CV-16-125371-00

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

BOOK OF AUTHORITIES OF THE APPLICANT

(Application returnable on May 29 and 30, 2017)

May 9, 2017

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INDEX

Jurisprudence

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) at s. 3.265

Case Name:

R. v. Schmidt

IN THE MATTER OF an appeal under clause 116(2)(a) of the Provincial Offences Act, R.S.O. 1990, c. P.33, as amended
Between
Her Majesty the Queen, Appellant, and
Michael Schmidt, Respondent

[2011] O.J. No. 4272

2011 ONCJ 482

248 C.R.R. (2d) 91

97 W.C.B. (2d) 587

2011 CarswellOnt 10564

Newmarket Court File No. 4911-999-07-0384-00

Ontario Court of Justice

P. Tetley J.

Heard: April 13, 2011.
Judgment: September 28, 2011.

(168 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Fundamental freedoms -- Freedom of conscience and religion -- Legal rights -- Life, liberty and security of person -- Right not to be deprived thereof -- Equality rights -- Discrimination, what constitutes -- Availability of Charter protection -- Appeal by Crown from acquittal of defendant of offences related to production, sale and distribution of unpasteurized milk products allowed in part -- Defendant was organic farmer and advocate for public access to unpasteurized milk products -- Sale and distribution of such products was illegal, subject to legislative exemption -- Defendant's Charter challenge to offence provisions based on alleged breach of consumers' rights dismissed due to lack of standing -- Provisions were not arbitrary, overly broad or grossly disproportionate -- Consumption of unpasteurized milk products was not a

Charter protected right -- Legislation targeted production and distribution rather than consumption -- Health Protection and Promotion Act, ss. 18(1), 18(2), 100(1) -- Milk Act, s. 15(1).

Criminal law -- Regulatory offences -- Appeal by Crown from acquittals on offences related to production, sale and distribution of unpasteurized milk products allowed in part -- Defendant was organic farmer and advocate for public access to unpasteurized milk products -- Sale and distribution of such products was illegal, subject to exemption for farmer and family -- Defendant's cow-share programme involving fractional ownership of herd sought to fit within exemption -- Court overturned certain acquittals, as Justice's interpretation of exemption was overly broad given public welfare aspects of legislation -- Defendant's Charter challenge based on consumption of unpasteurized products dismissed due to lack of standing -- Health Protection and Promotion Act, ss. 18(1), 18(2), 100(1) -- Milk Act, s. 15(1).

Health law -- Public health -- Food and drug safety -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Appeal by Crown from acquittals on offences related to production, sale and distribution of unpasteurized milk products allowed in part -- Defendant was organic farmer and advocate for public access to unpasteurized milk products -- Sale and distribution of such products was illegal, subject to exemption for farmer and family -- Defendant's cow-share programme involving fractional ownership of herd sought to fit within exemption -- Court overturned certain acquittals, as Justice's interpretation of exemption was overly broad given public welfare aspects of legislation -- Defendant's Charter challenge based on consumption of unpasteurized products dismissed due to lack of standing -- Health Protection and Promotion Act, ss. 18(1), 18(2), 100(1) -- Milk Act, s. 15(1).

Natural resources law -- Agriculture -- Agricultural products -- Food safety -- Appeal by Crown from acquittals on offences related to production, sale and distribution of unpasteurized milk products allowed in part -- Defendant was organic farmer and advocate for public access to unpasteurized milk products -- Sale and distribution of such products was illegal, subject to exemption for farmer and family -- Defendant's cow-share programme involving fractional ownership of herd sought to fit within exemption -- Court overturned certain acquittals, as Justice's interpretation of exemption was overly broad given public welfare aspects of legislation -- Defendant's Charter challenge based on consumption of unpasteurized products dismissed due to lack of standing -- Health Protection and Promotion Act, ss. 18(1), 18(2), 100(1) -- Milk Act, s. 15(1).

Appeal by the Crown from the acquittal of the defendant, Schmidt, of 19 charges related to the production, sale and distribution of raw and unpasteurized milk products. The defendant was an organic farmer and public advocate for facilitating public access to farm fresh or unpasteurized milk and related products. The Crown's position was that human consumption of raw milk posed pervasive risks to public health. Sections 18(1) and (2) of the Health Protection and Promotion Act (HPPA) prohibited sale, delivery and distribution of unpasteurized milk and related products. Section 15(1) of the Milk Act required all milk processing stations to be licensed by the Director under the Act. Consumption of such

products was found in previous proceedings to be implicitly limited to the dairy farmer and members of his or her family. The scope of the farm family exemption was at issue. The defendant's operation was unlicensed and was comprised of 24 dairy cows, processing area, a farm store selling its products, and a bus to transport products. The defendant operated a cow-share programme that enabled consumers of unpasteurized milk products to purchase fractional legal ownership interests in his cows in an effort to fall within the farm family exemption under the HPPA. The arrangement included the transport of the milk products to where consumers resided. The charges involved execution of a search warrant after an undercover investigator purchased unpasteurized products from the defendant at different locations on several different occasions. Seventeen of the 19 charges involved transactions after the investigator had joined the cow-share programme. A Justice of the Peace acquitted the defendant of 19 charges related to contravention of the HPPA and the Milk Act on the basis that the cow-share programme was a legitimate private enterprise. The Crown submitted that the associated public health risks justified a less expansive interpretation limiting the exemption to producers and their immediate family. The Crown submitted that the Justice erred in ruling that the defendant's cow-share programme complied with the HPPA. On appeal, the defendant submitted that the prohibition on the sale and distribution of raw milk as referenced in both the HPPA and the Milk Act breached rights protected by ss. 2(a), 7 and 15 of the Charter.

HELD: Appeal allowed in part. The analysis of ss. 18(1) and (2) of the HPPA and s. 15(1) of the Milk Act by the Justice of the Peace revealed reversible errors in law. The provisions were not given the broad interpretation required of public welfare legislation. Appropriate consideration was not afforded to the restrictions inherent in the HPPA and Milk Act according to their plain meaning. The interpretations adopted by the Justice defeated or undermined the legislative purpose of the provisions. Had the applicable legislation been more broadly interpreted, the defendant would have been found guilty of each of the alleged offences, save for two sale offences in which a reasonable doubt was raised regarding gifts of cheese. The same gifts constituted prohibited distributions. In addition, the evidentiary record supported a defence of honest but mistaken belief in respect of three charges for failure to comply with a prior cease and desist order made by a public health inspector, as the order was not clear and unequivocal and seemingly related to "place" rather than "person." No factual basis existed to support a defence of entrapment on the remaining charges based on the conduct of the undercover investigator. Convictions were entered where appropriate. The defendant's Charter challenge failed due to a lack of standing, as the defendant's submissions depended on consumption of raw milk products by others. The defendant failed to establish a breach of his own religious practices, liberty interest, or on the basis of equality rights. Despite internal inconsistencies and uncertainty in the evidence related to public health risk, the legislative restrictions were neither arbitrary nor overly broad or grossly disproportionate. The entitlement to consume milk, raw or otherwise, was not a Charter protected right. The legislative restrictions related to sale and distribution rather than consumption.

Statutes, Regulations and Rules Cited:

Business Names Act, R.S.O.: 1990, c B17,

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 2(a), s. 7, s. 15

Health Protection and Promotion Act, R.S.O. 1990, c. H.7, s. 1(1), s. 13, s. 13(1), s. 18, s. 18(1), s. 18(2), s. 18(3), s. 100(1)

Milk Act, R.S.O. 1990, c. M.12, s. 15(1), s. 15(2)

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 33, s. 34, s. 35, s. 116(2)(a), s. 117(1)(a.1), s. 121

Regulation 562, R.R.O. 1990, s. 2(1), s. 42.52

Appeal From:

On appeal from the dismissal of all charges by Justice of the Peace P. Kowarsky on January 21, 2009.

Counsel:

Alan E. Ryan, Ministry of Natural Resources, Legal Services Branch; John D. Middlebro' and Kelly Graham, Middlebro' & Stevens LLP - Grey Bruce Health Unit; and Michael Dunn, Ministry of the Attorney General, Constitutional Law Branch, for the Appellant.

Karen Selick, Canadian Constitution Foundation, for the Respondent.

INDEX

JUDGMENT

P. TETLEY J.:--

1. Background

1 The Respondent, Michael Schmidt, is a farmer and a committed, vocal and highly visible advocate, for the facilitation of greater public access to what he refers to as "farm fresh" or unpasteurized "raw" milk. This is a Crown appeal from the Respondent's acquittal on nineteen charges relating to the production and distribution of raw milk and milk products under the *Provincial Offences Act*, R.S.O. 1990, c. P.33 (hereinafter P.O.A.). The

subject matter of this appeal involves the distribution and consumption of "raw" or unpasteurized milk in the Province of Ontario. It also entails a review of the parameters of the law that tacitly authorizes the consumption of raw milk by members of certain "farm families", a substance the Appellant categorizes as constituting a potential public health hazard, while effectively restricting consumption by other interested, non-farm based, consumers. The constitutional implications of certain statutory provisions to the Respondent's "cow-share" programme also forms part of the reasons in this appeal.

2 Surprisingly, given the Appellant's position as to the pervasive risks to public health arising from human consumption of raw milk, it is not against the law to consume unpasteurized milk in Ontario. That lawful entitlement is subject, however, to significant legal restriction that appears to be designed to control or restrict consumption of raw milk to those who actually produce the milk. Although personal consumption of raw milk is legally authorized, for practical purposes, raw milk consumption has effectively been legislatively limited to the dairy farmer and members of his or her immediate family. Those individuals comprise the so called "farm family exemption".

3 An example of the statutory curtailment of the lawful entitlement to consume raw milk is apparent in Section 15(1) of the *Milk Act*, R.S.O. 1990, c. M.12 (hereinafter *Milk Act*). That provision mandates that all milk plants (which include a milk transfer station or premises where cream or milk is processed) be licensed by "the Director" appointed by regulation under the *Act*. Sections 18(1) and 18(2) of the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 (hereinafter *H.P.P.A.*), further limit consumer access by effectively prohibiting both the sale, delivery and/or distribution of unpasteurized milk, cream or other processed milk products or products derived from raw milk..

4 **Section 18(1)** of the H.P.P.A. deals with milk and provides as follows:

> (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).

Section 18(2) deals with milk products and provides:

> (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).

Section 18(3) references as authorized exception provides:

> (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).

5 Presumably, if a resident enjoys ownership of the means of production, a cow, that individual, together with members of their immediate family, can consume raw milk with impunity. This issue was considered in an earlier proceeding involving a 1994 regulatory review of a Public Health Inspector's Order directing that the Respondent cease and desist from selling unpasteurized milk and milk products. In that review, the Health Protection Appeal Board, a specialized tribunal with jurisdiction to review the decisions of *H.P.P.A.* inspectors, defined the parameters of the legal entitlement to consume unpasteurized milk as follows:

> The *H.P.P.A.* does not state clearly that members of "farm families" may consume unpasteurized milk and milk products; rather, the exception which allows them to do so is implicit. Section 18 of the *Act* does not prohibit the consumption of unpasteurized milk or milk products in a private residence. Similarly, the definition of "food premise" contained in section (1)(1) of the *Act*, and further refined in section 2(1) of Regulation 562, R.R.O. 1990, excludes a private residence. The effect of these definitions is to preclude the application of section 42.52 of Regulation 562, which sets out pasteurization requirements to a private residence. The only reason that a private residence of a "family farm" differs from a private residence of anyone else *vis-à-vis* consumption of unpasteurized milk and milk products, is that the members of "farm families" have access through a means not prohibited by section 18 of the *Act*. (Health Services Appeal and Review Board - Reasons for Decision - September 1, 1994 p. 11)

6 During the course of the trial proceedings now under review, the prosecution sought to rely on a similarly restrictive definition of the "farm family exemption" in support of the position that the lawfully authorized entitlement to consume unpasteurized milk in Ontario is effectively restricted to the milk producer or dairy farmer and his or her family. The Appellant submits that the health risks associated with a more expansive interpretation of the "farm family" exemption serve to create a risk to public health generally. As public welfare legislation, a broad, purposeful approach to statutory interpretation is contended as being warranted, an interpretation that would effectively restrict access to unpasteurized milk for consumption purposes to those that produce it and members of their immediate family. See: *Ontario (Ministry of Labour) v. Hamilton City* [2002] O.J. No. 283 (C.A.); *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (C.A.) at 27; *R. v. Rizzo and Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27. It is submitted that the trial justice erred in concluding that the defendant's "cow-share" programme complied with the applicable provisions of the *H.P.P.A.*

2. <u>The Respondent's Cow-Share Programme</u>

7 The Respondent, who was unrepresented at trial, is the sole proprietor of Glencolton Farms located at 393889 Lot 44, Concession 3 EGR, Municipality of West Grey, near Durham, Ontario. The farm is described by the Respondent as a "biodynamic organic operation". It encompasses 100 acres of land and features a detached barn containing dairy

equipment, refrigerated storage rooms, milking and processing areas, plus a blue bus used to transport milk and other farm products to the cow-share members in the GTA. At the time the charges in issue arose in late 2006, 24 dairy cows formed the resident herd on the premises. The farm also includes a detached farm store where various farm products were located including milk, cream, cheese and other products produced on the farm, such as eggs and meat.

8 The Respondent holds a Masters degree in agriculture. He immigrated to Canada from Germany in 1983 and originally operated a dairy farm within the quota system governing the distribution of milk in the Province of Ontario. In 1992, he cancelled his contract with the Milk Marketing Board and created a "lease-a-cow programme". That programme enabled interested consumers of unpasteurized milk to hold leasehold interests in the Respondent's cows in an effort to effect compliance with the restrictions against the sale or distribution of unpasteurized milk and milk products in s. 18(1) and s. 18(2) of the *H.P.P.A.*

9 On February 23, 1994, the Respondent was charged with contravening s. 18 of the *H.P.P.A.* He was subsequently convicted of that offence and an offence under the *Milk Act* and fined $3,500 and placed on probation for a period of two years. A permanent restraining Order was issued by an *H.P.P.A.* inspector at that time. The Order directed that the Respondent cease "the manufacturing, processing, preparation, storage, handling, and display of unpasteurized milk and milk products." The alleged breach of that Order forms the subject matter of three of the charges in issue in this appeal.

10 As an enthusiastic and longstanding proponent of the health benefits to be derived from the consumption of raw milk, the Respondent has personally endured significant personal stress and financial hardship as a consequence of his dedication to this issue. The legal costs associated with the defence of the 1994 prosecution lead to the eventual sale of five hundred acres of, his then, six hundred acre Glencolton farm and the sale of most of the dairy herd. Despite this setback, the Respondent was undeterred. Near bankruptcy, he reorganized and, in due course, instituted a "cow-share" programme. This arrangement was intended as a private "contractual" agreement between the Respondent, in his capacity as the sole proprietor of Glencolton Farms, and interested raw milk consumers, where cows are fractionally owned by the ultimate consumers of the raw milk they produce. In consideration of receipt of a capital sum, interested non-farmed based, consumers secure access to raw milk and raw milk products. The Respondent acts as the herdsman or "agister" and receives compensation in consideration of the capital cost of the dairy cow ($1200) and additional compensation for the costs of production and labour. The arrangement was designed with the intention that the cow-share members would have a defined legal interest in a particular cow in the Glencolton Farms' herd. Individual shareholders pay increments of three hundred dollars to the Respondent in exchange for a one quarter interest in one of the dairy cattle at his farm. The arrangement includes the transport of the raw milk and raw milk food product to the GTA where the majority of the cow-share certificate holders reside. The trial record indicates this cow-share programme has been in operation since 1996. It initially involved ten members. There were one hundred and fifty cow-share members at the time the charges now under review were laid. Despite the fact this arrangement was purportedly known to the local public health authority and operated in an open and public manner, it did not attract official scrutiny and subsequent intervention from government authorities until the fall of 2006.

3. The 2006 Charges

11 As noted, the trial justice dismissed all nineteen of the charges against the Respondent. Seventeen of the charges were laid by the Ministry of Natural Resources (M.N.R.) and allege infringement of s. 18(1) and s. 18(2) of the *H.P.P.A.* Fourteen of those charges arose from five distinct transactions involving an undercover investigator Susan Atherton, and the purchase of raw milk, or raw milk products, between August 22, 2006 and November 21, 2006. Three of the impugned transactions involved unpasteurized milk products on the aforementioned blue bus. The two others took place at the Respondent's farm. Each transaction involved a purported sale to the undercover operative, which is also alleged to constitute the offence of unlawful distribution of unpasteurized milk or milk products. The first two transactions (August 22, 2006 and October 17, 2006) include the purchase or gratuitous receipt of cheese when the undercover operative was not yet a cow-share member. The other transactions occur after Ms. Atherton became a cow-share member. Each includes either a cash purchase or the uncompensated receipt of unpasteurized milk or milk product. The three remaining charges under the *H.P.P.A.* include failing to obey the 1994 "cease and desist" Order issued by the Public Health Inspector, on three separate dates, by storing and displaying unpasteurized milk and milk products contrary to s. 100(1) of the *Act*. Section 100(1) of the *H.P.P.A.* provides that, "any person who fails to obey an Order made under this *Act* is guilty of an offence."

12 In addition to the charges under the *H.P.P.A.*, two offences in violation of the *Milk Act* were prosecuted. The *Milk Act* infractions include charges of operating a plant in which milk, or cream, or milk products were processed without a licence from the Director, contrary to s. 15(1) of the *Milk Act* and carrying on a business as a distributor of fluid milk products without a licence from the Director authorizing such a business, contrary to s. 15(2) of the *Milk Act*. The Appellant formally abandoned the appeal of the acquittal on the distribution count leaving only one count alleging infraction of the *Milk Act* to be considered in this appeal (the s. 15(1) offence). A summary of the evidence presented by the prosecutor at trial is located at paragraphs 20 to 31 of this judgment.

13 The applicable provisions of the *Milk Act* are as follows:

> Licences
>
> Licence to operate plant
>
> **15.(1)** No person shall operate a plant without a licence therefore 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 therefore from the Director. R.S.O. 1990, c. M.12, s. 15(2).

4. Summary of the Trial Record

14 Excluding the evidence offered by four expert witnesses in relation to the Respondent's *Charter* application, the entirety of the testimony presented at the Respondent's trial is attached, in summary form, as Appendix "A" to this appeal judgment.

15 The acknowledged facts arising from an Agreed Statement of Fact and the Respondent's statement follows. The case for the prosecution is also outlined and evidentiary references provided in respect to the various offences alleged. Similarly, the position of the defence at trial is reviewed with reference to the trial record.

(A) Agreed Facts and the Respondent's Statement

16 The trial featured an acknowledgment by the Appellant of a number of significant facts by way of an Agreed Statement of Fact, including the following: Michael Schmidt is the operator of Glencolton Farms. There was no pasteurization or sterilization of any dairy products produced, on display, stored or distributed by Glencolton Farms (Agreed Facts, para. 4, p. 47, January 26, 2009 Trial Transcript). Michael Schmidt is a dairy farmer who carries on a sole proprietorship under the name of Glencolton Farms, which was registered under the *Business Names Act*, R.S.O. 1990, c. B.17 (p. 42, January 26, 2009 Trial Transcript). The Appellant set up a cow-share programme in which people pay for a six-year membership with $300 being charged for a quarter interest in a cow, $600 for half a cow and $1,200 for a full cow (pp. 49-50, January 27, 2009 Trial Transcript).

17 At no time did the Respondent apply for, or obtain, a licence to operate this or any other plant within the provisions of the *Milk Act*. At various times between the offence dates August 17, 2006 - November 22, 2006, Mr. Schmidt transported his dairy and other products from Glencolton Farms to the parking lot of Waldorf School in Thornhill for sale to "customers". In response to a clarifying question from the trial justice the Respondent acknowledged that he sells all kinds of fresh produce and baked goods. He has a farm store. He operates a blue bus that drives to a certain location in the greater Toronto area and offers farm products for sale with the exception of milk and milk products. These are provided for a fee to people who are registered as cow-share members (p. 50, January 27, 2009 Trial Transcript).

18 In 1994, Mr. Schmidt was operating a similar farm store in Grey County, where he was selling and distributing unpasteurized milk and milk products under a "leasing" scheme. An Order was issued against him by a health inspector under s. 13 of the *H.P.P.A.* The Order directed the Respondent to stop "manufacturing, processing, preparation, storage, handling, display of unpasteurized milk and milk products" because such products were known to transmit disease to humans. On review of the health inspector's Order, the Health Protection Appeal Board held that raw milk was a health hazard, as defined under the *H.P.P.A.,* and expanded the prohibition Order against Mr. Schmidt (pp. 55-57 and 61, January 26, 2009 Trial Transcript).

The Respondent's Statement

19 During the execution of a search warrant at Glencolton Farms on November 21, 2006 the Respondent provided a statement to an investigator with the M.N.R. The statement was ruled to be voluntary and was read into the trial record by M.N.R. Conservation

Officer Dan Herries (pp. 74-78, January 28, 2009 Trial Transcript). In the statement the respondent acknowledged the following:

* He is "totally aware" it is illegal in Ontario to sell or distribute milk or milk products that have not been pasteurized. He is not currently licensed to operate a milk plant by any level of government.
* He owns the business and is in charge of the production and distribution operation.
* All eggs, meat, grains and milk, including fresh milk, fresh cream and fresh cheese are produced on the farm.
* He sells bread, meat, cinnamon buns and brownies, and distributes milk and milk products, to cow-share members. The milk and milk products are not pasteurized.
* The cow-share programme is to allow people to obtain raw milk by drinking milk from "their" cow. Members are aware they are purchasing unpasteurized milk and milk products: "that's why they buy it, or get the cow."
* The membership costs vary according to the portion of the cow that is being purchased with prices varying from $300, $600 to $1,200. Members come at least twice a year to see their cow, to "come work here", to "come help", although they rely on his expertise and knowledge. The cow-share members are assigned a name for their cow. The name usually stays with the family, although he didn't know if the membership card actually reflects the specific name of the cow that any particular cow-share member may have an ownership interest in.
* The Respondent later contradicts this factual assertion when he is asked if a member receives milk only from the cow he/she purchases. He responds, "They receive milk from the herd as a total" (p. 76).
* The cost and duration of the cow-share membership is discussed, as well as what membership entails, as delineated in a "membership handbook". In response to the question about whether the membership card reflects the cow an individual cow-share member may own, the Respondent referenced the questioner to see the membership book. (It does not.)
* The raw milk product is sold and distributed at the farm on Fridays and on the "famous blue bus" on Tuesdays. The blue bus had 30 cases, each containing 12 litres of milk, at the time of the execution of the search warrant. Mr. Schmidt was getting ready to leave to meet approximately 100 of "his customers" when he was stopped by the police and M.N.R. officials.
* Cow-share members in Toronto pay $2.50/litre of milk, and members in the Durham area pay $2. The fee is not for the milk itself. The charge is for the Respondent's services and costs associated with milking, housing and feeding the cows and transportation costs.

(B) The Prosecution's Case at Trial

20 The Respondent was charged with the offences in issue following the execution of a search warrant at Glencolton Farms on November 26, 2006. Prior to the culmination of the investigation, various M.N.R. personnel were deployed in an undercover capacity to investigate the suspected sale and/or distribution of unpasteurized milk and milk products by the Respondent. A detailed summary of the trial testimony of these witnesses is attached hereto as Appendix "A" to this appeal judgment.

21 The most involved M.N.R. investigator, Susan Atherton, commenced the inquiry into the Respondent's cow-share programme on June 27, 2006. On that date she conducted surveillance on the Respondent and the blue bus as it was parked near the Waldorf School in Richmond Hill. On August 22, 2006, Ms. Atherton again attended at the blue bus and purchased a small quantity of soft cheese from the Respondent for the sum of $3.10. The Respondent advised the cheese was fresh and had been made shortly before it was purchased. Subsequent chemical analysis of the cheese confirmed it to be unpasteurized.

22 On October 17, 2006, Ms. Atherton again purchased cheese from the Respondent, at the blue bus, for the sum of $3.20. During the course of this interaction with the Respondent the investigator inquired about a cow-share membership.

23 On October 20, 2006 a cow-share membership was purchased. Individuals were noted to be buying milk and milk products at the store located at the Respondent's farm. Ms. Atherton also purchased milk and milk products after she had paid the $300 fee to become a member of the cow-share programme.

24 The process was repeated on October 27, 2009. Ms. Atherton was accompanied by another M.N.R. Investigator, Victor Miller. Her purchases from the farm store that day included three jars of milk and a package of soft cheese.

25 The investigators observed milk and cream to be located in coolers in the farm store. Cheese was noted as being made on the farm premises and milk appeared to be bottled there.

26 On November 7, 2006, Ms. Atherton re-attended at the blue bus near the Waldorf School. She recalled purchasing a jar of milk from the Respondent for the sum of $7. She did not record amount of the purchase in her notebook. The Respondent disputed her recollection of that event at trial. Other people were noted to purchase milk and other farm produce at the bus.

27 Following the execution of the search warrant at Glencolton Farms on November 21, 2006, the Respondent was charged with fourteen different offences under s. 18(1) and s. 18(2) of the *H.P.P.A*. As noted previously, s. 18(1) prohibits the sale or distribution of unpasteurized milk or cream, with s. 18(2) prohibiting the sale or distribution of unpasteurized milk products (including cheese).

28 The charges were largely based on Ms. Atherton's undercover investigation and included the following:

Offence Date	Item(s)	Location	Amount	Charges

	Purchased or Received	of Purchase	Paid	
August 22, 2006	Cheese	Blue bus	$3.10	s. 18(2) x 2
October 17, 2006	Cheese	Blue bus	$3.20	s. 18(2) x 2
October 20, 2006	Milk and cheese	Glencolton Farms' Store	$30.00	s. 18(1) x 2 s. 18(2) x 2
October 27, 2006	Milk and cheese	Glencolton Farms' Store	unknown	s. 18(1) x 2 s. 18(2) x 2
November 7, 2006	Milk	Blue bus	$7.00	s. 18(1)* x 2

* Denotes an allegation that has not been particularized by date. The legal consequence of this omission is discussed in the Disposition of Appeal portion of this judgment.

29 In addition to the fourteen charges under the *H.P.P.A*., three charges were laid under the *Milk Act*. The charge of operating an unlicensed milk plant, in which milk, cream or milk products were processed, contrary to s. 15(1), remains the sole *Milk Act* charge in issue in this appeal. The Respondent was also charged with three counts of failing to comply with the 1994 Public Health Inspector's Order directing that he not store or display unpasteurized milk products contrary to s. 100(1) of the *H.P.P.A*. Those allegations reference offence dates of October 20, October 27, and November 21, 2006.

30 During the course of the trial, the Respondent acknowledged that he was not licensed under the *Milk Act* to operate a milk plant between August 17 - November 22, 2006.

(C) The Case for the Defence

31 The Respondent was the main defence witness. The entirety of his trial testimony is reviewed in detail in Appendix "A" to this appeal judgment (See pp. 86-142, January 28, 2009 Trial Transcript). A brief summary of the only other defence witness called at the trial, cow-share member Eric Bryant, is also summarized in Appendix "A" (See pp. 83-86, January 28, 2009 Trial Transcript).

32 The significant aspects of the Respondent's trial testimony include the following:

* Previous involvement in facilitating the provision of raw milk to interested consumers in a "cow-lease" programme;
* The absence of any reported raw milk related illness as a consequence of the consumption of raw milk from Glencolton Farms;
* Subsequent prosecution, as a consequence of the programmes alleged non-compliance with the *H.P.P.A*. and *Milk Act*, a prosecution that concluded with the Respondent's guilty plea and the imposition of a $3500 fine;
* Acknowledged receipt of a 1994 "cease and desist" Order originally issued by a local health inspector and subsequently confirmed by the Health Protection Appeal Board;
* An assertion that the Order was of no continuing force and effect, as of 2006, as the Order referenced the previous geographical location of the Respondent's farm operation and not the address where the farm is presently situated;
* Representations regarding the cow-share programme and it's uneventful operation for a period of ten years (1996-2006) without regulatory intervention of any kind;
* The purported knowledge of local health officials, with regard to the programmes ongoing operation, as a result of the Respondent's high public visibility as a raw milk advocate;
* The Respondent's assertion that the Glencolton Farms dairy operation did not include a "plant", as that term is defined in the *Milk Act,* based, in part, on the fact the milk house was directly attached to the barn;
* An acknowledgment that the Respondent provided undercover operative Atherton with a small quantity of cheese, prior to her enrolment in the cow-share programme, based on her false representation in relation to the deteriorating state of her health;
* An assertion that the farm store cooler door was solid stainless steel effectively preventing the display of raw milk and milk products as alleged;
* An outline of the steps taken to ensure the health of the Glencolton Farms dairy herd and the milk produced;
* An acknowledgement that the Respondent is not a cow-share programme member;
* An acknowledgement that raw milk and raw milk products were stored and displayed at Glencolton Farms on October 20, 2006 and at the farm and on the blue bus on November 21, 2006;
* The Respondent acknowledged that the member's handbook accurately outlined the details of the cow-share programme. No additional documentation, other than the handbook and membership card, reflected the "personal agreement" between Glencolton Farms and the cow-share membership;

* The Respondent acknowledged some uncertainty in the cow-share arrangement in regard to whether membership entitled the share-holder to a particular cow or access to a portion of the milk production; the Respondent stated "it could be both" with "the essential fact" being "that they (the cow-share members) actually have a cow".
* When confronted by the fact the name of a specific cow is not noted on the membership cards of any of the participants in the cow-share programme the Respondent advised of a "new" process where cow-share members are invited to the Respondent's barn in order to choose a cow;
* The Respondent testified that his responsibilities included the care and maintenance of the dairy herd and ensuring that they were properly fed and cleaned;
* The Respondent described himself as the "milkman" and agreed he performed different functions to facilitate the delivery of the raw milk to the cow-share members, including the bottling of the milk, the loading of the blue bus and the delivery of the milk and other farm products;
* The cow-share programme was indicated, by the Respondent, to be exempt from the prohibition against the sale of milk and milk products (s. 18(1) and 18(2) of the *H.P.P.A.*) by creating a "private contract between two people to lawfully obtain a product not normally available to the public. The Respondent testified, "There are no regulations in place when you privately own your cow, which nobody can interfere with in the drinking of milk, as it comes from your cow".

5. The Grounds of Appeal

33 In summary, the Appellant submits that the justice of the peace misapprehended the evidence at trial and misapplied the law to the evidence adduced in support of the various allegations. In addition, the Crown contends that the applicable burden, or onus of proof, has been misconsidered as a consequence of the justice's failure to properly interpret the applicable legislation in a broad, liberal and purposive fashion consistent with the public health safety objectives of both the *H.P.P.A.* and the *Milk Act*. Further, the Crown takes issue with the fact the Justice conducted his own research into the purported risks to health associated with human consumption of unpasteurized milk. The Appellant contends that the court then relied on the results of that independent research in reaching the conclusion that the available scientific evidence was effectively inconclusive on that issue. It is submitted that this out-of-court, independent inquiry affected procedural fairness and constituted a violation of natural justice, as neither Crown nor defence was able to respond to the results of the court's independent inquiries or even know what they were.

(A) Misapprehension and Misapplication of Evidence

34 At the outset of his decision, the presiding justice indicated that he would not elaborate on the *viva voce* evidence offered by the Crown witnesses in light of the acknowl-

edgments referred to in the Agreed Statement of Fact and the content of the defendant's statement to the investigators (para. 52). This concern is the basis for the detailed review of the entirety of the trial record in Appendix "A" of this judgment. The Appellant argues that the justice failed to give meaningful consideration to the evidence of the Crown witnesses', particularly the testimony of Ms. Atherton, where it conflicted with the Respondent's testimony.

35 With respect to the counts under s. 100(1) and ss. 18(1)(2) of the *H.P.P.A*, the Appellant asserts that the presiding justice of the peace erred in law by narrowing the issue to whether Ms. Atherton paid for the cheese before, and even after, she became a cow-share member. As a consequence, he is viewed as having misapprehended the core elements of the offences relating to producing, storing and distributing unpasteurized milk and milk products. The Appellant further contends that the court ignored the Respondent's express acknowledgements: that he was not licensed at any time under the *Milk Act*; that he continued to produce, store and distribute milk and milk products; and his acceptance of "the validity of" the Order to *cease manufacturing, processing, preparation, storage, handling, display [sale, offering for sale and distribution] of unpasteurized milk and milk products*, as delineated in the Agreed Statement of Facts and admitted by the Respondent during the trial (pp. 74-78, 98-100, 106-107, 172-108, 136-138, January 28, 2009 Trial Transcript). At paragraph 66, of the Reasons for Decision (January 22, 2009 Trial Transcript) the justice of the peace noted that cheese produced, stored and displayed by the Respondent was distributed to Ms. Atherton.

36 During the course of a *de facto* collateral attack on the Health Protection Appeal Board Order, the Appellant also argues that the justice conflated or amalgamated the offence of selling unpasteurized milk product with the other culpable acts relating to the storing of unpasteurized milk. It is submitted that his focus on the form of the Respondent's operation and the legal significance attributed to the cow-share programme, as opposed to the Respondent's earlier cow-lease structure, effectively derailed consideration of the acknowledged statutory violations and the convictions that would necessarily have followed as a consequence.

37 At paragraph 66 of his Reasons for Decision (January 22, 2010 Trial Transcript), the justice described the Respondent as being "emphatic" in his recollection that Ms. Atherton was not charged for the cheese. The Appellant points out that the Respondent's own evidence was that he could not categorically say under oath that Ms. Atherton was not charged, but that his "usual practice" is to say "no, you can't buy anything, [but] I can give you a piece to [...] to try out and let me know [but] you can always make a donation to the farm [...] (pp. 127-128, January 28, 2009 Trial Transcript). The issue of donation or gift of cheese, as an act of distribution of unpasteurized dairy product prohibited by the *H.P.P.A.,* was never considered. The Appellant contends, regardless of whether Ms. Atherton purchased the cheese, made a donation to Glencolton Farms, or was given the cheese for free, she was not eligible to receive the cheese lawfully. No recognized legal exemption authorizing this transaction is available to the Respondent. Section 4(3) of the *Provincial Offences Act* places the onus on the claimant to establish an exception, or exemption, from any licensing requirement, order or other concomitant legislation.

38 The Crown also objects to the adoption of the credibility assessment of the Respondent arising from the 1994 Health Protection Appeal Board hearing. The Appellant submits that the justice of the peace erred in applying the positive findings the Appeal Board made about the Respondent's credibility some 15 years earlier to buttress the credibility of the Respondent's trial testimony (paras. 76-77, January 21, 2010 Trial Transcript). The Appellant submits that the justice attached undue weight to the reliability of the Respondent's assertions as to whether milk and milk products were being sold based, in part, on a credibility assessment made by unknown others, in an unrelated proceeding, held some 12 years earlier. The Appellant further contends that it is well-established that such determinations must be made on a case-by-case basis based on consideration of the actual record before the court: see e.g. *R. v. Ghorvei*, [1999] O.J. No. 3241 (C.A.).

39 The Crown argues that this error was perpetuated by an apparent misapplication of the third branch of *R. v. W.(D.)*, [1991] 1 S.C.R. 742. The conflicting evidence of the investigator and the Respondent regarding Ms. Atherton's pre-cow-share membership receipt of two small quantities of cheese is reconciled by a credibility assessment that is resolved in the Respondent's favour without an explanation as to why Ms. Atherton's evidence was rejected and the Respondent's testimony concluded to be both credible and reliable. The stated preference for the evidence of the Respondent on the basis that "it strains common sense he would sabotage" his operation by selling the milk product, does not address the acknowledged fact that unpasteurized milk products were nonetheless being distributed, displayed, advertised and stored contrary to the *H.P.P.A.* and the *Milk Act* with the active participation of the Respondent. The Respondent's acknowledged lack of certainty in his own recollection of the sale versus gift, in relation to cheese received by Ms. Atherton, and the contended legal irrelevancy of the two accounts, given the express prohibition in the *H.P.P.A*. in relation to the distribution of raw milk, is submitted as undermining the basis for the justice's preference of the Respondent's trial testimony in relation to these transactions.

(B) Misapplication of the Burden of Proof

40 The Appellant submits that the trial court erroneously noted that the Respondent could avoid conviction by raising a defence available to him in the case of a strict liability offence, or by satisfying the court on a balance of probabilities that an authorization, exception, exemption or qualification "prescribed by law" operated in his favour, pursuant to s. 47(3) of the *Provincial Offences Act*. The Appellant contends that the Crown was not required, except by way of rebuttal, to prove that the exception did not operate in favour of the Respondent. The Respondent was required to prove the exception or exemption on a balance of probabilities: *Proulx v. Krukowski* (1993), 109 D.L.R. (4th) 606 (Ont. C.A.) and *Halton (Regional Municipality) v. Stainton* (1991), 2 O.R. (3d) 170 (Prov. Div.).

41 At trial, the Respondent offered no statutory or common law authority tending to show that he was not subject to the statutory requirements of the *H.P.P.A.* and *Milk Act*. No governing legislation or jurisprudence is viewed by the Appellant as an authorization, exception or exemption "prescribed by law" so as to exempt the Respondent from storing, distributing, delivering, or arguably, selling unpasteurized milk and milk products (para. 64, January 21, 2010 Trial Transcript). Moreover, no exemption is contended to exist in law to allow persons to contract out of the terms or provisions of either *Act* (See: *Kennedy v.*

Leeds, Grenville and Lanark District Health [2009] O.J. No. 3957 (C.A.)*; Universal Game Farm Inc. et al v. Her Majesty the Queen in Right of Ontario* 86 O.R. (3d) 752 (S.C.J.). Given the regulatory purpose of the *H.P.P.A.* and *Milk Act* this prohibition is submitted as being consistent with the expressed purpose or intent of the *Act* from a policy perspective. By analogy, the Appellant notes there are any number of reported circumstances where a private agreement or privately conveyed consent has not acted as an impediment to prosecution: e.g. see *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Labaye*, [2005] 3 S.C.R. 728.

