

Ontario Supreme Court
R. v. Kormos,
Date: 1998-01-27

Her Majesty The Queen

and

Peter Kormos

Ontario Court of Justice, Provincial Division Vaillancourt Prov. J.

Heard: December 17-18, 1997

Judgment: January 27, 1998

Docket: Toronto none given

Graham Sleeth, Q.C., for the Crown.

F. Addario and P. Burstein, for the Accused.

Vaillancourt Prov. J.:

Reasons for Judgment

1 The accused entered a plea of not guilty to the charge that he on or about the 7th day of November in the year 1996 in the Municipality of Metropolitan Toronto in the Toronto Region, did commit an assault on Hifzurrehman Subedar contrary to the Criminal Code.

2 This trial commenced with the defence bringing a motion to have the charge stayed because of inappropriate comments made by the Province's Attorney General in the Ontario Legislature. I dismissed that application for written reasons given on November 28, 1997. See: *R. v. Kormos* (1997), 154 D.L.R. (4th) 551 (Ont. Prov. Div.). As part of the stay application, I had several opportunities to view a videotape depicting the clandestine inspection of the Family Support offices of the Attorney General in Down-sview by the accused, Ms. Martel and Greg Bennett. This tape showed some interaction between the intruders and the security guard, Mr. Subedar. If the Crown's case had depended solely on the video, this judgment would be very short. An objective examination of the video shows, at its highest, some incidental contact between the accused and the complainant.

3 I was invited to review the tape in slow motion in order to examine the minute details of the encounter between the accused and Mr. Subedar. The actions are clear at any speed.

4 Mr. Justice Cory in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 (S.C.C.) at p. 1210 outlines the value of videotaped evidence as follows:

The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.

5 In the case at bar, the video also has sound which gives the court an added dimension. In particular, the court is able to hear things that are not caught by the camera's lens. This is an important fact since Mr. Subedar's evidence is that there was additional assaultive behaviour off camera. As a result of this assertion, the court must not only view the tape but also make assessments as to the issues of credibility.

6 When I first observed the videotape during the preliminary motion to stay the proceedings, I felt a certain amount of sympathy for the apparently beleaguered security guard. Here was an individual who had just arrived at work when he was overwhelmed by the Kormos team. The events that followed on November 7, 1996, at the very least, can be described as turbulent.

7 Furthermore, the subsequent media interest has placed Mr. Subedar squarely in the public spotlight. The complainant admitted that the resultant publicity has caused him considerable embarrassment especially when people approached him and commented that he was the friendly security guard who had given Mr. Kormos and others a tour of the facility which he was supposed to keep secure.

8 I believe that when the Mr. Subedar gave his evidence in court he did so honestly believing in the truthfulness of his answers. However, I also find as a fact that Mr. Subedar's recollection of the events was influenced by the forces of rationalization. The media attention and concerns regarding the potential loss of his employment were at work in the mind of the complainant when he advised the court and others what happened on November 7, 1996.

9 An examination of Mr. Subedar's evidence raises serious questions with respect to the issue of credibility.

The Facts

10 The complainant indicated that he first observed Mr. Kormos and Ms. Martel as they exited their motor vehicle in the parking lot of the building which housed the Family Responsibility offices. He apparently did not see Mr. Bennett, the cameraman, armed with a fairly large camera. I find that Mr. Subedar, Mr. Kormos, Ms. Martel and Mr. Bennett walked to the outer doors of the building in a group. After entering the building, they waited for the elevator to arrive. All four individuals entered the elevator and proceeded to the fourth floor. At this time, Mr. Kormos, Ms. Martel and Mr. Bennett exited the elevator. Mr. Subedar advised the court that he had not been aware of the cameraman's presence until everyone was in the elevator.

11 Mr. Subedar told the court that he had made a comment to Mr. Kormos asking him whether this was his first day on the job. Mr. Kormos denies this suggestion and I accept the evidence of Mr. Kormos in that regard. If the complainant had the conversation he said he had, this leads me to ponder what was going through his mind when he saw the three people exit on the fourth floor? The fourth floor was a storage area. Would it make any sense for these "new" employee(s) to be getting off on that floor? It would not. Concerns about the cameraman should have caused Mr. Subedar to investigate forthwith.

