

CITATION: Gavin Downing v. Agri-Cultural Renewal Co-operative Inc. O/A Glencolton Farms ("ARC") et al, 2018 ONSC 128
NEWMARKET COURT FILE NO.: CV-16-125371-00
DATE: 20180105

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
))
Gavin Downing, Director Appointed under)
the *Milk Act*, R.S.O. 1990, c. M.12) Sunil Mathai and Anathan Sinnadurai for the
Applicant) Applicant
))
- and -)
))
Agri-Cultural Renewal Co-operative Inc.) Elisa Vander Hout, self-represented and for
o/a Glencolton Farms, Elisa Vander Hout,) Glencolton Farms
Markus Christian Schmidt, Johannes)
Osthaus Nikolaus Alexander, John Doe(s),) Markus Christian Schmidt, self-represented
Jane Doe(s) and Persons Unknown) Johannes Osthaus Nikolaus Alexander, self-
) represented
Respondents)
))
Our Farm Our Food Cooperative Inc.) Lewis Taylor and Jared Taylor, for the
) Intervener
))
Intervener)

- AND -

NEWMARKET COURT FILE NO.: CV-16-125250-00

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
))
The Regional Municipality of York, Simcoe)
Muskoka District Health Unit, and the) Doug Smith and Alannah Fotheringham, for
Regional Municipality of Peel) the Applicants
))
Applicants)
))
- and -)
)

Michael Schmidt, Elisa Vander Hout,)	
Markus Christian Schmidt, Agri-Cultural)	
renewal Co-Operative Inc., Nikolaus)	Michael Schmidt, self-represented
Alexander Johannes Osthaus, John Doe,)	
Jane Doe and Persons Unknown and The)	Elisa Vander Hout, self-represented and for
Church of the Christian Community in)	Agri-Cultural Renewal Co-Operative Inc.
Canada)	
)	Nikolaus Alexander Johannes Osthaus, self-
Respondents)	represented
)	
)	Jonah Evans, for The Church of the Christian
)	Community in Canada
)	
)	Heard: May 29, 30, 31, June 5, and
)	December 21, 2017
)	

DECISION ON APPLICATIONS FOR A PERMANENT INJUNCTION

SUTHERLAND J.:

Overview

- [1] The applicants, in their respective applications, seek a permanent injunction against the respondents and all persons with knowledge of the injunctive order.
- [2] The applicant, Gavin Downing (“the Director”) seeks an order, pursuant to section 22 of the *Milk Act*¹ (“*Milk Act*”) restraining the operation of a plant located at 393887 and 393889 Lot 44 Concession 2 EGR, Glenelg Township, West Grey County, Ontario (“the Farm” and “Glencolton Farms”) without a licence and the respondent Agri-Cultural Renewal Co-Operative Inc. (“ARC”) and any related entity, and the individual respondents from operating a plant without a licence. The Director also seeks an order restraining the respondents and ARC’s employees and any other person involved in ARC’s operation from hindering or obstructing the inspection by a field person or officer appointed by the Director of ARC’s books, records and other documents as well as the Farm.
- [3] The applicants, The Regional Municipality of York (“York Region”), Simcoe Muskoka Health Unit (“SMHU”) and the Regional Municipality of Peel (“Peel Region”) (collectively, “the Municipalities”) seek, among other relief, a declaration that the respondents have contravened section 18 of the *Health Protection and Promotion Act*² (“*HPPA*”) by offering for sale, selling, delivering or distributing unpasteurized or unsterilized milk and unpasteurized or unsterilized milk products within the jurisdiction of The Regional Municipality of York and a permanent injunction restraining and enjoining the respondents and any and all persons having knowledge of the injunction from directly

¹ R.S.O.1990, c.M.12.

² R.S.O. 1990 c. H.7.

or indirectly, by any means whatsoever: offering for sale, selling or distributing, delivering or counselling others to offer for sale, sell, deliver or distribute unpasteurized or unsterilized or unpasteurized or unsterilized milk products with the jurisdiction of The Regional Municipality of York, permitting the use of their lands by others to offer for sale, sell or distribute, or deliver unpasteurized or unsterilized milk or unpasteurized or unsterilized milk products within the jurisdiction of The Regional Municipality of York. The Municipalities also request an order that the premises of the respondent The Church of the Christian Community in Canada ("the Church"), located at 901 Rutherford Road, Vaughan, Ontario, be closed to any use in anyway associated with or related to the offering for sale, selling, distribution or delivery of unpasteurized or unsterilized milk or milk products.

- [4] The respondents oppose the relief sought by the applicants. In support of their position the various respondents presented eighty-seven affidavits from various individuals in support of their opposition to the applications of the applicants. Since 1984, the respondent, Michael Schmidt has been involved with the issue of unpasteurized milk in the Province of Ontario. To fully appreciate the breadth of the issues in these applications and the position of the respondents, along with the numerous individuals in support of the respondents', a history of the *Milk Act* and the *HPPA*, of the respondents and particularly, Michael Schmidt along with this proceeding is necessary.

Background

- [5] Michael Schmidt ("Michael") is a dairy farmer who has a long history of advocating the legalization of the sale of raw milk, and was the originator of Glencolton Farms. The respondent Elisa Vander Hout ("Vander Hout") is the spouse of Michael.
- [6] The operations of Glencolton Farms, included the selling, distributing, and delivering unpasteurized/unsterilized milk or raw milk and unpasteurized/unsterilized milk products or raw milk products. The operations of Glencolton Farms were transferred in or about 2009 to ARC, an Ontario corporation incorporated under the *Co-operative Corporations Act*³ ("CCA").
- [7] The respondents Vander Hout, Markus Schmidt ("Markus") and Nikolaus Alexander Johannes Osthaus ("Osthaus") are Directors and Officers of ARC. Representations were made by the respondents that Osthaus has resigned his position as a director of ARC.
- [8] The respondents allege that while ARC owns the Farm, on which Glencolton Farm is situate, Our Farm Our Food Cooperative Inc. ("OFOF") currently owns the cows and all the dairy and other equipment involved in the production of unpasteurized milk or raw milk.
- [9] The respondents are currently distributing and delivering unpasteurized/unsterilized or raw milk to members of OFOF in York Region every Tuesday from the parking lot of property owned and operated by the Church, at 901 Rutherford Road in Vaughan, Ontario.

³ R.S.O. 1990, c. C.35.

- [10] The respondents are also distributing, and delivering unpasteurized/unsterilized or raw milk and unpasteurized/unsterilized products or raw milk products to members of OFOF at locations within Peel Region and within the jurisdiction of the SMHU.

