court to correct his errors and set straight what the law is in this area. The SCC’s has provided excellent guidance on this issue herein.

²² *R v J.M.H.* 2003 OJ #5512, para. 13 Ont. S.C.J.

Alternatively: Reasonable Apprehension of Bias

35. With respect, Kennedy advances this alternative position only upon the premise that, without prejudice to himself by so stating, he has failed to meet the test for granting of the appeal.

36. The JP has admitted to his clear dis-propensity to smokers.

“There are some exemptions, in a private dwelling where you are allowed to smoke in your own private dwelling. I don’t know why anyone would, but that is certainly an exemption..”⁰ⁿ

37. The JP clearly cannot understand why anyone would want to smoke and this has coloured his judgment to ignore the unrebutted evidence upon the record that this was in fact a private club, evidencing including *inter alia*, the inspector being refused entry, Kennedy admitting to refusing entry to those who refuse or do not agree with the rules of the Club, that the public could not enter, that advertising was restricted to smokers, as well as the organizational structure of the group including its executive and rule making structure.

38. The JP’s comments that he doesn’t know why anyone would want to smoke in their home clearly implies that he also cannot understand why someone would want to set up a private members group to so do.

39. During sentencing, the JP simply ignored the plight of Kennedy to requesting time to pay of one year. The JP simply did not consider them and/or give reasons as to why he refused to consider them in his refusal to grant time.

“But in any event, those comments you just made, as far as time for payment, I will do as I do for every person that comes before my Court, I impose a time to pay of 90 days and if you can’t pay the fine within that 90 day period, I certainly will take into account whether you make any partial payments as to whether a further extension of time to pay shall be granted.”⁰ⁿ

⁰ in Transcripts, March 7, 2007 page 132 line 8-11

⁰ in Transcripts, March 7, 2007 Reasons for Sentencing page 138 line 11-18

40. The JP's admission that he imposes the same payment times on all accused, illustrates that his mind was already made up on this point and the submissions of Kennedy were simply ignored.

41. In the previous case of *R v 1395075 Inc., c.o.b. Newfoundland Pub*, JP Bartraw conceded at this time that he did not know what a private club is, conclusively rebutting any presumption that the judge knows the law.

"It could very well be, and I don't know what a private club isI don't know what a private club is; I'm sure there is a lot to it."^{0a}

42. Notwithstanding his admitted want of knowledge and understanding on this pivotal issue, Bartraw still went ahead and ruled upon it.

"It is definitely and absolutely not a private club that is before the Court today."^{0b}

43. Kennedy submits herein that it is clear from Bartraw's bare bones judgment in this case, he still does not know what a private club is compared to a place where the public is ordinarily invited or permitted access and should not have been permitted to rule upon this case under these circumstances.

Law of Bias

44. The authority of any judge to adjudicate upon issues before him is dependant upon, *inter alia*, a presumption of impartiality and absence of bias or reasonable apprehension of bias.

*"Public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so."*²³

⁰ ^{3a} *R v 1395075 Ontario Inc.* page 8 line 30-31; page 9 line 1-10

⁰ ^{3b} *R v 1395075 Ontario Inc.* page 10 line 3-4

²³ *Wewaykum Indian Band v Canada* para. 57

45. This is a rebuttable presumption, though admittedly the onus of proof rests upon the party alleging said bias.²²

46. The term ‘bias’ was defined by the Supreme Court of Canada as follows:

“..a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.”^{22b}

Wewaykum Indian Band v Canada para. 58

47. The actual test for reasonable apprehension of bias was illustrated by the Supreme Court of Canada as follows:

“..the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information..that test is ‘what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker] whether consciously or unconsciously, would not decide fairly.’^{0a}

48. This test is manifested in the constitutional principle of law that,

“It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”.^{0b}

49. The Appellant is not required to prove actual bias, this being impossible to know the actual state of mind of the judge at the hearing in question.^{22a 23b}

²² *R v R.D.S.* 1997 3 S.C.R. 484, para. 114

⁰ 23a *R v R.D.S.* 1997 3 S.C.R. 484, para. para. 31

⁰ 23b *R v R.D.S.* 1997 3 S.C.R. 484, para. para. 110

22a *Wewaykum Indian Band v Canada* [redacted] para. 64

23c *R v R.D.S.* 1997 3 S.C.R. 484, para. para. 99

23d *R v R.D.S.* 1997 3 S.C.R. 484, para. para. 99 para. 100

23e *R v R.D.S.* 1997 3 S.C.R. 484, para. para. 99 para. 100 para. 112

50. Either actual or a reasonable apprehension of bias can arise as a result of either the judge's actions and/or comments.^{23c}
51. Neither the correctness of the judicial decisions nor proper findings of credibility can remedy a reasonable apprehension of bias.^{23d}
52. The threshold established to demonstrate a reasonable apprehension of bias is one of a "real likelihood or probability" as opposed to a mere suspicion.^{23e}

"If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. A reasonable apprehension of bias if it arises, colours the entire trial proceedings and cannot be cured by the correctness of the subsequent decision.

...in the circumstances, there was a reasonable apprehension of bias on his part, then he should not sit. And if he does sit, his decision cannot stand....notwithstanding the strong presumption of impartiality that applies to judges, they will nevertheless be held to certain stringent standards regarding bias – a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification. "^{0a}

53. Lord Denning's captured the essence of this test when he held:

"In considering whether there was a real likelihood of bias,...The court looks at the impression which would be given to other people. Even if he was as impartial as cold be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand...The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reasons is plain enough. Justice must be rotted in confidence: and confidence is destroyed when right-minded people go away thinking, 'The judge was biased. "^{23b}

⁰ 23a *R v R.D.S.* 1997 3 S.C.R. 484, para.
^{23b} *R v R.D.S.* 1997 3 S.C.R. 484, para. 11, in dissent

54. Where a reasonable apprehension of bias is established, a new trial must be ordered. Kennedy advances herein that if this issue was required to be examined, that he has made out the test for reasonable apprehension of bias and a new trial should be ordered.²⁴

Conclusion

55. test - error of fact
error of law

56. .The JP has conceded in his judgment to the evidence upon the record that the Club is indeed private.²⁵

The evidence before the JP does not support his findings of fact or law.

Notwithstanding the dangers of smoking, it is still a lawfully permitted practice and has been for hundreds of years.

signs advertise to public, no signs on this place

erred in failing to consider - ordinarily invited or permitted access

²⁴ *Phillips and Parry v HMTQ* 1997 1 S.C.R. 537 para. 5

²⁵ Transcripts, March 7, 2007, Reasons for Judgment, page 129 line 5-12

All of which is respectfully submitted.

Dated this ____ day of December, 2007.

Mike Kennedy

Mike Kennedy
2052 St. Marie, Ontario
K0A 1W0
613 443-1964

To:

Michael J. O'Shaughnessy
21 Courthouse Ave.
P.O. Box 2121
Brockville, Ontario K6V 6V5
613 342-4491
fax 613 342-8570
mike@courthouse.ca

Her Majesty the Queen
Applicant

-v-

Mike Kennedy
Respondent

Ontario Court of Justice No. 060201

Ontario Court of Justice

Proceedings commenced at Perth

Notice of Motion

Mike Kennedy
2052 St. Marie, Ontario
K0A 1W0
613 443-1964