

**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

Intervenors

APPLICATION UNDER Rule 14.05(3)(d) and (g.1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194

**FACTUM OF THE APPELLANTS,
DAIRY FARMERS OF ONTARIO AND DAIRY FARMERS OF CANADA**

November 7, 2018

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B E T W E E N:

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PART I - IDENTITY OF APPELLANTS, PRIOR COURT & RESULT

1. The Appellants Dairy Farmers of Ontario (“DFO”) and Dairy Farmers of Canada (“DFC”) appeal from the October 26, 2018 order of Master Graham (the “Decision”)¹ dismissing DFO and

¹ Order and Endorsement of Master Graham, October 26, 2018 [Decision], Appeal Book and Compendium [AB], Tab 2.

DFC's motion for leave to intervene as added parties pursuant to Rule 13.01 of the *Rules of Civil Procedure*.²

PART II - OVERVIEW

2. DFO and DFC are key players in Ontario's and Canada's dairy industry. DFO wears a number of hats in fulfilling its mandate: as a regulator, as a policy-making body, and as the public voice and educator of Ontario's licensed dairy farmers. Similarly, DFC coordinates dairy farmer policy-making at the national level and is the voice and educator of dairy farmers across Canada.

3. DFO and DFC seek leave to intervene as added parties in the underlying application, which is a challenge under the *Canadian Charter of Rights and Freedoms*³ to the constitutionality of federal and provincial laws mandating that all milk that is sold and distributed to consumers be pasteurized. The 25 Applicants in the underlying application include two unlicensed dairy farmers claiming a constitutional right to commercially produce and sell unpasteurized milk to members of the public.

4. DFO and DFC seek to intervene in order to provide the Court with evidence of the on-the-ground realities of on-farm food safety requirements and the important role that pasteurization plays in the regulatory system the Applicants seek to be exempted from. DFO and DFC also seek to be able to test the Applicants' evidence by way of cross-examination. DFO and DFC have a key role to play in the Court's evaluation of the factual context, particularly when potentially

² RRO 1990, Reg 194 [Rules].

³ Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter]; Fresh as Amended Notice of Application dated April 25, 2018 [NOA], AB, Tab 3 at paras 1-2.

considering section 1 justification under the *Charter*, including minimal impairment and the balancing of salutary and deleterious effects.

5. The Respondents, the Attorney General of Ontario (“Ontario”) and the Attorney General of Canada (“Canada”) consent to DFO and DFC’s intervention. Ontario and Canada represent the government’s and the general public’s interests; these differ from the interests of DFO and DFC.

6. The Master’s brief eight-paragraph Decision denying the motion for leave to intervene contains fundamental legal errors and should be set aside. In particular, the Master erred in law in finding that the Supreme Court of Canada’s 1978 decision in *Northwestern Utilities et al v Edmonton*⁴ precludes granting leave to intervene to DFO and DFC, rather than addressing the test for intervention in Rule 13.01. *Northwestern* does not apply, as there is no decision of DFO at issue, and DFC is a voluntary association that cannot render binding decisions. Even if, hypothetically, a DFO decision were under appeal, DFO is permitted under the statutory scheme to fully participate in appeals of its own decisions. In any event, *Northwestern* has been seriously circumscribed over the four decades since it was decided.

7. DFO and DFC meet the requirements of Rule 13.01. They have an interest in the constitutional issues raised in the underlying proceeding, and can provide a useful, distinct perspective without unduly delaying the proceedings or prejudicing the determination of the rights of the parties. They should be permitted to intervene as added parties.

⁴ [1979] 1 SCR 684 [*Northwestern*].

PART III - SUMMARY OF FACTS

A. The Nature of the Underlying Application

8. The Applicants (Respondents in Appeal) are producers and consumers of unpasteurized raw milk and/or raw milk products (referred to for simplicity as “raw milk”).⁵ They seek constitutional exemptions from, and challenge the constitutional validity of, the following legislation prohibiting the marketing and distribution of unpasteurized raw milk:⁶ (a) s. 18 of Ontario’s *Health Protection and Promotion Act* (“HPPA”);⁷ (b) portions of Ontario’s *Milk Act*⁸ and certain regulations enacted thereunder;⁹ and (c) s. B.08.002.2(1) of the federal *Food and Drug Regulations* (“FDR”).¹⁰ In support of their claim that these provisions violate ss. 2(a), 7, and 15 of the *Charter*, the Applicants rely on 29 affidavits, including three expert affidavits attaching multiple studies and reports, in an application record exceeding 3,400 pages in length.¹¹

9. The Applicants, notably, Ms. Vander Hout as a representative of Glencolton Farms, bring this application following a series of enforcement proceedings, in which DFO and DFC did not participate, dating back many years brought against, *inter alia*, her husband, Michael Schmidt (the owner and operator of Glencolton Farms), for selling and distributing raw milk and raw milk products contrary to the *HPPA*.¹² Those proceedings culminated in a permanent injunction

⁵ NOA, *supra* note 3 AB, Tab 3 at paras 3-4.

⁶ *Ibid* at para 1.

⁷ RSO 1990, c H.7 [*HPPA*].

⁸ RSO 1990, c M.12 [*Milk Act*].

⁹ The Applicants seek exemptions under s 7(1)(11) of the *Milk Act* and ss 5(r.1) and 5(r.2) of *Milk and Farm-Separated Cream – Marketing*, O Reg 354/95 [*Milk Marketing Regulation*]: see NOA, *supra* note 3, AB, Tab 3 at para 1(a). In the alternative, the Applicants seek an order that “portions of the *Milk Act* and its regulations” are contrary to the *Charter* and are therefore of no force and effect: see NOA, *supra* note 3, AB, Tab 3 at para 1(d)(i).

¹⁰ CRC, c 870 [*FDR*].

¹¹ The Application Record is 3,460 pages in length, divided into 8 volumes. The Applicants summarize that evidence in the Affidavit of Linda Robinson, sworn October 11, 2018, AB, Tab 8 at paras 14-19 [Affidavit of L Robinson].

¹² Affidavit of L Robinson, *supra* note 11, AB, Tab 8 at para 3 and Exhibits A and B.

against some of the Applicants in January 2018.¹³ The Applicants unsuccessfully sought a stay pending appeal of the permanent injunction to the Court of Appeal for Ontario¹⁴ and subsequently commenced these *Charter* proceedings.

B. The Appellants, Proposed Intervenors

i. Dairy Farmers of Ontario

10. DFO, the provincial milk marketing board for Ontario, represents approximately 3,500 licensed dairy farms in the province, which, by law, may only market milk to DFO.¹⁵ DFO's twelve-member Board of Directors is comprised of licensed Ontario dairy farmers elected by other licensed dairy farmers.¹⁶ DFO is not an agency of the provincial government.¹⁷

11. DFO receives broad regulatory authority respecting Ontario's licensed dairy farmers through delegation from the Ontario Farm Products Marketing Commission ("the Commission") pursuant to the *Milk Act*, notably, in respect of milk quota, pricing, and marketing.¹⁸ In addition, since 1998 DFO has been designated, by agreement, as the authority to administer the *Milk and Milk Products Regulation ("Regulation 761")*¹⁹ concerning raw milk quality testing, dairy farm inspections, milk transportation, and bulk tank grader requirements.²⁰

12. The key on-farm food safety program developed and administered by DFO is the Raw Milk Quality Program ("RMQP").²¹ Through the RMQP, DFO sets out requirements for Grade A farms

¹³ Affidavit of L Robinson, *supra* note 11, AB, Tab 8, Exhibit B at para 128. See also *R v Schmidt*, 2014 ONCA 188.

¹⁴ Affidavit of L Robinson, *supra* note 11, AB, Tab 8, Exhibit A.

¹⁵ Affidavit of Graham Lloyd, affirmed September 25, 2018, AB, Tab 7 at paras 2-4 [Affidavit of G Lloyd].

