

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N

**GAVIN DOWNING, DIRECTOR APPOINTED
UNDER THE *MILK ACT*, R.S.O. 1990, c M.12**

Applicant

- and -

**AGRI-CULTURAL RENEWAL CO-OPERATIVE INC. o/a GLENCOLTON FARMS,
ELISA VANDER HOUT, MARKUS CHRISTIAN SCHMIDT, JOHANNES OSTHAUS
NIKOLAUS ALEXANDER, JOHN DOE(S), JANE DOE(S) and PERSONS UNKNOWN**

Respondents

- and -

OUR FARM OUR FOOD COOPERATIVE INC.

Intervener

FACTUM OF THE APPLICANT

(Application returnable on May 29 and 30, 2017)

Date: May 9, 2017

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Our Farm Our Food Cooperative Inc.*

PART I: OVERVIEW

1. Pursuant to section 22 of the *Milk Act* (the “*Act*”)¹, the Director, Gavin Downing, seeks an order restraining the respondents and the intervener, Our Farm, Our Food Co-Operative Inc. (“**OFOF**”), from operating a plant at 393887 and 393889 Concession 2 EGR, R.R. 1 Glenelg Township, West Grey, Ontario (“**Glencolton Farms**”) without a licence, contrary to section 15(1) of the *Act*.
2. As described in greater detail below, section 15(1) of the *Act* prohibits any individual or corporation from operating a plant without a licence issued by the Director.² The *Act* defines a “plant” as any premises in which milk or milk products are processed, including premises where milk is churned, packaged, or treated in the manufacture or preparation of milk products.³
3. The uncontested evidence is that a plant is being operated at Glencolton Farms. The respondents and OFOF concede that they operate a plant where they process unpasteurized and unsterilized (“**raw**”) milk and milk products on a scale sufficient to serve over 100 people on a weekly basis.⁴ Further, the respondents concede that they do not have a licence to operate a plant at Glencolton Farms. As a result, the evidence on this Application conclusively establishes that the respondents and OFOF are operating a plant without a licence, contrary to section 15(1) of the *Act*. In fact, an unlicensed plant has been operating at Glencolton Farms since at least 2006.
4. Despite conceding these points, the respondents and OFOF resist this Application on the basis that their corporate schemes displace the *Act* and permit them to operate the plant without a licence. As will be further explained below, the past and current schemes involve the

¹ *Milk Act*, R.S.O. 1990, c M.12.

² *Ibid.* at s. 15(1).

³ *Ibid.* at s. 1; **Note:** See the definition of “plant” and “processing”.

⁴ Transcript of the Cross-Examination of Elisa Vander Hout, April 20, 2017 [“**Vander Hout Examination**”] at Q426 - 431.

following:

(a) **Scheme prior to March 1, 2016:** Consumers of raw milk and raw milk products processed at Glencolton Farms purport to be shareholders of the respondent, Agricultural Renewal Co-operative Inc. (“ARC”), the corporation that owns the property on which Glencolton Farms is located and was the owner of all assets necessary to operate a milk plant. “Shareholders” of ARC were required to pay a per unit price to purchase raw milk and milk products processed and manufactured at Glencolton Farms.⁵

(b) **Scheme subsequent to March 1, 2016:** Consumers of raw milk and raw milk products processed at Glencolton Farms purport to be shareholders of OFOF. OFOF purported to purchase all plant assets from ARC and contracted with ARC to operate the plant on its behalf as of March 1, 2016. As with the scheme prior to March 1, 2016, “shareholders” of OFOF were required to pay a per unit price to purchase raw milk and milk products processed and manufactured at Glencolton Farms.⁶

5. Relying on these schemes, the respondents argue that the *Act* does not apply to a plant that processes and manufactures raw milk and milk products for a closed group of consumers (i.e. shareholders of ARC or OFOF). The respondents and OFOF argue that these schemes create a “family farm” exception to the licensing regime. Respectfully, the respondents’ and OFOF’s reliance on these schemes is misplaced.

6. In 2006, the respondent Michael Schmidt was charged with a number of provincial offences, including a violation of section 15(1) of the *Act* for operating a plant at Glencolton Farms without a licence. At the time, Mr. Schmidt engaged in a scheme in which consumers of raw milk or milk products from Glencolton Farms entered into oral “cow-share agreements” wherein consumers purported to acquire a right of access to the raw milk or milk products processed at the farm. In upholding Mr. Schmidt’s convictions under the *Act*, the Court of Appeal found as follows:

...I cannot accept the appellant’s submission that the *Milk Act* licence requirement does not apply to the

⁵ Affidavit of Glenn Jarvie, sworn March 24, 2016, Application Record, Volume II at Tab 4 [“**Jarvie Affidavit**”] at paras. 60 - 75; Affidavit of Elisa Vander Hout Affidavit, sworn April 4, 2017, Responding Record of ARC at Tab 1 [“**Vander Hout Affidavit**”] at paras. 20 and 26.

⁶ Affidavit of William Denny, sworn March 28, 2017, Responding Record of OFOF, Volume I at Tab 1 [“**Denny Affidavit**”] at paras. 5, 6 and 27; Transcript of the Cross-Examination of William Denny, April 24, 2017 [“**Denny Examination**”] at Q241 - 243.

appellant's operation. The *Milk Act* makes no exception for "private" operations. Even if it did, the appellant operates a plant from which any member of the public can procure unpasteurized milk.⁷

7. The reasons of the Court of Appeal apply equally to the schemes at issue in this proceeding. The *Act* provides no exception to the plant licensing requirements. The corporate schemes set up by the respondents and OFOF do not displace the application of the *Act*. Simply put, there is no corporate scheme that relieves an operator of a plant from the requirement to obtain a licence.

8. Alternatively, the respondents' attempt to characterize the schemes as a "family farm"⁸, wherein shareholders are merely consuming milk and milk products they personally own⁹ is, tenuous. The schemes pursued by the respondents do not amount to a "family farm" for, amongst others, the following reasons:

- (a) With a few exceptions, the "shareholders" of ARC or OFOF are not related to each other;
- (b) Shareholders do not own the assets of a corporation. A corporation is a separate entity from its shareholders. The "shareholders" of ARC or OFOF do not own any of the cows or equipment necessary for the operation of the milk plant;
- (c) The schemes concocted by the respondents still require shareholders to purchase raw milk or milk products at a per unit price – these schemes are still commercial enterprises; and,
- (d) Within the limits of the plant's production capacity, any member of the public can obtain raw milk or milk products from Glencolton Farms as long as they become a shareholder of the relevant corporate entity and pay the requisite purchase price for shares, submit to an interview, and pay the per unit price.¹⁰

9. The *Act* applies to the plant operating at Glencolton Farms. As such, the operators of the plant (ARC and OFOF) are required to obtain a licence to operate the plant. Until the respondents and OFOF obtain a licence, they should be enjoined from operating the plant at Glencolton Farms.

⁷ *R. v. Schmidt*, 2014 ONCA 188 at para. 27.

⁸ Vander Hout Affidavit at paras. 11 and 17.

⁹ *Ibid.* at para. 25.

¹⁰ Vander Hout Examination at Q386, Q988, and Q1111; Denny Examination at Q101 - 102

PART II: FACTS

A. The history of this proceeding

10. This application was commenced on January 22, 2016. The companion application by the Regional Municipality of York, bearing court file number CV-16-125250 (the “**York Application**”), was commenced on January 4, 2016.

11. On March 16, 2016, following the parties’ attendance in assignment court, Justice Vallee issued an endorsement which, *inter alia*, scheduled the hearings for both applications for September 26 and 27, 2016 and, at his request, added Michael Schmidt as a respondent to this application.¹¹

12. On April 14, 2016, on the consent of the parties, Justice Charney ordered that this application and the York Application be heard together, or one immediately after the other, and that any cross-examinations conducted on any affiants in either proceeding be conducted jointly, for joint use in each proceeding.¹²

13. On May 26, 2016, Justice Edwards was assigned to case manage both applications. The respondents were not prepared to proceed with the hearing of the applications on the September 2016 dates scheduled by Justice Vallee. Those dates were instead used for the hearing of the following motions before Justice Mullins:

- a motion by the respondents to convert both proceedings into actions;
- motions by OFOF to intervene in both proceedings and to be represented by Lewis Taylor, a non-lawyer; and,
- a motion by York Region to add the Board of Health for the Simcoe Muskoka District Health Unit and the Regional Municipality of Peel as applicants in the York Application.

¹¹ Endorsement of Justice Vallee, dated March 16, 2016, York Region’s Supplementary Record; Transcript of the Cross-Examination of Michael Schmidt, April 20, 2017 [“**Schmidt Examination**”], at Q121 - 123

¹² Order of Justice Charney, dated April 14, 2016, York Region’s Supplementary Record

14. After completing oral arguments and during the course of the Director's submissions, the respondents sought to withdraw their motion to convert the applications to actions. Justice Mullins ordered that the motion was withdrawn, without prejudice, and that the costs of the motion were payable by the respondents to the Director and York Region in any event of the cause, if requested.¹³

15. On consent of the applicants, OFOF's motion to intervene was granted. Justice Mullins also granted OFOF's motion for leave to be represented by a non-lawyer, Lewis Taylor. York Region's motion to add additional applicants in the York Application was granted. Justice Mullins did not award costs for these motions.¹⁴

16. On December 6, 2016, Justice Edwards issued an endorsement setting a timetable for various procedural steps in the applications, including setting a hearing date.¹⁵ Amongst other things, the timetable required the respondents to serve and file materials for a proposed section 8 *Charter* motion to exclude evidence obtained during the execution of a search warrant at Glencolton Farms on October 2, 2015. Much of the evidence obtained during the search is relied upon in this application.¹⁶ On January 13, 2017, ARC and Markus Schmidt abandoned the proposed motion.

B. The legislative framework

i) The role of the director and the purposes of the *Milk Act*

17. The Applicant, Gavin Downing, is the Director appointed by the Minister of Agriculture,

¹³ Order of Justice Mullins re. the respondents' motion to convert, entered November 17, 2016; Applicant's Supplementary Application Record at Tab 2

¹⁴ Order of Justice Mullins re. OFOF's motion to intervene, entered November 17, 2016; Applicant's Supplementary Application Record at Tab 1

¹⁵ Endorsement of Justice Edwards, dated December 6, 2016, Applicant's Supplementary Record at Tab 3

¹⁶ *Regulatory Modernization Act, 2007, S.O. 2007, c 4* at s. 2, 4, and 7; *Designations*, O Reg 75/08 at s. 1 and Schedule A; *R. v. Murdock*, [2003] O.J. No. 5736 (S.C.J.) at paras. 12, 15 and 18.

Food and Rural Affairs (the “**Minister**”) pursuant to section 2.1(1) of the *Act*.¹⁷ In this capacity, the Applicant is statutorily obligated to administer and enforce the provisions of the *Act* and to “exercise the powers and perform the duties that are conferred or imposed” on him.¹⁸

18. The statutory purposes of the *Act* are detailed in section 2 of the *Act*. Particularly relevant to this application, section 2(b) states that one of the purposes of the *Act* is “the control and regulation in any or all respects of the quality of milk, milk products and fluid milk products within Ontario”.¹⁹ The *Act* is public welfare legislation and, as a result, is to be accorded a broad and liberal interpretation that is consistent with its purpose.²⁰

ii) The licensing requirement for a plant under the *Milk Act*

19. Section 15(1) of the *Act* prohibits anyone from operating a plant in Ontario without a licence from the Director. A plant is defined in the *Act* as including “a premises in which milk or cream or milk products are processed”.²¹ As detailed further below, the operation of plants is closely regulated. Indeed, section 14 of the *Act* prohibits anyone from even constructing a building for use as a plant without a permit from the Director.

20. The *Act* defines “processing” broadly:

“processing” means heating, pasteurizing, evaporating, drying, churning, freezing, packaging, packing, separating into component parts, combining with other substances by any process or otherwise treating milk or cream or milk products in the manufacture or preparation of milk products or fluid milk products; (“transformation”)

“processor” means a person engaged in the processing of milk products or fluid milk products²²

21. Regulation 761 to the *Act* sets out, among other things, the requirements for applying for

¹⁷ Affidavit of Gavin Downing, sworn March 24, 2016; Application Record, Volume I at Tab 2 [“**Downing Affidavit**”] at para. 3.

¹⁸ *Milk Act* at ss. 2.1(1), (3) and (4); “Appointment of the Director under the *Milk Act*”, Exhibit A to the Downing Affidavit

¹⁹ *Milk Act* at s. 2(b).

²⁰ *R v. Schmidt*, 2014 ONCA 188 at para. 23; *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685 at para. 44.

²¹ *Milk Act* at s. 1.

²² *Ibid.*

and maintaining a licence from the Director to operate a plant. Pursuant to sections 95 to 100 of the regulation, a person is required to apply for a licence before beginning to operate a plant and, once they obtain the licence, to comply with a series of conditions governing its operation.²³

22. Section 100(1) of Regulation 761 defines the circumstances under which the Director may refuse to issue a licence. These circumstances include where the Director does not believe the applicant is qualified to operate a plant based on their experience, equipment or personnel, or where the applicant has failed to observe, perform or carry out the requirements of the *Act* or its regulations.²⁴ A licence may also be refused where the applicant does not comply with the *Health Protection and Promotion Act*, R.S.O. 1990, c H7 (“*HPPA*”).²⁵ Subsections 18(1) and (2) of the *HPPA* prohibit the distribution of milk, or milk products derived from milk, which have not been sterilized or pasteurized at a licenced plant.²⁶

23. Sections 95 to 100 of Regulation 761 were established by the Ontario Farm Products Marketing Commission pursuant to its authority under section 19(1) of the *Act*.²⁷ The *Act* and its regulations apply to all plants in Ontario. Anyone who operates a plant is statutorily required to have a licence from the Director.²⁸ There are no exemptions and there is no exception for private operations.²⁹

C. Glencolton Farms and the respondents

24. Glencolton Farms, the property at issue in this litigation, is located at 393887 and 393889 Concession 2 RR1, EGR Glenelg Township, West Grey County, Ontario and bears the legal description of Lot 44 Concession 3 EGR Glenelg, West Grey.

²³ *Milk and Milk Products*, O. Reg. 761 at ss. 95(1) and 99(1).