42 Any of the individual acts of displaying, offering for sale, delivering, distributing or selling unpasteurized milk and milk products are submitted by the Appellant as being sufficient under the *H.P.P.A.* to warrant convictions under ss. 18(1)(2) and, by extension, 100(1). The Appellant further submits that the Respondent cannot benefit from the exemption under s. 18(3) because he was not licensed under the *Milk Act.* This fact was acknowledged by the trial justice (p. 12, January 21, 2010 Trial Transcript). Therefore, the court is said to have erred by narrowing the issue as to whether the Respondent sold milk and milk products to paid-up cow-share members to determine culpability under *H.P.P.A.*, ss. 18(1)(2) and 100(1). The Respondent's own evidence regarding the ownership of the cows and the sale of their milk and the evidence relating to the storage and display of raw milk and other unpasteurized products is seen as sufficient to support convictions on all of the *H.P.P.A.* counts.

43 The trial justice's consideration of the consequences of the conviction under the *H.P.P.A.* and *Milk Act* arising from the fact that the Respondent was concluded to have operated a "legitimate" enterprise is seen, by the Appellant, as reflecting a misunderstanding of the constituent elements of the offences in dispute. In any prosecution, the issue is whether the Crown has met the burden of proof of the charge beyond a reasonable doubt. The fact that members of the cow-share programme voluntarily assumed any health risks associated with the consumption of unpasteurized milk does not and cannot operate as a defence or exempt Mr. Schmidt's distribution arrangement from the restrictions inherent in the *H.P.P.A.* and *Milk Act*.

44 Whether or not the consumers of the raw milk and raw milk products are actually harmed is not an essential element that the Crown is required to establish, nor is it determinative of guilt or innocence. None of the provisions in issue in this matter have causation requirements. The legislative provisions and the 1994 Order simply proscribe the acts of storing, displaying, delivering, distributing and selling unpasteurized milk and milk products.

45 The Appellant acknowledges that there was no evidence that the raw milk produced by the cows at Glencolton Farm was a "health hazard" other than that it was "raw" or unpasteurized. The consequent sale or distribution of the milk is therefore proscribed by law. The 1994 finding of the Health Services Appeal and Review Board that raw milk is a "health hazard" was included in the Agreed Statement of Facts. Why the Order was made is viewed as irrelevant to the issues at trial and it is submitted as being outside the trial justice's jurisdiction to review. The testimony of the expert witness called by the Crown at trial is submitted as offering confirmatory support for the Review Board conclusion, as to the relative safety of raw milk, from a public health perspective.

46 Public Health Inspectors, Andrew Barton and Christopher Munn, testified that raw milk and raw milk products are deemed a health hazard pursuant to government guidelines. The trial justice noted, at paragraph 158 (January 21, 2010 Trial Transcript) that, "it is essential to note that [...] the tests conducted by the Public Health Officials on the seized (dairy) products revealed [...] that the milk had not been pasteurized, which in and of itself, is deemed to be a risk to public health by virtue of the provisions of the *H.P.P.A.*" Further, Mr. Munn testified, as noted previously, that M.N.R. Investigator Campbell contacted him in September 2006 about an E-Coli outbreak that the Respondent might be connected to by virtue of the fact raw milk was suspected as being the source of infection (p. 43-44, January 28, 2009 Trial Transcript).

(C) Issues of Procedural Fairness and Natural Justice

47 The Appellant contends the court committed reversible error in this respect. Specifically, the trial justice cited "Sullivan and Driedger on the Construction of Statutes" Butterworths Canada Ltd., 2002 (4th Edition) and "Sullivan on the Construction of Statutes", LexisNexis Canada Inc., 2008 (5th Edition) as authority to justify the fact he conducted his own research in concluding "similar cow-share programmes are functioning lawfully in large parts of the world, including many states in the United States of America and Australia [...] British Columbia, Nova Scotia and even in Ontario [...] some countries, such as Great Britain, Germany, Finland, Sweden and New Zealand [permit farmers] to sell their raw milk directly from the farm to the consumers" (paras. 168-169, January 21, 2010 Trial Transcript). From this, the justice surmised, without identifying the source of the information he was relying on, that the proponents of these arrangements "stress that any food whatsoever can be contaminated so that food safety in general boils down to how it was produced, handled and packaged." The Appellant submits that this inappropriate independent research likely contributed to the formulation of the justice's conclusion that the Respondent's raw milk enterprise did not violate either s. 18(1) or 18 (2) of the *H.P.P.A.*

48 In *R. v. Hamilton*, [2004] O.J. No. 3252 (C.A.), a case in which the topic of independent judicial research was discussed at some length, the Ontario Court of Appeal reversed the trial judge's sentence, [2003] O.J. No. 532, after it was determined to be unfit. In formulating sentence the trial judge used voluminous raw statistical information he had acquired without the assistance of a properly qualified witness or the receipt of evidence on the point and submissions by either party. From the statistical evidence he put together, the trial judge made certain factual conclusions about the circumstances of the accused. This information formed the basis of the justice's decision that the accused's involvement in the offence of importing cocaine could be understood as an aspect of the systemic, social and racial bias against poor black women. The court then used that research, at least in part, as a basis to hold that such bias justified the imposition of conditional sentences. The Court of Appeal concluded that this was a reversible error, absent any evidence or submissions to support the conclusions reached by the justice. Ultimately, the reviewing court concluded, "the trial judge effectively took over [the proceedings], and in doing so went beyond the role assigned to a trial judge in such proceedings. It became an inquiry by the trial judge into much broader and more complex issues [than the issues to be determined by the court]" (para. 3).

49 At paragraph 71 of the *Hamilton* decision, the Court of Appeal held that the manner that the proceedings were conducted and the approach of the trial judge created three overarching problems that may be viewed as having application in the instant case:

> (1) by assuming the multi-faceted role of advocate, witness and judge, the trial judge put the appearance of impartiality at risk, if not actually comprising that appearance;
> (2) it produced a fundamental disconnect between the case presented by counsel and the case constructed by the trial judge; and
> (3) it created a real risk of inaccurate fact-finding by introducing raw statistical information and forms of opinion on a wide variety of topics. None of this material was analyzed or tested in any way.

(D) The Primary Issue

50 In large measure this appeal turns on the legitimacy of the Respondent's cow-share programme and consideration of issues of statutory interpretation. The justice of the peace concluded the cow-share programme was a lawful way for unpasteurized milk to be distributed to the "legal" owners of the cows that produced the milk in compliance with both the *Milk Act* and *H.P.P.A*. The Appellant submits the cow-share programme constitutes an unlawful attempt to circumvent the clear intention of the legislation to limit the consumption of unpasteurized milk to a restricted group, implicitly limited by statute, the producers of the milk and members of their immediate family.

6. The Cow-Share Programme

51 A review of the trial record, the Statement of Agreed Facts and the trial exhibits confirms the Respondent's intention to create a share arrangement where interested whole milk consumers could gain a legal interest in a portion of the milk products generated by the Glencolton Farm dairy cattle. Although some uncertainty exists in the trial record as to whether the price paid by the consumer was for a specific cow within the herd or access to a portion of the milk production of a particular cow, the fact there were 150 cow-share members and only 24 cows suggests the agreement permitted access to the milk itself. This conclusion is confirmed at page nine of the publication "The Glencolton Farm Cow-Share Members' Handbook" which every cow-share member received along with a milk share certificate. The price to purchase a single share was three hundred dollars or approximately one quarter of the price of a dairy cow. No formal contract of purchase and sale was executed by either vendor or purchaser. No corporate structure was created allowing the interested consumer to receive an actual share certificate as an equity owner in the corporation that included the herd as one of its assets. It appears that legal title to the cows remained with the Respondent as the owner of Glencolton Farm. Although the trial record serves to confirm that the Respondent viewed the dairy herd as being owned by the various cow-share certificate holders, in reality, the cow-share arrangement approximates membership in a "big box" store that requires a fee to be paid in order to gain access to the products located therein. There is no evidence the cow-share holders were involved in the purchase of the cows in the herd, their subsequent sale or replacement, or that they had any say in the management of the herd or the distribution of the resultant milk product. The membership handbook indicates that the cow-share members fund the services of the

Respondent and his wife to tend the cows and look after the milk production. The members are directed to pick up the milk at the farm or from the blue bus with one cow-share indicated as entitling the share holder to a yearly total of approximately 750 litres of unpasteurized milk, cheese, cream or other dairy products.

(A) The Crown's View of the Cow-Share Programme

52 On behalf of the Ministry of Natural Resources, Mr. Ryan submits the following factors constitute legal deficiencies in what the Appellant views as an illegal distribution scheme within the context of the applicable provisions of the *H.P.P.A.*:

* the absence of any evidence of a legally valid and enforceable transfer of title to the cow-share member of a specific asset, i.e. a cow or a quantified interest in a cow or the herd itself;
* the absence of a written contract, agreement of purchase and sale or any title documents to offer legal confirmation of the purported legal transfer of a tangible ownership interest in the herd or a particular cow;
* the absence of any particularized accounting records to report milk sales as distinct from the sales of any other products;
* the fact the undercover operative was permitted to buy milk, on more than one occasion after becoming a cow-share member, without first producing her cow-share membership card is contended to undermine the significance of the membership card in the cow-share programme distribution scheme and the legitimacy of the cow-share arrangement as a lawful way to effect compliance with s. 18(2) of the *H.P.P.A*.;
* the absence of any discussion regarding equity ownership of the herd or the milk production of the herd at the time the undercover operative, Ms. Atherton, purchased a three hundred dollar cow-share certificate which was indicated as a required prerequisite before the milk produced by the Glencolton Farm cows could be purchased; and,
* the fact the transfer of legal ownership of the milk production or cows to the cow-share members, even if confirmed by a valid legal contract and/or shareholder agreement, cannot circumvent the statutory prohibition against distribution embodied in s. 18(1) and s. 18(2) of the *H.P.P.A*.

53 A valid transfer of ownership or the conferring of an equity interest in the cows or in the herd or the milk they produce is conceded by the Crown as potentially negating the alleged violation of s. 18(1) and its prohibition against the sale of unpasteurized milk. The initial money paid by the cow-share member could then be viewed as payable in consideration of an ownership interest in the cow. The money subsequently paid for the product would then be in consideration of the Respondent's labour as herdsman. If those circumstances were concluded to exist the Appellant contends the s. 18(1) distribution offence would continue to remain viable.

54 Mr. Ryan acknowledges cow-share programmes have been legally recognized in other jurisdictions. Those arrangements are indicated as featuring written sales documentation confirming the actual purchase and sale of a cow, legal contracts, binding agreements, a designated and confirmed legal interest in a particular cow and/or a matching of a particular owner to the ownership and milk production of a particular herd. The sharing of milk or milk products that legally belong to others, by gift, sale or otherwise, is viewed by the Appellant as transgressing the distribution prohibition found in both s. 18(1) and s. 18(2).

(B) Assessment of the Cow-Share Programme at Trial

55 The presiding justice of the peace concluded the Respondent's cow-share programme was a "legitimate private enterprise" with cow-share membership cards and the related booklet furnished exclusively to signed-up members. The purchase of unpasteurized milk products was found to be restricted to the cow-share membership with the membership fees paid reflecting an ownership in the herd's cows for the balance of the cow's milking life (pp. 35-36, paras. 143-145, January 21, 2010, Trial Transcript).

56 At trial, the members of the cow-share programme were concluded to be fully informed as to the nature of the products they gained access to consume and the methods by which these products had been produced. This led the justice of the peace to conclude at paragraph 145 of his judgment as follows:

> Those findings support the existence of a valid private agreement between the defendant and cow-share members in terms of which he is responsible for the upkeep of the cows and the provision of milk for membership. The responsibility of the members is to pay a fee for the upkeep of the cows, the production of the dairy products and their delivery.

57 At paragraph 158 the following considerations are referenced:

* cow-share members are fully informed of the fact the milk produced at Glencolton Farm is unpasteurized with the cow-share members booklet clearly delineating the respective duties and responsibilities of the Respondent and the cow-share members;
* the issuance of cow-share membership cards in the name of the subscribing member;
* the initial payment of a capital amount "relative" to the anticipated milking life of a cow;
* the fact the resultant milk and milk products are knowingly consumed by the cow-share members at their own risk; and
* the absence of any evidence that anyone has become ill as a consequence of consuming milk or milk products from the Glencolton Farm's herd.

58 After conducting his own independent research the justice noted similar cow-share programmes function lawfully in various jurisdictions throughout North America. Reference was made to the fact raw milk can be sold directly to consumers, by the farmer who pro-

duces it, in a number of countries such as Germany, Finland, Sweden and New Zealand. Based, at least in part, on consideration of these factors the Justice of the Peace concluded the Respondent's "raw milk enterprise" was not in violation of either s. 18(1) or 18(2) of the *H.P.P.A.*

59 On concluding the cow-share programme constitutes a "sharing of ownership of the cows amongst the members" no violation of the Public Health Inspector's 1994 "cease and desist" Order was found to have occurred, on the three dates alleged, as a consequence of the Respondent's role in storing or displaying unpasteurized milk and milk products. While the restraining Order was acknowledged to be valid, the distribution arrangement through the cow-share membership was concluded not to constitute a violation of the prohibited activities referenced in the Order itself "with respect to the public at large." (para. 175, January 21, 2010 Trial Transcript).

60 Additionally at page 43, paragraph 181, of the Reasons for Judgment, the justice concludes:

> While all of the products grown and produced by the defendant are available for sale to every member of the public who is prepared to pay the price, the milk and milk products are reserved for sale and distribution only to specific members of the public, namely those who are knowledgeable (not vulnerable), paid-up and properly informed members of the cow-share programme especially created by the defendant so as to make these products available for certain members of the public who wish to obtain them. By so doing, the defendant maintains that he has done everything reasonable to achieve that purpose while remaining within the confines and the spirit of the legislation. I agree.

(C) Does the Glencolton Farms Cow-Share Programme Contravene s. 18(1) and s. 18(2) of the *H.P.P.A.*?

61 In answering this question, the decision of the presiding justice of the peace, regarding the matter of statutory interpretation, is instructive.

62 At paragraphs 94-96 (January 21, 2010 Trial Transcript) the trial justice indicates that if he "were to adopt the ordinary meaning of the various pieces of legislation under consideration, at first blush it would appear that the defendant should be found guilty on all counts." No further elaboration or expanded rationale was offered in justification of this conclusionary statement. Thereafter, the justice of the peace proceeded to analyze the provisions in the *H.P.P.A.* and *Milk Act* in a contextual fashion. The "general terms" in which the *Acts* were drafted were determined to require a restrictive statutory interpretation that took into account "the history of the case and defendant's years of involvement with the justice system". The language in the *H.P.P.A.* and the *Milk Act* was considered "general" and requiring restrictive interpretation. No common law authority on point was referenced.

63 Also critical to the trial justice's analysis and his ultimate determination that the offence provisions do not apply to the Respondent's operation was his conclusion that the complexity of the proceeding made it a "hard case" where legislative intent was unclear

and ambiguous. Consequently, he found that "departure from according the ordinary meaning" of the statutes provisions was warranted (paras. 98 and 100, January 21, 2010 Trial Transcript). The rationale for concluding why the purpose of the *H.P.P.A.* and *Milk Act* was unclear or uncertain was not addressed in the Judgment.

64 In the Reasons for Judgment the purpose of the applicable legislation is concluded to be delivery of public health programmes and the prevention of the spread of disease, with the object of protecting the health of the people of Ontario (para. 124, January 21, 2010 Trial Transcript). The Appellant takes the position that the *H.P.P.A.* and *Milk Act* are public welfare statutes designed to promote public health and safety. As such, they should be broadly interpreted in a manner consistent with that purpose and the objective of the legislative scheme pursuant to *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.). The Appellant contends the trial justice failed to justify his restrictive interpretation of the provisions of the *H.P.P.A.* and *Milk Act* and his departure from assigning the ordinary meaning of "sell", "distribute", "distributor" and "marketing" to those terms, as they are referenced in the applicable legislation.

65 Furthermore, the Appellant asserts the justice erred in considering the Respondent's history with the justice system and the fact he would face "astronomical fines" if convicted on all counts as relevant factors in concluding that the offence provisions did not apply to the Respondent's "private" distribution scheme. No factual analysis or cited legal authority is relied upon in support of the proposition that, in the face of legislative provisions to the contrary, it was not the Legislature's intent to penalize where culpability is established to exist.

Conclusion

66 The foregoing analysis confirms reversible errors exist in law in the rationale relied on by the justice of the peace in acquitting the Respondent of the ss. 18(1) and s. 18(2) *H.P.P.A.* charges and the sole remaining charge (operating a milk plant without a licence) under s. 15(1) of the *Milk Act*. The applicable legislation was not given the broad interpretation it required as public welfare legislation. Appropriate consideration was also not afforded to the restrictions inherent in the *Act* according to their plain meaning. The interpretation of the reviewed legislative provisions consistent with the language of the sections in issue, the context in which the language is used and the expressed purpose of the legislation itself was required: See *Blue Star Trailer Rentals Inc*., and *407 E.T.R. Concession Co*. (2008), 91 O.R. (3d) 321 (C.A.) at para. 23. An interpretation consistent with the legislative aim of both the *Milk Act* and *H.P.P.A*. should have been adopted and not, as here, interpretations "that defeat or undermine legislative purpose": See *Her Majesty the Queen in Right of Ontario (Ministry of Labour) v. United Independent Operators*, (2011), 104 O.R. (3d) 1 (C.A.), per Gillese J.A. at paragraphs 31 and 32. Had the applicable legislation been more broadly interpreted in the instant case, as required by law, the Respondent would necessarily have been found guilty of each of the offences alleged with the possible exception of two s. 18(2) sale allegations (August 22, 2006 and October 17, 2006) on the basis of the evidence presented at trial. Only those two acquittals and the acquittals relating to the *H.P.P.A.* s. 100(1) offences regarding breaches of the 1994 public health inspector's cease and desist" Order are concluded as sustainable.

7. Failure to Obey the February 17, 1994 Order s. 100(1) *H.P.P.A.* of the Public Health Inspector

67 The charge of failing to comply with the twelve-year-old Order of the Public Health Inspector by storing and displaying unpasteurized milk and milk products on three separate occasions (October 20, 27 and November 21, 2006) is substantiated factually on the basis of the trial record for the reasons that have been previously enunciated in this appeal judgment. At trial the Respondent asserted that he believed the restriction in the Order applied to a specific location "LCT 38.39.40 Concession 2 EGR Glenelg Township, Grey County, Ontario" and not to the 2006 site of Glencolton Farms, namely Lot 44. This belief gives rise to consideration of the defence of honest but mistaken belief in facts that if true would render his acts innocent on proof that the Respondent exercised all reasonable care to avoid committing the offences. In my view, the fact that no enforcement action was taken by the authorities to enforce the Public Health Inspector's 1994 "cease and desist" Order for some twelve years after it had been originally issued, even though the Respondent's cow-share programme had been in active and known operation for approximately ten of those years following the Orders issuance, lends an air of reality to the Respondent's mistaken belief regarding the intent and scope of the 1994 Order. I conclude the trial record supports the defence of honest but mistaken belief in relation to the three s. 100(1) charges with that belief being supported by the prosecutorial inertia in even alerting the Respondent to the regulatory authorities concerns. The acquittals on these three charges are therefore affirmed.

68 As a consequence of the absence of any action by the Crown to enforce the terms of the Order it would not be unreasonable for the Respondent to conclude the Order referred to place rather than person. Similarly, the absence of any form of enforcement initiative under s. 18(1) or (2) of the *H.P.P.A.* or s. 15(1) or (2) of the *Milk Act* over a period of almost a decade might serve to reasonably affirm in the Respondent's mind that his cow-share programme was viewed by the authorities as being in compliance with the legislation.

69 On consideration of the trial record these misconceptions are viewed as being honestly held and a reasonable basis to conclude that the Respondent exercised reasonable care (the long-standing, officially unchallenged, cow-share programme instituted at a different location than that specifically referenced in the 1994 Order) to comply with the Order. The content of the Order itself may have served to contribute to the Respondent's misunderstanding that it related to "place" rather than "person". While the Order denotes the Respondent by name it also specifies him as being the operator of Glencolton Farms at a defined location. Had the Order referenced the Respondent by name only, any purported ambiguity would be removed and the defence of honest but mistaken belief for this strict liability offence would not be available. Considered collectively, the delay in any form of enforcement action by the authorities subsequent to the issuance of the Order, in the face of the Respondent's known participation in the cow-share programme involving the distribution of raw milk and raw milk products over an extended period of time, and in the face of the inherent ambiguity in the Order itself, persuades me that the acquittal on the three s. 100(1) charges ought to be affirmed, albeit for different reasons than those enun-

ciated by the trial Justice. It cannot be concluded in these circumstances that the Order was sufficiently clear and unequivocal, or the breach deliberate or intentional, in view of the apparent tacit acceptance of its existence by all interested government agencies over such a long period of time (See *Laroche* (1964), 43 C.R. 228 (S.C.C.); (1963), 40 C.R. 144 (Ont. C.A.) and *R. v. Roche* (1985), 46 C.R. (3d) 160, (Ont. C.A.) (1984), 40 C.R. (3d) 138 (Co. Ct.)*); Prescott - Russell Services for Children and Adults v. G.(N.)* (2006), 82 O.R. (3d) 686 (C.A.)

8. Entrapment

70 The potential applicability of the defence of entrapment was raised by Respondent's counsel, Ms. Selick, on appeal. Having reviewed the trial record in relation to the actions of the undercover operative, Ms. Atherton in her efforts to receive raw milk or raw milk product, I conclude a factual basis does not exist to advance such a defence. The use of a false identity by the undercover operative, prevailing on the Respondent's sensibilities with a concocted, compelling, personal medical history, and the assorted false representations that followed the initial encounter between the Respondent and the undercover operative do not amount to circumstances constituting "the clearest of cases" where the administration of justice would be brought into disrepute if the finding of guilt were to stand (*R. v. Mack* (1988), 67 C.R. (3d) 1 (S.C.C.).

71 Entrapment occurs when the authorities provide a person with an opportunity to commit an offence absent the reasonable suspicion that the person is already committing an offence or without making any bona fide inquiry to confirm that a prohibited activity is already taking place. On the facts here, in relation to the initial interaction between the Respondent and the undercover operative, the trial record clearly establishes the authorities had a reasonable basis to suspect raw milk products were being supplied by the Respondent, to others, long before Ms. Atherton arrived on the scene in an undercover capacity. The investigators were acting during the course of a "*bona fide*" inquiry and simply provided a further opportunity for unpasteurized milk product to be conveyed by the Respondent. The Respondent's own acknowledgment at trial of the conversations in which he recalls agreeing to give unpasteurized milk product to Ms. Atherton undermine the viability of an entrapment assertion based on an allegation of some form of official inducement influencing the Respondent's decision to convey the offending product.

9. The Charter Issues

72 In a ruling dated December 17, 2010, directions were provided to counsel regarding the scope of the *Charter* issues that would be permitted to be submitted in this appeal. Some expansion of the *Charter* issues raised or alluded to at trial were authorized, as these issues were determined to have been previously identified, but not formalized, by the Respondent. As the Respondent was not represented at trial and the *Charter* concerns advanced at his trial had not been adjudicated, several collateral grounds were permitted to be heard. Accordingly, in due course, two cow-share members were deposed on their affidavits which primarily relate to matters of personal health and religious practice involving the consumption of raw milk and raw milk products.

73 By application, the Respondent challenges the prohibition on the sale and distribution of raw milk as referenced in both the *H.P.P.A.* and the *Milk Act*. *Charter* issues were

advanced under ss. 7 of the *Canadian Charter of Rights and Freedoms*, which embodies the right not to be deprived of life, liberty or security of person except in accordance with the principles of fundamental justice, ss. 2(a), which enshrines the lawful entitlement to freedom of religion and s. 15, the right to equality.

74 The Appellant submits there is no merit to any of the *Charter* claims. In support of this contention the Attorney General submits both the *H.P.P.A.* and the *Milk Act* are directed, at least in part, to the regulation of the safety and quality of milk products in Ontario. The *H.P.P.A.* has as its broader objective the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario. The *Milk Act* also contains legislated directives governing all aspects of the production and marketing of milk and milk products in the province.

(A) Expert Evidence Regarding the Relative Health Risks Associated with Human Consumption of Unpasteurized Milk

75 Four expert witnesses testified during the course of the trial, two for each of the prosecution and defence, on the issue of whether or not the consumption of unpasteurized milk and milk products constitutes a risk to public health. The court heard from Dr. Griffiths, a dairy microbiologist and professor in the Department of Food Science at the University of Guelph, Dr. Wilson, an Associate Professor in the Department of Medicine at the University of Guelph, Dr. Beals, a pathologist and Dr. Ronald Hull, a dairy microbiologist.

76 The Crown experts, Drs. Griffiths and Wilson, testified that human consumption of raw milk and raw milk food products constitute a significant risk to health as raw milk is a known source of food borne illnesses. The elderly, pregnant women and others with compromised immune systems were noted as being particularly vulnerable to the various virulent bacteria, pathogens or infectious agents, with the potential to cause human disease that are often found in unpasteurized milk. The pathogens were noted to include salmonella, E. coli 157, Listeria, Verotoxigenic E. coli and campylobacter.

77 The process of pasteurization, which in Canada involves heating the milk to seventy-two degrees centigrade for a period of sixteen seconds, was indicated by Dr. Griffiths as a process that eliminates most of the pathogens from milk while retaining most of the nutritional characteristics of the milk. The process was indicated as being an effective way to reduce, but not eliminate, the risk of milk borne illness. Raw milk related illnesses were noted as occasionally manifesting in an asymptomatic fashion through transmission by an unaffected carrier to others with whom the carrier has subsequent contact. In those circumstances, the carrier of the milk borne infection displays no symptoms but may infect others who subsequently become ill.

78 The defence experts, Dr. Beals and Dr. Hull, noted the history of the commercialization of the milk distribution system in the early part of the 1900's as people moved from the country to the city and the subsequent development of large-scale dairy farms. The advent of pasteurization as an aspect of the commercialization of milk and milk products was also discussed by Dr. Beals. He asserted the process reduces the enzyme count in milk and effectively eliminates the presence of beneficial bacteria in the milk. Dr. Beals also drew a distinction between the relative health safety, of what the Respondent refers to as "farm fresh milk", or raw milk produced for the purpose of human consumption, as op-

posed to raw milk produced for commercial purposes and destined to be pasteurized. Dr. Beals testified that there is scientific support for the contention that good animal husbandry practices, farm cleanliness, appropriate pasturing and diet, and safe milk handling procedures can reduce the health related risks associated with the consumption of unpasteurized milk to a safe level.

(B) Section 7 - Security of Person

79 James McLaren and Eric Bryant provided affidavits in which they expressed the positive impact that the consumption of raw milk and raw milk products has had on the state of their health. Mr. Bryant also asserted that the consumption of raw milk formed an essential part of his religious practices as a vegan and a follower of the dieting guidelines as delineated in "The Essene Gospel of Peace". The restrictions inherit in the existing legislation are contended to violate Mr. Bryant's s. 2(a) entitlement to freedom of religion by arbitrarily interfering with and restricting an aspect of his religious practice.

80 In order to advance the s. 7 *Charter* challenge the law requires that the applicant establish that the state has deprived him or her of life, liberty or security of person (*R. v. Beare*, [1988] 2 S.C.R. 387 at para. 28; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 47 and *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 S.C.R. 486 at para. 30.

81 In order for this challenge to be considered, as the claim is not that the Respondent's own rights have been violated but those of others, the Respondent must establish the following:

1) that there is a serious issue as to the validity of either the *H.P.P.A*. or the *Milk Act*;
2) that he is directly affected by these *Acts* or has a genuine interest in its validity; and,
3) that that there is no other reasonable and or effective way to bring the validity of the Acts in issue before the court (*R. v. Hy and Zel's Inc. v. Ontario (Attorney General*); *Paul Magder Furs Ltd. v. Ontario (Attorney General),* [1993] 3 S.C.R. 675 at para. 30).

82 Having reviewed and considered the applicable authorities and counsel's written and oral submissions on this challenge, I conclude that the Respondent has failed to establish a breach of his own liberty interest. He therefore has no legal standing to advance a claim on behalf of either Mr. McLaren or Mr. Bryant. As noted, the Respondent faces a monetary penalty on conviction for the offences alleged. The prospect of a jail term arising in this matter is exceedingly remote. The Respondent would have to default on payment of the levied fine(s) and fail to comply with any of the remedial payment arrangements that are mandated by the *Provincial Offences Act* on default of payment of the fine. It is only after all other alternatives have been exhausted that a period of incarceration may be contemplated. Although imprisonment is a potential, albeit remote, consequence of conviction, that sanction must be weighed against the risk to public safety the legislation was intended to address and the need for restrictions on the distribution of raw milk in the *H.P.P.A*. On balance it cannot be concluded that the penalty provisions of the *Provincial Offences Act*,

applicable here, act to potentially deprive the Respondent of life, liberty or security of person.

83 Even if one were to accept the testimony proffered in support of the purported health benefits Mr. Bryant and Mr. McLaren associated with the consumption of raw milk, the right of these individuals to consume raw milk is not prohibited by law. Given the expressed restriction on the sale and distribution of raw milk and raw milk products in s. 18(1) and (2) of the *H.P.P.A.* the Respondent could not acquire a right to sell or distribute raw milk simply because others establish a right to acquire it. See: *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571 at paras. 85-86; *R. v. Parker*, (2000), 49 O.R. (3d) 481, at paras. 92-97 and 102-111.

84 It is open to the consumers of raw milk to mount their own challenge to the constitutionality of the legislation in the event they find they are unable to secure raw milk and to show that it is fundamental to their life, liberty or security of person in support of a request to be exempted from the existing legislation. Those similarly affected by the *H.P.P.A.* or *Milk Act*, including those non-farm based consumers of raw milk, can also seek a constitutional exemption which, if successful, would in all likelihood, result in access to raw milk being accorded. Although the Respondent has a genuine interest in the validity of the *Acts*, other alternative "reasonable" and "effective" ways exist for individual cow-share members to bring the validity of the *Acts* in issue before the court by seeking an individual constitutional exemption to the existing restraints on access to raw milk the law currently creates.

85 It is acknowledged that in general terms an individual has the right to make decisions regarding their own bodily integrity and personal health, as recognized by La Forest J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at paragraph 36. However, it does not logically follow that the right to security of the person of raw milk consumers will necessarily be infringed if the Respondent's cow-share arrangement is found to be illegal. The preponderance of scientific evidence cited offers factual support for the assertion that human consumption of raw milk may be hazardous to one's health or at least more hazardous than the health risk presented by the consumption of pasteurized milk. The wide interest in this litigation serves to confirm this assessment is not universally held and there are many residents of Ontario who have consumed a life-times worth of raw milk and raw milk products without any ill effects. On the basis of the expert evidence provided at trial it cannot however be concluded, in my view, that the resultant legislative restriction on the sale and distribution of raw milk is either arbitrary or overly broad.

86 I accept the Respondent's submission regarding the apparent internal inconsistency in the Attorney General's argument that on the one hand raw milk is asserted to be potentially hazardous to one's health to the extent its sale and distribution are banned but apparently not so hazardous as to warrant the restriction of the relatively unrestrained right to consume the product, provided one has an ownership interest in a dairy cow.

87 This particular legislation may also fairly be viewed as internally inconsistent from the perspective of its response to the serious public health concerns expressed by the expert witnesses who testified on behalf of the Crown during the course of the constitutional argument. The conclusions they reached largely reflect those found in the 1994 report of the Ministry of Health's - Health Services Review Board. In that report a Board qualified expert, Dr. Styliardis, concluded, in an opinion that the Board accepted, "that unpasteur-

ized milk and milk products constitute a health hazard as defined by the *H.P.P.A.* because they are vehicles for the transmission of a number of different harmful bacteria including bovine tuberculosis, brucellosis, staphylococcus, bacilli, shigella, chloroforms, and E-coli."

88 Dr. Styliardis opined that all of these bacteria were "capable of causing harmful diseases in human beings and that all these diseases had the potential to be life-threatening in the right set of circumstances" with young children, the elderly, pregnant women and the immunity compromised individual as being at greatest risk.

89 These concerns might suggest an even broader restriction on the consumption of unpasteurized milk and milk products could be justified from a public health perspective. The fact the legislation prohibits the sale and distribution of raw milk and effectively controls the hitherto lawful entitlement to consume raw milk does not however render the law arbitrary. The authorities direct that it is a matter for the legislature to delineate the parameters or define the scope of the regulatory scheme relating to the consumption, distribution and sale of raw milk and raw milk products, provided there is a sufficient body of scientific evidence to give rise to a "reasoned apprehension of harm to permit the legislature to act."

90 On consideration of the totality of the evidence presented at the Respondent's trial it is difficult to contend that a "reasonable apprehension of harm" to public health, arising from the serious potential health consequences of consuming raw milk, has not been established. While issue may be taken, depending on one's perspective, to the underwhelming or, alternatively, over-reaching, response by the legislature to this issue, it is clear that the courts must accord deference to those who have been elected to enact such rules and regulations.

91 The rationale for this separation of authority is recognized by the Supreme Court of Canada in *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, a case involving consideration of the criminalization of simple possession of marihuana. At paragraph 133, the Court addresses the issue of deference to the legislature:

> Once it is demonstrated, as it has been here, that the harm is not *de minimis*, or in the words of Braidwood J.A., the harm is "not [in] significant or trivial", the precise weighing and calculation of the nature and extent of the harm is Parliament's job. Members of Parliament are elected to make these sorts of decisions, and have access to a broader range of information, more points of view, and a more flexible investigative process than courts do. A "serious and substantial" standard of review would involve the courts in micromanagement of Parliament's agenda. The relevant constitutional control is not micromanagement but the general principle that the parliamentary response must not be grossly disproportionate to the state interest sought to be protected, as will be discussed.
>
> 134 Having said that, our understanding of the view taken of the facts by the courts below is that while the risk of harm to the great majority of users can be characterized at the lower level of "neither trivial nor insignificant", the risk of harm to members of the vulnerable groups reaches the higher level of "serious and substantial". This distinction simply underlines

the difficulties of a court attempting to quantify "harm" beyond a *de minimum* standard.

92 The evidence presented at trial indicates there are a number of jurisdictions that authorize the consumption, distribution and sale of raw milk and raw milk products, with minimal restrictions, including Germany, New Zealand, England, Wales, Australia and numerous States in the United States of America.

93 The fact that these jurisdictions have taken a different approach in assessing the relative health risks potentially presented by human consumption of raw milk cannot be relied upon to impugn the approach to the issue taken by the Legislature in Ontario. The Legislature is entitled to deference in its formulation of laws to best address the identified public health concern.

94 Similarly, the fact expert evidence presented at trial suggests the consumption of raw milk has positive effects on the immune system and provides a source of lactic acid bacteria that helps balance the potential harmful effects of numerous pathogenic organisms are factors that should be considered by the Legislature in formulating public health policy on this issue. The evidence at trial establishes, at the very least, a reasoned and sufficiently verified apprehension of potential harm to health as a consequence of the consumption of raw milk. Provided the legislative initiative is not arbitrary, or without a reasonable scientific foundation, it is a matter for the Legislature of each jurisdiction where milk is consumed to determine whether pasteurization will be mandated or not.

95 In *Cochrane v. Ontario (Attorney General)*, (2008), 92 O.R. (3d) 321 (C.A.) at paragraphs 26-30, a challenge to the law banning pit bull dogs, Justice Sharpe for the Court, discussed the interpretation of the phrase "reasoned apprehension of harm" and the court's role in assessing the legislated response to the interest to be protected. Specifically, even in areas where legislation may be based on a disputed scientific foundation, as the trial justice found existed in the present appeal, or in the area of social science, deference has been consistently demonstrated by the courts to legislative judgment in circumstances where "... there was sufficient evidence of a reasoned apprehension of harm to permit the legislation to act" (para. 29).

i) Law Not Grossly Disproportionate

96 The entitlement to consume milk, raw or otherwise, is not a *Charter* protected right. Accordingly, the Respondent bears the obligation of establishing that the restrictions on raw milk consumption and the prohibition of its sale and distribution is "grossly disproportionate" to the legislative objective inherent in the applicable provisions of the *Milk Act* and the *H.P.P.A.* This assessment involves consideration of the extent of the alleged *Charter* infringement, if any, and its significance when contrasted with the interest, or objective, the legislative initiative was enacted to address.

97 By analogy, Justice Sharpe's comments in *Cochrane v. Ontario (Attorney General)* resonate in this appeal. It is the "reasonable apprehension of harm" and not evidence of actual harm that must be considered in assessing the legislative response to the public health or safety issue the law was enacted to protect. As Ms. Selick rightly points out, there was no evidence presented at trial to suggest that the milk produced at Glencolton Farm

was unhealthy to consume. There is no evidence, other than anecdotal speculation, that anyone ever became ill after drinking unpasteurized milk produced by the cows on the Respondent's farm. As the *H.P.P.A.* implicitly authorizes a "farm family" exemption to permit a relatively unfettered entitlement to the dairy producers of Ontario to drink the raw milk they produce, one might reasonably expect to see regular outbreaks of raw milk related illness if the product was as dangerous to one's health as the Appellant asserts. Further, assuming that the dairy farmers of Ontario and their families consume raw milk, and presumably many do, one might also expect to see regular outbreaks of raw milk related illness in rural populations in which the dairy farms are located as a consequence of the fact the consumers of such milk may be asymptomatic carriers of milk based bacteria or pathogens that may cause infection in others. Consideration of these factors does not detract from the fact there is a scientific justification for the legislative response in issue.

98 The fact the milk from the Glencolton Farms cows has never been proven to have been unsafe for human consumption or to have caused illness in any of those who have consumed it or anyone else is not determinative of the "risk to public safety" issues from a constitutional perspective. The *Charter* does not mandate a cow by cow or herd by herd assessment to establish a risk to public safety. The gross disproportionality threshold requires "a substantial measure of deference to the legislature's assessment of risk to public safety and the need for the impugned law". *Cochrane v. Ontario (Attorney General),* (2008), 92 O.R (3d) 321 (C.A.), at para. 31; *R. v. Heywood*, [1994] 3 S.C.R. 761 at 793; and *R. v. Clay* [2003] 3 S.C.R. 735 at para. 40.

99 The balancing of the competing interests of preserving and maintaining public health on the one hand against the resultant limitations on the right to choose what we eat, on the other is similarly a matter for the legislature. The restrictions imposed on certain residents of Ontario, as far as the consumption, distribution and purchase of raw milk is concerned, are within the authorized ambit or scope of legislative authority. In view of the evidence presented at trial it cannot be concluded the law, as it presently stands, is overbroad from a constitutional perspective or too sweeping in its breadth. While it may effectively discriminate against non-farm dwelling raw milk consumers, that fact in itself does not necessarily render the law non-*Charter* compliant, particularly in relation to the Respondent who, as a dairy farmer, is not a member of the restricted group.

