

Court File No.:

CV-16-125371-00

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN

GAVIN DOWNING, DIRECTOR APPOINTED  
UNDER THE MILK ACT, R.S.O. 1990, c M.12

Applicant

- and -

AGRI-CULTURAL RENEWAL CO-OPERATIVE INC. o/a GLENCOLTON FARMS,  
ELISA VANDER HOUT, MARKUS CHRISTIAN SCHMIDT,  
JOHANNES OSTHAUS NIKOLAUS ALEXANDER, JOHN DOE(S), JANE DOE(S) and  
PERSONS UNKNOWN

Respondent

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NOTICE OF APPLICATION

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TO: THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

*WSDN 550X MAR 16, 2016 AM.*

*Not A/C*

THIS APPLICATION will come on for a hearing on ~~a date to be selected by the Court~~, at 9:30 in the forenoon at the Court House, 50 Eagle Street West, Newmarket, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.


IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSSEXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date

JAN 22 2016

Issued by



Local registrar

**TO: AGRICULTURAL RENEWAL CO-OPERATIVE INC.  
O/A GLENCOLTON FARMS ("ARC")  
393889 Concession 2, R R #1  
Durham, ON N0G 1R0**

Respondent

**AND TO: ELISA VANDER HOUT  
393889 Concession 2, R R #1  
Durham, ON N0G 1R0**

Respondent

**AND TO: MARKUS CHRISTIAN SCHMIDT  
393889 Concession 2, R R #1  
Durham, ON N0G 1R0**

Respondent

**AND TO: JOHANNES OSTHAUS NIKOLAUS ALEXANDER  
441478 Concession 8NDR RR#1  
Elmwood, ON N0G 1S0**

Respondent

**AND TO: JOHN DOE**

**AND TO: JANE DOE**

**AND TO: PERSONS UNKNOWN**

## APPLICATION

### 1. THE APPLICANT MAKES APPLICATION FOR:

- a. An order, pursuant to section 22 of the *Milk Act*, R.S.O. 1990, c M.12 ("**Milk Act**") restraining the Respondents and all persons with knowledge of this order from operating the plant located at 393887 and 393889 Lot 44 Concession 2 EGR Glenelg Township, West Grey County, Ontario (the "**Farm Property**") without a licence, in contravention of section 15(1) of the *Milk Act*.
- b. An order, pursuant to section 22 of the *Milk Act*, restraining the Agri-cultural Renewal Co-operative Inc. ("**ARC**"), any related corporate entities, the individually named respondents and all persons with knowledge of this order from operating a plant without a licence in contravention of section 15(1) of the *Milk Act* at any property owned by: (i) ARC or any related corporate entities; or (ii) any of the individually named respondents.
- c. an order restraining the Respondents, ARC's employees and all other persons involved in ARC's operations from hindering or obstructing the inspection, by a field person or officer appointed by the Director under the *Milk Act*, of ARC's books, records and other documents, as well as the Farm Property and any equipment, milk or milk products thereon, in contravention of section 13(2) of the *Milk Act*.
- d. the applicant's costs in this application; and
- e. such further and other relief as this Honourable Court may deem just.

### 2. THE GROUNDS FOR THE APPLICATION ARE:

#### The Parties

- a. The applicant, Gavin Downing (the "**Director**"), is appointed under section 2.1(1) of the *Milk Act* to exercise the powers and perform the duties of the Director in respect of milk and milk products. Pursuant to section 2.1(3) of the *Milk Act*, the Director is obligated to carry out the administration and enforcement of the Act and its regulations with respect to the quality of milk, milk products and fluid milk products in Ontario.

- b. The respondent ARC, operating as Glencolton Farms, is a co-operative corporation established in Ontario that is engaged in dairy farming activities. ARC is the owner of the Farm Property.
- c. Elisa Vander Hout, Markus Christian Schmidt, and Johannes Osthaus Nikolaus Alexander are all directors and officers of ARC.
- d. The respondents named in this application as John Doe(s), Jane Doe(s) are persons who are involved in ARC's activities, including the operation of the plant at the Farm Property, who have not yet been identified.
- e. There are other individuals who have hindered or obstructed an officer or field person in the course of his or her duties to inspect the Farm Property, ARC's books, records, equipment, and milk or milk products who have not yet been identified and have been named as Persons Unknown.