12 It would appear that none of the group were wearing identification tags. Again, one might have expected a security officer to confirm whether these strangers were authorized to be on any of the floors much less the fourth floor.

13 Another unanswered question that comes to mind is: What prompted Mr. Subedar to return to the fourth floor if he believed that the people who had exited the elevator were legitimate employees?

14 When Mr. Subedar returned to the fourth floor, he observed the three busy visitors checking things out. He believed that the cameraman was not really recording the proceedings. He based this conclusion on the fact that he did not see any light on the camera which would have suggested that it was operating and furthermore the cameraman had told

him that he was not filming. However, the actual actions of the cameraman should have caused Mr. Subedar to reflect upon the situation more critically.

15 Certainly at this point in time, the visitors had been identified as intruders. Mr. Subedar said that he ordered them to leave the premises. This is not caught on camera and I find that it was not said. If that had been the case, why were not Mr. Kormos and his associates escorted to the ground floor and shown the exit? The fact of the matter is that Mr. Subedar unwittingly gave the raiding party a complete overview of the operations of which they had heretofore been unaware.

16 Next stop was the fifth floor. The cameraman was in full view “not taking any footage”. Mr. Kormos and Ms. Martel were busy looking into the locked offices. Apparently, more requests to leave were made by the complainant.

17 How did the three intruders arrive at the sixth floor if Mr. Subedar had ordered them to leave as many times as he said he did? It would appear that Mr. Subedar did not make any effort to direct the elevator to the ground floor thereby facilitating the departure of Mr. Kormos.

18 The sixth floor was an area that would seem the easiest area to protect. There was a locked security door. Mr. Subedar had his desk in the hallway outside this door. How could this situation lead to the confrontation that eventually made its way into court?

19 Let’s start with the fact that Mr. Subedar had opened the door and had left it in a compromised position as he investigated the fourth floor. When the tour arrived at the sixth floor, the gates of the fortress were invitingly open. The immediate solution would have been to simply close the door. Unfortunately, Mr. Subedar became distracted with something on his desk. Mr. Kormos took advantage of this momentary lapse and slipped through the doorway in the blink of an eye.

20 The beleaguered Mr. Subedar did recover in time to close the locked door thereby preventing the entry of the cameraman. However, Mr. Subedar’s momentary victory in thwarting the cameraman’s entry into the inner sanctum on the sixth floor was short-lived.

21 Mr. Kormos was determined to capture everything on tape. To achieve his goals, the accused needed Mr. Bennett in the office area. The Crown contends that the actions taken by

Mr. Kormos to get the cameraman past the locked door amount to assault contrary to the *Criminal Code* of Canada.

22 The foregoing incidents indicate a situation that started out badly for the complainant and the morning was still young. To this point in time, the facts highlight a unique mix of non-observations, questionable security procedures, and an incredulous acceptance by Mr. Subedar of the events as they unfolded. Therefore, it is not too surprising that Mr. Subedar might now unconsciously recall the events in as favourable a light as he can.

23 Before I examine the physical contact between Mr. Kormos and Mr. Subedar, I want to examine another two aspects of the evidence that allows the court to assess the issue of credibility. The first issue in question relates to the sobriety of Mr. Kormos.

24 Were the actions of Mr. Kormos fuelled by the consumption of alcohol as Mr. Subedar would have us believe? The answer to the question is an unequivocal no. I arrive at this conclusion for a number of reasons.

Firstly, I accept the evidence given by Mr. Kormos and Mr. Bennett on the issue. Mr. Kormos denied having consumed any alcohol and Mr. Bennett indicated that he could not detect any signs that Mr. Kormos had consumed alcohol.

Secondly, Ms. Howell, an employee of the office, advised the court that she had spoken to Mr. Kormos in person and she was in close proximity to him. She made no mention that the accused was drunk or for that matter even had the smell of an alcoholic beverage on his breath.

Thirdly, I have listened to the tape and viewed it in order to assess the allegation of drunkenness and could not detect any indication that the accused was drunk.

Fourthly, Mr. Subedar did not mention this very important fact in his written report on the incident which he had submitted to his superiors. It was later, when he spoke to the police, that he mentioned the drunkenness of the accused.

