

**ONTARIO SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

**B E T W E E N:**

**JAMES LANSING AFFLECK, JOHN BAAK, ERIC BRYANT, CAROL CELENZA, SANDA DRAGA, WERNER FABIAN, KAREN FLIESS, MERLE GOULD, MARIA HELMS, ALLYSON MCMULLEN, LILIAN MICULESCU, PAUL NOBLE, ERA NOVAK, MASCHA PERRONE, JERRY PUCHYR, MARIA-THERSIA ROEMMELT, AMY STEIN, FRAN VAN DEN BERG, ELISA VANDER HOUT, BEVERLY VILJAKAINEN AND ELEANOR ZALECC**

**APPLICANTS  
(RESPONDENTS IN APPEAL)**

**AND**

**ATTORNEY GENERAL OF ONTARIO and ATTORNEY GENERAL OF CANADA**

**RESPONDENTS  
(RESPONDENTS IN APPEAL)**

**AND**

**REGIONAL MUNICIPALITY OF YORK, REGIONAL MUNICIPALITY OF PEEL AND  
SIMCOE MUSKOKA DISTRICT HEALTH UNIT**

**INTERVENERS**

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**FACTUM OF THE RESPONDENT,  
THE ATTORNEY GENERAL OF ONTARIO**

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**November 22, 2018**

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## **PART I – OVERVIEW**

1. The Attorney General of Ontario (“Ontario”) agrees with the appellants, Dairy Farmers of Ontario and Dairy Farmers of Canada (“DFO-DFC”), that the Master’s dismissal of its motion to intervene in a constitutional application challenging statutory prohibitions on the distribution of unpasteurized cow milk was based on errors of law and should be reversed.

2. Ontario provides these submissions on the appeal due to its concern that the decision below appears to stand for a categorical rule that administrative tribunals or regulators of an industry cannot make legal arguments or lead evidence in constitutional challenges to the legislation they administer. Such an approach is contrary to Supreme Court of Canada jurisprudence expressly holding that courts benefit from having the views of expert administrative tribunals on the merits of constitutional challenges to their home statutes. The Court’s rationale in these cases is equally applicable to question of whether DFO-DFC can be heard on a constitutional challenge to provisions DFO administers. Ontario also supports DFO-DFC’s proposed intervention on the basis that it would provide a distinct contribution to the application, reflecting the separate roles of Ontario and DFO-DFC in this policy area.

## **PART II – FACTS**

3. Ontario agrees with the facts as described in paragraphs 8-17 of DFO-DFC’s factum.

4. Ontario further notes that in the underlying application, the Applicants (respondents on this appeal) seek as constitutional remedies two different exemptions from Ontario's statutory schemes governing milk distribution.

5. First, pursuant to paragraph 96(1)(e) of the *Health Protection and Promotion Act*,<sup>1</sup> (HPPA) the Lieutenant Governor in Council may exempt by regulation any person from any provision of that statute. The Applicants requested such an exemption on March 7, 2018<sup>2</sup> and were advised on March 28, 2018 that there has never been an exemption created from the statutory prohibition in subsection 18(1) of the HPPA on the processing, sale and distribution of unpasteurized cow milk, and that the Ministry of Health and Long-Term Care had no intention of pursuing such an exemption given the significant public health risks associated with the prohibited activities.<sup>3</sup>

6. Second, clause 19(1)4.1 of the *Milk Act*<sup>4</sup> provides for exemptions from sections 14 and 15 of that statute, which respectively require permits and licences for the construction and operation of milk plants.<sup>5</sup> The statute does not provide that the Lieutenant Governor in Council may provide such exemptions. Instead, clause 19(1)4.1 provides that such exemptions may be created by the

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<sup>1</sup> RSO 1990, c H.7.

<sup>2</sup> Letter from Ian Blue to Michael Dunn dated March 7, 2018; Appeal Book and Compendium ("Appeal Book") at 351-353.

<sup>3</sup> Letter from Padraic Ryan to Ian Blue dated March 28, 2018, Appeal Book at 355-356.

<sup>4</sup> RSO 1990, c M.12.

<sup>5</sup> While the Applicants' pleadings seek an exemption pursuant to clause 7(1)11 of the *Milk Act*, this is presumably an error, since that provision refers only to exemptions from regulations, not statutory provisions: see Letter from Padraic Ryan, *supra*. If the Applicants do seek exemptions from the Farm Products Marketing Commission's regulations, they have not specified which regulatory provisions violate their *Charter* rights, or why.

Farm Products Marketing Commission.<sup>6</sup> The record does not disclose that any request has ever been made by the Applicants to the Commission for any exemption, and they did not indicate in the court below that they have ever sought such an exemption from this body. When they erroneously sought a *Milk Act* exemption from the Government of Ontario, the above legal framework was drawn to their counsel's attention.<sup>7</sup>

7. The Applicants appear to seek a further constitutional exemption from DFO rules in respect of milk quota, pricing and marketing, which are created through DFO's authority delegated from the Commission.<sup>8</sup> The Applicants' pleadings do not specify which DFO rules which they allege to be unconstitutional and do not plead any connection between DFO rules and *Charter* rights they allege are infringed by the impugned statutory provisions of the *HPPA* and the *Milk Act*. The constitutional basis for such an exemption is therefore unknown. The Applicants do not appear to have ever sought such exemptions from the DFO. The Applicants did not name the Commission or DFO as respondents to their application despite seeking a court order compelling these bodies to exercise their delegated authority.

8. In any event, the underlying application is not a judicial review of the above refusal by Ontario to create exemptions, or any purported refusals by the Commission or DFO to create exemptions. Instead, it is a Rule 14 application in

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<sup>6</sup> The Commission may make regulations, [...] exempting classes of persons from the requirement under section 14 to hold a permit and under section 15 to hold a licence, in such circumstances as may be prescribed and subject to such restrictions as may be prescribed.