100 It is also difficult to accept the Respondent's assertion that the legislative restrictions on the distribution of raw milk inherent in the *H.P.P.A.* and the *Milk Act* are "overly broad" when viewed in relation to the objectives of the two *Acts* in the manner "overbreadth" has been defined by the Supreme Court of Canada in *R. v. Heywood*, [1994] 3 S.C.R. 761. At para. 49 Cory J. wrote:

> "Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate".

(C) Equality Rights s. 15

101 Section 15 of the *Charter* provides that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

102 By analogy the Respondent asserts a claim of discrimination on the basis of residency. The law is viewed as favouring rural, dairy farm based, raw milk consumers while effectively prohibiting the Provinces urban residents from exercising their lawful entitlement to consume raw milk.

103 In advancing this challenge the Respondent relies on the Supreme Court of Canada decision *Corbiere v. Canada (Ministry of Labour and Northern Affairs), [1999] 2 S.C.R. 203* as authority for the proposition that one's place of "residence" may serve as a recognized basis to found a s. 15 *Charter* violation.

104 *Corbiere v. Canada* involved consideration of certain provisions of the *Indian Act* and the fact only those individuals living on the reserve were lawfully entitled to vote in band elections. The Court's expressed restraint in recognizing residence as an analogous ground, for "average Canadians", to the equality rights specified in s. 15 is noted by the Respondent, nevertheless it is submitted that the same legal reasoning should apply to consideration of the on-farm/off -farm distinction arising from the practical implications to the consumers of raw milk arising from s. 18(1) and (2) of the *H.P.P.A*.

105 On review of the court's decision in *Corbiere*, it is clear that the Court was not intending to recognize "residence" generally as the analogous, or like ground to those specifically enumerated in s. 15 (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.) This point is amplified in the reasons of Justice McLachlin, as she then was, and Justice Bastarache at paragraph 15:

> "Two brief comments on this new analogous ground are warranted. First, reserve status should not be confused with residence. The ordinary "residence" decisions faced by the average Canadians should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible. The reality of their situation is unique and complex. Thus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground. Second, we note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally interrelated form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.

106 The Respondent submits the *H.P.P.A*. effectively creates a discriminatory distinction between on and off farm dwellers as far as the exercise of the lawful entitlement to consume raw milk is concerned. Obviously, as a farm dweller, the Respondent cannot succeed with the s. 15 complaint even if the on-farm/off-farm distinction is concluded to be "analogous". The limitation of "residence" as a recognized analogous ground for the limited purpose of the *Indian Act* in *Corbiere v. Canada* persuades me that residency is also not an analogous ground that can be relied on here by the off-farm consumers of raw milk.

Conclusion

107 For the forgoing reasons I conclude as follows:

* The Respondent has not established standing to advance the *Charter* violations alleged by Eric Bryant and James McLaren.
* The Respondent has not established a breach of s. 7 (security of person) s. 2(a) (freedom of religion) or s. 15 (equality rights) in relation to himself.

108 The *Charter* Application is therefore dismissed.

(E) Disposition or Appeal

109 The *Provincial Offences Act*, s. 121, defines the powers of the reviewing court on appeal against acquittal. It provides that the court may allow the appeal, set aside the finding, and order a new trial or enter a finding of guilt with respect to the offence(s) which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted in law.

110 The general rule is that the Crown can obtain appellate relief against acquittal only where it is demonstrated that the verdict would not necessarily have been the same had the trial been properly conducted: *R. v. Vezeau*, [1977] 2 S.C.R. 277, *R. v. Morin* (1987), 44 C.C.C. (3d) 193 (S.C.C.). Additionally, a verdict can be set aside as unreasonable where the trial justice entered a verdict inconsistent with the factual considerations reached: *R. v. Bioniaris*, [2000] 1 S.C.R. 381.

111 In assigning a restricted interpretation to the applicable provisions of the *H.P.P.A*., that was inconsistent with the public safety objective of the *Act*, the justice made a reversible error. In large measure, this error of statutory interpretation led to a misapprehension of the evidence presented at trial as that evidence relates to the substance of the charges in issue. I conclude, but for this error, and the justice's credibility assessment relating to two of the *H.P.P.A*. allegations, the verdict of acquittal would not have been available to the Respondent in relation to the *H.P.P.A*. and the *Milk Act* charges. The Appellant has clearly demonstrated that absent this error the verdicts would not necessarily have been the same: *R. v. Power*, [1994] 1 S.C.R. 601.

112 Further, but for this error, the justice's initial assessment of the Respondent's culpability would have been correct subject to the application of the defence of honest but mistaken belief that I have concluded applies to the three alleged violations of the 1994 s. 13(1) *Health Promotion Act* "cease and desist" Order contrary to s. 100(1) and the credibil-

ity considerations concluded by the justice to impact the viability of the August 22 and October 17, 2006, s. 18(2), cheese sale allegations.

Re: Gift vs. Sale and the Application of *Regina v. W.D.*

113 The Appellant asserts the trial justice erred in accepting the Respondent's trial testimony in relation to his asserted gifts of two small quantities of cheese to the undercover investigator, Ms. Atherton, prior to her enrollment as a cow-share member. The justice is submitted as having misconstrued the credibility assessment referenced in *Regina v. W.D.* by accepting the Respondent's assertion of material fact without explaining the rationale for the rejection of the investigator's testimony, or having considered the Respondent's admissions on the totality of the trial record. The uncertainty of the Respondent's recollection of the specific transaction in issue and his reliance on his general practice of not selling milk or milk products to non cow-share members, when contrasted to the detailed recollections of the investigator, in regard to the specifics of the transactions in issue, are submitted as undermining the resultant credibility assessment.

114 Having reviewed the trial record in relation to this issue and the justice's rationale for his stated preference for the Respondent's testimony I am unable to conclude that *R. v. W.D.* has been misapplied. The trial justice's decision is entitled to deference on review. As a result the acquittal shall be affirmed with respect to the two s. 18(2) sale offences arising from the purported gifts of cheese on August 22 and October 17, 2006.

115 I do not however accept the Respondent's submission that the gifts of the unpasteurized cheese do not constitute acts of prohibited "distribution". Given the public health objectives of the *H.P.P.A.* I conclude the dissemination of the unpasteurized cheese product to Ms. Atherton is sufficient to constitute an act of distribution. "Distribution" in this context must be interpreted as widely as possible. I do not accept a more expansive form of dissemination is required, for instance a distribution to more than one person, for the offence to be made out. As a result the Respondent shall be found guilty of the s. 18(2) distribution offences arising from the August 22 and October 17, 2006 transactions.

The Deficient Information

116 The trial record indicates the Respondent was arraigned on a count relating to a s. 18(1) *H.P.P.A.* charge of distributing unpasteurized milk that appears to relate to an offence date of November 7, 2006. The date of the alleged offence was not read and is omitted from the information or charging document itself. My review of the trial record does not indicate that this apparent oversight was ever corrected by re-arraignment or a request to have the information amended to correspond to the evidence adduced. A review of the information itself confirms this understanding. In considering whether this charge should be quashed I note the broad powers to amend a defective information in sections 33.34 and 35 of the *P.O.A.* Note is also made of the fact the count in issue appears on a separate two count information that references a date of offence of November 7, 2006 in the first count alleged. The authority of the Court to amend the information on appeal, unless it is of the opinion that the defendant has been mislead or prejudiced in his or her defence of the charge, is referenced in s. 117(1)(a.1).

117 Generally an omission of the date of offence is viewed as an essential component of a charge. The rationale for this is based on the fact those charged must know the particulars of the charge or charges he or she must meet. The principle of fundamental trial fairness is noted by Binnie, J. for the majority, in *R. v. G.R.*, [2005] 2 S.C.R. 371 at para. 2.

118 The remedy in the face of the omission on essential averment, such as the date of offence, usually results in a defect that results in the charge being quashed. The *P.O.A.* directs that a defective information should be amended unless the amendment might cause the defendant to be misled or prejudiced in his or her defence or on appeal (See s. 33, 34, 35 and s. 117(1)(a.1).

119 On reflection, given that this issue is raised for the first time here, I conclude the Respondent has not been prejudiced or misled, at his trial or on appeal, by the omission of the date on the second count referenced in this information. The first count identified the transaction in issue and that count was responded to by the Respondent at trial. It cannot be concluded that the Respondent would be prejudiced in this appeal if the count were to be amended pursuant to s. 117(1)(a.1) of the *P.O.A*. to reflect the date of offence, November 7, 2006. Accordingly, the date will be added to the count in issue and the information amended to reflect the evidence adduced at trial.

Quantity of Product Conveyed

120 The Respondent's counsel asserts the quantities of cheese conveyed in relation to the transactions noted above were so small as to amount to a trifling amount not warranting a finding of culpability. In legal terms, the Respondent contends these charges do not warrant a finding of guilt as the law does not concern itself with very small or trifling matter, invoking the legal maxim "*De minimis non curat lex*".

121 As this legislation (the *H.P.P.A<./i>) is directed to the maintenance and prosecution of public health generally, and the prosecution of offences that may negatively impact public health, it cannot be concluded that the relatively small amount of unpasteurized milk product conveyed is so insignificant so as not warrant a finding of guilt. The nature and amount of the milk or cheese in issue may be a consideration in the determination of sentence but is not viewed as a relevant factor in the determination of the Respondent's culpability in relation to the offences alleged.*

122 The Respondent's acquittal with relation to the sole remaining *Milk Act* charge, of operating a plant in which milk or cream products are processed, will also be overturned and a guilty verdict registered. The Appellant established at trial that milk and milk products were processed at the Respondent's farm without compliance with the licensing requirements in the *Act*.

123 The acquittals on the three s. 100(1) *Health Protection and Promotion Act* charges are affirmed for the reasons previously discussed.

Other Matters

124 Counsel are requested to contact the Trial Co-ordinator, Ms. Maryann Knetsch, at the Ontario Court of Justice, Newmarket, telephone (905) 853-4817,or Email: Maryann.Knetsch@ontario.ca to schedule a date for the sentencing hearing. Once a conven-

ient date has been secured counsel are requested to serve and file a brief outline of their respective sentencing positions and the authorities upon which they intend to rely two weeks in advance of the scheduled hearing date.

* * * * *

Appendix "A"

The Trial Testimony of MNR Investigator Susan Atherton

125 Acting under the alias "Susan Taylor" (p. 26, January 27, 2009 Trial Transcript) Ms. Atherton watched the blue bus park, just down the road from Waldorf School, on June 27, 2006. People were observed to be lined up at the bus with coolers in hand. As people came out of the bus, the line would move forward. Those coming off the bus had glass jars with a white liquid in them, bakery products and eggs. Ms. Atherton did not get on the bus. She purchased strawberries on a rack outside the bus from the Respondent (pp. 29-31, January 27, 2009 Trial Transcript).

126 On July 26, 2006, Ms. Atherton observed people lined up with boxes and containers alongside and in the blue bus outside Waldorf School. They exited the bus with heavier containers (p. 35, January 27, 2009 Trial Transcript).

127 August 22, 2006, Ms. Atherton observed the blue bus at Waldorf School. She observed 12-14 "customers" when she arrived. She got on the bus. There were display shelves on the sides of the interior of the bus with pastries, honey, eggs, produce and cheese. She saw milk in jars at the back of the bus stored in crates. She observed transactions involving the exchange of the milk to people who were lined up in the bus. She observed individuals selecting items from display racks and paying the Respondent. He appeared to know most of the customers by name. Ms. Atherton bought soft cheese wrapped in cellophane for $3.10. He indicated to someone else that the cheese was "made Friday". The Respondent provided Ms. Atherton with a copy of the "Cow-Share Members Handbook" after she paid for the cheese. She discussed the six-year membership for $300 with the Respondent. Later at trial, Ms. Atherton confirmed that she had in fact acquired the unpasteurized cheese in question as it had been seized and subsequently frozen in the lab. It was tested and found to be "unsafe for consumption as per Health Canada guidelines" (pp. 36-40, 75-76 and 81-83, January 27, 2009 Trial Transcript).

128 On October 17, 2006, Ms. Atherton again observed customers lined up at the bus. Some customers were waiting to go into the bus and others were coming out with product. Ms. Atherton again bought cheese wrapped in cellophane for $3.20 directly from the Respondent. She also observed other people purchasing dairy products, including milk and cheese, from the Respondent. Ms. Atherton advised him that she wanted to become a cow-share member. He advised that if she went to the farm on Friday, she could register to become a member there and secure her milk at the farm itself. He advised her to attend between 3:00 p.m. and 6:30 p.m. to buy milk. Ms. Atherton did not see anyone produce a membership card and did not observe anyone being asked to establish proof of their membership before they made their purchases. The Respondent was observed to inform

the customers as to the total cost of their purchases (pp. 40-42, January 27, 2009 Trial Transcript).

129 On October 20, 2006, Ms. Atherton was again working undercover with M.N.R. conservation officer Victor Miller, alias "Victor Douglas". Together they attended Glencolton Farms for the entire day. The lone employee in the farm store, Beverley Viljakainen, was taking money for customer purchases. The farm store appeared to be open to the general public. People were observed in the store. They were noted to make purchases in a manner similar to what she had witnessed at the bus. The sign on one of the milk coolers said, 'members only'. Ms. Viljakainen was observed noting or recording the names of the customers. A milk cooler, containing between 2-3 dozen bottles of milk, was in the store. Cheese, meats, potatoes, pastries, some vegetables and bread were also on display. Customers were buying milk and cream from the coolers. The investigator opened the door and removed the items she wanted from the shelves. Ms. Atherton purchased a cow-share membership from Ms. Viljakainen by writing a cheque in the amount of $300 to Glencolton Farms. There was no application form to be completed before becoming a member. She was not provided with a membership handbook when she purchased her cow-share membership. She purchased milk, cream, quark (a type of soft, white, cheese) and meat for $30. Each item had an identifying sticker plus the price tag. She subsequently received emails about the "My Cows Moosletter" from Ms. Viljakainen at the address she provided as part of the cow-share registration process. She received her membership card, which read "milk share", Glencolton Farms shareholder Susan "Taylor", in December 2006 (pp. 42-49, 55 and 59-62, January 27, 2009 Trial Transcript).

130 On October 27, 2006, continuing surveillance revealed the farm store to be very busy. The milk and cheese products were observed to be stored in the same location as on October 20. Ms. Atherton and Mr. Miller did not go directly into the farm store, as they assisted another member with loading milk from the milk house into a cow-share member's vehicle. They purchased three jars of milk and a package of soft cheese, hamburger and cider from Ms. Viljakainen. Ms. Atherton observed others making purchases (pp. 55-57, January 27, 2009 Trial Transcript). After finishing in the store, they went into the barn and proceeded to the milking parlour and a storage area. The investigators were shown a cheese making area. They observed equipment, including milking stations and stanchions (a restraining device to prevent a cow's head from moving forward), where cattle were housed in that area. There was a milk storage area. Wooden boxes with jars full of milk were observed. She noted cheese curd in a separate area next to the milk station (pp. 57 and 63-66, January 27, 2009 Trial Transcript).

131 On November 7, 2006, Ms. Atherton attended the Waldorf School location to observe the blue bus operation. She got into line with the other customers and eventually purchased a jar of milk for $7 from the Respondent. However, the price of the purchase was not recorded in her notes. She also observed others buying milk, pastries, eggs and other products (pp. 57-58, January 27, 2009 Trial Transcript).

132 On November 21, 2006, MNR investigators, accompanied by Public Health Inspectors, executed a search warrant on the farm. Collectively, these officials seized dairy production equipment, machinery and documentation, including correspondence with "all milk share holders" (Agreed Facts - Appendix C), a contract list of shares for "customers"

(Agreed Facts - Appendix D) and the bus sales and farm sales for milk and milk products dated May 23, 2006 through to November 7, 2006 (Agreed Statement of Facts - Appendices E and F; pp. 49-51, January 26, 2009 Trial Transcript). They found large quantities of milk, cheese, cream and other dairy and non-dairy products displayed and stored in the farm store and blue bus. Laboratory testing revealed the milk products were neither pasteurized, nor sterilized (p. 51, January 26, 2009 Trial Transcript).

Ministry of Natural Resources Investigator Victor Miller

133 Victor Miller is an investigator with the Intelligence Investigation Services Unit of the MNR. He first came into contact with the Respondent on July 28, 2006, when he attended Glencolton Farms in an undercover capacity as "Victor Douglas". Mr. Miller did not purchase a cow-share membership (p. 106, January 27, 2009 Trial Transcript).

134 On October 20, 2009, Victor Miller went to the store at Glencolton Farms with Ms. Atherton. Ms. Viljakainen was attending the customers that come into the store to purchase product. Purchases were recorded by Ms. Viljakainen in a notebook on the counter. Mr. Miller observed a cold storage, stainless steel, refrigeration unit, a freezer unit and empty containers and jars on the floor. The shelves contained bakery products. On the floor, in front of the service counter, vegetables were located. In the cold storage unit were jars full of a white substance that appeared to be a dairy product. There were smaller jars that stored cottage cheese. Ms. Atherton purchased several large jars and a few small jars of milk, plus meat, bread and a cow-share membership. Lab testing confirmed the white liquid was unpasteurized milk. Ms. Viljakainen seemed to be aware that Ms. Atherton had previously spoken to the Respondent on the phone about purchasing a cow-share. Ms. Atherton asked for milk, and Ms. Viljakainen accordingly directed the investigator to the cold storage area to secure the clear jars containing white liquid that Ms. Atherton ultimately purchased (pp. 88-90 and 96, January 27, 2009 Trial Transcript).

135 While being cross-examined, Investigator Miller confirmed that the Respondent had advised him that "the membership card would be a mandatory requirement" in order to be a part owner of a cow. He agreed that the notes of his interaction with the Respondent served to confirm public access to the milk produced at Glencolton Farms was restricted to cow-share members and not to the public generally (pp. 102-103, January 27, 2009 Trial Transcript).

136 On October 27, 2006, Mr. Miller again attended Glencolton Farms with Ms. Atherton. There were many people in the store that day and others lined up outside the store. Mr. Miller observed people purchasing jars of milk that were located alongside other produce. The purchasers were seen to remove jars from the refrigeration unit. Ms. Viljakainen recorded each sale. Ms. Atherton purchased some cheese from Ms. Viljakainen. The barn had a cold storage area, a freezer unit and an area that looked like a place used to manufacture cheese. It also had an area where there were cream cans or milk cans. Mr. Miller was given a tour of both the milking area and cheese production areas. The next day Mr. Miller drove to the Agricultural Investigative Unit where the purchased items were taken to the storage unit and into the custody of Investigator Campbell. Samples were taken from the various containers for testing. Miller catalogued all of the seized items (pp. 92-96 and 108, January 27, 2009 Trial Transcript).

(B) Lead MNR Investigator Brett Campbell

137 Investigator Campbell was involved in the November 22, 2006 execution of the search warrant at Glencolton Farms. He received a number of seized items from Mr. Miller the following day. Investigator Campbell was present with Ms. Atherton when she received the Glencolton Farms cow-share membership card.

138 At the time of the execution of the search warrant Investigator Campbell acknowledged that he was not aware of any specific risk to public health originating at Glencolton Farms when the authorities decided to investigate the Respondent. The names of all cow-share members were seized during the search. None of the members were contacted in regard to any health related concerns they might have regarding the milk products they had been consuming. The focus of the investigation was acknowledged to be the Respondent and Glencolton Farms (p. 121, January 27, 2009 Trial Transcript).

(C) Grey-Bruce Health Inspector Andrew Barton

139 Health Inspector Andrew Barton testified that he was not initially aware that a s. 13 *Health Protection and Promotion Act*, R.S.O. 1990, Chapter 4.7, order had been issued by another inspector from the Bruce Grey Owen Sound Health Unit against the Respondent in 1994 and that this Order had been reviewed and upheld by the Health Protection Appeal Board.

140 After the search of Glencolton Farms was completed on November 22, 2006, Mr. Barton wrote to the Respondent explaining the purpose for "visit" and describing the earlier s. 13 Order from 1994. Inspector Barton's letter was personally delivered to the Respondent on November 24, 2006. The letter was intended to indicate that the Health Unit and MNR "wished" the Respondent to cease storing, distributing raw milk products (pp. 18-19, January 28, 2009 Trial Transcript).

141 During the execution of the warrant the blue bus was searched. The seats had been removed in the bus and replaced by shelving. There were food products on the shelves, including bread, cinnamon buns, oats and vegetables. Underneath, in some coolers and a chest freezer, meat products and some dairy products, including milk, quark and cheese were observed. The milk products were stacked and stored in plywood boxes. Mr. Barton estimated there were in excess of 32 boxes. There were one or two coolers underneath. Mr. Barton recalled there were six two-litre jars of milk in a box. The store fridges had meat and a small amount of dairy products. The jars of dairy products had screw tops. The milk was sent to a laboratory for testing. It was determined to be raw or unpasteurized (pp. 9-13, January 28, 2009 Trial Transcript).

142 The raw milk and milk product seized was dumped in a local landfill site as a deemed health hazard, pursuant to s. 19(1) and s. 19(4) of the *H.P.P.A.* (pp. 17-18 and 25-26, January 28, 2009 Trial Transcript). Inspector Barton also testified that "raw milk products are considered a health hazard [because] they are a fantastic vehicle for transferring pathogenic organisms, and there's plenty of, a large number of, infectious outbreaks [...]" (p. 25, January 28, 2009 Trial Transcript). Inspector Barton indicated the determination that the disposed milk and milk product were health hazards was "based partly on

what we'd been told and also the results of some analysis that had been done on some earlier milk products, and then also based on what was said by the Respondent, and what we saw during the inspection" (p. 26, January 28, 2009 Trial Transcript).

143 In February 2007, Inspector's Barton and Munn returned to the farm store to see if any raw milk or dairy products were displayed for sale. Nothing was found. (pp. 19-20, January 28, 2009 Trial Transcript).

(D) Grey-Bruce Health Inspector Christopher Munn

144 Inspector Munn was contacted by Brett Campbell of the Ministry of Natural Resources on September 8, 2006 in relation to an E-coli outbreak in Simcoe County. As part of a follow-up communicable disease investigation by Simcoe County Health Unit, it was determined that the most probable cause of illness was raw milk. Their investigation led to a concern that raw milk was being produced and distributed from Grey-Bruce or possibly Waterloo counties. Brett Campbell indicated that the Health Unit would likely be called in to assist with the *H.P.P.A.* aspects of the investigation of Glencolton Farms as the Respondent's cow share programme was suspected as being a possible source of what was believed to be an outbreak related to raw milk (pp. 43-44, January 28, 2009 Trial Transcript).

145 Inspector Munn was aware of the Health Unit's 1994 Order restraining Mr. Schmidt from distributing and selling unpasteurized milk from his farm.

146 Inspector Munn's role during November 21, 2006 search was to inspect the farm premises to determine whether there was compliance with the 1994 Order. He was involved in the search of the farmhouse and blue bus. Milk containers, quark and yogurt containers were noted as being provided by another local company. The milk packaging was not labelled. The investigator also visited the store. Mr. Barton noted everything he saw in the store. As the milk was recognized as a potential health hazard, it was ordered seized. Samples of the milk were provided to Ministry of Natural Resources for testing to determine if it was unpasteurized and for a bacterial analysis.

Defence Witnesses Trial Testimony

(A) Cow-Share Member Eric Bryant

147 Mr. Bryant testified that he normally drives out to the Glencolton Farms every two weeks to pick up a supply of raw milk. After encountering digestion problems 12 years before he became a vegetarian. He follows the "Ascene teaching" that has led him to embrace raw milk as part of his religious practise. He is the owner of two cow-shares and conducted his own research regarding the benefits and potential risks of raw milk. Mr. Bryant expressed his understanding that the cow-share arrangement involved a contract with Michael Schmidt and a continuing financial obligation to pay for the upkeep of cows (pp. 82-86, January 28, 2009 Trial Transcript).

Trial Testimony of the Respondent

148 The Respondent began his testimony by reading a 18-page document as his verbatim evidence in chief (pp. 89-103, January 28, 2009 Trial Transcript).

149 The Respondent indicated that he established the "lease a cow programme" in 1992. Between 1992-1994, but prior to the Grey-Bruce Health Unit Order in February 1994, he stated that there was no reported illness from the consumption of the raw milk produced at Glencolton Farms. The *H.P.P.A.* Order was issued to him in his capacity as the operator of the farm. The raw milk and raw milk products were "deemed to constitute a health hazard". The Health Protection Appeal Board upheld the order, concluding that raw milk was in fact a health hazard (p. 93, January 28, 2009 Trial Transcript). In the subsequent 1994 investigation, the Ontario Ministry of Agriculture and Food and Rural Affairs ("OMAFRA") destroyed hundreds of pounds of butter, hundreds of litres of milk and numerous rounds of cheese. The Respondent indicated his compliance with the terms of the *H.P.P.A.* Order, which he intimated applied to a previous farm operation at a different location. Based on the subsequent transfer of title of lots 38, 39 and 40, Concession 2, Durham, in Grey County Ontario, he believed that the 1994 Order was no longer of any force and effect (p. 95, January 28, 2009 Trial Transcript).

150 The Respondent developed the cow-share programme at its current location, Lot 44 Concession 3 Glenelg, where the cows "were owned by various cow-share people." This involved a private contractual agreement with the shareowners. He did not advertise for cow share members. He asserted that the operation fell outside the definition of "plant" contained in the *Milk Act* because of the expansion of the milk house directly attached to the barn (p. 96, January 28, 2009 Trial Transcript). That facility had a bulk tank for milk cooling, a separator for cream, shelves, a dishwasher and a walk-in cooler as described by Ms. Atherton and Mr. Miller.

151 The Respondent testified that he had several friendly conversations with the Health Inspector for the region after the cow-share programme had been initiated. No government intervention occurred for almost 12 years. During this time the Respondent gave lectures at universities and cooking schools about the importance of farmer and consumer relations and cow-sharing (p. 97, January 28, 2009 Trial Transcript).

152 Since 1996, he has provided a delivery service by bringing, cow-share owner's milk to the GTA. Members must have a card. Only cow-share members are eligible to receive milk or milk products. The Respondent is known to give potential members some raw milk product to try out before they commit to the programme (p. 99 January 28, 2009 Trial Transcript). His primary concern was to ensure a reliable supply of raw milk for those who need the milk for health reasons. Accordingly, the Respondent admitted that he instructed Beverley Viljakainen to validate Ms. Atherton as a cow-share member based on her representations of a health-based need for raw milk. In retrospect, these representations were viewed by the Respondent as being a false pretence as they were untrue (p. 100, January 28, 2009 Trial Transcript). The Respondent noted that not all his members consume raw milk for health reasons. Many just express a preference for unpasteurized milk. Ms. Atherton was given a small quantity of cheese before she became a member in order to try it out. In the Respondent's own words, he "never asked for money for that reason that she was not a member yet [...] but as to her testimony, the price was written on the package. Therefore I can only assume that she believes she may have paid for it. By my clear recollection, "there was no sales transaction" (p. 100, January 28, 2009 Trial Transcript).

153 The Respondent stated that there was never a cooler with glass doors at Glencolton Farms. The cooler has always been stainless steel. He indicated there had never been a glass door displaying dairy products for sale to the public. A sign on the milk fridge read "Members only". The Respondent confirmed that Inspector Miller was correct when he advised that the store did not have a cooler with glass doors to display milk products (p. 101, January 28, 2009 Trial Transcript).

154 The Respondent stated that he does not sell raw milk to the public. Instead, he provides a boarding service for cow-share owners. Cow-share owners have access to the health records of their cows. He provides access to milk test results and keeps frozen milk samples from every production, for a period of four weeks, for backup testing. He has never had anyone report that they have been made ill due to the milk he provided. An annual inspection of the entire operation is conducted by an independent dairy inspector, in addition to frequent tests of the cow manure, for pathogens, conducted by a licensed veterinarian. No pathogens harmful to human health have ever been found in Glencolton Farm's raw milk. Monthly tests are conducted by the Dairy Herd Improvement Organization to check for somatic cell counts and milk quality verification. These tests have yielded "great results". The herd is tested regularly under supervision of licensed veterinarian. The Respondent advised that he keeps an updated cow-share membership list (pp. 101-102, January 28, 2009 Trial Transcript).

The Cross-examination of Mr. Michael Schmidt

155 The Respondent testified that he is not a cow-share member (p. 136, January 28, 2009 Trial Transcript).

156 He acknowledged receiving Ms. McLeod's "cease and desist" Order of February 1994, which was addressed to "Michael Schmidt operating as Glencolton Farms". The location of the farm specified in the 1994 Order (Lots 38, 39 and 40) was indicated as being a half an hour walk from Glencolton Farms' current location, lot 44. All of the lots are in Glenelg Township in Grey County (pp. 130-131, January 28, 2009 Trial Transcript). Following the issuance of the 1994 Order the Respondent launched an appeal of that Order. The Health Services Appeal and Review Board provided its decision in writing. The Review Board decision confirmed that raw milk was a health hazard. The Respondent believes they got it "totally wrong" but acknowledged the Order was never appealed or made subject to judicial review (pp. 132-133, January 28, 2009 Trial Transcript). The Respondent accepted that the Order was a determination of certain rights between himself and the Grey-Bruce Health Unit (p. 135, January 28, 2009 Trial Transcript). He also agreed that the Order directed him to stop the "manufacturing, processing, preparation, storage, handling, or display of unpasteurized milk and milk products" (p. 137, January 28, 2009 Trial Transcript). He stated that he believed the Order did not currently apply to him because he was no longer producing raw milk at the same location as referred to in the Order (pp. 139-140, January 28, 2009 Trial Transcript). He viewed the Order as being connected to the previous farm property (p. 141, January 28, 2009 Trial Transcript).

157 The Respondent agreed that there was raw milk and raw milk products stored on Glencolton Farms on October 20, 2006. He could not recall if raw milk and milk products were stored and displayed on October 27, 2006 as he was on the bus on that date. On

November 21, 2006, raw milk and milk products were also acknowledged as being located on the blue bus (p. 138, January 28, 2009 Trial Transcript).

158 The Respondent acknowledged the accuracy of the statement he provided to Investigator Herries. He agreed that the cow-share handbook prepared by cow-share member Andrea Lemieux (p. 107, January 28, 2009 Trial Transcript) accurately outlines the programme's operation. There is no other documentation relating to the cow-share agreement (p. 108, January 28, 2009 Trial Transcript). The sale of a cow works on the basis of a hand shake. The nature of the contractual agreement is based on an understanding of the handbook, a membership card and "a personal agreement" between Glencolton Farms and, the various cow-share members (p. 108, January 28, 2009 Trial Transcript).

159 The Respondent advised that he is not disputing the fact unpasteurized milk cannot legally be sold anywhere in Ontario (p. 108, January 28, 2009 Trial Transcript). He acknowledged pleading guilty to two offences under the *Milk Act*, ss. 15(1)(2) in 1994 and agreed he received two year's probation. He also entered a plea of guilty to a s. 18 *H.P.P.A.* infraction and received a $3500 fine (p. 109, January 28, 2009 Trial Transcript).

160 Confronted by the fact that the member's handbook indicates that a member is a "part owner of the milk production"; whereas his evidence in-chief was that a member was buying a share in a cow, the Respondent conceded "it could be both": the essential fact is that they actually have a cow" (pp. 111-112, January 28, 2009 Trial Transcript). The Respondent stated that a "loophole" in the *H.P.P.A.* permits a private contract between two people to lawfully obtain a product not available normally to the public (p. 112, January 28, 2009 Trial Transcript). The *H.P.P.A.* does not preclude the drinking of raw milk while the applicable statutes prohibit the selling/distribution of raw milk (p. 115, January 28, 2009 Trial Transcript). At trial, the Respondent stated, "There are no regulations in place when you privately own your cow, which nobody can interfere with in the drinking of milk, as it comes from the cow".

161 The cow-share members hire the Respondent to milk and feed the cows (p. 117, January 28, 2009 Trial Transcript). The Respondent acts as a mentor because of his knowledge. "I'm the milkman, but I just mean from a technical point of view, I'm asked to load the bus. Sometimes I'm asked to bottle the milk. Whatever is required? " The Respondent is the one responsible for the production of milk. He handles the milk, stores the milk at the farm and transports it on the bus (for delivery to the cow-share membership) (p. 136, January 28, 2009 Trial Transcript).

162 Shareholder responsibilities do not include the care or maintenance of the cows (p. 118, January 28, 2009 Trial Transcript). The Respondent testified that members instruct him how to take care of their cow, in order to ensure it is healthy, properly fed and clean (p. 118, January 28, 2009 Trial Transcript). While this information is not in the handbook, the Respondent states it was discussed with Ms. Atherton. The Respondent also stated that he would have discussed these matters with her on the blue bus based on his general practice and the sort of questions people usually ask about the conditions for becoming a cow-share member (p. 119, January 28, 2009 Trial Transcript). He was unaware if Ms. Atherton had the name of her cow on her card or if she was led by one of the members to the barn to see her cow. A review of the cow-share documents that were filed as exhibits at trial reveal that a specific cow was not named on her card or any of the other

membership cards. The Respondent advised that a new process is developing where, once they are official members, the cow-share members come to the barn and choose their cow (p. 120, January 28, 2009 Trial Transcript).

163 The Respondent testified that the private contract between the parties has nothing to do with public health. It involves a conscious decision of individuals to get a product that they think is good for them. It is viewed as empowering people who want to make a decision to drink raw milk. By entering into a private agreement, they have their own milk (p. 125, January 28, 2009 Trial Transcript). "What we do in our house, public health has no right to go in ..." (p. 125, January 28, 2009 Trial Transcript). The cow-share arrangement is purported to allow the milk products to be brought to the cow-share members without falling under the jurisdiction of the local health authority.

164 The cow-share handbook introduction reads as follows: "This booklet is intended solely for informational purposes. You consume raw dairy products at your own risk. This disclaimer is intended to advise cow-share members that they consume raw milk at their own risk. The purpose of the statement is to confirm you are responsible if you get sick from consuming raw milk (pp. 125-126, January 28, 2009 Trial Transcript).

165 The Respondent could not say that Ms. Atherton did not purchase cheese from him twice before she became a cow-share member (August 22 and October 17, 2006). He refers to his usual practice or principle that he "always follows":

> When somebody wants to become a cow share owner and they tell me all their stories [...] that's their own decision why they want to drink the milk [...] I'm very careful when people come and want to start, and they haven't had raw milk before, to see if they can actually digest it properly or if there is any adverse reactions. So what I usually do is say no, you can't buy anything [but] I can give you a piece [...] to try out and you let me know [but] I said I cannot sell that to you, you're not a member [...] if you want to pay, you can always make a donation to the farm, but I'm not selling that to you (pp. 127-128, January 28, 2009 Trial Transcript).

166 He stated that the reason he did not give Ms. Atherton milk instead of the cheese is because the quantity of milk on hand at the blue bus was limited and just enough to meet the needs of the cow-share members who were there. Accordingly, Ms. Atherton was asked to attend at the farm if she wished to obtain some milk (p. 128, January 28, 2009 Trial Transcript). He believed there was sufficient cheese on hand to permit her to sample that product.

167 When Ms. Atherton attended at the farm on October 20, 2006 and purchased her membership, she also received raw milk. The Respondent could not name a particular cow that the milk had come from, or say that it corresponded with Ms. Atherton's choice, or whether a specific cow had been assigned to her through the "cow-share" arrangement. He speculated that there would likely have been a few more bottles of milk than the farm store required and permitting her to receive some of the additional available milk (p. 129, January 28, 2009 Trial Transcript).

Acknowledgement

168 Appreciation is extended to Jeremy Tatum, student-at-law, for his helpful assistance in the preparation of the trial summary in this matter. His contribution to the editing of this judgment and the attendant legal research, in his capacity as Law Clerk to the Court, is gratefully acknowledged.

Case Name:

R. v. Schmidt

Between
Her Majesty the Queen, Respondent on Appeal, and
Michael Schmidt, Applicant on Appeal

[2014] O.J. No. 1074

2014 ONCA 188

119 O.R. (3d) 145

318 O.A.C. 53

2014 CarswellOnt 2796

112 W.C.B. (2d) 592

304 C.R.R. (2d) 126

Docket: C55843

Ontario Court of Appeal
Toronto, Ontario

K.M. Weiler, R.J. Sharpe and R.A. Blair JJ.A.

Heard: February 5, 2014.
Judgment: March 11, 2014.

(48 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- Right not to be deprived thereof -- Principles of fundamental justice -- Economic rights -- Personal autonomy -- Appeal by accused from convictions related to sale and distribution of un-pasteurized milk dismissed -- Accused was organic dairy farmer and public advocate for consumption of un-pasteurized milk -- He operated cow-share arrangement in attempt to fall within exemption permitting consumption of un-pasteurized products from one's own cow -- Appellate judge did not err in interpreting

legislation -- Public health purpose supported broad and liberal interpretation -- Cow-share program fell within ordinary meaning of sale and distribution -- s. 7 of Charter did not extend to protect arrangement and legislation was not overbroad or arbitrary -- Canadian Charter of Rights and Freedoms, s. 7 -- Health Protection and Promotion Act, s. 18 -- Milk Act, s. 15.

Criminal law -- Regulatory offences -- Appeal by accused from convictions related to sale and distribution of un-pasteurized milk dismissed -- Accused was organic dairy farmer and public advocate for consumption of un-pasteurized milk -- He operated cow-share arrangement in attempt to fall within exemption permitting consumption of un-pasteurized products from one's own cow -- Appellate judge did not err in interpreting legislation -- Public health purpose supported broad and liberal interpretation -- Cow-share program fell within ordinary meaning of sale and distribution -- s. 7 of Charter did not extend to protect arrangement and legislation was not overbroad or arbitrary -- Canadian Charter of Rights and Freedoms, s. 7 -- Health Protection and Promotion Act, s. 18 -- Milk Act, s. 15.

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- Economic rights -- Personal autonomy -- Principles of fundamental justice -- Appeal by accused from convictions related to sale and distribution of un-pasteurized milk dismissed -- Accused was organic dairy farmer and public advocate for consumption of un-pasteurized milk -- He operated cow-share arrangement in attempt to fall within exemption permitting consumption of un-pasteurized products from one's own cow -- Appellate judge did not err in interpreting legislation -- Public health purpose supported broad and liberal interpretation -- Cow-share program fell within ordinary meaning of sale and distribution -- s. 7 of Charter did not extend to protect arrangement and legislation was not overbroad or arbitrary -- Canadian Charter of Rights and Freedoms, s. 7 -- Health Protection and Promotion Act, s. 18 -- Milk Act, s. 15.