25 I would have found it incredibly stupid of Mr. Kormos if he had shown up at the offices after having consumed alcohol. This publicity stunt had been sanctioned and coordinated by the

New Democratic Party caucus. The events were being recorded on videotape for the purpose of distribution to the media. An experienced politician such as Mr. Kormos would not jeopardize this mission by consuming alcohol.

26 The issue regarding the sobriety of Mr. Kormos extends beyond the question itself. When Mr. Subedar portrays Mr. Kormos to be drunk, he is casting the accused in a most unfavourable light. At the same time, perhaps, he gains a measure of sympathy from his superiors, if they accept the fact that he was overwhelmed by an aggressive drunk and his associates. This stance, however, allows the court to weigh the credibility of the witnesses on an issue. I have done so and conclude that Mr. Subedar was not being completely forthright with the court.

27 I now propose to deal with a second area of the evidence that highlights a fundamental inconsistency between the evidence given by Mr. Subedar and the video. The videotape shows the incidental contact used by Mr. Kormos to distract Mr. Subedar from interfering with Mr. Bennett's efforts to shoot footage on the sixth floor of the Family Support offices. However, Mr. Subedar's evidence suggests that Mr. Kormos pushed him around, pushed him into a wall, and "body-checked" him. It would seem that all of these significant contacts between the accused and Mr. Subedar happened off camera. If these events had occurred as Mr. Subedar has described them, one would have expected to hear the resulting confrontations.

28 The audio portion of the tape records the inflections in Mr. Subedar's voice, the words he uses, and his general demeanour. These images and sounds do not support the kind of struggle suggested by the complainant. Rather, the tenor of the events remains one of bluster and diversion on the part of Mr. Kormos and confusion and helplessness on the part of Mr. Subedar.

29 Let me now focus on the actual allegations of assaultive behaviour. Counsel have dissected the relatively short exchange into its various subparts and I propose to deal with each segment individually.

(1) The first incident between the accused and the security guard happened when Mr. Kormos slipped by Mr. Subedar into the office area on the sixth floor. Their clothing may have brushed but I am of the view that there was no actual contact.

(2) The next incident occurred when Mr. Kormos came to the door to assist the cameraman entering the office area. The accused put his hand on the security guard's wrist. This action was an incidental touching and involved a minimal use of force. The cameraman did not enter the offices at this point in time. The banter between the complainant and the cameraman certainly is not consistent with a victim who has been assaulted in a criminal sense. Mr. Subedar was chuckling. He commented that: "When you need somebody, they are not in." He then made inquiries as to what station the cameraman was associated.

(3) Mr. Kormos returned to the door and opened it. He waved the cameraman into the office area. At the same time, he made light contact with the security guard's chest and explained that he (Kormos) was having a bad day and was very tired. I do not find that Mr. Kormos pushed the complainant into the wall. The transitory touching allowed the cameraman to slip into the offices.

(4) When the cameraman began to film the interior of the office, Mr. Kormos minimally touched the chest area of the complainant.

(5) When Mr. Subedar attempted to cover the camera lens, Mr. Kormos directed him away from the cameraman explaining that "[I've] got to talk to you pal." The videotape appears to indicate that Mr. Kormos was shoving the accused off to the side with some force. The cameraman explained this apparent depiction of force by stating that at that moment he was rapidly panning his camera in the opposite direction to the movement of the people thereby creating an illusion of speed that was not in fact present. I viewed this portion of the tape in slow motion in order to ascertain whether any elements of force could be observed. There were none. It is noteworthy to listen to the communications over the two way radio shortly after the foregoing incidents. The complainant was advised that, if he was having a problem, the police would be called. If Mr. Subedar had been the victim of the assaults that he has described, this would have been an excellent opportunity to sound the alarm. Mr. Subedar's response to the radio communication was to the effect that these people (Mr. Kormos, Ms. Martel, and Mr. Bennett) would not listen to him. That response is consistent with the

diversionary tactics of Mr. Kormos and the recording efforts of Mr. Bennett. Surely, if Mr. Subedar had been assaulted one would have expected him to convey that information to the person on the walkie-talkie.