**The Farm Property and related properties**

- f. Prior to ARC's ownership of the Farm Property, it was previously owned by Michael Schmidt. In addition to the Farm Property, Mr. Schmidt also owned the adjacent properties located at Lots 48 and 49 Concession 3 Glenelg West Grey County.
- g. In December 1995, Mr. Schmidt transferred the Farm Property to his former spouse, Dorothea Schmidt. Lots 48 and 49 were subsequently transferred to Ms. Schmidt on January 29, 2010. On the same day, Ms. Schmidt transferred the Farm Property to ARC and transferred Lots 48 and 49 to a numbered company 2215914 Ontario Ltd. ("221").
- h. The Respondents Elisa Vander Hout and Markus Christian Schmidt are also directors and officers of 221. 221 is wholly owned by ARC.

**The *Milk Act* prohibits a person from operating a plant without a licence**

- i. Pursuant to section 15(1) of the *Milk Act*, a person is prohibited from operating a plant without a licence from the Director. A plant is defined under section 1 of the *Milk Act* as a premises in which milk, cream or milk products are processed. Processing is defined under section 1 of the *Milk Act* as heating, pasteurizing,

evaporating, drying, churning, freezing, packaging, packing, separating, combining with other substances by any process or otherwise treating milk or cream or milk products in the manufacture or preparation of milk products or fluid milk products.

- j. Sections 95 to 109 of O. Reg. 761 to the *Milk Act* (the "**Regulation**") set out the process, terms and conditions governing the application for and issuance of a licence to operate a plant.
- k. Section 95 of the Regulation details the content requirements of an application and specifies that a licence is required before the plant begins operating. Section 98 prohibits a person from operating a plant except in accordance with a licence from the Director. Section 100 sets out conditions under which the Director may refuse to issue a licence, including non-compliance with the *Health Protection and Promotion Act*, R.S.O. 1990, c H.7 (the "**HPPA**").
- l. Section 13(1) of the *Milk Act* requires a person engaged in the producing, processing or marketing of milk or milk products to produce and to permit the inspection of their books, records and documents, and permit inspection of their premises, including any equipment, milk or milk products therein, at the request of a field person or officer appointed by the Director. Section 13(2) prohibits a person from hindering or obstructing an officer or field person in the course of his or her duties.
- m. Pursuant to section 21 of the *Milk Act*, anyone who contravenes a provision of the Act or its regulations is guilty of an offence.

**Provincial investigation and evidence of an operating milk plant at the Farm Property**

- a. ARC does not have a licence from the Director to operate a plant. Further, ARC has never had a licence to operate a plant and has not applied for one. None of ARC's directors or officers possess a licence to operate a plant.
- b. In 2015, provincial government investigators responsible for investigating offences under the *Milk Act* commenced an investigation to determine whether ARC was operating a plant at the Farm Property without a licence, in contravention of section 15(1) of the *Milk Act*.

- c. On September 28, 2015, the investigators obtained a search warrant pursuant to section 158 of the *Provincial Offences Act*, R.S.O. 1990, c P.33 for the Farm Property on the basis that there were reasonable grounds to believe that the search would yield evidence that ARC was operating a plant without a licence contrary to sections 15(1) and 21 of the *Milk Act*.
- d. On October 2, 2015, the investigators executed the search warrant at the Farm Property. Directors, officers, or other individuals associated with ARC's operations obstructed the investigators during the course of their execution of the search warrant. Among other things, investigators were prevented from removing validly seized evidence from the Farm Property.
- e. Despite this obstruction, the investigators conclusively determined that there was an active plant processing dairy products and packaging fluid milk at the Farm Property. This conclusion was based on a number of observations, including:
  - i. a milking parlour set up to allow for the milking of cows;
  - ii. permanent pipelines for the delivery of milk from the milking parlour to the processing area;
  - iii. bulk storage tanks with valves that would allow for the filling of jars (packaging within the definition of processing under section 1 of the *Milk Act*);
  - iv. functional fridges storing finished fluid milk and cheese products, as well as cheese starter cultures (treating milk products within the definition of processing);
  - v. incubators storing wheels of cheese (treating milk products within the definition of processing);
  - vi. a drain table carrying cheese curds in various cheese forms (separating and treating milk products within the definition of processing);
  - vii. a kettle which could be used as a cheese vat with piping (heating and treating milk products within the definition of processing);
  - viii. a cream separator (separating into component parts within the definition of processing);
  - ix. electrical connections and chemicals indicating ongoing operation and cleaning of parts and equipment; and
  - x. evidence of the commercial sale and distribution of milk products.