Michael Schmidt and the Legal System

- [11] Michael originally operated a dairy farm within the milk quota system governing the distribution of milk within the Province of Ontario. In 1992, Michael cancelled his contract with the Milk Marketing Board and created a "lease-a-cow" system, whereby interested consumers of unpasteurized milk could ostensibly hold leasehold interests in the cows in an effort to comply with legislation prohibiting the production, sale and distribution of unpasteurized milk and milk products.
- [12] On February 17, 1994, an order was issued by the Grey Bruce Health Unit under section 13 of the *HPPA* directing Michael to cease the manufacturing, processing, and preparation etc. of raw milk and raw milk products on the grounds that such constituted a health hazard (the "Grey Bruce Order").
- [13] An appeal of the Grey Bruce Order was taken by Michael to the Health Protection Appeal Board ("HPAB"). For reasons given on September 1, 1994, the HPAB dismissed the appeal.
- [14] Michael was also charged by the Grey Bruce Health Unit with contravening section 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*. Michael 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.
- [15] In 1994, York Region Public Health issued an order under section 13 of the *HPPA* to Michael requiring him to cease selling and distributing raw milk in York Region (the "York Region Order").
- [16] After the lease-a-cow scheme proved ineffective, a "cow-share" scheme was developed whereby an interested consumer of raw milk could enter into a contractual agreement which created a fractional ownership interest in one of his cows.
- [17] Under the cow-share scheme, individual cow-share members paid \$300 in exchange for a one-quarter interest in one of the cows on the Farm. The raw milk was transported first to the parking lot of the Waldorf School and then, later on, to the Church where the milk was collected by the cow-share members upon payment. By the end of the cow-share programme, there were approximately 150 members.
- [18] Every member was fully aware that he or she was receiving raw milk and no one could receive milk from Glencolton Farms unless he or she was a cow-share member. In return for the cow-share fee and the payment by members for raw milk upon delivery, the service provided to the members included feeding, cleaning, housing the cows, and bottling, cooling and transporting the milk. The members had access to the cows' health records and milk test results. An independent dairy inspector inspected the operation annually.

- [19] In 2006, nineteen charges (the “2006 Provincial Charges”) were instituted by the Province of Ontario for contraventions of section 18 of the *HPPA* and section 15 of the *Milk Act*.
- [20] In 2006, York Region discovered that Michael and others were still delivering and distributing raw milk and other products from the Farm to its cow-share members in Thornhill in a recognizable blue bus (the “Blue Bus”).
- [21] On December 5, 2006, the second order issued by York Region’s Public Health Services Branch pursuant to section 13 of the *HPPA* (the “Second York Region Order”) was served whereby it was ordered to cease the offering for sale, sale, or distribution of unpasteurized milk and its products within the jurisdiction of York Region.
- [22] The terms of the Second York Region Order were not complied with and the distribution of unpasteurized milk within the jurisdiction of York Region continued. York Region applied to the Superior Court of Justice for an order pursuant to section 102 of the *HPPA*.
- [23] On May 17, 2007 Ferguson J. issued an order (the “2007 Court Order”) restraining from contravening the Second York Region Order and from offering for sale or distributing raw milk and raw milk products within the jurisdiction of York Region.
- [24] The 2007 Court Order was not complied with and York Region brought a motion in the Superior Court of Justice for contempt. The motion was heard by way of a trial of an issue by Boswell J. on September 10 to 12, 2008. On October 20, 2008, Boswell J. released Reasons for Decision in which he found Michael in contempt of the 2007 Court Order in that he continued to distribute unpasteurized milk in York Region (“the Ontario Contempt Order”).
- [25] By way of Reasons for Decision dated December 2, 2008, Boswell J. sentenced Michael to a fine of \$5,000 and awarded costs to York Region in the amount of \$50,000. The requisite Judgment was issued.
- [26] The 2006 Provincial Charges went to trial before Justice of the Peace Kowarsky in 2010. Michael 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. He also argued that the statutory provisions prohibiting the sale of unpasteurized milk were contrary to section 7 of the *Canadian Charter of Rights and Freedoms* (“the *Charter*”).
- [27] At trial, the Justice of the Peace accepted Michael’s argument that providing unpasteurized milk to individuals who had entered into cow-share agreements was not caught by the legislation and dismissed all the charges.
- [28] The Crown appealed the acquittals to the Ontario Court of Justice and the appeal was heard by Tetley J. on April 13, 2011. For Reasons released on September 28, 2011⁴, Tetley J. 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 unpasteurized or unsterilized milk to cow-share members violated both statutes. Tetley J. further concluded that there

⁴ *R. v. Schmidt*, 2011 ONCJ 482 (CanLII).

was no violation of the *Charter* by the statutory provisions in issue. Tetley J. entered convictions on 13 of the 2006 Provincial Charges and imposed fines totaling \$9,150, and one year of probation.

- [29] Michael appealed the convictions entered by Tetley J. in respect of the 2006 Provincial Charges to the Ontario Court of Appeal. The Ontario Court of Appeal dismissed the appeal with Reasons released on March 11, 2014. The Court of Appeal rejected the argument that the cow-share agreements amounted to an arrangement that took the 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 the member did not acquire the rights that ordinarily attach to ownership. The Court of Appeal further found that the cow-share programme was nothing more than a marketing and distribution scheme.
- [30] Leave to appeal the decision of the Ontario Court of Appeal in respect of the 2006 Provincial Charges to the Supreme Court of Canada was sought and leave was denied on August 14, 2014.
- [31] On October 2, 2013, Michael 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").
- [32] The BC Injunction Order was obtained on application 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 British Columbia'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.
- [33] Michael took over operation of the Home on the Range farm in 2010 and purported to sell raw milk as a "cosmetic". He was served with a copy of the BC Injunction Order and was ordered by the Fraser Health Authority to cease and desist from the production and distribution of raw milk. When he refused to do so, the Fraser Health Authority sought an order finding Michael in contempt of the BC Injunction Order.
- [34] On October 2, 2013 Wong J. of the Supreme Court of British Columbia found Michael in contempt of the BC Injunction Order (the "BC Contempt Order"). Wong J. found that Michael 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 a ruse. Michael was sentenced to a term of imprisonment of 3 months, suspended with a probationary period of one year.
- [35] Michael appealed the BC Contempt Order and the appeal was dismissed with costs by the BC Court of Appeal on February 12, 2015.