¹⁶ *Ibid* at para 7; *Milk and Farm-Separated Cream – Plan*, RRO 1990, Reg 760, s 5 [Plan].

¹⁷ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 7; *Plan*, *supra* note 16, ss 8-9.

¹⁸ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at paras 2, 4 and 6. The statutory scheme for appeals from DFO decisions is addressed below at paras 35 to 44.

¹⁹ RRO 1990, Reg 761 [Regulation 761].

²⁰ *Ibid*; Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 5.

²¹ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 9.

(i.e., farms that produce milk that meets DFO's production standards), raw milk quality standards, milk and water sample collection and sample testing, farm inspections, truck-tank inspections, and bulk tank milk grader certification, recertification, and monitoring.²² DFO ensures the compliance of all licensed producers, transporters, and bulk tank milk graders with provincial regulations and/or DFO policies for milk safety and quality, farmyards, lanes, biosecurity, and other related matters.²³ DFO also maintains Quota and Milk Transportation Policies,²⁴ which deal with, among other things, bulk tank installation, inspection, sanitization and cleanliness, as well as the length of time that milk can be kept in bulk tanks.²⁵ In addition, DFO supervises, reviews, and educates Ontario's licensed dairy producers regarding milk safety and various other matters.²⁶

13. In short, DFO wears a number of hats in fulfilling its mandate: as a regulator, as a policy-making body, and as the public voice and educator of Ontario's licensed dairy farmers.²⁷

ii. Dairy Farmers of Canada

14. DFC is a national non-profit organization founded in 1934 and represents Canada's approximately 12,000 licensed dairy farms.²⁸ DFC's Board of Directors is made up of members from each provincial dairy board or association, including DFO.²⁹

²² *Ibid* at para 10 and Exhibit A.

²³ *Ibid* at para 10. Processors are then responsible for pasteurization and other equivalent processes under requirements created and enforced by the provincial government.

²⁴ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7, Exhibit B.

²⁵ *Ibid* at para 12.

²⁶ Transcript of cross-examination of Graham Lloyd, October 15, 2018, AB, Tab 6, p 50, lines 5-15 [Cross-examination of G Lloyd].

²⁷ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at paras 4-6, 8-12.

²⁸ *Ibid* at para 13.

²⁹ *Ibid* at para 14. The Canadian Dairy Network is also a DFC member.

15. DFC is an observer on the dairy policy-making body, the Canadian Milk Supply Management Committee (“CMSMC”), an organization chaired by the Canadian Dairy Commission (“CDC”), a federal Crown corporation.³⁰ In addition, DFC has many years of experience as a participant in various international organizations, including the Codex Alimentarius Commission and the International Dairy Federation.³¹

16. DFC also coordinates various programs with Canada’s dairy boards,³² including the proAction® Program, respecting raw milk safety and quality,³³ animal care and welfare, dairy animal traceability, farm and animal biosecurity, and environmental sustainability.³⁴ The proAction Program builds on the Canadian Quality Milk Program (“CQM”), a science-based program for milk quality, based on “HACCP” (Hazard Analysis Critical Control Points) and recognized by Canada’s federal government.³⁵

17. DFO and the other provincial milk marketing boards have made DFC’s proAction Program a condition for farmers to be issued provincial producer licenses allowing them to produce and market milk.³⁶ The proAction Program, like DFO’s policies, is designed around the concept that all milk must be pasteurized before being sold or distributed to consumers.³⁷

³⁰ See *Canadian Dairy Commission Act*, RSC 1985, c C-15, s 3(1); Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 19. DFO is a signatory member of the CMSMC, along with provincial dairy boards and provincial government representatives from across Canada: see *Canadian Restaurant and Foodservices Assn v Canadian Dairy Commission*, 2002 CanLII 5501 (ON SCDC) at para 4 [CRFA].

³¹ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 15.

³² *Ibid* at para 16.

³³ *Ibid*, Exhibits C and D.

³⁴ *Ibid* at para 16.

³⁵ *Ibid*.

³⁶ *Ibid*.

³⁷ *Ibid*, Exhibit B, ss 1(p) and (q).

C. Position of the Parties and the Master's Decision

18. Before Master Graham, Ontario and Canada supported DFO and DFC's motion for leave to intervene as added parties, while the Applicants opposed that motion.³⁸ The Applicants disputed the standing of DFO and DFC to seek leave to intervene under Rule 13.01 based on *Northwestern*, and DFO and DFC addressed this issue in oral argument before the Master.

19. In his very brief eight-paragraph Decision, the Master made no mention of the framework for determining Rule 13.01 motions for leave to intervene as added parties, or the Rule 13.01 jurisprudence. Instead, he dismissed DFO and DFC's motion based on *Northwestern*,³⁹ a 1978 Supreme Court of Canada decision concerning tribunal participation in an appeal from that tribunal's decision. He adopted the Applicants' position that: "DFO, as an administrative authority, should not be permitted to intervene as a party in a case impugning the constitutional validity of statutory and regulatory provisions that it administers and enforces."⁴⁰ Without further explanation, he concluded that DFC was in the same position, even though DFC is not a tribunal and has no regulatory powers of any kind.

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. Issues

20. The issues in this appeal are:
- a) What is the applicable standard of review?

³⁸ *Ibid*, Exhibits G and H, respectively.

³⁹ *Northwestern*, *supra* note 4 at 709.

⁴⁰ Decision, *supra* note 1, AB, Tab 2 at para 4.

- b) Did the Master err in law in finding that *Northwestern* precludes granting leave to intervene to DFO and DFC, and in failing to address the test for intervention in Rule 13.01 of the *Rules*?
- c) Do DFO and DFC satisfy the test in Rule 13.01 for leave to intervene as added parties?

B. Standard of Review

21. The standard of review in an appeal from the decision of a master is the same as that on appeal from the decision of a judge.⁴¹ For questions of law, the standard of review is correctness.⁴² Failure to consider a required element of a legal test is a question of law.⁴³ For questions of fact, the standard is palpable and overriding error.⁴⁴

22. DFO and DFC submit that the Master's misapplication of *Northwestern*, and his failure to address the test in Rule 13.01, are errors of law reviewable on a correctness standard.

C. Master's Decision Misapplied *Northwestern* and Failed to Apply the Rule 13.01 Test

23. The crux of the Master's brief Decision is his reliance, for the purpose of applying Rule 13.01, on the following passage from *Northwestern*:

This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, *or in future*

⁴¹ *Zeitoun v The Economical Insurance Group*, 2009 ONCA 415 at para 1.

⁴² *Housen v Nikolaisen*, 2002 SCC 33 at para 8.

⁴³ *Ibid* at para 36.

⁴⁴ *Ibid* at para 10.

*proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.*⁴⁵

According to the Master:

To grant the DFO and DFC the status of interveners in a proceeding in which they would be opposing the applicants' position would violate their impartiality in respect of the applicants. Accordingly, their motion is dismissed.⁴⁶

24. With respect, the Master made a number of errors of law in his decision.

i. *Northwestern Utilities* Does Not Apply on a Rule 13.01 Motion

25. The first error of law in the Decision is that *Northwestern* has no application in a Rule 13.01 motion for leave to intervene as an added party where the underlying proceeding does not challenge a decision of the party seeking leave. *Northwestern* addresses the participation of a tribunal in a proceeding that reviews that tribunal's decision either through an appeal or judicial review. *Northwestern*, which has been confined in subsequent cases,⁴⁷ has no bearing on a motion for leave to intervene as an added party in an originating proceeding that focuses on the constitutionality of legislation and regulations enacted by other bodies.

26. As the Master's Decision indicates, *Northwestern* is founded on the concept that a board which has been "given a clear opportunity to make its point in its reasons for its decision" should

⁴⁵ Decision, *supra* note 1, AB, Tab 2 at para 3, citing *Northwestern*, *supra* note 4 at 709 (italicized emphasis in Decision, underlined emphasis added).