- f. Between 45 and 50 cows, divided into two herds, have been observed at or near the Farm Property. One herd is milked at the milking parlour located on the Farm Property. In addition, cattle have been observed on property owned by ARC's related corporation 221 (Lot 49 Con 3 Glenelg West Grey).
- g. Samples of milk seized during the execution of the search warrant were tested and identified as bovine in origin. The plant does not contain equipment which would allow for the legal pasteurization of milk.
- h. Section 18 of the *HPPA* prohibits the sale or distribution of milk or milk products which have not been pasteurized or sterilized at a licenced plant.
- i. The milk and milk products processed at the plant at the Farm Property do not meet the requirements of the *HPPA* and appear to be distributed in contravention of that Act. ARC would not be entitled to a licence because, among other reasons, it is not operating the plant in compliance with the *HPPA*.

**Injunction proceedings under section 22 of the *Milk Act***

- j. Section 22 of the *Milk Act* authorizes the Director to seek an injunction order from the Superior Court of Justice where it appears that an offence under the *Milk Act* or its regulations has been or is being committed.
- k. ARC is operating a plant on the Farm Property without a licence from the Director, in contravention of section 15(1) of the *Milk Act*. ARC, at the direction of its directors and officers, is committing an offence under the *Milk Act* and an order enjoining the respondents from continuing to operate the plant without a licence is justified in these circumstances.
- l. During the execution of the search warrant (i.e. October 2, 2015), field persons and officers appointed pursuant to the *Milk Act* were obstructed and hindered in the course of inspecting the Farm Property pursuant to section 13(1) of the *Milk Act*, in contravention of section 13(2) of the *Milk Act*. The respondents, in permitting or participating in this contravention, are committing an offence under the *Milk Act*. An order enjoining the respondents from obstructing or hindering the inspection of the property pursuant to section 13(1) is justified in these circumstances.

- m. Sections 1, 2, 2.1, 13, 15, 21 and 22 of the *Milk Act*, R.S.O. 1990, c M.12;
- N. Sections 95 to 109 of *Milk and Milk Products*, R.R.O. 1990, Reg. 761;
- O. Sections 1 and 18 of the *Health Protection and Promotion Act*, R.S.O. 1990, c H.7;  
and
- P. Rule 14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194.

**3. THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:**

- a. Affidavit of Gavin Downing to be sworn;
- b. Affidavit of Rick Bond to be sworn;
- c. Affidavit of Glenn T. Jarvie to be sworn; and
- d. Such further and other evidence as counsel may advise and this Honourable Court may permit.

**January 22, 2016**

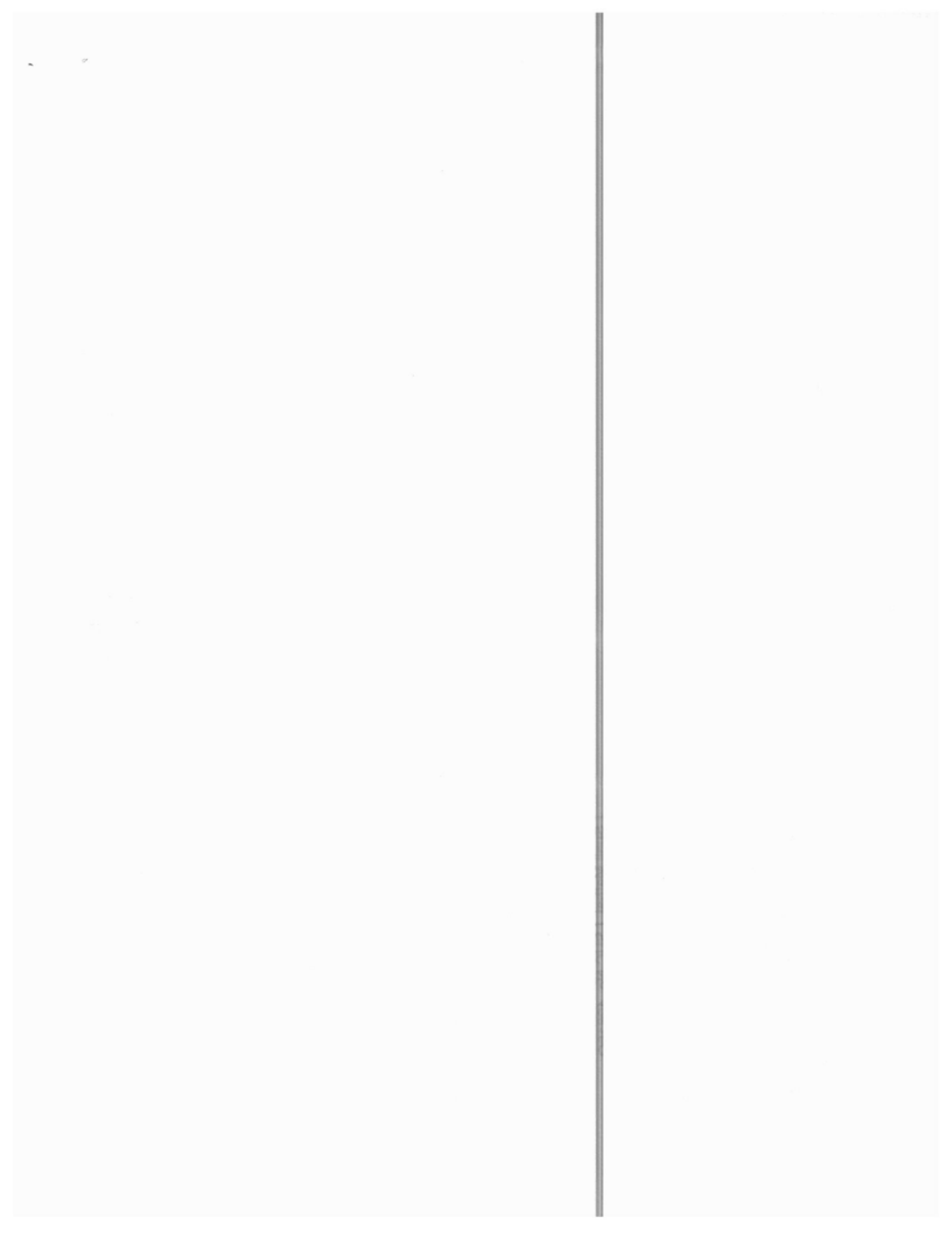
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Counsel for the applicant,  
Gavin Downing, Director appointed under  
the *Milk Act*, R.S.O. 1990, c M.12