Farm Co-operative

- [36] In 2007, Vander Hout changed the name of a co-op that she controlled from “Circle Sun Farm Workers Co-op” to “ARC”, a worker-owned co-op. In 2010, title in the Farm property was transferred from Michael to his previous wife, Dorothea Schmidt and then from her to ARC.
- [37] Many of the cow-share members were offered an opportunity to purchase shares in ARC in order to become shareholders. Approximately 150 people purchased shares in ARC and generally, most of the shareholders were former cow-share members.
- [38] Generally, members paid \$2,000 for 20 Preference A (non-voting) shares in ARC. On top of that, members paid for any milk that they consumed at a price of \$3.00 to \$5.50 per litre.
- [39] People purchased shares in ARC in order to gain access to raw milk. ARC only allowed its shareholders to purchase the raw milk produced at Glencolton Farms.
- [40] ARC shareholders ordered raw milk and other products from Glencolton Farms by way of a website known as FarmMatch. Once the orders were placed, FarmMatch would calculate the cost of the order.
- [41] The raw milk produced at Glencolton Farms was distributed by a few different methods: some of the ARC shareholders picked up their milk directly from the Farm; Vander Hout delivered milk directly to an address in Brampton, an address in Cookstown and at times an address in Barrie. Deliveries were every Tuesday. Raw Milk and raw milk products were transported from the Farm to the Church in a Mercedes van leased by ARC, where it would be collected by ARC shareholders.

OFOF

- [42] OFOF was incorporated in January 2016. People who wanted to become members in OFOF were required to invest \$2,000 consisting of: the purchase of one membership share at a cost of \$100; the purchase of nine Class A Preference Shares at a cost of \$100 for a total of \$900; and, the provision to OFOF of a non-interest-bearing loan in the amount of \$1,000.
- [43] There are currently about 150 members of OFOF. Most of the current OFOF members were former ARC shareholders. A number of the ARC shareholders sold back their ARC shares in order to make the \$2,000 investment in OFOF.
- [44] Individuals purchased shares in OFOF in order to gain access to raw milk and raw milk products.
- [45] By way of a purchase and sale agreement dated March 1, 2016 (the “Purchase Agreement”) ARC sold to OFOF all of the cows and dairy equipment on the Farm. By way of a lease agreement dated March 1, 2016 (the “Lease Agreement”), OFOF leased from ARC certain areas of the Farm involved in the production of milk and milk products. By way of a

Management Agreement dated March 1, 2016 (the “Management Agreement”), OFOF purported to retain ARC to care for the cows and manage the dairy operations.

Search Warrant

[46] The Director obtained a search warrant and on October 2, 2015 attended at Glencolton Farms to execute on said search warrant. Member(s) of the Agricultural Investigators Unit (AIU) attempted to execute the search and were unable to do so. Obstruction of a peace officer, namely investigator Glenn Jarvie, charges were laid against Michael and other individuals who were present at the Glencolton Farms. These charges against Michael went to trial. On October 19, 2017, R.A. Minard J. convicted Michael of the obstruction of a peace officer charge. Michael has appealed his conviction and sentence to the Ontario Court of Appeal.

Issues

[47] The questions for this court to answer are:

- (a) Are the actions of the respondents, or anyone of them, in violation of the *Milk Act*?
- (b) Are the actions of the respondents, or anyone of them, in violation of the *HPPA*?
- (c) Does the “family farm” exemption” apply?
- (d) If the actions of the respondents, or anyone of them, are in violation of the *Milk Act* and/or *HPPA* and the “family farm” exemption does not apply, should a permanent injunction be granted?

[48] For the reasons below, this court answers the four questions as follows:

- (a) In the affirmative that the respondents are in violation of the *Milk Act*.
- (b) In the affirmative that the respondents are in violation of the *HPPA*.
- (c) In the negative that the “family farm exemption” applies.
- (d) In the affirmative that an injunction should be granted.

A. Are The Actions Of The Respondents, Or Anyone Of Them, In Violation Of The Milk Act?

i. The Milk Act

[49] The *Milk Act* is remedial and regulatory legislation.⁵

[50] The *Milk Act* was originally introduced in 1965. It flowed from “the Royal Commission Inquiry into the Milk Industry” (known as the Hennessey Commission). In the 1960’s the marketing system for milk operated under the *Milk Industry Act* was in disarray. There was

⁵ *R. v. Schmidt*, 2014 ONCA 188 (CA) (CanLII).

dissatisfaction among producers due to disparities of returns. The Ontario government appointed the Royal Commission. Based on the findings from the Hennessey Commission, the *Milk Act* was introduced in 1965. The primary purpose of the *Milk Act*, at the time, was to develop the Milk Commission of Ontario and the Ontario Milk Marketing Board which established a comprehensive marketing plan in Ontario with the power to set prices, establish quota, establish pools and buy and sell raw milk.⁶ In developing this comprehensive marketing plan, the regulation of the quality of raw milk produced and its viability for human consumption formed part of the regulatory plan but did not seem to be the impetus for the need of the comprehensive plan.

[51] The present day *Milk Act* sets out its purposes in section 2. Section 2 reads:

2. The purpose and intent of this Act is,

(a) to stimulate, increase and improve the producing of milk within Ontario;

(b) to provide for the control and regulation in any or all respects of the producing or marketing within Ontario of milk, cream or cheese, or any combination thereof, including the prohibition of such producing or marketing in whole or in part; and

(c) to provide for the control and regulation in any or all respects of the quality of milk, milk products and fluid milk products within Ontario.

[52] Sections 2.1 to 2.11 set out the Minister of Agriculture, Food and Rural Affairs (the "Minister") authority to administer and enforce the provisions of the *Milk Act* as well as the Minister's authority to enact regulations concerning the quality of the milk, and the administration and enforcement of the Act.

[53] Section 22 of the *Milk Act* states:

22. Where it is made to appear from the material filed or evidence adduced that any offence against this Act or the regulations or any plan, order, direction, agreement, award or renegotiated agreement or award made under this Act has been or is being committed, the Superior Court of Justice may, upon the application of the Commission, the Director or a marketing board, enjoin any transporter, processor, operator of a plant, absolutely or for such period as seems just, and any injunction cancels the licence of the transporter, processor, distributor or operator of a plant named in the order for the same period.

⁶ Ontario Ministry of Agriculture, Food and Rural Affairs, OFOF's Responding Book Vol 3.

[54] From the evidence filed on this motion, does it appear that any offence against the *Milk Act* or its regulations has been or is being committed by the actions of the respondents, or anyone of them?

ii. Positions of the Parties

The Director

[55] The Director submits that the respondents have committed and continue to commit offences against the *Milk Act* and its regulations. The Director argues that the respondents are transporters, processors, distributors and operators of a plant as defined in section 1 of the *Milk Act*. The evidence clearly shows, the Director argues, that the respondents and the intervener, OFOF, are operating a plant which milk and milk products are processed. The respondents and OFOF are processing and manufacturing raw milk and raw milk products at Glencolton Farms. The evidence on this motion supports this assertion, the Director contends, by indicating that on the Farm there is various equipment used in the "processing" of milk and milk products, which include:

- (a) A kettle/vat to heat the milk in order to manufacture raw milk products, such as cheese.
- (b) A bulk tank to store milk and empty bottles lined up adjacent to the bulk tank, in the processing area, to bottle the milk.
- (c) A butter churn in the processing area used to make butter.
- (d) A cream separator in the processing area used to separate cream from milk, a step in both the butter and cream-making process.
- (e) The presence of starter cultures, a kettle for heating and cooling, cheese forms actively draining whey and wheels of cheese ageing within heated incubators which all indicate the making of cheese from the raw milk.