²⁴ *Ibid.* at ss. 100(1)(a) and (c).

²⁵ *Ibid.* at ss. 100(1)(f).

²⁶ *Health Protection and Promotion Act*, R.S.O. 1990, c H.7 at s. 18.

²⁷ O. Reg. 174/14

²⁸ *Milk and Milk Products*, O. Reg. 761 at s. 98.

²⁹ *R. v. Schmidt*, 2014 ONCA 188 at para. 27.

25. The Glencolton Farms property is owned by ARC.³⁰ In the early 1990s, Michael Schmidt owned Glencolton Farms and operated an unlicensed plant there. In 1995, Michael Schmidt transferred Glencolton Farms to his wife (at the time), Dorothea Schmidt. In 2010, Dorothea Schmidt transferred the property to ARC.³¹

26. The respondent Elisa Vander Hout is a director of ARC and is the current wife of Michael Schmidt. Ms. Vander Hout is also a shareholder of OFOF. The respondent Markus Schmidt is a director of ARC and is the son of Michael Schmidt.³²

27. None of the respondents possesses or has possessed a permit from the Director to construct a plant or a licence from the Director to operate a plant at Glencolton Farms. None of the respondents has applied for such a permit or licence. No licence exists for the operation of a plant by anyone at Glencolton Farms.³³

28. At this time, the respondents Michael Schmidt, Markus Schmidt and Elisa Vander Hout reside at Glencolton Farms. Markus Schmidt's spouse and children also reside at the farm property. In addition, two employees of ARC reside at the farm: Michael Jackson and Carl Natiuk.³⁴ Mr. Jackson is on ARC's payroll and his duties include milking the cows and keeping the processing area clean.³⁵

D. The history of unlicensed milk production at the plant at Glencolton Farms

29. The unauthorized operation of the plant at Glencolton Farms has given rise to a number of successful legal proceedings against its operators, including multiple prosecutions and a

³⁰ **Note:** ARC also uses "Glencolton Farms" as a business name; Jarvie Affidavit at paras. 11, 15 and 17.

³¹ Jarvie Affidavit at para. 11; Affidavit of Vito Chiefari, Application Record of York Region at Tab 2 ["**Chiefari Affidavit**"] at para. 21.

³² Jarvie Affidavit at para. 16.

³³ *Ibid.* at para 23.

³⁴ Vander Hout Examination at Q41.

³⁵ *Ibid.* at Q43 and at Q49 - Q50.

contempt proceeding.

i) 1994 Prosecution and Conviction

30. In 1994, Michael Schmidt was charged with and pleaded guilty to operating a plant at Glencolton Farms without a licence from the Director, contrary to section 15(1) of the *Act*.³⁶ Mr. Schmidt was sentenced to probation and required to deliver a written undertaking that he would “dismantle his equipment used in the processing and distribution of unpasteurized dairy products” and “allow inspection of his facility by Ministry staff to ensure compliance with this undertaking”.³⁷

ii) 2006 – 2014: Prosecution and Conviction

31. In 2006, Michael Schmidt was charged with, among other things, operating a plant at Glencolton Farms without a licence, contrary to section 15(1) of the *Act*, and selling and distributing unpasteurized milk, contrary to s. 18 of the *HPPA*. The charges related to the operation of a “cow-share program” at Glencolton Farms.

32. At trial, Mr. Schmidt was acquitted of all charges. The presiding Justice of the Peace ruled that the *Act* and the *HPPA* did not apply to the cow-share program because it was a “private scheme”.³⁸ On appeal, Justice Tetley of the Ontario Court of Justice rejected this position and convicted Mr. Schmidt of 13 offences, including operating a plant without a licence.³⁹ Justice Tetley’s ruling was upheld by the Ontario Court of Appeal. Mr. Schmidt unsuccessfully sought leave to appeal to the Supreme Court of Canada.⁴⁰

³⁶ Jarvie Affidavit at para. 29; Chiefari Affidavit at para. 28.

³⁷ Downing Affidavit at para. 29; Memorandum to Sandy MacMillan from A.D. Neath, September 14, 1994, Exhibit “E” to the Downing Affidavit.

³⁸ *Ibid.* at para. 14.

³⁹ *R. v. Schmidt*, [2011] O.J. No. 4272 (O.C.J.); aff’d 2014 ONCA 188 (C.A.) at paras. 4, 14-15.

⁴⁰ *R. v. Schmidt*, [2014] S.C.C.A. No. 208.

33. The Court of Appeal described the cow-share scheme as follows:

The appellant endeavored to comply with the *HPPA* through his cow-share program. Cow-share members paid the appellant a capital sum ranging between \$300 and \$1200 and were required to pay a per litre charge for the services involved in keeping the cow, milking the cow, and bottling and transporting the milk.

The cow-share agreements were oral in nature. Members were given a card but the cards did not contain the name of a cow and there was no other evidence that the name of the cow in which the member had a share was ever communicated. Nor was there any evidence that the agreements formally transferred ownership in a cow from the appellant to the member. The members were not involved in the purchase, care, sale, or replacement of any cow nor were they involved in the management of the herd. The appellant provided cow-share members with a handbook outlining the scheme. It states: “As a cow-share member, you are a part owner of the milk production. In effect, you are paying [the appellant and his wife] to look after the cows and produce the milk...”

The appellant contends that the cow-share agreements are a form of agistment, a traditional common law arrangement whereby the agister cares for cattle and livestock owned by others for remuneration.⁴¹

34. As detailed above, the Court of Appeal rejected the argument that the *HPPA* and the *Act* did not apply to the cow-share scheme, finding that there are no exceptions to the provisions of the *Act*. The Court of Appeal found that Mr. Schmidt’s dairy operation fell within the ordinary meaning of plant:

The transactions involving unpasteurized milk that form the subject of the charges fall squarely with the ordinary meaning of the words “sale” and “distribute” as does the appellant’s dairy operation fall within the ordinary meaning of “plant” and “premises in which milk or cream or milk products are processed”. To conclude otherwise would be to ignore the jurisprudence on proper approach to the interpretation of public welfare legislation and the direction given in the *Legislation Act*, [citation omitted], that all legislation is deemed to be remedial and should be given a liberal and purposive interpretation.⁴²

iii) 2006 – 2008: Public Health Order Proceedings

35. In 2006, the York Region Public Health Services Branch issued an order pursuant to section 13 of the *HPPA* requiring Mr. Schmidt to cease the sale and distribution of raw milk produced at Glencolton Farms. Mr. Schmidt did not comply with this order.⁴³

36. In 2007, Justice Ferguson of the Superior Court issued an order requiring Mr. Schmidt to

⁴¹ *R. v. Schmidt*, 2014 ONCA 188 at paras. 4 and 14-15.

⁴² *Ibid.* at para. 24.

⁴³ Chiefari Affidavit at paras. 34–35.

comply with the York Region Public Health order. Mr. Schmidt did not comply with Justice Ferguson's order. In 2008, Justice Boswell of the Superior Court found Mr. Schmidt in contempt of Justice Ferguson's order and fined him \$5,000. Justice Boswell ordered Mr. Schmidt to pay \$50,000 in costs to York Region.⁴⁴

E. Investigation into the operation of a plant without a licence at Glencolton Farms

i) Investigations from December, 2014 to September, 2015

37. On December 5, 2014, the York Regional Public Health Unit ("YRPHU") advised OMAFRA that its investigators had observed Michael Schmidt delivering what they believed to be unpasteurized milk and/or milk products. The matter was referred to Ontario's Agricultural Investigations Unit ("AIU"), which commenced an investigation into potential offences under the *Act* at Glencolton Farms. The AIU investigation included, amongst other things, surveillance of the property and a distribution site in Vaughan.

38. From March, 2015 to September, 2015, the AIU investigators observed the following:

- (a) 45 to 50 cattle on Glencolton Farms and on an adjacent lot owned by a corporation controlled by Ms. Vander Hout and Markus Schmidt.⁴⁵ The cattle were divided into two herds in a manner consistent with the operation of a dairy farm, with one herd kept close to the plant for regular milking and the other permitted to graze and develop further afield;⁴⁶
- (b) On a weekly basis, Ms. Vander Hout drove a van loaded with crates of bottles containing milk from Glencolton Farms to a parking lot at 901 Rutherford Road in Vaughan.⁴⁷ Once at the parking lot, Ms. Vander Hout set up a distribution operation from the rear of the van.⁴⁸ The operation, which often involved the assistance of another individual, comprised of Ms. Vander Hout sitting behind a table and providing individuals with bottles of raw milk after being provided with unidentified pieces of paper and, in some instances, money. In some cases, AIU investigators observed at least 80 vehicles enter

⁴⁴ *Ibid.* at paras. 36-38.

⁴⁵ Jarvie Affidavit at para. 21(b).

⁴⁶ *Ibid.* at para. 21(c).

⁴⁷ *Ibid.* at para. 21(f); Vander Hout Examination at Q131.

⁴⁸ Exhibits 2, 3 and 4 to the Vander Hout Examination, Applicant's Supplementary Record at Tabs 4A, 4B and 4C

the parking lot on these distribution days;⁴⁹

- (c) That no permit had been issued to build a plant at Glencolton Farms;
- (d) That no operating license had been issued to any of the Respondents or any other person for the plant at Glencolton Farms.

39. Based on the history of non-compliance with the *Act* at Glencolton Farms, and the direct observations made during their surveillance, the AIU investigators formed reasonable grounds to believe that a plant was operating at Glencolton Farms without a licence. Consequently, pursuant to an information to obtain sworn by AIU investigator Glenn Jarvie, a search warrant was obtained for Glencolton Farms on September 28, 2015.⁵⁰ The search warrant was executed on October 2, 2015.⁵¹

40. Based on the observations of investigators during the execution of the search warrant, as well as the evidence of the respondents in this proceeding, it is known that the barn on the property houses a number of distinct areas dedicated to the production of milk and milk products, including a milking parlour; processing rooms; and a wash-up room.⁵² From these observations and this evidence, it is clear that a plant is operating at Glencolton Farms:

- (a) The milking parlour, located in the main barn area, was set up in a manner and with equipment to permit the milking of up to eight cows.⁵³ It contains fixed piping to transport milk to the processing areas described below.⁵⁴
- (b) The processing rooms contained a variety of equipment used in the production of milk and milk products, including:
 - a stainless kettle with heating and cooling capability, generally used for manufacturing cheese curds;⁵⁵
 - a bulk storage tank with cooling capability, with an outlet valve positioned to fill bottles;⁵⁶

⁴⁹ Jarvie Affidavit at paras. 21(i) and 21(j).

⁵⁰ *Ibid.* at para. 25.

⁵¹ *Ibid.* at para 26; Affidavit of Rick Bond, sworn March 24, 2016, Application Record, Volume I at Tab 3 [“**Bond Affidavit**”] at para 3.

⁵² Bond Affidavit at para. 5.

⁵³ Jarvie Affidavit at para. 29; Vander Hout Examination at Q101 and Q736 - 740.

⁵⁴ Bond Affidavit at para. 9(a); Vander Hout Examination at Q740.

⁵⁵ Bond Affidavit at para. 7(a); Vander Hout Examination at Q1101 - 1104.

⁵⁶ Bond Affidavit at para. 7(b); Vander Hout Examination at Q1065 - 1067.

- a cream separator, used to separate cream from milk, dismantled for cleaning;⁵⁷
- a butter churn, used to manufacture butter from cream;⁵⁸
- two large stainless tables, one of which AIU investigators observed held cheese curds in rectangular forms with whey actively draining to a bucket below, a step in the cheese-making process;⁵⁹ and,
- an incubator, used to store products such as cheese at a controlled temperature to allow it to age. The incubator contained wheels of cheese in the process of ageing.⁶⁰

41. In addition to the above, AIU investigators observed a retail store on site. Milk and milk products were stored in refrigerators at the store and were available for sale.⁶¹ AIU investigators seized milk and milk products from the retail store and a walk-in cooler in the processing area for testing.⁶² Subsequent lab analyses confirmed that the seized milk and milk products originated from cattle.⁶³

ii) ARC's business structure and distribution scheme

42. Records obtained from computers seized during the search, including investor information packages, correspondence and application forms, reveal the nature of ARC's operations. Although ARC maintains that it is a not-for-profit organization, records seized during the search indicate that ARC is structured as a "for-profit worker-owned cooperative" corporation.⁶⁴ Its operations are described in ARC's records as "milking 24 cows, supplying milk directly to about 150 families in the form of fluid and processed milk products such as cheese" made on the farm.⁶⁵

43. A 2009 investor document obtained during the execution of the search describes the ARC

⁵⁷ Bond Affidavit at para. 7(c); Vander Hout Examination at Q1124.

⁵⁸ Bond Affidavit at para 7(d); Vander Hout Examination at Q1118 - 1121.

⁵⁹ Bond Affidavit at para 7(e).

⁶⁰ *Ibid.* at para 7(f).

⁶¹ Jarvie Affidavit at para. 31.

⁶² *Ibid.* at para. 37.

⁶³ *Ibid.* at paras. 37 and 57.

⁶⁴ Financial Statements of ARC for the years 2010 to 2013, Exhibit CC to Chiefari Affidavit.

⁶⁵ Jarvie Affidavit at paras. 60 and 65.

investment scheme. The document explains that investors in ARC were required to purchase at least 20 Class A shares for \$100 each, for an investment of \$2,000. In return, those investors obtained the right to purchase up to 10 litres of milk or mil products from ARC per week for \$3 a litre “to cover the cost of the producing and processing time and the expenses of the farm, including the cheese operation”.⁶⁶ Individuals who wished to increase their allotment of milk could purchase more shares.⁶⁷ Shareholders could purchase milk in excess of their allotment when a surplus of milk was available.⁶⁸ As of September 2015, shareholder equity in ARC amounted to approximately \$646,000.⁶⁹

44. Prior to March 2, 106, shareholders” of ARC would order milk, milk products and other products from ARC by sending a message via e-mail or text to Ms. Vander Hout, or by submitting an order on FarmMatch.com. FarmMatch.com allows purchasers to orders products from ARC on-line and arrange for pick-up at specified locations, including the on-site retail store.⁷⁰

45. Based on the documents obtained from ARC, it appeared that raw milk and milk products processed at Glencolton Farms were being made available for pick-up at sites in Richmond Hill, Brampton, Barrie, Richmond Hill, Schomberg, Toronto and Vaughan.⁷¹

46. An ARC order management document for September 22, 2015 revealed the extent of the company’s operations. On that day alone, deliveries included 286 1-litre and 2-litre bottles of “Fresh Milk”; 50 1-litre bottles of “Cultured Milk”; and 48 jars of “Fresh Cream”.⁷² On cross-examination, Ms. Vander Hout estimated that the herd at Glencolton Farms produces an average

⁶⁶ *Ibid.* at paras. 60 and 61; See also: Vander Hout Examination at Q379 - 380.

