

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

JOHN LANSING AFFLECK, JOHN BAAK, ERIC BRYANT,
CAROL CELENZA, SANDA DRAGA, WERNER FABIAN, KAREN FLIESS,
MERLE GOULD, MARIA HELMS, ALLYSON MCMULLEN, LILIANA MICULESCU,
PAUL NOBLE, ERA NOVAK, MASCHA PERRONE, JERRY PUCHYR,
MARIA-THERESIA ROEMMELT, AMY STEIN, FRANK VAN DEN BERG,
ELISA VANDER HOUT, BEVERLEY VILJAKAINEN and ELEANOR ZALEC

Applicants

- and -

THE ATTORNEY GENERAL OF ONTARIO and
THE ATTORNEY GENERAL OF CANADA

Respondents

- and -

THE REGIONAL MUNICIPALITY OF YORK,
THE REGIONAL MUNICIPALITY OF PEEL and
SIMCOE MUSKOKA DISTRICT HEALTH UNIT

Interveners

NOTICE OF MOTION

Dairy Farmers of Ontario (“DFO”) and Dairy Farmers of Canada (“DFC”) (together, “the Moving Parties”) will make a motion to the court on ____, ____, at ____, or as soon after that time as the motion can be heard, at the Court House, 393 University Avenue, Toronto, Ontario, M5G 1E6.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR AN ORDER:

1. Granting the Moving Parties leave to intervene, as added parties in the proceeding.

2. Permitting the Moving Parties to participate in the proceedings, including providing evidence and cross-examining, and making oral and written submissions on issues raised in connection with the underlying Application.
3. Providing that the affidavit evidence of the Moving Parties shall be filed at the same time as the affidavit evidence of the Respondents.
4. Providing that the Moving Parties shall not seek any costs from any party and shall not be liable to any party in respect of any costs awarded in respect of the underlying Application.
5. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

A. DFO's Role in Ontario's Dairy Industry and Interest in this Application

6. DFO is a provincial milk marketing board vested with broad regulatory authority under the Ontario *Milk Act*, R.S.O. 1990, c. M.12, and its regulations.
7. DFO has been in operation since 1995 and is the successor organization to the Ontario Milk Marketing Board (founded in 1965) and the Ontario Cream Producer's Marketing Board (founded in 1947).
8. Under an agreement with the Ontario Ministry of Agriculture, Food and Rural Affairs ("OMAFRA"), DFO is the designated authority responsible for administering R.R.O. 1990, Reg. 761: *Milk and Milk Products* ("Regulation 761") pertaining to raw milk quality

testing, the inspection of dairy farm premises, milk transportation, and bulk tank grader requirements. DFO also exercises federal delegated authority under the *Dairy Products Marketing Regulations*, SOR/94-466.

9. DFO represents and regulates Ontario's approximately 3,500 dairy farms. DFO regulates milk marketing within Ontario, administers provincial regulations and programs regarding milk production, and sets policy regarding such matters as quotas, milk pricing and transportation. Under the *Milk Act*, broad regulatory authority over Ontario's dairy industry is conferred on the Ontario Farm Products Marketing Commission (the "Commission"), which in turn delegates authority to DFO.
10. In Ontario, by law, no person may market raw milk from cows except by, from and through DFO. DFO's operations are subject to supervision by the Commission, and appeals from DFO decisions, regulations and policies are brought before the Ontario Agriculture, Food and Rural Affairs Appeal Tribunal ("OAFRAAT").
11. DFO's Board of Directors is established by regulation under the *Milk Act* and is comprised of twelve members, each of whom are licensed dairy farmers elected by other licensed producers in the twelve regions specified in R.R.O. 1990, Reg. 760: *Milk and Farm-Separated Cream – Plan*.
12. Nationally, DFO is a member organization of DFC and is a signatory to the National Milk Marketing Plan. Pursuant to the National Milk Marketing Plan, DFO participates in the dairy policy-making body known as the Canadian Milk Supply Management Committee ("CMSMC").