⁴⁶ Decision, *supra* note 1, AB, Tab 2 at para 7.

⁴⁷ See below at paras 29 to 33.

not be a “full-fledged litigant” in an appeal of that decision.⁴⁸ This reasoning has no relevance to this case, since neither DFO nor DFC have made any decision under challenge in the Applicants’ *Charter* proceeding. There is thus no potential for “bootstrapping” by DFO or DFC, a concern raised in some of the cases which have addressed and narrowed *Northwestern*.⁴⁹

27. Indeed, counsel to DFO and DFC are unaware of any previous case in which *Northwestern* has been treated as creating a bar to a body’s intervener participation where that body has not made a decision under challenge in the underlying proceeding.⁵⁰

ii. In any event, *Northwestern* has been Curtailed by Subsequent Cases

28. The second legal error is that the Decision dramatically extends the scope of *Northwestern* – a forty-year-old case which has been seriously curtailed by subsequent caselaw. Whereas more recent cases suggest the principles outlined in *Northwestern* should be applied with circumspection, the Master’s Decision does the very opposite. Thus, even if *Northwestern* somehow applies – which it emphatically does not – the Master erred in failing to address the confinement of *Northwestern* in subsequent caselaw.

⁴⁸ *Northwestern*, *supra* note 4 at 709.

⁴⁹ See for example *Children’s Lawyer for Ontario v Goodis*, [2005] OJ No 1426 at para 42 (CA) [*Goodis*], further discussed below at para 29, and *Ontario (Energy Board) v Ontario Power Generation*, 2015 SCC 44 at paras 49 and 63-72 [*OEB*], further discussed below at paras 29-33.

⁵⁰ See *Energy Probe v Canada (Atomic Energy Control Board)*, [1984] 2 FC 138 (FCTD), *aff’d* (on other grounds): 1984 CarswellNat 806 (FCAD), leave to appeal dismissed: [1984] SCCA No 36 (SCC), in which the Attorney General of Canada sought leave to intervene in an action to quash a decision of the Atomic Energy Control Board. The Federal Court (Trial Division) granted leave to intervene, finding, *inter alia*, that there was no decision of the Attorney General under review, and thus *Northwestern* had no application: para 12.

By analogy, see the recent Supreme Court of Canada decision in *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at paras 50-54, distinguishing limited tribunal participation in an appeal or judicial review application stemming from “the decision-maker’s impartiality or the finality of his or her decision”, as opposed to the separate and distinct matter of “a quasi-judicial regulatory board’s defence against damages claims”.

See also, by analogy, *Stevens v Canada (Commission of Inquiry)* 1998 CarswellNat 1049 at para 19 (FCAD), in which the Federal Court (Appeal Division) distinguished “the jurisprudence respecting the joinder of a party in a proceeding for judicial review” from common law principles regarding the joinder of parties to an action.

29. The departure by appellate courts from *Northwestern* respecting tribunal participation in appeals was addressed by the Court of Appeal for Ontario in *Goodis*⁵¹ (2005) and more definitively by the Supreme Court of Canada in *OEB*⁵² (2015). Both cases were drawn to the Master's attention by counsel for DFO and DFC, and commented on by counsel for the Applicants, during oral argument.⁵³

30. *OEB* firmly rejects the position that *Northwestern* supports "a categorical ban" on tribunals participating in appeals of their own decisions.⁵⁴ In particular, *OEB* underscores "the structure, processes and role of the particular tribunal" as "key aspects of the analysis".⁵⁵ Also relevant, *OEB* holds, is: (a) whether the tribunal performs a policy-making as opposed to an adjudicative role; (b) whether the appeal or review may be otherwise unopposed; and (c) the knowledge and expertise of the tribunal relative to the parties.⁵⁶

31. The Supreme Court of Canada's curtailment of *Northwestern* in *OEB* reflects "the increasing number and variety of administrative tribunals and the technical complexity of many of the areas in which they operate".⁵⁷ In other words, there is no "one size fits all answer"⁵⁸ in terms of the degree to which a tribunal can participate in reviews of its own decisions.

32. DFO is an example of a regulatory and policy-making body with legislative structures, procedures and roles radically different from those of the utility regulator in *Northwestern*.

⁵¹ *Supra* note 49.

⁵² *Supra* note 49.

⁵³ Counsel for DFO and DFC brought both *OEB* and *Goodis* to the attention of the Master during the oral hearing, but the Master only mentioned *Goodis* in his reasons: see Decision, *supra* note 1, AB, Tab 2 at para 5.

⁵⁴ *OEB*, *supra* note 49 at para 52.

⁵⁵ *Ibid* at para 55.

⁵⁶ *Ibid* at para 52.

⁵⁷ *French v Township of Springwater*, 2018 ONSC 94 at para 63 (Div Ct).

⁵⁸ *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, 2018 ABCA 173 at para 3.

Indeed, unlike the tribunals to which the concerns in *Northwestern* more directly apply, DFO's function is not to adjudicate individual conflicts between two or more parties.⁵⁹ To the contrary, DFO's policy-making role makes it uniquely situated to assist the Court in presenting helpful argument and evidence "in an adversarial but respectful manner",⁶⁰ as contemplated by the Supreme Court of Canada in *OEB*. As for DFC, it is uniquely positioned to assist the Court but is not a decision-maker.

33. Thus, even if *Northwestern* as modified by *OEB* somehow applied in this case – which it does not – the Master would have had to have conducted a much more nuanced, contextual analysis, as opposed to the categorical ban on participation adopted in the Decision.

iii. Failure to Take into Account Rule 13.01 Framework and Jurisprudence

34. The third legal error is that the Master disregarded the legal framework for a Rule 13.01 motion for leave to intervene, and the nuanced Rule 13.01 factors stemming from the decision of the Court of Appeal for Ontario in *Peel*.⁶¹ The Master effectively treated *Northwestern* as a jurisdictional bar to Rule 13.01 intervener status, even in the absence of any appeal or judicial review from a decision by either of the bodies seeking leave to intervene.⁶² Rule 13.01 and the *Peel* factors are addressed below in Section D.

⁵⁹ *OEB*, *supra* note 49 at paras 59(3), 61 and 67.

⁶⁰ *OEB*, *supra* note 49 at para 72.

⁶¹ *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd (CA)*, 1990 CanLII 6886 (Ont CA) [*Peel*]. See the discussion of *Peel* and related jurisprudence below at paras 46-61.

⁶² Again, DFC does not have the power to render decisions.

iv. Failure to Consider Statutory Scheme

35. The fourth legal error is that the Decision misconstrues DFO's statutory authority and function in relation to the *Charter* challenge at issue, and erroneously presumes that DFC somehow exercises statutory powers over the Applicant producers.

36. As discussed above, DFO has a wide range of powers in relation to licensed dairy farmers. However, DFO has no authority to override or modify the legislative pasteurization requirements at the heart of the underlying constitutional challenge, which are enacted by the Ontario Legislature in s. 18 of the *HPPA*,⁶³ the Governor in Council in the *FDR*⁶⁴ and the Commission in *Regulation 761*.⁶⁵ Thus, in addition to not having made any decision under challenge by the Applicants, it is "above DFO's paygrade" to change the laws which the Applicants seek constitutional exemptions from or, alternatively, to strike down.⁶⁶

37. As for DFC, it is a non-profit corporation with no regulatory powers of any kind. While DFC's proAction Program can be incorporated by reference into provincial board policies, as DFO has chosen to do, neither DFC, nor DFC's proAction Program have any legal effect on their own.

38. The Master's Decision also fails to consider that, even if, hypothetically, a DFO decision involving the Applicants were to be challenged, DFO would automatically be accorded party status in any subsequent appeal or judicial review of that decision. More specifically, DFO is a "marketing board",⁶⁷ and thus an appeal from a DFO decision lies to the Ontario Agriculture, Food

⁶³ *Supra* note 7.