⁶⁷ Jarvie Affidavit at paras. 6062.

⁶⁸ Vander Hout Examination at Q862, Q880 - 881, and Q965 - 969.

⁶⁹ Jarvie Affidavit at para. 63.

⁷⁰ *Ibid.* at paras. 31 and 68.

⁷¹ Jarvie Affidavit at paras. 68, 70-71; Vander Hout Examination at Q591 and Q977.

⁷² Jarvie Affidavit at para. 72.

of 200 litres of milk every day.⁷³

47. A pricing list located in the cheese plant listed dairy products, including milk and cheese, and their price by volume and weight, respectively. The pricing list indicated that milk was sold in jars for \$5 per litre. Cheese is sold for \$12 to \$16 per pound.⁷⁴ Spreadsheets from ARC's computers demonstrated the size and nature of the operation as it existed prior to March 1, 2016. Sales receipts from January 7, 2015 to September 22, 2015 indicate just over \$200,000 in sales from the distribution of milk. "On Farm Sales" for the same period totalled \$62,729.⁷⁵

iii) Obstruction of the search of Glencolton Farms

48. Shortly after arriving at Glencolton Farms on October 2, 2015 to execute the search warrant, AIU investigators were advised by Michael Schmidt that they were not permitted to remove anything from the property, despite their authority pursuant to the search warrant, until the Premier provided a guarantee that raw milk would be legalized.⁷⁶ Investigators were advised by another individual that the truck they had brought to carry exhibits had been seized and would only be returned if they paid \$5,000.⁷⁷

49. When AIU investigators attempted to leave Glencolton Farms with items seized pursuant to the search warrant, they were blocked by approximately 30 people. Equipment, including tractors, grain bins, and trucks, were positioned on the driveways to block investigators from leaving.⁷⁸

50. In order to ensure their safety, and after an hour of unsuccessfully attempting to clear the

⁷³ Vander Hout Examination at Q61 - 65.

⁷⁴ Pricing List, Exhibit "V" to the Bond Affidavit; Jarvie Affidavit at para. 31; Vander Hout Examination at Q796.

⁷⁵ Jarvie Affidavit at para. 73.

⁷⁶ *Ibid.* at para 34; Exhibit 5 to the Vander Hout Examination, Applicant's Supplementary Record at Tab 4D; Schmidt Examination at Q142 - 143.

⁷⁷ Jarvie Affidavit at para. 35.

⁷⁸ *Ibid.* at para. 38; Exhibit 2 to the Schmidt Examination, Applicant's Supplementary Record at Tab 5A; Vander Hout Examination at Q1226.

driveways with the assistance of police, investigators agreed to return the items that had been lawfully seized pursuant to the search warrant to Ms. Vander Hout.⁷⁹

51. As a result of these events, the West Grey Police charged Michael Schmidt, along with a number of other individuals, with obstruction of a peace officer. The criminal trial for those charges is ongoing.

52. In media reports following the execution of the search warrant, Michael Schmidt is quoted as “vow[ing] to keep his raw milk production going” and indicates that members of ARC are prepared to resist further investigations by provincial investigators.⁸⁰ In his cross-examination, Michael Schmidt acknowledged that shareholders and supporters of ARC impeded the execution of a lawful search warrant.⁸¹

F. The role of Our Farm Our Cooperative Inc.

53. On March 1, 2016, following the commencement of this application, ARC entered into agreements with OFOF for the sale of certain assets (the “**Asset Agreement**”), the lease of part of Glencolton Farms (the “**Lease Agreement**”), and for the operation of the plant by ARC on OFOF’s behalf (the “**Management Agreement**”).⁸²

54. OFOF describes itself as a private consumer cooperative corporation.⁸³ It was incorporated on January 8, 2016.⁸⁴ The company was established by ARC supporters and shareholders in an attempt to create a new corporate structure that would purportedly allow its members to consume raw milk while avoiding the requirements of the *Act* and the *HPPA*. These individuals were also concerned that ARC’s operations were not compliant with the *Securities*

⁷⁹ Jarvie Affidavit at para. 44.

⁸⁰ Downing Affidavit at paras. 37 - 39.

⁸¹ Schmidt Examination at Q236 – 238 and Q247 - 248.

⁸² Exhibits H, I and J to the Denny Affidavit.

⁸³ Denny Affidavit at para. 3.

⁸⁴ *Ibid.*

*Act.*⁸⁵

55. OFOF is structured in a manner similar to ARC, with its shareholders purchasing shares in exchange for the right to purchase raw milk and milk products.⁸⁶ Many of OFOF's approximately 135 shareholders are supporters of and were previously shareholders in ARC, as demonstrated in Schedule "C" to this factum.⁸⁷ During Ms. Vander Hout's cross-examination, she indicated that about half of ARC's shareholders sold back their shares to ARC and utilized the proceeds to purchase shares in OFOF.⁸⁸

56. Pursuant to the Asset Agreement, ARC purported to convey the contents of the milk plant to OFOF, including the milking parlour, dozens of cases of bottles, the commercial dishwasher, the bulk tank, and the equipment required for cheese production.⁸⁹ ARC also purported to convey approximately 60 cattle to OFOF. The herd at the farm was owned by Michael Schmidt at the time of his last prosecution, in 2006.⁹⁰ There is no indication that Mr. Schmidt conveyed his interest in the herd, including their offspring, to ARC prior to the execution of the Asset Agreement.

57. In consideration for the cattle, OFOF signed a non-interest bearing promissory note for \$130,500, payable on March 1, 2019. In consideration for the other chattel, OFOF signed a non-interest bearing promissory note for \$152,500, payable on demand.⁹¹ At this time, OFOF has not paid any funds to ARC for the purchase of the assets, including the cattle.

58. The Lease Agreement provides OFOF with exclusive use of the "cheese kitchen" and non-exclusive use of the main barn, farm lane and pasture fields in exchange for \$500 a month,

⁸⁵ *Ibid.* at para. 19.

⁸⁶ Vander Hout Examination at Q532 - 534.

⁸⁷ *Ibid.* at Q 537-542; Denny Examination at Q278.

⁸⁸ Vander Hout Examination at Q537 - 542.

⁸⁹ Exhibit I to the Denny Affidavit; Vander Hout Examination at Q32.

⁹⁰ *R. v. Schmidt*, [2014] ONCA 188 (C.A.) at para. 7.

⁹¹ Exhibit I to the Denny Affidavit.

for a term of 20 years.⁹² OFOF identifies Glencolton Farms as its head office and holds some meetings there, with Ms. Vander Hout frequently in attendance.⁹³

59. Pursuant to the Management Agreement, ARC operates the plant on OFOF's behalf and for OFOF's benefit. Among other obligations, ARC is required to house, feed and milk the cattle; maintain the production of milk and milk products; and to provide OFOF's members with these milk and milk products. ARC pays the costs associated with these activities, including purchasing hay for the cattle; OFOF's proportion of the utility bills on the farm; and the monthly testing of the milk produced at Glencolton Farms.⁹⁴ In exchange, OFOF is to compensate ARC weekly "on a per unit basis and at a price to be agreed to by both parties from time to time".⁹⁵

60. As with ARC, OFOF's shareholders purchase raw milk and milk products through FarmMatch.com and pay for items by the unit. FarmMatch sends a confirmation email to the ARC email address upon each purchase. The confirmation emails are accessible by ARC and OFOF.⁹⁶ OFOF asserts, without evidence, that the amounts it charges are intended to cover operating expenses.⁹⁷

61. Members of OFOF often pay for their dairy products by providing Ms. Vander Hout with cash or a cheque at the designated distribution location on Tuesdays.⁹⁸ Ms. Vander Hout in turn deposits those funds into an account held by OFOF. Every Wednesday, OFOF pays ARC for the units of dairy products sold to its members.⁹⁹

62. The execution of these agreements has not altered the operation of the plant at Glencolton

⁹² Exhibit H to the Denny Affidavit.

⁹³ Denny Examination at Q41 and Q86; Transcript of the Cross-Examination of Mascha Perrone, April 24, 2017 [**"Perrone Examination"**] at Q135 – 138 and Q142.

⁹⁴ Denny Examination at Q39; Perrone Examination at Q86 - 88; Vander Hout Examination at Q86 and Q197.

⁹⁵ Exhibit I to the Denny Affidavit.

⁹⁶ Vander Hout Examination at QQ 661-667 and QQ 949-956.

⁹⁷ Denny Affidavit at para. 27.

⁹⁸ Vander Hout Examination at Q581, Q661-667 and Q1173 - 1174; Perrone Examination at Q267-271.

⁹⁹ Vander Hout Examination at Q1174 - 1176; Denny Examination at Q246 - 247.

Farms. ARC continues to own Glencolton Farms and continues to operate the plant without a licence.¹⁰⁰

PART III: ISSUES

63. The sole issue on this application is whether this Honourable Court should issue an order enjoining the respondents and OFOF from carrying on business as processors and operators of a plant without a licence.

PART IV: LAW & ARGUMENT

A. Statutory injunctions under the *Milk Act*

64. Section 22 of the *Act* permits the Director to apply to the Court for an injunction to prevent a party who has or is committing an offence under the *Act* from continuing to do so,

22. Where it is made to appear from the material filed or evidence adduced that any offence against this Act or the regulations or any plan, order, direction, agreement, award or renegotiated agreement or award made under this Act has been or is being committed, the Superior Court of Justice may, upon the application of the Commission, the Director or a marketing board, enjoin any transporter, processor, distributor or operator of a plant from carrying on business as a transporter, processor, distributor or operator of a plant, absolutely or for such period as seems just, and any injunction cancels the licence of the transporter, processor, distributor or operator of a plant named in the order for the same period.¹⁰¹

65. An “offence” is defined under section 21 as including the contravention of the *Act* or its regulations.¹⁰² Section 22 does not establish a high evidentiary threshold: the Director is only required to prove on a balance of probabilities that it appears the party has committed or is committing an offence.¹⁰³

66. Section 22 does not require the Director to establish that Ontario will suffer irreparable

¹⁰⁰ Vander Hout Examination at Q34, Q1112, Q1126 and Q1133; Denny Examination at Q288-293.

¹⁰¹ *Ibid.* at s. 22 and Downing Affidavit at para. 18.

¹⁰² *Milk Act* at s. 21.

¹⁰³ *Milk Act* at s. 22; *Ontario (Minister of Agriculture and Food) v. Georgian Bay Milk Co.*, [2008] O.J. No. 485 (S.C.J.) at para. 35; *Certified General Accountants Assn. of Ontario v. American Institute of Certified Public Accountants*, [2013] O.J. No. 5360 (S.C.J.) at para. 60.

harm from the offending conduct or that the balance of convenience favours an injunction.¹⁰⁴ Similarly, the Director is not required to establish that other enforcement remedies have been pursued and have been ineffectual. While the hardship on the respondent is a relevant factor, it will not outweigh the harm to the public interest that occurs when a statute is being breached.¹⁰⁵

67. Section 22 is discretionary and the Court may decline to grant an injunction even if the requirements for an order are established. The circumstances under which a statutory injunction may be denied are narrow and have been described as exceptional. The circumstances are generally limited to situations where the offending conduct has stopped or where an injunction would be of little utility.¹⁰⁶

68. Importantly, section 22 does not require the Director to establish that raw milk or milk products made from raw milk will cause harm to consumers. Absent a constitutional challenge to the *Act*, the legislature's policy decisions regarding the regulation of milk and milk products, including the basis for those policy decisions, are immune from review.¹⁰⁷ The Director does, however, accept that the preponderance of literature demonstrates that the consumption of raw milk represents a higher relative risk to human safety than the consumption of pasteurized milk.¹⁰⁸

¹⁰⁴ *Ibid.*; *Valastro v. London (City)*, [2013] O.J. No. 478 (S.C.J.) at paras. 68-71.

¹⁰⁵ *Canada v. Ipsco Recycling Inc.* (F.C.) [2003] F.C.J. No. 1950 (F.C.T.J.) at paras. 50-51; *Law Society of Upper Canada v. Chiarelli*, [2014] O.J. No. 2328 (C.A.) at para.15; Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2016) at s. 3.265. **See also:** *Attorney-General for Ontario v. Grabarchuk et al.*, (1976), 11 O.R. (2d) 607 (H.C.J. – Div. Ct.) at pg. 2 - 3, 5 and 8 - 9; *Maple Ridge (District) v. Thornhill Aggregates Ltd.*, [1998] B.C.J. No. 1485 (B.C.C.A) at paras. 6 - 11; *Chicken Farmers of Ontario v. Drost*, [2005] O.J. No. 3973 (Div. Ct.) at paras. 25 and 45.

¹⁰⁶ *Vancouver (City) v. O'Flynn-Magee*, [2011] B.C.J. No. 2305 (B.C.S.C.) at para. 47; *British Columbia (Minister of Environment, Lands and Parks) v. Alpha Manufacturing Inc.*, [1997] B.C.J. No. 1989 (B.C.C.A.) at para. 32; Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2016) at s. 3.265.

¹⁰⁷ *Ontario Federation of Anglers & Hunters v. Ontario*, [2002] O.J. No. 1445 (C.A.) at paras. 49 and 57; leave to appeal denied, [2002] S.C.C.A. No. 252.

¹⁰⁸ "Memorandum of the Acting Chief Medical Officer of Health for Ontario", dated November 10, 2015, Exhibit C to the Downing Affidavit; Affidavit of Nadine Ijaz, sworn March 31, 2017, OFOF's Record, Volume I, Tab 75, at paras. 56, 75 and 76.