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Court File No.

CJ-16-125250-00

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:



THE REGIONAL MUNICIPALITY OF YORK

Applicant

- and -

MICHAEL SCHMIDT, ELISA VANDER HOUT, MARKUS CHRISTIAN SCHMIDT,  
AGRI-CULTURAL RENEWAL CO-OPERATIVE INC.,  
NIKOLAUS ALEXANDER JOHANNES OSTHAUS,  
JOHN DOE, JANE DOE and PERSONS UNKNOWN and  
THE CHURCH OF THE CHRISTIAN COMMUNITY IN CANADA

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicants appears on the following pages.

*Cum 29*

*wednesday the 16th of March*

THIS APPLICATION will come on for a hearing on ~~Wednesday~~ the 16<sup>th</sup> of March, 2016 at 9:30 in the forenoon at the Court House, 50 Eagle Street West, Newmarket, Ontario.

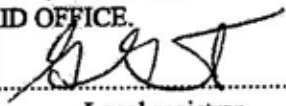
IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have

a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

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Date: January 13, 2016  
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Issued by .....  .....

Local registrar

Address of  
court office

50 Eagle St. W, Newmarket, ON L3Y 6B1

**TO: MICHAEL SCHMIDT**  
393889 Concession 2  
R R #1  
Durham, ON  
N0G 1R0

**AND TO: ELISA VANDER HOUT**  
393889 Concession 2  
R R #1  
Durham, ON  
N0G 1R0

**AND TO: MARKUS CHRISTIAN SCHMIDT**  
393889 Concession 2  
R R #1  
Durham, ON  
N0G 1R0

**AND TO: AGRI-CULTURAL RENEWAL CO-  
OPERATIVE INC.**

393889 Concession 2  
R R #1  
Durham, ON  
N0G 1R0

**AND TO: NIKOLAUS ALEXANDER JOHANNES  
OSTHAUS**  
441478 Concession 8NDR  
R R #1  
Elmwood, ON  
N0G 1S0

**AND TO: JOHN DOE**

**AND TO: JANE DOE**

**AND TO: PERSONS UNKNOWN**

**AND TO: THE CHURCH OF THE CHRISTIAN  
COMMUNITY IN CANADA**  
901 Rutherford Road  
Vaughan, ON  
L6A 1S2

## APPLICATION

### THE APPLICANT MAKES APPLICATION FOR:

- (a) A declaration that the Respondents have contravened s. 18 of the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 (the "HPPA") by offering for sale, selling, delivering or distributing unpasteurized milk and unpasteurized milk products that contravene the HPPA and Regulations thereunder within the jurisdiction of The Regional Municipality of York;
- (b) An interim and permanent injunction restraining and enjoining the Respondents and any and all persons having knowledge of the injunction Order from directly or indirectly, by any means whatsoever:
  - (i) Offering for sale, selling or distributing, delivering or counselling others to offer for sale, sell, deliver or distribute unpasteurized milk and unpasteurized milk products within the jurisdiction of The Regional Municipality of York;
  - (ii) Permitting the use of their lands by others to offer for sale, sell deliver or distribute unpasteurized milk and unpasteurized milk products within the jurisdiction of The Regional Municipality of York;
  - (iii) Threatening or intimidating the Applicant's employees, servants, agents or other persons acting in the lawful execution of their duties under the HPPA; and
  - (iv) Physically interfering with or counselling others to physically interfere with the performance by the Applicant's employees, servants, agents or other persons acting in the lawful execution of their duties under the HPPA;
- (c) An Order that the premises of the Respondent, The Church of the Christian Community in Canada (the "Church"), located at 901 Rutherford Road in Vaughan be closed to any use in any way associated with or related to the sale, offer for sale, distribution or delivery of unpasteurized milk or milk products;

