COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Schmidt, 2014 ONCA 188
DATE: 20140311
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Weiler, Sharpe and Blair JJ.A.

BETWEEN

Her Majesty the Queen

Respondent on Appeal

and

Michael Schmidt

Applicant on Appeal

Derek From and Chris Schafer, for the appellant

Shannon Chace, Michael Dunn and Daniel Huffaker, for the respondent

Heard: February 5, 2014

On appeal from the convictions entered on September 28, 2011 by Justice Peter Tetley of the Ontario Court of Justice, sitting on appeal from the acquittals entered on January 20 2010 by Justice of the Peace P. Kowarsky.

Sharpe J.A.:

[1] The appellant, Michael Schmidt, is a milk farmer who produces and advocates the consumption of unpasteurized milk. The sale and distribution of unpasteurized milk and milk products is prohibited by the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 ("*HPPA*"). However, the *HPPA* does not prohibit the consumption of unpasteurized milk and an individual can legally

consume unpasteurized milk obtained from his or her own cow. The appellant provided unpasteurized milk and milk products to individuals who paid a capital sum to acquire a fractional interest in a cow in what he described as a “cow share agreement”. The appellant testified that cow-share members also paid an amount per litre to cover the cost of keeping the cow and producing the milk.

[2] The appellant was charged with several counts of selling and distributing of unpasteurized milk and cheese contrary to the *HPPA*, operating an unlicensed milk plant contrary to the *Milk Act*, R.S.O. 1990, c. M.12, and failing to obey an order of the Public Health Inspector. The appellant argued that he did not violate the *HPPA* or the *Milk Act* by providing unpasteurized milk to individuals who had entered into cow-share agreements and, in any event, submitted that those statutory prohibitions are contrary to the *Charter of Rights and Freedoms,* s. 7.

[3] At trial, the Justice of the Peace accepted the appellant’s argument that providing milk to those who had entered cow-share agreements was not caught by the legislation and acquitted the appellant on all charges.

[4] On appeal to the Ontario Court of Justice, the appeal judge found that the Justice of the Peace had erred in his approach to statutory interpretation. The appeal judge went on to consider the *Charter* arguments and concluded that there was no violation of the interests protected by s. 7 and that, given the preponderance of scientific evidence as to the risk to public health posed by

unpasteurized milk, the impugned legislation did not violate the principles of fundamental justice on the ground that it was arbitrary or overbroad. The appeal judge entered convictions on thirteen counts and imposed fines totaling $9,150 and one year of probation.

[5] The appellant appeals those convictions, with leave, to this court. Leave to appeal the sentence was refused. For the following reasons, I would dismiss the appeal.

FACTS

[6] The appellant is an experienced organic farmer with a deeply committed belief in the benefits of unpasteurized milk. The appellant endeavored to comply with the *HPPA* through his cow-share program. Cow-share members paid the appellant a capital sum ranging between $300 and $1200 and were required to pay a per litre charge for the services involved in keeping the cow, milking the cow, and bottling and transporting the milk. Although the capital sum of $300 was said to give a member a ¼ interest in a cow, the herd consisted of 24 cows and there were approximately 150 individual or family cow-share members.

[7] The cow-share agreements were oral in nature. Members were given a card but the cards did not contain the name of a cow and there was no other evidence that the name of the cow in which the member had a share was ever communicated. Nor was there any evidence that the agreements formally

transferred ownership in a cow from the appellant to the member. The members were not involved in the purchase, care, sale, or replacement of any cow nor were they involved in the management of the herd. The appellant provided cow-share members with a handbook outlining the scheme. It states: “As a cow-share member, you are a part owner of the milk production. In effect, you are paying [the appellant and his wife] to look after the cows and produce the milk…”

[8] The appellant contends that the cow-share agreements are a form of agistment, a traditional common law arrangement whereby the agister cares for cattle and livestock owned by others for remuneration.

[9] The appellant did not have a licence to operate his plant pursuant to the *Milk Act* and he was subject to a 1994 cease and desist order issued by the Public Health Inspector forbidding the appellant from storing and displaying unpasteurized milk and milk products.

[10] The Crown led evidence as to the health risks and benefits of consuming unpasteurized milk. The appellant led evidence that suggested that there were potential health benefits from the consumption of unpasteurized milk including possible protection against asthma and allergies. He pointed out that several American states permit some form of unpasteurized milk sale to the public and that there was no suggestion that anyone had suffered ill-effects from consuming the milk he produced. The Crown highlighted the fact that even the evidence

relied on by the appellant concludes that despite the potential benefits, because of the risks posed by pathogens, consumption of unpasteurized milk is not recommended.