[56] Further, the evidence also shows that the respondents are transporting and delivering raw milk and raw milk products to individuals off the Farm by driving a Mercedes van to designated areas in York Region, Peel Region and Simcoe County. The raw milk and raw milk products are delivered to individuals, who seem to be shareholders of ARC or their family members in ARC, and money passes hands from these people to the respondents to receive raw milk and raw milk products processed on Glencolton Farms by the respondents and OFOF.

[57] The respondents and OFOF do not have a licence issued by the Director to operate a plant to process, milk and milk products in Ontario. Thus, the Director argues the respondents and OFOF have committed and are committing an offence contrary to the *Milk Act*, namely section 15(1) which prohibits the operation of a plant without a licence.

The Respondents and OFOF

- [58] The respondents and OFOF do not deny that there is processing of raw milk on Glencolton Farms. The respondents and OFOF do not deny that there are raw milk products being manufactured on Glencolton Farms. The respondents and OFOF do not deny that raw milk and raw milk products are being delivered to shareholders of OFOF and their respective family members. The respondents and OFOF contend that the operation on Glencolton Farms is not an activity that is subject to the provisions and regulations of the *Milk Act*.
- [59] The respondents and OFOF point out that Glencolton Farms is owned and operated by ARC since 2008. ARC in March 2016 sold all of its dairy cattle, and milk-related equipment to OFOF. Through a management contract between OFOF and ARC, ARC manages the property of OFOF, namely the cattle, the milk produced and milk-related equipment. ARC still is the registered owner of Glencolton Farms but leases space at the Farm to OFOF to have the cattle and milk-related equipment reside on the farm.
- [60] The shareholders of ARC were invited to become shareholders of OFOF. By being shareholders in OFOF, the shareholders were the owners of the cows, the milk produced and the milk-related equipment. The milk and milk products were then managed and processed on behalf of the OFOF shareholders through the Management Agreement between OFOF and ARC. Thus, the ownership and equity interest is that of the shareholders of OFOF. It is the shareholders' of OFOF cows and milk produced. It is the same shareholders' milk products. The shareholders are the only ones who receive the milk and milk products. The milk and milk products are transported to them by the company they own, OFOF. Accordingly, given that the shareholders of OFOF are the recipients of the raw milk and raw milk products, there is no sale of the raw milk or raw milk products to third parties and there is no processing to anyone but the owners/shareholders. There is no plant on Glencolton Farms as defined in the *Milk Act*. There is no offence committed. This is akin to the "family farm exemption", which I will discuss later.
- [61] OFOF argues, similar to the respondents, that there is no provision in the *Milk Act* that prevents private owners of dairy milk to collect that milk for their own purposes to consume. The shareholders of OFOF paid money to become shareholders. OFOF pays ARC to manage the cows, obtain the raw milk and provide it to the shareholders of OFOF. OFOF has paid ARC in excess of \$283,000. The process of becoming a shareholder in OFOF is restricted. One must apply and be accepted by the OFOF Board of Directors ("the Board") after the Board vets the application. One cannot obtain raw milk or raw milk products from OFOF unless one is a shareholder or family member of the shareholder.
- [62] ARC and OFOF conducted the sales transaction of the cattle and milk-related equipment after and in response to the decision of Tetley J.⁷ and the Ontario Court of Appeal⁸ in *R. v. Schmidt*.

⁷ [2001] O.J. No. 4272.

⁸ *Supra*, footnote 5.

[63] To understand the sales transactions, Management Agreement and Lease Agreement between the ARC and OFOF, a discussion of the two decisions is necessary.

iii. R. v. Schmidt

The Decision of Tetley J.

[64] Tetley J. heard an appeal from the decision of Justice of the Peace P. Kowarsky dated January 21, 2010.⁹ Justice of the Peace Kowalski acquitted Michael of the charges under the *HPPA* and *Milk Act*. Tetley J. allowed the appeal and entered a conviction and sentence.

[65] In a well-reasoned and written decision, Tetley J. described the “farm family exemption” as follows:

[2] Surprisingly, given the Appellant’s position as to the pervasive risks to public health arising from human consumption of raw milk, it is not against the law to consume unpasteurized milk in Ontario. That lawful entitlement is subject, however, to significant legal restriction that appears to be designed to control or restrict consumption of raw milk to those who actually produce the milk. Although personal consumption has effectively been legislatively limited to the dairy farmer and members of his or her immediate family. Those individuals comprise the so called “farm family exemption”.

[66] Tetley J. continues and states:

[5] Presumably, if a resident enjoys ownership of the means of production, a cow, that individual, together with members of their family, can consume raw milk with impunity. This issue was considered in an earlier proceeding involving a 1994 regulatory review of a Public Inspector’s Order directing that the Respondent cease and desist from selling unpasteurized milk and milk products. In that review, the Health Protection Appeal Board, a specialized tribunal with jurisdiction to review the decisions of *H.P.P.A.* inspectors, defined the parameters of the legal entitlement to consume unpasteurized milk as follows:

The *H.P.P.A.* does not state clearly that members of “farm families” may consume unpasteurized milk and milk products; rather the exception which allows them to do so is implicit. Section 18 of the *Act* does not prohibit the consumption of unpasteurized milk or milk products in a private residence. Similarly, the definition of “food premise” contained in section (1) (1) of the *Act*, and further refined in section 2(1)

⁹ 2010 ONCJ 9 (CanLII).

of Regulation 562, R.R.O. 1990, excludes a private residence. The effect of the definition is to preclude the application of section 42.52 of Regulation 562, which sets out private residence of a "family farm" differs from a private residence of anyone else *vis-à-vis* consumption of unpasteurized milk and milk products, is that the members of "farm families" have access through a means not prohibited by section 18 of the *Act*. (Health Services Appeal and Review Board-Reasons for Decision- September 1, 1994 p.11)

- [67] Tetley J. described the "cow-share" programme where private individuals contractually own fractions of cows and the milk produced by that cow for consumption as Michael is paid a capital cost as the herdsman and receives additional compensation for the costs of production and labour. Tetley J. concluded that the "cow-share" programme does violate the *Milk Act* and *HPPA*, allowed the appeal and sentenced Michael.
- [68] Michael appealed to the Ontario Court of Appeal. The Appeal Court dismissed the appeal and found that the cow-share programme does not take the activities outside "the reach of the *HPPA* and the *Milk Act*."¹⁰ The Court went on and stated:

[25] ...The oral cow-share agreement does not transfer an ownership interest in a particular cow or in the herd as a whole. The member does not acquire or exercise the rights that ordinarily attach ownership. The member is not involved in the acquisition, disposition or care of any cow or of the herd. The cow-share member acquires a right of access to the milk produced by the appellant's dairy farm, a right that is not derived from an ownership interest in any cow or cows.....This court has resisted schemes that purport to create "private" enclaves immune to the reach of public health legislation and has insisted that public health legislation not be crippled by a narrow interpretation that would defeat its objective of protecting from risks to health: (citation omitted)¹¹

- [69] At paragraph 27, the Court of Appeal further states:

[27] For similar reasons, I cannot accept the appellant's submission that the *Milk Act* licence requirement does not apply to the appellant's operation. The *Milk Act* makes no exception for "private" operations. Even if it did, the appellant operates a plant from which any members of the public can procure unpasteurized milk.

¹⁰ *Supra*, footnote 5, para. 25.

¹¹ *Ibid*, para 25.

[70] The question then is whether the present shareholdings in *OFOF* fall outside the gambit of the *Milk Act*.

iv. Analysis

[71] Section 1 of the *Milk Act* defines the following:

“milk” means milk from cows or goats.

“plant” means a cream transfer station, a milk transfer station or premises in which milk or cream or milk products are processed.

“processing” means heating, pasteurizing, evaporating, drying, churning, freezing, packaging, separating into component parts, 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.

[72] From the evidence filed on this application, it does appear to this court that the actions of the respondents and *OFOF* contravene sections 14(1) and 15(1) of the *Milk Act*. The respondents and *OFOF* have constructed a building intended for use as a plant without a permit and are operating that plant without a licence from the Director.

[73] The evidence, which is not contradicted by the respondents or *OFOF*, is that there is equipment in a building on Glencolton Farms used for the heating, churning, packing and separating into component parts cow’s milk and products of cow’s milk. There is also no dispute that raw milk products, cheese and other similar products, are manufactured at Glencolton Farms.

[74] The respondents and *OFOF* contend that the operation is not a commercial operation and thus, does not contravene the *Milk Act*. I do not accept this submission. Whether the operation is for commercial purposes that is the making of a profit, is not material. It is the processing of cows’ or goats’ milk where milk or milk products are manufactured that is material. The evidence provided does clearly show that milk and milk products are being processed to be delivered to the shareholders of *OFOF* and their respective families.

[75] It therefore seems apparent to this court that the respondents and *OFOF* are processing milk and milk products in a building without the necessary approvals and licence from the Director to do so. This, *prima facie*, are actions that are offences that are committed against the *Milk Act*.

[76] Accordingly, I find that the actions of the respondents and *OFOF* are in contravention of the *Milk Act*, namely sections 14(1) and 15 (1), subject to the “family farm exemption” applying.

B. Are The Actions Of The Respondents, Or Anyone Of Them, In Violation Of The HPPA?

[77] The *HPPA* is remedial legislation that mandates that milk and milk products sold or distributed must be pasteurized or sterilized.

[78] The purpose of the *HPPA* is described in section 2 as:

Purpose

2 The purpose of this Act is 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 people of Ontario

[79] Section 18 of the *HPPA* states:

Unpasteurized or unsterilized milk

18. (1) No person shall sell, offer for sale, deliver or distribute milk or cream that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards licensed under the *Milk Act*.

Milk products

(2) No person shall sell, offer for sale, deliver or distribute a milk produce processed or derived from milk that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*.

[80] Under the *HPPA* milk is defined in section 1(1) as “milk from cows, goats or sheep”.

[81] The *HPPA* clearly prevents the selling, offer for sale, delivery or distribution of raw or unpasteurized milk or their products.

[82] The respondents do not dispute that the evidence on this application shows that they were and are delivering or distributing unpasteurized milk and their products to the shareholders of OFOF. The respondents dispute that they are selling raw milk and their products. The Ontario Court of Appeal in *R. v. Schmidt*¹², at paras. 22, 23 and 24, found that the operation of the cow-share programme clearly falls within the ordinary meaning of “distribute” and “sale”, even though “distribute” and “sale” are not defined in the *HPPA*. On the evidence provided, it seems abundantly evident that the respondents and OFOF are, at a minimum, distributing raw milk and their products to shareholders of OFOF, within the ordinary meaning of “distribute”.

¹² *Supra*, footnote 5.

[83] The respondents contend that the shareholders have the right to consume raw milk if they wish for their health benefits and/or based on their cultural or religious beliefs and that the shareholders of OFOF fall within the “family farm exemption”.

i. Health Benefits and Religious Beliefs

[84] The respondents have provided this court with much evidence on the health benefits of raw milk, how other jurisdictions deal with the distribution and sale of raw milk, and eighty-seven affidavits from various shareholders of OFOF. Seventy-five affiants state that they need to consume raw milk for health reasons. Twelve affiants state that they consume raw milk for cultural reasons and one affiant deposes that he consumes raw milk for religious reasons.¹³

[85] The evidence provided by the respondents indicate:

- (a) 1.84% of the Ontario population, nearly 258,000 people, access raw milk. The vast majority obtain their raw milk from alternate sources.
- (b) 88.9% of approximately 4,000 dairy farmers in Ontario consume raw milk.
- (c) OFOF membership is 143 people plus their families.
- (d) Canada is the only G8 country which prohibits the distribution and sale of raw milk.
- (e) 42 States in the United States of America have legalized the sale and/or distribution through legislation. Since 1994, the year prosecution actions against Michael began, sixteen States in the United State of America have legalized the sale and/or distribution of raw milk or increased access to raw milk to the general public.
- (f) The affiants that choose to consume raw milk are aware of the health issues arising from the consumption of unpasteurized milk and choose to do so on their own accord. If this court grants the injunction requested by the Director and the Municipalities, the affiants will still obtain raw milk for consumption by other means.
- (g) Affiants have deposed that the drinking of raw milk is done for health reasons, including arthritis¹⁴ and inflammation, gastrointestinal issues¹⁵, children’s health issues,¹⁶ calcium and bone issues,¹⁷ and Lupus.¹⁸

¹³ The affidavits illustrate the demand by various people from various backgrounds to consume raw milk and their products. Seventy-five affidavits are found in the Responding Application of the Intervenor, OFOF, volumes I, II and III, and eighty-six affidavits in the Responding Application Record of Michael Schmidt, volumes I and III.