13. DFO administers a variety of programs and initiatives. Of particular note, DFO administers the Raw Milk Quality Program (“RMQP”), which is established under Regulation 761. The RMQP relates to the safety and quality of milk produced and marketed by each licensed dairy farmer who provides milk to DFO, and in turn DFO provides milk to processors. The DFO-appointed Director of Regulatory Compliance oversees the provincial regulations relating to the quality of milk from the farm to the dairy processing plant receiving bay. The RMQP covers milk and water sample collection and sample testing, Grade A farm inspections, truck-tank inspections, penalty application, as well as bulk tank milk tank grader activities, performance, and certification.
14. DFO stands to be directly affected by the orders sought by the Applicants in respect of provisions in and under the *Milk Act*, the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7, and the *Food and Drug Regulations*, C.R.C. c. 870. Indeed, DFO is expressly referenced in the regulatory provisions under which the Applicants seek exemptions (subsections 5(r.1) and 5(r.2) of O/Reg. 354/95, *Milk and Farm-Separated Cream – Marketing*, as referred to at paragraph 1(a) of the Notice of Application).

B. DFC’s Role in Canada’s Dairy Industry and Interest in this Application

15. Founded in 1934, DFC is a national non-profit corporation representing approximately 12,000 dairy farms throughout Canada, at both the national and international level.
16. DFC’s Board of Directors is appointed by the provincial dairy farmer boards/associations and the Canadian Dairy Network. Ontario and Quebec are represented by three

members each on the DFC Board of Directors, while the remaining provinces and the Canadian Dairy Network are represented by one director each.

17. Among other initiatives at the national level, DFC undertakes research respecting human nutrition, on-farm quality assurance programs, improving farming practices and animal well-being. In addition, DFC has many years of experience as a participant in various international organizations, including the Codex Alimentarius Commission and the International Dairy Federation.
18. DFC coordinates a number of programs, including the proAction Program, a prevention-based on-farm program which requires management practices relating to raw milk safety and quality, animal care and welfare, dairy animal traceability, biosecurity, and environmental sustainability. The proAction Program builds on the government-recognized Canadian Quality Milk Program (“CQM”) and is based on a science-based approach known as “HACCP” (Hazard Analysis Critical Control Points). The proAction Program is in turn made a condition of provincial producer licenses by DFO and other provincial marketing boards throughout Canada.
19. DFC is an observer on the CMSMC, an organization chaired by the Canadian Dairy Commission (“CDC”), a federal Crown corporation established pursuant to the *Canadian Dairy Commission Act*, R.S.C. 1985, c. C-15. The CDC, among other things, administers the *Dairy Product Marketing Regulations*, SOR/94-466, through which federal quota administration authority is delegated to DFO and other provincial milk boards.

20. As a national dairy farmer organisation with longstanding involvement in on-farm food safety and related initiatives, DFC's interests, and the interests of dairy farmers represented by DFC, stand to be affected by the orders sought by the Applicants, notably, relating to the Applicants' challenge to the federal *Food and Drug Regulations*.

C. Relevance and Usefulness of DFO and DFC's Contribution to this Litigation

21. The Applicants' constitutional challenge raises a host of issues related to such matters as: dairy farming practices, raw milk production and processing, dairy herd models, risk assessment and testing, and varying regulatory approaches respecting the production and marketing of raw milk on the international scene.
22. DFO and DFC are uniquely positioned to assist the Court in addressing these and other aspects bearing on Ontario's and Canada's highly complex milk production and marketing system. Indeed, given the nature of the Applicants' claims and the degree to which they implicate DFO's authority, the Applicants ought to have named DFO as a respondent. DFC's national reach and international involvement will assist the Court in addressing the various regulatory approaches to the production and marketing of raw milk in other Canadian provinces and abroad.

D. DFO and DFC's unique perspective

23. As organizations representing dairy producers, DFO and DFC bring a perspective to this litigation different from that of the Applicants or either of the Attorney General respondents.