69. In summary, a section 22 injunction should be granted where:

- a) The respondent is a transporter, processor, distributor or operator of a plant, as defined under section 1 of the *Act*;
- b) The respondent has committed or is committing an offence by contravening a provision of the *Act* or one of its regulations; and,
- c) There are no residual factors that would justify the Court declining to exercise its discretion, including the absence of ongoing misconduct or where the injunction would be inequitable or of questionable utility.

B. A section 22 order is justified

i) A plant is operating at Glencolton Farms

70. The evidence conclusively establishes that the respondents and OFOF are operating a plant in which milk and milk products are processed. The respondents and OFOF acknowledge that raw milk and raw milk products were (pre March 1, 2016) and continue (post March 1, 2016) to be processed and manufactured at Glencolton Farms.¹⁰⁹ The evidence of “processing” at Glencolton Farms includes:

- **“Heating”**: The kettle/vat was used to heat milk in order to manufacture cheese, among other things.¹¹⁰
- **“Packaging”**: Empty bottles lined the hallway adjacent to the processing area. The bulk tank in the processing area was positioned to fill bottles. ARC and OFOF distribute milk in bottles at the on-site retail store and at the distribution points.¹¹¹
- **“Churning”**: A butter churn in the processing area of the plant was and is used to make butter. “Fresh butter” was available for sale at ARC’s on-site retail store. ARC continues to use the churn to make butter for OFOF.¹¹²
- **“Separating”**: A cream separator in the processing area was and is used to separate cream from milk, a necessary step in both the butter and cream-making process. Butter and cream were both available for purchase at the on-site retail store.¹¹³

¹⁰⁹ Vander Hout Examination at Q1047 - 1092; Q1112, Q1126, and Q1133; Vander Hout Affidavit at paras. 20-23; Denny Affidavit at paras. 5-7 and 20; Denny Examination at Q284 - 29.

¹¹⁰ Bond Affidavit at para. 7(a); Vander Hout Examination at Q1103 - 1110.

¹¹¹ Bond Affidavit at para. 7(b); Vander Hout Examination at Q1086 - 1092.

¹¹² Bond Affidavit at para. 7(d); Vander Hout Examination at Q1120 - 1126.

¹¹³ Bond Affidavit at para. 7(c); Vander Hout Examination at Q1124.

- **Treating milk or milk products in their manufacturing:**
 - There are numerous indications that cheese was being manufactured at the site, including: the presence of starter cultures; a kettle with heating and cooling functions; cheese forms actively draining whey; and wheels of cheese aging within heated incubators.¹¹⁴

71. The contractual agreements between ARC and OFOF have no relevance to whether a plant is being operated at Glencolton Farms. Both before and after March 1, 2016, ARC was processing raw milk and manufacturing raw milk products at Glencolton Farms.¹¹⁵ Prior to March 1, 2016, the raw milk and milk products were sold to ARC shareholders. Since March 1, 2016, the raw milk and milk products are being sold to many of the same people, now shareholders of OFOF.¹¹⁶

ii) The respondents and OFOF are processors and the operators of the plant

72. Section 22 permits orders enjoining the conduct of, among others, processors and operators of plants. The respondents and OFOF are processors and plant operators and can consequently be enjoined by a section 22 order. A processor is defined under section 1 the *Act* as “a person engaged in the processing of milk products or fluid milk products”. While operator is not defined in the *Act*, it is commonly defined in provincial legislation as a person who has charge, management or control over an operation.¹¹⁷

73. ARC, the corporation that owns Glencolton Farms and is the counterparty to the Management Agreement with OFOF, falls squarely within the definitions of both a processor and operator. ARC’s directors, who are also its officers, constitute operators of the plant as a result

¹¹⁴ Bond Affidavit at paras. 5 to 12; Vander Hout Examination at Q1127 - 1129.

¹¹⁵ Vander Hout Examination at Q1113; Denny Examination at Q284 - Q293.

¹¹⁶ Vander Hout Examination at Q540 - 543 and Q1132 - 1133; Denny Examination Q76 and Q268.

¹¹⁷ **Note:** See, for example: *Environmental Protection Act*, R.S.O. 1990, c. E.19 at s. 25; *Education Act*, R.S.O. 1990, c. E.2 at s. 258; O. Reg. 31/05 at s. 1(1); *Legislation Act, 2006*, S.O. 2006, c 21, Sch F at s. 87.

of their management and control over ARC.¹¹⁸

74. OFOF, by virtue of the Management Agreement, the Lease Agreement and the Asset Agreement, has charge, management and control over the plant operation. In his affidavit, OFOF's president acknowledges that OFOF is the operator of the plant.¹¹⁹ OFOF is an operator of the plant at Glencolton Farms and may be bound by an order made pursuant to section 22.

iii) The Respondents and OFOF are committing an offence because they are operating a plant and processing milk and milk products without a licence from the Director

75. Section 15(1) of the *Act* provides that no person shall operate a plant without a licence from the Director. The evidence clearly establishes that the respondents and OFOF are operating a plant, and processing milk and milk products, without a licence from the Director.

76. Section 21 of the *Act* provides that every person who contravenes the *Act* or its regulations is guilty of an offence. Accordingly, by carrying on the activities of operating a plant and processing milk and milk products, the respondents and OFOF are committing an offence under the *Act*.

77. This is not one of the exceptional situations in which the Court should exercise its discretion not to grant the requested statutory injunction. The unlawful conduct which gave rise to this proceeding is active and ongoing. Indeed, the respondents and OFOF continue to operate a plant and process milk and milk products on a scale sufficient to serve hundreds of people weekly.

C. The respondents' and OFOF's response to the application

78. It is anticipated that the respondents and OFOF will rely on the following arguments in

¹¹⁸ *Co-operative Corporations Act*, R.S.O. 1990, c C.35 at s. 96: **Note:** Markus Schmidt is ARC's president; Ms. Vander Hout is the company's secretary ("Corporation Profile Report", Exhibit I to the Jarvie Affidavit).

¹¹⁹ Denny Affidavit at para. 7.

resisting this application: (i) the *Act's* plant licensing regime does not apply to the past and current corporate schemes because they are “family farms” or “private operations”; (ii) the respondents are being selectively prosecuted; (iii) ARC is not obligated to comply with the *Act* by virtue of the terms of the original Crown patent for the land;¹²⁰ and, (iv) the regulation governing licensing under the *Act* is invalid.

i) The licensing regime under the *Act* applies to ARC's and OFOF's operations

79. This Court should reject any suggestion by the respondents or OFOF that they have arranged themselves in a manner that takes them outside of the scope of the *Act*. The respondents base this argument on the characterization of their operations, and OFOF's operations, as a “family farm” or closed network of like-minded people.

80. There is no allowance in the *Act* for any exemption or exclusion. The Ontario Court of Appeal affirmed this point in dismissing Michael Schmidt's appeal from his convictions in 2014, when it succinctly noted, “[t]he *Milk Act* makes no exception for ‘private’ operations”.¹²¹

81. There is even more reason to resist such a submission in this matter, where the respondents and OFOF purport to limit the enforcement of a statute and regulations that exist, in part, to protect public health. In *R. v. Schmidt*, among other decisions, the Court of Appeal has cautioned against the acceptance of this argument,

This court has resisted schemes that purport to create “private” enclaves immune to the reach of public health legislation and has insisted that public health legislation not be crippled by a narrow interpretation that would defeat its objective of protecting the public from risks to health.¹²² [citation omitted]

82. In any event, the evidence from both the applicant and the respondents does not support the respondents' characterization of their operations as “family farms”. ARC and OFOF both

¹²⁰ Vander Hout Affidavit at paras. 23 and 49.

¹²¹ *R. v. Schmidt*, 2014 ONCA 188 at para. 27.

¹²² *Ibid.* at para. 25; *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685 at para. 44; *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), [2002] O.J. No. 283 (C.A.) at para. 16.

have sophisticated corporate structures, with corporate officers, multiple classes of shares, and significant assets.

83. The assertion that ARC's shareholders were, and OFOF's shareholders are, consuming milk that they own is premised on the mistaken belief that the shareholder owns the assets of a corporation. It is a fundamental legal principle that a corporation is a separate legal person from its shareholders and that a corporation's shareholders do not own its assets.¹²³ The shareholders of ARC and OFOF did not and do not, respectively, own the cows and equipment being used to process milk and milk products at Glencolton Farms. They are customers purchasing milk and milk products from a separate and distinct entity.¹²⁴

84. ARC and OFOF are clearly commercial operations. This is supported by the uncontroverted evidence showing that ARC's and OFOF's shareholders purchase milk and milk products on a per unit basis in order for ARC and OFOF to fund their operations. ARC's accounting records, online ordering system, employment structure, and regular and extensive distribution system all demonstrate the commercial nature of their operations.¹²⁵

85. Similarly, the evidence also disproves the argument that ARC and OFOF are closed groups. Members of the public may become a shareholder who is entitled to purchase milk and milk products from ARC and OFOF, so long as they purchase shares, submit to an interview and pay the per unit price. The large number of shareholders in both operations illustrates the openness of each entity. ARC and OFOF are not closed networks.¹²⁶

86. ARC and OFOF assert that the dairy operation at Glencolton Farms does not operate for

¹²³ *McLennan Estate (Re)*, [2002] O.J. No. 4716 (S.C.J.) at para. 38; *McGauley v. British Columbia*, [1989] B.C.J. No. 1699 (B.C.C.A.) at p. 16.

¹²⁴ See also, *Johnson County, Iowa v. Guernsey Association of Johnson County, Iowa, Inc.*, 232 N.W.2d 84 (Iowa Supreme Court, 1975) at pgs. 2 to 3; *Slippy v. Northy*, EQCV067968 (Linn County Circuit Court, Iowa 2012) at pgs. 15 – 17.

¹²⁵ Jarvie Affidavit at paras. 21 and 59 - 75; Denny Affidavit at Paras. 26 – 27 and 33 - 35

¹²⁶ Vander Hout Examination at Q988 - 990; Vander Hout Affidavit at para. 8; Denny Affidavit at paras. 21-24.

profit and, as a result, the plant licensing regime in the *Act* does not apply. There are two fundamental problems with this position.

87. First, as explained above, the *Act* does not provide any exemptions to the plant licensing regimes. No reasonable interpretation of the relevant definitions (“processor”, “operator”, “business” or “processing”) includes a requirement that the processing operation result in a profit. Moreover, inferring such a profit requirement into the legislation would eviscerate the public welfare aspect of the litigation and create an unregulated private enclave that the Legislature did not intend to create.

88. Second, and in the alternative, the evidence filed by ARC and OFOF does not demonstrate that the dairy operations at Glencolton Farms do not generate profit for ARC. To the contrary, the financial statements prepared for ARC from 2010 to 2013 demonstrate that proceeds generated from the sale of products exceeded the costs attributable to those sales. Under the line item “GROSS PROFIT” or “GROSS MARGIN”, the financial statements demonstrate profits of \$272,258 (2010); \$286,291 (2011); \$306,175 (2012); and \$212,469 (2013).¹²⁷ In fairness, these financial statements do not distinguish between dairy product sales and other sales. That said, ARC’s sales documentation demonstrates that a significant amount of the sale proceeds originate from the dairy product sales (see para. 48, above). If the respondents and OFOF intend argue that the *Act* only applies to “for profit” operations, which is denied, it was incumbent on them to provide documentary evidence establishing that their operation does not generate a profit. Other than mere assertions, the respondents have provided no such evidence.

89. In taking the above positions, ARC and OFOF rely on a number of factual assertions.

¹²⁷ Financial Statement of ARC for the years 2010 to 2013, Exhibit CC to Chiefari Affidavit.

During cross-examinations, numerous undertakings were sought to verify the factual assertions. These undertakings were either refused or have not been satisfied at the time of filing this factum. Given time constraints, an undertakings and refusals motion was not practicable. In the circumstances, the Director respectfully submits that this Honourable Court should draw an adverse inference from the failure of the Respondents and OFOF to respond to undertaking requests and reject the following factual assertions¹²⁸:

- (a) Prior to March 1, 2016, ARC only sold milk or milk products to ARC “shareholders”;¹²⁹
- (b) ARC is selective of who can purchase shares and have access to raw milk and milk products processed and manufactured at Glencolton Farms;¹³⁰
- (c) OFOF purchased the cattle and plant assets from ARC;¹³¹
- (d) ARC provides raw milk and milk products to shareholders as a dividend; and,¹³²
- (e) OFOF makes payments to ARC in relation for farm expenses that is separate and apart from the per unit cost contemplated in the management agreement.¹³³

ii) The respondents’ assertion that they are being selectively prosecuted is irrelevant

90. The Applicant’s approach to regulating other entities is not relevant to the determination of whether to grant a s. 22 injunction against the Respondents or OFOF. In *Toronto (City) v. Polai*, the Supreme Court considered an appeal by an individual who operated a multi-unit dwelling in violation of a municipal by-law from the imposition of a statutory injunction.

91. The trial judge had dismissed the City of Toronto’s application for an injunction after he found that the city maintained a list of other individuals who had contravened the same by-law

¹²⁸ **Note:** A chart of the factual assertions, the U/T Request and Relevance to the Application and Status of the U/T at the time of filing is attached as Schedule “D” to this factum.

¹²⁹ Vander Hout Examination at Q836.

¹³⁰ Vander Hout Examination at Q988; Vander Hout Affidavit at para. 8.

¹³¹ Purchase and Sale Agreement between ARC and OFOF dated March 1, 2016, Exhibit G to Denny Affidavit; Denny Examination at Q185 - 191.

¹³² Vander Hout Examination at Q390.

¹³³ Denny Examination at Q27 - 40.

and failed to prosecute them. The Court of Appeal reversed the trial judge's ruling and granted the injunction. The Supreme Court upheld the Court of Appeal's ruling, rejecting the assertion that the lack of enforcement against others constituted a defence to an application for an injunction,

I do not think that law enforcement of a zoning by-law-- and I am by no means sure that it can be called "lax enforcement" in this case--can afford any defence against an application for an injunction under s. 486 of The Municipal Act, [...]