<sup>7</sup> Letter from Padraic Ryan to Ian Blue, *supra*.

<sup>8</sup> Fresh as Amended Notice of Application at 1(a) (reference to ss 5(r.1) and (r.2) of *Milk and Farm-Separated Cream – Marketing*, O Reg 354/95); Appeal Book at 15. DFO is the designated marketing board pursuant to *Milk and Farm-Separated Cream – Plan*, RRO 1990, Reg 760.

Superior Court challenging the validity of statutory provisions. Therefore, Ontario's position on remedy will be that even if the applicants succeed in establishing that the impugned statutes unjustifiably violate the *Charter*, judicially ordered administrative exemptions are not an appropriate remedy, as they would amount to orders in the nature of *mandamus*, which fall within the Divisional Court's exclusive jurisdiction over applications seeking the grant of prerogative writs.<sup>9</sup> Ontario will also rely on the Supreme Court's repeated holdings that individual exemptions are not an appropriate remedy for successful constitutional challenges to the validity of legislation.<sup>10</sup>

### **PART III – ISSUES AND ARGUMENT**

#### **A. Standard of review**

9. Ontario agrees with DFO-DFC that the standard of review is correctness for questions of law and palpable and overriding error for questions of facts.

#### **B. The Court below erred in law by relying on *Northwestern Utilities***

10. Ontario adopts the argument of DFO-DFC at paragraphs 23-45 of their factum on this issue. Whether a tribunal should be heard on a judicial review of its own decision is a distinct issue from whether it should be heard on a Rule 14 application challenging the constitutionality of its home statute, and the Master erred by applying the test from the former scenario to the latter.

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<sup>9</sup> *Alford v The Law Society of Upper Canada*, 2018 ONSC 4269 at paras 22-23, 42; *Judicial Review Procedure Act*, s 2(1)1.

<sup>10</sup> Reasons of Nordheimer JA at para 14 (unreported, Appeal Book at 310), citing *R v Ferguson*, 2008 SCC 6 and *Carter v Canada (Attorney General)*, 2015 SCC 5.

11. Ontario further submits that the Master's reasoning is contrary to the well-established body of administrative law which *requires* many constitutional challenges to statutory regimes to be brought before an administrative tribunal even when litigants would prefer to proceed in the courts.<sup>11</sup> This is a strong indicator that there is nothing improper about a tribunal providing its views on the merits of a constitutional challenge to the tribunal's home statute. Rather, that process has been explicitly identified as a benefit to the courts which must ultimately decide on the constitutional question.

12. In *Martin*, for example, the Supreme Court noted that "the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court", citing several previous Supreme Court decisions expressing the same view.<sup>12</sup> The Court expressed no concern that a litigant whose constitutional challenge was rejected by a tribunal would later not be treated fairly by the tribunal, or that the tribunal's independence would be compromised due to it providing its view on the merits of a constitutional argument.

13. The Court of Appeal for Ontario has also held that the benefit of a tribunal's views on a constitutional challenge is one reason that constitutional litigants should not be able to circumvent a statutory scheme:

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<sup>11</sup> *Okwuobi v Lester B. Pearson School Board; Casimir v. Quebec (Attorney General)*, 2005 SCC 16 at paras 38-49, holding that litigants are required to respect the exclusive jurisdiction of administrative tribunals even when they wish to raise constitutional challenges.

<sup>12</sup> *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at para 30, citing *Douglas/Kwantlen Faculty Assn. v Douglas College*, [1990] 3 SCR. 570 at 604-5 and *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at 16-17.



The Law Society Tribunal should be allowed to decide at first instance whether the constitutional arguments advanced herein are well-founded and, in particular whether there is any room in the legislative design and policy of the Act for the specific client-focused protections being sought by the applicants. The Law Society Tribunal has the expertise and the experience to consider the applicants' submissions and proposed reforms and make the required determinations at first instance. And the court (should the matter get to court) would benefit greatly from this expert tribunal's reasons and decision.<sup>13</sup> [emphasis added]

14. Again, it was clear in that decision that the Law Society would continue to be the statutory regulator of the licensees who were challenging the Law Society's powers as contrary to the *Charter*, regardless of the outcome. Nonetheless, the Court of Appeal expressed no qualms in requiring the licensees to raise their constitutional challenge before the Law Society Tribunal and explicitly indicated that it would benefit from the Tribunal's reasons on the constitutional issue. The case law set out above also refers to the benefit of the factual findings made by tribunals in their adjudicative capacity, which is an indication that it is not only legal argument made by tribunals and regulators that would be of assistance to the Court in the underlying application, but also the evidence that DFO-DFC intends to lead.

15. Similarly, given that the Superior Court has held that "specialized tribunals are in the best position to hear and decide constitutional cases related to their statutory mandates because of their expertise",<sup>14</sup> it follows that tribunals and regulators are also well-placed to make useful contributions to such constitutional challenges when they are brought directly in the courts, and there

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<sup>13</sup> *DioGuardi Tax Law v Law Society of Upper Canada*, 2016 ONCA 531 para 2, quoting the reasons of the decision below (2015 ONSC 3430) at para 14.

<sup>14</sup> *Landau v Attorney General of Canada*, 2017 ONSC 2938 at para 22.

is no conflict of interest in tribunals or regulators giving their views on constitutional challenges to their home statutes.

16. The above holdings are particularly applicable to the case at bar where, as discussed above, the Applicants seek what is in substance an order in the nature of *mandamus* compelling the DFO to exercise their delegated authority to provide an exemption from DFO rules. In the realm of administrative law, a reviewing court would never grant such an order without giving the party exercising the delegated authority at issue the chance to be heard. The same should be true for constitutional remedies, if not with more force given that the Applicants will be asking the Court to provide such a remedy on the basis of overriding statutory provisions enacted by democratically elected legislatures, and therefore should welcome considering a variety of perspectives and evidentiary sources.