24. The Applicants are individuals who either wish to commercially produce, distribute and sell raw milk, or to consume raw milk off-farm. The Attorney General of Ontario represents the provincial government, which has opted for a broad delegation and authorization of key regulatory aspects of the dairy industry to DFO. The Attorney General of Canada represents the federal government, which has enacted national restrictions on the selling of raw milk, and interfaces with the dairy industry on a national basis through bodies such as the CDC and CMSMC.
25. DFO and DFC's intervention will assist the Court by linking the regulatory perspective with the practical realities of dairy farming as they are evolving in Canada. Neither Respondent is able to provide the practical dairy farmer perspective of DFO or DFC. The Applicants are similarly not involved in the provincial and national regulatory system, and they seek to be exempt from key aspects of that system. Moreover, the Applicants do not have experience similar to that of DFC on the international stage.

E. DFO and DFC's application has been brought sufficiently early in the proceeding to permit properly tested evidentiary contributions

26. DFO and DFC are bringing this application roughly three months prior to the November 30, 2018 deadline for responding affidavits, the date fixed by Madam Justice Matheson at the June 25, 2018 case conference. DFO and DFC will be able to deliver their affidavit materials by the November 30, 2018 deadline. The Applicants will have the same opportunity to test DFO and DFC's evidence by cross-examination as will be the case for the evidence to be submitted by the Attorney General of Ontario and the Attorney General of Canada.

F. DFO and DFC have access to specialized knowledge and expertise

27. As industry organizations with many decades of direct involvement in Ontario's and Canada's dairy industries, DFO and DFC have an in-depth knowledge and expertise of every stage of this industry, from the dairy farm to the sale of the processed dairy product. DFO in particular can speak to the on-the-ground reality of administering and enforcing Ontario's existing regulatory regime. DFC's national activities, and participation in international exchanges with farm and industry groups around the world, provide it with information not available to the Attorney General of Ontario and the Attorney General of Canada.

G. DFO and DFC's interest and evidence are necessary to a properly informed adjudication of the issues and are not likely to be fully represented or advanced by the existing parties

28. DFO and DFC will provide evidence of the on-the-ground regulatory context at a level of granularity that would not be possible for the Attorney General of Ontario and the Attorney General of Canada. DFO and DFC will also be able to provide evidence relevant to the practical realities of the regulation of dairy production and processing, and the alternatives for raw milk production and marketing proposed by the Applicants.

H. DFO and DFC's interest, and that of their members, would be affected by the constitutional issue and their determination in a way not common to other citizens

29. The remedies that the Applicants seek from the Court would impact DFO and DFC's interests, as well as those of their members. Among other things, the orders sought by the Applicants would require DFO and DFC to undertake significant regulatory/policy

work, and to bear associated costs, to address issues raised by the commercial sale and distribution of unpasteurized raw milk directly to consumers.

I. DFO and DFC's intervention will not cause delay or prejudice to the other parties

30. DFO and DFC will adhere to the existing deadline for the filing of the respondent Attorney General of Ontario's and the respondent Attorney General of Canada's affidavits. DFO and DFC will also make every effort to not duplicate evidence led, or submissions made, by the Attorney General of Ontario or the Attorney General of Canada.
31. DFO and DFC only became aware of these proceedings in early June 2018 and did not obtain the lengthy record until several weeks later.
32. DFO and DFC rely on Rule 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
33. Such further and other grounds as counsel may advise and the Court consider just.

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

34. The affidavit of George MacNaughton, sworn August XX, 2018; and
35. Such further and other material as counsel may advise and the Court consider just.

Date September XX, 2018

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DRAFT

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at TORONTO

NOTICE OF MOTION

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SIMCOE MUSKOKA DISTRICT HEALTH UNIT

Interveners

AFFIDAVIT OF GEORGE MACNAUGHTON

I, GEORGE MACNAUGHTON, of the City of Guelph, in the Province of Ontario, HEREBY SOLEMNLY
AFFIRM:

1. I am the Director of Operations and Director of Regulatory Compliance for Dairy Farmers of Ontario (“DFO”), positions I have held since 2005.