Health law -- Public health -- Food and drug safety -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Appeal by accused from convictions related to sale and distribution of un-pasteurized milk dismissed -- Accused was organic dairy farmer and public advocate for consumption of un-pasteurized milk -- He operated cow-share arrangement in attempt to fall within exemption permitting consumption of un-pasteurized products from one's own cow -- Appellate judge did not err in interpreting legislation -- Public health purpose supported broad and liberal interpretation -- Cow-share program fell within ordinary meaning of sale and distribution -- s. 7 of Charter did not extend to protect arrangement and legislation was not overbroad or arbitrary -- Canadian Charter of Rights and Freedoms, s. 7 -- Health Protection and Promotion Act, s. 18 -- Milk Act, s. 15.

Natural resources law -- Agriculture -- Agricultural products -- Food safety -- Appeal by accused from convictions related to sale and distribution of un-pasteurized milk dismissed -- Accused was organic dairy farmer and public advocate for consumption of un-pasteurized milk -- He operated cow-share arrangement in attempt to fall within exemption permitting consumption of un-pasteurized products from one's own cow -- Appellate judge did not err in interpreting legislation -- Public health purpose supported broad and liberal interpretation -- Cow-share program fell within ordinary meaning of sale and distri-

bution -- s. 7 of Charter did not extend to protect arrangement and legislation was not overbroad or arbitrary -- Canadian Charter of Rights and Freedoms, s. 7 -- Health Protection and Promotion Act, s. 18 -- Milk Act, s. 15.

Appeal by the accused, Schmidt, from convictions for 13 offences related to the sale and distribution of un-pasteurized milk and milk products. The accused was an organic dairy farmer and public advocate for the consumption of un-pasteurized milk. The Health Protection and Promotion Act (HPPA) prohibited sale and distribution of un-pasteurized milk, but permitted consumption of un-pasteurized products from one's own cow. The accused allowed individuals to purchase a fractional ownership interest in a cow in an attempt to comply with the HPPA. Cow-share members paid a capital sum plus an amount per litre to cover the cost of keeping the cow and producing the milk. The accused was charged with several counts of selling and distributing un-pasteurized milk and cheese contrary to the HPPA, operating an unlicensed milk plant contrary to the Milk Act, and failing to obey an order of the Public Health Inspector. At trial, the accused was acquitted on all charges. The Justice of the Peace accepted the argument that the provision of milk to individuals in private cow-share agreements was not caught by the legislation. The Crown appealed to the Ontario Court of Justice. The judge found that the Justice of the Peace erred in interpreting the HPPA and the Milk Act. The judge found no breach of s. 7 of the Charter. Given the preponderance of scientific evidence as to the risk to public health posed by un-pasteurized milk, the impugned legislation did not violate the principles of fundamental justice as arbitrary or overbroad. Convictions were entered on 13 counts. The accused appealed to the Court of Appeal.

HELD: Appeal dismissed. The appellate judge did not err in interpreting the HPPA and the Milk Act and in failing to give due recognition to the cow-share plan. The impugned legislation was intended to control and regulate the quality of milk products in all respects. The legislature determined that consumption of un-pasteurized milk posed serious risks to public health. There was ample evidence to support the appellate judge's conclusion that the scientific evidence supported the existence of such health risk. The transactions involving the accused fell squarely within the ordinary meaning of the legislation. To conclude otherwise would ignore the jurisprudence on the proper approach to the interpretation of public welfare legislation. The cow-share arrangement was nothing more than a marketing and distribution scheme offered to the public at large. The arrangement did not transfer an ownership interest in a particular cow or involve the exercise of rights and obligations normally attached to ownership. The appellate judge did not err in concluding that neither the HPPA nor the Milk Act violated s. 7 of the Charter. An individual's subjective belief that a banned substance benefited health did not give rise to a s. 7 right. There was no scientific or medical evidence to support the proposition that consumption of un-pasteurized milk would benefit the health of any cow-share member. Similarly, consumption choices on the basis of lifestyle were not protected by s. 7. The jurisprudence did not extend s. 7 to protect economic or contractual rights related to the cow-share arrangement. The offences under the legislation did not engage liberty interests. The offence provisions were not arbitrary or overbroad in relation to the public health protection purpose.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 7

Health Protection and Promotion Act, R.S.O. 1990, c. H.7, s. 2, s. 18

Legislation Act, 2006 S.O. 2006, c. 21, Sched. F, s. 64

Milk Act, R.S.O. 1990, c. M.12, s. 1, s. 1, s. 1, s. 1, s. 15

Ontario Human Rights Code, s. 3

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 72(2)

Appeal From:

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

Counsel:

Derek From and Chris Schafer, for the appellant.

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

The judgment of the Court was delivered by

1 **R.J. SHARPE J.A.**:-- The appellant, Michael Schmidt, is a milk farmer who produces and advocates the consumption of unpasteurized milk. The sale and distribution of unpasteurized milk and milk products is prohibited by the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 ("*HPPA*"). However, the *HPPA* does not prohibit the consumption of unpasteurized milk and an individual can legally consume unpasteurized milk obtained from his or her own cow. The appellant provided unpasteurized milk and milk products to individuals who paid a capital sum to acquire a fractional interest in a cow in what he described as a "cow share agreement". The appellant testified that cow-share members also paid an amount per litre to cover the cost of keeping the cow and producing the milk.

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

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

4 On appeal to the Ontario Court of Justice, the appeal judge found that the Justice of the Peace had erred in his approach to statutory interpretation. The appeal judge went on to consider the *Charter* arguments and concluded that there was no violation of the interests protected by s. 7 and that, given the preponderance of scientific evidence as to the risk to public health posed by unpasteurized milk, the impugned legislation did not violate the principles of fundamental justice on the ground that it was arbitrary or overbroad. The appeal judge entered convictions on thirteen counts and imposed fines totaling $9,150 and one year of probation.

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

FACTS

6 The appellant is an experienced organic farmer with a deeply committed belief in the benefits of unpasteurized milk. The appellant endeavoured to comply with the *HPPA* through his cow-share program. Cow-share members paid the appellant a capital sum ranging between $300 and $1200 and were required to pay a per litre charge for the services involved in keeping the cow, milking the cow, and bottling and transporting the milk. Although the capital sum of $300 was said to give a member a 1/4 interest in a cow, the herd consisted of 24 cows and there were approximately 150 individual or family cow-share members.

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

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

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

10 The Crown led evidence as to the health risks and benefits of consuming unpasteurized milk. The appellant led evidence that suggested that there were potential health benefits from the consumption of unpasteurized milk including possible protection against asthma and allergies. He pointed out that several American states permit some form of unpasteurized milk sale to the public and that there was no suggestion that anyone had suffered ill-effects from consuming the milk he produced. The Crown highlighted the fact that even the evidence relied on by the appellant concludes that despite the potential benefits, because of the risks posed by pathogens, consumption of unpasteurized milk is not recommended.

LEGISLATION

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

> **Unpasteurized or unsterilized milk**
>
> 18. (1) No person shall sell, offer for sale, deliver or distribute milk or cream that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*.
>
> **Milk products**
>
> (2) No person shall sell, offer for sale, deliver or distribute a milk product processed or derived from milk that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*.
>
> **Exception**
>
> (3) Subsection (1) does not apply in respect of milk or cream that is sold, offered for sale, delivered or distributed to a plant licensed under the Milk Act.
>
> The *HPPA* does not define the terms "sale", "deliver" or "distribute".

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

> **Licence to operate plant**
>
> 15. (1) No person shall operate a plant without a licence therefor from the Director.
>
> **Licence to operate as distributor**
>
> (2) No person shall carry on business as a distributor without a licence therefor from the Director.

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

> "distributor" means a person engaged in selling or distributing fluid milk products directly or indirectly to consumers; ("distributeur")
>
> ...
>
> "milk product" means any product processed or derived in whole or in part from milk, and includes cream, butter, cheese, cottage cheese, con-

> densed milk, milk powder, dry milk, ice cream, ice cream mix, casein, malted milk, sherbet and such other products as are designated as milk products in the regulations; ("produit du lait")
>
> ...
>
> "processing" means heating, pasteurizing, evaporating, drying, churning, freezing, packaging, packing, separating into component parts, combining with other substances by any process or otherwise treating milk or cream or milk products in the manufacture or preparation of milk products or fluid milk products; ("transformation")
>
> "processor" means a person engaged in the processing of milk products or fluid milk products; ("préposé à la transformation")

TRIAL AND APPEAL DECISIONS

Trial before the Justice of the Peace

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

Appeal to the Ontario Court of Justice

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

MOTION TO ADDUCE FRESH EVIDENCE

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

ISSUES

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

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

2. Should the proposed fresh evidence be admitted?
3. Did the appeal judge err in concluding that neither the *HPPA* nor the *Milk Act* violated s. 7 of the *Charter*?

ANALYSIS

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

Statutory purpose

18 The *HPPA*, s. 2 states that one of the purposes of the Act is "the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario". Similarly, one of the stated purposes of the *Milk Act*, s. 2 is "to provide for the control and regulation in any or all respects of the quality of milk, milk products and fluid milk products within Ontario".

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

Evidence of harm

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

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

There was ample evidence to support that finding.

21 The appellant and his followers disagree with the scientific evidence and have what appears to be a sincere and honest belief in the benefits of unpasteurized milk. However, provided that the legislature has acted within the limits imposed by the constitution, the legislature's decision to ban the sale and distribution of unpasteurized milk to protect and promote public health in Ontario is one that must be respected by this court.

Statutory interpretation

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

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

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

Cow-share agreements

25 I do not accept the submission that the cow-share agreements amount to an arrangement that takes the appellant's activities outside the reach of the *HPPA* and the *Milk Act*. The oral cow-share agreement does not transfer an ownership interest in a particular cow or in the herd as a whole. The member does not acquire or exercise the rights that ordinarily attach to ownership. The member is not involved in the acquisition, disposition or care of any cow or of the herd. The cow-share member acquires a right of access to the milk produced by the appellant's dairy farm, a right that is not derived from an ownership interest in any cow or cows. As the appeal judge put it, at para. 51, "the cow-share arrangement approximates membership in a 'big box' store that requires a fee to be paid in order to gain access to the products located therein." This court has resisted schemes that purport to create "private" enclaves immune to the reach of public health legislation and has insisted that public health legislation not be crippled by a narrow interpretation that would defeat its objective of protecting the public from risks to health: *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685 at paras. 45-47.

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

27 For similar reasons, I cannot accept the appellant's submission that the *Milk Act* licence requirement does not apply to the appellant's operation. The *Milk Act* makes no exception for "private" operations. Even if it did, the appellant operates a plant from which any member of the public can procure unpasteurized milk.

28 I conclude that there is no merit in the appellant's contention that he is not engaged in the sale, delivery and distribution of unpasteurized milk and milk products, contrary to the *HPPA*, s. 18 or that he does not operate a plant without a licence contrary to the *Milk Act*, s. 15.

2. Should the proposed fresh evidence be admitted?

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

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

30 It is my view that the proposed fresh evidence should not be admitted. Assuming that the appellant is able to satisfy the first three criteria, I fail to see how this evidence could be expected to have affected the result at trial. First, it essentially replicates evidence that was led at trial to the effect that unpasteurized milk could benefit children who have asthma and allergies. Second, like the evidence led at trial, the recent study concludes that despite those possible beneficial effects, "on the basis of current knowledge, raw milk consumption cannot be recommended because it might contain pathogens".

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

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

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

Standing

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

Security of the person

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

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

36 Nor does the ban on the sale and distribution of unpasteurized milk constitute an infringement of security of the person akin to that encountered in cases where the state seeks to administer medical treatment without the individual's consent: see e.g. *Fleming v. Reid*,(1991), 4 O.R. (3d) 74 (C.A.). In those cases, by administering unwanted medical treatment, the state interferes with the individual's bodily integrity. In this case, the ban simply prevents an individual from acquiring a product that the individual subjectively believes would be beneficial.

Liberty

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

38 As the appellant candidly conceded in oral argument, in making this submission, the appellant invites us to depart from the existing jurisprudence. While the Supreme Court of Canada has not foreclosed the possibility that s. 7 may evolve to protect certain economic rights such as a basic minimum level of subsistence, the proposition that s. 7 protects freedom of contract or the right to engage in the economic activity of one's choice has been rejected. In *Siemens v. Manitoba (Attorney General),* 2003 SCC 3 at para. 46, the Supreme Court held that "[t]he ability to generate business revenue by one's chosen means is not a right protected under s. 7 of the *Charter.*" In *Edwards Books and Art Ltd. v. R.,* [1986] 2 S.C.R. 713 at pp. 785-6, Dickson C.J. held that the right to liberty protected by s. 7 "is not synonymous with unconstrained freedom" and "does not extend to an unconstrained right to transact business whenever one wishes." Even if it were in the power of the court to do so, I can see no reason to depart from these authorities on the facts of this case.

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

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

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

42 I disagree.

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

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

Principles of fundamental justice

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

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

Section 1

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

CONCLUSION

48 For these reasons, I would dismiss the appeal.

R.J. SHARPE J.A.
K.M. WEILER J.A.:-- I agree.
R.A. BLAIR J.A.:-- I agree.

Case Name:

R. v. Schmidt

Michael Schmidt
v.
Her Majesty the Queen

[2014] S.C.C.A. No. 208

[2014] C.S.C.R. no 208

File No.: 35890

Supreme Court of Canada

Record created: May 14, 2014.
Record updated: August 14, 2014.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Status:

Application for leave to appeal dismissed without costs (without reasons) August 14, 2014.

Catchwords:

Charter of Rights -- Freedom of conscience and religion -- Democratic rights -- Right to life, liberty and security of person -- Appeals -- Whether the Court of Appeal correctly found social and legislative facts, absent palpable and overriding error with the trial judge's findings of fact -- Whether the Court of Appeal erred by substituting its assessment of the evidence for that of the trial judge -- Whether s. 18 of the Health Protection and Promotion Act and s. 15 of the Milk Act infringe ss. 2, 3, or 7 of the Charter -- If so, whether the infringement is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Charter.

Case Summary:

Mr. Schmidt, an experienced organic farmer, has a deeply committed belief in the benefits of unpasteurized milk and sold it through a "cow share" program, which provides unpas-

teurized milk and milk products to members of the program. The members paid a capital sum of $300 (1/4 share) to $1200 (full share), plus an amount per litre to cover the cost of keeping and milking the cow, and bottling and transporting the milk. Mr. Schmidt kept 24 shared cows, with about 150 individual or family cow-share members.

Mr. Schmidt was charged with several counts of selling and distributing of unpasteurized milk and cheese contrary to the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, operating an unlicensed milk plant contrary to the Milk Act, R.S.O. 1990, c. M.12, and failing to obey an order of the Public Health Inspector. He was acquitted on all counts. An appeal to the Ontario Court of Justice was allowed in part, and a further appeal to the Court of Appeal was dismissed.

Counsel:

Michael Schmidt, for the motion.

Shannon Chace-Hall (A.G. of Ontario), contra.

Chronology:

1. Application for leave to appeal:

FILED: May 14, 2014.
SUBMITTED TO THE COURT: July 14, 2014.
DISMISSED WITHOUT COSTS: August 14, 2014 (without reasons).
Before: Abella, Rothstein and Moldaver JJ.

The motion for an extension of time to serve and file the application for leave to appeal is granted. The application for leave to appeal and all ancillary motions are dismissed without costs.

Procedural History:

Judgment at first instance: Acquittals on all counts under the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, and the Milk Act, R.S.O. 1990, c. M.12. Ontario Court (Provincial Division), Kowarsky, Justice of the Peace, January 21, 2010.
2010 ONCJ 9.

Judgment at first instance: Appeal allowed in part. Ontario Court of Justice (Tetley J.), September 28, 2011. 2011 ONCJ 482.

Judgment on appeal: Appeal dismissed.
Court of Appeal for Ontario (Weiler, Sharpe, Blair J.A.),
March 11, 2014.
2014 ONCA 188; [2014] O.J. No. 1074.

Case Name:

R. v. Murdock

Between
Her Majesty the Queen, and
Clair Murdock

[2003] O.J. No. 5736

Information No. CR-M08/02

Ontario Superior Court of Justice
Cornwall, Ontario

McKinnon J.

Oral judgment: November 12, 2003.

(21 paras.)

Criminal law -- Evidence and witnesses -- Admissibility and relevance -- Documents and reports.

Application by the accused to exclude evidence obtained from Canada Customs and Revenue Agency, specifically a report reviewing the financial situation of Hanes and the accused. The report was prepared by Brown, a Policy Analyst attached to the Investigation Directorate of the Department, using information and documentation provided by the police. The information was obtained through a lawful search in accordance with prior judicial authorization and at no time did Brown share any protected information with the police or include it in her report. The accused was charged with one count of theft of monies exceeding $5,000 and one of defrauding his aunt and her estate of a sum of money exceeding $5,000. Copies of the information had been given to Revenue Canada because the investigating officer believed that the accused had stolen money from the estate of Hanes. The accused argued that the report was inadmissible on the basis that the foundational evidence of the report was provided to Brown in contravention of the accused's rights under the Canadian Charter of Rights and Freedoms. Specifically, he argued that the possession of the information in the hands of Revenue Canada was not in accordance with prior judicial authorization.

HELD: Application dismissed. At all times the investigating officer acted in good faith in sharing the information that he had with Revenue Canada. He had a reasonable suspicion that if in fact the accused had stolen the money involved in the estate he would not have declared it as income for income tax purposes. Therefore, sharing the information was entirely reasonable in these circumstances. The sharing had occurred between sister law enforcement agencies and the information had been seized pursuant to a validly executed warrant and thus any expectation of privacy in the information was greatly reduced if not altogether extinguished, for the purposes of the administration of Canadian law.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982.

Criminal Code, ss. 334(a), 380(1)(a), 490(15).

Counsel:

M. Lindsay, for the Crown.
T. Byrne, for the accused.

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1 **McKINNON J.** (orally):-- The accused Clair Murdock is charged that between the 1st day of May, 1997 and the 31st day of August, 1998 at the Village of Morrisburg in the County of Dundas and elsewhere in the East Region and in the Provinces of Ontario and Quebec did steal a sum of money exceeding $5,000 from Nelda Hanes and her estate contrary to section 334(a) of the Criminal Code of Canada and further between the same dates did by deceit, falsehood or other fraudulent means defraud Nelda Hanes and her estate of a sum of money exceeding $5,000 contrary to section 380(1)(a) of the Criminal Code of Canada.

2 Counsel for the accused has brought an application to exclude evidence obtained from Canada Customs and Revenue Agency, specifically a report reviewing the financial situation of Nelda Hanes and Clair Murdock prepared by Darlene Brown a Policy Analyst attached to the Investigation Directorate of the Department.

3 The report is based entirely upon information and documentation obtained by Detective Constable Weekes of the Ontario Provincial Police during the course of his investigation into the two crimes alleged. Some of the information came from the original complainant in the case, Mr. Douglas Grenkie, a solicitor acting for the estate of Nelda Hanes.

4 Based on the information received in the course of the investigation Detective Weekes applied for and obtained two warrants to search the financial records of the accused Clair Murdock. No objection is taken in this proceeding to the validity of the informations to obtain those warrants, nor the execution of the warrants, which defense acknowledges to be lawful.

5 The fruits of the investigation conducted by Detective Weekes were compiled into a number of volumes of evidence. Detective Weekes believed that the accused had stolen

money from the estate of Nelda Hanes. As a result Detective Weekes shared the fruits of his investigation with Canada Customs and Revenue Agency during the month of November 2001. Further information was provided in January 2002.

6 During a meeting in January of 2002 it was decided that a report for use at trial would be prepared by Darlene Brown, thus saving money to the Ontario Provincial Police by not having to retain outside accounting forces to prepare the report. The report has been filed on this Voir Dire and I conclude that it would be a most helpful document to assist the jury in understanding the various financial data that was seized.

7 I find that all times Detective Weekes acted in good faith in sharing the information that he had with Revenue Canada. I find that he had a reasonable suspicion that if in fact the accused had stolen the money involved in the estate he would not have declared it as income for income tax purposes.

8 Darlene Brown testified that Canada Customs and Revenue Agency receives information from police agencies on a "very frequent" basis and that in fact the Agency encourages the practice, going so far as visiting police agencies in an effort to encourage the sharing of information that might establish tax evasion. The benefit of this cooperation is ultimately to the taxpayers of Canada because those who evade tax shift a greater burden of tax on those who honestly do not evade tax.

9 The relationship, however, is a one way street so far as the information provided to Revenue Canada is concerned. Because of the statutory restraints of the Income Tax Act, tax authorities are not permitted to offer police agencies any information concerning taxpayers.

10 I find that Ms. Brown at no time shared any protected information with Detective Weekes and that her report as based entirely upon information and documentation that he provided to her. At the moment Revenue Canada has frozen any action concerning Mr. Murdock pending the outcome of this trial.

11 Mr. Byrne wishes to obtain an order declaring the report inadmissible on the basis that the foundational evidence of the report was provided to Ms. Brown in contravention of Mr. Murdock's rights under the Canadian Charter of Rights and Freedoms. Specifically, he argues that the possession of the information in the hands of Canada Customs and Revenue is not in accordance with prior judicial authorization.

12 I have some difficulty understanding the submission but presumably this would mean that notwithstanding the information has already been obtained by the O.P.P. pursuant to a lawfully obtained search warrant, a judge would either have to issue a new warrant to search and seize the information involved based upon an information on oath provided by an employee of Revenue Canada or alternatively, authorize a sharing of this information in accordance with the provisions of section 490(15) of the Criminal Code.

13 In my view proceeding under either route presupposes the affiant possesses specific knowledge concerning the material that has been seized. However, Canada Customs and Revenue would be in a classic catch 22 situation, because if the material that is subject to seizure could not be shared in advance then the affiant would have no knowledge as to what might be seized. This would create an impossible dilemma, independent of the

fact that it is completely impractical. I find that it would encourage a legal fiction and do damage to the image of the judicial process.

14 I find that the sharing of the information with Canada Customs and Revenue is entirely reasonable in these circumstances. The sharing has occurred between sister law enforcement agencies. Both agencies are bound to uphold the laws of Canada, and no extra-territorial jurisdictions are involved. The information has been seized pursuant to a validly executed warrant and thus any expectation of privacy in the information is greatly reduced if not altogether extinguished, for the purposes of the administration of Canadian law.

15 This is not a case where a less stringent regime used to gain evidence is being used to feed a regime where the requirements are more stringent as was a concern cited in R. v. Law, [2002] 1 S.C.R. 227, 160 C.C.C. (3d) 449 (S.C.C.) p. 23, which in turn cited the concern of the same court in R. v. Colarusso [1994] 1 S.C.R. 20. For example, if Canada Customs and Revenue had obtained information from Mr. Murdock in the exercise of it's audit powers and proceeded to share this information with the Ontario Provincial Police in order to advance a Criminal Code offence then it could well be argued that such activity violated the Charter rights of the accused and legitimate privacy expectations. In the present case however, I find the situation to be entirely opposite.

16 Mr. Byrne further argues that the indiscriminate copying of the document provided to Detective Weekes to Canada Customs and Revenue and the production of a report therefrom is not different really than the conduct found to be constitutionally objectionable in Law, (supra). I cannot agree.

17 In Law the accused had reported his safe to be stolen. One cannot imagine a higher expectation of privacy than in one's own safe. The safe was found abandoned and opened in a field. A police officer, thinking Mr. Law might be breaching the G.S.T. reporting requirements, copied documents found in the safe and used them to advance a prosecution contrary to the Excise Tax Act. The Supreme Court, properly in my view, deemed the evidence inadmissible on the basis of an unreasonable search and seizure.

18 In the case at bar the very records in issue that were copied by Canada Customs and Revenue were obtained through a lawful search in accordance with prior judicial authorization. As stated, the expectation of privacy in such circumstances is substantially reduced or perhaps even extinguished for the purposes of Canadian law enforcement.

19 In an era of cost cutting and increased police cooperation as mandated by the Campbell Commission arising out of the Bernardo Case, the proper sharing of information done in good faith and in the advancement of Canadian law enforcement must be encouraged.

20 As was stated by Justice Chevalier in Chowiere et al v. Canada Customs and Revenue Agency et al [2001] Q.C. Hull No. 550-773-000127-978: "It is clearly in the public interest that the R.C.M.P. should advise the proper authorities when they encounter information to suggest the commission of other offences." Also at page 45, "Law enforcement does not exist in watertight compartments, particularly in a Canadian federal system."

21 In the case at Barr there has been no unwelcome complicity as envisaged in Colarusso, (supra) there has been no evidence of bad faith on the part of Detective Weekes or any employee of Canada Customs and Revenue Agency and I find that there has been no breach of Mr. Murdock's rights pursuant to the Canadian Charter of Rights and Freedoms. Even if it could be said that there has been a breach of some sort, then I find that the evidence in the report would not be excluded in any event because no harm to the image of the administration of justice would be occasioned. The evidence was not conscripted from the accused. It is real, it is relevant and admissible.

McKINNON J.

qp/s/qw/qlgkw/qlkjg

Case Name:

Kennedy v. Leeds, Grenville and Lanark District Health Unit

Between
Mike Kennedy, Appellant, and
Leeds, Grenville and Lanark District Health Unit, Respondent

[2009] O.J. No. 3957

2009 ONCA 685

254 O.A.C. 133

99 O.R. (3d) 215

Docket: C49015

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, R.P. Armstrong and R.G. Juriansz JJ.A.

Heard: May 6, 2009.
Judgment: September 28, 2009.

(54 paras.)

Health law -- Public health -- Tobacco control -- Smoking bans to minimize environmental tobacco smoke (ETS) -- Provincial and territorial restrictions -- Bans on smoking in public places -- Appeal by Kennedy from convictions for five offences under Smoke-Free Ontario Act related to use of leased premises for smoking by its patrons dismissed -- Kennedy operated sports bar as private club which permitted smoking -- He was prosecuted and convicted under Act -- If legislature had intended to exempt private clubs from application of Act it clearly would have done so -- Premises in question constituted "an enclosed public space" within meaning of s. 9(1) of Act -- Smoke-Free Ontario Act, 1994, c. 10, s. 9(1).

Municipal law -- Powers of municipality -- Regulation of properties and activities -- Health -- Smoking in public places -- Appeal by Kennedy from convictions for five offences under Smoke-Free Ontario Act related to use of leased premises for smoking by its patrons dismissed -- Kennedy operated sports bar as private club which permitted smoking -- He was

prosecuted and convicted under Act -- If legislature had intended to exempt private clubs from application of Act it clearly would have done so -- Premises in question constituted "an enclosed public space" within meaning of s. 9(1) of Act -- Smoke-Free Ontario Act, 1994, c. 10, s. 9(1).

Appeal by Kennedy from convictions for five offences under the Smoke-Free Ontario Act related to the use of leased premises for smoking by its patrons. Kennedy leased premises that been operated as a sports bar. In order to avoid the provisions of the Act, he purported to operate the sports bar as a private club for people who paid a monthly membership fee of four dollars. Patrons of the sports bar could purchase food and alcoholic beverages, and they were also permitted to smoke on the premises. The club was said to have a membership in excess of 500 people. The Act prohibited smoking "in any enclosed public place." At issue was whether the premises fell within the definition of "enclosed public place." Kennedy was prosecuted and convicted under the Act. Both the justice of the peace at trial and the provincial court judge on appeal held that the premises constituted an enclosed public space.

HELD: Appeal dismissed. The Act was public welfare legislation designed to promote public health and safety. Such legislation attracted an interpretation that was consistent with its objective. The Act was clearly designed to eliminate smoking in public places and thus protect members of the public from contact with second-hand smoke. The word "public" was not defined in the Act. There was no attempt to limit or restrict its application in any way. People who joined the club were members of the public. If Kennedy's position were accepted, everyone who belonged to a private club would be exempt from the Act, even if the club chose to operate in a public place. Such an interpretation would defeat the Act's objective of protecting the public from second-hand smoke. If the legislature had intended to exempt private clubs from the application of the Act it clearly would have done so. The premises in question constituted "an enclosed public space" within the meaning of s. 9(1) of the Act. The definition of "enclosed public place" in the Act was not general, vague, ambiguous and/or uncertain in its scope and application.

Statutes, Regulations and Rules Cited:

Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20, s. 55

Interpretation Act, R.S.O. 1990, c. I.11, s. 10

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 116(2)

Smoke-Free Ontario Act, S.O. 1994, c. 10, s. 1(a)(i), s. 1(1), s. 1(1)(a)(ii), s. 9(1), s. 9(7), s. 9(11)

Appeal From:

On appeal from the judgment of Justice Stephen March of the Ontario Court of Justice dated April 8, 2008, dismissing an appeal from the conviction entered by Justice of the Peace Darrell F. Bartraw on March 7, 2007.

Counsel:

John Petrosoniak, for the respondent.

Mike Kennedy, acting in person.

The judgment of the Court was delivered by

R.P. ARMSTRONG J.A.:--

INTRODUCTION

1 The appellant leased premises in a hotel in Smiths Falls, which had been operated as Do Little's Sports Bar & Grill ("the premises"). In order to avoid the provisions of the *Smoke-Free Ontario Act, 1994*, c. 10 (the "Act"), the appellant purported to operate the sports bar as a private club for people who paid a monthly membership fee of $4.00.

2 The appellant was prosecuted under the Act and convicted of five offences related to the use of the premises for smoking by its patrons.

3 The Act prohibits smoking "in any enclosed public place". The central issue in the prosecution was whether the premises fell within the definition of "enclosed public place". Section 1(1) of the Act defines "enclosed public place" as follows:

> "enclosed public place" means,
>
> (a) the inside of any place, building or structure or vehicle or conveyance or a part of any of them,
>
> (i) that is covered by a roof, and
> (ii) to which the public is ordinarily invited or permitted access, either expressly or by implication, whether or not a fee is charged for entry, or
>
> (b) a prescribed place

Both the justice of the peace at trial and the provincial court judge on appeal held that the premises constituted an enclosed public space. The convictions followed accordingly.

4 The matter now comes before us by way of leave to appeal, granted by R.A. Blair J.A. on two questions:

> (i) Do the premises regarding which the charges were laid constitute an "enclosed public place" within the meaning of s. 9(1) of the Act?
> (ii) Is the definition of "enclosed public place" in the Act general, vague, ambiguous and/or uncertain in its scope and application?

5 For the reasons that follow, I conclude that the premises in question constituted an "enclosed public place". I further conclude that the definition of "enclosed public place" in the Act is not general, vague, ambiguous and/or uncertain in its scope and application.

THE FACTS

6 The appellant was the organizer and operator of Smokers' Choice/Non-Smokers' Choice, a not-for-profit club (the "club"). Membership in the club was solicited by recruiters who approached members of the public who were smokers. The prospective members were given application forms which were also available at the door of the premises.

7 The membership application form, which was signed by the prospective member, contained the following declaration:

> **AS A MEMBER I AGREE TO COMPLY WITH THE FOLLOWING RULES;**
>
> * I accept second hand smoke at private functions
> * I will not engage in the use of drugs
> * I will not permit entry to the general public
> * I will not enter if intoxicated
> * I will not jeopardize the enjoyment of other members

8 The club was said to have a membership in excess of 500 people from Smiths Falls and the surrounding communities, including Ottawa.

9 No change was made to the interior of the premises other than to remove the "No Smoking" signs and place ashtrays on the tables. The "Do Little's Sports Bar and Grill" signs remained both inside and outside the premises. There was an electric "OPEN" sign in the window. There were no signs prohibiting entry by the public, although one sign advised patrons not to enter if sensitive to second-hand smoke.

10 The operation of the premises was carried out by independent contractors and volunteers under the supervision of the appellant.

11 Patrons of the sports bar, as before, could purchase food and alcoholic beverages. However, they were also permitted to smoke on the premises.

12 On September 8, 2006, in response to a complaint, an inspector from the Leeds, Grenville and Lanark District Health Unit conducted an inspection of the premises. He observed that there were no "No Smoking" signs posted and there were ashtrays on the tables. He made a return visit on September 13, 2006. After the appellant refused him entry, the inspector looked through a window and saw a person sitting in the bar area while holding lighted tobacco. He also observed tobacco smoke in the premises. His final visit took place on September 20, 2006. The inspector observed the appellant coming out of the premises with a partially smoked cigarette in his hand. The inspector presented his credentials to the appellant and explained that the Act authorized his entry for the purpose of conducting an inspection. Nonetheless, the appellant again denied him entry.

13 As a result of his observations at the premises, the inspector laid an information against the appellant in respect of five offences under the Act:

(i) as a proprietor of an enclosed public place, he failed to post signs prohibiting smoking - s. 9(6)(c) of the Act;
(ii) as a proprietor of an enclosed public place, he failed to insure that no ashtrays remained in the enclosed public place - s. 9(6)(d) of the Act;
(iii) as a proprietor of an enclosed public place, he failed to insure compliance with the no smoking requirements - s. 9(6)(a) of the Act;
(iv) he obstructed an inspector from conducting an inspection - s. 14(16) of the Act;
(v) he was smoking tobacco or holding lighted tobacco in an enclosed public place - s. 9(1) of the Act.

THE TRIAL

14 The trial of the charges proceeded before Justice of the Peace Bartraw (the "trial judge") on March 7, 2007. The central issue was whether the premises were an "enclosed public place" within the meaning of the Act. The trial judge said:

> It may very well be that you are a member of an organization but that does not stop you from being a member of the public of the Province of Ontario and the legislature's intent was to protect members of the public of the Province of Ontario from second hand smoke and smoke and that is why they have made these laws.
>
> So whether you are signing a membership card or not, you are still a member of the public of the Province of Ontario. You should not have to be put into a situation where your health is at risk through smoking and that is why they put in these laws. So clearly when they made the definition under sub-section 1 of this Act, regarding an enclosed public place and when they say it is covered which is not an issue to which the public is ordinarily invited or permitted access either expressly or by implication, whether or not a fee is charged, they are speaking of all members of the public whether you are a member of a club or not.

15 Convictions followed and the appellant was fined a total of $3,530.00.

THE ONTARIO COURT OF JUSTICE APPEAL

16 The appeal, pursuant to s. 116(2) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended, was heard by Justice S. March of the Ontario Court of Justice on January 3, 2008. The appeal judge noted that the trial had proceeded on the basis that if the prosecution established the premises, operated by the appellant, were an "enclosed public place", then convictions would follow as the other elements of the offences had been made out. The appeal judge adopted a purposive approach to the definition of "enclosed public place". He also relied on this court's judgment in *R. v. D'Angelo* (2002), 8 C.R. (6th) 386 (Ont. C.A.). In that case, the appellant was prohibited under s. 161 of the *Criminal Code* from attending a public swimming area where persons under the age of 14 might reasonably be present. He was arrested for swimming in his condominium swimming pool when

minors were present. The pool was restricted to the 8,000 members of the condominium club. The court had no difficulty in concluding that the swimming pool was a public swimming area. At para. 19 of his reasons, MacPherson J.A. said:

> Finally, I turn to a consideration of the purpose of s. 161 of the Code. Section 161 is contained in Part V of the Code which deals with, inter alia, sexual offences. Many of the provisions in this part of the Code are designed to protect children from sick adults who prey on them for purposes of selfish sexual gratification. Adopting a narrow definition of "public swimming pool" - for example, which excluded such large facilities as Wet and Wild Kingdom or Canada's Wonderland - would be a disservice to a particularly vulnerable group in Canadian society.

17 Similarly, the appeal judge in this case concluded:

> In applying the analysis set out in the D'Angelo case, this Court is satisfied that the decision of the Justice of the Peace was not unreasonable.
>
> The SFOA is to be interpreted broadly so as to attain the objectives of the SFOA which is to protect people from the hazard of smoking, including second hand smoke.
>
> It was clearly open for the Justice of the Peace to find that a group of people with approximately 578 members who are prepared to accept the hazard of second hand smoke, are still members of the public and therefore covered by the SFOA.

18 The appeal judge therefore upheld the convictions.

THIS APPEAL

19 Both the appellant and respondent seek the leave of the court to introduce new material on appeal. The respondent moves to have the court consider the following documents:

(i) the statement of the Minister of Health of 15 December 2004 on the tabling of the legislation to create the Act.
(ii) the statement of the Minister of Health of 15 February 2005 on moving the second reading of the legislation.
(iii) the statement of the Minister of Health of 5 September 2006 to the Standing Committee on Estimates.

The above statements relate to the intended purpose of the Act and the legislature's intent that the Act apply to legion halls and private clubs.

20 The appellant, in a responding motion, relies upon a statement made by the Minister of Health to the Standing Committee on Estimates on September 5, 2006 to the effect that the Act was the mirror image of the City of Ottawa no smoking bylaw. Based on that statement, the appellant seeks to have admitted a raft of material concerning the Ottawa

bylaw for the purpose of establishing that the bylaw did not apply to private clubs and by analogy, the Act does not apply to private clubs.

21 Additional materials sought to be entered into evidence by the appellant included: the minutes of meetings of committees of the Ottawa city council, various publications of the Ministry of Health and Hansard reports of the debates in the Ontario legislature concerning the Act. He also sought to tender in evidence a transcript of an interview on an Ottawa radio station talk show with the Chief Medical Officer of Health for the City of Ottawa.

22 Both the appellant and the respondent frame their motions as motions for the admission of fresh evidence. In my view, this material is not the kind of material that is typically received as fresh evidence, which must be assessed in accordance with the criteria articulated in *Palmer v. Palmer*, [1980] 1 S.C.R. 759. The *Palmer* criteria are properly reserved for fresh evidence that goes to adjudicative facts. It seems to me that we can consider this additional material on appeal to assist in statutory interpretation if the interests of justice so warrant. The interests of justice require a consideration of the potential cogency of the material, the unfairness, if any, occasioned to the other side by receiving the material on appeal and the court's ability to effectively assess that material.

23 In respect of the Hansard evidence, the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, has said that Hansard evidence is a legitimate source of assistance when a court is interpreting the provisions of a statute. At para. 35, Iacobucci J. said:

> Although the frailties of *Hansard* evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, Sopinka J. stated:
>
> > ... until recently the courts have balked at admitting evidence of legislative debates and speeches ... The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of *Hansard* evidence, it should be admitted as relevant to both the background and the purpose of legislation.