This is a case of persistent and defiant infringement. The defence really amounts to a claim for immunity until the list is disregarded and everybody else prosecuted. This is small comfort to a neighbour in an otherwise residential area who is complaining of the infringement. Nor does s. 486 confine the remedy to the municipality. A ratepayer has a right of action. It is no defence against his action to say that there are other cases of infringement which had not been questioned. ... The City, in this action, is seeking to protect and enforce a public right, and should not be denied the remedy of injunction merely because others, in addition to the defendant, are guilty of similar violations and have not been restrained. [sic]¹³⁴

92. In any event, there is no evidence that the respondents are being improperly targeted. This application is brought validly, pursuant to the Applicant's statutory obligation to ensure compliance with the *Act*.

iii) The Crown patent does not displace the operation of the *Act* at Glencolton Farms

93. The respondents' argument that the original Crown patent for the land precludes the application of the *Act* to Glencolton Farms is unsupported by the evidence and is incorrect in law. The Respondents have not adduced a copy of the Crown patent for Glencolton Farms and instead have excerpted one paragraph in the affidavit of Ms. Vander Hout:

To have and to hold the said parcel or tract of land, hereby granted, conveyed and assured unto Joseph Firth, his heirs and assigns, for ever; saving, excepting and reserving, nevertheless unto us, our, heirs and successors, all mines of gold and silver, and the free uses, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid. [sic]¹³⁵

94. Despite Ms. Vander Hout's assertion that this paragraph grants ARC "unfettered used of

¹³⁴ *Toronto (City) v. Polai*, [1973] S.C.R. 38 at pgs. 2 - 3.

¹³⁵ Vander Hout Affidavit at para. 23.

the land granted ...” [sic],¹³⁶ a plain reading of the paragraph reveals that it does not contain any such grant. While there is a reference to “free use”, it is in relation to the reservation by the Crown of its right to freely use “all navigable waters” flowing through or on the property.

95. This language, which is common in Crown patents¹³⁷, does not grant any rights to the owner of the property. The province is entitled to regulate activities on private land pursuant to the *British North America Act*.¹³⁸ The Respondents have not adduced any evidence or argument which displaces the operation of the *Milk Act*, a validly enacted provincial statute, at Glencolton Farms.

iv) The provisions governing a milk plant licences under Regulation 761 are validly enacted

96. Contrary to the assertion of Ms. Vander Hout in her affidavit,¹³⁹ sections 95 to 100 of Regulation 761 to the *Milk Act* are valid and applicable to the Respondents. The Regulations were not made by the Director, Ontario’s Ministry of Agriculture, Food and Rural Affairs, or a delegate under section 19.1 of the *Act*, as asserted, and there is consequently no restriction on their nature or content.¹⁴⁰

97. For the reasons set out above, the Court should exercise its discretion under section 22 and permanently enjoin the Respondents and OFOF from carrying on business as processors and operators of the plant at Glencolton Farms.

D. An order restraining the obstruction of inspections

98. Pursuant to his statutory obligations, the Director appoints field-persons to conduct

¹³⁶ *Ibid.* at para. 24.

¹³⁷ **See, for example:** *Bierer v. Ontario* [2011] O.J. No. 1535 (S.C.J.) at para. 131 and *Lieding v. Ontario*, [1991] O.J. No. 186 (C.A.) at paras. 2 and 24.

¹³⁸ *R. v. Mackie*, [2012] O.J. No. 4718 (C.A.) at paras. 5 and 8.

¹³⁹ Vander Hout Affidavit at para. 36.

¹⁴⁰ **Note:** See O. Reg. 174/14, O. Reg. 268/99, and O. Reg. 348/95.

inspections to ensure compliance with the *Act* and its regulations, pursuant to section 13(1) of the *Act*. Section 13(2) of the *Act* prohibits anyone from hindering or obstructing an officer or field-person exercising these functions.

99. While the execution of the search warrant at Glencolton Farms in October 2015 was not an inspection conducted pursuant to section 13(1) of the *Act*, the distinction is immaterial. An inspection is a proactive step intended to ensure compliance, while a search warrant into suspected offences is reactive, based on existing knowledge of ongoing non-compliance. Both actions are carried out in order to ensure compliance with the *Act*.

100. Among the individuals participating in the execution of the search warrant on October 2, 2015 was Rick Bond, a field-person appointed by the Director. Investigators were forced to return validly seized items and leave the property out of concern for their safety.¹⁴¹ Michael Schmidt has publicly indicated that such resistance would continue.¹⁴²

101. Given the nature of the obstruction and in light of the history of non-compliance with the *Act* at Glencolton Farms, the Director submits that it is necessary and appropriate for the Court to issue an order requiring the Respondents to refrain from obstructing or hindering field-persons appointed by the Director in the conduct of inspections pursuant to section 13(1) of the *Act*.¹⁴³

PART V: ORDERS REQUESTED

102. The Applicant requests an order as reflected in Schedule “E” to this factum.

¹⁴¹ Jarvie Affidavit at para. 44.

¹⁴² Downing Affidavit at paras. 38 - 39.

¹⁴³ *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, [2010] B.C.J. No. 1766 (B.C.C.A.) at paras. 27 – 28; *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, [2014] O.J. No. 697 (C.A.) at paras. 79 - 80.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 9, 2017



Attorney General for Ontario
Crown Law Office – Civil Law

Per. Sunil S. Mathai
Ananthan Sinnadurai
Nansy Ghobrial

SCHEDULE A: AUTHORITIES CITED

Jurisprudence

1. *R v. Schmidt*,
 - a. [2011] O.J. No. 4272 (O.C.J.)
 - b. [2014] O.J. No. 1074 (C.A.) 4, 7, 14-15, 23 27
 - c. [2014] S.C.C.A. No. 208
2. *R. v. Murdock*, [2003] O.J. No. 5736 (S.C.J.)
3. *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685 at para. 44
4. *Ontario (Minister of Agriculture and Food) v. Georgian Bay Milk Co.*, [2008] O.J. No. 485 (S.C.J.) at para. 35;
5. *Certified General Accountants Assn. of Ontario v. American Institute of Certified Public Accountants*, [2013] O.J. No. 5360 (S.C.J.)
6. *Valastro v. London (City)*, [2013] O.J. No. 478 (S.C.J.)
7. *Canada v. Ipsco Recycling Inc.* (F.C.) [2003] F.C.J. No. 1950 (F.C.T.J.)
8. *Law Society of Upper Canada v. Chiarelli*, [2014] O.J. No. 2328 (C.A.)
9. *Attorney-General for Ontario v. Grabarchuk et al.*, (1976), 11 O.R. (2d) 607 (H.C.J. – Div. Ct.)
10. *Maple Ridge (District) v. Thornhill Aggregates Ltd.*, [1998] B.C.J. No. 1485 (B.C.C.A.)
11. *Chicken Farmers of Ontario v. Drost*, [2005] O.J. No. 3973 (Div. Ct.)
12. *Vancouver (City) v. O'Flynn-Magee*, [2011] B.C.J. No. 2305 (B.C.S.C.)
13. *British Columbia (Minister of Environment, Lands and Parks) v. Alpha Manufacturing Inc.*, [1997] B.C.J. No. 1989 (B.C.C.A.)
14. *Ontario Federation of Anglers & Hunters v. Ontario*, [2002] O.J. No. 1445 (C.A.); leave to appeal denied, [2002] S.C.C.A. No. 252
15. *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), [2002] O.J. No. 283 (C.A.)
16. *McLennan Estate (Re)*, [2002] O.J. No. 4716 (S.C.J.)
17. *McGauley v. British Columbia*, [1989] B.C.J. No. 1699 (B.C.C.A.)

18. *Johnson County, Iowa v. Guernsey Association of Johnson County, Iowa, Inc.*, 232 N.W.2d 84 (Iowa Supreme Court, 1975)
19. *Slippy v. Northy*, EQCV067968 (Linn County Circuit Court, Iowa 2012)
20. *Toronto (City) v. Polai*, [1973] S.C.R. 38
21. *Bierer v. Ontario*, [2011] O.J. No. 1535 (S.C.J.)
22. *Lieding v. Ontario*, [1991] O.J. No. 186 (C.A.)
23. *R. v. Mackie*, [2012] O.J. No. 4718 (C.A.)
24. *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, [2010] B.C.J. No. 1766 (B.C.C.A.)
25. *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, [2014] O.J. No. 697 (C.A.)

Secondary Authorities

26. Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2016)

Schedule B: Legislation and Regulations

Statutes

1. *Canada Evidence Act*, R.S.C. 1985, c. C-5
2. *Co-operative Corporations Act*, R.S.O. 1990, c C.35
3. *Competition Act*, R.S.C. 1985, c. C-34
4. *Environmental Protection Act*, R.S.O. 1990, c. E.19
5. *Education Act*, R.S.O. 1990, c. E.2
6. *Evidence Act*, R.S.O. 1990, c. E.23
7. *Health Protection and Promotion Act*, R.S.O. 1990, c H.7
8. *Legislation Act, 2006*, S.O. 2006, c 21, Sch F
9. *Milk Act*, R.S.O. 1990, c M.12
10. *Regulatory Modernization Act, 2007*, S.O. 2007, c 4

Regulations

1. *Milk and Milk Products*, R.R.O. 1990, Reg. 761
2. *Designations*, O Reg 75/08
3. O. Reg. 31/05 made under the *Food Safety and Quality Act, 2001* at s. 1(1);
4. O. Reg. 174/14 made under the *Milk Act*

1. *Canada Evidence Act*, R.S.C. 1985, c. C-5

s. 30(12) In this section,

"business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government.

* * *

2. *Co-operative Corporations Act, R.S.O. 1990, c C.35*

Duties of board

96. (1) The board of directors shall manage or supervise the management of the affairs and business of the co-operative.

* * *

3. *Competition Act*, R.S.C. 1985, c. C-34

s. 2(1) In this Part,

"business" includes the business of

(a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and

(b) acquiring, supplying and otherwise dealing in services;

It also includes the raising of funds for charitable or other non-profit purposes.

* * *

4. *Environmental Protection Act, R.S.O. 1990, c. E.19*

25 In this Part,

“operator” means the person in occupation or having the charge, management, or control of a waste management system or a waste disposal site; (“exploitant”)

“owner” includes,

(a) a person that is responsible for the establishment or operation of a waste management system or waste disposal site, or

(b) the person that owns the land in or on which a waste disposal site is located; (“propriétaire”)

“owner”, in section 47, means a person that is responsible for the operation of a well that is a waste disposal site; (“propriétaire”) [...]

* * *

5. *Education Act, R.S.O. 1990, c. E.2*

Definitions

258 In this Part,

“operator” means, in respect of a third party program, the owner or person who has the charge, management or control of the program; (“exploitant”) [...]

* * *

6. *Evidence Act*, R.S.O. 1990, c. E.23

s. 35(1) In this section,

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise.

* * *

7. *Health Protection and Promotion Act, R.S.O. 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*. R.S.O. 1990, c. H.7, s. 18 (1).

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*. R.S.O. 1990, c. H.7, s. 18 (2).

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*. R.S.O. 1990, c. H.7, s. 18 (3).

* * *

8. *Legislation Act, 2006, S.O. 2006, c 21, Sch F*

Definitions

87. In every Act and regulation, [...]

“person” includes a corporation; (“personne”)

* * *

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

Definitions

1. In this Act, [...]

“Commission” means the Ontario Farm Products Marketing Commission under the *Ministry of Agriculture, Food and Rural Affairs Act*; (“Commission”)

[...]

“Director” means, in respect of a provision of this Act or the regulations, the Director appointed under this Act by the person who is responsible for the administration and enforcement of the provision; (“directeur”)

“distributor” means a person engaged in selling or distributing fluid milk products directly or indirectly to consumers; (“distributeur”)

“field-person” means a field-person appointed for the purposes of this Act; (“inspecteur itinérant”)

“fluid milk products” means the classes of milk and milk products processed from Grade A milk and designated as fluid milk products in the regulations; (“produits du lait liquides”)

[...]

“licence” means a licence provided for under this Act or the regulations; (“permis”)

“marketing” includes advertising, assembling, buying, distributing, financing, offering for sale, packing, processing, selling, shipping, storing and transporting and “market” and “marketed” have corresponding meanings; (“commercialisation”, “commercialiser”, “commercialisé”)

“marketing board” means a board constituted under a plan; (“commission de commercialisation”)

“milk” means milk from cows or goats; (“lait”)

“milk product” means any product processed or derived in whole or in part from milk, and includes cream, butter, cheese, cottage cheese, condensed milk, milk powder, dry milk, ice cream, ice cream mix, casein, malted milk, sherbet and such other products as are designated as milk products in the regulations; (“produit du lait”)

“milk transfer station” means premises at which milk is received for the purpose of being transported to a plant for processing; (“centre de transfert du lait”)

“Minister” means the Minister of Agriculture, Food and Rural Affairs; (“ministre”)

“plan” means a plan that is in force under this Act to provide for the control and regulation of the producing or marketing or both of milk, cream or cheese, or any combination thereof; (“plan”)

“plant” means a cream transfer station, a milk transfer station or premises in which milk or cream or milk products are processed; (“usine”)

“processing” means heating, pasteurizing, evaporating, drying, churning, freezing, packaging, packing, separating into component parts, combining with other substances by any process or otherwise treating milk or cream or milk products in the manufacture or preparation of milk products or fluid milk products; (“transformation”)

“processor” means a person engaged in the processing of milk products or fluid milk products; (“préposé à la transformation”)

“producer” means a producer of milk, cream or cheese; (“producteur”)

“reconstituted milk” means milk designated as reconstituted milk in the regulations; (“lait reconstitué”)

“regulated product” means milk, cream or cheese, or any combination thereof, in respect of which a plan is in force; (“produit réglementé”)

“regulations” means the regulations made under this Act; (“règlements”)

“transporter” means a person transporting milk or cream; (“transporteur”)

“Tribunal” means the Agriculture, Food and Rural Affairs Appeal Tribunal continued under the *Ministry of Agriculture, Food and Rural Affairs Act*. (“Tribunal”) R.S.O. 1990, c. M.12, s. 1; 1997, c. 44, s. 1; 2006, c. 19, Sched. A, s. 15 (1); 2009, c. 33, Sched. 1, s. 20 (1).