- (d) An Order that any police service or peace officer be authorized to arrest, or arrest and remove, any person who has knowledge of the Order and who the police service or peace officer has reasonable and probable grounds to believe is contravening or has contravened the provisions of the Order, and for greater certainty, such a police service or peace officer retains his or her discretion to decide whether to arrest or remove any person pursuant to the Order;
- (e) An Order that any police service or peace officer who arrests or arrests and removes any person pursuant to the Order be authorized to:
  - (i) release that person from arrest upon that person agreeing in writing to abide by the Order and to appear before this Court at such time and place as may be fixed for the purpose of being proceeded against for contempt of Court or fixing a date for such proceeding;
  - (ii) where such person has refused to give a written undertaking to abide by the Order or to appear before this Court, or where in the circumstances the peace officer considers it appropriate, to bring forthwith such person before this Court in Newmarket, Ontario, or such other place as the Court may direct, for the purpose of being proceeded against for contempt of Court or for fixing a date for such proceeding; or
  - (iii) detain such person in custody until such time as it is possible to bring that person before this Court;
- (f) An Order that any party affected by this Order may move to set aside or vary the Order upon three days' notice, but that no such motion shall in any way excuse that party from compliance with the terms of the Order;
- (g) An Order awarding the costs of this Application against any or all of the Respondents on a substantial indemnity basis; and
- (h) Such further and other relief as this Honourable Court may deem just.

**THE GROUNDS FOR THE APPLICATION ARE:**

*The Parties*

- (a) The Regional Municipality of York (the "**Region**") is an upper-tier municipal corporation in Ontario as defined by the *Municipal Act, 2001*, S.O. 2001, c.25, headquartered in Newmarket, Ontario. The Region as a board of health is mandated under the HPPA to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the citizens of the Region;
- (b) The Respondent Michael Schmidt ("**Schmidt**") is a dairy farmer who is a passionate advocate for the legalization of the sale of unpasteurized or raw milk. Schmidt has been the subject of criminal charges, restraining and contempt orders in Ontario and British Columbia as a result of his sale and distribution of unpasteurized milk and milk products;
- (c) The Respondent Elisa Vander Hout ("**Vander Hout**") is the spouse of Schmidt;
- (d) Schmidt and Vander Hout (and others) are currently selling, distributing, and delivering unpasteurized or raw milk in the Region through the Respondent Agricultural Renewal Co-operative Inc. ("**ARC**"), a co-operative corporation which was incorporated on May 12, 2004;
- (e) The Respondents Vander Hout, Markus Schmidt ("**Markus**"), Nikolaus Alexander Johannes Osthhaus ("**Osthhaus**") are directors and officers of ARC;
- (f) Schmidt and Vander Hout and others are currently illegally distributing, selling offering for sale and delivering unpasteurized or raw milk to their customers every Tuesday from the parking lot of the Respondent, the Church, at 901 Rutherford Road, Vaughan, Ontario;

- (g) The Church gains a monetary benefit from the illegal sale, offering for sale, delivery and distribution of raw milk in that ARC pays monthly rent to the Church for the use of its property;
- (h) There are other individuals who are involved in the distribution, sale and delivery of the raw milk produced by Schmidt and Vander Hout who have not yet been identified and have been named as "John Doe, Jane Doe and Persons Unknown";

*The Farm*

- (i) The raw milk that is sold, offered for sale, distributed and delivered within the Region by Schmidt, Vander Hout and their associates has always been produced at Glencolton Farms (the "Farm"), which is located at 393889 Lot 44, Concession 3 EGR, Municipality of West Grey, near Durham, Ontario;
- (j) Schmidt previously owned 3 lots (Lots 44, 48 and 49) in Grey County with his previous wife Dorothea Schmidt ("Dorothea"). Schmidt transferred Lot 44 (the Farm) to Dorothea in December 1995 in an attempt by Schmidt to defeat, hinder and delay his potential creditors. Lots 48 and 49 were then transferred to Dorothea on January 19, 2010 for nominal consideration. On the same day (January 19, 2010), Dorothea transferred Lot 44 to the Respondent, ARC for \$653,866 and Lots 48 and 49 to a numbered company (2215914 Ontario Ltd, "221") for \$300,000 (for both lots);
- (k) The Respondents Vander Hout, Markus, Alexander and Osthaus and are also directors and officers of 221;
- (l) 221 is owned by ARC;