LEGISLATION

[11] The *HPPA*, s. 18, prohibits the sale, delivery and distribution of unpasteurized milk and milk products:

> **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*.
>
> **Milk products**
>
> (2) No person shall sell, offer for sale, deliver or distribute a milk product 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*.
>
> **Exception**
>
> (3) Subsection (1) does not apply in respect of milk or cream that is sold, offered for sale, delivered or distributed to a plant licensed under the Milk Act.

The *HPPA* does not define the terms “sale”, “deliver” or “distribute”.

[12] The *Milk Act,* s. 15, prohibits the operation of a plant without a licence:

> **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.

[13] The following definitions are found in the *Milk Act,* s. 1:

> "distributor" means a person engaged in selling or distributing fluid milk products directly or indirectly to consumers; ("distributeur")
>
> ...
>
> "milk product" means any product processed or derived in whole or in part from milk, and includes cream, butter, cheese, cottage cheese, condensed milk, milk powder, dry milk, ice cream, ice cream mix, casein, malted milk, sherbet and such other products as are designated as milk products in the regulations; ("produit du lait")
>
> ...
>
> "processing" means heating, pasteurizing, evaporating, drying, churning, freezing, packaging, packing, 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; ("transformation")
>
> "processor" means a person engaged in the processing of milk products or fluid milk products; ("préposé à la transformation")

TRIAL AND APPEAL DECISIONS

Trial before the Justice of the Peace

[14] At trial, the Justice of the Peace found that the appellant's cow-share program was essentially a private scheme that was not caught by either the *HPPA* or the *Milk Act.* The Justice of the Peace held that the legislation should be given a restrictive interpretation so that it did not apply to what he viewed as essentially a private arrangement. As he held that the legislation did not apply,

the Justice of the Peace did not find it necessary to consider the *Charter* arguments raised by the appellant.

Appeal to the Ontario Court of Justice

[15] The appeal judge dismissed the Crown's appeal with respect to one count of selling unpasteurized cheese to a non cow-share member on the basis of the Justice of the Peace's conclusion that he had a reasonable doubt as to whether the individual had paid for the cheese. The appeal judge also dismissed the Crown's appeal from acquittal for the alleged breach of the twelve-year old order of the Public Health Inspector. However, the appeal judge disagreed with the Justice of the Peace's interpretation of the legislation and the cow-share agreements and found that by operating his plant and selling and distributing milk to cow-share members, the appellant had violated both statutes. The appeal judge went on to consider and reject the contention that the legislation violated s. 7 of the *Charter*.

MOTION TO ADDUCE FRESH EVIDENCE

[16] The appellant moves to introduce as fresh evidence an affidavit of an expert witness giving an opinion based on a recently published article as to the protective effect of unpasteurized milk in relation to childhood asthma and atopy.

ISSUES

[17] The appellant raises three issues on appeal to this court:

1. Did the appeal judge err in his interpretation of the *HPPA* and the *Milk Act* and in failing to give due recognition to the cow-share plan?
2. Should the proposed fresh evidence be admitted?
3. Did the appeal judge err in concluding that neither the *HPPA* nor the *Milk Act* violated s. 7 of the *Charter*?

ANALYSIS

1. Did the appeal judge err in his interpretation of the *HPPA* and the *Milk Act* and in failing to give due recognition to the cow-share plan?

Statutory purpose

[18] The *HPPA*, s. 2 states that one of the purposes of the Act is "the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario". Similarly, one of the stated purposes of the *Milk Act*, s. 2 is "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".

[19] Acting in pursuit of these purposes, the legislature has determined that the consumption of unpasteurized milk poses serious risks to public health. While the scientific evidence relates primarily to the *Charter* issue, a brief review of that evidence at this point will provide context for the discussion of statutory interpretation.

Evidence of harm

[20] The record in this case reveals that there is a substantial body of scientific evidence that pasteurization kills pathogens found in raw milk. Those pathogens can cause serious illness. Pasteurization effectively reduces the risk to public health posed by pathogens to an acceptable level. Even the appellant's experts concede that their view that unpasteurized milk is safe represents a minority within the scientific community. A study relied on by the appellant that suggested that unpasteurized milk may have certain health benefits cautioned that "consumption of unpasteurized farm milk cannot be recommended as a preventative measure" because of the risk of illness. After a careful review of the evidence, the appeal judge concluded, at para. 85:

> The preponderance of scientific evidence cited offers factual support for the assertion that human consumption of unpasteurized milk may be hazardous to one's heath or at least more hazardous than the health risk presented by the consumption of pasteurized milk.

There was ample evidence to support that finding.

[21] The appellant and his followers disagree with the scientific evidence and have what appears to be a sincere and honest belief in the benefits of unpasteurized milk. 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 public health in Ontario is one that must be respected by this court.