Purpose of Act

2. The purpose and intent of this Act is,

- (a) to stimulate, increase and improve the producing of milk within Ontario;
- (b) to provide for the control and regulation in any or all respects of the producing or marketing within Ontario of milk, cream or cheese, or any combination thereof, including the prohibition of such producing or marketing in whole or in part; and
- (c) to provide for the control and regulation in any or all respects of the quality of milk, milk products and fluid milk products within Ontario. R.S.O. 1990, c. M.12, s. 2.

ADMINISTRATION AND ENFORCEMENT

Director

2.1 (1) The Minister may appoint a Director for the purposes of the provisions of this Act and the regulations for which the administration and enforcement are not delegated to a designated administrative authority. 1997, c. 44, s. 2.

Director appointed by administrative authority

(2) If the administration and enforcement of any provisions of this Act and the regulations are delegated to a designated administrative authority, the authority may appoint a Director for the purposes of those provisions. 1997, c. 44, s. 2.

Responsibility of Director

(3) A Director appointed under subsection (1) or (2) shall carry out the administration and enforcement of those provisions of this Act and the regulations with respect to the quality of milk, milk products and fluid milk products within Ontario for which the person who appointed the Director is responsible for the administration and enforcement. 1997, c. 44, s. 2.

Powers and duties

(4) A Director appointed under subsection (1) or (2) shall exercise the powers and perform the duties that are conferred or imposed on the Director by or under this Act. 1997, c. 44, s. 2.

Appointments

(5) A Director appointed under subsection (1) or (2) may appoint the officers, field-persons, graders and other persons who are considered necessary for the Director to exercise the powers and to perform the duties of the Director. 1997, c. 44, s. 2.

[...]

Producer-processors

11. (1) Any person who is a producer and processor is entitled in the person's respective capacities as a producer and as a processor to all the rights and privileges and is subject to all the duties and obligations of a producer and of a processor. R.S.O. 1990, c. M.12, s. 11 (1).

Idem

(2) Any person who is a producer and processor shall be deemed to have received in the capacity of a processor from himself, herself or itself in the capacity of a producer, the milk that the person both produces and processes, and to have contracted in that capacity with himself, herself or itself in the capacity of a producer for the marketing of the milk, upon the condition that the regulations, orders, directions, agreements and awards and the renegotiated agreements and awards made under this Act apply. R.S.O. 1990, c. M.12, s. 11 (2).

Idem

(3) A producer or group of two or more producers who, directly or through a corporation of which the producer or producers is or are members or shareholders, or through an agent, arrange for the processing, on the account of the producer or producers, by a processor of any milk produced by the producer or producers, shall be deemed to be a producer and processor or producers and processors for the purposes of subsections (1) and (2). R.S.O. 1990, c. M.12, s. 11 (3).

[...]

Production of books, etc., to field-person

13. (1) Every person engaged in the producing, processing or marketing of milk or milk products, when requested so to do by a field-person appointed for the exercise of the powers and the performance of the duties of the Director, shall, in respect of milk and milk products, produce the person's books, records and documents and permit inspection thereof and furnish copies thereof or extracts therefrom and permit inspection of the person's premises and any equipment, milk or milk products therein. R.S.O. 1990, c. M.12, s. 13 (1).

Obstruction of field-person

(2) No person shall hinder or obstruct an officer or field-person mentioned in subsection (1) in the course of his or her duties, furnish him or her with false information or refuse to furnish him or her with information. R.S.O. 1990, c. M.12, s. 13 (2).

Certificate of appointment of field-person

(3) The production by a field-person mentioned in subsection (1) of a certificate of appointment purporting to be signed by the Director shall be accepted by any person engaged in the producing, processing or marketing of milk or milk products as proof of such appointment. R.S.O. 1990, c. M.12, s. 13 (3).

Permits re plants

Permit to construct plant

14. (1) No person shall construct or alter any building intended for use as a plant without a permit from the Director. R.S.O. 1990, c. M.12, s. 14 (1).

Permit to alter plant

(2) No person shall alter a plant without a permit from the Director. R.S.O. 1990, c. M.12, s. 14 (2).

Conditions precedent to issue of permit

- (3) No permit shall be issued by the Director unless,
- (a) in the opinion of the Director, the plant is necessary and desirable, having regard to the needs of the producers in the locality in which it is proposed to locate the plant and to the facilities of the existing plants in operation; and
 - (b) the proposed plant complies with the regulations. R.S.O. 1990, c. M.12, s. 14 (3).

Licences

Licence to operate plant

15. (1) No person shall operate a plant without a licence therefor from the Director. R.S.O. 1990, c. M.12, s. 15 (1).

Licence to operate as distributor

(2) No person shall carry on business as a distributor without a licence therefor from the Director. R.S.O. 1990, c. M.12, s. 15 (2).

[...]

Regulations with respect to the operation of plants

19. (1) The Commission may make regulations,

1. providing for the issue, renewal, suspension or revocation of or refusal to issue or renew licences for the operation of any class of plant, and prescribing the fees payable for licences or the renewal thereof;
2. providing for the issue, renewal, suspension or revocation of or refusal to issue or renew licences for any class of distributor, and prescribing the fees payable for licences or the renewal thereof;
3. prescribing the terms and conditions upon which licences under paragraphs 1 and 2 are issued, renewed, suspended or revoked;

[...]

Delegation of regulation-making powers

19.1 (1) Subject to subsections (2), (3) and (4), as long as a regulation of the Minister designating an administrative authority for the purpose of administering and enforcing designated legislation is in force, the Commission may, by regulation, delegate to the authority those of its powers, that the Commission considers necessary and specifies in its regulation,

- (a) to make regulations under subsection 19 (1) that relate to the producing of milk or cream or anything related to it, except for a power to make regulations mentioned in clause (b); or
- (b) to make regulations under paragraph 22, 27, 35, 67.1 or 67.2 of subsection 19 (1) that relate to fees, penalties, costs or charges in respect of designated legislation for which the administration and enforcement are delegated to the authority, other than regulations specifying the person to whom they are payable or the use that the person may make of them. 1997, c. 44, s. 8.

Powers not delegated

(2) For the purpose of clause (1) (a), the Commission shall not specify any power to make regulations that, in its opinion, have as their primary purpose the protection of the health or safety of the public. 1997, c. 44, s. 8.

Same

(3) A power to make regulations that the Commission delegates to a designated administrative authority under subsection (1) does not include any power to make regulations under subsection 19 (5). 1997, c. 44, s. 8.

[...]

Offences

21. Every person who contravenes this Act or the regulations, or any plan or any order or direction of the Commission, the Director or any marketing board, or any agreement or award or renegotiated agreement or award declared to be in force by the Commission, or any by-law under this Act, is guilty of an offence and on conviction is liable for a first offence to a fine of not more than \$2,000 for each day that the offence continues and for a subsequent offence to a fine of not more than \$10,000 for each day that the offence continues. R.S.O. 1990, c. M.12, s. 21.

Injunction proceedings

22. Where it is made to appear from the material filed or evidence adduced that any offence against this Act or the regulations or any plan, order, direction, agreement, award or renegotiated agreement or award made under this Act has been or is being committed, the Superior Court of Justice may, upon the application of the Commission, the Director or a marketing board, enjoin any transporter, processor, distributor or operator of a plant from carrying on business as a transporter, processor, distributor or operator of a plant, absolutely or for such period as seems just, and any injunction cancels the licence of the transporter, processor, distributor or operator of a plant named in the order for the same period. R.S.O. 1990, c. M.12, s. 22; 2006, c. 19, Sched. C, s. 1 (1).

* * *

10. *Regulatory Modernization Act, 2007, S.O. 2007, c 4*

Scope of Act

2. Nothing in this Act shall be interpreted to,
- (a) limit the collection, use or disclosure of information if the collection, use or disclosure is authorized or required by law;
 - (b) authorize or require the collection, use or disclosure of information if the collection, use or disclosure is prohibited by law;
 - (c) limit or interfere with any power or duty that a person may have, including but not limited to, the power or duty of a head of an institution, within the meaning of the *Freedom of Information and Protection of Privacy Act*, to refuse to disclose information in accordance with that Act. 2007, c. 4, s. 2.

[...]

Types of information

4. The following types of information may be collected, used and disclosed in accordance with an authorization made under section 7 or 14:
1. The legal name of an organization.
 2. The name under which an organization operates, if it is not the legal name.
 3. The address, telephone number, fax number and e-mail address of a facility, principal place, head office or other place where the organization operates.
 4. Any identifying number, symbol or other identifier assigned to an organization under designated legislation.
 5. Statistical information about an organization and the sector or industry in which the organization operates.
 6. With respect to a licence, permit, certificate or other similar approval that an organization may or is required to obtain under designated legislation, information about its issuance or renewal, a refusal to issue or renew it or its suspension, revocation or cancellation.
 7. Information about complaints filed in respect of an organization where the complaint is regarding conduct that may be in contravention of designated legislation.
 8. Information compiled in connection with an examination, test, audit, inspection, investigation or other inquiry with respect to an organization under designated legislation, including but not limited to, information regarding forms, notes or reports generated by the inquiry.
 9. Information related to an organization's compliance with designated legislation, including but not limited to, information about convictions and penalties imposed on conviction and information regarding orders or notices issued under the designated legislation.
 10. With respect to an organization, any other type of information that is prescribed.
 11. With respect to an owner, officer or director of an organization,
 - i. his or her name, home address and home telephone number, and
 - ii. the types of information described in paragraphs 8 and 9 where they pertain to the owner, officer or director in that capacity. 2007, c. 4, s. 4.

[...]

Authorization to collect and use information

7. (1) A Minister responsible for an Act or regulation designated for the purposes of this section may authorize any person or class of persons to collect and use information that was originally collected under the authority of or for the purposes of any other legislation designated for the purposes of this section. 2007, c. 4, s. 7 (1).

Authorization to disclose information

(2) A Minister responsible for an Act or regulation designated for the purposes of this section may authorize any person or class of persons to disclose information that was originally collected under the authority of or for the purposes of that Act or regulation. 2007, c. 4, s. 7 (2).

* * *

1. Milk and Milk Products, R.R.O. 1990, Reg. 761

PLANT LICENCES AND PERMITS

95. (1) A person who wishes to operate a plant shall submit an application to the Director for a licence to operate the plant,

- (a) before beginning to operate the plant; and
- (b) if the plant is not yet constructed or if alterations are required to the plant, before commencing the construction or alterations. O. Reg. 174/14, s. 2.

(2) A person who holds a licence to operate a plant and who wishes to change any aspect of the licence described in clause 96 (2) (d), (e) or (f) shall submit an application to the Director to change the licence before implementing such a change. O. Reg. 174/14, s. 2.

(3) A person who submits one of the following types of application shall, at the same time, submit an application for a permit referred to in section 109:

1. An application for a licence to operate a plant that is not yet constructed or that requires alterations.
2. An application to change a licence, if the change would require that a plant undergo construction or alterations. O. Reg. 174/14, s. 2.

(4) A person who wishes to renew a licence to operate a plant shall submit an application to the Director at least 60 days before the licence expires. O. Reg. 174/14, s. 2.

(5) An application for a licence shall include the following information:

1. The applicant's name, address, phone number and other relevant contact information.
2. The location or proposed location of the plant.
3. The type of plant for which the licence is sought and, in the case of a processing plant, the kinds of processing activities to be carried out at the plant.
4. A list of the milk products to be processed at the plant.
5. The species of animal that will produce the milk to be processed at the plant.
6. An estimate of the volume of milk to be processed at the plant.
7. The source of milk to be processed at the plant.
8. The signature of the applicant, or of the signing officer, as appropriate. O. Reg. 174/14, s. 2.

(6) An application made under this section shall be in a form provided by the Director. O. Reg. 174/14, s. 2.

96. (1) Subject to section 99.3, the Director shall issue a licence to operate a plant to a person who applies in accordance with section 95 unless the Director determines that the licence should be refused under section 100. O. Reg. 174/14, s. 2.

(2) The licence shall set out,

- (a) the licence number;
- (b) the licensee's name, address, phone number and other relevant contact information;
- (c) the name and address of the plant;

- (d) the species of animal that will produce the milk to be processed at the plant;
- (e) the type of plant approved for operation and, in the case of a processing plant, the kinds of processing activities approved to be carried out at the plant;
- (f) in the case of a processing plant that will process cow's milk, the classes or sub-classes of milk established under section 11 of Regulation 753 of the Revised Regulations of Ontario, 1990 (Grades, Standards, Designations, Classes, Packing and Marking) made under the Milk Act that may be processed at the plant;
- (g) the effective date and expiry date of the licence; and
- (h) the Director's signature. O. Reg. 174/14, s. 2.

(3) A licence to operate a plant is effective on the date set out in the licence and expires on the earlier of,

- (a) the date set out in the licence; and
- (b) the day that is three years after the effective date. O. Reg. 174/14, s. 2.

(4) The fee for a licence to operate a plant is an amount equal to \$150 for each one-year period the licence is effective, subject to subsection (5). O. Reg. 174/14, s. 2.

(5) If the licence to operate a plant expires on a day other than the anniversary of the licence's effective date, the Director may prorate the licence fee that is payable for the period from the effective date, or the last anniversary of the licence's effective date, until the expiry date. O. Reg. 174/14, s. 2.

97. Revoked: O. Reg. 174/14, s. 2.

98. No person shall operate a plant except in accordance with a licence from the Director. R.R.O. 1990, Reg. 761, s. 98.

99. (1) A licence to operate a plant is subject to the following conditions:

1. The licence holder shall ensure that the only milk processed at the plant is milk produced by the species specified in the licence.
2. The licence holder shall ensure that the plant being operated is the type of plant specified in the licence and, in the case of a processing plant, that the plant carries out only the kinds of processing activities specified in the licence.
3. In the case of a licence to operate a plant that processes cow's milk, the licence holder shall ensure that the only milk products processed at the plant are within the classes or subclasses of milk specified in the licence.
4. The licence holder shall not permit an employee to work in the plant while the employee has a communicable disease.
5. The licence holder shall ensure that every employee working in the plant wears outer clothing that is clean and light in colour.
6. The licence holder shall ensure that any person who grades milk received at the plant is the holder of a certificate for that purpose issued under section 89.
7. The licence holder shall carry on business in accordance with the law, with honesty and integrity and with regard to the public interest.

8. The licence holder shall observe, perform and carry out the provisions of the Act, the regulations, all plans, agreements and awards and all orders of the Commission, the Director and the marketing board. O. Reg. 174/14, s. 3.