24 In *Re Canada 3000 Inc.*, [2006] 1 S.C.R. 865, Binnie J. relied on Hansard evidence and common sense to establish the meaning of the word "owners" in s. 55 of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20. In doing so, he referred to the "limited weight" of Hansard evidence.

25 I do not perceive any unfairness in considering the Hansard material. First, both parties seek to rely on Hansard evidence to advance their case. Second, if Hansard evidence were admitted at trial it is doubtful that either side could have done anything more with the evidence than they could do now on appeal. Hansard evidence is not comparable to the evidence of a live witness who would be subject to cross-examination and whose

evidence is better heard by the trier of fact. It is difficult to see how either side would suffer any disadvantage in the admission of this evidence in the Court of Appeal.

26 The Hansard references proffered by the respondent support its position and confirm the interpretation placed on s. 9(1) of the Act by the courts below to the effect that the legislature did not intend to exempt private clubs from the reach of the Act.

27 I do not agree that the material concerning the Ottawa bylaw would be of any relevance or assistance in determining the legislature's intention regarding the definition of "enclosed public place" in the Act. Also, I do not find that either the publications of the Ministry of Health or the transcript of the radio interview with the Chief Medical Officer of Health to be of any assistance.

28 I now turn to the merits of the appeal.

(i) Do the premises regarding which the charges were laid constitute an "enclosed public place" within the meaning of s. 9(1) of the Act?

29 I repeat the relevant words of the Act for convenient reference. Section 9(1), the offence section of the Act, provides:

> No person shall smoke tobacco or hold lighted tobacco in any enclosed public place or enclosed workplace.

Section 1(1) of the Act, the definition section, reads:

> "enclosed public place" means,
>
> (a) the inside of any place, building or structure or vehicle or conveyance or a part of any of them,
>
> (i) that is covered by a roof, and
> (ii) to which the public is ordinarily invited or permitted access, either expressly or by implication, whether or not a fee is charged for entry, or
>
> (b) a prescribed place

(a) The Position of the Appellant

30 The appellant concedes that the premises satisfy s. 1(a)(i) of the Act; namely, the premises are the inside of a place that is covered by a roof. The sole issue on this appeal is whether the premises are a place "to which the public is ordinarily invited or permitted access, either expressly or by implication, whether or not a fee is charged for entry" as set out in s. 1(1)(a)(ii) of the Act.

31 The appellant takes the position that the operation of the premises constitutes a private club to which the public is not ordinarily invited or permitted access. Entry to the premises is granted only to club members who must establish their membership in the club

at the door by presenting their membership cards. The premises therefore do not fall within the language of the definition of "enclosed public place" under the Act.

32 The appellant also submits that the use of the word, "means", as opposed to "includes" in the definition section indicates the intention of the Legislature to apply a restrictive approach to the definition of "enclosed public place".

33 The appellant cites a number of cases in support of his position. He places particular emphasis on two decisions of the House of Lords: *Dockers' Labour Club and Institute Ltd. v. Race Relations Board*, [1976] A.C. 285 and *Charter v. Race Relations Board*, [1973] A.C. 868. These dealt with allegations of racial discrimination and the meaning of "a section of the public" in the *Race Relations Act, 1968* (U.K.), C. 71. Both cases are dated and, in my view, are not relevant to the issue before this court.

34 The appellant also places considerable weight on the judgment of the Supreme Court of Canada in *R. v. Labaye*, [2005] 3 S.C.R. 728. In that case, the appellant was convicted of keeping a common bawdy house under s. 210 of the Criminal Code. He operated a club that facilitated group sex. Only members and their guests had access to the club premises. Group sex took place on the third floor of a commercial establishment, which was separated from the rest of the premises by two doors. One of the doors was locked with a numbered key pad and marked "Privé". Only those who were inclined to group sex activity were allowed to participate.

35 McLachlin C.J.C., writing for the majority, discussed the kinds of harm or risk of harm necessary to found a conviction in this kind of case. She referred *inter alia* to "the harm of public confrontation with unacceptable and inappropriate conduct". She further observed at para. 42 of her reasons:

> Since the harm in this class of case is based on the public being confronted with unpalatable acts or material, it is essential that there be a risk that members of the public either will be unwillingly exposed to the conduct or material, or that they will be forced to significantly change their usual conduct to avoid being so exposed.

The Chief Justice went on to conclude that on the facts of that case, there was no evidence of the kind of harm necessary to found a criminal conviction.

36 The court in *Labaye* was pre-occupied with what conduct is appropriately made subject to criminal sanction. There is no issue in this case of an adequate foundation for a criminal conviction.

37 I am not persuaded that the judgment of the court in *Labaye* is at all helpful in ascertaining the scope of the definition of "enclosed public place" under the Act and, in particular, whether the premises in issue constitute a place "to which the public is ordinarily invited or permitted access".

38 The appellant also submits that the common law of trespass to land and the common law of privacy assist in the determination of whether the premises constituted an "enclosed public place". I do not agree.

39 The appellant further questions the lawfulness of the inspector's entry and attempted entry into the premises. This issue is not before us on this appeal.

(b) The Position of the Respondent

40 The respondent submits that the Act is a public welfare statute, designed to promote public health and safety, and should be interpreted in a manner consistent with the purpose and objective of the legislative scheme: see *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.).

41 The respondent relies on s. 10 of the *Interpretation Act*, R.S.O. 1990, c. I.11, in force at time of offences, which reads:

> Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

42 The respondent notes that the Act exempts residential care facilities; psychiatric facilities; facilities for veterans; guest rooms in hotels, motels or inns; and scientific testing research facilities from its application. No mention is made of private clubs. The respondent concludes that the legislature would have expressly excluded private clubs if it had so intended.

ANALYSIS

43 The modern approach to statutory interpretation is well known:

> Today there is only one principle or approach namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See E. Driedger, *Construction of Statutes*, 2nd ed. (Toronto, Ont.: Butterworths, 1983); *R. v. Bell ExpressVu Ltd. Partnership*, [2002] 2 S.C.R. 559 at para. 26.

44 I agree with the respondent that the Act is public welfare legislation designed to promote public health and safety. Such legislation attracts an interpretation that is consistent with its objective. In *Ontario (Ministry of Labour) v. Hamilton (City)* at para. 16, this court said:

> Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

Similarly, in *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (C.A.) at para. 22, this court said:

> The *Occupational Health and Safety Act* is a public welfare statute. The broad purpose of the statute is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. It should be interpreted in a manner consistent with its broad purpose.

45 Read as a whole, the Act is clearly designed to eliminate smoking in public places and thus protect members of the public from contact with second-hand smoke. The word "public" is not defined in the Act. There is no attempt to limit or restrict its application in any way. As I see it, people who join the club are as much members of the public as are members of a swimming club or tennis club.

46 In this case members of the "smoking public" were approached and recruited to patronize the former sports' bar in the guise of joining a private club. While the club was said to be a non-profit operation it ran essentially as before, except that admission was restricted to those members of the public who paid four dollars a month and accepted the club's simplistic rules.

47 If the appellant's position was accepted, everyone who belonged to a private club would be exempt from the Act, even if the club chose to operate in a public place. Such an interpretation of the Act would defeat its objective of protecting the public from second-hand smoke. The approach taken by this court in *D'Angelo* supports the proposition that a narrow interpretation of "enclosed public space" would be wholly inappropriate.

48 If the legislature had intended to exempt private clubs from the application of the Act it clearly would have done so. As the respondent pointed out, ss. 9(7) - (11) of the Act set out a narrowly defined set of exemptions from s. 9(1) of the Act. It is significant that private clubs are not included in this list of exemptions. As indicated above, the statements in the legislature of the Minister of Health confirm this view.

49 In my view the approach which I take is consistent with the approach taken by the Saskatchewan Court of Appeal in *Albertos Restaurant v. Saskatoon (City)* [2001] 6 W.W.R. 214. In the Saskatchewan case the court had the opportunity to consider the words "any enclosed public space" in a Saskatoon by-law regulating smoking in restaurants. Thirty-five restaurants brought an action to have the by-law set aside. The restaurants argued, *inter alia*, that although they invite the general public into their premises, they reserve the right to refuse entry to anyone they choose, therefore their premises were not public places within the meaning of the by-law.

50 I note that "enclosed public place" was not defined in the by-law and the facts of *Albertos Restaurant* differ significantly from this case. That said, I find the Saskatchewan court's response to the arguments advanced by counsel for the restaurants to be helpful and informative.

> We cannot agree with their argument. The term "public place" as used in s. 142 is modified by the words which follow: "including ... any building or part of a building that is open to the public." The words "open to the pub-

> lic", in their plain and ordinary meaning, include places to which "members of the public are customarily invited and admitted" as described in para. 6 of the agreed statement of facts. The reservation of the right to deny access to anyone, or to remove anyone, does not alter the fact of the general invitation of the public. In sum, a place to which the public is invited is clearly "open to the public". If the legislators had intended to restrict the scope of s. 142 to places to which the public had a right of access, as opposed to a revocable invitation to enter, they would have said so.
>
> Furthermore, this interpretation conforms with the obvious purpose of s. 142: to permit a municipality to protect public health by regulating smoking in places where the public gathers, and to thereby protect the public from the deleterious effects of second hand smoke. To confine the municipality's power to legislate to places to which the public has a right of access would render the legislation almost meaningless.

51 In conclusion I am satisfied that the premises in this case constitute "an enclosed public space" within the meaning of s. 9(1) of the Act.

(ii) Is the definition of "enclosed public space" in the Act, general, vague, ambiguous or/uncertain in its scope and application?

52 As noted by Professor Sullivan in *Driedger on the Construction of Statutes*, 4th ed. (Markham, On.: LexisNexis Butterworths, 2002), at 385-386, the vagueness doctrine involves a consideration of "whether the legislation can be given a sensible meaning through interpretation, whether it provides an adequate framework for resolving interpretative doubt through reasoned legal analysis."

53 Having concluded above that private clubs are not exempted from the Act and that the premises in issue fall within the definition of an "enclosed public place" in s. 9(1) of the Act, I am satisfied that the definition is not general, vague, ambiguous and/or uncertain in its scope and application. In my view, the definition of "enclosed public place" in the Act is capable of interpretation through reasoned legal analysis.

DISPOSITION

54 I would answer "yes" to the first question and "no" to the second question. I would therefore dismiss the appeal.

R.P. ARMSTRONG J.A.
D.H. DOHERTY J.A.:-- I agree.
R.G. JURIANSZ J.A.:-- I agree.

Case Name:

Ontario (Minister of Agriculture and Food) v. Georgian Bay Milk Co.

Between
The Minister of Agriculture and Food and Dairy Farmers of Ontario, Plaintiffs (moving Parties), and Georgian Bay Milk Company Ltd., Chris Birch, Andrew Streutker, Joban Farms Ltd., Albert Haemmerli, Almac Holsteins Limited, Laurence Mackay, Henry Bloemert, Quality Cheese Inc. and BTU36094 Group Ltd., Defendants (Respondents)

[2008] O.J. No. 485

169 A.C.W.S. (3d) 1126

Docket: 07-CV-335186PD3

Ontario Superior Court of Justice

L.A. Pattillo J.

Heard: November 13, 2007.
Judgment: February 13, 2008.

(79 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Considerations affecting grant -- Requirement to exhaust available remedies -- Interlocutory or interim injunctions -- Statutory injunction issued against milk transporter restraining transporter from further violations of Milk Act in transporting milk without authorization of Dairy Farmers of Ontario -- Injunction not granted against farmers selling milk for export without quotas because Dairy Farmers and Minister of Agriculture and Rural Affairs failed to avow themselves of enforcement provisions of Milk Act -- No evidence showed farmers' conduct placing public health and safety at risk -- Milk Act, ss. 1, 7, 21, 22.

Health law -- Public health -- Food and drugs -- Statutory injunction issued against milk transporter restraining transporter from further violations of Milk Act in transporting milk without authorization of Dairy Farmers of Ontario -- Injunction not granted against farmers

selling milk for export without quotas because Dairy Farmers and Minister of Agriculture and Rural Affairs failed to avow themselves of enforcement provisions of Milk Act -- No evidence showed farmers' conduct placing public health and safety at risk.

Natural resources law -- Agriculture -- Statutory injunction issued against milk transporter restraining transporter from further violations of Milk Act in transporting milk without authorization of Dairy Farmers of Ontario -- Injunction not granted against farmers selling milk for export without quotas because Dairy Farmers and Minister of Agriculture and Rural Affairs failed to avow themselves of enforcement provisions of Milk Act -- No evidence showed farmers' conduct placing public health and safety at risk.

Motion by Minister of Agriculture and Rural Affairs and Dairy Farmers of Ontario for interlocutory injunction restraining several farmers from continuing to market milk unless they acquired marketing quota and from marketing milk other than through Dairy Farmers -- Motion by Minister and Dairy Farmers for interlocutory injunction restraining BTU from buying or selling milk produced by Ontario farmers except through Dairy Farmers and from transporting milk without being appointed transportation agent of Dairy Farmers -- Defendant farmers were licensed by Dairy Farmers but held no quota -- Were selling milk to BTU, Ontario corporation which sold milk to buyers in United States -- Farmers were entitled to sell milk for export without quota as part of Commercial Milk Export Program which deregulated export milk contracts in Ontario -- Program no longer permitted by regulatory changes which took place in 2003 -- Farmers appealed to Agriculture, Food and Rural Affairs Tribunal, objecting to blanket application of Dairy Farmers regulations and seeking involvement of federal government -- Tribunal ordered Dairy Farmers to exempt farmers from quota requirements -- Minister rescinded Tribunal's decision in July 2003, but granted farmers transition period to November 2003 to acquire quota or cease production -- Interim stay granted to farmers when they applied for judicial review of Minister's decision, permitting farmers to continue production and export of milk to United States -- Application was dismissed in 2005 -- Farmers declared subject to provincial Milk Act and regulations despite fact they exported all milk they produced -- Court found Ontario's milk marketing program was validly enacted and that Dairy Farmers had authority to enforce it -- Subsequent applications by farmers for leave to appeal to Court of Appeal and Supreme Court dismissed -- Final stay granted pending outcome of these applications expired May 2007 -- Farmers continued to produce milk and sell it to BTU without acquiring quota -- Some ceased to do so before hearing of motion -- Minister and Dairy Farmers discontinued motion against these farmers -- HELD: Motion for injunction against defendant farmers dismissed; and motion for injunction against BTU allowed -- Injunction issued restraining BTU from carrying on business as transporter of milk without authorization of Dairy Farmers until trial -- To obtain injunction against BTU, Dairy Farmers needed to show defendants were committing offences under Milk Act, but did not have to establish irreparable harm -- BTU was clearly transporter of milk as defined in Act -- BTU engaged in transportation of milk without authorization from Dairy Farmers in contravention of Act -- Farmers were not enumerated persons against whom statutory injunction could be obtained -- Evidence clearly established farmers were engaged in production and sale of milk without required quota, therefore Minister and Dairy Farmers made out prima facie case for injunction against farmers -- Injunction would force defendant farmers out of business -- Minister and

Dairy Farmers did not have to establish farmers' conduct was causing actual harm to obtain injunction -- Public interest in compliance with regulatory scheme favoured granting injunction -- No risk to public health or safety established by Minister and Dairy Farmers -- Farmers' conduct could not be considered extreme contempt of law in absence of any attempt by Minister and Dairy Farmers to avow themselves of enforcement provisions of Act.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101

Milk Act, R.S.O. 1990, c. M.12, s. 1, s. 1, s. 7(1)(6), s. 21, s. 22

Milk Act Regulation 761, R.R.O. 1990, Reg. 761, s. 44(3)

Milk General Regulation 07/07, s. 4(4)

Ministry of Agriculture, Food and Rural Affairs Act, R.S.O. 1990, c. M.16, s. 16, s. 18

Ontario Regulation 354/95, s. 5(s)

Counsel:

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Geoffrey Spurr, David Wilson and *Anne Tardiff* For Dairy Farmers of Ontario.

Julian Falconer and *Sunil S. Mathai* For the Defendants Andrew Streutker, Almac Holsteins Limited, Laurence Mackay, Henry Bloemert and BTU36094 Group Ltd.

[Editor's note: A corrigendum was released by the Court February 20, 2008; the correction has been made to the text and the corrigendum is appended to this document.]

L.A. PATTILLO J.:--

Introduction

1 This is a motion by the co-plaintiffs, the Minister of Agriculture and Rural Affairs (the "Minister") and Dairy Farmers of Ontario ("DFO") for an interlocutory injunction restraining the defendants Almac Holsteins Limited, Laurence MacKay, Henry Bloemert, Andrew Streutkes, Joban Farms Ltd. and Albert Haemmarli from continuing to market milk unless they acquire marketing quota and restraining them from marketing their milk, other than through the DFO.

2 The plaintiffs also seek an interlocutory injunction against the defendant BTU36094 Group Ltd., ("BTU") restraining it from buying or selling milk produced by Ontario milk producers except through DFO and from carrying on business as a transporter of milk without being appointed as a transportation agent of DFO.

3 At issue in this motion is whether the Minister and DFO who are responsible for the control and regulation of the production and marketing of milk in Ontario can obtain an interlocutory injunction from this court against the defendants who, except for BTU, are licensed dairy farmers who produce, market and sell milk, without quota and without mar-

keting through the DFO contrary to the clear requirements of the law governing the marketing and sale of milk in Ontario.

The Parties

4 The Ministry of Agriculture, Food and Rural Affairs oversees the regulation of the agriculture industry in Ontario as provided by the *Ministry of Agriculture, Food and Rural Affairs Act*, R.S.O. 1990, C. M. 16 (the "MAFRA Act"). The Minister is responsible for the administration of the law relating to agriculture and food in all their branches, and in particular with respect to this proceeding, the *Milk Act*, R.S.O. 1990, C. M-12, as amended (the "Milk Act").

5 DFO is a marketing board constituted under the Milk Act. DFO controls and regulates the production or marketing of milk in Ontario. DFO regulates marketing, in part, through a quota system and a marketing and transportation system that pools expenses for all producers in relation to the marketing of all milk acquired from producers.

6 The defendants against who the interim injunction is sought, Almac Holsteins, Laurence MacKay, Henry Bloemert, Andrew Streutker, Joban Farms and Albert Haemmerli (the "Defendant Producers"'), are active producers of milk in Ontario. They are licensed by the DFO but hold no quota. Prior to August 2007, the milk produced by the Defendant Producers was sold to Georgian Bay Milk Company. Since August 2007, the milk has been sold to BTU.

7 Georgian Bay Milk Company is an Ontario corporation which, up until August 2007, purchased milk from the Defendant Producers and others and sold it to three Ontario processors (including the defendant Quality Cheese Inc.), and buyers in the United States.

8 BTU is an Ontario corporation which was incorporated in July 2007. Since August 2007, BTU has replaced Georgian Bay Milk Company as the buyer of milk from the Defendant Producers. BTU sells the milk to buyers in the United States. At the outset of the hearing of the motion, with the consent of the Defendant Producers (except Joban Farms and Albert Haemmerli who did not appear) and BTU, I granted an order adding BTU as a defendant in the action and amending the plaintiffs' motion for an interim injunction and the Statement of Claim accordingly.

Background

9 The production and marketing of milk in Ontario and in Canada is controlled by a complex federal and provincial regulatory scheme. A detailed description of the legislative framework and factual background leading up to the issues in this motion is set forth in a decision of the Divisional Court in 2005 in a judicial review application involving the parties to this action (except BTU) (the "JR Application") (see: *Alan v. Ontario (Attorney General)* (2005), 76 O.R. (3d) 616 (Div. Ct.) at para. 2-31). What follows is a brief overview in order to place the present issues between the parties in context.

10 In August 2000, in response to the World Trade Organization ("WTO") ruling that Canada was improperly subsidizing its export milk industry, Canada implemented the Commercial Export Milk Program (the "CEM Program"). The CEM Program allowed producers and processors of milk to make contracts for the sale of milk for export without any involvement of provincial marketing boards like DFO. As a result of the CEM Program,

DFO de-regulated export milk contracts in Ontario. Milk producers were able to participate without holding quota and without marketing through DFO. DFO continued, however, to regulate the producers through licensing.

11 From at least June 2002, the Defendant Producers, and others, as a result of the CEM Program, sold milk to Georgian Bay Milk Company who in turn sold it and transported it to buyers in the United States. The Defendant Producers have been, at all times, licensed by DFO. Although they originally held quota in respect of their marketing of milk, they sold it and from at least June 2002, they have not held any quota.

12 Unfortunately the CEM Program did not resolve the concern of the WTO. In a ruling dated December 20, 2002, the WTO's appellate body held that milk marketed under the CEM Program was subsidized. As a result, on February 25, 2003, DFO rescinded the exemption from the Milk Act regulations permitting the CEM Program, and once again required that all milk producers in Ontario hold quota and market their milk through DFO.

13 As a result of DFO's action in rescinding the exemption, the Defendant Producers and others appealed to the Agriculture, Food and Rural Affairs Tribunal (the "Tribunal") as provided by s. 16 of the MFRA Act. The appellants objected to the blanket application of the DFO's regulations and sought the involvement of the Federal Government.

14 The appellants were successful, in part, on their appeal. The Tribunal ordered, among other things, that DFO obtain an opinion from the Federal Government concerning the appellants' program for unsubsidized export milk. In the interim, the Tribunal ordered DFO to exempt the appellants from the requirement to hold quota.

15 On July 23, 2003, the Minister, pursuant to s. 18 of the MAFRA Act, rescinded the Tribunal's decision and upheld DFO's actions in rescinding the exemption. The effect of the Minister's decision was to require the appellants (including the Defendant Producers) to acquire quota and sell their milk through DFO. As part of the decision, the Minister requested DFO to allow the appellants who were shipping milk to Georgian Bay Milk Company a transition period to November 30, 2003 to enable them to either acquire quota or cease production.

16 On November 18, 2003, the Defendant Producers, Georgian Bay Milk Company and others commenced the JR Application for judicial review of the Minister's July 23, 2003 decision. As part of their application, the applicants applied to the Divisional Court for and were granted an interim stay of the Minister's decision, enabling the Defendant Producers, among others, and Georgian Bay Milk Company to remain in operation producing and exporting milk to the United States pending the outcome of the application.

17 Also on November 2003, the Defendant Producers, Georgian Bay Milk Company and others again appealed to the Tribunal in respect of DFO's decision to require them to market milk with quota and only through DFO. The Tribunal subsequently rejected the appeal and the Tribunal's decision was confirmed by the Minister.

18 The JR Application was heard by the Divisional Court in February 2005, and the reasons for judgment of the court, dismissing the application, were reported, as noted, in *Alan v. Ontario, supra*.

19 In dismissing the JR Application, the Divisional Court held, following the Supreme Court of Canada decision in *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R 292, notwithstanding that the applicants (including the Defendant Producers and Georgian Bay Milk Company) exported all their milk from Ontario, they were subject to the provisions of Milk Act and its regulations which is valid legislation. The applicants also argued that DFO had no authority to regulate export trade, in the absence of a valid delegation or regulatory authority from the Federal Government. The court stated at para. 52:

> Given the provincial regulatory scheme for marketing milk in Ontario established by the Milk Act and the regulations described earlier, s. 8 of the Federal Dairy Regulations incorporate the Ontario legislation by reference and allow DFO to apply its regulatory scheme to the export trade in milk. In this case, DFO, exercising power delegated by the provincial government, has issued its General Milk Regulation 11/04, which provides in s. 3 that all milk producers must sell all of their milk to DFO and that no one else can buy milk from a producer. Because of s. 8 of the Federal Dairy Regulations, that provision of the DFO regulation applies to industrial milk defined for the export trade, which is the concern in this case.

20 Having held that Ontario's milk marketing program was validly enacted and that DFO had the authority to enforce it, the court then considered and upheld the validity of the Minister's decision of July 23, 2003.

21 Following the decision of the Divisional Court, the applicants applied to the Court of Appeal, [2006] O.J. No. 1891, for leave to appeal the decision. The application for leave was dismissed by the court on February 3, 2003. The applicants thereafter sought further leave to appeal from the Court of Appeal's decision to the Supreme Court of Canada, [2006] S.C.C.A. No. 266, which application was dismissed by the Supreme Court on February 22, 2007.

22 Throughout the course of the legal proceedings between the applicants and the Attorney General of Ontario, the Minister and DFO, three successive consent interim stay orders were put in place permitting the applicants, including the Defendant Producers and Georgian Bay Milk Company, to continue selling and marketing milk without holding quota and other than through DFO. As already noted, the first stay order was granted by the Divisional Court. The next stay order was granted by the Court of Appeal on February 21, 2006 and provided, in part, that it would remain in effect for 90 days following final disposition of proceedings before the Court of Appeal. The last stay order, dated September 20, 2006, was also issued by the Court of Appeal in respect of the applicants' leave application to the Supreme Court of Canada. That order provided, in part, that it would remain in effect until 90 days after the final disposition of the appellants' application for leave to appeal to the Supreme Court of Canada. As a result, therefore, the interim stay order expired on May 23, 2007, 90 days following the Supreme Court of Canada's dismissal of the leave application.

23 By letters both before and after May 23, 2007, to each of the applicants in the JR Application still marketing milk without quota, DFO and its counsel advised that, as a result of the final conclusion of the legal proceedings and the expiry of the stay, effective May 24, 2007, the milk marketed by each of them is subject to DFO regulations, including DFO Milk General Regulation 07/07 which provides, among other things, that every producer shall sell milk produced to DFO; that no person other than DFO shall buy milk from a producer; and no person can market milk in the absence of having quota.

24 On July 23, 2007, the defendant Chris Birch, on behalf of the Defendant Producers and others who continued to ship export milk to Georgian Bay Milk Company, initiated a hearing before the Tribunal, on the basis that DFO failed to hold a hearing in respect of certain issues raised by Mr. Birch. The issues raised at the Tribunal by Mr. Birch are as follows:

(a) That according to the March 26, 2005 Government of Canada Gazette Notice with respect to Ontario non-quota-holding producers, federal re-regulation will not result in any violation of the Dairy Products Marketing Regulations so long as the producers continue to be licensed under the Milk Act;
(b) That instead of retaliating against the Defendant Producers' activities, the Untied States authorities have inspected their farms and licensed them;
(c) That the federal government, in a brief circulated to the Ministry of Agriculture and Food, amongst others, is suggesting that non-quota holding dairy producers be permitted to engage in the export of milk to the United States.

25 Prior to the final expiry of the interim stay on May 23, 2007, a number of the applicants on the JR Application ceased their operations. One of the applicants acquired quota. Subsequent to May 23, 2007, and prior to the action being commenced on July 23, 2007, other applicants ceased their operations.

26 The evidence on the motion establishes that since May 24, 2007, the Defendant Producers MacKay, Streutker, Almac Holsteins and Bloemert have each been marketing milk, initially to and through Georgian Bay Milk Company and since August 2007 to and through BTU without having acquired quota.

27 Mr. Haemmerli and Joban Farms, who did not file any material on the injunction and who were not present or represented at the hearing, have, based on the evidence, ceased the marking of milk in or around July 2007. Joban Farms has sold its herd of approximately 90 cows to Mr. Streutker.

28 In early June 2007, Quality Cheese ceased purchasing milk from Georgian Bay Milk Company. The Minister and DFO have indicated that the action will be discontinued against it.

29 Mr. Birch ceased the marketing of milk in early June 2007.

30 As noted, Georgian Bay Milk Company which had purchased the Defendant Producers milk and, in turn marketed it to purchasers the United States and to three proces-

sors in Ontario, including Quality Cheese, ceased its activities in August 2007. In its place, the Defendant Producers caused BTU to be incorporated. The Defendant Producers are the shareholders of BTU. On August 29, 2007, BTU obtained an import permit from the United States Food and Drug Administration (the "FDA") permitting it to ship or transport milk into the United States.

31 In their Statement of Claim in the action, incorporating the amendments to the claim made upon the addition of BTU, the Minister and DFO seek the following relief in para. 1 against the defendants:

> a) an interim and a permanent injunction restraining the defendant milk producers from marketing milk unless they acquire marketing quota and sell their milk through DFO.
> b) an interim and a permanent injunction restraining the defendants, Georgian Bay Milk Company, BTU and Quality Cheese Inc., from marketing milk produced by Ontario milk producers except through DFO.

The Law

32 In the absence of the availability of a statutory injunction, the granting of an interim or interlocutory injunction in accordance with s. 101 of the *Courts of Justice Act*, R.S.O. 1990, C. 43 is governed by the three-part test set forth by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at para. 43. The tests are:

> 1. Is there a serious question to be tried?
> 2. Will irreparable harm be caused unless the injunction is granted?
> 3. Does the balance of convenience favour the granting of the injunction?

33 In the present case, in addition to the test in *RJR MacDonald*, the Minister and DFO also rely on s. 22 of the Milk Act which provides:

> 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, 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.

i) BTU

34 In *Canada v. IPSCO Recycling Inc.,* [2004] 2 F.C.R. 530 (FCTD), the court considered the issue of the granting of a statutory injunction to Her Majesty the Queen, as represented by the Minister of the Environment to enforce public rights. Dawson J. discussed

the principles which apply to the granting of a statutory injunction. The learned Judge stated as follows at para. 50 and 51:

> 50 There is, however, a significant distinction between an injunction authorized by statute and an injunction available to the attorney general at common law. This distinction is aptly illustrated in *Ontario (Minister of the Environment) v. National Hard Chrome Plating Co.* (1993), 11 C.E.L.R. (N.S.) 73 (Ont. Gen. Div.). There, the statutory provision with respect to the granting of an injunction contemplated an injunction to [page 543] "restrain" contravention of the statute. The Court concluded that because the statute only provided a basis for the issuance of a prohibitory injunction, a mandatory injunction was only available at common law at the request of the Attorney General suing in the public interest. Such common law relief was available only where the law was being flouted and the legislation was inadequate to protect the public interest.
>
> 51 On the basis of the authorities cited by the parties I am satisfied that where a statute provides a remedy by way of injunction, different considerations govern the exercise of the court's discretion than apply when an attorney general sues at common law to enforce public rights. The following general principles apply when an injunction is authorized by statute:
>
> * (i) The court's discretion is more fettered. The factors considered by a court when considering equitable relief will have a more limited application. See: *Prince Edward Island (Minister of Community and Cultural Affairs) v. Island Farm and Fish Meal Ltd.* (1989), 79 Nfld. & P.E.I.R. 228 (P.E.I. S.C. (A.D.)); *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 162 D.L.R. (4th) 203 (B.C.C.A.).
> * (ii) Specifically, an applicant will not have to prove that damages are inadequate or that irreparable harm will result if the injunction is refused. See: *Shaughnessy Heights Property Owners' Association v. Northup* (1958), 12 D.L.R. (2d) 760 (B.C.S.C.); *Manitoba Dental Association v. Byman and Halstead* (1962), 34 D.L.R. (2d) 602 (Man. C.A.); *Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press*, [2000] N.S.J. No. 139 (S.C.) (QL).
> * (iii) There is no need for other enforcement remedies to have been pursued. See: *Saskatchewan (Minister of the Environment) v. Redberry Development Corp.*, [1987] 4 W.W.R. 654 (Sask. Q.B.).
> * (iv) The court retains a discretion as to whether to grant injunctive relief. Hardship from the imposition and [page 544] enforcement of an injunction will generally not outweigh the public interest in having the law obeyed. However, an injunc-

tion will not issue where it would be of questionable utility or inequitable. See: *Saskatchewan (Minister of the Environment) v. Redberry Development Corp., supra*; *Maple Ridge (District) v. Thornhill Aggregates Ltd., supra*; *Capital Regional District v. Smith* (1998), 168 D.L.R. (4th) 52 (B.C.C.A.).

* (v) It remains more difficult to obtain a mandatory injunction. See: *Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press, supra*.

35 Based on the above summary of the principles that apply and having regard to the wording of s. 22 of the Milk Act, in order to be entitled to an injunction pursuant to s. 22, DFO, as a "marketing board" must establish *prima facie* that an offence under the Milk Act or its regulations, "has been or is being committed" by any "transporter, processor, distributor or operator of a plant." There is no need for it to establish irreparable harm or to pursue any other enforcement proceedings. Notwithstanding DFO establishes a *prima facie* case, however, the court still retains a discretion not to grant the injunctive relief.

36 DFO submits that BTU is a "transporter" within the meaning of s. 22 of the Milk Act and by contravening the regulations in purchasing milk from the Defendant Producers from the end of August 2007 and transporting it to buyers in the United States in the absence of the authority of DFO, BTU is committing an offence against the Milk Act and regulations. BTU submits that, on the evidence, it is not a "transporter" within the meaning of s. 22 of the Milk Act and accordingly, the section, by its wording, does not apply to it.

37 Section 1 of the Milk Act defines "transporter" to mean "a person transporting milk or cream." In my view, the evidence establishes, clearly, that BTU is a "transporter" within the meaning of s. 22 of the Milk Act and accordingly that section does apply to it.

38 Prior to August 2007, Georgian Bay Milk Company purchased the Defendant Producers' milk at their farm gate and was responsible for transporting it to the buyers both in Ontario and the United States. Georgian Bay Milk Company's parent, Great Lakes Farms Ltd. held an import permit issued by the FDA pursuant to which Georgian Bay Milk Company exported the milk into the United States. That permit expired at the end of August 2007.

39 BTU has seamlessly taken over where Georgian Bay Milk Company left off at the end of August 2007. BTU purchases the milk from the Defendant Producers and sells it to buyers in the United States. It arranges for the transportation of the milk to the United States and charges the cost back to the Defendant Producers.

40 The Defendant Producers and BTU submit that BTU is not a "transporter" within the meaning of the Milk Act because the evidence establishes that the transportation of the milk is being done by American trucks and drivers who pick the milk up at the Defendant Producers' farms and transport it to the United States. Regardless of who is actually transporting the milk, it is done for and on behalf of BTU. As noted, the FDA import permit, which was issued to BTU in late August 2007, and which permits the milk to be exported from Canada and imported into the United States describes BTU as the "Shipper". The permit enables BTU, by its wording to "ship or transport raw whole milk into the United States from Embro, Ontario, Canada." It is therefore BTU who is transporting the milk into

the United States. In my view, on the facts, BTU is clearly transporting milk and is therefore a "transporter" within the meaning of the Milk Act and is included in the enumerated persons against whom an injunction may be sought pursuant to s. 22 thereof.

41 Section 44 (3) of Regulation 761, R.R. 1990 Reg. 761, as amended, provides that no transporter shall engage in the purchasing or selling of milk or the trafficking in milk unless so authorized by the DFO. The evidence clearly establishes that BTU engages in those activities but is not authorized by the DFO. Section 21 of the Milk Act provides that every person who contravenes the Act or the regulations is guilty of an offence. Accordingly, DFO has established, on a *prima facie* basis that by carrying on its activities of purchasing milk from the Defendant Producers and selling, transporting and exporting it to United States buyers, BTU is committing an offence against the Milk Act and its regulations.

42 As noted above in *IPSCO Recycling*, notwithstanding that the applicant meets the applicable criteria for the granting of a statutory injunction, the court retains discretion not to grant it. In my view that discretion should not be exercised in this case. BTU was clearly set up by the Defendant Producers, well after the final termination of their legal proceedings, solely for the purpose of facilitating their continued activities, which are in breach of the Milk Act and regulations. It matters not that BTU's operation has met with the approval of the U.S. agriculture authorities or the FDA. Further, in my view, on the facts, the granting of the statutory injunction would be neither inequitable or of questionable utility.

43 DFO is therefore entitled to an injunction against BTU pursuant to s. 22 of the Milk Act restraining it from buying or selling milk produced by the Defendant Producers (or any other Ontario producer) except through DFO and from carrying on business as a transporter of milk without the authorization of DFO until trial.

ii) Defendant Producers

44 The Defendant Producers are not included in the enumerated persons listed in s. 22 of the Milk Act and against whom a statutory injunction can be obtained. Section 1 of the Milk Act defines "producer" as a "producer of milk, cream or cheese". This definition encompasses the activities of the Defendant Producers. Section 22 is therefore not available to DFO to enable it to obtain an injunction against the Defendant Producers.

45 In order to determine whether the Minister and DFO are entitled to an interlocutory injunction against the Defendant Producers pursuant to s. 101 of the *Courts of Justice Act*, it is necessary to consider the three-part test as set out above in *RJR MacDonald, supra*, at para. 43: is there a serious issue to be tried; will irreparable harm be suffered in the absence of granting the injunction; and the balance of convenience.

Serious Issue

46 The Supreme Court of Canada noted in *RJR MacDonald, supra*, at paras. 49 and 50, that the issue of whether an action contained a serious issue to be tried requires a determination based on a preliminary assessment of the merits of the action, that the plaintiff's claim is neither frivolous nor vexatious. It is a low threshold for the plaintiff to meet. There are, however, exceptions to the "serious issue" test. In *RJR MacDonald, supra*, at para. 51, the court stated:

> Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.

47 The present motion, in my view, falls within the second exception referred to by the Supreme Court of Canada. If the injunction requested against the Defendant Producers is granted, it will have the practical effect of ending the action. The claim by the Minister and DFO in the action seeks only an injunction, interim and permanent. The granting of the injunction against the Defendant Producers will determine the final issue. Further, the evidence indicates that in excess of 85% of the milk produced by the Defendant Producers is exported to the Untied States and that they cannot afford to purchase enough quota to be able maintain their current level of milk production. The result of the injunction will be that they will be forced out of business. As a result therefore, because of the harm which will be occasioned by the Defendant Producers if the injunction is granted, any benefit in the Defendant Producers proceeding to trial will be effectively removed by the granting of the injunction.

48 The Minister and DFO submit that the serious issue in this case, the validity of the Milk Act and its regulations, has already been finally determined between the parties. The Defendant Producers submit that there are serious issues to determine, as defined by their most recent appeal to the Tribunal and that those issues should be left to the determination of the Tribunal.

49 In my view, the only issue in the action is whether the Defendant Producers, by marketing and selling their milk as they are, are in violation of the Milk Act and the regulations. As the Minister and DFO submit, the issue of the validity of the legislation and the authority of the DFO has already been finally determined and is *res judicata* to the Defendant Producers. The current appeal by the Defendant Producers to the Tribunal and the issues they raise, in my view, have no bearing on the issues in the action. By their appeal, the Defendant Producers do not purport to challenge the provisions of the Milk Act and regulations that they are required to hold quota and market their milk through DFO nor do they dispute that their activities do not comply with the legislation.