Statutory interpretation

[22] The appellant argues that as the *HPPA* does not define the term "distribute", reference should be had to the definition of "distributor" in the *Milk Act*, a closely related statute. Under that definition, a distributor is a "person engaged in selling or distributing fluid milk products" and the definition of fluid milk products points to milk that has been pasteurized. From this chain of reasoning, the appellant argues that as he was not distributing pasteurized milk, he did not "distribute" unpasteurized milk within the meaning of the *HPPA*, s. 18. This tortured submission must be rejected. It would produce an absurd result that would eviscerate s. 18 of any meaning.

[23] In my view, the appeal judge applied the correct approach to the interpretation of s. 18. It is well-established that public welfare legislation is to be accorded a broad and liberal interpretation that is consistent with its purpose. Narrow interpretations that would frustrate the legislature's public welfare objectives are to be avoided: *Blue Mountain Resorts Ltd. v. Bok*, 2013 ONCA 75 at para. 24-25; *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.) at para. 16

[24] The transactions involving unpasteurized milk that form the subject of the charges fall squarely with the ordinary meaning of the words “sale” and “distribute” as does the appellant’s dairy operation fall within the ordinary meaning of “plant” and “premises in which milk or cream or milk products are processed”. To conclude otherwise would be to ignore the jurisprudence on proper approach to the interpretation of public welfare legislation and the direction given in the *Legislation Act, 2006* S.O. 2006, c.21, Sched. F, s. 64, that all legislation is deemed to be remedial and should be given a liberal and purposive interpretation.

Cow-share agreements

[25] I do not accept the submission that the cow-share agreements amount to an arrangement that takes the appellant’s activities outside the reach of the *HPPA* and the *Milk Act*. 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 to 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. As the appeal judge put it, at para. 51, “the cow-share arrangement approximates membership in a ‘big box’ store that requires a fee to be paid in order to gain access to the products located therein.” 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 the public from risks to health: *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685 at paras. 45-47.

[26] Within the limits of the production capacity of the appellant’s dairy farm, any member of the public can acquire unpasteurized milk by becoming a cow-share member. In my view, the cow-share arrangement is nothing more than a marketing and distribution scheme that is offered to the public at large by the appellant. I accordingly cannot accept the Justice of the Peace’s interpretation that the cow-share arrangement constitutes a private arrangement to which s. 18 was not intended to apply.

[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 member of the public can procure unpasteurized milk.

[28] I conclude that there is no merit in the appellant’s contention that he is not engaged in the sale, delivery and distribution of unpasteurized milk and milk

products, contrary to the *HPPA*, s. 18 or that he does not operate a plant without a licence contrary to the *Milk Act*, s. 15.

2. Should the proposed fresh evidence be admitted?

[29] The test for the admission of fresh evidence on appeal was laid down in *Palmer v. The Queen,* [1980] 1 S.C.R. 759, at p. 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[30] It is my view that the proposed fresh evidence should not be admitted. Assuming that the appellant is able to satisfy the first three criteria, I fail to see how this evidence could be expected to have affected the result at trial. First, it essentially replicates evidence that was led at trial to the effect that unpasteurized milk could benefit children who have asthma and allergies. Second, like the evidence led at trial, the recent study concludes that despite

those possible beneficial effects, “on the basis of current knowledge, raw milk consumption cannot be recommended because it might contain pathogens”.

[31] In my view, the proposed fresh evidence supports the position of the respondent that on the basis of current scientific knowledge, the consumption of unpasteurized milk poses a risk to public health and cannot be recommended. Such evidence could not have affected the result and for that reason, should not be admitted on appeal.

3. Did the appeal judge err in concluding that neither the *HPPA* nor the *Milk Act* violated s. 7 of the *Charter*?

[32] To satisfy the onus imposed on the appellant to establish a breach of s. 7 of the Charter, the appellant must show that the impugned legislation: (a) interferes with life, liberty or security of the person, and (b) that it does so in a manner that does not comport with the principles of fundamental justice.

Standing

[33] I agree with the appellant that, as conceded by the respondent, the appeal judge erred by concluding that the appellant lacks standing to base his *Charter* challenge on any infringement of the s. 7 rights of the cow-share members supplied by the appellant: see *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 at pp. 313-314.

Security of the person

[34] The appellant contends that by banning the sale and distribution of unpasteurized milk and thereby depriving cow-share members of the right to acquire a product they deem beneficial to their health, the *HPPA* violates their right to security of the person.

[35] I disagree with that submission. The impugned legislation prohibits the appellant from selling or distributing a product that certain individuals think beneficial to their health. As this court held in *R. v. Mernagh,* 2013 ONCA 67 at paras. 66 to 74, dealing with the consumption of marijuana, a s. 7 violation cannot be made out on the basis of an individual's subjective belief that a banned substance would benefit his or her health. There is no scientific or medical evidence of the kind contemplated in *Mernagh* to support the proposition that consumption of unpasteurized milk would benefit the health of any cow-share member. This case is readily distinguished from *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.) where there was medical evidence to substantiate the claim that the health of the right's claimant would improve if he were allowed to consume marijuana.