¹⁴ OFOF Responding Application: Affidavit of Judy Corras (Tab 14).

¹⁵ OFOF Responding Application: Affidavits of Stephen Corras (Tab 8), Richard Chomko (Tab 17), Edward Tait (Tab 19), Rasha Coleman (Tab 52), James L. Affleck (Tab 69).

¹⁶ OFOF Responding Application: Alireza Khani (Tab 25).

¹⁷ OFOF Responding Application: Anna Dekleva (Tab 12) and Andrea Lemieux (Tab 18).

¹⁸ OFOF Responding Application: Latoya Nongauza (Tab 67).

- (h) Affiants have deposed that the drinking of raw milk is required for religious and cultural reasons.¹⁹
- (i) There is various scientific research on the health risks and benefits on the consumption of raw milk.²⁰ In paragraphs 89, 90 and 91 of the Affidavit of Nadine Ijaz, Ms. Ijaz concludes that with regulatory control on the sale and distribution of raw milk, the risk of disease from “key foodborne hazards” can be reduced to “low” or “negligible”. Complete prohibition of the sale and distribution of raw milk does not minimize the potential risk to those who seek out raw milk and its products for consumption.
- [86] There is no question that there is a demand in the Province of Ontario to consume unpasteurized/raw milk and their products. Consumers have a varied set of reasons to consume raw milk and their products, as illustrated by the eight-one affidavits. The choice to do so seems to this court to be for their own personal reasons: cultural, health or religious.
- [87] The respondents and OFOF have submitted to this court that the ability of Ontarians to purchase and consume raw milk and their products can and should be regulated similar to the sale and regulation of cigarettes, alcohol and soon marihuana. There is a demand for the product. Ontarians want to have the product for their own choice and reasons. Other countries have regulated the sale and distribution of raw milk and their products, why cannot Ontario?
- [88] There is a logical and common sense appeal to the submissions of the respondents and OFOF. I agree with Tetley J. that there is an inherent illogical reasoning on part of the Attorney General of Ontario that the prohibition of the sale and distribution of raw milk and their products are for health reasons but the consumption of raw milk per se is not illegal. In addition, the respondents contend that the sale of cigarettes and alcohol are legal and permitted and each of these products can have potential negative health consequences.
- [89] Though this court has sympathy with the position of the respondents and OFOF, the authority of this court is limited. As the Ontario Court of Appeal stated in *R. v. Schmidt*²¹:
- ... However, provided that the legislature has acted within the limits imposed by the constitution, the legislature’s decision to ban the sale and distribution of unpasteurized milk to protect and promote the public health in Ontario is one that must be respected by this court.
- [90] The question of whether either or both statutes violate one or more Ontarians of a constitutionally protected right or freedom is not before this court.

¹⁹ OFOF Responding Application: Eric Bryant (Tab 22), Zaguir Hassen (Tab 55).

²⁰ The Affidavit of Nadine Ijaz (OFOF Responding Application Tab 75) and Volumes I and II of the Book of Health Authorities from the Affidavit of Nadine Ijaz.

²¹ *Supra*, footnote 4, para 21.

- [91] Accordingly, I am satisfied that the preponderance of evidence provided on this application shows that the respondents and OFOF are delivering and distributing unpasteurized/unsterilized or raw milk and their products in the Province of Ontario.
- [92] I therefore come to the conclusion that the respondents are in breach of sections 18(1) and 18(2) of the *HPPA*, subject to qualifying under the “family farm exemption”.

C. Does The “Family Farm Exemption” Apply?

- [93] The respondents and OFOF eloquently argue that notwithstanding the processing of milk and milk products on Glencolton Farms, the owning of shares, the transfer of ownership of the cows and equipment to OFOF, the consideration paid and selective process of becoming a shareholder takes the actions on Glencolton Farms outside of the *Milk Act* and the *HPPA*. In effect, the close knit organization of ownership of the cows and related equipment is akin to a family farm and thus, the “family farm exemption” applies.
- [94] At first blush, this argument seems reasonable and seems to adhere to the statements of Tetley J. and the Ontario Court of Appeal. There is a transfer of ownership. The shareholders through the Board and shareholders meetings have an element of control over the cows and process. There is a Management Agreement between OFOF and ARC on the caring and maintenance of the herd. One has to apply to be a shareholder in OFOF. The applications are screened and approval is required by the Board. Membership is restricted and thus, is not open to the public as a whole, as with a membership in a “big-box” store. Membership entitles one to shares which translates into ownership of the assets of the company, OFOF. Actual money exchanged hands for the purchase of the cows and milk-related equipment from OFOF to ARC. One of the shareholders, Van Holt does reside on Glencolton Farms.
- [95] The “family farm exemption” is not defined by legislation. As Tetley J. quoted in his Reasons, there does seem to be a difference between “farm families” and private residences in that “farm families” have an “access through a means not prohibited.”²²
- [96] In taking a common sense approach to the meaning of “family farm”, I do not accept the submission of the respondents and OFOF that the shareholders in this case fall within the “family farm exemption”. Family is defined in the Oxford dictionary as: “a group of people related by blood, marriage or adoption”²³. There is no application process to be a family member. One does not complete a form which is then approved by others. A family is a group of people related by blood, adoption or by marriage to someone who is related by blood or adoption. The owning of shareholdings in a company is not in itself a family.
- [97] Having said this, I can envisage a family owned company, where family are the sole shareholders that own the farm operation, and family member(s) reside on the farm may fall within the “family farm exemption”. But that is not the facts in this case. The shareholders of OFOF are not related by blood, marriage or adoption. The shareholders are strangers that have a common interest, being the consumption of raw milk and its

²² *Supra*, footnote 4, para. 5.

²³ Oxford Canadian Dictionary of Current English, Oxford University Press, 2005 first published.

products. That interest does not, on its own, I find, qualify as a family to fall within the gambit of the “family farm exemption”.