**C. DFO-DFC's proposed intervention satisfies the test under Rule 13.01**

17. Ontario agrees with the submissions of DFO-DFC at paragraphs 46- 61 of their factum. DFO-DFC has met the proper test under Rule 13.01 as it has a distinct interest from the two levels of government named as respondents and it can make a useful, different contribution to the application based on its specialized expertise in this regulatory area.

18. In particular, Ontario emphasizes the need for a broad evidentiary record to assist the Court in the underlying application. The legal arguments advanced

by the Applicants have largely been made and rejected before.<sup>15</sup> The Applicants have argued that one of the reasons that their application is not simple re-litigation of a settled issue is because they have assembled a superior evidentiary record.<sup>16</sup> Given that this is the basis on which they will ask the Court in the underlying application to depart from the binding precedent of the Court of Appeal, interested parties with evidence that would assist the Court should be entitled to respond to the Applicants' claims. DFO-DFC has met that threshold given that it will provide further and useful evidence of the context in which the impugned stator schemes operate.

#### **PART IV – ORDER REQUESTED**

19. Ontario requests that the Master's decision be set aside and that DFO-DFC be granted leave to intervene pursuant to Rule 13.01. Ontario seeks no costs on this appeal and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22<sup>nd</sup> DAY OF  
NOVEMBER, 2018



Padraic Ryan

Counsel for the Respondent,  
Attorney General of Ontario

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<sup>15</sup> *R v Schmidt*, 2014 ONCA 188 at paras 33-48.

<sup>16</sup> Reasons of Nordheimer JA, *supra* at para 14.

**ONTARIO SUPERIOR COURT OF JUSTICE  
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**B E T W E E N:**

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**INTERVENERS**

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**CERTIFICATE OF THE RESPONDENT,  
THE ATTORNEY GENERAL OF ONTARIO**

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1. An Order under subrule 61.09(2) is not required.
2. The Intervener, the Attorney General of Ontario, estimates 15 minutes will be required for its oral argument.

November 22, 2018

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## SCHEDULE A

### List of Authorities

- 1 *Alford v. The Law Society of Upper Canada*, 2018 ONSC 4269
- 2 *R. v. Ferguson*, 2008 SCC 6
- 3 *Carter v. Canada (Attorney General)*, 2015 SCC 5
- 4 *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General)*, 2005 SCC 16
- 5 *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54
- 6 *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 SCR. 570
- 7 *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 SCR 5
- 8 *DioGuardi Tax Law v. Law Society of Upper Canada*, 2016 ONCA 531
- 9 *Landau v. Attorney General of Canada*, 2017 ONSC 2938
- 10 *R. v. Schmidt*, 2014 ONCA 188

## SCHEDULE B

### Statutes and Legislation Relied On

## **Health Protection and Promotion Act R.S.O. 1990, c. H.7**

### **SECTION 18.1**

*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 for plants licensed under the Milk Act.

### **PART VIII REGULATIONS**

### **SECTION 96**

*Regulations*

96. (1) The Lieutenant Governor in Council may make regulations,
- (e) exempting any person, organization, premises, food, substance, thing, plant, animal other than man, solid, liquid, gas, heat, radiation or combination of any of them, or any class of any of them from any provision of this Act or the regulations and prescribing conditions that shall apply in respect of any such exemption.

**Milk Act**  
**R.S.O. 1990, c. M.12**

**SECTION 7**

*Regulations with respect to regulated products*

7.--(1) The Commission may make regulations with respect to regulated products generally or to any regulated product, and, without limiting the generality of the foregoing, may make regulations,

11. providing for the exemption from any or all of the regulations under any plan of any class, variety, grade or size of regulated product or of any person or class of persons engaged in the producing or marketing of the regulated product or any class, variety, grade or size of regulated product

**CONSTRUCTION AND OPERATION OF PLANTS**  
**SECTION 14**

*Permit to construct plant*

14.--(1) No person shall construct or alter any building intended for use as a plant without a permit from the Director.

*Permit to alter plant*

(2) No person shall alter a plant without a permit from the Director.

*Conditions precedent to issue of permit*

(3) No permit shall be issued by the Director unless,

- (a) in the opinion of the Director, the plant is necessary and desirable, having regard to the needs of the producers in the locality in which it is proposed to locate the plant and to the facilities of the existing plants in operation; and
- (b) the proposed plant complies with the regulations.

**SECTION 15**

*Licence to operate plant*

15.--(1) No person shall operate a plant without a licence therefor from the Director.

*Licence to operate as distributor*

(2) No person shall carry on business as a distributor without a licence therefor from the Director.

## **CONSTRUCTION AND OPERATION OF PLANTS**

### **SECTION 19**

*Regulations with respect to the operation of plants*

19.--(1) The Commission may make regulations,

- 4.1 exempting classes of persons from the requirement under section 14 to hold a permit and under section 15 to hold a licence, in such circumstances as may be prescribed and subject to such restrictions as may be prescribed.



## **Milk Act**

### **Ontario REGULATION 354/95**

#### **MILK AND FARM-SEPARATED CREAM — MARKETING**

Consolidation Period: From April 12, 2011 to the e-Laws currency date.

Last amendment: 115/11.

This Regulation is made in English only.

#### Definitions

1. In this Regulation,

“cream” means farm-separated cream delivered to a plant in Ontario for manufacture into creamery butter;

“creamery operator” means a person engaged in the manufacture of creamery butter at a plant;

“marketing board” means the marketing board known as Dairy Farmers of Ontario;

“milk” means milk from cows;

“plan” means the Ontario Milk and Farm-Separated Cream Plan;

“producer” means a producer of milk or cream. O. Reg. 354/95, s. 1.

#### Application of Regulation

2. This Regulation provides for the control and regulation in any or all respects of the producing or marketing within Ontario of milk and farm-separated cream, including the prohibition of that producing or marketing in whole or in part. O. Reg. 354/95, s. 2.