(2) A licence to operate a plant is not transferable. O. Reg. 174/14, s. 3.

99.1 The Director may impose conditions on a licence to operate a plant in addition to those set out in section 99. O. Reg. 174/14, s. 3.

99.2 The Director may, after a hearing, suspend or revoke a licence issued under section 96 if the licence holder fails to comply with any condition of the licence. O. Reg. 174/14, s. 3.

99.3 (1) If the Director receives an application under section 95 in respect of a licence to operate a plant at which cow's milk is to be processed, the Director shall not issue the licence unless he or she first complies with the process described in this section. O. Reg. 174/14, s. 3.

(2) This section does not apply in respect of an application for a licence in the following circumstances:

1. The application is for a renewal of a licence to operate a plant.
2. The application is in respect of changes to a licence but the proposed changes would not change the classes or subclasses of milk specified in the licence. O. Reg. 174/14, s. 3.

(3) The Director shall notify the following persons and entities of the application:

1. The Canadian Food Inspection Agency.
2. The Dairy Farmers of Ontario.
3. The Ontario Dairy Council.
4. The Ontario Farm Products Marketing Commission.
5. Any person or entity that holds a licence as a producer, processor or distributor issued under the Act if,
 - i. the person or entity informs the Director in writing that the person or entity wishes to receive notice under this section, and
 - ii. in the opinion of the Director, the person or entity would be affected by the granting of the licence.
6. Any other person that the Director believes may have information that should be considered before determining whether to issue the licence. O. Reg. 174/14, s. 3.

(4) A notice given under subsection (3) shall include the following information:

1. The name of the applicant.
2. The location or proposed location of the plant.
3. The type or types of plant for which the licence is sought and, in the case of a processing plant, the kinds of processing activities to be carried out at the plant.
4. The fact that the recipient is entitled to provide comments or information in respect of the application in accordance with clause (5) (a), to request a meeting under clause (5) (b) or to request further information under clause (5) (c).
5. Any other relevant information that may reasonably be required to allow the recipients to comment on the application. O. Reg. 174/14, s. 3.

(5) Within 30 days after the date the notice is sent, or within such shorter period of time as may be specified in the notice, the recipient may,

- (a) provide the Director with written comments or information relating to the issuing of the licence;
- (b) if the recipient believes that the licence should not be issued, request that the Director hold a meeting relating to the issuing of the licence; and
- (c) request that the Director provide further information about the application. O. Reg. 174/14, s. 3.

(6) If the Director receives a request for a meeting under clause (5) (b), he or she shall set a time and place for a meeting and invite the following participants to the meeting in order to discuss whether the licence to operate a plant should be issued or refused:

1. The applicant.
2. The entities and persons who provided comments or information to the Director under clause (5) (a).
3. Any other person the Director believes may have information that should be considered before determining whether to issue the licence. O. Reg. 174/14, s. 3.

(7) Even if the Director does not receive a request for a meeting under clause (5) (b), the Director may set a time and place for a meeting and invite the participants listed in subsection (6) to the meeting in order to discuss whether the licence to operate a plant should be issued or refused. O. Reg. 174/14, s. 3.

(8) If the Director receives a request for further information under clause (5) (c), the Director may provide further information in accordance with the request. O. Reg. 174/14, s. 3.

(9) The Director shall not determine whether to issue or refuse a licence until the time permitted under subsection (5) to provide comments or information or request a meeting has elapsed. O. Reg. 174/14, s. 3.

(10) The Director shall consider any comments or information he or she receives under clause (5) (a) or at a meeting held under subsection (6) or (7) in determining whether to issue a licence or refuse it under section 100. O. Reg. 174/14, s. 3.

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

- (a) where the applicant is not qualified by experience, personnel or equipment to properly engage in the business for which the application was made;
- (b) Revoked: O. Reg. 268/99, s. 1 (1).
- (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;
- (d) where, in the opinion of the Director, any material representation or information made or provided by or on behalf of the applicant is false or misleading;
- (e) Revoked: O. Reg. 268/99, s. 1 (2).
- (f) where the applicant does not comply with the Health Protection and Promotion Act and the regulations thereunder;

- (g) where, in the opinion of the Director, the issuance or renewal of the licence is not in the public interest having regard to the past conduct of the applicant or, where the applicant is a corporation, of its officers or directors;
- (h) where, in the opinion of the Director, the past conduct of the applicant or, where the applicant is a corporation, of its officers or directors, affords reasonable grounds for belief that the business will not be carried on in accordance with law or with honesty and integrity;
- (i) where the applicant or, where the applicant is a corporation, any officer, director or servant thereof, or any person who is or will be in any way associated with the applicant in the operation of the business, has contravened or has permitted any person under their control or direction in connection with the business to contravene any provision of the Act or the regulations or of any other Act or the regulations thereunder or of any law of any jurisdiction applying to the carrying on of business and, in the opinion of the Director, such contravention warrants the refusal to issue or renew the licence;
- (j) Revoked: O. Reg. 174/14, s. 4 (2).
- (k) where the Director is of the opinion that the plant is not necessary or desirable having regard to,
 - (i) the needs of the producers in the locality in which the plant is located,
 - (ii) the impacts on the facilities of other plants in operation,
 - (iii) the interests of consumers who would be served by the plant,
 - (iv) the conditions and policies governing both the milk supply in Ontario and the allocation of milk to Ontario plants,
 - (v) the socio-economic impacts resulting from a decision to grant a licence, including direct and indirect economic activity, both in the locality in which the plant is located and in other parts of Ontario. R.R.O. 1990, Reg. 761, s. 100; O. Reg. 348/95, s. 15; O. Reg. 268/99, s. 1; O. Reg. 174/14, s. 4 (1-3).
- (2) Before the Director refuses to issue or renew a licence, he or she shall,
 - (a) give the applicant notice that he or she may request a hearing before the Director; and
 - (b) if a request for a hearing is made, hold a hearing. O. Reg. 174/14, s. 4 (4).

101. Revoked: O. Reg. 174/14, s. 5.

102. Where, after a hearing, the Director has determined that a licensee or former licensee has contravened any condition of a licence or any provision of the Act, the regulations, a plan or any order or direction of the Commission, the Director may impose a penalty on the person. R.R.O. 1990, Reg. 761, s. 102.

103. (1) The Director may require that a person engaged in the operation of a plant furnish a performance bond in an amount that does not exceed 10 per cent of the price payable to the marketing board and producers for milk and cream processed during the immediately preceding 12 months in the plant. O. Reg. 348/95, s. 16.

(2) The Director may determine that a performance bond is forfeited where, after a hearing, the Director has determined that the plant operator who obtained the bond has contravened any condition of a licence or a provision of the Act, the regulations, a plan or an order or direction of the Commission. R.R.O. 1990, Reg. 761, s. 103 (2).

104., 105. Revoked: O. Reg. 268/99, s. 2.

106. Every person who operates more than one plant is required to be the holder of a licence in respect of each plant and shall be deemed to be a separate operator in respect of each such plant. R.R.O. 1990, Reg. 761, s. 106.

107. Revoked: O. Reg. 174/14, s. 5.

108. Where the holder of a licence to operate a plant ceases to carry on the business for which the holder is licensed, the holder shall forthwith surrender the licence to the Director. R.R.O. 1990, Reg. 761, s. 108.

109. (1) A person who holds a licence to operate a plant and who wishes to construct or alter a building intended for use as a plant or wishes to make alterations to an existing plant shall submit an application to the Director for a permit to construct or alter the building or plant before commencing the construction or alterations. O. Reg. 174/14, s. 6.

(2) The application for the permit shall include all the information required under subsection 95 (5) and two copies of drawings and specifications of the proposed construction or alteration, one copy to be retained by the Director and the second copy to be returned to the applicant. O. Reg. 174/14, s. 6.

(3) An application for a permit shall be in a form provided by the Director. O. Reg. 174/14, s. 6.

(4) A permit to construct or alter a building intended for use as a plant or to alter an existing plant is issued subject to the condition that,

- (a) the plant is located on land that is well drained and readily accessible;
- (b) the building being constructed or altered or the plant being altered has a supply of clean, fresh water, and has facilities for disposal of sewage sufficient for the purposes of the operation of the plant as constructed or altered;
- (c) the construction or alteration of the building or alteration of the plant is carried out in accordance with the drawings and specifications submitted with the application; and
- (d) the applicant has complied with the municipal by-laws and the Acts and regulations applicable to the construction or alteration being made. O. Reg. 174/14, s. 6. [...]

* * *

2. Designations, O Reg 75/08 made under the *Regulatory Modernization Act*, 2007

Designation for purposes of s. 7 of Act — information sharing

1. (1) The legislation set out in Table 1 of Schedule A is designated under section 6 of the Act for the purposes of section 7 of the Act. O. Reg. 75/08, s. 1 (1).

(2) The designations in subsection (1) are limited, as follows:

1. The designation of the provisions of the *Milk Act* and the provisions of regulations made under that Act listed in Table 1 of Schedule A applies only for the purpose of the collection, use and disclosure of information that was originally collected in the course of the administration and enforcement of those provisions by or on behalf of a Minister.
2. The designation of the *Tobacco Tax Act* in Table 1 of Schedule A applies only for the purposes set out in paragraphs 1 to 7 and paragraph 9 of section 5 of the Act. O. Reg. 75/08, s. 1 (2).

(3) The repealed Acts and revoked regulations set out in Table 2 of Schedule A are designated under section 12 of the Act for the purposes of section 7 of the Act. O. Reg. 75/08, s. 1 (3).

(4) With respect to a repealed Act or revoked regulation set out in Table 2 of Schedule A, the Minister identified in the corresponding row of Column 4 of the Table is the Minister responsible for the purposes of exercising the powers set out in subsection 7 (2) of the Act. O. Reg. 75/08, s. 1 (4).

[...]

SCHEDULE A
DESIGNATION FOR PURPOSES OF S. 7 OF ACT (INFORMATION SHARING)

TABLE 1
ACTS AND REGULATIONS DESIGNATED UNDER S. 6 OF ACT

47.	<i>Milk Act</i>	Sections 1 and 2, subsections 2.1 (1), (3), (4) and (5) and sections 4, 10, 11, 13, 14, 15, 16, 21 and 22	R.R.O. 1990, Regulation 753 (Grades, Standards, Designations, Classes, Packing and Marking) R.R.O. 1990, Regulation 761 (Milk and Milk Products)
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* * *

3. O. Reg. 31/05 made under the *Food Safety and Quality Act, 2001*

Interpretation

1. (1) In this Regulation, [...]

“operator” means a person who has responsibility for and control over the operation of a meat plant;

* * *

4. O. Reg. 174/14 made under the *Milk Act*

Made: July 16, 2014

Filed: August 29, 2014

Published on e-Laws: September 2, 2014

Printed in The Ontario Gazette: September 13, 2014

AMENDING REG. 761 OF R.R.O. 1990

(MILK AND MILK PRODUCTS)

1. The heading before section 95 of Regulation 761 of the Revised Regulations of Ontario, 1990 is revoked and the following substituted:

v) PLANT LICENCES AND PERMITS

2. Sections 95 to 97 of the Regulation are revoked and the following substituted:

95. (1) A person who wishes to operate a plant shall submit an application to the Director for a licence to operate the plant,

(a) before beginning to operate the plant; and

(b) if the plant is not yet constructed or if alterations are required to the plant, before commencing the construction or alterations.

(2) A person who holds a licence to operate a plant and who wishes to change any aspect of the licence described in clause 96 (2) (d), (e) or (f) shall submit an application to the Director to change the licence before implementing such a change.

(3) A person who submits one of the following types of application shall, at the same time, submit an application for a permit referred to in section 109:

1. An application for a licence to operate a plant that is not yet constructed or that requires alterations.

2. An application to change a licence, if the change would require that a plant undergo construction or alterations.

(4) A person who wishes to renew a licence to operate a plant shall submit an application to the Director at least 60 days before the licence expires.

(5) An application for a licence shall include the following information:

1. The applicant's name, address, phone number and other relevant contact information.

2. The location or proposed location of the plant.

3. The type of plant for which the licence is sought and, in the case of a processing plant, the kinds of processing activities to be carried out at the plant.

4. A list of the milk products to be processed at the plant.

5. The species of animal that will produce the milk to be processed at the plant.

6. An estimate of the volume of milk to be processed at the plant.

7. The source of milk to be processed at the plant.

8. The signature of the applicant, or of the signing officer, as appropriate.

(6) An application made under this section shall be in a form provided by the Director.

96. (1) Subject to section 99.3, the Director shall issue a licence to operate a plant to a person who applies in accordance with section 95 unless the Director determines that the licence should be refused under section 100.

(2) The licence shall set out,

(a) the licence number;

(b) the licensee's name, address, phone number and other relevant contact information;

(c) the name and address of the plant;

(d) the species of animal that will produce the milk to be processed at the plant;

(e) the type of plant approved for operation and, in the case of a processing plant, the kinds of processing activities approved to be carried out at the plant;

(f) in the case of a processing plant that will process cow's milk, the classes or sub-classes of milk established under section 11 of Regulation 753 of the Revised Regulations of Ontario,

- 1990 (Grades, Standards, Designations, Classes, Packing and Marking) made under the *Milk Act* that may be processed at the plant;
- (g) the effective date and expiry date of the licence; and
 - (h) the Director's signature.
- (3) A licence to operate a plant is effective on the date set out in the licence and expires on the earlier of,
- (a) the date set out in the licence; and
 - (b) the day that is three years after the effective date.
- (4) The fee for a licence to operate a plant is an amount equal to \$150 for each one-year period the licence is effective, subject to subsection (5).
- (5) If the licence to operate a plant expires on a day other than the anniversary of the licence's effective date, the Director may prorate the licence fee that is payable for the period from the effective date, or the last anniversary of the licence's effective date, until the expiry date.