(6) Near the end of the tape, Mr. Subedar is heard to say “excuse me” a couple of times. He indicated that Mr. Kormos was making contact with his left arm. The accused denied this incident. I accept the evidence of the accused.

The Applicability of The Doctrine of De Minimis Non Curat Lex

30 The common law concept of *de minimus non curat lex* was expressed in the case of ‘Reward’ (*The*) (1818), 2 Dods. 265 at pp. 269-70, 165 E.R. 1482 (Eng. Adm. Ct.) at p. 1484 in the following manner:

The Court is not bound to the strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimus non curat lex*. - Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

31 The Supreme Court of Canada has not specifically dealt with the applicability of the *de minimus* principle in criminal matters. However, Madame Justice L’Heureux-Dube in *R. v. Hinchey* (1996), 111 C.C.C. (3d) 353 (S.C.C.) leaves the door open to the possibility of such an approach when she wrote as follows at pp. 380-381:

In my view, this interpretation removes the possibility that the section will trap trivial and unintended violations. **Nevertheless, assuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimus non curat lex*, that “the law does not concern itself with trifles”.** This type of solution to cases where an accused has “technically” violated a Code section has been proposed by the Canadian Bar Association, in *Principles of Criminal Liability* (Ottawa: The Association 1992), and others: see Professor Stuart, *Canadian Criminal Law*, 3rd ed. (Scarborough, Ont.: Carswell, 1995) at pp. 542-46. I am aware, however, that this principle’s potential

application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below. Since a resolution of this issue is not strictly necessary to decide this case, I would prefer to leave this issue for another day. (My emphasis)

32 Further support for applying the *de minimus* concept in criminal matters can be found in the case of *R. v. Lepage* (1989), 74 C.R. (3d) 368 (Sask. Q.B.), wherein McIntyre J. wrote at pp. 374-5 that:

As I stated earlier, I have grave and serious doubts that this charge can be supported by the facts found by the learned trial judge, in that there was no evidence to support a finding that there was an intentional application of force by Lepage against Mitchell in the sense of there being a wrongful application of force. I am also of the view that the conduct of Mr. Lepage in this case was of such a trifling nature that the maxim “*de minimus non curat lex*” should apply.

33 It is interesting that Justice McIntyre’s approach is twofold. Firstly, he examines the circumstances surrounding the actual physical contact between the parties to consider whether there was an intentional application of force in the sense of there being a wrongful application of force. This requires the court to characterize the actions of the parties to ascertain whether the actions have the indicia of criminality.

34 Undoubtedly, there are many instances in our day to day life when people come in physical contact with one another without first ascertaining whether there is permission/consent for one person to apply a certain amount of force upon the second individual. For example, persons attempting to exit a crowded subway car or elevator might very well move an individual out of the way by placing their hands on the other person’s shoulder and directing them to the side. It is not uncommon for some people to put their hand on the person they are addressing. There are incidents where individuals will guide another person in a certain direction such as a teacher directing a student from the classroom or an office manager directing an employee from their office. The mere application of some force upon another does not always suggest an assault in the criminal sense. Quite the contrary, there are many examples of incidental touching that cannot be considered criminal conduct.

35 Justice McIntyre's secondary position in the *Lepage* decision incorporates the concept of *de minimus*.

36 The factual circumstances as found by the trial judge in *Lepage* are found commencing at p. 371:

I'm satisfied that, no, he waited until Mitchell came with the Fire Prevention Bylaw, probably, showed it, put it on the desk, said, "Here it is." And I'm satisfied that he realizes at that moment, there is no talking, there is no way this order is going to be rescinded by Mr. Mitchell or Mr. Fargo. And, I'm satisfied, he realizes that it's suddenly out of my hands and out of their hands, and so he just says, "Oh, I might as well get this darn thing over with," and marches out. And on the way out, I'm satisfied, Mr. Mitchell was probably standing in the way of either his egress to his coat or the door, one of the two, and he simply pushes him, not in the sense of, you know, striking out or anything of that nature, but more in the sense of "Get out of my way." You know, "You represent," the person who brings the order, "you represent bad news, you represent more problems for me, in terms of these Christmas trees, and get out of my road." And it is in that sense that that push is administered to Mr. Mitchell. I accept Mr. Mitchell's testimony when he indicates that he was pushed.