⁶⁴ *Supra* note 10.

⁶⁵ *Supra* note 19.

⁶⁶ Affidavit of L Robinson, *supra* note 11, AB, Tab 8, Exhibits D and E.

⁶⁷ *Milk Act*, *supra* note 8, s 1; see also Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 2.

and Rural Affairs Tribunal (the “Tribunal”).⁶⁸ Appeals to the Tribunal are *de novo* proceedings, in which the Tribunal has extensive powers to effectively step into DFO’s shoes and substitute its own determination in the place of DFO’s.⁶⁹ DFO is entitled to notice of an appeal of its decision to the Tribunal,⁷⁰ and as a responding party to this *de novo* appeal process, DFO is permitted to lead evidence before the Tribunal,⁷¹ as illustrated by case examples discussed below.

39. Tribunal decisions are subject to judicial review before the Divisional Court, and DFO is automatically a party to such Divisional Court applications or to subsequent appeals.⁷² Four cases illustrate the nuances of this legislative scheme, the character of DFO’s functions, and the Legislature’s intent to allow DFO to fully participate in subsequent Tribunal appeals, Ministerial reviews, and/or judicial review proceedings.

40. *Allan*,⁷³ a Divisional Court case cited by DFO and DFC before Master Graham, upheld a direction by the Minister rescinding a Tribunal decision⁷⁴ which ordered DFO to pursue regulatory changes stemming from an international trade dispute. The applicants were licensed, non-quota holding dairy farmers who sold milk through an export broker.⁷⁵ DFO was a party at the following stages: before the Tribunal; in the Ministerial variance process; in the Divisional Court; as well as

⁶⁸ See *Ministry of Agriculture, Food and Rural Affairs Act*, RSO 1990, c M.16, s 16(1)(2) [MAFRAA]; Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 2.

⁶⁹ MAFRAA, *supra* note 68, s 16(11).

⁷⁰ *Ibid*, s 16(2.1).

⁷¹ See *Rules of Procedure for the Agriculture, Food and Rural Affairs Appeal Tribunal (the Tribunal)*, online: <<http://www.omafra.gov.on.ca/english/tribunal/about/rules-of-procedure.htm>>, Rule 30, regarding the order of presentation at a hearing.

⁷² MAFRAA, *supra* note 68, s 16(10). In addition, the Minister has powers to confirm, vary or rescind a Tribunal decision, to substitute his or her own decision or order a new hearing: s 18(2).

⁷³ *Allan v Ontario (Attorney General)*, [2005] OJ No 3083 (Div Ct) [*Allan*], leave to appeal dismissed: 2006 CarswellOnt 9532 (Ont CA), leave to appeal dismissed: 2007 CarswellOnt 992 (SCC).

⁷⁴ *Georgian Bay Milk Company v DFO*, 2003 ONAFRAAT 17 (CanLII).

⁷⁵ *Allan*, *supra* note 73 at para 3.

in subsequent appeal proceedings. The Divisional Court upheld the constitutionality of the legislative scheme⁷⁶ and ruled that the concept of impartiality expected of a judicial body has no application to a Minister's variance decision, which is infused with policy-making.⁷⁷

41. In *Denby*,⁷⁸ the Divisional Court set aside a Tribunal decision⁷⁹ which directed DFO to provide an exemption to a group of individual dairy farmers' milk from a DFO quota transfer policy. Again, DFO fully participated as a party before the Tribunal and the Divisional Court. The Court found DFO's function in devising the quota policy was "of a legislative nature and not subject to the rules of procedural fairness".⁸⁰

42. *French*⁸¹ is a Tribunal decision upholding a finding by DFO's Director of Regulatory Compliance penalizing a licensed dairy farmer for exceeding prescribed somatic cell count limits and failing to meet other on-farm food safety requirements regulated by DFO pursuant to *Regulation 761*. Once again, DFO's Director of Regulatory Compliance was a party in the Tribunal appeal and presented evidence.

43. Finally, *Stetler*⁸² concerned a decision by another marketing board, the Ontario Flue-Cured Tobacco Growers' Marketing Board (which is similar in its legislative makeup to DFO's), cancelling the quota of an individual producer who had marketed tobacco in violation of the quota system for that product. *Stetler* is at the opposite end of the adjudicative/policy spectrum

⁷⁶ *Ibid* at paras 42-44.

⁷⁷ *Ibid* at para 69.

⁷⁸ *Denby v Dairy Farmers of Ontario*, 2009 CarswellOnt 6924, 182 ACWS (3d) 243 at para 6 [*Denby*].

⁷⁹ *Denby Group v Dairy Farmers of Ontario*, 2008 ONAFRAAT 19 (CanLII).

⁸⁰ *Denby*, *supra* note 78 at para 6(ii).

⁸¹ *Jeffrey French v DFO*, 2017 ONAFRAAT 21 (CanLII).

⁸² *Stetler et al v The Ontario Flue-Cured Tobacco Growers' Marketing Board*, [2005] OJ No 2817 (CA) [*Stetler*], leave to appeal dismissed: 2006 CarswellOnt 930 (SCC).

compared to *Allan* and *Denby*, since it deals with a serious breach of regulatory requirements by a licensed tobacco farmer, and a severe penalty – the cancellation of the farmer’s entire quota. The Tobacco Board was an active party both before the Tribunal and in subsequent judicial review and appeal proceedings. After referring to *Northwestern* and *Goodis*, the Court of Appeal for Ontario found no apprehension of bias from the participation of a Tobacco Board member as a witness before the Tribunal.⁸³

44. The relevant insights from the above cases include the following:

- a) The intent of the Legislature is that DFO be accorded broad participatory rights in *de novo* appeals of its decisions to the Tribunal, and in subsequent judicial review and appeal proceedings – even in enforcement proceedings.
- b) Policy-making and regulation-making functions of DFO do not attract a duty of procedural fairness, and do not give rise to a duty of impartiality comparable to that of a quasi-judicial body.⁸⁴

45. To conclude with respect to this aspect of the appeal:

- a) The Master erred in law in holding DFO is subject to a free-standing duty of “impartiality in respect of the applicants”⁸⁵ which operates as a complete bar preventing DFO from intervening in the Applicants’ *Charter* challenge. It was wrong

⁸³ *Ibid* at paras 92-97.

⁸⁴ See also *CRFA*, *supra* note 30 in which DFO intervened in a Divisional Court case which found that the dairy policy-making body, the CMSMC, did not owe a duty of procedural fairness to an industry group seeking access to lower-priced milk products.

⁸⁵ Decision, *supra* note 1, AB, Tab 2 at para 7.

for the Master to presume that DFO has an open-ended obligation of “maintaining the impartiality of the tribunal as a quasi-judicial decision-making body”.⁸⁶

- b) In addition to there being no DFO decision at issue, the Applicants claim to be exempt constitutionally from the regulatory framework.⁸⁷ If they succeed in this claim the Applicant producers would presumably operate outside of DFO’s jurisdiction.
- c) Even if, in the future, a DFO decision were to be involved, the nature and context of the decision would need to be assessed to determine whether and to what extent a duty of impartiality should be implied. For example, if following a *Charter* ruling DFO had to amend its policies and regulations to adjust to a legal requirement to permit farmgate sales of unpasteurized raw milk,⁸⁸ this would be a legislative policy-making decision that would not attract a duty of fairness. In addition, in cases in which DFO’s decisions actually are under appeal, the Legislature has provided DFO with broad participatory rights.
- d) DFC is not a body with any regulatory powers and *a fortiori* cannot be subject to a free-standing duty of impartiality.

D. DFO and DFC Satisfy the Conditions for Rule 13.01 Intervener Status

46. Since the Master failed to consider the required framework in Rule 13.01, it falls to this Court to “make any order or decision that ought to or could have been made by the court ...

⁸⁶ *Ibid* at para 5.

