

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

(Respondent)

- and -

MICHAEL SCHMIDT

(Applicant)

NOTICE OF MOTION FOR LEAVE TO APPEAL
PURSUANT TO S. 131 of the
PROVINCIAL OFFENCES ACT

TAKE NOTICE that a motion will be made before the presiding judge at Osgoode Hall, 130 Queen Street West, Toronto, Ontario on Friday, January 20, 2012 at 10:00 a.m. or as soon after that time as this motion can be heard, for an order under s. 131 of the Provincial Offences Act granting leave to appeal from the judgment of Justice Peter Tetley given on September 28, 2011 at Newmarket, Ontario, allowing, in part, the appeal by Her Majesty the Queen from the judgment of Justice of the Peace P. Kowarsky given on January 21, 2010 acquitting Michael Schmidt on charges of:

- Operating a plant without a licence, contrary to ss. 15(1) of the *Milk Act*, R.S.O. 1990, Chapter M-12
- Selling or distributing unpasteurized milk, contrary to ss. 18(1) of the *Health Protection and Promotion Act*, R.S.O. 1990, Chapter H-7
- Selling or distributing unpasteurized milk products, contrary to ss. 18(2) of the *Health Protection and Promotion Act*, R.S.O. 1990, Chapter H-7,

and from the judgment of Justice Peter Tetley given on November 25, 2011 regarding the sentence for the above-noted offences.

TAKE NOTICE that the applicant will also seek an extension of time for this motion should it prove necessary.

THE SPECIAL GROUNDS FOR LEAVE TO APPEAL ARE:

1. The applicant was acquitted at trial but has now been convicted on appeal.
2. The interpretation of the relevant sections of the *Milk Act* and the *Health Protection and Promotion Act* have never previously been considered by a court in the Province of Ontario.
3. The judgment introduces uncertainty into the law, making it impossible for individuals who are similarly situated to the applicant to determine whether they are breaching the law or not.
4. The judgment personally affects approximately 150 Ontario individuals or families who believed themselves to be in a contractual relationship (referred to in the proceedings below as “cow-sharing”) with the applicant Michael Schmidt, which relationship purported to give them certain rights to property that are now placed in limbo as a result of the judgment.
5. There are several hundred other Ontario residents who are known to belong to other cow-sharing programs similar to that of Michael Schmidt’s, whose rights are also affected by the judgment.
6. Thousands of Ontario residents are either current or would-be consumers of unpasteurized milk to whom the interpretation of the aforementioned statutes has significant importance for health reasons.
7. The interpretation of the word “distribute” in the aforementioned statutes potentially affects approximately 6,000 dairy farmers in Ontario, while the interpretation of the word “plant” potentially affects every Ontario householder and restaurateur.

8. The case involves constitutional issues pertaining to the interpretation of “security of the person” under s. 7 of the *Canadian Charter of Rights and Freedoms*, including the right of an individual to determine what foods and beverages he or she puts into his or her own body; and as such, the issue is of potential interest to all Canadians because it affects their daily lives.
9. The case involves the interpretation of the word “liberty” under s. 7 of the *Charter* and challenges the restrictive and highly subjective interpretations which Canadian courts have hitherto placed on that word; as such, the issue is of potential interest to all Canadians.
10. The case involves a constitutional claim of discrimination under s. 15 of the *Charter* on the basis of residence, and is therefore of potential issue to all Canadians.
11. The Premier of Ontario personally expressed his view of the importance of this case prior to the appeal below, saying that he had a “responsibility to take this to a higher court and give the judge there an opportunity to speak to this.”
12. The case has received wide publicity in all major media and has demonstrated itself to be of great interest to the Canadian public.

THE GROUNDS FOR APPEAL ARE:

1. The learned judge erred by denying the accused natural justice and a fair, impartial appeal hearing, and in particular by:
 - a. Relying upon numerous purported grounds of appeal which were not advanced by the appellants below (i.e. the prosecutors) either in their factum or in oral argument and which the applicant therefore had no opportunity to address; and

- b. Conducting his own legal research subsequent to the appeal hearing and relying upon extensive jurisprudence which had not been referred to by any of the parties, without notifying counsel or providing them with an opportunity to make response thereto.
- 2. The learned judge erred by failing to apply proper rules of statutory interpretation to the word “distribute” as used in the *Health Protection and Promotion Act*, and in particular:
 - a. By failing to consider the definition of “distributor” contained in the *Milk Act*, a statute which is *in pari materia* with the *Health Protection and Promotion Act*;
 - b. By failing to apply the plain and ordinary meaning of “distribute” which connotes multiple recipients rather than a single recipient; and
 - c. By failing to interpret “distribute” in a manner consistent with the acknowledged principle, applied routinely in Ontario, that small gifts of unpasteurized milk made by farmers do not contravene the law.
- 3. The learned judge erred by failing to apply proper rules of statutory interpretation to the word “plant” as it is used in the *Milk Act*, and in particular:
 - a. By failing to look at the technical statutory definitions of “plant” and “processing” contained within the statute itself; and
 - b. By failing to consider the wider consequences and impact on Ontarians of applying a broad, rather than a restrictive, interpretation of those terms.