37 Counsel for the accused referred the court to a number of cases that have considered the issue of non-consensual touching. These authorities highlight examples where non-consensual contact has been found not to amount to criminal conduct and they also highlight some characteristics that incorporate the concept of *de minimus*.

(a) Did the intentional application of force amount to a wrongful application of force?

38 In *R. v. Starrat* (1971), 5 C.C.C. (2d) 32 (Ont. C.A.) at p. 33 Chief Justice Gale wrote:

To constitute the offence of assault occasioning bodily harm it has to be shown beyond a reasonable doubt that a person intentionally applied force. The trial Judge found that any application of force resulted from either the appellant's action in the course of duty, which is proper, or his carelessness, **but made no finding that there was an intentional application of force in the sense of being a wrongful application of force.** (My emphasis)

39 What was the intention of Mr. Kormos when he attended the Family Support offices with a cameraman in tow? The purpose of the exercise was to obtain proof of the Ministry's failure to implement an amalgamation of their support services for dependent spouses and dependents. There was no intention to assault anyone. Mr. Sleeth, Q.C. pressed the point that Mr. Kormos would have done anything to achieve his goals and that nothing would deter him in his mission. I find that although Mr. Kormos would have used many tactics to accomplish his objective, he did not approach his task intent upon assaulting anyone in the criminal sense. I find that the transitory nature of the contact by Mr. Kormos upon Mr. Subedar was intended to distract the security guard thus allowing Mr. Bennett to obtain his film footage.

(b) Was there a proper or laudatory motive for the accused's actions?

40 Mr. Addario cited the decision of *R. v. Bochar* (May 24, 1994), Vaillancourt Prov. Div. J. (Ont. Prov. Div.) as an example of a lawful application of force. In *Bochar* (supra) a school principal took hold of a teacher's arm for the purpose of securing that person's attendance at the principal's office and directing them to that specific location.

41 The diversionary motive referred to in (a) above certainly is not on its face cloaked in criminality. Neither would I describe the actions in laudatory terms.

(c) The duration and results of the physical contact

42 One cannot state as a blanket rule that, if the contact is of a brief period and there are no injuries, there cannot be a finding or conviction for assault. However, duration and results of physical contact are aspects to be considered when assessing the overall nature of the incident. Here, the incident was brief and there were no injuries.

(d) Complainant's desire or lack thereof to pursue a criminal charge.

43 This concept may be of some weight when the police are investigating an allegation. They may consider a complainant's wishes in the overall exercise of their responsibilities to swear an information. Law enforcement officers are required to investigate allegations of criminal activity and, if they are of the view that there are reasonable and probable grounds to lay a charge, a charge will be laid whether the complainant acquiesces or not in that decision.

44 Counsel has made reference to Mr. Subedar's initial reluctance to proceed with an assault charge against the accused. I do not consider that position of any particular advantage to the accused. Mr. Subedar had been caught up in a whirlwind and was more focused on his personal employment situation than any criminal process.

(e) Accused's publicity of his actions.

45 I have already characterized the attendance of Mr. Kormos and company at the offices of the Family Responsibility offices in my reasons on the stay application as a publicity stunt. The results of the excursion were announced through a press conference complete with the release of the footage that was shot. If the accused had for one moment considered that his actions demonstrated the criminal offence of assault, I doubt that he would have called attention to his criminality through the media. Mr. Addario characterized this informational release in terms of reverse consciousness of guilt.

Conclusion

46 Based on the findings of fact that I have made in this case, I am not satisfied that the Crown has proven beyond a reasonable doubt that Mr. Kormos committed an assault on the complainant. The evidence, at its highest, shows an insignificant amount of physical contact by Mr. Kormos. There was no evidence to support a finding that there was an intentional application of force by Mr. Kormos against Mr. Subedar in the sense of there being a wrongful application of force. There was some incidental contact by Mr. Kormos in order to divert Mr. Subedar's attention away from the cameraman's efforts to film the offices.

47 I reject Mr. Subedar's evidence as it relates to any off camera body checking or wall slamming allegations.

48 If the actions of Mr. Kormos could be elevated to assaultive behaviour in a criminal sense, consideration should be given to the doctrine of *de minimus*. The contact in this case can best be characterized as trifling.