⁸⁷ NOA, *supra* note 3, AB, Tab 3 at paras 1(a) and (b).

⁸⁸ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 20.

appealed from”.⁸⁹ Taking into account the disjunctive requirements of Rule 13.01,⁹⁰ and the factors suggested by the jurisprudence, DFO and DFC should be granted leave to intervene as added parties. DFO and DFC should not be limited to merely making submissions, as proposed by the Applicants.⁹¹

47. Factors considered in determining whether to grant leave to intervene pursuant to Rule 13.01, and the extent of the intervention, are: (1) the nature of the case; (2) the issues that arise; (3) whether the issues are essentially private or whether they involve a public interest component; (4) the likelihood of the proposed intervener making a useful contribution to the resolution of the issues; and (5) whether the proposed intervener’s participation would be unfair to the immediate parties.⁹²

i. Nature of the Case and Issues that Arise

48. As set out above, the on-farm milk safety programs established and administered by DFO and DFC are integrally connected to the mandatory pasteurization laws and regulations that the Applicants challenge as being unconstitutional. As a statutory body that independently exercises delegated authority, DFO is the designated authority in Ontario for raw milk quality testing, dairy

⁸⁹ *Courts of Justice Act*, RSO 1990, c C.43, s 134(1)(a).

⁹⁰ Rule 13.01 of the *Rules*, *supra* note 2, states:

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

⁹¹ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7, Exhibit H.

⁹² See *Fontaine v Canada (Attorney General)*, 2014 ONSC 3781, 241 ACWS (3d) 808 at para 23, citing, *inter alia*, *Peel*, *supra* note 61 at para 10; Paul M Perell & John W Morden, *Morden & Perell: The Law of Civil Procedure in Ontario*, 3d ed (Toronto: LexisNexis Canada, 2017) at 437 [*Morden & Perell*].

farm inspection, milk transportation, and bulk tank grader requirements.⁹³ DFC establishes and coordinates dairy on-farm food safety and milk quality programs across Canada.⁹⁴

49. The Applicants seek constitutional exemptions under Ontario's *Milk Marketing Regulation*,⁹⁵ under which the Commission authorizes DFO to grant exemptions to certain milk types and certain persons involved in producing or marketing milk in Ontario.⁹⁶ In other words, the Applicants effectively ask the Court to direct DFO to exercise its powers to exempt the Applicant producers from the requirements applicable to Ontario's milk and milk producers.

50. The exemptive and declaratory relief sought by the Applicants would impact DFO and DFC, both directly, in terms of their raw milk safety and quality programs and policies, and indirectly, in terms of the interests of the licensed milk producers they represent. Among other things, the orders sought by the Applicants would require DFO and DFC to undertake significant regulatory/policy work, and to bear associated costs, to address issues raised by the commercial sale and distribution of unpasteurized raw milk directly to consumers.⁹⁷ In cross-examination Mr. Lloyd, DFO's CEO, also noted DFO's and DFC's interest, and that of licensed dairy farmers, in terms

⁹³ *Regulation 761*, *supra* note 19; see para 11 above.

⁹⁴ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 16 and Exhibits C and D.

⁹⁵ *Supra* note 9; see NOA, *supra* note 3, AB, Tab 3 at para 1(a).

⁹⁶ *Allan*, *supra* note 73 at para 12; *Milk Marketing Regulation*, *supra* note 9, ss 5(r.1) and 5(r.2). Subsection 5(r.1) provides for "the exemption of any class, variety, grade or size of milk or cream from any or all of the regulations under the plan" while subsection 5(r.2) provides 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".

⁹⁷ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 20; Cross-examination of G Lloyd, *supra* note 26, AB, Tab 6, p 41, line 25 to p 42, line 8.

of the reputational harms that may arise from outbreaks associated with the distribution of unpasteurized raw milk.⁹⁸

51. Thus, not just one, but all three of Rule 13.01(1)'s disjunctive conditions are satisfied. DFO and DFC have an "interest" in the subject matter of the proceeding and they "may be adversely affected" by the order sought by the Applicants.⁹⁹ Moreover, there is a question of fact or law in common between DFO/DFC and the Applicants, notably regarding the constitutional exemptions sought by the Applicants from the requirements to which licensed dairy farmers are subject.¹⁰⁰

ii. Public Nature of the Issues

52. The public nature of the *Charter* issues in this case favour allowing DFO and DFC to intervene as added parties. For one thing, the underlying issues in the case are of a public nature rather than a private nature. Indeed, the application raises wide-ranging issues not only with respect to public safety, but also with respect to potential implications for licensed dairy farmers and the dairy industry as a whole.¹⁰¹

⁹⁸ Cross-examination of G Lloyd, *supra* note 26, AB, Tab 6, at p 37, line 10 to p 39, line 17. The Applicants' expert, Nadine Ijaz, acknowledges that the raw milk debate "undoubtedly has economic and political dimensions", and emphasizes DFC's role in the debate, noting that "the prospect of introducing raw milk – clearly a higher risk food than pasteurized milk – into the marketplace may be seen as potentially jeopardizing 'the image of an entire industry which has built its reputation on the safety and wholesomeness of its products'": Dr Nadine Ijaz, "Canada's Other Illegal White Substance: Evidence, Economics and Raw Milk Policy" (2014) 22:1 Health L Rev 26 at 28, AB, Tab 9 at p 28, excerpted from Exhibit QQ to the Affidavit of Dr Nadine Ijaz sworn April 18, 2018. While DFO and DFC do not agree with the conclusions of Dr. Ijaz, it is significant that even the Applicants' own expert points to the need for the Court to understand the competing interests surrounding the issues raised by the underlying *Charter* application.

⁹⁹ *Ontario Federation of Anglers and Hunters v Ontario (Minister of Natural Resources and Forestry)*, 2015 ONSC 7969, 128 OR (3d) 501 at para 21.

¹⁰⁰ Cross-examination of G Lloyd, *supra* note 26, AB, Tab 6, at p 20, lines 5-22, and at p 22, line 9 to p 23, line 3, and at p 29, line 25 to p 31, line 12, and at p 34, lines 3-14, and at p 40, lines 11-24.

¹⁰¹ *Ibid*, AB, Tab 6 at p 13, line 15 to p 14, line 16, and at p 15, lines 7-21, and at p 35, line 7 to p 38, line 7, but see especially at p 35, lines 16-23.

53. In addition, DFO and DFC have a significant interest in these issues that extends beyond the interest of the general public.¹⁰² Unlike DFO and DFC, members of the general public consume milk, but they are not involved in the oversight of dairy on-farm food safety, and related regulations and policies.

iii. Likelihood DFO/DFC Will Make a Useful Contribution

54. Courts consistently emphasize the need to be “vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack”.¹⁰³ DFO and DFC’s intervention will enhance the court’s ability to determine the issues in the underlying application by helping to ensure a proper factual foundation exists.

55. DFO and DFC offer an important perspective distinct from the parties’ – that of licensed dairy producers across Ontario and Canada, respectively. By contrast, the Attorneys General of Ontario and Canada represent governmental interests and the interests of the public generally, and they are decidedly not in a position to represent the interests of DFO and DFC, or of licensed dairy farmers. Indeed, the evidence in the motion underscores that the Attorney General of Ontario has not focused on DFO/DFC in its approach to this case.¹⁰⁴

56. As representatives of licensed milk producers across Ontario and Canada, and given their regulatory and policymaking role, DFO and DFC provide a unique and important perspective

¹⁰² Having an interest in the subject matter of the proceeding includes a public interest “to the extent that the interest goes beyond that of the public generally”: *Morden & Perell*, *supra* note 92 at pp 437-438.

¹⁰³ *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at 1099.