4. The learned judge erred on questions relating to the law of contract, and in particular:
 - a. He failed to comprehend and apply the nature and effect of contracts of agistment;
 - b. He gave undue weight to the purportedly defective formalities of the cow-sharing contract, rather than focusing on the substance; and
 - c. He concluded that the contracts between Michael Schmidt and cow-share members were essentially shams, without taking into account the jurisprudence on the subject of sham contracts and in the absence of the type of evidence that would have been necessary to prove that the contracts were shams.
5. The learned judge erred in holding that Mr. Schmidt did not have standing to advance constitutional claims on behalf of raw milk consumers, and in particular:
 - a. He contradicted his own order of December 17, 2010 which explicitly permitted Mr. Schmidt to advance constitutional challenges on behalf of raw milk consumers James McLaren and Eric Bryant;
 - b. He failed to apply the correct test for standing, namely the principle that no-one may be convicted, either of a criminal or a regulatory offence, under a law which is unconstitutional;
 - c. Even in applying his own erroneous test for standing, he failed to apply it appropriately to the case before him by holding that consumers of raw milk have other more reasonable and effective ways to challenge the statutes; and

- d. He conflated the concept of an individual's standing to bring a matter before the court with the availability of a constitutional remedy.
6. The learned judge erred in failing to give a large and liberal interpretation and application to the concepts of "liberty" and "security of the person" under the *Charter*.
 7. The learned judge erred by failing to apply the principle that decisions of fundamental personal importance engage an individual's liberty interest and in failing to consider the evidence that Mr. Schmidt meets this test.
 8. The learned judge erred in failing to find that the exposure to ruinous financial penalties are "true penal consequences" which engage an individual's liberty interest and in failing to consider the evidence that Mr. Schmidt meets this test.
 9. The learned judge erred in failing to find that Mr. Schmidt's liberty was at stake by concluding that "the prospect of a jail term arising in this matter is extremely remote," when in fact the prospect of a jail term for Mr. Schmidt is highly probable.
 10. The learned judge erred in failing to find that the rights of individuals to determine what foods and beverages they consume falls within the ambit of "security of the person", and in failing to consider the evidence that Mr. McLaren, Mr. Bryant and other cow-share members met this test.
 11. The learned judge erred in failing to find that the impugned legislation, which infringes the section 7 rights of both Mr. Schmidt and consumers, does so in a manner that is not consistent with the principles of fundamental justice, since it is both arbitrary and overbroad.
 12. The learned judge erred in failing to comprehend the overall scheme of the *Charter*, as demonstrated by paragraph 96 of his decision, thereby rendering all of his *Charter*-related reasoning suspect.
 13. The learned judge erred in failing to consider that the purpose of the *Health Protection and Promotion Act*, which includes "the promotion and protection

of the health of the people of Ontario” should be interpreted in a manner that will permit James McLaren, Eric Bryant and other cow-share members to obtain the health benefits which they have observed raw milk to provide them with.

14. The learned judge erred in failing to find that the distinction between on-farm and off-farm residency was an analogous ground for a complaint of unequal treatment under s. 15 of the *Charter* and that the statutes discriminate contrary to the *Charter*.
15. The learned judge erred in failing to appreciate the law on “reading down” statutes to ensure that their interpretation conforms to the requirements of the *Charter*, as a result of which he concluded that no remedy would be available to consumers who established a constitutional right to acquire raw milk, instead of concluding that the impugned legislation should be interpreted to permit cow-share agreements, in order to ensure those consumers’ rights.
16. The learned judge erred in imposing a sentence in an amount which the evidence disclosed that the applicant could not possibly pay, and in assuming that other people would pay the fine on behalf of the applicant.
17. Such further and other grounds as counsel may advise and this honourable court permit.

IN SUPPORT OF THIS MOTION THE APPLICANT RELIES UPON THE FOLLOWING:

1. Provincial Offences Act, section 131 and other relevant sections
2. Rules of the Court of Appeal in Appeals under the Provincial Offences Act, O.Reg. 721/94, sections 3 and 7
3. The documents and transcripts that will be filed with the motion record pursuant to rule 3(9).
4. Affidavit of Christopher Schafer, to be served with the motion record.
5. Such further and other evidence as counsel may advise and this honourable court permit.

THE RELIEF SOUGHT IS:

An order granting leave to appeal from the judgments of Justice Peter Tetley dated September 28, 2011 and November 25, 2011.

The estimated time for the hearing of the motion is 3 hours.

The applicant's address for service is:

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The Applicant's address is:

Michael Schmidt,
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DATED AT BELLEVILLE, ONTARIO this 15th day of December, 2011

A handwritten signature in dark ink, reading "Karen Selick", is written over a horizontal line.

Karen Selick
Counsel for the applicant Michael Schmidt

To: Registrar,
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130 Queen Street West
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And to:

Mr. Michael Dunn & Ms. Shannon Chace,
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Her Majesty the Queen
Respondent

v.

Michael Schmidt
Applicant

Court File No.

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Toronto, Ontario

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