#### Exemption

3. The Commission exempts from this Regulation milk consumed on the farm on which the milk is produced and not sold. O. Reg. 354/95, s. 3.

#### Delegation of Powers to Marketing Board

4. The Commission delegates to the marketing board the power,

(a) to require persons engaged in the producing or marketing of milk or cream to register their names, addresses and occupations with the marketing board;

(b) to require persons engaged in the producing or marketing of milk or cream to furnish the information relating to the producing or marketing that the marketing board determines;

(c) to appoint persons to inspect the books, records, documents and premises of persons engaged in producing or marketing milk or cream;

(d) to stimulate, increase and improve the marketing of milk by such means as the marketing board considers proper;

(e) to co-operate with a marketing board or a marketing agency of Canada or of a province of Canada for the purpose of marketing milk or cream; and

(f) to take such action, make such orders and issue such directions as are necessary to enforce the due observance and carrying out of the Act, the regulations, the plan or an agreement or award. O. Reg. 354/95, s. 4.

5. The Commission delegates to the marketing board its powers to make regulations with respect to milk or cream,

(a) providing for the licensing of any or all persons before commencing or continuing to engage in the producing or marketing of milk or the producing of cream;

(a.1) prescribing or providing for classes of licences and the imposition of terms and conditions on any class of licence;

(b) prohibiting persons from engaging in the producing or marketing of milk or the producing of cream except under the authority of a licence and except in compliance with the terms and conditions of the licence;

(c) providing for the refusal to grant or renew a licence or for the suspension or revocation of a licence,

(i) where the applicant or licensee is not qualified by experience, financial responsibility or equipment to engage properly in the business for which the application was made or the licence granted, or

(ii) where the applicant or licensee has failed to comply with or has contravened a provision of the Act, the regulations, the plan or an order or direction of the Commission, the marketing board or a marketing agency of Canada;

(c.1) providing for the imposition, amount, disposition and use of penalties where, after a hearing, the marketing board is of the opinion that the applicant or licensee has failed to comply with or has contravened any term or condition of a licence or any provision of this Act, the regulations, any plan or any order or direction of the marketing board;

(d) providing for the fixing of licence fees, the payment of the licence fees by any or all persons producing or marketing milk or producing cream, the collecting of the licence fees and their recovery by action in a court of competent jurisdiction;

(e) requiring a person who receives milk or cream from a producer to deduct from the money payable to the producer all licence fees payable by the producer to the marketing board with respect to milk or cream, as the case may be, and to pay those licence fees to the marketing board within the time specified in the regulations;

(f) requiring a person who produces and processes milk or cream to furnish to the marketing board statements of the amounts of the milk or cream that the person produced in any year and used for processing;

(g) prescribing the form of licences;

(g.1) requiring and providing for the furnishing of security or proof of financial responsibility or of a performance bond by a person or class of persons engaged in the producing, marketing or processing of milk or cream and providing for the administration, forfeiture and disposition of any money or securities so furnished and the proceeds therefrom;

(h) providing for the control and regulation of the marketing of milk and cream, including the times and places at which milk and cream may be marketed;

(i) determining the quantity of each class or grade of milk or cream that shall be marketed by each producer;

(j) providing for the control and regulation of agreements entered into by producers of milk or cream with persons engaged in marketing or processing milk or cream, and prohibiting the inclusion of any provision or clause in the agreements;

(k) providing for the fixing, imposing and collecting of service charges from time to time for the marketing of milk or cream;

(l) requiring a person who produces milk or cream to offer to sell the milk or cream to the marketing board and to sell the milk or cream to or through the marketing board;

(m) providing that milk and cream shall be marketed by, from or through the marketing board and prohibiting a person from marketing milk or cream except by, from or through the marketing board;

- (n) prohibiting a person from processing, packing or packaging milk or cream that has not been sold through the marketing board;
- (o) providing for the establishment and the manner of payment of price differentials for any grade of milk or any class of milk;
- (p) providing for the establishment and the manner of payment of price differentials in relation to the content of milk or any class of milk;
- (q) providing for the marketing board to give statements to producers showing the amount, content and grade of the milk or cream marketed, the price or prices paid and the particulars of the service charges, licence fees and levies imposed by the marketing board;
- (r) providing for the making of agreements relating to the marketing of milk or cream by or through the marketing board and prescribing the forms and the terms and conditions of the agreements;
  - (r.1) providing for the exemption of any class, variety, grade or size of milk or cream from any or all of the regulations under the plan;
  - (r.2) providing for the exemption of any person or class of persons engaged in the producing or marketing of milk or cream or any class, variety, grade or size of milk or cream from any or all of the regulations under the plan; and
- (s) providing for the making of such orders and the issuing of such directions as are necessary to enforce the due observance and carrying out of the Act, the regulations, the plan or an order or direction of the marketing board. O. Reg. 354/95, s. 5; O. Reg. 18/97, s. 1; O. Reg. 269/99, s. 1; O. Reg. 179/00, s. 1; O. Reg. 675/00, s. 1; O. Reg. 115/11, s. 1.

5.1 The marketing board may impose such terms and conditions on a licence as the marketing board considers proper. O. Reg. 675/00, s. 2.