50 Given that the only issue for determination in the action is whether the Defendant Producers are marketing and selling their milk in the absence of holding quota and other than through DFO, does the evidence establish a prima facie case? As noted above, the Supreme Court, in *RJR MacDonald* indicated that if the motion fell within one of the two enumerated exceptions, the court was required to engage in an extensive review of the merits as part of the first test. In my view this equates to the applicant (in this case the Minister and DFO) having to establish a *prima facie* case.

51 The evidence in this case in respect of the issue of whether the Defendant Producers are complying with the Milk Act and regulations concerning the marketing and sale of milk is neither detailed nor in dispute. The Minister and DFO have established that the

Defendant Producers (except for Joban Farms and Mr. Haemmerli) are clearly engaged in marketing and selling milk without quota and other than through DFO which activity is contrary to the regulations under the Milk Act. The Minister and DFO have therefore established a *prima facie* case.

52 Notwithstanding that in my view the Minister and DFO have met the higher onus required of them in respect of establishing the first test in this case that does not end the matter. As this is an interlocutory injunction, the tests of irreparable harm and balance of convenience must still be considered and applied (see: *RJR Macdonald, supra*, at para. 54).

Irreparable Harm

53 The Minister and DFO submit that the Defendant Producers by continuing to market and sell milk in the absence of holding quota and other than through DFO, in light if the history of the legal proceedings between the parties, are "flouting" the law. The Defendant Producers indicated on more than one occasion during the JR Application that if they were unsuccessful in those proceedings, they would have to acquire quota or cease production. The Defendant Producers have done neither subsequent to May 23, 2007. Their continuing breach of the Milk Act and regulations constitutes irreparable harm to the public interest which cannot be quantified or compensated for in monetary terms.

54 The Defendant Producers submit that they are not "flouting" the law. They submit that "flouting" requires repeated refusal on their part to comply with enforcement proceedings initiated by DFO. Notwithstanding that they challenged the regulatory scheme and lost, the Defendant Producers submit that, in effect, they are entitled to continue their activities until DFO initiates enforcement proceedings and it is determined that they are in violation of the Milk Act and regulations. The Defendant Producers further submit that the Minister and DFO have failed to establish irreparable harm because they have not produced any evidence that what the Defendant Producers are doing is in any way harmful to the public and particularly the health of the public.

55 Having regard to the fact that what the Minister and DFO are seeking is a public interest injunction, it is not incumbent upon them, in my view, to provide evidence of actual harm being occasioned by the Defendant Producers' conduct. In *RJR MacDonald, supra*, at para. 71, the Supreme Court of Canada stated, in part:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less harm than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will clearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

56 There is no question that the Minister and DFO are charged with the responsibility of enforcing the regulatory scheme in respect of, among other things, the marketing and sale of milk in Ontario. Further, to the extent that the Defendant Producers deliberately and wilfully violate the regulatory scheme such that their conduct constitutes extreme contempt of the law, such actions would constitute irreparable harm. The issue is whether the Defendant Producers' conduct amounts to extreme contempt of the law. As that issue is tied into a consideration of the balance of convenience, it is appropriate to consider that test at this stage.

Balance of Convenience

57 The balance of convenience involves a determination of which of the two parties to the motion will suffer the greater harm should the injunction be granted or not be granted, having regard to the circumstances before the court (*RJR MacDonald, supra,* at para. 62). In injunctions involving the public authority, it is in respect of the balance of convenience that the consideration of the public interest comes most into play.

58 The Minister and DFO submit that failure to grant the injunction will enable the Defendant Producers to continue their conduct in marketing and selling milk contrary to the regulatory scheme in place in the province. It will prevent DFO from carrying out its statutory mandate to regulate the milk industry. Finally, it will allow the Defendant Producers to circumvent the Minister's decision of July 23, 2003 which decision has been upheld by the courts.

59 There is no doubt that it is important that the regulatory scheme, established by the legislature, be followed and complied with by all participants. It exists, not only for the benefit of the public, but for the producers.

60 On the other hand, the granting of an injunction will have the effect of enabling DFO and the Minister to ignore the enforcement provisions of the Milk Act and the regulations. The Milk Act, and its regulations, contain the following varied enforcement provisions to ensure compliance with the legislation:

a) the cancelling or revoking of producers' licences (s. 4(4) of the Milk General Regulation 07/07);
b) the issuance of a cease and desist order as necessary to enforce the due observance and carrying out of the Milk Act and regulations (s. 5(s) of Ontario Regulation 354/95);
c) the imposition of penalties for failure to comply with or contravention of any term or condition of a licence or any provision of the Milk Act or regulations (s. 7(1)(6) of the Milk Act);
d) a charge of an offence of the Act or regulations (s. 21 of the Milk Act).

61 In addition, and as noted earlier in respect of BTU and the injunction remedy in s. 22 of the Milk Act, in granting the statutory injunction remedy to DFO under the Act, the legislature, in its wisdom, did not provide that such remedy would be available against the producers.

62 In *Attorney General for Ontario v. Ontario Teachers' Federation et al.* (1997), 36 O.R. (3d) 367 (Gen. Div.), the court dealt with a motion for an interlocutory public interest injunction to restrain the defendants from engaging in an unlawful strike contrary to ss. 63, 64 and 65 of the *School Boards and Teachers' Collective Negotiations Act*. MacPherson J. (as he then was) dismissed the motion. In dealing with the issue of balance of convenience, the learned judge considered the fact that the Attorney General had not made use of what MacPherson J. termed "robust enforcement provisions" in the Act in question prior to bringing the injunction application. MacPherson J. stated at p. 382:

> The courts have consistently held that a public rights injunction, brought by the Attorney General to restrain an alleged statutory breach, will only be granted in exceptional cases, and in particular where:
>
> a) there is repeated flouting of the law following determinations of illegality by the body entrusted with making those findings or there is a serious and established risk to public health and safety;
> b) the court is satisfied that the alleged breach of the law is clear; and
> c) the enforcement provisions of the statute in question have proven ineffective.
>
> See Robert Sharpe, *Injunctions and Specific Performance*, 2nd ed., paras. 3.190-3.240; and *Gourier, supra*, at pp. 491 and 500.

63 In *Ontario Teachers' Federation, supra*, MacPherson J. dealt with the question of what is meant by flouting of the law by way of a preliminary issue to the issue of irreparable harm. The Attorney General had submitted that once a court determines that a person is in violation of the law, it is unnecessary to consider, in an injunction application, whether the violation causes irreparable harm. The Attorney General relied on *Ontario (Attorney General) v. Berar Island Foundation* (1989), 70 O.R. (2d) 758 (H.C.J.) and *Attorney General for Ontario v. Grabarchuk* (1976), 11 O.R. (2d) 607 (Div. Ct.). In *Bear Island*, an injunction was granted to restrain the defendants from interfering with the construction of a road. The defendants had previously lost three different court proceedings with respect to their claims concerning the road and had disobeyed one injunction previously granted by the court. In *Grabarchuk*, the defendant had already been convicted on seven occasions of violating a public statute before the injunction motion was brought. MacPherson J. stated at p. 376:

> In Bear Island O'Leary J., and in Grabarchuk Reid J., both used the word flout' to describe the defendants' conduct, and linked the flouting of the law to their conclusion that the Attorney General need not demonstrate irreparable harm in order to obtain an injunction. The New Shorter Oxford English Dictionary defines flout' as follows at p. 981:
>
> > Flout: (verb) Treat or behave with disdain; mock; jeer; express contempt (for) by action or speech. Now usually denoting indirect expression: openly disregard (a law, an opinion, etc.).

> The conduct of the teachers does not, in my view, come close to this definition of flout, or to the conduct of the defendants in Bear Island Foundation or Grabarchuk.

64 In dealing with the issue of flouting as part of the three part test set forth above, MacPherson J. concluded that there had been no repeated flouting by the teachers and that the Labour Relations Board was the more appropriate forum for determining the issue of whether the teachers had violated the Act.

65 The Minister and DFO rely on the recent decisions of the Divisional Court in *Chicken Farmers of Ontario v. Drost* (2005), 258 D.L.R. (4th) 177 and of the Supreme Court of Canada in *Pelland, supra*.

66 In *Drost*, the respondent was producing and marketing chickens without quota. Chicken Farmers of Ontario, the marketing board, had advised and then twice ordered the respondent through formal Directions, to cease and refrain from the activity. The respondent did not comply with the directions nor did he appeal them through the administrative appeal system established by the legislation. CFO sought an injunction to restrain the respondents conduct. The motions judge dismissed the application on the ground that there was no irreparable harm as the CFO could be adequately compensated in damages. In allowing the appeal, the Divisional Court held that there would be irreparable harm to the integrity of the regulatory scheme if the respondents continued to ignore it. The Court further held that the balance of convenience favoured the granting of the injunction to prohibit the respondents from continuing to profit from their defiance of the legislation. In granting the injunction, the Divisional Court characterised the respondent's conduct as "knowingly and deliberately" ignoring the regulatory scheme.

67 In *Pelland, supra*, the Supreme Court of Canada upheld the Quebec Court of Appeal and the initial motions judge in respect of an injunction issued to restrain Mr. Pelland, a chicken farmer, from producing far more than his quota allowed. Mr. Pelland was a licensed producer who held quota. The marketing board imposed penalties on him in respect of his activities including reducing his quota to zero and imposing fines, all to no avail. The Quebec Court of Appeal, in upholding the injunction stated "the appellant has flagrantly violated the statutory and regulatory provisions validly enacted and ... the public interest favours the maintenance of the interlocutory injunction" ([2003] J.Q. No. 3331 (Que. C.A.) at para. 47).

68 In the present case, notwithstanding the legal history between the parties, it is my view that the conduct of the Defendant Producers, in the absence of the Minister and DFO utilizing the enforcement provisions of the Milk Act and regulations, does not constitute repeated flouting of the law. The Defendant Producers commenced their operations when the Milk Act and regulations permitted them to carry out such activities. They are and continue to be licenced by DFO as producers. Notwithstanding that they have continued to operate following a change in the regulations and thereafter in accordance with a stay pending final resolution of the validity of the scheme, in the absence of repeated refusal to comply with penalties, orders or other enforcement proceedings by DFO or orders of the court in respect of violation of the Milk Act and regulations, it cannot be said at this stage that the Defendant Producers are repeatedly flouted the law. Their conduct in continuing

does not, in my view, come close to the conduct referred to by the courts in Drost or Pelland, and which entitles a court to grant a public rights injunction.

69 The legislation dealing with the production and marketing of milk in this province creates a structure in respect of enforcement. The Milk Act and regulations, as noted, provide for many different and substantial enforcement proceedings to ensure compliance with the legislation. Further, the MAFRA Act, s. 16 provides, in part, that a person aggrieved by an order, direction, policy or decision of DFO may appeal to the Tribunal. That enforcement regime has been put in place by the legislature for a reason and should not be ignored.

70 Nor, in my view, have the Minister and DFO established that there is a serious and established risk to public health and safety. The Defendant Producers are licensed. There is no evidence they are not complying with the safety requirements of the Milk Act and regulations. Up until approximately mid 2007, DFO inspected the Defendant Producers regularly. The evidence is that they have been inspected by U.S. agriculture officials and that samples from each load of milk the Defendant Producers deliver to BTU are tested by a licensed person in New York State and by the University of Guelph, the results of which are sent by BTU to DFO. Notwithstanding this information, there is no evidence that the Defendant Producers' conduct which is complained of causes any risk to public health and safety.

71 With respect to the second requirement noted by MacPherson J., *supra*, a clear breach of law, it is clear in my view, for the reasons I have already outlined, that the Defendant Producers, by continuing to market their milk without quota and in the absence of DFO are in breach of the requirements of the Milk Act and regulations. Accordingly, the second factor referred to by MacPherson J. above is met.

72 The final factor, the ineffective nature of the enforcement provisions of the Milk Act and regulations has not been established because DFO and the Minister have not taken any steps to utilize such provisions against the Defendant Producers. The DFO submits that given the course of conduct of the Defendant Producers, there is no reason to believe that any enforcement proceedings by it pursuant to the legislation would result in compliance by the Defendant Producers. Such a submission, in the absence of any steps whatsoever, is simply speculation. It certainly is not sufficient to establish that the Milk Act and regulations' enforcement provisions are ineffective to restrain the Defendant Producers' conduct.

73 Accordingly, because the Minister and DFO have taken no steps to utilize the enforcement provisions of the Milk Act and regulations in respect of the Defendant Producers' conduct, I am of the view that the Minister and DFO have not established either that irreparable harm will be suffered in the absence of the injunction being granted or that the balance of convenience favours the granting of the injunction requested against the Defendant Producers.

74 In the absence of utilization by the Ministry and DFO of the many and quite significant enforcement provisions in the Milk Act and regulations which fail to restrain the conduct complained of, it cannot, in my view, be said that the Defendant Producers' conduct constitutes extreme contempt of the law, such that it would constitute irreparable harm.

There is no other evidence of irreparable harm that has been put forward by the Minister and DFO. Accordingly, the Minister and DFO have not established that the public interest will suffer irreparable harm.

75 In respect of the balance of convenience, while the failure to grant the injunction may be perceived by the public as permitting a breach of the regulatory scheme, in my view it is outweighed by the failure of the Minister and DFO to utilize the enforcement provisions of the Milk Act and regulations. Simply put, the motion for an interlocutory injunction is, in my view, premature.

Conclusion

76 For the above reasons, therefore, the DFO's motion for an interlocutory injunction pursuant to s. 22 of the Milk Act is granted and an order shall issue restraining BTU from buying or selling milk produced by Ontario milk producers except through DFO and from carrying on business as a transporter of milk without being appointed as a transportation agent of DFO until the trial of the action.

77 The Minister and DFO's motion for an interlocutory injunction against the Defendant Producers is dismissed. While the Minister and DFO have established the serious issue to be tried (against the Defendant Producers except Joban Farms and Mr. Haemmerli), they have not established that failure to grant the injunction will cause irreparable harm or that the balance of convenience favours the granting of the injunction.

78 As noted, I was advised at the outset that both Chris Birch and Georgian Bay Milk Company have consented to an injunction. Neither the signed consents nor the form of injunction agreed to has been provided to the court. Upon the filing of such material I will deal with them.

79 In the absence of the parties being able to agree on costs within 30 days, the parties shall make submissions in writing, limited to three pages plus costs outlines within 45 days of today.

L.A. PATTILLO J.

* * * * *

Corrigendum
Released: February 20, 2008

The correction is in the spelling of counsel's name: *Sunil S. Mathai*.

cp/e/qlttm/qlpwb/qlesm/qltxp/qlhcs

Case Name:

Certified General Accountants Assn. of Ontario v. American Institute of Certified Public Accountants

Between
Certified General Accountants Association of Ontario, Applicant, and
American Institute of Certified Public Accountants, Chartered Institute of Management Accountants, Canada Inc., Chartered Institute of Management Accountants, Association of International Certified Professional Accountants, Mohandas Puzhankara, Damien Martin, Carlos Lameiro, Dev Devendra and John Doe, Respondents

[2013] O.J. No. 5360

2013 ONSC 7111

22 B.L.R. (5th) 121

235 A.C.W.S. (3d) 793

2013 CarswellOnt 16081

Court File No. CV-12-463641

Ontario Superior Court of Justice

S.E. Firestone J.

Heard: August 22, 2013.
Judgment: November 22, 2013.

(61 paras.)

Intellectual property law (trade-marks) -- Trade-marks -- Related legislation -- Provincial statutes -- Opposition -- Grounds -- Confusion -- Nature of wares, services or business -- Degree of resemblance, sound or idea -- Remedies -- Injunctions -- Application by Certified General Accountants Association for statutory injunction prohibiting respondents from using CGMA designation in Ontario dismissed -- Applicant opposed use of Chartered Global

Management Accountant designation in Ontario on basis it was too similar to CGA designation -- ss. 26(1)(a) and 26(4)(a) prohibited use of CGA designation alone or in combination with other words -- Double quotes around abbreviations restricted prohibition to specific permutation of letters, and inserting "M" in middle broke up abbreviation -- s. 26(1)(b) and 26(4)(b) prohibited implying Certified General Accountant, which CGMA did not, particularly as long form of designation was substantially different.

Professional responsibility -- Self-governing professions -- Legislation -- General principles -- Monopoly -- Governing body -- Use of name -- Advertising and marketing -- Professional designation -- Restrictive covenants -- Professions -- Public accountants -- Certified general accountants -- Certified management accountants -- Unauthorized practice -- Use of professional designation -- Injunction -- Application by Certified General Accountants Association for statutory injunction prohibiting respondents from using CGMA designation in Ontario dismissed -- Applicant opposed use of Chartered Global Management Accountant designation in Ontario on basis it was too similar to CGA designation -- ss. 26(1)(a) and 26(4)(a) prohibited use of CGA designation alone or in combination with other words -- Double quotes around abbreviations restricted prohibition to specific permutation of letters, and inserting "M" in middle broke up abbreviation -- s. 26(1)(b) and 26(4) (b) prohibited implying Certified General Accountant, which CGMA did not, particularly as long form of designation was substantially different.

Application by the Certified General Accountants Association of Ontario for a statutory injunction prohibiting the respondents from contravening s. 26 of the Certified General Accountants Act. The respondents were part of a joint venture that developed the Chartered Global Management Accountant (CGMA) designation for worldwide use. The respondents had filed trademark applications for the CGMA designation, which the applicant was opposing in Canada. The applicant argued s. 26 prohibited the use of the CGMA designation in Ontario as it only differed from the CGA designation by one letter and a lay person would be led to believe that a CGMA was a CGA. The respondent argued the statute created a monopoly, so s. 26 was to be strictly interpreted and did not protect individual letters, just the actual CGA designation.

HELD: Application dismissed. s. 26(1)(a) and 26(4)(a) prohibited the use or designation of the Certified General Accountant or CGA alone, or in combination with other words or abbreviations. The sections used double quotes around the protected abbreviations, leading to the conclusion it was the specific permutation of letters that was protected. CGMA qualified as an abbreviation, but inserting "M" in the middle of it broke up the abbreviation, so it was not clearly contrary to s. 26. The purpose of the sections was to restrict the use of foreign designations that could reasonably be confused with Ontario designations. CGMA was not likely to be confused with CGA. The long form of the designations was significantly different. Ss. 26(1)(b) and 26(4)(b) prohibited the use of initials or designations implying Certified General Accountant. Given the long form of the designations, there was no suggestion they were the same, nor were the designations for the same type of accountants. The public could understand that management accountants were different from general accountants.

Statutes, Regulations and Rules Cited:

Certified General Accountants Act, 2010, S.O. 2010, c. 6, s. 26(1)(a), s. 26(1)(b), s. 26(2), s. 26(4)(a), s. 26(4)(b), s. 26(5), s. 30(1)

Certified Management Accountants Act, 2010, S.O. 2010, c. 6,

Chartered Accountants Act, 2010, S.O. 2010, c. 6,

Counsel:

Clifford I. Cole and Laurent Massam, for the Applicant.

Bruce Stratton and Henry Lue, for the Respondents.

REASONS FOR DECISION

1 **S.E. FIRESTONE J.**:-- The Certified General Accountants Association of Ontario ("CGA Ontario"), the Applicant, brings this application for a statutory injunction pursuant to section 30(1) of the *Certified General Accountants Act, 2010*, S.O. 2010, c. 6, Schedule A ("CGA Act")[1] to prohibit the Respondents from contravening section 26 of the CGA Act.

2 The Applicant argues that the Respondents have contravened section 26 of the CGA Act by taking and using the acronym CGMA, which stands for Chartered Global Management Accountant, as an accounting designation in the province of Ontario. The Respondents argue that section 26 of the CGA Act does not expressly prohibit the use of the CGMA designation in Ontario.

3 The CGMA designation was developed and promoted worldwide by the Association of International Certified Professional Accountants ("the joint venture"), which was formed by two of the world's largest associations of accountants, namely, the American Institute of Certified Public Accountants ("AICPA") and the UK-based Chartered Institute of Management Accountants ("CIMA"). CGMA was intended to be a global accounting designation for management accountants.

The Parties

4 CGA Ontario is a professional body that is statutorily mandated to self-regulate individuals and firms designated as Certified General Accountants, aka "C.G.A." or "CGA", in Ontario. CGA Ontario derives its jurisdiction pursuant to the CGA Act and is responsible for granting the exclusive right to use the designation CGA in the province of Ontario. It also has the responsibility of enforcing section 26 of the CGA Act.

5 The Respondents, AICPA and CIMA, are American and British accounting organizations. AICPA does not have any affiliated business or branch offices in Canada. CIMA has a presence in Canada through its Canadian branch, which operates under the name the Chartered Institute of Management Accountants, Canada Inc. ("CIMA Canada"). CIMA Canada is also a named Respondent, but does not have a physical office in Canada. In January 2012, AICPA and CIMA formed the joint venture to promote and support the

CGMA designation on a worldwide basis including the province of Ontario. In addition the Respondents include four individual accountants who have been using the CGMA designation in Ontario and John Doe.

Applicable Statutory Framework

6 Three statutes have been enacted to regulate the accounting profession in Ontario. Each prohibits taking or using certain designations. These Acts are the CGA Act, the *Certified Management Accountants Act, 2010*, S.O. 2010, c. 6, Schedule B ("CMA Act") and the *Chartered Accountants Act, 2010*, S.O. 2010, c. 6, Schedule C ("CA Act").

7 The relevant subsections of 26(1) and (4) of the CGA Act state as follows:

> **Prohibition, individuals**
>
> (1) No individual, other than a member of the Association, shall, through an entity or otherwise,
>
> (a) take or use the designation "Certified General Accountant" or "comptable général accrédité", or the initials "C.G.A.", "CGA", "F.C.G.A." or "FCGA", alone or in combination with other words or abbreviations;
> (b) take or use any term, title, initials, designation or description implying that the individual is a Certified General Accountant;
>
> ...
>
> **Prohibition, corporations**
>
> (4) No corporation, other than a professional corporation that holds a valid certificate of authorization, shall,
>
> (a) take or use the designation "Certified General Accountant" or "comptable général accrédité", or the initials "C.G.A.", "CGA", "F.C.G.A." or "FCGA", alone or in combination with other words or abbreviations;
> (b) take or use any term, title, initials, designation or description implying that the corporation is entitled to practise as a Certified General Accountant;

8 Sections 26(2) and (5) of the CGA Act state as follows:

> **Exceptions-Individuals**
>
> (2) Clauses (1) (a) and (b) do not apply to an individual in any of the following circumstances:

1. The individual uses a term, title, initials, designation or description when making reference to authentic professional accounting qualifications obtained by the individual from a jurisdiction other than Ontario in,

    i. a speech or other presentation given at a professional or academic conference or other similar forum,
    ii. an application for employment or a private communication respecting the retainer of the individual's services, if the reference is made to indicate the individual's educational background and the individual expressly indicates that he or she is not a member of the Association and is not governed by the Association, or
    iii. a proposal submitted in response to a request for proposals, if the reference is made to demonstrate that the individual meets the requirements for the work to which the request for proposals relates.

2. The individual uses a term, title, initials, designation or description as authorized by the by-laws.

...

Exceptions-Corporations

(5) Clauses (4) (a) and (b) do not apply if a corporation uses a term, title, initials, designation or description when making reference to authentic professional accounting qualifications obtained by the corporation from a jurisdiction other than Ontario in a proposal submitted in response to a request for proposals, if the reference is made to demonstrate that the corporation meets the requirements for the work to which the request for proposals relates.

9 Section 30(1) of the CGA Act authorizes CGA Ontario to bring an application for a statutory injunction in the Superior Court of Justice against persons who have contravened section 26 of the CGA Act.

Factual Background

10 The Chartered Global Management Accountant designation-acronym "CGMA" was announced in or around March 2011 by the joint venture as a new global accounting designation for management accountants.

11 After the announcement, the joint venture promoted the new CGMA designation worldwide by way of media coverage, web presence, traditional advertising, and a launch event. Such advertising was meant to promote the objectives of the AICPA and CIMA, namely to establish a preeminent global standard of professional excellence in management accounting.

12 Currently there are approximately 140,000 to 145,000 management accounting professionals in over 140 countries who hold the CGMA designation. In Canada, there are approximately 440 AICPA members and approximately 900 CIMA members who have been granted the right to use the joint venture's CGMA designation.

13 On March 25, 2011, the joint venture filed trademark applications for the word-mark "CGMA" in Canada and other countries. The application in Canada is being opposed by CGA Ontario. Before the trademark applications were filed, the AICPA and CIMA performed global searches, which revealed that the CGMA designation had not been used anywhere in the world. However, AICPA confirmed on cross-examination that it did not take measures to ensure that the CGMA designation did not create confusion for consumers.

14 When the CGA Act came into force in May 2010, CIMA published a document titled "Guidance for Ontario." In the document examples were given of accounting designations that were prohibited in Ontario based on the section 26 of the CGA Act. In 2011, around the same time that the joint venture began promoting the CGMA designation, CIMA amended the guidance document to warn against using the CGMA designation in Ontario.

15 On cross-examination, CIMA admitted it added a warning because of their concern that CGMA varied from CMA by one letter. In correspondence dated May 11, 2012, CGA Ontario made a complaint to CIMA regarding the use of CGMA on the basis that CIMA was violating section 26 of the CGA Act. The warning regarding the use of CGMA was, however, subsequently removed from the guidance document by CIMA.

16 CGA Ontario announced in April 2012 it would offer its own CGMA designation for a "Certified Global Management Accountant." This announcement appeared on its website, newsletter, and was included in its by-laws. At the same time, CGA Ontario sought to have the Registrar of Trademarks declare CGMA an official mark of CGA Ontario.

Issues for Determination

1. Does the Respondents' use of CGMA contravene section 26 of the CGA Act?
2. If section 26 has been contravened, should a statutory injunction be granted pursuant to section 30(1) of the CGA Act?

1. Does the Respondents' use of CGMA contravene s. 26 of the CGA Act?

Position of the Parties

17 CGA Ontario submits that the use of CGMA in Ontario by the Respondents is a breach of sections 26(1)(a), 26(4)(a), 26(1)(b), and 26(4)(b) of the CGA Act. CGA Ontario highlights the well-established principle of statutory interpretation reiterated by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26:

> The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

18 CGA Ontario argues that the legislative intention of s. 26 of the CGA Act can be discerned from Hansard. They argue it was enacted by the Government of Ontario to protect the public from confusion about the qualifications of professional accountants. The Applicant submits that the use of foreign unregulated accounting designations in Ontario that are the same or similar to regulated accounting designations can confuse the public.

19 The phrase "alone or in combination with other words or abbreviations" contained in sections 26(1)(a) and 26(4)(a), CGA Ontario argues, is not restricted to the placement of words or abbreviations placed immediately before or after the protected designations in the subsections.

20 CGA Ontario states the designations that are prohibited do not need to have the same sequential letters as the protected designations. Because the subsections protect the use of "C.G.A." and "CGA" alone or in combination with other words or abbreviations, CGMA necessarily falls within the scope of a prohibited designation. The only difference is one single letter, namely the letter "M."

21 It submits that for the purposes of ss. 26(1)(b) and 26(4)(b), the test to determine whether the use of CGMA implies the person is a Certified General Accountant is whether a lay member of the public would believe the use of CGMA implies that the person is in fact a Certified General Accountant: see *Inst. Chartered Accountants of Man. v Bellamy*, [1926] 4 D.L.R. 230 (Man. K.B.), aff'd [1927] 3 D.L.R. 1071 (Man. C.A.), at pp. 233-234. It is argued that the subjective intention of the person using the impugned designation is irrelevant.

22 In *R. v. Langley* (1959), 23 D.L.R. (2d) 285 (Alta. C.A.), the majority of the Alberta Court of Appeal found the use of the phrase "certified public accountant" implied the respondent was a certified accountant, which was prohibited under a similarly worded accounting statutory provision. The court noted as follows, at p. 292:

> The addition of such a qualifying adjective would denote the particular kind of an accountant such a person is, but the implication would continue to remain that he is a certified accountant, though of a particular kind .... I am of the opinion that the insertion of the word "Public" between the words "Certified" and "Accountant," does not prevent the full force of the statute applying to make such use an offence.

23 The point is that the initials C.G.A. as well as the CGA designation are well-known and uniquely associated with Certified General Accounting in Canada. The CGMA designation on the other hand is new and relatively unknown. Therefore, the use of CGMA by the Respondents causes the very deception that was intended to be prevented and avoided by the application of the section 26 prohibitions.

24 The Respondents, on the other hand, submit that while they agree on the principle of statutory interpretation to apply in this case, the Supreme Court of Canada in *Laporte v. College of Pharmacists of the Province of Quebec*, [1976] 1 S.C.R. 101, at pp. 102-103,

has held statutes creating professional monopolies must be strictly construed. Given the CGA Act is a statute that creates a professional monopoly for Certified General Accountants in Ontario, the Respondents argue that section 26 of the CGA Act should be interpreted strictly.

25 It is acknowledged that section 26 of the CGA Act has not been interpreted by the courts previously. The Respondents submit that the purpose of the CGA Act is not to broadly regulate the accounting profession. Section 2 of the CGA Act states "this Act does not affect or interfere with the right of any person who is not a member of the Association to practise as an accountant." The purpose of the CGA Act also includes preventing confusion between CGA Ontario members and non-members. The specific language of s. 26(1), they submit, must be interpreted in the context of the goals and objectives of the legislation as a whole.

26 The purpose of s. 26 is to prevent confusion by the public regarding persons improperly using Ontario regulated accounting designations. It is important to note that the section contains exceptions to the general prohibition.

27 The Respondents argue that on an ordinary reading of s. 26(1)(a), no individual shall take or use "the" designation alone or in combination with other words or abbreviations. They argue that the subsection applies to a use or taking of the designations as enumerated and not a use or taking of component parts of the designations. The key point is that the subsection does not protect the individual letters, C, G, and A. The legislature specifically and carefully identified the protected designations by quotes around each designation. Therefore, acronyms not enumerated in the subsection should not receive the special status afforded by s. 26(1).

28 The Respondents submit that the list of protected designations in s. 26(1) is consistent with the purpose of the CGA Act, which is to prevent public confusion related to accounting designations.

29 The Applicant's position, according to the Respondents, leads to an absurd and illogical interpretation that must be avoided. If the use of CGMA was prohibited under the CGA Act, then CGA and CMA would be in violation of the CA Act because it prohibits the use of CA alone or in combination with other words or abbreviations. At the same time CGA and CMA are protected under their respective Acts. The Respondents also state that during the legislative process submissions focused on the exact grouping of letters being prohibited under the CMA Act, not the CGA Act.

30 According to the Respondents, if the Applicant's interpretation is accepted, the result is that the CGMA designation will be used worldwide except in Ontario. This will lead to heightened public confusion regarding accounting designations in Ontario. Management Accountants in Ontario will be prohibited from using the CGMA designation and s. 26 will effectively prohibit designations in any field that use the individual letters C, G, and A.

31 Use of CGMA does not, in the Respondents' view, imply a Certified General Accountant in Ontario. The promotion of the CGMA designation closely connects it to a globally recognized, new and different, accounting designation. The accounting profession currently uses and has similar looking acronyms. The Respondents submit that consumers of the CGMA designation are sophisticated managers in global business and are able to

distinguish between Ontario accounting designations and the CGMA accounting designation. Such consumers of these designations do pay attention to small differences. They also note that the Applicant has adduced no evidence that the public will be harmed or confused by the CGMA designation.

Analysis

32 In determining whether the use of CGMA contravenes s. 26 of the CGA Act, the section must be read in its context and its ordinary meaning harmoniously with the scheme of the Act, the object of the Act, and the legislative intent. Other principles of interpretation are not engaged unless the provision has ambiguous meaning.

33 In *Laporte* a unanimous court established a specific principle of interpretation for profession regulating statutes as follows, at pp. 102-103:

> The statutes creating these professional monopolies, sanctioned by law, access to which is controlled and which protect their members in good standing, who meet the required conditions against any competition, must however be strictly applied. Anything which is not clearly prohibited may be done with impunity by anyone not a member of these closed associations.

Grammatical and Ordinary Sense: ss. 26(1)(a) and 26(4)(a)

34 Subsections 26(1)(a) and (4)(a) provide no individual or corporation shall take or use the designation "Certified General Accountant" or the initials "C.G.A.", "CGA" alone or in combination with other words or abbreviations. The nature of the prohibition is taking or using, the object of the prohibition is "the designation" and "the initials", and the scope of the prohibition is "alone or in combination with other words or abbreviations."

35 Breaking this section down, the sanctioned activities are

* taking or using the enumerated designations or initials alone.
* taking or using the enumerated designations or initials combined with other words or abbreviations.

36 Members of the profession are exempted from these prohibitions and there are limited circumstances where individuals and corporations are exempted. This includes the use of a designation that is similar to the protected designation-initials in a speech by an individual, but that designation was obtained outside of Ontario.

37 It is important to consider the object of the prohibition. The definite article "the" indicates the prohibition specifically refers to the enumerated double quoted phrases and abbreviations. The objects of the prohibition read as follows:

* the designation "Certified General Accountant"
* the designation "comptable général accrédité"
* the initials "C.G.A."
* the initials "CGA"
* the initials "F.C.G.A."

* the initials "FCGA"

38 In my view, the use of double quotes around each abbreviation leads to the conclusion that it is the specific permutation of letters and punctuation as opposed to each individual letter that is protected. The issue then is whether the Respondent's use of CGMA constitutes a taking or use of the initials "CGA" in combination with other words and abbreviations.

39 The plain meaning of "the initials ... 'CGA' ... in combination with other words and abbreviations" is an object of the prohibition, CGA, being combined with other words and abbreviations. A combination is defined as "a combined set of things" and "a selection of a given number of elements from a larger number of elements, without regard to the order of the elements chosen"; words are defined as "a sound or combination of sounds forming a meaningful element of speech usually shown with a space on either side of it when written or printed, used as part of a sentence"; and abbreviations are defined as a "shortened form of a word or phrase": see *Canadian Oxford Dictionary*, 2d ed., *s.v.*"combination", "word", and "abbreviation".

40 The letter "M" in CGMA would, in my view, qualify as an abbreviation. This is because M is the short form for the word Management. The definition of "combination" suggests each of the objects of the prohibition and "other words and abbreviations" are unified, unbreakable elements. Consequently, CGA is an element and the abbreviation "M" is an element. Thus, the following combinations of these two elements are, in my view, prohibited: "MCGA", "CGAM", "C.G.A.M.", and "M.C.G.A.".

41 CGMA is not clearly prohibited because the meaning of "combination" does not imply the "M" element can be inserted into the middle of the "CGA" element.

42 The legislature chose to add double quotes around the protected designations and use the phrase "in combination with" instead of simply "with." In choosing narrower language and punctuation, the legislature narrowed the possible permutations of designations that are prohibited.

Context: ss. 26(1)(a) and 26(4)(a)

43 The CGA Act is one of three statutes governing the accounting profession in Ontario and came into force on May 18, 2010. It regulates Certified General Accountants in Ontario by imposing conditions of membership, overseeing disciplinary procedures for members, and enforcing general prohibitions against non-members who practise or hold themselves out as CGAs. The CMA Act regulates Certified Management Accountants and the corresponding CMA designation in Ontario. The CA Act regulates Chartered Accountants and the corresponding CA designation in Ontario. The overall objective of the statutes is to allow these various accounting bodies to oversee their profession and protect the public in the public interest.

44 In accordance with *Bell ExpressVu*, at para. 46, the various provisions in each statute should be read in the context of the others and consideration should be given to each statute's role in the overall scheme.

45 The Hansard debates regarding the virtually identical prohibitions in the CMA Act are equally applicable to the corresponding s. 26 prohibitions in the CGA Act. The stated

purpose of the prohibitions in Hansard is to protect "clients of Ontario accountants from confusion about the qualifications or oversight of their professional advisors."

46 A reading of Hansard discloses that such prohibitions were said to restrict the use of foreign designations that may be confused with Ontario designations, but the use of designations that will not reasonably be mistaken as Ontario designations will not be restricted.

47 In analyzing ss. 26(1)(a) and (4)(a) in this context, the prohibitions are intended to protect the public interest and restrict the use of foreign designations that may confuse the public into thinking it is an Ontario designation. From this perspective, in my view, the CGMA designation would likely not be confused with the Ontario regulated CGA.

48 It is important to consider the long form of CGMA. A Chartered Global Management Accountant is significantly different from a Certified General Accountant. A member of the public and sophisticated managers in global business on balance would be able to distinguish between the two designations especially once they hear the long form of the abbreviation.

49 Considering the ordinary grammatical meaning of s.26 of the CGA Act, the context of the provision in the larger regulatory scheme, the manner in which the CGMA designation was promoted, as well as the meaning of the designation, CGMA is different enough from the CGA designation so as to not confuse the public into thinking it is an Ontario regulated designation. In my view, it falls outside the scope of the prohibited uses of CGA designations as indicated above.

50 If there is ambiguity in the provision based on the ordinary grammatical meaning and context, the CGA Act is to be strictly interpreted given that it creates a professional monopoly for Certified General Accountants.

51 I, therefore, find that the CGMA designation is not clearly prohibited under ss. 26(1)(a) and 26(4)(a) of the CGA Act.

Grammatical and Ordinary Sense: ss. 26(1)(b) and 26(4)(b)

52 Subsections 26(1)(b) and 26(4)(b) provides that no individual or corporation shall take or use any initials or designation implying the individual or corporation is a Certified General Accountant.

53 As with ss. 26(1)(a) and 26(4)(a), the subsections are an absolute prohibition with the same limits and exceptions. The prohibition is that of taking or using and the object of the prohibition is "initials or designations." The scope of the prohibition is "implying" that the person is a Certified General Accountant. In order for the sections to apply, the use of any term, title, initials, designation or description is not enough. They must in fact "imply" that the individual is a Certified General Accountant.

54 The question is whether the use of CGMA, in fact, implies a person is a Certified General Accountant. The word "imply" means to "strongly suggest the truth or existence of the thing not expressly asserted" or "signify": see *Canadian Oxford Dictionary*, 2d ed., *s.v.*"imply".

Context: ss. 26(1)(b) and 26(4)(b)

55 The prior contextual analysis is applicable. Like ss. 26(1)(a) and 26(4)(a), these sections are intended to protect the public from confusing foreign designated accountants with local designated accountants.