- [98] Historically, the family farm was that, a farm inhabited and operated, sometimes over generations, by famers related to each other by either blood, marriage or adoption. The product and operation of the farm may have changed over the years but the farm stayed inhabited and operated by family members, either by blood, marriage or adoption. To me, the meaning and intention of the “family farm exemption” is that of farmers and their family members who consume unpasteurized or unsterilized milk, among themselves, which is produced from cows residing on the farm property that are owned or leased by the family farm, be it an incorporated entity or not.²⁴
- [99] In addition, this court must be cognizant of the instructions from the Ontario Court of Appeal to not permit “schemes that purport to create “private” enclaves immune to the reach of public health legislation.”²⁵
- [100] The *Milk Act* and the *HPPA* both have components of public health. The control and regulation of milk, pasteurized milk, and their products within Ontario for the public health. As a public welfare legislation, a broad and purposeful statutory interpretation is mandated that facilitates the intention and purpose of the legislation.²⁶
- [101] Given this public health concern, to broaden that definition of “family farm” as suggested by the respondents and OFOF to include a corporation, as discussed above, would eviscerate the public health aspect of both the *Milk Act* and *HPPA*. Such a broadening would permit people to incorporate a company, transfer cows and equipment, open up shareholdings that would permit people to consume milk, without being subject to the provisions of the *Milk Act* or the *HPPA*. Such a situation does not adhere to the purpose and intention of either statutes.
- [102] As already stated, the right of individuals to produce and consume milk and milk products outside of the regime outlined in the *Milk Act* and the *HPPA* is not for this court to determine. This is an issue for the policy decision makers, the Ontario legislature, to determine, weighing the benefits to the public good, which includes those who wish to consume raw milk and raw milk products distributed by likeminded individuals such as the respondents.
- [103] Therefore, I do not find that OFOF, the shareholders of OFOF, or the actions of the respondents fall within the “family farm exemption”.

²⁴ Ontario *Land Transfer Act*, RSO 1990 c. L.6 and Regulation 697, RRO 1990 contains an extensive definition of family that defines the membership of a family with a list of blood relations, adoptive members and members by marriage along with definition of family business corporation.

²⁵ Supra, footnote 11.

²⁶ Supra, footnote 5, paras. 22, 23 and 24.

D. Should A Permanent Injunction Be Granted?

[104] Section 22 of the *Milk Act* provides this court with the authority to grant an injunction if the court is satisfied “from the material filed or evidenced adduced” that an offence against the Act has been or is being committed.

[105] Section 102(2) of the *HPPA* reads:

(2) Where any provision of this Act or the regulations is contravened, despite any other remedy or any penalty imposed, the Minister or the Chief Medical Officer of Health may apply to a judge of the Superior Court of Justice for an order,

(a) prohibiting the continuation or repetition of the contravention or the carrying on of any activity specified in the order that, in the opinion of the judge, will or will likely result in the continuation or repetition of the contravention by the person committing the contravention; and

(b) requiring the person committing the contravention to take any action that is, in the opinion of the judge, necessary or advisable for the purpose of reducing the likelihood of a continuation or repetition of the contravention. 2007, c. 10, Sched. F, s. 21.

[106] Section 101 of the *Courts of Justice Act*²⁷ (“*CJA*”) provides the court with the authority to grant an interlocutory injunction or mandatory order “where it appears to a judge of the court to be just or convenient to do so” on “such terms as are considered just”.

[107] The Director and the Municipalities are seeking a permanent injunction based on their respective statutes and pursuant to section 101 of the *CJA*.

i. Statutory Injunctions

Legal Principles

[108] The granting of a statutory injunction is a different analysis than the granting of an equitable injunction under the common law.²⁸ The test as described in *RJR-MacDonald Inc. v. Canada (Attorney General)*²⁹ which was repeated and confirmed by the Supreme Court of Canada in *Google Inc. v. Equustek Solutions Inc. et al*³⁰ is not applicable.

[109] Carole J. Brown J. in *The Law Society of Upper Canada v. Coulson*³¹ put it this way:

²⁷ RSO 1990, c. C.43.

²⁸ *Law Society of Upper Canada v. Coulson*, 2013 ONC 2448 (SCJ), para 6.

²⁹ [1994] 1 S.C.R. 311.

³⁰ 2017 SCC 34 (CanLII).

³¹ *Supra*, footnote 28.

[6] The applicable test in determining whether a statutory injunction should issue is different from the test applicable to common law injunctions set forth in *RJR-MacDonald V. Canada (Attorney General)*, [1995] 3 S.C.C. 199. The applicable test is set forth at *R. v. IPSCO Recycling Inc.*, [2003] F.C.J. No. 1950 at paragraph 51. Among the applicable legal principles in determining whether to grant a statutory injunction, the Court observed in *R. v. IPSCO, supra*, that “the Court retains a discretion as to whether to grant conjunctive relief. Hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed.”³²

- [110] The requirement of irreparable harm and balance of convenience as described in *RJR-MacDonald* is not applicable. Having said this, it does not translate that the court has no discretion on whether to grant the injunction requested. The court does maintain a residual discretion as to whether to grant the injunction even if there is a clear breach of the statute.³³
- [111] The residual discretion that the court maintains is limited. The court will only refuse an application for a statutory injunction from a municipality in “exceptional circumstances”.³⁴
- [112] The applicant need only to establish that there is a breach of the applicable statute. There is no obligation on the municipality to provide “compelling evidence.”³⁵
- [113] Once a breach of the statute has been established by the evidence provided, the court can only exercise its discretion to not grant the injunction in “exceptional circumstances” which could include: the offending party has ceased the activity; the injunction is moot and would serve no purpose; the offending party has provided clear and unequivocal evidence that the unlawful conduct will cease; where there is a right that pre-existed the enactment that was breached; there is uncertainty that the offending party is flouting the law or where the conduct is not what the enactment was intended to prevent.³⁶

Analysis

- [114] I have found that the respondent is in breach of sections 14(1) and 15(1) of the *Milk Act* and section 18 of the *HPPA*. The question to be answered is whether there exists “exceptional circumstances” in that the court should exercise its discretion to not grant the statutory injunction requested by the Director and the Municipalities.
- [115] The voluminous material provided by the respondents and the OFOF indicate that there is a high demand for the consumption of raw milk and raw milk products. The demand is

³² *Ibid*, para. 6.

³³ *Peachland (District) v. Peachland Self Storage Ltd.*, 2011 BCCA 466 (CA), paras 27 and 28.

³⁴ *Newcastle Recycling Ltd. et al v. Clarington (Municipality) et al*, 2005 ONCA 46384 (CA) (CanLII), para 32.

³⁵ *Ibid*, paras. 31 and 32.

³⁶ *Vancouver (City) v. Claude Maurice*, 2002 BCSC 1421 (BCSC); *Vancouver (City) v. O’Flynn-Magee*, [2011] B.C.J. No. 2305 (BCSC); *British Columbia (Minister of Environment, Lands and Parks) v. Alpha Manufacturing Inc.*, [1997] B.C.J. No. 1989 (BCCA); Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2016) at 3.265.

based on cultural, health, life choices and religious reasons. All these reasons are laudable and legitimate.