2. I have worked for DFO almost continuously since June 1981. My role as Director of Operations involves responsibility for administration of R.R.O. 1990, Reg. 761: *Milk and Milk Products* (“Regulation 761”) relating to dairy farms and milk transportation, which includes milk quality and safety, animal care and welfare, and Grade A farm standards. My role also includes policy development and oversight for milk sample transportation, milk quota issuance and policy oversight, milk allocation to processors, and research strategy, including project selection and oversight.

3. My role as Director of Regulatory Compliance involves responsibility for milk safety and quality in the dairy production system.

4. As such, I have personal knowledge of the facts hereinafter deposed to, except for those matters that are stated to be based upon information provided by others, all of which information I believe to be true.

Dairy Farmers of Ontario’s History and Structure

5. In 1995, DFO was continued by regulation from the Ontario Milk Marketing Board (founded in 1965) and the Ontario Cream Producers’ Marketing Board (founded in 1947). Pursuant to the *Milk Act*, R.S.O. 1990, c. M.12, DFO operates under the supervision of the Ontario Farm Products Marketing Commission (the “Commission”). Appeals from DFO decisions, regulations and policies are brought before the Ontario Agriculture, Food and Rural Affairs Appeal Tribunal, as are decisions I make as the Director of Regulatory Compliance.

6. DFO represents Ontario’s approximately 3,500 dairy farms. By law, these farms may only market their milk to DFO. DFO regulates milk marketing within the province, administers

provincial regulations and programs regarding milk production, and sets policy regarding such matters as quotas, milk pricing and transportation. Under the *Milk Act*, broad regulatory authority over Ontario's dairy industry is conferred on the Commission, which in turn delegates authority to DFO.

7. In addition, under an agreement with Ontario Ministry of Agriculture, Food and Rural Affairs ("OMAFRA"), DFO is the designated authority for Regulation 761 and appoints a Director of Regulatory Compliance. Regulation 761 addresses raw milk quality testing, the inspection of dairy farm premises, milk transportation, and bulk tank grader requirements.

8. DFO also exercises federal delegated authority under the *Dairy Products Marketing Regulations*, SOR/94-466.

9. DFO's Board of Directors is established by regulation under the *Milk Act*. The Board is made up of twelve Members, each of whom are licensed dairy farmers elected by other licensed producers in their region. R.R.O. 1990, Reg. 760: *Milk and Farm-Separated Cream – Plan* establishes twelve regions for dairy producers in Ontario.

10. Nationally, DFO is a member organization of Dairy Farmers of Canada ("DFC") and is a signatory to the National Milk Marketing Plan. Pursuant to the National Milk Marketing Plan, DFO participates in the dairy policy-making body known as the Canadian Milk Supply Management Committee ("CMSMC").

11. DFO has been the administrative authority for the Raw Milk Quality Program ("RMQP") since 1998. The RMQP relates to the safety and quality of milk produced and marketed by each

licensed dairy farmer who provides milk to processors. Essentially, the DFO-appointed Director of Regulatory Compliance oversees the provincial regulations relating to the quality of milk from the farm to the dairy processing plant receiving bay. The pasteurization, heat treating or equivalent process is the processor's responsibility.

12. Established pursuant to Regulation 761, the RMQP covers such matters as the requirements for Grade A farms (i.e. farms that produce milk that meets the standards required for the production of milk products), raw milk quality standards, milk and water sample collection and sample testing, Grade A farm inspections, truck-tank inspections, bulk tank milk grader certification, recertification, and monitoring. DFO ensures that producers, transporters, and bulk tank milk graders comply with provincial regulations and/or DFO policies pertaining to matters such as milk safety and quality, farmyards, lanes, and biosecurity.