¹⁰⁴ Affidavit of L Robinson, *supra* note 11, AB, Tab 8, Exhibit G; Cross-examination of G Lloyd, *supra* note 26, AB, Tab 6 at p 65, line 10 to p 69, line 10, and see also at p 43, lines 9-23.

regarding the issues. This perspective will inform the Court of the on-the-ground reality of the dairy industry.¹⁰⁵

57. As the Supreme Court of Canada held in *Mackay v Manitoba*, “[t]he presentation of facts is not ... a mere technicality; rather, it is essential to a proper consideration of *Charter* issues.”¹⁰⁶

Courts have every right to “insist upon the careful preparation and presentation of a factual basis in most *Charter* cases ... [and the] relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects”.¹⁰⁷

58. DFO and DFC’s contribution will take on particular significance if the Court is required to assess whether the impugned mandatory pasteurization provisions are a “reasonable limit” under s. 1 on any *Charter* rights under ss. 2(a), 7, and 15. In that context, DFO and DFC’s evidence will ensure that the on-the-ground perspective of the dairy industry informs the court’s assessment of what is reasonable in terms of minimal impairment.¹⁰⁸ DFO and DFC’s participation

¹⁰⁵ As Mr. Lloyd stated in cross-examination (Cross-examination of G Lloyd, *supra* note 26, AB, Tab 6 at p 16, lines 5-18):

“We are the experts in the area with respect to the on-farm inspection, the on-farm requirements, the quality and safety through the enforcement of, for instance, regulation 761; through the policies and procedures and practices with respect to how milk is tested, how it's picked up, what it's – how it's treated.

Dairy Farmers of Canada has a unique experience and expertise in respect to understanding raw milk issues at the international level. It's the key member and participant at the IDF, which is the International Dairy Federation, which gives it unique experience and information.”

¹⁰⁶ *Mackay v Manitoba*, [1989] 2 SCR 357 at 361.

¹⁰⁷ *Ibid.*

¹⁰⁸ As the Supreme Court of Canada recognized in *Canada (Attorney General) v JTI-MacDonald Corp*, 2007 SCC 30 at para 43:

“There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament.”

as added parties will ensure the factual record allows the court to evaluate the current regulatory system as well as the Applicants' proposed exemptions.¹⁰⁹

59. Furthermore, DFO and DFC have extensive knowledge regarding raw milk and its regulation. By analogy, as the Divisional Court noted in *Halpern v Toronto (City) Clerk*,¹¹⁰ the organization EGALE had developed institutional legal knowledge and expertise over many years.¹¹¹ As a result, EGALE could provide factual context by leading evidence and presenting legal arguments on the issues in the proceedings.¹¹² EGALE's interest was also found to extend beyond its involvement as a lobbyist, given that it had membership across Canada and represented a wide variety of perspectives.¹¹³

60. Similarly, DFO and DFC are the only organizations that represent licensed milk producers across Ontario and Canada and that also play a crucial policymaking role in the regulation of raw milk. DFO and DFC have thus not only developed significant institutional legal knowledge and expertise regarding the regulation of raw milk, but also offer a unique perspective regarding the potential impacts of the underlying application. Their participation as added parties, and

¹⁰⁹ Indeed, as Mr. Lloyd stated during his cross-examination (Cross-examination of G Lloyd, *supra* note 26, AB, Tab 6 at p 15, lines 12-21), DFO and DFC seek to intervene to:

“... identify to the Court why it's essential that milk be tested, the requirements of Grade A, the manner about which the regulation 761 is in force, the importance of 761 with respect to food safety, the cleanliness of cows and why that's inspected. And I think it's essential ... that any attempts not to abide by those regulations and requirements should be known to the Court.”

¹¹⁰ [2000] OJ No 4514 (Div Ct) [*Halpern*].

¹¹¹ *Ibid* at para 27.

¹¹² *Ibid*.

¹¹³ *Ibid*. Similarly, in *Pinet v Penetanguishene Mental Health Centre (Administrator)*, 2006 CanLII 4952 (ON SC) [*Pinet*], an organization offering advocacy services to psychiatric patients was granted leave to intervene as an added party in respect of whether a psychiatric inmate's *Charter* rights had been violated. The Superior Court found at para 43 that the organization “may well be directly affected by the determination of the constitution questions in this application in a way not common to other citizens”.

particularly the accompanying ability to adduce and test evidence, would add significantly to the court's ability to determine the *Charter* issues raised in this case.

iv. DFO/DFC's Participation Will Not Be Unfair to the Applicants or to the Attorneys General

61. DFO's and DFC's participation as added parties under Rule 13.01 will not unduly prejudice the parties or delay the proceedings. In making this determination, courts generally consider whether the application is made sufficiently early in the proceeding to permit properly tested evidentiary contributions.¹¹⁴ In this case, the underlying application is at an early stage and the Respondents' materials have not yet even been filed.¹¹⁵ Moreover, DFO and DFC have committed to make best efforts to ensure that their evidence is not duplicative and have undertaken to deliver their affidavits on November 30, 2018 – the same date as the Respondents.¹¹⁶ DFO and DFC have also committed to work collaboratively with the parties to minimize any potential disruption or delay.¹¹⁷ DFO and DFC cannot be held responsible for the delay resulting from this appeal, and have moved with dispatch to minimize any such delay.

PART V - ORDER REQUESTED

62. DFO and DFC seek an order setting aside the Master's Decision and granting them leave to intervene as added parties to the underlying application pursuant to Rule 13.01 of the *Rules of Civil Procedure*, with the right to lead evidence, cross-examine, and make submissions.¹¹⁸ DFO

¹¹⁴ *Pinet*, *supra* note 113 at para 35, citing *R v LePage*, 1994 CanLII 7394 at para 23(b)(i) (Ont SC (Gen Div)).

¹¹⁵ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 23.

¹¹⁶ Cross-examination of G Lloyd, *supra* note 26, AB, Tab 6, at p 60, line 9 to p 61, line 13; Affidavit of G Lloyd, *supra* note 15, AB, Tab 7 at para 23.

¹¹⁷ Affidavit of G Lloyd, *supra* note 15, AB, Tab 7, Exhibit E.

¹¹⁸ *Ibid*, Exhibit G.

and DFC do not seek costs in respect of this appeal, the underlying motion, or the underlying application, and ask that no costs be awarded against them in any of these fora.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of November 2018.

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

B E T W E E N:

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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

Intervenors

APPLICATION UNDER Rule 14.05(3)(d) and (g.1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194

CERTIFICATE

I estimate that 75 minutes will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT this day of November, 2018.

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SCHEDULE "A" - LIST OF AUTHORITIES

Jurisprudence

1. *Northwestern Utilities et al v Edmonton*, [1979] 1 SCR 684
2. *R v Schmidt*, 2014 ONCA 188
3. *Canadian Restaurant and Foodservices Assn v Canadian Dairy Commission*, 2002 CanLII 5501 (ON SCDC)
4. *Zeitoun v The Economical Insurance Group*, 2009 ONCA 415
5. *Housen v Nikolaisen*, 2002 SCC 33
6. *Children's Lawyer for Ontario v Goodis*, [2005] OJ No 1426 (CA)
7. *Ontario (Energy Board) v Ontario Power Generation*, 2015 SCC 44
8. *Energy Probe v Canada (Atomic Energy Control Board)*, [1984] 2 FC 138 (FCTD), aff'd (on other grounds): 1984 CarswellNat 806 (FCAD), leave to appeal dismissed: [1984] SCCA No 36 (SCC)
9. *Ernst v Alberta Energy Regulator*, 2017 SCC 1
10. *Stevens v Canada (Commission of Inquiry)*, 1998 CarswellNat 1049 (FCAD)
11. *French v Township of Springwater*, 2018 ONSC 94 at para 63 (Div Ct)
12. *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, 2018 ABCA 173
13. *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd (CA)*, 1990 CanLII 6886 (Ont CA)
14. *Allan v Ontario (Attorney General)*, [2005] OJ No 3083 (Div Ct), leave to appeal dismissed: 2006 CarswellOnt 9532 (Ont CA), leave to appeal dismissed: 2007 CarswellOnt 992 (SCC)
15. *Georgian Bay Milk Company v DFO*, 2003 ONAFRAAT 17 (CanLII)
16. *Denby v Dairy Farmers of Ontario*, 2009 CarswellOnt 6924, 182 ACWS (3d) 243
17. *Denby Group v Dairy Farmers of Ontario*, 2008 ONAFRAAT 19 (CanLII)
18. *Jeffrey French v DFO*, 2017 ONAFRAAT 21 (CanLII)
19. *Stetler et al v The Ontario Flue-Cured Tobacco Growers' Marketing Board*, [2005] OJ No 2817 (CA) [Stetler], leave to appeal dismissed: 2006 CarswellOnt 930 (SCC)
20. *Fontaine v Canada (Attorney General)*, 2014 ONSC 3781, 241 ACWS (3d) 808
21. *Ontario Federation of Anglers and Hunters v Ontario (Minister of Natural Resources and Forestry)*, 2015 ONSC 7969, 128 OR (3d) 501