#### Authority of Marketing Board

6. The Commission authorizes the marketing board,

- (a) to determine from time to time the price or prices that shall be paid to producers or the marketing board for milk or a class or grade of milk, and to determine different prices for different parts of Ontario;
- (b) to pay from service charges imposed under clause 5 (k) its expenses in carrying out the purposes of the plan;

(c) to use a class of licence fees and other money payable to it for the purposes of paying the expenses of the marketing board, carrying out and enforcing the Act and the regulations and carrying out the purposes of the plan;

(d) to establish a fund in connection with the plan for the payment of the money that may be required for the purposes mentioned in clause (c);

(e) to prohibit the marketing of a class or grade of milk or cream;

(f) to require the price or prices of milk and cream to be paid to or through the marketing board, and to recover the price or prices by action in a court of competent jurisdiction;

(g) to purchase or otherwise acquire such quantity or quantities of milk as the marketing board deems advisable and to sell or otherwise dispose of the quantity or quantities of milk so purchased or otherwise acquired;

(h) to conduct a pool or pools for the distribution of all money received from the sale of milk and, after deducting all necessary and proper disbursements and expenses, to distribute the remainder of the money so that every producer receives a share in relation to,

(i) the amount, content and grade of milk supplied by the producer,

(ii) the amount and type of quota for the marketing of milk held by the producer, and

(iii) sales by the marketing board of the classes of milk;

(i) to make an initial payment on delivery of milk mentioned in clause (h) and subsequent payments until all the remainder of the money received from the sale is distributed to the producers;

(j) to require that milk or cream be marketed on a quota basis;

(k) to prohibit persons to whom a quota has not been fixed and allotted for the marketing of milk or cream or whose quota has been cancelled from marketing milk or cream;

(l) to prohibit persons to whom a quota has been fixed and allotted for the marketing of milk or cream from marketing milk or cream in excess of the quota;

(m) to fix and allot to persons quotas for the marketing of milk or cream on such basis as the marketing board considers proper;

(n) to refuse to fix and allot to a person a quota for the marketing of milk or cream for any reason that the marketing board considers proper;

(o) to cancel or reduce, or refuse to increase, a quota fixed and allotted to a person for the marketing of milk or cream for any reason that the marketing board considers proper;

(p) to permit a person to whom a quota has been fixed and allotted for the marketing of milk or cream to market milk or cream in excess of the quota on such terms as the marketing board considers proper;

(q) to appoint agents, to prescribe their duties and terms of employment, and to fix their remuneration and provide for the payment of it; and

(r) to impose and collect levies from producers of milk, to pay the levies to the Ontario Dairy Herd Improvement Corporation for the purpose of stimulating, increasing and improving the producing of milk and to fix the amount of the levies up to but not exceeding 6 cents per hectolitre of milk. O. Reg. 354/95, s. 6; O. Reg. 18/97, s. 2.

#### Negotiating Agency

7. (1) The negotiating agency known as the Negotiating Committee for Cream is continued. O. Reg. 354/95, s. 7 (1).

(2) The Committee shall consist of six members, of whom three shall be appointed by the marketing board and three shall be appointed by the creamery operators. O. Reg. 354/95, s. 7 (2).

(3) After January 1 and before April 1 in each year, the Commission shall request the marketing board and the creamery operators to appoint the members that they are required to appoint to the Committee. O. Reg. 354/95, s. 7 (3).

(4) If, within seven days of the request, the marketing board or the creamery operators do not appoint the members that they are required to appoint, the Commission may appoint the members that are necessary to increase the number of members to six. O. Reg. 354/95, s. 7 (4).

(5) Each member shall hold office until a successor is appointed in accordance with this section. O. Reg. 354/95, s. 7 (5).

(6) If a member of the Committee dies or resigns or becomes unavailable to act before the expiration of the term of office, the Commission shall request the person who appointed the member to appoint a person as a member for the remainder of the term of office. O. Reg. 354/95, s. 7 (6).

(7) If the person who is required to appoint a member under subsection (6) does not do so within seven days of the request, the Commission may appoint a person as a member for the remainder of the term of office. O. Reg. 354/95, s. 7 (7).

8. The Negotiating Committee for Cream may adopt or settle by agreement,

(a) minimum prices for cream or for a class or grade of cream;

(b) terms, conditions and forms of agreements relating to the producing or marketing of cream; and

(c) charges, costs or expenses relating to the production or marketing of cream. O. Reg. 354/95, s. 8.

9. (1) The members of the Negotiating Committee for Cream appointed by the marketing board or the creamery operators may convene a meeting of the Committee by giving notice in writing to the other members of the Committee at least seven days, but not more than ten days, before the date of the meeting. O. Reg. 354/95, s. 9 (1).

(2) The notice shall state the time and place of the meeting and include a description of the matters to be negotiated at the meeting. O. Reg. 354/95, s. 9 (2).

(3) The members giving the notice shall forward a copy of it to the Commission. O. Reg. 354/95, s. 9 (3).

#### Board of Arbitration

10. (1) If members of the Negotiating Committee for Cream have convened a meeting but the meeting has not been held in accordance with the notice, the Committee shall notify the Commission in writing and the Commission shall refer the matters that were on the agenda for the meeting to a board of arbitration appointed under section 11. O. Reg. 354/95, s. 10 (1).

(2) If a meeting of the Negotiating Committee for Cream has been held in accordance with section 9 but the Committee does not arrive at an agreement within 14 days after the date of the meeting on the matters on the agenda for the meeting, the Committee shall notify the Commission in writing of the matters in dispute and the Commission shall refer the matters in dispute to a board of arbitration appointed under section 11. O. Reg. 354/95, s. 10 (2).

11. (1) A board of arbitration shall consist of three members. O. Reg. 354/95, s. 11 (1).

(2) One member of a board of arbitration may be appointed by the members of the Negotiating Committee for Cream appointed by the marketing board and one other member may be appointed by the members of the Committee appointed by the creamery operators. O. Reg. 354/95, s. 11 (2).

(3) The two members appointed to a board of arbitration in accordance with subsection (2) may appoint a third member. O. Reg. 354/95, s. 11 (3).

(4) The Commission shall appoint the members that are necessary to increase the number of members of a board of arbitration to three if three members have not been appointed in accordance with subsections (2) and (3),

(a) within 14 days after the Commission received notification under subsection 10 (1);  
or

(b) within seven days after the Commission received notification under subsection 10 (2). O. Reg. 354/95, s. 11 (4).

(5) A board of arbitration shall meet within seven days after the appointment of its third member and shall make an award in respect of the matters referred to it. O. Reg. 354/95, s. 11 (5).

#### Advisory Committees

12. (1) The advisory committee known as the Advisory Committee for Milk is continued. O. Reg. 354/95, s. 12 (1).