***The Legal History***

- (m) Schmidt originally operated a dairy farm within the milk quota system governing the distribution of milk in the Province of Ontario. In 1992, Schmidt cancelled his contract with the Milk Marketing Board and created a "lease-a-cow" scheme whereby interested consumers of unpasteurized milk could putatively hold leasehold interests in Schmidt's cows, in an ostensible effort to avoid the effect of legislation prohibiting the sale and distribution of unpasteurized milk and milk products;
- (n) A permanent restraining Order was issued by Grey Bruce County under section 13 of the HPPA directing that Schmidt cease the manufacturing, processing, preparation etc. of unpasteurized milk and milk products (the "**Grey Bruce Order**");
- (o) In 1994 Schmidt was charged with contravening s. 18 of the HPPA, which prohibits the sale or distribution of milk or milk products that have not been pasteurized or sterilized in a plant that is licensed under the *Milk Act*. Schmidt was subsequently convicted of that offence and an offence under the *Milk Act*, fined \$3,500 and placed on probation for a period of two years;
- (p) In 1994, York Region Public Health also issued an order under section 13 of the HPPA to Mr. Schmidt requiring him to cease selling and distributing the raw milk in York Region (the "**York Region Order**");
- (q) After the Lease-A-Cow scheme proved ineffective, Schmidt, again in an effort to avoid the effect of legislation prohibiting the sale and distribution of unpasteurized milk, developed a "cow-share" scheme whereby an interested consumer of unpasteurized milk could ostensibly enter into a contractual agreement with Schmidt, the intent of which was to create a fractional ownership interest in one of Schmidt's cows;

- (r) Schmidt used to transport his dairy and other products from the Farm to the parking lot of the Waldorf School in Thornhill for sale to his customers in a recognizable blue bus (the "**Blue Bus**");
- (s) In 2006, nineteen charges (the "**2006 Charges**") were instituted by the Province of Ontario against Schmidt in which it was alleged that he had failed to obey the Grey Bruce Order and had contravened s. 18 of the HPPA and provisions of the *Milk Act*;
- (t) As well, on December 5, 2006 the Region's Health Services Department issued a second order to Schmidt pursuant to s. 13 of the HPPA (the "**Second York Region Order**") whereby he was ordered to cease the offering for sale of unpasteurized milk and milk products within the jurisdiction of the Region;
- (u) Schmidt refused to abide by the terms of the Second York Region Order and continued to illegally distribute unpasteurized milk within the jurisdiction of the Region. Accordingly, the Region applied to the Superior Court of Justice for an order pursuant to s. 102 of the HPPA that Schmidt be restrained from contravening the Second York Region Order. On May 17, 2007 Justice Ferguson issued an order (the "**2007 Court Order**") restraining Schmidt from contravening the Health Services Order and from offering for sale or distributing unpasteurized milk and milk products within the jurisdiction of the Region;
- (v) Schmidt refused to abide by the terms of the HPPA Order and the Region brought a motion against Schmidt for contempt. The motion was heard by way of a trial of an issue by Justice Boswell on September 10 to 12, 2008. On October 20, 2008 Justice Boswell released reasons for decision in which he found Schmidt in contempt of the HPPA Order in that he continued to distribute unpasteurized milk in the Region in deliberate disregard to the HPPA Order (the "**Ontario Contempt Order**");