- [116] The question however is whether any of these reasons fall within the meaning of “exceptional circumstances”. I find they do not.
- [117] There was no evidence provided that indicate that the respondents and OFOF will cease the delivery of raw milk and raw milk products. There was no evidence provided that indicate the issue on these applications are moot. On the contrary, the evidence clearly indicates that it is the intention and motivation of the respondents and the intervener to continue to produce raw milk, manufacture raw milk products and distribute the raw milk and raw milk products to the shareholders of OFOF. All these indicators leave the court with the inescapable conclusion that “exceptional circumstances” do not exist. The respondents and the intervener appreciate that they are producing and manufacturing raw milk and raw milk products. They are fully aware that doing so is in violation of the *Milk Act* and the *HPPA*. It is for the reason to attempt to comply with the two statutes that the farm co-operative was created and implemented.
- [118] Notwithstanding, the demand for raw milk and its products, the actions of the respondents and OFOF to distribute to non-family members raw milk and its products outside the confines of the family farm violates the *Milk Act* and the *HPPA*. Thus, the conclusion is evident. The actions of the respondents and OFOF are in contravention and are in repeated breach of the two statutes, the *Milk Act* and the *HPPA*. A permanent injunctive order, as requested by the Director and the Municipalities, is warranted.

ii. Injunction under the CJA

- [119] Given my conclusion that a permanent injunctive order is warranted under the provisions of the *Milk Act* and the *HPPA*, I need not determine if a similar order is justified under section 101 of the *CJA*. Hence, I make no finding on whether such an order can or should be granted under the *CJA*.

iii. Terms of the Injunctive Order

- [120] The Director and the Municipalities each request a permanent injunctive order but differ of the breadth of such an order. The Director simply requests an order restraining the respondents and all persons with knowledge of this order from operating a plant without a licence under the *Milk Act* along with an order restraining the respondents, ARC’s employees and all other persons from hindering or obstructing the inspection, by a field person or officer appointed by the Director under the *Milk Act*.
- [121] The Municipalities are requesting a far more expansive order. The Municipalities request a declaration that the respondents have contravened section 18 of the *HPPA* but also an order restraining the respondents and any and all persons having knowledge of the order from directly and indirectly, by any means whatsoever from a variety of activities including offering for sale, selling or distributing or counselling others to offer for sale, sell, deliver or distribute unpasteurized milk and their products, permitting use of their land to do so, threatening or intimidating the Municipalities’ employees and physically interfering with

or counselling others to physically interfere with the performance of the Municipalities' employees. The Municipalities support their request on the actions of some of the respondents, and specifically the conduct of interfering with the search warrant on October 2, 2015 and the subsequent convictions of obstruction of a peace officer.

- [122] In addition, the Municipalities request an order that the premises of the Church be closed to any use in any way associated with the sale, offer to sale, distribution or delivery of raw milk or their products and authorizing the arrest by any police officer.
- [123] The granting of a permanent injunction is an exceptional remedy that should be granted in rare and limited circumstances. A court should not grant such an order unless the court is prepared if necessary to commit a violator of the order into prison.³⁷ As Robert J. Sharpe stated in his book:

...Like other injunctions, a statutory order should not be overly broad. It should be framed so as to clearly indicate what conduct is prohibited or commanded and should not just reproduce the general language of the statute. If the language of the statute is narrow, an injunction should correspond to and reflect the prohibitions contemplated in the statute and should not go beyond them.³⁸

- [124] In keeping these instructions in mind, I find the request by the Municipalities overly broad and do not confine themselves to the language of the statute.
- [125] I am also mindful of the submissions and beliefs of the respondents that they have and continue to be targeted by the Director and the Municipalities. It is their belief that they are being persecuted for their desire to consume unpasteurized milk and their products. The submission of Mark was duly compelling for this belief.
- [126] Though I can appreciate perspective of the respondents and that of Mark, until the law is found to be unconstitutional or is changed, the present law is the law and must be complied with or one risks prosecution and court action. This includes compliance with the investigative powers provided under the *Milk Act* and *HPPA*.
- [127] Having said this, the order that I intend to draft will be narrower in focus than that requested by the Municipalities and will specifically deal with the applicable provisions of the *Milk Act* and the *HPPA*, keeping in mind the "family farm exemption."

³⁷ Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2016) at 3.265.

³⁸ *Ibid.*

Disposition³⁹

[128] I therefore make the following final order:

Under CV-16-125371-00

- (a) The respondents, any corporate entity and all persons with knowledge of this order are hereby restrained from operating a plant without a licence, in contravention of section 15(1) of the *Milk Act*.
- (b) The respondents, any employees of the respondents and all other persons with knowledge of this order are hereby restrained from hindering or obstructing the inspection, by a field person or officer appointed by the Director from exercising their powers to request, in respect of milk from cows or goats (milk) and their products, to produce the books, records and documents and permit inspections and furnish copies or extracts thereof and permit inspection of the premises and any equipment, milk or milk products therein.
- (c) Any person affected by this order may move to set aside or vary the terms of this order upon providing five clear days notice and any such motion or proceeding shall not in any way excuse that person or persons from compliance with the terms of this order.

Under CV-16-125250-00

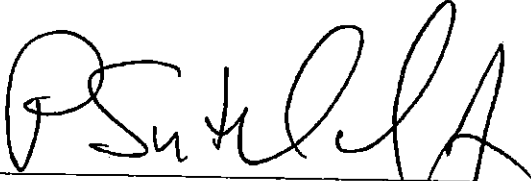
- (d) A declaration that the respondents have contravened section 18 of the *HPPA* and its regulations by delivering and distributing unpasteurized milk and unpasteurized milk products.
- (e) The respondents and any and all persons having knowledge of this order are hereby restrained from directly or indirectly:
 - i. Selling, offering for sale, delivering or distributing milk or cream or products processed or derived from milk that has not been pasteurized or sterilized in a plant that is not licenced under the *Milk Act* and that is not exempt by the “family farm exemption”, as defined herein.
 - ii. Interfering, physically or otherwise, with the strict performance by the Municipalities or their employees, servants or agents acting in lawful execution of their specific and mandated powers, obligations and duties under the *HPPA*.

³⁹ I wish to acknowledge my appreciation to Dylan Baker and Allison Large, previous and present student at-law for the Court for their helpful assistance. Their assistance in the review and attendant legal research in their capacity as Law Clerks for the Court is acknowledged.

- (f) Any person affected by this order may move to set aside or vary the terms of this order upon providing five clear days notice, but such motion or proceeding shall not in any way excuse that person or persons from compliance with the terms of this order.

Costs

- (g) If the parties cannot agree on costs, then the Director and the Municipalities to serve and file their respective submissions for costs within thirty days from the date of this decision, and the respondents and the intervener will have thirty days thereafter to serve and file their submissions. There is no right for any reply submissions. The submissions to be no more than five pages, double spaced, exclusive of any bill of costs, case law and offers to settle. Submissions are to be filed with the court. If no submissions are received within the time period set out herein, an order will be made that there will be no costs.



Justice P.W. Sutherland

Released: January 5, 2018