(2) The Commission shall appoint the members of the Advisory Committee annually subject to this section. O. Reg. 354/95, s. 12 (2).

(3) The Advisory Committee shall consist of 17 members, of whom,

(a) one shall be the chair of the Committee;

(b) eight shall be appointed from persons nominated by the marketing board; and

(c) eight shall be appointed from persons nominated by processors and distributors. O. Reg. 354/95, s. 12 (3).

(4) If the marketing board, or the processors and distributors, as the case may be, do not nominate the persons that they are required to nominate after receiving notice from the Commission, the Commission may appoint persons who have not been nominated to increase the number of members to 17. O. Reg. 354/95, s. 12 (4).

(5) Subject to subsection (6), the members of the Advisory Committee shall hold office for such period of time as the Commission determines. O. Reg. 354/95, s. 12 (5).

(6) If a member of the Advisory Committee dies or resigns or becomes unavailable to act before the expiration of the term of office, the Commission shall appoint a person as a member for the remainder of the term of office. O. Reg. 354/95, s. 12 (6).

(7) The Commission shall provide a secretary for the Advisory Committee. O. Reg. 354/95, s. 12 (7).



13. The Advisory Committee for Milk may advise and make recommendations to the marketing board or to any person or organization represented on the committee in respect of,

(a) the promotion of harmonious relationships between persons engaged in the producing and marketing of milk;

(b) the promotion of greater efficiency in the producing and marketing of milk;

(c) the prevention and correction of irregularities and inequities in the marketing of milk;

(d) the improvement of the quality of milk;

(e) the improvement of the circulation of market information respecting milk; and

(f) without limiting the generality of the foregoing, any matter with respect to which the marketing board may make regulations under the Act. O. Reg. 354/95, s. 13.

14. (1) The advisory committee known as the Advisory Committee on Transportation of Milk is continued. O. Reg. 354/95, s. 14 (1).

(2) The Advisory Committee shall consist of 11 members, of whom,

(a) one shall be the chair of the Committee appointed annually by the Commission;

(b) five shall be appointed annually by the marketing board; and

(c) five shall be appointed annually by the Ontario Milk Transporters Association from persons who have been appointed by the marketing board as its agents for the transporting of milk. O. Reg. 354/95, s. 14 (2).

(3) If the marketing board or the Ontario Milk Transporters Association, as the case may be, does not appoint the persons that they are required to appoint after receiving notice from the Commission, the Commission may appoint persons to increase the number of members to 11. O. Reg. 354/95, s. 14 (3).

(4) Subject to subsection (5), the members of the Advisory Committee shall hold office for such period of time as the Commission determines. O. Reg. 354/95, s. 14 (4).

(5) If a member of the Advisory Committee dies or resigns or becomes unavailable to act before the expiration of the term of office, the Commission shall appoint a person as a member for the remainder of the term of office. O. Reg. 354/95, s. 14 (5).

(6) The Commission shall provide a secretary for the Advisory Committee. O. Reg. 354/95, s. 14 (6).

15. The Advisory Committee on Transportation of Milk may advise and make recommendations to the marketing board or to any person or organization represented on the Committee in respect of,

(a) the promotion of harmonious relationships between persons engaged in the producing and transporting of milk;

(b) the promotion of greater efficiency in the producing and transporting of milk;

(c) the prevention and correction of irregularities and inequities in the transporting of milk;

(d) the improvement of the quality of milk;

(e) the improvement of the circulation of market information respecting milk; and

(f) without limiting the generality of the foregoing, any matter with respect to which the marketing board may make regulations under the Act. O. Reg. 354/95, s. 15.

16. (1) The advisory committee known as the Advisory Committee for Processors is continued. O. Reg. 354/95, s. 16 (1).

(2) The Commission shall appoint the members of the Advisory Committee annually subject to this section. O. Reg. 354/95, s. 16 (2).

(3) The Advisory Committee shall consist of nine members, of whom,

(a) one shall be the chair of the Committee; and

(b) eight shall be appointed from persons nominated by the Ontario Dairy Council who are engaged in the processing of milk products or fluid milk products in Ontario. O. Reg. 354/95, s. 16 (3).

(4) If the Ontario Dairy Council does not nominate the persons that it is required to nominate after receiving notice from the Commission, the Commission may appoint persons who have not been nominated to increase the number of members to nine. O. Reg. 354/95, s. 16 (4).

(5) Subject to subsection (6), the members of the Advisory Committee shall hold office for such period of time as the Commission determines. O. Reg. 354/95, s. 16 (5).

(6) If a member of the Advisory Committee dies or resigns or becomes unavailable to act before the expiration of the term of office, the Commission shall appoint a person as a member for the remainder of the term of office. O. Reg. 354/95, s. 16 (6).

(7) The Commission shall provide a secretary for the Advisory Committee. O. Reg. 354/95, s. 16 (7).

17. The Advisory Committee of Processors may advise and make recommendations to the Commission in respect of,

(a) the promotion of harmonious relationships between persons engaged in the producing and marketing of milk;

(b) the promotion of greater efficiency in the producing and marketing of milk;

(c) the prevention and correction of irregularities and inequities in the marketing of milk;

(d) the improvement of the quality of milk;

(e) the improvement of the circulation of market information respecting milk; and

(f) without limiting the generality of the foregoing, any matter with respect to which the Commission may make regulations under the Act. O. Reg. 354/95, s. 17.

18. (1) This section applies to the following committees:

1. The Advisory Committee for Milk.

2. The Advisory Committee on Transportation of Milk.

3. The Advisory Committee of Processors. O. Reg. 354/95, s. 18 (1).

(2) The chair or secretary of a committee may convene a meeting of the committee at any time by giving written notice to the members at least ten days before the date of the meeting, stating the time and place of the meeting. O. Reg. 354/95, s. 18 (2).