Legislative Privilege

49 The findings of fact that I have made in this judgment makes it unnecessary for me to rule on the issues involving the concept of legislative privilege. However, both the Defence and the Crown have expended a great deal of effort on the subject and therefore, I propose to address some of the matters that have been raised.

50 Mr. Burstein stated that Mr. Kormos was discharging his duties as an elected member of the Ontario Legislature and therefore had authority to attend at the government offices in question and conduct a fact-finding exercise. Since he would have had a right to be present at the location, he would have been entitled to use a reasonable amount of force to prevent Mr. Subedar from interfering with him as he conducted his fact-finding task. It was clearly put forth that such privilege does not mean that a member of the Legislature is immune from criminal prosecution and the member's extended privilege would not allow the member to assault anyone during an inspection.

51 Counsel also contended that a member *could not* inspect *any* office at *any* time for *any* reason. (My emphasis) Mr. Kormos in cross-examination indicated that, as an example, he could not just waltz into the Ontario Provincial Police offices and conduct an inspection. This concession seems to seriously undermine the whole proposition of legislative privilege in the context of inspections by members of the Legislature. It introduces such uncertainty to the concept that confusion and uncertainty would be the order of the day.

52 The defence contends that the source of legislative privilege is found in the Standing Orders of the Legislative Assembly of Ontario adopted July 25, 1989 and amendments thereto. Under the heading CONDUCT OF BUSINESS, the following excerpts are found:

1(a) The proceedings in the Legislative Assembly of Ontario and in all the Committees of the Assembly shall be conducted according to the following Standing Orders. (My emphasis)

(b) The purpose of these Standing Orders is to ensure that the Proceedings are conducted in a manner that respects the democratic rights of members,

(i) to submit motions, resolutions and bills for the consideration of the Assembly and its Committees, and to have them determined by democratic vote;

(ii) to debate, speak to, and vote on motions, resolutions and bills;

(iii) to hold the government accountable for its policies; and (Mr. Burstein's emphasis)

(iv) collectively, to decide matters submitted to the Assembly or a Committee.

53 Counsel referred the court to the case of *Attorney General for Ceylon v. De Livera*, [1962] 3 All E.R. 1066 (Ceylon P.C.) to demonstrate that the duties of the elected members of government are not restricted to the narrow confines of the Legislature. No one would disagree that parliamentary debates and committee work account for only a portion of the duties and responsibilities of our representatives. The case of *Attorney General for Ceylon* recognised that a member of Parliament has responsibilities and status "in his capacity as a member of Parliament" outside the legislative body. The member in *Attorney General for Ceylon* case wished an interpretation restricting his "capacity as a member" in light of the fact that he had been charged with the offence of accepting what would amount to a bribe. The Privy Counsel recognized that members have a wide ranging arena wherein they will be considered to be acting as members of Parliament.

54 This aforementioned view with respect to the role of elected members has been followed in Canadian jurisprudence. The Ontario Court of Appeal in *R. v. Bruneau*, [1964] 1 C.C.C. 97 (Ont. C.A.) dealt with the interpretation "the official capacity" of a member of Parliament at pp. 99-100 as follows:

Counsel for the appellant submitted that his client was not acting in "his official capacity" as a member of Parliament when he agreed to accept the money for the use of his influence. It was put to us that there were three branches of Government-the legislative, the administrative and the judicial; that s. 100 applied only to the legislative and judicial branches and corruption of the administrative branch was dealt with in the offences defined in s. 102. Counsel argued that "official capacity" must mean that capacity or power of a member to take part in legislation and matters directly related to it in the House of Commons, and only that capacity or power, and any act done by a member related to the administrative branch was not done in his official capacity as a member and therefore did not fall within s. 100 but rather under s. 102(1)(d). In support of his

contention counsel pointed out that the adjective “official” was first used in the revision of the Code in 1955 and that Parliament must have meant by the use of that word to restrict acts or omissions to those related directly to the legislative process. As put by counsel for the appellant the argument was logical and to a degree persuasive, but after consideration I find myself unable to agree with it.