22. *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086
23. *Mackay v Manitoba*, [1989] 2 SCR 357
24. *Canada (Attorney General) v JTI-MacDonald Corp*, 2007 SCC 30
25. *Halpern v Toronto (City) Clerk*, [2000] OJ No 4514 (Div Ct)
26. *Pinet v Penetanguishene Mental Health Centre (Administrator)*, 2006 CanLII 4952 (ON SC)

Secondary Sources

27. Perell, Paul M & John W Morden, *Morden & Perell: The Law of Civil Procedure in Ontario*, 3d ed, Toronto: LexisNexis Canada, 2017

SCHEDULE “B” - TEXT OF STATUTES, REGULATIONS & BY-LAWS

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| 2. | <i>Courts of Justice Act</i> , RSO 1990, c C.43..... | 3 |
| 3. | <i>Canadian Charter of Rights and Freedoms</i> , Part 1 of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11, ss 1, 2(a), 7 and 15..... | 4 |
| 4. | <i>Milk Act</i> , RSO 1990, c M.12..... | 5 |
| 5. | Regulations Enacted Under the <i>Milk Act</i> , RSO 1990, c M.12 | 7 |
| | (a) <i>Milk and Farm-Separated Cream – Marketing</i> , O Reg 354/95 | 7 |
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| 10. | <i>Rules of Procedure for the Agriculture, Food and Rural Affairs Appeal Tribunal</i> , online: < http://www.omafra.gov.on.ca/english/tribunal/about/rules-of-procedure.htm > | 22 |

1. Rules of Civil Procedure, RRO 1990, Reg 194

RULE 13 INTERVENTION

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

2. *Courts of Justice Act*, RSO 1990, c C.43

Powers on appeal

- 134 (1) Unless otherwise provided, a court to which an appeal is taken may,
- (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
 - (b) order a new trial;
 - (c) make any other order or decision that is considered just.

3. *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982*

Guarantee of Rights and Freedoms

- | | | |
|--------------------------------------|-----------|---|
| Rights and freedoms in Canada | 1. | The <i>Canadian Charter of Rights and Freedoms</i> guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. |
|--------------------------------------|-----------|---|

Fundamental Freedoms

- | | | |
|-----------------------------|-----------|---|
| Fundamental freedoms | 2. | Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; [...] |
|-----------------------------|-----------|---|

[...]

Legal Rights

- | | | |
|---|-----------|--|
| Life, liberty and security of person | 7. | Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. |
|---|-----------|--|

[...]

Equality Rights

- | | | |
|--|------------|--|
| Equality before and under law and equal protection and benefit of law | 15. | (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. |
|--|------------|--|

- | | | |
|------------------------------------|--|--|
| Affirmative action programs | | (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. |
|------------------------------------|--|--|

4. Milk Act, RSO 1990, c M.12

Definitions

1 In this Act,

[...]

“administrative authority” means the Government of Canada, an agency of the Government of Ontario or Canada, a not-for-profit corporation without share capital incorporated under the laws of Ontario or Canada that operates in Ontario or a marketing board; (“organisme d’application”)

[...]

Not Crown agents

2.7 A designated administrative authority that is not an agency of the Government of Ontario and its members, officers, directors, employees and agents, together with the persons whose services the authority retains, are not and shall not be deemed to be agents of the Crown in right of Ontario, and they shall not hold themselves out as such.

[...]

Delegation of powers

3 (5) The Commission may delegate to a marketing board those of its powers under subsection (2), other than clause (2) (f.1), that it considers necessary and may at any time terminate the delegation.

[...]

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;

[...]

Delegation of powers to marketing boards

7 (8) The Commission may delegate to a marketing board such of its powers under subsection (1) as it considers necessary, and may at any time terminate any such delegation.

Authority of marketing board to make regulations, etc.

7 (9) Where the Commission authorizes a marketing board to exercise any of the powers mentioned in subsection (1), the marketing board, in the exercise of such powers, may make regulations, orders, policies and decisions or issue directions.

Acts of marketing board deemed administrative

7 (10) Everything that is done by a marketing board under the authority of paragraph 15 of subsection (1) shall be deemed to be of an administrative and not of a legislative nature.

5. Regulations Enacted Under the *Milk Act*, RSO 1990, c M.12

(a) *Milk and Farm-Separated Cream – Marketing*, O Reg 354/95

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.

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.

EXEMPTION

3. The Commission exempts from this Regulation milk consumed on the farm on which the milk is produced and not sold.

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.

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.

5.1 The marketing board may impose such terms and conditions on a licence as the marketing board considers proper.

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.

(b) Milk and Farm-Separated Cream – Plan, RRO 1990, Reg 760

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.
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*.
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**.

SCHEDULE
PLAN
Milk Act

[...]

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.

[...]

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.

(c) Milk and Milk Products, RRO 1990, Reg 761

DEFINITIONS

1. In this Regulation,

[...]

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

[...]

INSPECTIONS BY FIELDPERSONS

2. (3) A fieldperson who determines that the milk or cream delivered from a producer does not comply with this Regulation or is produced from animals or on premises that do not comply or with equipment that does not comply with this Regulation,

(a) shall immediately notify the producer and the marketing board of the finding; and

(b) may by order require that no milk or cream from the producer be marketed by the producer until the milk, cream, animals, premises or equipment, as the case may be, comply with this Regulation.

(3.1) A fieldperson who determines upon inspection of a producer’s premises that dairy cattle on the premises have not been cared for or handled in accordance with the requirements in **sections 34.3, 34.4 and 34.5,**

(a) shall immediately notify the producer, the Director and the marketing board of the determination; and

(b) may by order require that no milk or cream from the producer be marketed by the producer until changes are made to the way the dairy cattle are cared for or handled to ensure the requirements are met.

[...]

PRODUCERS

3. No producer shall sell or offer for sale milk or cream that is not produced, handled and stored in accordance with this Regulation.

[...]

14. (2) A producer who installs a new farm bulk tank or changes a farm bulk tank installation shall notify the Director and the marketing board of the installation or the change, as the case may be, before using the farm bulk tank.

[...]

18. (5) Every producer shall maintain near the tank a milk chart, in good condition, for each farm bulk tank.

[...]

(5.2) Every producer shall provide a copy of each chart to the marketing board on the board's request.

[...]

(8) No person shall alter in any way a measuring device or chart except that the marketing board or the manufacturer of the farm bulk tank may correct or replace an inaccurate chart.

[...]

37. (1) Before transferring any milk from a farm bulk tank to a tank-truck, a bulk tank milk grader shall,

- (a) examine the milk in the farm bulk tank to determine if the milk must be rejected under subsection 51 (1); and
- (b) in the case of cow's milk, take the temperature of the milk in the farm bulk tank in accordance with subsection (1.0.1) to determine if it must be rejected under subsection 51 (4).

[...]