(3) Upon the written request of at least three members of a committee, the secretary shall convene a meeting of the committee by giving notice in accordance with subsection (2). O. Reg. 354/95, s. 18 (3).

19. Omitted (revokes other Regulations). O. Reg. 354/95, s. 19.

20. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 354/95, s. 20.

**Milk Act**  
**Loi sur le lait**

**R.R.O. 1990, REGULATION 760**

**MILK AND FARM-SEPARATED CREAM — PLAN**

Consolidation Period: From September 25, 2008 to the e-Laws currency date.

Last amendment: 334/08.

This Regulation is made in English only.

1. The plan in the Schedule is continued for the control and regulation of the producing and marketing within Ontario of milk and farm-separated cream. O. Reg. 345/95, s. 2.
2. The marketing board named in the Schedule is given all of the powers that are vested in a co-operative corporation incorporated under the [Co-operative Corporations Act](#). R.R.O. 1990, Reg. 760, s. 2.
3. The members of the marketing board shall be deemed to be the shareholders and directors thereof in the exercise of any of the powers mentioned in [section 2](#). R.R.O. 1990, Reg. 760, s. 3.

Schedule  
PLAN

Milk Act

1. This plan may be cited as the Ontario Milk and Farm-Separated Cream Plan.
2. This plan applies to the control and regulation of the producing and marketing within Ontario of milk and farm-separated cream.
3. In this plan,  
  
“cream” means farm-separated cream delivered to a plant in Ontario for manufacture into creamery butter;  
  
“marketing board” means the marketing board continued under the name Dairy Farmers of Ontario in section 4;  
  
“milk” means milk from cows;

“producer” means a producer engaged in the production of milk or cream.

4. The Ontario Milk Marketing Board is continued as a marketing board under the name Dairy Farmers of Ontario.

5. The marketing board shall be composed of not more than 12 members.

6. Revoked: O. Reg. 305/91, s. 1 (1).

7. Producers are divided into 12 regions as follows:

1. Region 1, comprising that part of the geographic area of Ottawa formerly known as the City of Cumberland, that part of the geographic area of Stormont, Dundas and Glengarry formerly known as the County of Glengarry and the geographic area of Prescott and Russell.

2. Region 2, comprising those parts of the geographic area of Stormont, Dundas and Glengarry formerly known as the Counties of Dundas and Stormont and the geographic area of Ottawa excluding the former City of Cumberland.

3. Region 3, comprising the geographic areas of Frontenac, Lanark, Leeds and Grenville, and Renfrew.

4. Region 4, comprising the geographic areas of Hastings, Lennox and Addington, Northumberland and Prince Edward.

5. Region 5, comprising the geographic areas of Durham, Kawartha Lakes, Peterborough, Toronto and York.

6. Region 6, comprising the geographic areas of Dufferin, Peel, Simcoe and Wellington.

7. Region 7, comprising the geographic areas of Brant, Haldimand, Halton, Hamilton, Niagara and Norfolk.

8. Region 8, comprising the geographic areas of Oxford and Waterloo.

9. Region 9, comprising the geographic areas of Chatham-Kent, Elgin, Essex, Lambton and Middlesex.

10. Region 10, comprising the geographic areas of Huron and Perth.

11. Region 11, comprising the geographic areas of Bruce and Grey.

12. Region 12, comprising the geographic area of Haliburton and the geographic areas (territorial districts) of Algoma, Cochrane, Kenora, Manitoulin, Muskoka, Nipissing, Parry Sound, Rainy River, Sudbury, Thunder Bay and Timiskaming.

8. One member of the marketing board shall be elected in each region in the election year prescribed for the region under section 19.

9. (1) Subject to subsection (3), no person is eligible to vote or be elected in the election of the marketing board unless the person is a licensed producer residing in the region in which the election takes place.

(2) Where a licensed producer is a corporation or partnership, the person eligible to vote or be elected in the election of the marketing board shall be the person, if any, designated by the corporation or partnership for that purpose.

(3) Where, by reason of absence or illness, a licensed producer is unable to cast a vote in the election, the producer may designate a member of his or her immediate family to vote on his or her behalf where the person designated,

(a) is the spouse or a parent, son or daughter of the licensed producer;

(b) is eighteen years of age or over; and

(c) resides on the farm of the licensed producer.

(3.1) In subsection (3),

“spouse” means,

(a) a spouse as defined in [section 1](#) of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage.

(4) No licensed producer is entitled to cast more than one ballot in any election.

10. (1) Nominations for election to the marketing board shall be submitted to the marketing board on or after the 1st day of September and not later than the 15th day of September in an election year.

(2) Revoked: O. Reg. 345/95, s. 3 (3).

(3) The marketing board shall not accept a nomination unless,

(a) the nominee is qualified under section 9;

(b) the nomination is in a form provided by the marketing board;

(c) the nomination bears the signature of the nominee indicating his or her acceptance of the nomination;

(d) the nomination bears the signatures of ten persons as nominators, each of whom is qualified under section 9; and

(e) the nomination was received not later than the 15th day of September in the election year.

11. (1) Where the marketing board is satisfied that nominations under section 10 are complete, the marketing board shall forthwith provide each nominee with the list of nominees for the region in respect of which he or she is nominated.

(2) A nominee may withdraw his or her nomination by notice in writing to the marketing board delivered or mailed so that it is received not later than the tenth day after the date of delivery or mailing to the nominee of the list of nominees for his or her region.

12. (1) Where not more than one person is a candidate for election to the marketing board in respect of a region, the marketing board shall declare such person elected to the marketing board by acclamation.

(2) Where two or more persons are candidates for election to the marketing board in respect of a region, the marketing board shall conduct an election.

13. (1) For each region in which an election is to be conducted, the marketing board shall appoint a returning officer and such deputy returning officers and other persons as it considers necessary for the conduct of the election.

(2)-(4) Revoked: O. Reg. 345/95, s. 3 (5).