56 The abbreviation, CGMA, does not in my view suggest a Certified General Accountant. This is clear when looking at the long form of CGMA. A Chartered Global Management Accountant does not strongly suggest or imply that a person is a Certified General Accountant. The only common word between the two designations is "Accountant." This case is distinguishable from *Langley* in that *Langley* concerned the use of the long form of "certified accountant", not the use of initials. Also, a Chartered Global Management Accountant is not a particular kind of Certified General Accountant nor does CGMA have a qualifying adjective that would denote it is a particular kind of Certified General Accountant. Management accountants are focused on accounting for business organizations, whereas certified general accountants are more general in scope by working in various contexts such as government, non-for-profits, and public accounting.

57 Following the test from *Bellamy*, the public, in my view, would likely understand that management accountants are functionally different from general accountants and that the word "Global" indicates a worldwide designation. It does not indicate an Ontario-related or Ontario-based designation.

58 As well, a member of the public can easily ascertain the long form of CGMA by searching for "CGMA" on the internet, which returns the CGMA global accounting designation's website.

59 Therefore, I do not find that the use of CGMA implies a person is practising as a Certified General Accountant pursuant to ss. 26(1)(b) or 26(4)(b).

Disposition

60 Since the Applicant has not met the onus on a balance of probabilities that the Respondents have contravened s. 26 of the CGA Act, a statutory injunction should not be granted. The application is therefore dismissed.

61 If the parties are not able to agree on costs I may be contacted in order to set a timetable for the delivery of cost submissions.

S.E. FIRESTONE J.

1 The CGA Act received royal assent on May 18, 2010 in the form of Bill 158, *An Act to repeal and replace the statutes governing The Certified General Accountants Association of Ontario, the Certified Management Accountants of Ontario and The Institute of Chartered Accountants of Ontario*, *Accounting Professions Act*, 2nd Sess., 39th Parl., Ontario, S.O. 2010, c. 6.

Case Name:

Valastro v. London (City)

Between
Annamaria Valastro, Applicant, and
The Corporation of the City of London, Respondent

[2013] O.J. No. 478

2013 ONSC 598

224 A.C.W.S. (3d) 777

7 M.P.L.R. (5th) 157

2013 CarswellOnt 1119

Court File No. 8937-12

Ontario Superior Court of Justice

I.F. Leach J.

Heard: January 24, 2013.
Judgment: February 4, 2013.

(79 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Circumstances when not granted -- Considerations affecting grant -- Balance of convenience -- Irreparable injury -- Serious issue to be tried or strong prima facie case -- Interlocutory or interim injunctions -- Prohibitive injunctions -- Application by city resident for interlocutory injunction restraining City from carrying out remediation work dismissed -- City resident opposed remedial work believing it would destroy amphibian breeding habitat and brought application to quash bylaw relating to work -- Applicant had demonstrated serious issue to be tried with respect to bylaw's effect -- Only irrevocable harm suggested by applicant, destruction of amphibian breeding habitat, was not supported by evidence -- Balance of convenience favoured City as any cessation of work would entail substantial financial cost and it would have no effective ability to recover losses from applicant.

Application by a city resident for an interlocutory injunction restraining substantial ongoing remediation work being carried out by the City until the hearing of her application to quash a City bylaw. The municipal work in question was part of an extensive storm water management project relating to the development of the Hyde Park area of the City. The work included the construction of six storm water management ponds. The work was carried out in a phased-in approach and three of the six contemplated ponds had been constructed. As part of the process, an existing municipal drain, the Stanton Drain, was formally abandoned through the passage of a bylaw. In December 2012, Council passed a resolution accepting a tendered bid to carry out construction of the next phase of the project. The relevant work began on December 31, 2012 and had continued since then. The applicant, believing that the Hyde Park area had ecological significance, opposed the development. She had uncovered a report which she alleged acknowledged that the Hyde Park area had significant natural heritage features that warranted its consideration as a non-development area and confirmed that the proposed development would result in the loss of a significant amphibian breeding habitat. She argued that the report should have triggered further opportunities for public participation and that, as the City did not follow its own mandated procedures before passing the bylaw abandoning the Stanton Drain, the bylaw was invalid and all work in the area should cease. As a result, she brought an application to quash the City bylaw abandoning the Stanton Drain and sought an order restraining the continued work until the hearing of her application.

HELD: Application dismissed. While the applicant did not live in the Hyde Park area, she had standing to bring the application as she was a resident of the City and had a legitimate interest in questioning the legality of the bylaw. The applicant had demonstrated a serious issue to be tried with respect to the effect of the bylaw in question. However, the applicant had not demonstrated that she would suffer irreparable harm in the absence of an injunction. The only irrevocable harm suggested by the applicant, the destruction of a significant amphibian breeding habitat, was not supported by the evidence. Furthermore, the balance of convenience favoured the City as any cessation of the work would entail substantial financial cost and it would have no effective ability to recover its losses from the applicant.

Statutes, Regulations and Rules Cited:

City of London Bylaw DR-102-207,

Drainage Act, R.S.O. 1990, c. D.17,

Environmental Assessment Act, R.S.O. 1990, c. E.18,

Milk Act, R.S.O. 1990, c. M.12, s. 22

Municipal Act, 2001, S.O. 2001, c. 25, s. 273, s. 273(1), s. 273(4)

Planning Act, R.S.O. 1990, c. P.13,

Counsel:

Douglas Christie, for the Applicant.

Janice L. Page and Nicole Hall, for the Respondent.

1 **I.F. LEACH J.**:-- In formal terms, the Applicant's motion now before me seeks an interlocutory order, pursuant to s. 273(4) of the *Municipal Act, 2001*, S.O. 2001, c. 25, directing that nothing be done under City of London By-law DR-102-207, (the specifically identified by-law the Applicant seeks to quash through her application), until her application has been adjudicated on the merits.

2 In essence, however, the Applicant desires an interlocutory injunction restraining substantial ongoing remediation work being carried out by the City in the Hyde Park area of London.

3 This motion follows the Applicant's unsuccessful previous motion, (brought on an urgent basis on January 9, 2013, and heard and decided by me by way of an extended oral judgment on January 10, 2013, since transcribed), requesting the same relief on an interim basis.

4 The history and nature of this dispute are outlined in my earlier Reasons for Judgment, but some repetition of that background is advisable.

Municipal Works

5 The municipal work in question is part of an extensive storm water management project relating to development of the Hyde Park area. It includes the construction of six stormwater management ponds designed to address existing drainage and flood protection deficiencies, and facilitate future development. The work has been carried out in a "phased-in approach", and three of the six contemplated ponds have been constructed since 2002.

6 The stormwater management work follows years of study and interim steps extending back almost 19 years, including a subwatershed study in 1994, a community plan started in 1997 under the *Planning Act*, and Municipal Council acceptance of an associated Municipal Class Environment Assessment in August of 2002.

7 One of the many steps taken in furtherance of the ongoing project was formal abandonment, (pursuant to the applicable process required by the *Drainage Act*, R.S.O. 1990, c.D.17), of an existing municipal drain known as "the Stanton Drain". That process was initiated by the City's engineers in 2008, included delivery of notice to 1400 landowners and meetings with those who responded, and culminated in Municipal Council's passage of By-law DR-102-207, formally abandoning the Stanton Drain.

8 On December 11, 2012, Municipal Council passed a resolution accepting a tendered bid in the sum of $5,719,479.55 to carry out construction of the next phase of the project. Pursuant to those binding contractual commitments, the relevant contractor mobilized workers and equipment.

9 The relevant work began on December 31, 2012, and has continued since then. A detailed description of the work is set forth in the Respondent's material. It includes substantial protocol development and implementation, extensive finalized and activated subcontractor and supplier commitments, (including special order production of replacement

culverts and box culverts already underway), mobilization of a substantial labour force, extensive tree removal and grubbing, clearance of numerous private properties, major excavations, extensive construction of temporary works, (e.g., settling basin, access roads and diversion channel), and production of channel remediation aggregates.

Applicant Opposition to Works

10 The Applicant, a resident of London, (although she lives in the centre of the City, a considerable distance from the Hyde Park area), believes the area has ecological significance, and is passionately opposed to its development.

11 She has devoted considerable time, personal expense and effort to the matter; effort which included discussions with the City's engineers and an extended personal review of all Respondent documentation associated with the project.

12 In the course of that review, the Applicant came across documents which now form the basis of her current application.

13 In particular, the Applicant now relies upon a Scoped Environmental Impact Study, (the final version of which is dated January 25, 2012), prepared by consultants retained by the City.

14 According to the Applicant, the report acknowledges that the area in question contains significant natural heritage features warranting its consideration as a "non-development area". In particular, the Applicant says the report confirms that the proposed development would result in the loss of a significant amphibian breeding habitat.

15 The Applicant also says that the commissioning and receipt of such an Environmental Impact Study should have triggered further opportunities for public participation pursuant to clause 15.5.1(viii) of the City's Official Plan, (adopted pursuant to the *Planning Act*), which reads as follows:

> 15.5.1 (viii) The public, including adjacent property owners, shall be notified of the preparation of an Environmental Impact Study, and given the opportunity to comment. The public notices respecting all Official Plan, Zoning, Subdivision and Site Plan applications shall clearly state whether an associated Environmental Impact Study is being prepared and, if so, that a separate notice of its preparation will be given to the public, including abutting property owners.

16 The Applicant says that, as the City did not follow its own mandated procedures in that regard before passing its by-law abandoning the Stanton Drain, the by-law is invalid, with the suggested consequence that all work in the area should cease, unless and until the City first revisits and completes the additional public consultation the Application says is required.

17 In October of 2012, the Applicant provided written and verbal submissions to a City Committee meeting in October of 2012, outlining her opposition to continued development of the area, but achieved no success.

18 In November of 2012, the Applicant asked the Ministry of the Environment for formal review of the Project, and was refused.

19 On December 24, 2012, the Applicant served the Respondent with her application record herein requesting relief pursuant to s.273 of the *Municipal Act*, *supra*, which reads in part as follows:

> 273.(1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.
>
> (2) In this section, "bylaw" includes an order or resolution. ...
> (4) The court may direct that nothing shall be done under the by-law until the application is disposed of.
> (5) An application to quash a by-law in whole or in part ... shall be made within one year after the passing of the by-law.

20 On January 7, 2013, in response to an inquiry from counsel for the Applicant, the Respondent indicated that, "unless otherwise ordered by a Court, the City's engineers will continue with the Work as directed by Municipal Council".

21 On January 9, 2013, the Applicant served the Respondent with a motion, returnable the following day on an urgent basis, effectively seeking interim injunctive relief until her solicitor was available to argue a motion for interlocutory relief.

Position of the Respondent

22 In broad terms, the City says the Applicant not only lacks standing to pursue her application, but that the application itself is fundamentally misconceived and without merit in any event for numerous reasons that include the following:

i. According to the City, if the version of the Official Plan relied upon by the Applicant governs at all, it specifically contemplates satisfaction of desired public involvement and consultation in alternate ways. In particular, the "deeming" provision of clause 15.5.1(vii) expressly indicates that, "When an Environmental Assessment of a proposal is carried out under the Ontario Environmental Assessment Act", (which was done in this case pursuant to the class environmental assessment completed August of 2002), that assessment "will be considered as fulfilling the Environmental Impact Study required by the plan". In other words, the Official Plan itself indicates that the desired level of public consultation has been satisfied in such circumstances.
ii. The City notes that, of all the steps taken in relation to the relevant project, the Applicant has seized on a particular by-law in respect of which the Official Plan has no application. It was *not* a by-law passed pursuant to the *Planning Act*. Rather, it was a by-law passed pursuant to the *Drainage Act*, *supra*, and all requisite procedures required by that legislation were followed. (In particular, the *Drainage Act* is exempt from an environmental assessment under the regulations of the *Environmental Assessment Act*. The City is not required to provide an addendum to an approved municipal

class assessment, obtain a certificate of approval from any agency, or prepare an environmental impact study prior to passing a by-law under the *Drainage Act* to abandon a municipal drain; i.e., a man-made conveyance.)

iii. The City emphasizes that the Court's jurisdiction pursuant to s.273(4) of the *Municipal Act* is limited to ordering that "nothing shall be done under the by-law" pending disposition of an application to quash a by-law, and in this case, the relevant work the Applicant wishes to enjoin is *not* being done "under the by-law" that abandoned the Stanton Drain, but pursuant to *other* by-laws, orders and resolutions of the City. The by-law targeted by the Applicant was limited to formal and instantaneous abandonment of the relevant drain, and effectively was spent the moment it was passed.

23 For all these reasons and more, the Respondent says the application is doomed to fail on its substantive merits. In the meantime, it opposes the granting of any injunctive relief that would interfere with completion of the works now underway.

Denial of Interim Injunctive Relief

24 When the Applicant was before me on January 10, 2013, (temporarily without counsel because her lawyer was unable to attend on short notice, to address the Applicant's urgent request for interim injunctive relief), I gave Ms Valastro leave to appear in person for purposes of that hearing, and she argued the motion relying upon material prepared by her counsel.

25 For the purpose of that hearing, at least, I also was prepared to proceed on the basis that Ms Valastro had sufficient standing to bring her application.

26 However, I denied the Applicant's request for interim injunctive relief.

27 I did so based on my belief that the making of orders pursuant to s. 273(4) of the Municipal Act should be governed by the well-known approach to interlocutory relief mandated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, and my opinion that the Applicant was not able to establish the prerequisites for such relief, having regard to the material then before me.

28 My reasons in that regard were set out in my extended oral judgment. For present purposes, suffice it to say that, in my opinion:

i. The Applicant had demonstrated the existence of a "serious question to be tried", within the meaning of the applicable test. In particular, despite the flaws in reasoning suggested by the City, which eventually might warrant a substantive ruling in the City's favour when the application is determined on its merits, the Applicant's intended arguments could not properly be characterized as "frivolous or vexatious". They were, rather, principled arguments advanced with the assistance of counsel, based on a not fanciful characterization of the effect of the by-law in question and an exercise in legisla-

tive interpretation that was at least arguable as a matter of first impression.

ii. The Applicant's evidence of "irreparable harm" that she would sustain, in the absence of an injunction, nevertheless seemed amorphous and inadequate. In particular, I was prepared to accept that effective frustration of an important intangible right, (such as the right to be heard in a timely fashion, in a wider public forum such as that arguably contemplated by the City's own Official Plan), was a loss not easily quantifiable in monetary terms, and therefore in the nature of a principled loss suggestive of "irreparable harm". In practical terms, however, the Applicant's evidence and submissions made it clear that the suggested loss of a right to be heard really entailed irreparable consequences only because of what supposedly would be destroyed and lost forever, in physical terms, pending determination of the Application. In that regard, the only irreparable loss suggested by the Applicant was alleged irrevocable destruction of a significant amphibian breeding habitat if the remedial work was allowed to continue. Yet it seemed to me that the evidence of such destruction, (based entirely on the Applicant's lay interpretation of the report prepared by the Respondent's consultant), was tenuous at best - given my review of the material in the time permitted by the Applicant's urgent motion.

iii. On any objective view, evidence of the extensive detrimental impact on the City via the granting of any injunctive relief at this point tilted the "balance of convenience" scale firmly in the Respondent's favour. In that regard, uncontradicted evidence tendered by the City confirmed that any temporary cessation of the remedial work would entail very substantial financial cost, having regard to the extraordinary and time-sensitive financial obligations already undertaken by way of contract and subcontracts, and the extensive additional work that would be required to stabilize an otherwise fluid and temporary situation. At the time of the earlier hearing before me, the estimated costs in that regard were estimated to be approximately $1,650,000.00. However, that figure was likely to escalate dramatically if a "stop work" order delayed completion of the contemplated work beyond the relatively narrow window of construction opportunity permitted by associated authority granted by the Department of Fisheries. Although no formal undertaking as to damages had been offered by the Applicant, (and I accepted that the court's equitable discretion permitted waiver of the undertaking requirement in appropriate cases), it was not disputed that such an undertaking would have no practical value in any event, having regard to the Applicant's professed limited means. In the result, the Respondent would have no effective ability to recover such losses from the Applicant in the event injunctive relief was granted but the Applicant's arguments proved to be unsuccessful.

29 I therefore rejected the request for interim injunctive relief, without prejudice to the Applicant's possible request for interlocutory injunctive relief, possibly based on additional evidence.

30 That request is the one before me now. (In that regard, it should be emphasized that the substantive merits of the application are not before me for determination. In the present context, I am simply being asked to address the Applicant's request for interlocutory injunctive relief until such time as the application is heard and determined, at some later date which has not yet been scheduled.)

Analysis - Current Request for Injunctive Relief

31 At the return of the Applicant's latest motion, the Respondent formally renewed its objection based on the Applicant's alleged lack of standing, and I therefore turn first to that threshold issue.

32 As noted above, for purposes of the earlier hearing, I was content to regard the Applicant as having sufficient standing to advance her arguments for interim relief.

33 I did so based on comments by the Court of Appeal in *Galganov v. Russell* (2012), 293 O.A.C. 340 (C.A.), in which the Court expressly considered the scope of litigants contemplated by the term "any person" used in s.273(1) of the *Municipal Act, supra*; i.e., the provision indicating that the Superior Court of Justice had authority to quash a by-law of a municipality for illegality, and grant corresponding relief pursuant to s. 273(4), "upon the application of any person".

34 In that case, the Court of Appeal noted how the wording of s. 273(1) previously had limited use of the section to "a resident of the municipality", but recent legislative amendments had employed the "broader, more inclusive phrase" of "any person" to reflect "the more general trend of broadening access to justice in the courts". The Court went on to emphasize that this did not eliminate the courts' ability to refuse standing in the absence of a suitable "connecting factor" between a proposed litigant and the substantive matters to be put in issue.

35 For present purposes, however, the important point is that simple residence within a municipality may no longer be a *necessary* condition for standing pursuant to s. 273(1), but it continues to be a *sufficient* basis for standing under the "broader, more inclusive" wording. This was made clear by the comments at paragraph 15 of the *Galganov* decision, where Weiler J.A., speaking for the Court, said this:

> That said, although s. 273(1) no longer specifies one or more categories of persons who can challenge a by-law, I do not take the legislature to have eliminated the principled exercise of judicial discretion respecting standing. *The existence of a connecting factor, such as residency*, owning property in the municipality and therefore being a ratepayer, being affected by a by-law, or having a specific interest in a by-law, can still be required before a challenge to a by-law will be allowed to proceed.
>
> [Emphasis added.]

36 At the earlier hearing before me, I deferred final determination of the standing issue pending more fulsome argument of the point when both parties were represented by counsel.

37 However, nothing submitted during the latest hearing altered my preliminary view that Ms Valastro has standing to bring her application pursuant to s. 273, with associated requests for interim relief. She may not live in the immediate vicinity of the area in question, but she unquestionably is a resident of London. In my view, (supported by the *Galganov* decision), any resident of a municipality had a legitimate interest in questioning the legality of a by-law enacted by his or her municipal authority.

38 My analysis therefore proceeds to consideration of the Applicant's renewed request for injunctive relief.

39 In that regard, although both parties filed supplementary motion records prior to return of the latest motion, I am not persuaded that anything material has changed that would alter the outcome of the *RJR-MacDonald* analysis outlined above.

40 To the contrary, it seems to me that further reflection and review of the additional evidence reinforce my preliminary conclusion that the Applicant has not established all three prerequisites of the *RJR-MacDonald* test in the circumstances before me.

41 As far as the "irreparable harm" requirement is concerned, the Applicant continues to rely on alleged impairment of the public hearing and participation rights which, (according to her substantive argument), were contemplated and mandated by provisions of the City's Official Plan. In terms of what might be forever lost through delayed vindication of that right, the Applicant's evidence essentially continues to rely principally, if not exclusively, on the alleged destruction of a significant amphibian breeding habitat. In that regard, her evidence still is limited to her lay interpretation of the Scoped Environmental Impact Study prepared by the Respondent's consultant, the final version of which is dated January 25, 2012.

42 However, a more thorough review of that report suggests, I think, that its authors by no means shared the appellant's view of the harm that might be inflicted on the relevant amphibian breeding habitat if the contemplated remedial works were allowed to proceed.

43 In particular, on p.43 of the report, (at s. 8.2.1.7 addressing "Terrestrial Compensation"), I note the following comments:

> This area displaced also removes *some* habitat considered provincially significant in terms of Amphibian breeding. Amphibians were not concentrated just within the area allocated for the SWM facility, *but throughout the area*. The sheer number of amphibians heard calling and observed is an account of the diversity of habitat found *throughout the overall area*, not just the swamp thicket within the area of the SWM facility. The loss of the 1.04ha of wetland area *accounts for less than 10% of amphibian habitat throughout the total surrounding area*.
>
> Considering these conditions, the 1.04ha of wetland area lost contains the following:

> * *Less than 10% of the amphibian habitat for species within the surrounding area* (i.e., the American toad, Green frog, Leopard frog);
> * Low quality wetland habitat that has *likely established itself within the last 10 years*;
> * Presence of common vascular plant species.
>
> In light of these conditions, compensation should be implemented through the detailed design of the remediation and SWM works *to replace any removed habitat* within the area.
>
> [Emphasis added.]

44 In my view, an objective reading of the report, taken as a whole, simply does not support the Applicant's suggestion of irreparable harm in terms of lost amphibian breeding habitat, (which in turn would establish irreparable consequences flowing from deferred vindication of the public's "right to be heard" pursuant to the Official Plan).

45 To the contrary, the authors of the report clearly seem to indicate that the contemplated remedial works will entail only a relatively modest and temporary impact on the relevant overall breeding habitat. In particular, a relatively small percentage of the habitat will be lost only until its later replacement, at which time that replacement area probably will be repopulated in the same manner as the current overall habitat came to be populated over the past ten years.

46 As far as "balance of convenience" is concerned, I specifically reject the suggestion, advanced by the Applicant repeatedly in her supplementary evidence, that the Respondent really will entail no financial loss through imposition of an injunction, (if later shown to have been inappropriate), because the City can always recoup any such losses "through taxation once the development is completed".

47 In a very real sense, the City is representative of its residents, and the financial burdens created by municipal expenditure and correlative taxation should not be regarded as separate and distinct. Moreover, taken to its logical extreme, the Applicant's suggestion would mean that a public body with tax authority could never establish irreparable financial loss, and therefore could neither seek nor resist requests for injunctive relief.

48 Beyond this, the supplementary evidence tendered by the City indicates that the consequences of injunctive relief have escalated since the time of the previous hearing. In particular, the City's exposure to increased costs resulting from any "stop work" order at this point, (for the reasons outlined above), is now thought to exceed $3 million. Moreover, prolonged or repeated extension of road closures, in the area of Gainsborough Road, would entail significant expense and profound detrimental impact on local businesses and residents.

49 In short, the "balance of convenience" now tilts even more firmly in favour of the City and refusal of the requested injunctive relief.

50 In the course of argument, counsel for the Applicant effectively conceded these financial realities, but questioned how any normal resident of a municipality, without the personal means to make good on any undertaking to provide reimbursement for the extraordinary costs usually associated with such municipal undertakings, could ever hope to satisfy the "balance of convenience" requirement and enjoin such activities.

51 While such concerns have merit in the abstract, I agree with the Respondent's submission that, in the case before me at least, such arguments lose their force when one has regard to considerations of timing.

52 In particular, the vast majority of the irreparable harm now relied upon by the City, in its "balance of convenience" arguments, stems from the fact that it has committed itself contractually, financially and physically to the remedial works in question. Had Ms Valastro come before the court requesting an injunction *before* Council committed itself to the tender, or *before* the construction juggernaut had been set in motion, the balance of convenience considerations may have been very different.

53 As matters stand, application of the *RJR-MacDonald* analysis, based on the evidence now before me, once again indicates that injunctive relief should be denied.

54 Counsel for the Applicant did not seriously or strenuously question or challenge that suggested conclusion. Instead, he suggested that the *RJR-MacDonald* analysis simply did not apply to this situation.

55 In particular, relying upon certain passages from *Ontario (Minister of Agriculture and Food) v. Georgian Bay Milk Co.*, [2008] O.J. No. 485 (S.C.J.), ("Georgian Bay Milk"), the Applicant argues that a significantly different test applies to requests for injunctive relief permitted by specific statutory provisions, (a "statutory injunction"), and that this different test effectively dictates that injunctive relief should be granted in this case, as requested by the Applicant.

56 In *Georgian Bay Milk*, the Ministry of Agriculture and Rural Affairs (the "Minister") and the Dairy Farmers of Ontario ("DFO" sought injunctive relief preventing various milk producers from marketing and transporting milk "contrary to the clear requirements of the law governing the marketing and sale of milk in Ontario". In that regard, injunctive relief was sought not only pursuant to s.101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, but also pursuant to s.22 of the *Milk Act*, R.S.O. 1990, c. M-12, which reads in part as follows:

> *Where it is made to appear from the material filed or evidence adduced that any offence against this act or the regulations ... 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, absolutely or for such period as seems just, and any *injunction* cancels the licences of the transporter, processor, distributor or operator of a plant named in the order for the same period.
>
> [Emphasis added.]

57 In the course of his reasons in *Georgian Bay Milk*, Justice Pattillo expressly applied the *RJR-MacDonald* analysis to some of the requests for injunctive relief, but noted that different considerations applied in relation to injunctions sought pursuant to statutory provisions such as those in s. 22 of the *Milk Act*, *supra*. In particular, at paragraphs 50-51 of his decision, Justice Pattillo summarized the relevant authorities as follows:

> There is, however, a significant distinction between an injunction authorized by statute and an injunction available to the attorney general at common law. ...
>
> On the basis of the authorities cited by the parties I am satisfied that where a statute provides a remedy by way of injunction, different considerations govern the exercise of the court's discretion than apply when an attorney general sues at common law to enforce public rights. The following general principles apply when an injunction is authorized by statute:
>
> i. *The court's discretion is more fettered*. *The factors considered by a court when considering equitable relief will have a more limited application*. ...
> ii. Specifically, *an applicant will not have to prove that damages are inadequate or that irreparable harm will result if the injunction is refused*. ...
> iii. There is no need for other enforcement remedies to have been pursued. ...
> iv. The court retains a discretion as to whether to grant injunctive relief. *Hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed*. However, an injunction will not issue where it would be of questionable utility or inequitable. ...
> v. It remains more difficult to obtain a mandatory injunction.
>
> [Emphasis added.]

58 Relying on the emphasized portions of the above comments, counsel for the Applicant submits that, in the case before me, the Applicant's reliance on s.273 of the *Municipal Act* reduces or eliminates the barriers to injunctive relief that otherwise might be suggested by application of the "normal" *RJR-MacDonald* analysis.

59 In particular, counsel for the Applicant submits that she has satisfied the "serious question to be tried" test, (as per my earlier ruling), and that the express statutory basis for the underlying application then makes it:

> a. unnecessary for the Applicant to lead evidence establishing that she will experience irreparable harm if the injunction is not granted; and

b. inappropriate to conclude that the public's interest in law enforcement is outweighed by any threatened financial hardship to the City, stemming from imposition of an injunction.

60 With respect, I think the comments of Justice Pattillo regarding the principles applicable to granting a "statutory injunction" must not be taken out of context, and that the Applicant's reliance on them in the case before me is fundamentally misconceived.

61 In my opinion, the three-stage analysis mandated by the Supreme Court of Canada in *RJR-MacDonald* is a carefully crafted equation that balances competing interests, and must be viewed as a unified whole. In particular, it offsets avoidance of a detailed and aggressive inquiry into the substantive merits of a dispute in the "first stage" of the inquiry by imposition of a requirement that the party seeking an injunction establish that he or she will establish irreparable harm, as well as an effective requirement that any such irreparable harm outweigh that threatened to the respondent if the injunction is granted.

62 That careful balancing exercise obviously would be completely and inevitably skewed in favour of those seeking an injunction if one preserves and applies only one element of the *RJR-MacDonald* equation, (i.e., satisfaction of the substantively relaxed "serious question to be tried" test), while effectively eliminating any need to satisfy the second and third elements of the test. In effect, so long as a litigant could establish that his or her claim was not "frivolous or vexatious", an injunction would be available largely on demand.

63 I certainly agree that there are situations where applicable legislation effectively may result in a departure of the "normal" analysis suggested in *RJR-MacDonald*.

64 Indeed, the possibility of an express statutory deviation from the rules "normally" applicable to injunctions and stays was expressly acknowledged by the Supreme Court of Canada in the *RJR-MacDonald* decision itself, at paragraph 46, where it expressly quoted from its earlier decision in *A.G. Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, at p. 127:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. *In the absence of a different test prescribed by statute*, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stays the principles which they follow with respect to interlocutory injunctions. [Emphasis added.]

65 However, as this comment suggests, the relevant emphasis is on effective legislation of a different statutory *test* for the injunction, which in my opinion is something conceptually and fundamentally distinct from situations where legislation merely makes reference to the possibility of injunctive relief without specifying or suggesting a different test for the granting of such relief.

66 In that regard, I think the Applicant's argument pays insufficient regard to what usually is contemplated by the term "statutory injunction".

67 In particular, the term usually is employed in relation to situations where the state seeks an injunction to enforce public rights. See, for example, Sharpe, *Injunctions and*

Specific Performance, at chapter 3, dealing with injunctions at the suit of the Attorney General to restrain open contraventions and defiance of legislation, public nuisance, statutory prohibitions, dangers to public safety, etc., especially in situations where there has been a clear contravention of legislative provisions.

68 It is not unusual in such situations for the Legislature to alter, in effect, the usual balancing equation underlying an approach to requests for injunctive relief; e.g., by suggesting that injunctive relief should be granted more readily where the circumstances clearly indicate a *prima facie* merits analysis favouring the state.

69 In such cases, "the legislative authority is presumed to have taken into consideration the various competing interests of the public in enacting the legislation which is being contravened; the public has a direct and substantial interest in the enforcement of the law; and open defiance of the law constitutes irreparable harm to the public interest"; see *Vancouver (City) v. Zhang*, [2009] 8 W.W.R. 713 (S.C.), at paragraph 18.

70 Similarly, "despite the absence of actual or threatened injury to persons or property, the public's interest in seeing the law obeyed justifies equitable intervention where the defendant is a persistent offender who will not be stopped by the penalties provided by statute"; see Sharpe, *supra*, at p. 3-12.

71 Indeed, an example of a "true" statutory injunction is provided in *Georgian Bay Milk* itself, where the express provision for injunctive relief is conferred by s.22 of the *Milk Act*, *supra*, to enjoin conduct "where it is made to appear ... that any offence ... has been or is being committed". This expressly permits exploration of the substantive merits of a situation before the court, (not something normally permitted by the *RJR-MacDonald* approach). Where that exploration in turn suggests clear contravention of legislation, it obviously makes sense to alter the remaining components of the "injunction equation" by relaxation of the normal "irreparable harm" and "balance of convenience" requirements.

72 But that is not the sort of situation in which the Applicant advances her request for injunctive relief.

73 In particular, the underlying legislation in the case before me is s. 273 of the *Municipal Act*, *supra*. In very broad terms, that legislation addresses "law enforcement" only insofar as it contemplates the possibility that an allegedly illegal municipal by-law may be struck down after a merits inquiry; i.e., the court "*may* quash a by-law in whole or in part for illegality", and has a discretion as to whether interim orders should be granted directing that nothing be done under the relevant by-law "until the application has been disposed of".

74 This is a far cry from the sort of situation normally contemplated by reference to a "statutory injunction". In particular, I see nothing in the relevant legislation that suggests any kind of *prima facie* merits determination that would justify relaxation of the remaining components of the "normal" test for injunctions suggested by *RJR-MacDonald*.

75 In my opinion, the applicable test for determining the Applicant's request for injunctive relief is that set out in *RJR-MacDonald*, and that test is not satisfied for the reasons set out above.

Disposition and Costs

76 For the above reasons, the Applicant's motion for interlocutory relief, i.e., an interlocutory order pursuant to s. 273(4) of the *Municipal Act*, is dismissed.

77 Because my decision was reserved, the parties were unable to make any submissions regarding costs of the Applicant's latest motion.

78 If the parties are unable to reach an agreement on costs in that regard:

a. the Respondent may serve and file written cost submissions, not to exceed five pages in length, (not including any bill of costs), within two weeks of the release of this decision;
b. the Applicant then may serve and file responding written cost submissions, also not to exceed five pages in length, within two weeks of service of the Respondent's written cost submissions; and c. the Respondent then may serve and file, within one week of receiving any responding cost submissions from the Applicant, reply cost submissions not exceeding two pages in length.

79 If no written cost submissions are received within two weeks of the release of this decision, there shall be no costs of the Applicant's motion for an interlocutory injunction.

I.F. LEACH J.

Indexed as:

Canada v. Ipsco Recycling Inc. (F.C.)

Her Majesty the Queen (applicant)
v.
Ipsco Recycling Inc. and General Scrap & Car Shredder Ltd., now known as Jamel Metals Inc., carrying on business as partnership under the firm name and style of General Scrap Partnership and XPotential Products Inc., Jacob Lazareck and Melvin Lazareck (respondents)

[2004] 2 F.C.R. 530 [part]*

[2003] F.C.J. No. 1950

2003 FC 1518

No. T-2274-00

Federal Court

Dawson J.

Heard: Winnipeg, April 3, 4, 7, 8, 9, June 23, 24, 2003;
Judgment: Ottawa, December 23, 2003.

(240 paras.)

Subsequent History

* Editor's note: The judgment as reported in the Federal Court Reports has been abridged. See EDITOR'S NOTE below. For the full text of the decision as released by the Court, please see [2003] F.C.J. No. 1950.

Catchwords:

Environment -- Crown application for permanent, mandatory injunction under Canadian Environmental Protection Act, s. 311 -- Respondents in recycling business -- Product of automobile shredding, ASR, stored in piles -- Material containing over 50 parts per million (ppm) of PCBs defined as "PCB material", must be dealt with in accordance with Storage

of PCB Material Regulations -- Environment Canada testing respondents' ASR for PCB levels -- Departmental testing indicating level exceeded -- Testing by respondents' experts indicating not exceeded -- Remedial actions proposed to be taken by respondents not satisfactory compliance plan -- Department seeking injunction all ASR in certain piles, cells deemed PCB material unless, until areas below limit identified, separated -- Sampling, analysis to be done by third party under departmental supervision, at respondents' cost -- Application denied -- Requirements for injunctive relief under Act, scope of s. 311(1) -- Requisite standard of proof -- Necessity for reasonable, probable grounds -- Whether injunction available in case of past act having present, ongoing effect -- English, French versions of provision -- Contextual factors, scheme of Act considered -- Act provides comprehensive code for pollution prevention -- Provides for substantial fines, imprisonment -- Court concerned Crown avoiding procedural safeguards by seeking injunction, not prosecuting -- Review of expert evidence whether ASR was PCB material -- Analysis of evidence -- Court presented with two different views of common set of facts -- Central dispute: whether average of entire cell, pile or smaller areas within cell ("hot spots") used to determine if 100kg of ASR having PCB level over 50 ppm -- Validity of Departmental data, use of individual results -- Use of statistical analysis -- Conflicting methodologies explained -- Whether Regulations permit use of averages -- Meaning of [page531] "aggregate" in PCB Regulations -- Characterization of ASR question to be answered by science -- Mean or average PCB concentration relevant where heterogeneous substance -- Department taking position contrary to what sworn by own expert witness -- Statistical analysis relevant, required to interpret data -- Mean PCB concentration below limit -- ASR not PCB material.

Injunctions -- Environment Minister seeking permanent, mandatory injunction under Canadian Environmental Protection Act, 1999, s. 311 -- Automobile shredder residue said to exceed limit imposed by Storage of PCB Material Regulations -- Requirements for injunctive relief under s. 311(1) -- Respondent arguing Act enacted under Parliament's criminal law jurisdiction, injunction granted only in exceptional cases -- At common law, Attorney General may seek injunction to secure compliance with law only in exceptional cases -- Otherwise where injunction authorized by statute -- Need not show damages inadequate, irreparable harm if denied -- No requirement other enforcement measures tried -- Court retains discretion to deny if inequitable, of doubtful utility -- Requisite standard of proof -- Necessity for reasonable, probable grounds -- Unnecessary for Court to determine whether mandatory injunction may issue to prevent continuation of offence in view of Court's assessment of scientific evidence of expert witnesses.

Summary:

This was an application by Her Majesty, as represented by the Minister of the Environment, for a permanent, mandatory injunction under *Canadian Environmental Protection Act, 1999*, section 311. This was the first such application to come before a court.

[page532]

Respondents, General Scrap Partnership and XPotential Products Inc., are in the recycling business. The former shreds automobiles; the latter combines material supplied by General Scrap with waste plastics in the manufacture of various products. One of the products of General Scrap's shredding operation is automobile shredder residue or "ASR", non-metallic material, which it supplies to XPotential. ASR is a heterogeneous material composed of plastic, foam and other materials. Some 20,000 metric tonnes of ASR is stored at the General Scrap site. XPotential has a vast amount of ASR at its place.

Under the *Storage of PCB Material Regulations*, material containing over 50 parts per million (ppm) of PCBs are defined as "PCB material" and must be dealt with in accordance with the Regulations. Non-compliance is a statutory offence.

When, in September 1997, Environment Canada notified respondents that they were to be subjected to investigation to determine PCB levels in their ASR, they retained their own experts to conduct sampling and analysis. The report prepared for respondents indicated that PCB levels were not exceeded, but reports prepared by the Department in 1997 and 1999 said that they were. Respondents advised Environment Canada as to what they intended to do about the problem but the Department took the position that respondents had failed to submit a satisfactory compliance plan and launched this application rather than resorting to other statutory enforcement options. In seeking an injunction, the Department's position was that all of the ASR in General Scrap's East and West Piles and all that in Cells 4, 5 and the Drying Cell at the XPotential facility was considered to be PCB material, unless and until any areas below the limit were identified and separated. Any sampling and analysis protocol would have to be carried out by a third party under Departmental supervision but at respondents' cost. The remaining PCB material had to be dealt with in accordance with the PCB Regulations.

Held, the application should be denied.