(1.0.2) If, after examining milk or taking the temperature of the milk under subsection (1), the bulk tank milk grader determines that the milk must be rejected in accordance with subsection 51 (1) or (4), he or she shall refuse to transfer the milk or, if the transfer has already begun, cease to transfer the milk, and shall,

- (a) attach to the tank a rejection tag showing the reason for the rejection;
- (b) attempt to notify the producer; and
- (c) notify the marketing officer of the marketing board as soon as possible.

[...]

(2) Where a producer receives a rejection tag, the marketing board may apply to the operator of a plant for acceptance of the milk for which the rejection tag was issued.

(3) Where the bulk tank milk grader rejects milk in a farm bulk tank under subsection (1.0.2), the producer shall not market the milk unless authorized to do so by the marketing board.

[...]

38. (10) Where the bulk tank milk grader is unable to transfer all the milk from a farm bulk tank to a tank-truck, the grader shall, on the same day, return for the rest of the milk or notify the milk marketing board that he or she is unable to return.

[...]

44. (1) No person shall transport milk or cream for manufacture into a milk product in a tank-truck other than a tank-truck having a tank with an inside lining of stainless steel that is free from rust, open seams and other mechanical defects.

(2) No operator of a plant shall receive milk or cream delivered to the plant in a tank-truck other than a tank-truck having a tank with an inside lining of stainless steel that is free from rust, open seams and other mechanical defects.

(3) No transporter shall engage in the purchasing or selling of milk or the trafficking in milk unless so authorized by the marketing board.

[...]

49. (1) Milk rejected at a plant or at a farm bulk tank shall be known as “rejected milk”.

(2) No person shall sell, offer for sale, transport or deliver rejected milk for use as food, or in the preparation of food, for human consumption unless so authorized by the marketing board.

(3) No person shall remove a rejection tag from a farm bulk tank unless authorized to do so by the marketing board or the Director or until the milk for which the rejection tag was issued has been dumped and the farm bulk tank has been washed and sanitized.

[...]

54. (5) Where the testing of a sample under subsection (2) shows the presence of an inhibitor, the fieldperson shall,

- (a) notify the marketing board that the milk from which the sample was taken shall not be marketed;
- (b) take such steps and make such orders as are considered necessary to ensure that such milk is not used for food, or in the preparation of food, for human consumption; and
- (c) maintain the detention, sampling and testing of the milk of the producer until such time as the testing shows that the milk does not contain an inhibitor.

(6) Upon receiving notice under clause (5) (a), the milk marketing board shall notify the operator of the tank-truck that the milk from which the sample was taken shall not be marketed.

[...]

100. (1) The Director may refuse to issue or renew a licence for the operation of a plant,

[...]

(c) where the applicant fails to observe, perform or carry out the requirements of the Act, the regulations, a plan, an agreement or an award, or an order of the Commission, the Director or the marketing board;

[...]

6. *Health Protection and Promotion Act, RSO 1990, c H.7*

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*.

Definition

(4) In subsection (2),

“milk product” means a product processed or derived in whole or mainly from milk.

7. Food and Drug Regulations, CRC, c 870

B.08.002.2 (1) Subject to subsection (2), no person shall sell the normal lacteal secretion obtained from the mammary gland of the cow, genus *Bos*, or of any other animal, or sell a dairy product made with any such secretion, unless the secretion or dairy product has been pasteurized by being held at a temperature and for a period that ensure the reduction of the alkaline phosphatase activity so as to meet the tolerances specified in official method MFO-3, *Determination of Phosphatase Activity in Dairy Products*, dated November 30, 1981.

(2) Subsection (1) does not apply to

(a) cheese; or

(b) any food that is sold for further manufacturing or processing in order to pasteurize it in the manner described in subsection (1).

8. *Canadian Dairy Commission Act*, RSC 1985, c c-15

Constitution of the Commission

Commission continued

3 (1) The Canadian Dairy Commission is continued as a corporation consisting of a Chairperson, a Chief Executive Officer and one other member.

9. Ministry of Agriculture, Food and Rural Affairs Act, RSO 1990, c M.16

Appeal to Tribunal

16 (1) Subject to subsections (4) and (5), a person who is aggrieved by any of the following orders, directions, decisions, policies or regulation made under the *Farm Products Marketing Act* and the *Milk Act* may appeal the matter to the Tribunal:

1. Any order, direction, decision or policy made by a Director.
2. Any order, direction, decision, policy or regulation made by a local board or marketing board.
3. An order, direction or decision made by the Commission that applies specifically to the aggrieved person, to a group of persons of which the aggrieved person is a member or with respect to a particular dispute or incident involving the aggrieved person.

[...]

Parties

(10) At any hearing under this section, any person entitled to receive notice under subsection (8) and any person having a sufficient interest in the subject-matter of the appeal may be a party to the appeal and the *Statutory Powers Procedure Act* applies.

Powers of Tribunal on appeal

(11) Upon an appeal to the Tribunal under subsection (1), the Tribunal may by order direct the Commission, the local board, the marketing board or the Director, as the case may be, to take such action as it or he or she is authorized to take under the *Farm Products Marketing Act* or the *Milk Act* and as the Tribunal considers proper, and for this purpose the Tribunal may substitute its opinion for that of the Commission, the local board, the marketing board or the Director.

[...]

Review of decisions of Tribunal, Commission

18 (1) The Minister may review a decision of the Tribunal made under this Act and a decision of the Commission to which subsection 17 (7) applies within 30 days after receipt by the Minister of the decision of the Tribunal or of the Commission and the reasons therefor, if any, or within such longer period as may be determined by the Minister within such 30-day period.

Powers of Minister

(2) Upon review of a decision under subsection (1), the Minister may,

- (a) confirm, vary or rescind the whole or any part of the decision;
- (b) substitute for the decision of the Tribunal or of the Commission, as the case may be, such decision as the Minister considers appropriate; or

(c) by notice to the Tribunal or Commission, as the case may be, require it to hold a new hearing of the whole or any part of the matter appealed to the Tribunal or reconsidered by the Commission and further reconsider its decision.

[...]

10. Rules of Procedure for the Agriculture, Food and Rural Affairs Appeal Tribunal, online:
 <<http://www.omafra.gov.on.ca/english/tribunal/about/rules-of-procedure.htm>>

Rule 30 - Order of Presentation at a Hearing

Adding parties

30.01 Where persons who are not parties to a proceeding wish to make submissions, the Tribunal will, by way of preliminary matters, determine the issues that these persons wish to address and establish the time in the proceedings that the Tribunal will hear these persons, but no such person will be heard unless willing to undergo cross examination by the parties to the hearing.

Opening Statements

30.02 Unless the Tribunal directs otherwise, each party at the beginning of the hearing may give a brief opening statement that describes the issues that the party will address during the hearing. The statement should include a brief outline of the evidence the party intends to call, a list of witnesses and the desired outcome of the hearing.

Order of presentation

30.03 Unless specified otherwise in the statute or otherwise directed by the Tribunal at the start of a hearing, the order of presentation at the hearing will be

- the presentation of the evidence of the appellant,
- cross examination by the parties,
- questions from the Tribunal,
- presentation of evidence by the respondent,
- cross examination by the appellant,
- questions from the Tribunal,
- reply evidence from the appellant (if any),
- cross examination on the reply by the respondent,
- questions from the Tribunal,
- summation by the appellant
- summation by the respondent, and
- reply by the appellant to any unexpected issue raised in the summation of the respondent.

Variation for appeals under Drainage Act

30.04 At hearings of appeals made under the Drainage Act, at the commencement of the hearing, a brief overview may be presented by the engineer who prepared the report under appeal.

JAMES LANSING AFFLECK et al. and ATTORNEY GENERAL OF ONTARIO et al.
Applicants Respondents
(Respondents in Appeal) (Respondents in Appeal)

Court File No.

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

Proceeding commenced at TORONTO

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