- (w) By way of reasons for decision dated December 2, 2008 Justice Boswell sentenced Schmidt to a fine of \$5,000 and awarded costs to the Region in the amount of \$50,000. A judgment dated December 2, 2008 was obtained by the Region against Schmidt for the \$55,000 owing. Neither the fine nor the costs have been paid by Schmidt, who has been quite vocal about his intention to never pay the costs or the fine;
- (x) The 2006 Charges went to trial before Justice of the Peace Kowarsky in 2010. Schmidt argued that he did not violate the HPPA or the *Milk Act* as he had only supplied unpasteurized milk to individuals who had entered into the cow-share agreements. Schmidt also argued that the statutory provisions prohibiting the sale of unpasteurized milk were contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*. At trial the Justice of the Peace accepted Schmidt's argument that providing unpasteurized milk to individuals who had entered into cow-share agreements was not caught by the legislation and acquitted Schmidt of all charges;
- (y) The Crown appealed the acquittals to the Ontario Court of Justice and the appeal was heard by Justice Tetley on April 13, 2011. For reasons released on September 28, 2011 Justice Tetley found that the Justice of the Peace had erred in his approach to statutory interpretation and found that by operating the Farm and selling and distributing milk to cow-share members, Schmidt had violated both statutes. Justice Tetley further concluded that there was no violation of the *Charter* by the statutory provisions in issue. Justice Tetley entered convictions on 13 of the 2006 Charges and imposed fines against Schmidt totalling \$9,150, and one year of probation;
- (z) Schmidt appealed the convictions entered by Justice Tetley in respect of the 2006 Charges to the Ontario Court of Appeal. The Ontario Court of Appeal dismissed the appeal by way of reasons released on March 11, 2014. The Court of Appeal did not accept Schmidt's argument that the cow-share agreements amounted to an arrangement that took Schmidt's activities outside the reach of the HPPA and the

*Milk Act*. The Court of Appeal found that the cow-share agreement did not transfer an ownership interest in a particular cow and that members did not acquire any rights that ordinarily attach to ownership and that the cow-share programme was nothing more than a marketing and distribution scheme;

- (aa) Schmidt sought leave to appeal the decision of the Ontario Court of Appeal in respect of the 2006 Charges to the Supreme Court of Canada and leave was denied on August 14, 2014;
- (bb) On October 2, 2013 Schmidt was found guilty of civil contempt in British Columbia for packaging and distributing raw milk for human consumption contrary to the terms of a permanent injunction order granted in 2010 (the "**BC Injunction Order**"). The BC Injunction Order was obtained by the Fraser Health Authority originally against Alice Jongerden ("**Jongerden**"), who was found to have sold and distributed raw milk for distribution for human consumption contrary to BC's *Public Health Act*, through an operation known as "Home on the Range" or "Our Cows". The BC Injunction Order prohibited Jongerden and anyone having notice of the Order from packaging and/or distributing raw milk and/or raw milk products for human consumption;
- (cc) Schmidt took over operation of the Home on the Range farm in 2010 and purported to sell raw milk as a "cosmetic." Schmidt was served with a copy of the BC Injunction Order and was advised by the Fraser Health Authority to cease and desist from the production and distribution of raw milk. When Schmidt refused to do so, the Fraser Health Authority sought an order finding Schmidt in contempt of the BC Injunction Order.
- (dd) On October 2, 2013 Justice Wong of the Supreme Court of British Columbia found Schmidt to be in contempt of the BC Injunction Order (the "**BC Contempt Order**"). Justice Wong found that Schmidt had a central role in taking over the operations of Our Cows and that the description of the raw milk being sold as a

cosmetic was merely a ruse. Schmidt was sentenced to a term of imprisonment of 3 months, suspended with a probationary period of 1 year;

- (ee) Schmidt appealed the BC Contempt Order and the appeal was dismissed with costs by the BC Court of Appeal on February 12, 2015;

*Current Operations*

- (ff) Schmidt no longer makes use of the Blue Bus previously utilized for the sale, offering for sale, delivery and distribution of the raw milk in the Region. Instead, Schmidt, Vander Hout and other currently unidentified people associated with the Farm currently make delivery of the raw milk in a white cube delivery van (the "Van") bearing licence AH92334 at the Church every Tuesday. The Van is leased by ARC;
- (gg) Schmidt's customers are all members or shareholders of ARC who believe that their status as members entitles them to a share of the raw milk produced on the Farm. Schmidt and Vander Hout have marketed membership in ARC as a "Farm Share" program;
- (hh) In order to become a member of (or shareholder in) ARC, customers were required to purchase 20 Class A Preference shares in ARC at a purchase price of \$2,000, to replace the "cow-share program";
- (ii) There are about 150 shareholders of ARC and individuals who was previously part of the cow-share program have bought into the farm share program;
- (jj) Even after the purchase of the 20 Class A Preference shares in ARC, shareholders are still required to pay \$3 to \$5.50 per litre for the unpasteurized milk that they purchase from ARC;

- (kk) ARC is structured as a for-profit, worker-owned cooperative corporation. Each worker-owner is required to purchase 50 Class B Preference Shares in ARC at a purchase price of \$5,000 and one Common Share valued at \$1. Only holders of Common Shares are afforded voting rights;
- (ll) There are 3 issued and outstanding common shares in ARC. As of September 2014, Vander Hout owned 1 of the issued and outstanding common shares in ARC;
- (mm) Vander Hout is also an employee of ARC;
- (nn) Membership in ARC does not convey ownership rights in the Farm. The farm share program does not exempt the Respondents' activities in respect of the sale, offering for sale, distribution and delivery of unpasteurized milk from the provisions of the HPPA;
- (oo) The delivery, distribution, sale and offering for sale of the unpasteurized milk and milk products by the Respondents continues on a weekly basis at the Church;