[36] Nor does the ban on the sale and distribution of unpasteurized milk constitute an infringement of security of the person akin to that encountered in cases where the state seeks to administer medical treatment without the individual's consent: see e.g. *Fleming v. Reid*,(1991), 4 O.R. (3d) 74 (C.A.). In

those cases, by administering unwanted medical treatment, the state interferes with the individual's bodily integrity. In this case, the ban simply prevents an individual from acquiring a product that the individual subjectively believes would be beneficial.

Liberty

[37] The appellant argues that the impugned legislation infringes the liberty interest by limiting his right to freedom of contract and the freedom of the cow-share members to make a decision of fundamental personal importance.

[38] As the appellant candidly conceded in oral argument, in making this submission, the appellant invites us to depart from the existing jurisprudence. While the Supreme Court of Canada has not foreclosed the possibility that s. 7 may evolve to protect certain economic rights such as a basic minimum level of subsistence, the proposition that s. 7 protects freedom of contract or the right to engage in the economic activity of one's choice has been rejected. In *Siemens v. Manitoba (Attorney General),* 2003 SCC 3 at para. 46, the Supreme Court held that "[t]he ability to generate business revenue by one's chosen means is not a right protected under s. 7 of the *Charter.*" In *Edwards Books and Art Ltd. v. R.,* [1986] 2 S.C.R. 713 at pp. 785-6, Dickson C.J. held that the right to liberty protected by s. 7 "is not synonymous with unconstrained freedom" and "does not extend to an unconstrained right to transact business whenever one wishes."

Even if it were in the power of the court to do so, I can see no reason to depart from these authorities on the facts of this case.

[39] I agree with the respondent that the appellant's argument that the *Ontario Human Rights Code*, s. 3, recognizing the right to contract on equal terms without discrimination on enumerated grounds, does not create a free standing right to freedom of contract.

[40] I also agree with the respondent that preventing an individual from drinking unpasteurized milk does not fall within the "irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference": *Godbout v. Longueuil (City),* [1997] 3 S.C.R. 844 at para. 66. In my view, the appellant's argument to the contrary cannot be accepted in the face of the holding in *R. v. Malmo-Levine,* 2003 SCC 74, at para. 86, that "the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle." Lifestyle choices as to food or substances to be consumed do not attract *Charter* protection as "[a] society that extended constitutional protection to any and all such lifestyles would be ungovernable." Such choices, held the court, citing *Godbout* at para. 66, are not "basic choices going to the core of what it means to enjoy individual dignity and independence".

[41] Finally, the appellant submits that security of the person is engaged because the appellant is liable to probation and pay a fine and, if the fine is not paid, to imprisonment.

[42] I disagree.

[43] The statutory terms of probation (*Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 72(2)) – that the defendant not commit the same or any related or similar offence, or any offence that is punishable by imprisonment; appear before the court as and when required, and notify the court of any change in the defendant's address – do not have a significant impact on the appellant's liberty.

[44] This court has held that the risk of imprisonment in default of payment of a fine under the *Provincial Offences Act* is sufficiently remote that it does not engage the liberty interest under s. 7: *R. v. Polewsky* (2005), 202 C.C.C. (3d) 257 (Ont. C.A.), at para. 4.

Principles of fundamental justice

[45] If there is an infringement of life, liberty and security of the person, the appellant must show that such infringement is not in accord with the principles of fundamental justice. The appellant submits that s. 18 of the *HPPA* and s. 15 of the *Milk Act* violate the principles of fundamental justice because they are arbitrary and overbroad.

[46] A law is arbitrary where there is "*no connection* to its objective" (emphasis in original): *Bedford v. Canada*, 2013 SCC 72, at para 111. A law is overbroad "where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts" (emphasis in original): *Bedford*, at para 112. The scientific evidence that I have already mentioned easily reaches the standard of "sufficient evidence to give rise to a reasoned apprehension of harm to permit the legislature to act": *Cochrane v. Ontario (A.G.),* 2008 ONCA 718, at para. 29, leave to appeal refused [2009] SCCA No. 105; *R. v. Malmo-Levine* at para. 133. The law does not offend the overbreadth principle by targeting all unpasteurized milk. There is no evidence to suggest that the legislature could somehow narrow the reach of the legislation and still achieve it purpose of protecting public health.

Section 1

[47] As I have found that there is no violation of s. 7, it is unnecessary for me to consider whether any violation is justified as a reasonable limit prescribed by law under s. 1 of the *Charter*.

CONCLUSION

[48] For these reasons, I would dismiss the appeal.

"Robert J. Sharpe J.A."
I agree K.M. Weiler J.A."
"I agree R.A. Blair J.A.

Released: March 11, 2014