13. A copy of DFO's Raw Milk Quality Policy Book is attached to my affidavit as **Exhibit "A"**.

14. In addition to the RMQP, DFO has detailed policies regarding the transportation of milk. DFO's Quota and Milk Transportation Policies deal, among other things, with the length of time milk can be kept in bulk tanks, bulk tank installation, bulk tank inspection, and bulk tank sanitization and cleanliness. A copy of DFO's Quota and Milk Transportation Policies is attached to my affidavit as **Exhibit "B"**.

DFC's History and Structure

15. DFC was founded in 1934 and is a national organization representing approximately 12,000 dairy farms throughout Canada, at both the national and international level.

16. Each provincial dairy board or association, as well as the Canadian Dairy Network, appoints directors to DFC's Board. Each of Ontario and Quebec are represented by three members on the DFC Board, while the remaining provinces and the Canadian Dairy Network are represented by one director each.

17. Among other initiatives, DFC undertakes research respecting dairy nutrition, on-farm quality assurance programs, improving farming practices and animal well-being. In addition, DFC has many years of experience as a participant in various international organizations, including the Codex Alimentarius Commission and the International Dairy Federation.

18. DFC also coordinates a number of programs, including the proAction Program, a prevention-based on-farm program that requires management practices relating to raw milk safety and quality, animal care and welfare, dairy animal traceability, farm and animal biosecurity, and environmental sustainability. The proAction Program builds on the government-recognized Canadian Quality Milk Program ("CQM") and is based on a science-based approach known as "HACCP" (Hazard Analysis Critical Control Points). The proAction Program is in turn made a condition of being issued a provincial producer license to produce and market milk by DFO and other provincial marketing boards throughout Canada.

19. A copy of the Milk Quality Requirements prescribed under the proAction Program are attached to my affidavit as **Exhibit "C"**.

20. A copy of the Food Safety Requirements prescribed under the proAction Program are attached to my affidavit as **Exhibit "D"**.

21. DFC is an observer on the CMSMC, an organization chaired by the Canadian Dairy Commission (“CDC”), a federal Crown corporation established pursuant to the *Canadian Dairy Commission Act*, R.S.C. 1985, c. C-15. The CDC, among other things, administers the *Dairy Product Marketing Regulations* through which federal quota administration authority is delegated to DFO and other provincial milk boards.

DFO and DFC’s Interest in this Litigation

22. The remedies that the Applicants seek from the Court would significantly impact DFO and DFC’s interests, as well as those of their members. Among other things, the orders sought by the Applicants would require DFO and DFC to undertake significant regulatory/policy work, and to bear associated costs, to address issues raised by the commercial sale and distribution of unpasteurized raw milk directly to consumers. DFO stands to be particularly affected as it is referenced in the very regulatory provisions under which the Applicants seek exemptions.

DFO and DFC’s intervention will not cause delay

23. DFO and DFC first learned about this constitutional challenge in early June, but did not receive a full copy of the Application Record until several weeks later. Counsel to DFO and DFC, David Wilson, wrote to counsel for the parties on June 19, 2018 to advise them that DFO and DFC were considering seeking intervener status, as indicated in the letter attached to my affidavit as **Exhibit “E”**. Related email correspondence dated August 9, 2018 is attached to my affidavit as **Exhibit “F”**.

24. If granted leave, DFO and DFC will deliver their responding affidavits by November 30, 2018, the same date as the filing date for the Attorney General of Ontario and Attorney General

of Canada. DFO and DFC will also make every effort to not duplicate evidence led, or submissions made, by the Attorney General of Ontario or the Attorney General of Canada.

AFFIRMED before me at the City of)
Guelph, in the Province of Ontario)
on September XX, 2018.)

A Commissioner, etc.

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GEORGE MACNAUGHTON

DRAFT

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**AFFIDAVIT OF GEORGE McNAUGHTON
SWORN SEPTEMBER XX, 2018**

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