***Execution of Search Warrant by the Region on the Van***

- (pp) On September 29, 2015 Health Inspectors with the Region attended at the Church and attempted to conduct an inspection of the Van. They were prevented from doing so by Vander Hout, who was present in the Van;
- (qq) The Region then sought and obtained a warrant to search the Van pursuant to the HPPA, re-attended at the Church and seized milk products. During this lawful seizure, Vander Hout refused to allow Region staff to access the back of the van. Further, a number of the customers who were on site behaved in an obstructive manner towards Region staff;

- (rr) Those milk products that were seized were later tested and tests confirmed that the milk seized was unpasteurized. In media accounts, Schmidt has confirmed that the milk seized by the Region was raw milk. Testing of the seized milk products also revealed the presence of *staphylococcus aureus* bacteria and enterotoxin;

***Execution of Search Warrant by the Crown at the Farm***

- (ss) The Ministry of Natural Resources and Forestry ("MNRF") applied for and received a warrant (the "Crown Warrant") authorizing them to search the Farm and seize:

- Milk and milk products;
- Milking equipment;
- Packaging items for milk and milk products;
- Cleaning and sterilizing equipment;
- All business records and documents related to the production, sale, offering for sale, delivering or distribution of milk and milk products; and
- Computer equipment related to the production, sale, offering for sale, delivering or distribution of milk and milk products;

- (tt) The Crown Warrant was executed at the Farm on October 2, 2015 at approximately 10:30 a.m. and shortly thereafter a number of Schmidt's supporters arrived and blocked investigators from leaving the property with milk products and other items that they had seized. The driveway to the Farm was blocked with a tractor. Supporters surrounded a vehicle being used by investigators to transport items lawfully seized pursuant to the warrant;

- (uu) The stand-off was only resolved when investigators agreed to remove only items that had already been seized from the Farm and to remove no further property.

Investigators were able to seize milk, milk products, one computer and several USB drives from the Farm before Schmidt's supporters attended on scene;

(vv) The information from the Respondents' computers obtained by the Region from the Crown (obtained by warrant) confirms the following information regarding the Respondents' operation:

- Raw milk orders are made by clients online or via email;
- Purchases are paid for through a program called FARMMATCH, which is similar to PayPal;
- ARC had 149 shareholders at the time of the execution of the Crown Warrant; and
- There are 6 known delivery locations for the raw milk and milk products, at least one of which is within the geographic boundaries of York Region and therefore under the jurisdiction of the York Region Board of Health;

(ww) Email correspondence downloaded from the computer seized from the Farm pursuant to the Crown Warrant confirms that, despite the payment of \$2,000 for their shares, shareholders are still required to pay for all of their purchases from ARC, including milk and milk products. Shareholders have an account and are generally charged \$5.50 for a litre of "fresh milk." As well, shareholders are charged a delivery fee and are required to make a payment towards a "legal fund";

***Legal Test***

(xx) The sale, offering for sale, distribution and delivery of unpasteurized milk and milk products in the Region is a public nuisance and presents a public health hazard for the citizens of the Region of York;

(yy) The Respondents have demonstrated a pattern of disregard for the rule of law and have repeatedly flouted orders issued by the Region, other municipalities and by



the Courts such that resort by the Region to any administrative remedies available is not practicable;

- (zz) There is a serious issue to be tried;
- (aaa) The Region and its citizens are suffering and will suffer irreparable harm from the actions of the Respondents;
- (bbb) The balance of convenience favours granting the relief claimed;
- (ccc) The Applicant undertakes that it will abide by any order concerning damages that this Honourable Court may make if it is found that the granting of the order sought causes compensable damages to the Respondents;
- (ddd) Rule 40 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended;
- (eee) Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;
- (fff) Sections 18, 100 and 101 of the HPPA;
- (ggg) Sections 2, 8, 9 and 447.1 of the *Municipal Act, 2001*, S.O. 2001, c. 25;
- (hhh) Section 127 of the *Criminal Code*, R.S.C. 1985, c. C-46; and
- (iii) Such further and other grounds as counsel may advise and this Honourable Court permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the application:

- (a) Affidavit of Vito Chiefari, Manager, Health Protection, Community & Health Services for the Region, to be sworn;
- (b) Such further and other evidence as counsel may advise and this Honourable Court may permit

Date: January 14, 2016

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