

CITATION: Affleck v. AGO, 2019 ONSC 1292
DIVISIONAL COURT FILE NO.: 700/18
DATE: 20190222

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

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. FRANK VAN DEN BERG. ELISAVANDER HOUT. BEVERLY VIUAKAINEN and ELEANOR ZALEC

Applicants
(Respondents in Appeal)

and

ATTORNEY GENERAL OF ONTARIO and ATTORNEY GENERAL OF CANADA

Respondents

and

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

Intervenors

BEFORE: Backhouse, J.

COUNSEL: *David Wilson, Julie Mouris* for the Appellants, Dairy Farmers of Ontario and Dairy Farmers of Canada

Ian Blue, Q.C. and Daria Peregoudova, for the Respondents in Appeal

HEARD at Toronto: February 11, 2019

ENDORSEMENT

[1] The appellants, Dairy Farmers of Ontario (“DFO”) and Dairy Farmers of Canada (“DFC”), appeal from the October 26, 2018 order of Master Graham dismissing their motion pursuant to Rule 13.01 of the *Rules of Civil Procedure* for leave to intervene as added parties in the underlying application.

[2] DFO, the provincial milk marketing board for Ontario, represents approximately 3500 licensed dairy farms in the province, which, by law, may only market milk to DFO. DFO has broad regulatory authority respecting Ontario's licensed dairy farmers through delegation from the Ontario Farm Products Marketing Commission pursuant to the *Milk Act*¹, notably, in respect of milk quota, pricing and marketing. Since 1998, DFO has been designated by agreement as the authority to administer the *Milk and Milk Products Regulation*² concerning raw milk quality testing, dairy farm inspections, milk transportation and bulk tank grader requirements. DFO's 12-member Board of Directors is comprised of licensed Ontario dairy farmers elected by other licensed dairy farms.

[3] DFO developed and administers the Raw Milk Quality Program, a key on-farm safety program through which DFO sets out requirements for farms that produce milk that meets DFO's 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. It is DFO's responsibility to ensure 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. DFO also maintains Quota and Milk Transportation Policies 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. In addition, DFO supervises, reviews and educates Ontario's licensed dairy producers regarding milk safety and other matters.

[4] DFC is a national non-profit organization and represents approximately 12,000 licensed dairy farms. DFC's Board of Directors is made up of members from each provincial dairy board or association, including DFO.

[5] DFC is an observer on the dairy policy-making body, the Canadian Milk Supply Management Committee and has many years of experience as a participant in various international organizations. DFC also coordinates various programs with Canada's dairy board including the proAction Program, respecting raw milk safety and quality, animal care and welfare, dairy animal traceability, farm and animal biosecurity and environmental sustainability. The proAction Program builds on the Canadian Quality Milk Program, a science-based program for milk quality based on Hazard Analysis Critical Control Points.

[6] DFO and 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. 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.

[7] The applicants (respondents on appeal) are producers and consumers of unpasteurized raw milk and/or raw milk products ("raw milk"). They seek constitutional exemptions under the *Milk*

¹ RSO 1990 c.M.12

² RRO 1990, Reg 761

*Act, the Health Protection and Promotion Act ("HPPA")³ and the Food and Drug Regulations ("FDR")⁴, to permit the processing, sale and distribution of raw milk for direct consumption at the farm gate. Alternatively, they seek an order that the impugned provisions of the *Milk Act*, the *HPPA* and the *FDR* are unconstitutional and are therefore of no force and effect.*

[8] Before the Master, the Attorneys General Ontario and Canada supported DFO and DFC's motion for leave to intervene as added parties. The applicants opposed the motion. The Master's decision was based on the case of *Northwestern Utilities Ltd. et al v. Edmonton*⁵ which found that the participation of a tribunal as a full-fledged litigant against a principal in a proceeding that reviews that tribunal's decision either through an appeal or judicial review violated the principal's impartiality and should not be countenanced. The Master found that:

[7] ... the DFO, as an administrative authority that has the ability to affect the rights of at least two of the applicants and which must make decisions in that regard impartially, should not be permitted to take an adversarial position against the applicants. To grant the DFO and DFC the status of intervenors 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.

Standard of Review

[9] The standard of review is correctness for questions of law and palpable and overriding error for questions of facts.

Submissions

[10] It is submitted on behalf of DFO and DFC that the Master made an error of law in applying *Northwestern*⁶, a decision of the Supreme Court of Canada regarding whether a tribunal should be heard on a judicial review of its own decision.

[11] DFC submits that it has no regulatory powers of any kind.

[12] It is further submitted on behalf of DFO and DFC that the Master disregarded the legal framework for a Rule 13.01 motion for leave to intervene. While the requirements of Rule 13.01 are disjunctive, DFO and DFC submit that all 3 of the conditions are satisfied.

[13] The applicants submit that the Master correctly applied the principle in *Northwestern* that it is not appropriate for a board such as DFO to oppose parties in judicial proceedings over whom

³ RSO 1990, c.H.7

⁴ C.R.C.,c. 870

⁵ *Northwestern Utilities Ltd. et al v. Edmonton*, [1979] 1 S.C.R.684

⁶ *supra*

it has the power to make decisions that affect their rights because it vitiates the board's duty of impartiality and prejudices the rights of parties.

Rule 13.01 of the Rules of Civil Procedure

[14] Because the Master did not analyze the factors in Rule 13.01, I do so below. Rule 13.01 of the *Rules of Civil Procedure*⁷ provides:

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.