14. (1) Where an election is to be conducted for a region, the marketing board shall mail or cause to be delivered one ballot to each licensed producer in the region,

(a) no later than October 15 in the election year, if the ballot is mailed; or

(b) no later than October 17 in the election year, if the ballot is delivered otherwise than by mail.

(2) Each ballot shall be in a form provided by the marketing board and shall be accompanied by,

(a) an envelope identified by the words "Ballot Envelope"; and

(b) a mailing envelope addressed to the returning officer appointed by the marketing board for the Region.

(2.1) If a licensed producer establishes to the satisfaction of the marketing board that the producer did not receive or has misplaced the ballot that the marketing board mailed or

delivered under subsection (1), the marketing board shall provide a substitute ballot to the producer and declare the original ballot void.

(3) A voter shall cast a vote by,

(a) placing a mark on the ballot in the box opposite the name of the candidate for whom the voter wishes to vote;

(b) sealing the marked ballot within the Ballot Envelope;

(c) affixing the voter's signature and licence number on the detachable portion of the Ballot Envelope in the spaces provided;

(d) sealing the Ballot Envelope within the mailing envelope; and

(e) mailing the mailing envelope, or consigning it for delivery, to the returning officer not later than the last Tuesday in October in the election year.

(4) The returning officer shall not accept a mailing envelope unless he or she is satisfied it was mailed or consigned for delivery not later than the last Tuesday in October in the election year.

(5) Where the returning officer accepts a mailing envelope, he or she shall, subject to subsection (5.1),

(a) remove the Ballot Envelope from the mailing envelope, remove the detachable portion of the Envelope, and deposit the Envelope in a sealed ballot box; and

(b) record, in the form provided by the marketing board, which producer has cast a vote.

(5.1) The returning officer shall not accept a Ballot Envelope if the detachable portion of the Envelope is not attached and completed in accordance with clause 14 (3) (c).

(6) The ballots shall be counted by the returning officer on the second Tuesday in November in the election year, and the returning officer shall,

(a) count the ballots in the presence of at least two persons eligible under section 9 to vote in the election;

(b) permit each candidate to be represented at the counting of the ballots by a scrutineer designated by the candidate;

(c) reject and keep separate every ballot,

(i) that he or she did not supply,



(ii) that contains votes for more than one candidate, or

(iii) upon which, or upon the Ballot Envelope containing which, there is any writing or mark by which the voter may be identified or where such ballot or Ballot Envelope has been so dealt with by the voter that he or she can thereby be identified;

(d) prepare and deliver to the marketing board, in the form provided therefor by the marketing board, a record of,

(i) the number of ballots cast,

(ii) the number of votes given and allowed for each candidate, and

(iii) the number of rejected ballots; and

(e) retain in safe custody, for such period of time as the marketing board directs,

(i) the detachable portion of the Ballot Envelopes, and

(ii) all the ballots, including the rejected ballots, if any.

15. (1) Where an election is conducted in respect of a region, the marketing board shall declare elected in the region the candidate who obtained the largest number of votes and shall notify the candidates of the results of the election.

(2) Any candidate may request a recounting of the ballots by notice in writing to the marketing board delivered or mailed so that it is received not later than seven days after the date of giving the notice referred to in subsection (1).

(3) Upon receipt of a notice under subsection (2), the marketing board shall conduct a recounting of the ballots and each candidate may designate a scrutineer for the purposes of such recounting.

(4) The election of a candidate on the basis of such recounting shall be final.

(5) Where, by reason of a tie vote or other cause, the election of a member to the marketing board in respect of a region is not determined upon the counting of the ballots, the marketing board shall declare the election void and shall conduct a further election within fifteen days from the date of such declaration.

16. (1) A member of the marketing board shall take office immediately following the adjournment of the annual meeting of producers.

(2) Despite subsection (1), if the member who would have otherwise held office until the day referred to in subsection (1) dies, resigns or ceases to be a licensed producer, the

newly elected member may take office on a day prior to the day referred to in subsection (1) that is agreed upon by the marketing board and the newly elected member.

(3) Once a member takes office, he or she shall hold office until his or her successor takes office.

16.1 A member of the marketing board ceases to be a member upon ceasing to be a licensed producer of milk or cream during his or her term of office.

17. At their first meeting after the annual meeting of producers referred to in section 16, the members of the marketing board shall elect from among themselves a chair and a vice-chair, and shall appoint a secretary and a treasurer who shall not be members of the marketing board.

18. A majority of the members of the marketing board constitutes a quorum whether or not a vacancy exists in the membership.

19. (1) The election year for a region established under this plan and mentioned in Column 1 of the Table shall be the year set out in Column 2 opposite it and every fourth year after that year.

Column 1	Column 2
Region 1	2008
Region 2	2005
Region 3	2006
Region 4	2007
Region 5	2008
Region 6	2005
Region 7	2006
Region 8	2007
Region 9	2008
Region 10	2005
Region 11	2006
Region 12	2007

(2) Despite subsection (1), the marketing board may cause an election to be held to elect a replacement member in a region represented by a member of the marketing board who dies, resigns or ceases to be a licensed producer, and the replacement member shall take office upon being elected and shall hold office until a successor is elected and takes office.

(3) An election held under subsection (2) shall be conducted in such manner and on such terms and conditions as the marketing board directs.

(4) Where an election is not held under subsection (2), the year in which the 15th day of September next following the date on which the member died, resigned or ceased to be a producer of milk falls shall be an election year for the region that was represented by such member in addition to any election year established for that region under subsection (1).

20. Revoked: O. Reg. 457/05, s. 7.

21. The marketing board may appoint an agent to conduct the election of members to the marketing board in accordance with this plan.

**JAMES LANSING AFFLECK et al.**

**-and -**

**THE ATTORNEY GENERAL OF ONTARIO AND THE  
ATTORNEY GENERAL OF CANADA**

Applicants

Respondents

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**AFFIDAVIT OF SERVICE**

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