55 The “official capacity” or role of an elected official was also given a more expansive definition in the decision of Justice Ritchie in *R. v. Arseneau* (1979), 45 C.C.C. (2d) 321 (S.C.C.) commencing at p. 325:

In the absence of evidence to the contrary, I am prepared to proceed on the basis that it was as a member of the Legislature that Van Horne was appointed to be Minister of Tourism. This would accord with the generally accepted practice in this country whereby Ministers are accountable to the elected representatives of the people in Parliament or the Legislature as the case may be, and it is in his capacity as a member of the Legislature that a Cabinet Minister participates in the process of securing legislative authority for the implementation of the policies which he proposed. In the final analysis, it is as a member and not as a Minister that he approves the expenditures which he may have recommended as a Minister. In the view of the above, I am unable to accept the contention of the appellant that Van Horne’s capacity as a member of the Legislature can be so severed from the functions which he performs as Minister of Tourism as to make it an offence under s. 108 to corruptly pay money to him as a member of the Legislature and no offence to corruptly pay money to the same man in his capacity as Minister.

56 Can the inspection by Mr. Kormos be sanctioned as legislative privilege? Although not specifically set out in Standing Orders or otherwise, is it reasonable to envisage that members of the Ontario Legislature have the right to make surprise inspections at government offices as an adjunct to their role as an elected member?

57 I find that the Standing Orders address issues of governing the Assembly’s procedures in the House and in its Standing Committees. Although I recognize that a member must function in various capacities in order to discharge his duties, I do not interpret section 1(b)(iii) of the

Standing Orders of the Legislative Assembly of Ontario as a vehicle to allow inspections of government offices in any fashion by any member of the Assembly.

58 I am not prepared to say that a member's privilege should be expanded to allow members to embark upon self directed inspections of government facilities. I do not find it necessary to sanction this procedure as an adjunct to their duties as members of the Legislature. The members have many ways to discharge their responsibilities without sanctioning the kind of inspections as occurred in the case at bar.

Addendum

59 An objective view of the allegations currently before the court might give one pause to question the necessity of using the better part of five days of court time to deal with the trial of this incident. Could this matter have been handled in a different manner? I do not think so. This whole situation was rooted in the public domain. The accused attended at the government offices specifically to expose the government's handling of the Family Responsibility Support situation. He wanted his findings documented and therefore had a cameraman in tow. After his inspection, he made his observations public through the media.

60 The government retained the services of independent outside legal counsel. Mr. Sleeth, Q.C., a very competent counsel, was given the delicate task of prosecuting an opposition member of the Ontario Legislature. Obviously, he was aware that the press would be much more interested in the handling of an assault charge when the accused was a prominent politician. If the charge had been diverted and withdrawn, criticism might very well have come forth. I find that Mr. Sleeth, Q.C. concentrated his attention on the legal issues presented by the facts. If the facts had dictated that the appropriate disposition would have been a withdrawal of the charge, Mr. Sleeth, Q.C. would have withdrawn the charge. From cross-examination of the complainant, it is clear that Mr. Sleeth, Q.C. reviewed the evidence with the complainant very thoroughly. At the end of the day, it was clear that the complainant was standing by his version of the events which included the state of sobriety of Mr. Kormos and the assaultive allegations which included body checking on the part of Mr. Kormos as well as the accused slamming the complainant into the wall. The prosecutor had a videotape that did not capture the most significant allegations of assault and therefore had to rely on the

state of affairs as expressed by the complainant. Therefore, the only option open to the Crown was to proceed to trial.

61 Obviously, once a criminal charge is laid, an accused is entitled to defend himself thoroughly. The fact that an allegation might not be considered a serious criminal offence is of little moment. Any charge under the *Criminal Code* is a serious matter. A criminal finding of guilt or a conviction is of great importance. In the case at bar, the application for a stay of proceedings was argued. In hindsight, one might ask why this aspect was argued in light of the eventual findings of the court in this matter. The answer is simple. The accused could not have predicted with certainty the eventual findings of fact made by the court and if the court had found against the accused it would have been too late to argue the possibility of a stay.

62 I would like to commend all counsel for their thorough and thoughtful presentation of their positions.

Disposition

63 The assault charge is dismissed.

Accused acquitted.