Factors to Consider under Rule 13.01

[15] The well-established factors to consider 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 intervenor making a useful contribution to the resolution of the issues; and
- (5) whether the proposed intervenor's participation would be unfair to the immediate parties.

(1) Nature of the Case and (2) Issues that Arise

DFO and DFC's Submissions

⁷ R.R.O. 1990, Reg. 194

[16] 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. The relief sought would impact DFO and DFC both directly in terms of their programs and policies and indirectly in terms of the interests of the licensed milk producers they represent including reputational harm that may arise from outbreaks associated with the distribution of unpasteurized raw milk. In essence the applicants are seeking an order in the nature of mandamus compelling the DFO to exercise its delegated authority to provide them an exemption to the mandatory pasteurization laws. Both the nature of the case and the issues that arise support the DFO and DFC being added as intervenors.

Applicants' Submissions

[17] DFO and DFC do not meet the *Peel*⁸ test that they have a genuine and direct interest in the outcome of the proceeding. The fact that they may have to carry out regulatory policy work and bear some additional costs does not mean they should be added as party respondents in the underlying application.

(3) Public Nature of the Issues

DFO and DFC's Submissions

[18] The underlying issues are public, raising wide-ranging issues with respect to public safety, potential implications for licensed dairy farms and the dairy industry as a whole. This factor supports their being added as intervenors.

(4) Likelihood DFO/DFC Will make a Useful Contribution

DFO and DFC's Submissions

[19] 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 regarding the issues. The perspective is distinct from the parties. The Attorneys General Ontario and Canada represent governmental interests and the interests of the public generally and not licensed dairy farms.

[20] 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" and what is reasonable in terms of minimal impairment under a Section 1 *Charter* analysis.

Applicants' Submissions

⁸ *Peel Regional Municipality v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 OR (2d) 164(ONCA)

[21] DFO relies on provincial health officials to determine whether drinking raw milk is safe. They are not able to offer anything in regard to a policy allowing the distribution and sale of hygienic raw milk. They want to argue that the sale of raw milk is unlawful and that the *Milk Act* and regulations should continue to be enforced. That is a lobbying position that is intended to protect the interests of dairy farmers. Both DFO and DFC are registered and active lobbyists with the Office of the Commissioner of Lobbying of Canada. A proposed intervenor's interest must not be that of a lobbyist.⁹

(5)Unfair to the Parties

DFO and DFC's Submissions

[22] The underlying application is at an early stage. DFO and DFC have undertaken to make sure their evidence is not duplicative and have already served the evidence which they seek to be permitted to file. They propose to meet the schedule of cross-examinations set for April, 2019.

Applicants' Submissions

[23] The applicants rely upon the prejudice outlined in *Northwestern*.¹⁰ Further, to allow DFO/DFC to complicate the proceedings would distort the purpose and focus of the underlying application. The case has already exceeded the budgets of the applicants. The timeline for the resolution of this matter has already been extended by the potential intervention of DFO/DFC. DFO/DFC want to cross examine the applicants' witnesses, which will add confusion and costs.

Position of the Attorneys General Ontario and Canada

[24] The Attorneys General Ontario and Canada support DFO/DFC's position on this appeal.

Analysis

[25] The issue in the case of *Northwestern*¹¹ was whether a tribunal should be heard on a judicial review of its own decision. This is a different issue from whether an administrative body should be heard on a Rule 14 application challenging the constitutionality of its home statute. DFO has no authority to override the pasteurization requirements. DFC has no regulatory powers of any kind. No DFO decision is in issue in the underlying application. Moreover DFO is accorded broad participatory rights in *de novo* appeals of its decisions to the Tribunal and in subsequent judicial review and appeal proceedings. I find that the Master erred in applying the test from *Northwestern*.

[26] Many courts have commented on the benefit to a court of an administrative tribunal's views on a constitutional challenge to their statutory mandate. I find that DFO and DFC have met the

⁹ *Halpern v. Toronto(City)Clerk*,2000 CanLII 29029(ON SCDC)

¹⁰ *Northwestern Utilities Ltd. et al v. Edmonton*, *supra*

¹¹ *Supra*

proper test under Rule 13.01. Their role and expertise goes well beyond lobbying. They have a distinct interest from the Attorneys General Ontario and Canada and can make a useful contribution to the application based on their specialized expertise in this regulated area. The nature of the underlying application and the issues that are likely to arise support adding them as intervenors. They will contribute to a broad evidentiary record about the context in which the impugned statutory scheme operates which will assist the court in the underlying application.

[27] I do not agree that DFO/DFC have not established that they have a genuine and direct interest in the outcome of the underlying application. To the contrary, I find that they have an interest. The administrative bodies most knowledgeable and familiar with the impugned legislation obviously have an important perspective to offer. The issues are of a public nature. Their unique perspective supports that they will make a useful contribution. They have undertaken to meet the schedule of the other parties and have already served the evidence upon which they intend to rely. I do not accept the applicants' argument that it would be unfair to them for DFO and DFC to be added as parties or that it will unduly delay or prejudice the applicants.

[28] I find that the Master erred in not considering the criteria under Rule 13.01.

Conclusion

[28] In the result, the appeal is allowed. DFO and DFC are granted leave to intervene in the underlying application as added parties under Rule 13.01 on the basis set out in their notice of appeal including the no costs provision.

Released February 22, 2019

Backhouse J.

Backhouse J.