3. Section 99 of the Regulation is revoked and the following substituted:

- 99.** (1) A licence to operate a plant is subject to the following conditions:
- 1. The licence holder shall ensure that the only milk processed at the plant is milk produced by the species specified in the licence.
 - 2. The licence holder shall ensure that the plant being operated is the type of plant specified in the licence and, in the case of a processing plant, that the plant carries out only the kinds of processing activities specified in the licence.
 - 3. In the case of a licence to operate a plant that processes cow's milk, the licence holder shall ensure that the only milk products processed at the plant are within the classes or subclasses of milk specified in the licence.
 - 4. The licence holder shall not permit an employee to work in the plant while the employee has a communicable disease.
 - 5. The licence holder shall ensure that every employee working in the plant wears outer clothing that is clean and light in colour.
 - 6. The licence holder shall ensure that any person who grades milk received at the plant is the holder of a certificate for that purpose issued under section 89.
 - 7. The licence holder shall carry on business in accordance with the law, with honesty and integrity and with regard to the public interest.
 - 8. The licence holder shall observe, perform and carry out the provisions of the Act, the regulations, all plans, agreements and awards and all orders of the Commission, the Director and the marketing board.
- (2) A licence to operate a plant is not transferable.
- 99.1** The Director may impose conditions on a licence to operate a plant in addition to those set out in section 99.
- 99.2** The Director may, after a hearing, suspend or revoke a licence issued under section 96 if the licence holder fails to comply with any condition of the licence.
- 99.3** (1) If the Director receives an application under section 95 in respect of a licence to operate a plant at which cow's milk is to be processed, the Director shall not issue the licence unless he or she first complies with the process described in this section.
- (2) This section does not apply in respect of an application for a licence in the following circumstances:
- 1. The application is for a renewal of a licence to operate a plant.
 - 2. The application is in respect of changes to a licence but the proposed changes would not change the classes or subclasses of milk specified in the licence.
- (3) The Director shall notify the following persons and entities of the application:
- 1. The Canadian Food Inspection Agency.
 - 2. The Dairy Farmers of Ontario.
 - 3. The Ontario Dairy Council.
 - 4. The Ontario Farm Products Marketing Commission.
 - 5. Any person or entity that holds a licence as a producer, processor or distributor issued under the Act if,

- i. the person or entity informs the Director in writing that the person or entity wishes to receive notice under this section, and
 - ii. in the opinion of the Director, the person or entity would be affected by the granting of the licence.
- 6. Any other person that the Director believes may have information that should be considered before determining whether to issue the licence.
- (4) A notice given under subsection (3) shall include the following information:
 - 1. The name of the applicant.
 - 2. The location or proposed location of the plant.
 - 3. The type or types of plant for which the licence is sought and, in the case of a processing plant, the kinds of processing activities to be carried out at the plant.
 - 4. The fact that the recipient is entitled to provide comments or information in respect of the application in accordance with clause (5) (a), to request a meeting under clause (5) (b) or to request further information under clause (5) (c).
 - 5. Any other relevant information that may reasonably be required to allow the recipients to comment on the application.
- (5) Within 30 days after the date the notice is sent, or within such shorter period of time as may be specified in the notice, the recipient may,
 - (a) provide the Director with written comments or information relating to the issuing of the licence;
 - (b) if the recipient believes that the licence should not be issued, request that the Director hold a meeting relating to the issuing of the licence; and
 - (c) request that the Director provide further information about the application.
- (6) If the Director receives a request for a meeting under clause (5) (b), he or she shall set a time and place for a meeting and invite the following participants to the meeting in order to discuss whether the licence to operate a plant should be issued or refused:
 - 1. The applicant.
 - 2. The entities and persons who provided comments or information to the Director under clause (5) (a).
 - 3. Any other person the Director believes may have information that should be considered before determining whether to issue the licence.
- (7) Even if the Director does not receive a request for a meeting under clause (5) (b), the Director may set a time and place for a meeting and invite the participants listed in subsection (6) to the meeting in order to discuss whether the licence to operate a plant should be issued or refused.
- (8) If the Director receives a request for further information under clause (5) (c), the Director may provide further information in accordance with the request.
- (9) The Director shall not determine whether to issue or refuse a licence until the time permitted under subsection (5) to provide comments or information or request a meeting has elapsed.
- (10) The Director shall consider any comments or information he or she receives under clause (5) (a) or at a meeting held under subsection (6) or (7) in determining whether to issue a licence or refuse it under section 100.
- 4. (1) Section 100 of the Regulation is amended by striking out “may, after a hearing, refuse” in the portion before clause (a) and substituting “may refuse”.**
- (2) Clause 100 (j) of the Regulation is revoked.**
- (3) Clause 100 (k) of the Regulation is revoked and the following substituted:**
 - (k) where the Director is of the opinion that the plant is not necessary or desirable having regard to,
 - (i) the needs of the producers in the locality in which the plant is located,
 - (ii) the impacts on the facilities of other plants in operation,
 - (iii) the interests of consumers who would be served by the plant,
 - (iv) the conditions and policies governing both the milk supply in Ontario and the allocation of milk to Ontario plants,

- (v) the socio-economic impacts resulting from a decision to grant a licence, including direct and indirect economic activity, both in the locality in which the plant is located and in other parts of Ontario.

(4) Section 100 of the Regulation is amended by adding the following subsection:

- (2) Before the Director refuses to issue or renew a licence, he or she shall,
 - (a) give the applicant notice that he or she may request a hearing before the Director; and
 - (b) if a request for a hearing is made, hold a hearing.

5. Sections 101 and 107 of the Regulation are revoked.

6. The Regulation is amended by adding the following section:

109. (1) A person who holds a licence to operate a plant and who wishes to construct or alter a building intended for use as a plant or wishes to make alterations to an existing plant shall submit an application to the Director for a permit to construct or alter the building or plant before commencing the construction or alterations.

(2) The application for the permit shall include all the information required under subsection 95 (5) and two copies of drawings and specifications of the proposed construction or alteration, one copy to be retained by the Director and the second copy to be returned to the applicant.

(3) An application for a permit shall be in a form provided by the Director.

(4) A permit to construct or alter a building intended for use as a plant or to alter an existing plant is issued subject to the condition that,

- (a) the plant is located on land that is well drained and readily accessible;
- (b) the building being constructed or altered or the plant being altered has a supply of clean, fresh water, and has facilities for disposal of sewage sufficient for the purposes of the operation of the plant as constructed or altered;
- (c) the construction or alteration of the building or alteration of the plant is carried out in accordance with the drawings and specifications submitted with the application; and
- (d) the applicant has complied with the municipal by-laws and the Acts and regulations applicable to the construction or alteration being made.

Commencement

7. This Regulation comes into force 30 days after the day it is filed.

Made by:

ONTARIO FARM PRODUCTS MARKETING COMMISSION:
GERI KAMENZ
Chair
ROB GAMBLE
Secretary (A)

Date made: July 16, 2014.

Schedule “C”: ARC and OFOF’s Shareholders

Tab #	Name of Affiant	Member of Cow Share	Member of ARC	Member of OFOF
1	William Denny	X	X	X
2	Phil Caranci		X	X
3	Coreen McNally		X	X
4	Tia Mannapso			X
5	Martin Duris			X
6	Anna Kochanowsky	X	X	X
7	John Baak			X
8	Stephen Corras		X	X
9	Alison Graham			X
10	Cory Eichman	X	X	X
11	Amy Stein		X	X
12	Anna Dekleva		X	X
13	Surya Leigh Mellor	X	X	X
14	Judy Corras		X	X
15	Don Shane		X	X
16	David Amonite			X
17	Richard Chomko	X	X	X
18	Andrea Lemieux	X	X	X
19	Edward Tait	X	X	X
20	Giuseppina Visconti			X
21	Myriam Lefebvre		X	X
22	Eric Bryant	X	X	X
23	Ruth Welch	X	X	X
24	Natasha Hanna		X	X
25	Alireza Khanisworn			X
26	Michael Plummer		X	X
27	Nita Hill		X	X
28	Connie Pugliese-Riolino	X	X	X
29	Karen Fleiss		X	X
30	David Pickett		X	X
31	Maria-Theresia Roemmelt		X	X
32	Maria Helms		X	X
33	Alex Bakchinian		X	X
34	Paul Naccarato			X
35	Liliana Miclescua		X	X
36	Shawn Conway		X	X
37	Julita Koprianiuk		X	X
38	Lizia Renna		X	X
39	Irena Forester			X
40	Anca Grigorescu		X	X

41	David Hillesheim		X	X
42	Miles Santo		X	X
43	Eleanor Zalec		X	X
44	Douglas Wylie		X	X
45	Andrei Lambert	X	X	X
46	Lance Shulz			X
47	Laurie Harper-Burgess			X
48	Christine Sakarya		X	X
49	Ninoslava Jagaric		X	X
50	Sanda Draga	X	X	X
51	Zheni Nasi		X	X
52	Rasha Coleman		X	X
53	Kevin Moynagh			
54	Zebulon Landon		X	X
55	Zaqir Hassen		X	X
56	Radu Georgescu		X	X
57	Perry Friedrichs		X	X
58	Tamara Aminov		X	X
59	Giulietta Folino		X	X
60	Georgiy Davydenko	X	X	X
61	Olga Shibanova	X	X	X
62	Werner A. Fabian			X
63	Reverend Hildegard Ute Koenig			
64	Ana Maria Resrepo		X	X
65	Spomenka Kaldin		X	X
66	Merle Gould	X	X	X
67	Latoya Nongauza		X	X
68	George Affleck		X	X
69	James L. Affleck		X	X
70	Artan Bushi		X	X
71	Galina Katz	X	X	X
72	Mascha Perrone		X	X
73	Garry Lean			
74	Carl Natiuk			X
75	Nadine Ijaz			

Schedule “D”: Factual Assertions and Status of Undertakings

Factual Assertion	U/T Request and Relevance	Status
<p>Prior to March 1, 2016, ARC only sold milk or milk products to ARC “shareholders”¹⁴⁴</p>	<p>(a) List of shares held by each shareholder. List of shareholders immediately prior to March 1, 2016 and a list of shareholdings prior to that date;¹⁴⁵</p> <p>(b) Sales tracking data in unredacted form to see members who purchased the milk and milk products on a week-to-week basis.¹⁴⁶</p> <p>Relevance: To ascertain whether ARC is selling raw milk and milk products to non-shareholders.</p>	<p>U/A – not yet produced</p>
<p>ARC is selective of who can purchased shares and have access to raw milk and milk products from Glencolton Farms;¹⁴⁷</p>	<p>(a) Copies of unredacted rejected applications.¹⁴⁸</p> <p>Relevance: To ascertain the ease by which an applicant can become an ARC shareholder</p>	<p>U/A – not yet produced</p>
<p>OFOF purchased the cattle and plant assets from ARC¹⁴⁹</p>	<p>(a) provide copies of the Promissory Notes provided by OFOF to ARC in respect of the Purchase Agreement¹⁵⁰</p> <p>Relevance: No actual money was exchanged for the “purchase” of the cattle and plant assets.</p>	<p>U/A – not yet produced</p>

¹⁴⁴ Vander Hout Examination, at Q836.

¹⁴⁵ *Ibid.* at Q845 - 848.

¹⁴⁶ *Ibid.* at Q860.

¹⁴⁷ *Ibid.* at Q1003 - 1014.

¹⁴⁸ *Ibid.* at Q1019.

¹⁴⁹ Denny Examination, at Q185 - 191.

¹⁵⁰ *Ibid.* at Q195.

<p>OFOF makes payments to ARC in relation for farm expenses that is separate and apart from the per unit cost contemplated in the management agreement</p>	<p>(a) To produce statements from ARC's records from March 1, 2016 to present regarding the following types of transactions:</p> <ul style="list-style-type: none"> a. Payments made to and from OFOF; b. Payments made in respect of farm expenses; c. Payments made regarding the purchase of hay; and d. Payments received in respect of the purchase of memberships;¹⁵¹ <p>Relevance: Verify that the assertion made that OFOF actually owns the plant operations.</p>	<p>U/A – not yet produced</p>
<p>ARC provides milk to shareholders as a “dividend”.¹⁵²</p>	<p>(a) To advise if it is stated in the by-laws of ARC that dividends are payable to preference A shareholders in milk;¹⁵³</p> <p>(b) To review ARC's minutes book to determine whether there was ever a director's resolution regarding the right of preference A shareholders to receive dividends¹⁵⁴</p>	<p>U/A – not yet produced</p>

¹⁵¹ Vander Hout Examination, at Q523; Denny Examination, at Q56 - 58.

¹⁵² Vander Hout Examination, at Q390.

¹⁵³ *Ibid.* at Q293.

¹⁵⁴ *Ibid.* at Q299 - 300.

THIS COURT ORDERS THAT the Director's application for an injunction, pursuant to section 22 of the *Milk Act*, is hereby granted.

THIS COURT FURTHER ORDERS THAT Agri-cultural Renewal Co-operative Inc., its officers, directors and employees; Our Farm, Our Food Cooperative Inc., its officers, directors and employees; Michael Schmidt; and any other person or corporation with knowledge of this order, are permanently restrained from:

- (a) carrying on business as a processor and/or operator of a plant at 393887 and 393889 Concession 2 EGR, R.R. 1 in Glenelg Township, West Grey, Ontario (the "Farm Property") without a licence from the Director, in contravention of section 15(1) of the *Milk Act*;
- (b) carrying on business as a processor and/or operator of a plant on lots 48 or 49 of Concession 3 EGR in Glenelg Township, West Grey, Ontario without a licence from the Director, in contravention of section 15(1) of the *Milk Act*;
- (c) carrying on business as a processor and/or operator of a plant anywhere in Ontario without a licence from the Director, in contravention of section 15(1) of the *Milk Act*; and
- (d) hindering or obstructing the inspection, by a field person or officer appointed by the Director under the *Milk Act*, of ARC's and OFOF's books, records and other documents, as well as the Farm Property and any equipment, milk or milk products thereon, in contravention of section 13(2) of the *Milk Act*.

**GAVIN DOWNING, DIRECTOR
APPOINTED UNDER THE MILK
ACT, R.S.O. 1990, c. M. 12**

Applicant

- and -

**AGRI-CULTURAL RENEWAL
CO-OPERATIVE INC., o/a
GLENCOLTON FARMS, et al.**

Respondents

- and -

**OUR FARM OUR FOOD
COOPERATIVE INC.**

Intervener

**ONTARIO
SUPERIOR COURT OF JUSTICE**
Proceedings commenced at Newmarket

FACTUM OF THE APPLICANT
(Application returnable on May 29 and 30, 2017)

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