The first issue for consideration was the requirements for injunctive relief under Act, subsection 311(1) and the scope of that provision. Respondents suggested that the Act was enacted [page533] pursuant to Parliament's criminal law jurisdiction and that a court ought grant an injunction in aid of criminal law only in the most exceptional of cases. They argued that the exercise of this exceptional jurisdiction has been confined to cases where a law has been repeatedly flouted and statutory enforcement provisions have proven ineffective. The cases relied upon by respondents were distinguishable. At common law, the Attorney General may, in exceptional cases, seek an injunction to secure compliance with the law. But, where an injunction is authorized by statute, the Court's discretion is more fettered. In such cases, applicant need not show that damages are inadequate or that irreparable harm will result should an injunction be denied. Nor is there a requirement that other enforcement procedures have been attempted. Even so, the Court does retain a discretion to deny an injunction if of doubtful utility or inequitable.

An ordinary reading of subsection 311(1) suggests that, for an injunction to issue, the Court must be satisfied either that respondent has done an act amounting to an offence or an act directed toward commission of an offence or is about or likely to do an act that constitutes an offence or is directed thereto. If so satisfied, a court may issue a prohibitory or mandatory injunction.

The language of the provision does not support respondents' submission that there is a requirement for proof beyond a reasonable doubt. It speaks of where "it appears to a court" rather than "where it is established that" an offence has been committed. In this regard, the wording of section 311 may be compared with that of section 39 which indicates the necessity for a higher degree of proof. Use of the word "appears" would suggest that not even proof at the high end of the civil standard is required. The Court could not, on the other hand, accept applicant's submission, that it need not establish reasonable and probable grounds. As moving party, the onus is on the Minister to satisfy the Court that it appears that an offence has been or is about to be committed. It is necessary that the Court at least arrive at a *bona fide* belief, on a balance of probabilities, that a serious possibility exists that an offence has, or is likely to be, committed. The Court's belief must be based on credible evidence.

While the subsection is aimed at preventing offences, applicant argues that where a past act has a present and [page534] ongoing effect, a court may by injunction require that a respondent discontinue the unlawful conduct. While the English version is not explicit as to an ongoing situation, the French version of the provision makes it clear that one may be ordered to abstain from actions capable of perpetuating the offence. Indeed, it was applicant's submission that the offence of improper storage of PCB materials constitutes an offence of a continuous nature within the contemplation of Act, section 276. In determining whether subsection 311(1) authorizes issuance of a mandatory injunction to remedy an existing situation, it was helpful to turn to contextual factors such as the scheme of the Act.

The Act provides a comprehensive code regarding pollution prevention and environmental protection. The Act makes provision for a fine of up to $1 million per day or up to 5 years' imprisonment. Additional orders may be made by a court upon conviction of an offence. In particular, under paragraph 291(1)(*a*), a court may prohibit any act that may result in "the continuation" of the offence. Respondents pointed out the absence of explicit reference in the English version of section 311 to prevention of the continuation of an offence. Respondents further argued that it is anomalous that the same relief be available under subsection 311(1) when it merely "appears" that an offence has been committed as is available following conviction under section 291. The procedural safeguards available in a prosecution can indeed be avoided by the Minister electing to proceed for injunctive relief and the Court was concerned by the potential to use section 311 to prosecute rather than section 291. But, in view of the Court's assessment of the evidence, it was not necessary to reach a final conclusion as to whether a mandatory injunction may issue to prevent the continuation of an offence by remediation of an existing situation.

Justice Dawson proceeded to review the expert, scientific evidence as to whether the ASR was PCB material. For a summary of this, see the Editor's note. The Judge then analysed the evidence, noting that from the materials filed by the parties, it seemed that there were two different cases before the Court in that it was presented with two entirely different views of a common set of facts. While certain matters were not in dispute, the central dispute was as to whether the average of an entire cell or pile, or smaller individual areas within a pile [page535] or cell referred to as hot spots, should be used to determine whether there is 100 kg of ASR with a PCB concentration above 50 ppm.

Refer to the Editors note for a summary of the Court's consideration of the validity of the Environment Canada data and of the use of individual results.

Turning to the use of statistical analysis, applicant's position was that the applicability of the mean, standard deviation and confidence intervals for entire cells and piles were irrelevant to the issue of compliance. The methodology developed by respondents' experts involved the identification of each entire pile or cell as a sampling unit, an approach said to be consistent with the 1992 EPA Report. Applicant argued, however, that the language found in the Regulations does not support the use of averages and that respondents' reliance upon an "average" contradicts the word "aggregate" used in the Regulations. The submission was that "aggregate" in the context of the PCB Regulations was the opposite of "average". The Court could not agree that use of the word "aggregate" was inconsistent with the use of statistical averages. Respondents' submission, that what was first required was that the suspect material be categorized and if some was found to be PCB material, it had then to be determined whether it amounted to 100 kg or more, was accepted. The proper characterization of ASR was a question to be answered by science. In dealing with a heterogeneous substance such as ASR, the mean or average PCB concentration is relevant. Applicant's witness, Dr. Fingas, swore that his duty was to design and implement a methodology yielding results "representative of each entire cell". Applicant now, however, takes the position that what is relevant is smaller areas within each pile. Furthermore, in the 1997 and 1999 Reports, Dr. Fingas' results were expressed as an average for each entire pile or cell. This was contrary to the argument now advanced by applicant. The Court was persuaded by the opinion of Merks, that a statistical analysis was relevant and accepted that a statistical analysis was required to properly interpret the data. Also accepted was Merks' opinion that the mean PCB concentration fell below the limit and that respondents' ASR did not constitute PCB material.

[page536]

Statutes and Regulations Judicially Considered

Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33, ss. 2(1)(i), 17, 22, 29, 39, 217, 218, 235, 238(1), 239(1), 243-268, 272(1)(a), 273(2), 274(1), 276, 290, 291(1), 311.

Fisheries Act, R.S.C., 1985, c. F-14, s. 78.1 (as enacted by S.C. 1991, c. 1, s. 24).

Storage of PCB Material Regulations, SOR/92-507, s. 2 "PCB solid", "PCB substance".

Cases Judicially Considered

Distinguished:

Gouriet v. Union of Post Office Workers, [1978] A.C. 435 (H.L.).

Ontario (Attorney General) v. Ontario Teachers' Federation (1997), 36 O.R. (3d) 367; 44 O.T.C. 274 (Gen. Div.).

Ontario (Attorney General) v. Hale (c.o.b. Hale Sand and Gravel) (1983), 13 C.E.L.R. 19; 38 C.P.C. 292 (Ont. H.C.).

Prince Edward Island (Minister of Community and Cultural Affairs) v. Island Farm and Fish Meal Ltd. (1989), 79 Nfld. & P.E.I.R. 228 (P.E.I. S.C. (A.D.)).

Considered:

Ontario (Minister of the Environment) v. National Hard Chrome Plating Co. (1993), 11 C.E.L.R. (N.S.) 73 (Ont. Gen. Div.).

Biolyse Pharma Corp. v. Bristol-Myers Squibb Co., [2003] 4 F.C. 505; (2003), 226 D.L.R. (4th) 138; 24 C.P.R. (4th) 417; 303 N.R. 63 (C.A.).

Referred to:

Maple Ridge (District) v. Thornhill Aggregates Ltd. (1998), 162 D.L.R. (4th) 203; [1999] 3 W.W.R. 93; 109 B.C.A.C. 188; 54 B.C.L.R. (3d) 155; 47 M.P.L.R. (2d) 249 (B.C.C.A.).

Shaughnessy Heights Property Owners' Association v. Northup (1958), 12 D.L.R. (2d) 760 (B.C.S.C.).

Manitoba Dental Association v. Byman and Halstead (1962), 34 D.L.R. (2d) 602 (Man. C.A.).

Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press, [2000] N.S.J. No. 139 (S.C.) (QL).

Saskatchewan (Minister of the Environment) v. Redberry Development Corp., [1987] 4 W.W.R. 654; (1987), 58 Sask. R. 134; 2 C.E.L.R. (N.S.) 1 (Q.B.).

Capital Regional District v. Smith (1998), 168 D.L.R. (4th) 52; 115 B.C.A.C. 76; 61 B.C.L.R. (3d) 217; 49 M.P.L.R. (2d) 159 (C.A.).

Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84; (2002), 208 D.L.R. (4th) 107; 37 Admin. L.R. (3d) 252; 18 Imm. L.R. (3d) 93; 280 N.R. 268.

[page537]

Authors cited

Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983.

U.S. Environmental Protection Agency. EPA Manual SW-846. Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, 3rd ed. Washington: U.S.G.P.O., looseleaf.

History and Disposition:

APPLICATION for a permanent, mandatory injunction under Canadian Environmental Protection Act, 1999 in respect of piles of automobile shredder residue, said to contain PCB material. Application denied.

Appearances:

Duncan A. Fraser and Joel I. Katz for applicant.

James G. Edmond and John D. Stefaniuk for respondents.

Solicitors of record:

Deputy Attorney General of Canada for applicant.

Thompson Dorfman Sweatman, Winnipeg, for respondents.

EDITOR'S NOTE:

The Executive Editor has determined that these 96-page reasons for order should be reported in the abridged format as authorized by *Federal Courts Act*, subsection 58(2). This case is of significance as the first in which a court has had to deal with an application for injunctive relief under *Canadian Environmental Protection Act, 1999*, subsection 311(1). The legal issues are here published in full text but much of the facts and conflicting scientific evidence have been omitted. Brief editor's notes replace the omitted portions.

The following are the reasons for order and order rendered in English by

[page538]

1 DAWSON J.:-- In this application Her Majesty The Queen, as represented by the Minister of the Environment (applicant or Environment Canada), seeks a permanent, mandatory injunction against the respondents pursuant to section 311 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (Act). The injunction sought is one which would require the respondents, and their agents and servants, to store all PCB material at the business premises of General Scrap & Car Shredder Ltd. and XPotential Products Inc. that is currently lying in open piles or otherwise improperly stored, in containers that provide sufficient durability and strength to prevent the PCB solids and PCB substances from being affected by the weather or released.

2 These reasons are lengthy. In them I conclude that upon the totality of the evidence Environment Canada has failed to meet its burden to establish on a balance of probabilities that it appears that the respondents have committed an offence under the Act by improperly storing PCB material. In consequence, the application for injunctive relief is dismissed.

Editor's note (replaces part of paragraph 2 to paragraph 44):

Respondents, General Scrap Partnership and XPotential Products Inc. are in the recycling business. General Scrap was Canada's first automo-

bile shredder, having commenced business at Winnipeg in 1967. In the shredding process, ferrous metals are separated from non-ferrous materials including metals (copper and aluminum) and automobile shredder residue or "ASR". The latter is made up of plastic, foam, rubber, carpet and glass. The chunks of this ASR may exceed one foot in size.

PCBs were banned in Canada in 1977. Prior to then, this now prohibited substance was found in automobiles and household appliances. So, when older vehicles are shredded, PCBs remain in the ASR in low concentrations. But just 500 grams of PCBs can contaminate up to 10 tonnes of ASR in a concentration [page539] exceeding the regulatory limit of 50 parts per million (ppm). The prohibited substance is found in varying amounts in ASR storage piles.

General Scrap has 20,000 metric tonnes of ASR in three piles. This ASR was generated between 1969 and 1978. Respondent, XPotential, recycles ASR with post-consumer waste plastics to manufacture such products as fence posts and railway ties. Its operation is located one mile away from General Scrap and consists of a plant and storage cell area. Since 1996 it has received some 125,000 tonnes of ASR from General Scrap. It has 6 ASR storage cells and a drying cell. Environment Canada is concerned about the ASR in cells 4 and 5 as well as that in the drying cell. Some of the ASR in these cells had been stored at General Scrap for several years.

The *Storage of PCB Material Regulations*, SOR/92-507 define material containing more than 50 ppm of PCBs to be "PCB material". Such material in the amount of 100 kg or more has to be stored and handled in accordance with the Regulations and non-compliance is an offence.

When Environment Canada notified respondents that they were to be inspected and ASR samples taken for analysis to ascertain PCB levels, respondents engaged Wardrop Engineering to conduct sampling and analysis for them. Its report indicated levels below the regulatory threshold. But the Environment Canada report found the limit exceeded at three locations: the West Pile at General Scrap and storage cells 5 and 6 at XPotential. Wardrop prepared a second report, based on its analysis of duplicate samples, indicating that the limit was not exceeded. Environment Canada did not, however, undertake enforcement action since its report was based upon an analytical protocol other than that referenced in the Regulations. But within a few months, the Department took more samples and in 1999 issued a new report to the effect that two ASR piles at General [page540] Scrap and three of the four storage areas at XPotential exceeded the legal limit. General Scrap advised the Department of its plans to deal with the problem but was found not to have provided a detailed compliance plan with specific steps and time frames. Respond-

> ents retained Dillon Consulting and another expert to design a sampling program that would yield the most accurate results but the Department was unwilling to comment on the proposed sampling and analysis procedures. These proceedings were instituted by applicant without first resorting to other enforcement options available under the Act. It seeks an injunction on the basis that all of the ASR in General Scrap's East and West Pile and that in XPotential's Cells 4, 5 and Drying Cell are PCB material unless and until areas under the limit are separated. The injunction would further require that sampling, analysis and identification of non-PCB material be done by a third party at respondents' cost but under Departmental supervision. The remaining PCB Material would have to be stored or disposed of in accordance with the PCB Regulations.

II. THE ISSUES

45 In order to determine whether the injunction requested should issue, the following issues must be considered:

(i) What are the requirements which must be met in order to be entitled to obtain an injunction pursuant to subsection 311(1) of the Act and what is the scope of subsection 311(1)?

[page541]

(ii) Is some or all of the ASR PCB material as defined in the Regulations so that some or all of the respondents are in breach of the Regulations?
(iii) If so, which respondents are in breach of the Regulations? and
(iv) Should the Court grant the requested injunction?

III. ANALYSIS

(i) What are the requirements to be met in order to obtain injunctive relief under subsection 311(1) of the Act and what is the scope of subsection 311(1)?

46 Counsel advise that this is the first occasion on which a court has considered a request for injunctive relief under subsection 311(1) of the Act. Section 311 of the Act is as follows:

> **311.** (1) Where, on the application of the Minister, it appears to a court of competent jurisdiction that a person has done or is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under this Act, the court may issue an injunction ordering any person named in the application

> (*a*) to refrain from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence under this Act; or
>
> (*b*) to do any act or thing that it appears to the court may prevent the commission of an offence under this Act.
>
> (2) No injunction shall be issued under subsection (1) unless 48 hours notice is given to the party or parties named in the application or the urgency of the situation is such that service of notice would not be in the public interest.

(a) Is subsection 311(1) to be limited to exceptional cases?

47 The respondents' fundamental argument with respect to the application of section 311 is that the Act in its entirety is enacted pursuant to Parliament's jurisdiction over criminal law matters. It follows, they [page542] submit, that the jurisdiction of the Court to grant an injunction in aid of criminal law is a jurisdiction to be used with caution and only in the most exceptional of cases. Reliance is placed upon authorities such as *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435 (H.L.); *Ontario (Attorney General) v. Ontario Teachers' Federation* (1997), 36 O.R. (3d) 367 (Gen. Div.); and *Ontario (Attorney General) v. Hale* (*c.o.b. Hale Sand and Gravel*) (1983), 13 C.E.L.R. 19 (Ont. H.C.). The respondents say that the exercise of this exceptional jurisdiction has been confined to cases where a law has been repeatedly flouted, the alleged breach of law is clear, and the enforcement provisions of the statute in question have proven ineffective.

48 With respect, I find the authorities relied upon by the respondents to be distinguishable. In the cases cited by the respondents there was either no specific legislative provision which authorized injunctive relief, or, as in *Hale, supra*, the statutory provision which provided for injunctive relief was not applicable. Therefore, in all of the cases what was in issue was the right of an attorney general to sue at common law in order to attempt to enforce a law by way of injunction.

49 The nature of an injunction available at common law to an attorney general in order to enforce public rights is well described by Justice MacPherson in *Ontario Teachers' Federation, supra*. This remedy reflects the role of the attorney general in securing compliance with the laws of the land. Courts have held this to be a remedy granted in exceptional cases.

50 There is, however, a significant distinction between an injunction authorized by statute and an injunction available to the attorney general at common law. This distinction is aptly illustrated in *Ontario (Minister of the Environment) v. National Hard Chrome Plating Co.* (1993), 11 C.E.L.R. (N.S.) 73 (Ont. Gen. Div.). There, the statutory provision with respect to the granting of an injunction contemplated an injunction to [page543] "restrain" contravention of the statute. The Court concluded that because the statute only provided a basis for the issuance of a prohibitory injunction, a mandatory injunction was only available at common law at the request of the Attorney General suing in the public interest. Such

common law relief was available only where the law was being flouted and the legislation was inadequate to protect the public interest.

51 On the basis of the authorities cited by the parties I am satisfied that where a statute provides a remedy by way of injunction, different considerations govern the exercise of the court's discretion than apply when an attorney general sues at common law to enforce public rights. The following general principles apply when an injunction is authorized by statute:

(i) The court's discretion is more fettered. The factors considered by a court when considering equitable relief will have a more limited application. See: *Prince Edward Island (Minister of Community and Cultural Affairs) v. Island Farm and Fish Meal Ltd.* (1989), 79 Nfld. & P.E.I.R. 228 (P.E.I. S.C. (A.D.)); *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 162 D.L.R. (4th) 203 (B.C.C.A.).

(ii) Specifically, an applicant will not have to prove that damages are inadequate or that irreparable harm will result if the injunction is refused. See: *Shaughnessy Heights Property Owners' Association v. Northup* (1958), 12 D.L.R. (2d) 760 (B.C.S.C.); *Manitoba Dental Association v. Byman and Halstead* (1962), 34 D.L.R. (2d) 602 (Man. C.A.); *Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press*, [2000] N.S.J. No. 139 (S.C.) (QL).

(iii) There is no need for other enforcement remedies to have been pursued. See: *Saskatchewan (Minister of the Environment) v. Redberry Development Corp.*, [1987] 4 W.W.R. 654 (Sask. Q.B.).

(iv) The court retains a discretion as to whether to grant injunctive relief. Hardship from the imposition and [page544] enforcement of an injunction will generally not outweigh the public interest in having the law obeyed. However, an injunction will not issue where it would be of questionable utility or inequitable. See: *Saskatchewan (Minister of the Environment) v. Redberry Development Corp., supra*; *Maple Ridge (District) v. Thornhill Aggregates Ltd., supra*; *Capital Regional District v. Smith* (1998), 168 D.L.R. (4th) 52 (B.C.C.A.).

(v) It remains more difficult to obtain a mandatory injunction. See: *Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press, supra*.

(b) The constituent elements of subsection 311(1)

52 Having rejected the respondents' argument that relief pursuant to section 311 of the Act is only available upon proof that the law has been repeatedly flouted and that other enforcement provisions of the statute have proven ineffective, I turn to consider what must be established in order to permit the Court to issue a mandatory injunction.

53 The starting point for the interpretation of subsection 311(1) of the Act is the following well-known and accepted statement of principle:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at page 87 as cited in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at paragraph 27.

54 This approach requires a court to attribute to a legislative provision the meaning that best accords with both the text and the context of the provision. While neither can be ignored, as the Federal Court of Appeal observed in *Biolyse Pharma Corp. v. Bristol-Myers Squibb Co.*, [2003] 4 F.C. 505, at paragraph 13, the clearer the ordinary meaning of the provision, the more [page545] compelling the contextual considerations must be in order to warrant a different reading.

55 Before beginning this analysis it is convenient to again set out the text of subsection 311(1) of the Act:

> **311.** (1) Where, on the application of the Minister, it appears to a court of competent jurisdiction that a person has done or is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under this Act, the court may issue an injunction ordering any person named in the application
>
> > (*a*) to refrain from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence under this Act; or
> >
> > (*b*) to do any act or thing that it appears to the court may prevent the commission of an offence under this Act.

1. <u>The Text -- Grammatical and Ordinary Sense</u>

56 An ordinary reading of subsection 311(1) leads to the interpretation that for an injunction to issue it must appear to a court that either:

> (i) the respondent has done any act or thing constituting an offence under the Act, or done any act or thing that is directed toward the commission of an offence; or
> (ii) the respondent is about to do, or is likely to do, any act or thing that constitutes an offence under the Act or is directed toward the commission of an offence.

57 If so satisfied, the court may:

> (i) issue a prohibitory injunction restraining the respondent from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence; or

(ii) issue a mandatory injunction requiring the respondent to do any act or thing that it appears to the court may prevent the commission of an offence.

The Text as it Speaks to the Requisite Standard of Proof

58 The respondents argue that the Act requires proof beyond a reasonable doubt of the facts giving rise to the [page546] commission of an offence. In my view, the language used in subsection 311(1), read in its grammatical and ordinary sense, does not support this conclusion. I so conclude because the provision speaks to the situation where "it appears to a court" that an act or thing has occurred or is about to occur or is likely to occur, and that act or thing constitutes or is directed toward the commission of an offence. If proof beyond a reasonable doubt of the commission, or likely commission, of an offence was required it is reasonable to infer that Parliament would have used more specific language in the nature of "where it is established that a person has done or is about to do or is likely to do any act or thing constituting an offence".

59 Further, the court may restrain any act or thing that "appears to the court may constitute or be directed toward the commission of an offence". The court may order anything to be done that "may prevent the commission of an offence". This wording again falls short of requiring proof beyond a reasonable doubt that an offence has occurred or is about to occur or is likely to occur.

60 Moreover, the wording used in subsection 311(1) is to be contrasted with that found in section 39 of the Act. Section 39 permits a person who suffers, or is about to suffer, loss or damage "as a result of conduct that contravenes any provision of this Act" to apply to a court for injunctive relief. Section 39 therefore requires that the court be satisfied that loss or damage results from conduct that "contravenes the Act" in order to grant injunctive relief. The use of wording in subsection 311(1) which only requires that it "appears" that an offence has occurred, or is about to or likely to occur, must be taken to reflect Parliament's intent that a lower degree of proof is required under section 311 than is required under section 39. That lower degree of proof would not equate to proof beyond a reasonable doubt, or even proof at the high end of the civil standard.

61 In so concluding, I have considered the respondents' argument that section 29 of the Act [page547] supports the conclusion that section 311 requires proof to the criminal standard. Section 29 provides:

> **29.** The offence alleged in an environmental protection action and the resulting significant harm are to be proved on a balance of probabilities.

62 The respondents argue that because section 311 and related provisions contain no similar provision invoking the civil standard, the standard of proof must be intended to be the criminal standard.

63 However, it is significant, in my view, that an environmental protection action referenced in section 29 may only be brought by a person who has applied to the Minister for an investigation of an offence and the Minister has either failed to investigate and report as required or has responded unreasonably to the investigation. An environmental protection action is therefore a form of substitution for a proper investigation of an alleged offence.

The gravamen of the action is proof of an offence. In that circumstance, the need for clarification of the standard of proof is apparent. Viewed in this context I am not prepared to infer from the absence of a similar provision applicable to section 311 that the criminal standard of proof was intended to apply to section 311.

64 To conclude on this point, I also observe that nothing in section 311 indicates that the application commenced by the Minister is criminal in nature so as to attract the criminal standard of proof.

65 On the other hand, Environment Canada asserts that it need only establish that there is reason to believe that a violation of the Act is occurring. It is said by Environment Canada that in the absence of an express statutory requirement it is not necessary for it to prove reasonable and probable grounds for that belief. In the words used in Environment Canada's written submission:

[page548]

> 31. Environment Canada need only prove that they [*sic*] have reason to believe a violation of the Act is occurring. Unless the statute indicates otherwise, reasonable and probable grounds for such belief or actual proof of the violation is not required.
>
> ***Prince Edward Island (Minister of Community and Cultural Affairs) v. Island Farm and Fish Meal Ltd.*** **(1989), 79 Nfld. & P.E.I.R. 228 (P.E.I.C.A.)**

66 While I reject the respondents' submission that what is required is proof beyond a reasonable doubt of facts giving rise to the commission of an offence, I also reject the submission of Environment Canada that it is not necessary for it to establish reasonable and probable grounds upon which to base a belief that a violation of the Act has occurred, or will occur, or will likely occur.

67 The ordinary meaning of the words used in subsection 311(1) places the onus on the Minister, as moving party, to satisfy a court of competent jurisdiction that it appears that an act or thing constituting or directed toward the commission of an offence has occurred or is about to occur or is likely to occur. If so satisfied the court may enjoin any act or thing that it appears may constitute or be directed toward the commission of an offence. Alternatively, the court may mandate any act or thing that it appears may prevent the commission of an offence. While the language used falls short of requiring proof that an offence has occurred or will occur, it is necessary for the court at least to come to a *bona fide* belief, on a balance of probabilities, that a serious possibility exists that an offence has been committed, or is likely to be committed, or conduct directed toward the commission of an offence has occurred or will likely occur unless an injunction is issued. Unless the court is so satisfied, the Minister will have failed to establish the existence of facts that make the commission of an offence or conduct furthering an offence appear likely. The court's belief

must be based on credible evidence, and any inferences that such evidence properly supports. The onus is upon the Minister to meet that burden.

[page549]

68 I do not find the *Island Farm and Fish Meal Ltd.* case relied upon by Environment Canada to assist its position. This case turned upon the wording of the specific provincial legislation which expressly allowed a ministerial order to be issued simply where the Minister had reason to believe that a violation had occurred. The case is not authority for any broader proposition applicable to subsection 311(1) because of differences in the language used in each statute.

The Text as it Speaks to the Prevention of Offences

69 Environment Canada submits that the language of subsection 311(1) when read in its entirety is directed toward the prevention of offences under the Act. I agree. It does so by allowing a court to prohibit acts or things that may constitute or be directed to the commission of an offence and by allowing a court to order that any act or thing be done where it appears that the resulting effect of the order may prevent the commission of an offence.

70 For example, in the case of a single discrete act that constitutes or may constitute an offence under the Act, on proper evidence the court could enjoin the act or could order that any act or thing be done so as to prevent the occurrence of the offence. However, if that single, discrete act had already taken place, there would be no scope for the application of subsection 311(1) because there would be no act to restrain and no way to prevent the commission of an offence after the fact.

71 What then of the case where a past or present act has a present and ongoing effect? For example, if the ASR at issue now constitutes, in whole or in part, PCB material can prohibitory or mandatory injunctive relief be granted?

72 Environment Canada argues that in such a situation a court may (pursuant to paragraph 311(1)(*a*) of the Act) by injunction require a respondent to discontinue acting in a manner that constitutes or is directed toward the commission of an offence. The ordinary meaning of the words used in paragraph [page550] 311(1)(*a*) support that submission in the following manner.

73 The offence at issue in this case is the alleged failure to store PCB material in conformance with the Regulations. This is an offence pursuant to paragraph 272(1)(*a*) of the Act, which makes it an offence to contravene a provision of this Act or the regulations. Paragraph 311(1)(*a*) would therefore apply where, to paraphrase the language of the provision, it appears to the court that a person has stored PCB material in contravention of the Regulations. In that circumstance, the court could order that the respondents refrain from storing PCB material in contravention of the Regulations because this non-compliant form of storage would constitute the commission of an offence. While the English version is not explicit with respect to an ongoing situation, the French version of paragraph 311(1)(*a*) expressly provides that one may be ordered to abstain from all acts capable of continuing or

perpetuating an offence. Thus, the use of the phrase "*de s'abstenir de tout acte susceptible [...] de perpétuer le fait*".

74 In this type of situation, the court could as well order pursuant to paragraph 311(1)(*b*) that the material be stored in accordance with the Regulations if satisfied that this would "prevent the commission of an offence".

75 In this connection, Environment Canada argues that the offence of improper storage of PCB materials is an offence of a continuous nature as contemplated by section 276 of the Act. Section 276 provides:

> **276.** Where an offence under this Act is committed or continued on more than one day, the person who committed the offence is liable to be convicted for a separate offence for each day on which it is committed or continued.

76 It follows in the present case, in the submission of Environment Canada, that while any offence of failing to comply with the Regulations occurred before the proceeding was commenced, it continues to occur. So long as PCB material remains stored in a manner inconsistent with the Regulations, Environmental Canada [page551] argues that the offence continues and a fresh, separate and discrete offence occurs each day. Thus, a mandatory injunction may issue requiring PCB material to be stored as stipulated in the Regulations in order to prevent the commission of a fresh, separate offence.

77 In response, the respondents argue that section 276 of the Act does not in its language provide that the continuation of an offence is itself a separate offence. Rather, the section provides that "the person who committed the offence is liable to be convicted for a separate offence for each day on which it is committed or continued". This is said to allow for the multiplication of penalties and for the continuation of any limitation period. The wording used in section 276 is contrasted by the respondents with section 78.1 of the *Fisheries Act*, R.S.C., 1985, c. F-14 [as enacted by S.C. 1991, c. 1, s. 24]. The environmental provisions contained in the *Fisheries Act* are noted by the respondents to be administered by Environment Canada. Section 78.1 of the *Fisheries Act* provides:

> **78.1** Where any contravention of this Act or the regulations is committed or continued on more than one day, it constitutes a separate offence for each day on which the contravention is committed or continued.

78 The *Fisheries Act* pre-dates the Act and therefore could provide support for the respondents' submission that the wording used in section 276 means something other than the continuation of a contravention of the Act constitutes a separate offence for each day it persists. Notwithstanding that submission, section 276 of the Act does expressly state that the continuation of an offence over more than one day renders the offender liable to be convicted for separate offences.

79 It is at this point helpful to turn to the contextual factors that aid in the interpretation of subsection 311(1) and that specifically should aid in interpreting whether subsection 311(1) permits the issuance of a mandatory injunction in order to remedy an existing situation.

[page552]

2. The Context

The Scheme of the Act

80 The Act may be described as being a comprehensive code respecting pollution prevention and the protection of the environment.

81 Part 2 of the Act deals with public participation in the administration and enforcement of the Act. An individual who is at least 18 years of age and a resident of Canada may request an investigation of an alleged offence under the Act (section 17). As referred to above, should the responsible Minister fail to conduct an investigation, or respond unfavourably, and if there has been significant harm to the environment, then the individual who requested the investigation may proceed with an environmental protection action (section 22). Subsection 22(3) of the Act provides that in such an action the individual may claim any or all of the following relief:

> **22.** (3) ...
>
> (*a*) a declaratory order;
>
> (*b*) an order, including an interlocutory order, requiring the defendant to refrain from doing anything that, in the opinion of the court, may constitute an offence under this Act;
>
> (*c*) an order, including an interlocutory order, requiring the defendant to do anything that, in the opinion of the court, may prevent the continuation of an offence under this Act;
>
> (*d*) an order to the parties to negotiate a plan to correct or mitigate the harm to the environment or to human, animal or plant life or health, and to report to the court on the negotiations within a time set by the court; and
>
> (*e*) any other appropriate relief, including the costs of the action, but not including damages. [Underlining added.]

82 Of significance is the explicit reference in paragraph 22(3)(*c*) to an order "requiring the defendant to do anything that ... may prevent the continuation of [page553] an offence" under the Act (underlining added).

83 Section 39 of the Act, also previously referred to, allows a person who suffers, or is about to suffer, loss or damage as a result of conduct contravening the Act to seek an injunction. Such an injunction may require the contravener to refrain from doing anything that

it appears causes or will cause the loss or damage, or may require the contravener to do anything that it appears prevents or will prevent the loss or damage.

84 Part 10 of the Act deals with the enforcement of the Act and provides extensive enforcement powers. The responsible Minister may designate enforcement officers who have peace officer powers (section 217). An enforcement officer may enter and inspect any place where there are reasonable grounds to believe there might be a substance or activity regulated under the Act (section 218). During the course of an investigation or search, an enforcement officer may issue an Environmental Protection Compliance Order (EPCO) where there are reasonable grounds to believe that any provision of the Act or regulations has been contravened by a person who is continuing the commission of the offence. Section 235 deals with EPCOs and is, in material part, as follows:

> **235.** (1) Whenever, during the course of an inspection or a search, an enforcement officer has reasonable grounds to believe that any provision of this Act or the regulations has been contravened in the circumstances described in subsection (2) by a person who is continuing the commission of the offence, or that any of those provisions will be contravened in the circumstances described in that subsection, the enforcement officer may issue an environmental protection compliance order directing any person described in subsection (3) to take any of the measures referred to in subsection (4) and, where applicable, subsection (5) that are reasonable in the circumstances and consistent with the protection of the environment and public safety, in order to cease or refrain from committing the alleged contravention.
>
> (2) For the purposes of subsection (1), the circumstances in which the alleged contravention has been or will be committed are as follows, namely,
>
> ...
>
> (*b*) the possession, storage, use, sale, offering for sale, advertisement or disposal of a substance or product containing a substance;

[page554]

> ...
>
> (3) Subsection (1) applies to any person who
>
> (*a*) owns or has the charge, management or control of the substance or any product containing the substance to which the alleged contravention relates or the property on which the substance or product is located; or

(*b*) causes or contributes to the alleged contravention.

(4) For the purposes of subsection (1), an order in relation to an alleged contravention of any provision of this Act or the regulations may specify that the person to whom the order is directed take any of the following measures:

(*a*) refrain from doing anything in contravention of this Act or the regulations, or do anything to comply with this Act or the regulations;

(*b*) stop or shut down any activity, work, undertaking or thing for a specified period;

(*c*) cease the operation of any activity or any part of a work, undertaking or thing until the enforcement officer is satisfied that the activity, work, undertaking or thing will be operated in accordance with this Act and the regulations;

(*d*) move any conveyance to another location including, in the case of a ship, move the ship into port or, in the case of an aircraft, land the aircraft;

(*e*) unload or re-load the contents of any conveyance; and

(*f*) take any other measure that the enforcement officer considers necessary to facilitate compliance with the order or to protect or restore the environment, including, but not limited to,

(i) maintaining records on any relevant matter,
(ii) reporting periodically to the enforcement officer, and
(iii) submitting to the enforcement officer any information, proposal or plan specified by the enforcement officer setting out any action to be taken by the person with respect to the subject-matter of the order. [Underlining added.]

85 An EPCO may therefore direct that a person who is continuing the commission of an offence to "do anything to comply with this Act or the regulations".

[page555]

86 A person to whom an EPCO is directed shall immediately on receipt of the order comply with it (subsection 238(1)). An EPCO is valid for up to 180 days (subsection 235(7)). The affected person may make representations to the enforcement officer before

the order is issued, or seek review of the order by an independant review officer (sections 243-268). The order remains in effect until the review officer otherwise rules. An appeal from that decision lies to the Federal Court. Where a person fails to take any measures specified in an EPCO an enforcement officer may cause those measures to be taken (subsection 239(1)).

87 The maximum penalty under the Act for an offence is a fine of up to one million dollars per day or up to 5 years' imprisonment (subsections 273(2) and 274(1)). A court can also levy a fine equal to any profits earned as a result of the offence (section 290). Subsection 291(1) of the Act provides that upon conviction for an offence under the Act the court may make additional orders. Subsection 291(1) is as follows:

> **291.** (1) Where an offender has been convicted of an offence under this Act, in addition to any other punishment that may be imposed under this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects:
>
> (*a*) prohibiting the offender from doing any act or engaging in any activity that may result in the continuation or repetition of the offence;
>
> (*b*) directing the offender to take any action that the court considers appropriate to remedy or avoid any harm to the environment that results or may result from the act or omission that constituted the offence;
>
> (*c*) directing the offender to prepare and implement a pollution prevention plan or an environmental emergency plan;
>
> (*d*) directing the offender to carry out environmental effects monitoring in the manner established by the Minister or directing the offender to pay, in the manner prescribed by the court, an amount for the purposes of environmental effects monitoring;
>
> (*e*) directing the offender to implement an environmental management system that meets a recognized Canadian or international standard;

[page556]

> (*f*) directing the offender to have an environmental audit conducted by a person of a class and at the times specified by the court and

directing the offender to remedy any deficiencies revealed during the audit;

(*g*) directing the offender to publish, in the manner directed by the court, the facts relating to the conviction;

(*h*) directing the offender to notify, at the offender's own cost and in the manner directed by the court, any person aggrieved or affected by the offender's conduct of the facts relating to the conviction;

(*i*) directing the offender to post any bond or pay any amount of money into court that will ensure compliance with any order made under this section;

(*j*) directing the offender to submit to the Minister, on application by the Minister made within three years after the date of conviction, any information with respect to the offender's activities that the court considers appropriate and just in the circumstances;

(*k*) directing the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the act or omission that constituted the offence;

(*l*) directing the offender to perform community service, subject to any reasonable conditions that may be imposed in the order;

(*m*) directing that the amount of any fine or other monetary award be allocated, subject to the *Criminal Code* and any regulations that may be made under section 278, in accordance with any directions of the court that are made on the basis of the harm or risk of harm caused by the commission of the offence;

(*n*) directing the offender to pay, in the manner prescribed by the court, an amount for the purposes of conducting research into the ecological use and disposal of the substance in respect of which the offence was committed or research relating to the manner of carrying out environmental effects monitoring;

(*o*) directing the offender to pay, in the manner prescribed by the court, an amount to environmental, health or other groups to assist in their work in the community where the offence was committed;

(*p*) directing the offender to pay, in the manner prescribed by the court, an amount to an educational institution for [page557] scholarships for students enrolled in environmental studies; and

> (*q*) requiring the offender to comply with any other reasonable conditions that the court considers appropriate and just in the circumstances for securing the offender's good conduct and for preventing the offender from repeating the same offence or committing other offences. [Underlining added.]

88 Relevant are paragraphs 291(1)(*a*), (*b*) and (*f*). Paragraph 291(1)(*a*) allows a court to prohibit any act that may result in "the continuation" of the offence, paragraph 291(1)(*b*) allows the court to order that an offender take any action considered by the court appropriate to remedy any harm to the environment resulting from the offence and paragraph 291(1)(*f*) allows the court to direct an offender to have an environmental audit conducted as prescribed by the court and to further direct the offender to remedy any deficiencies revealed during the audit.

89 The respondents argue that a review of the legislative scheme contained in the Act reveals that where Parliament intends the Act to be directed to continuing offences it uses express language in that regard. Thus, paragraph 22(3)(*c*) of the Act authorizes a court to require a defendant to an action to do anything to "prevent the continuation of an offence", subsection 235(1) enables an EPCO to be issued where there are grounds to believe the Act or its regulations have been breached "by a person who is continuing the commission of the offence" and paragraph 291(1)(*a*) allows a court to prohibit an offender from doing any act that may "result in the continuation ... of the offence". The absence of explicit reference in the English version of section 311 of the Act to prevention of the "continuation of an offence" is said to reflect Parliament's intent that section 311 not apply in that circumstance.

90 The respondents also argue, inferentially, that orders issued pursuant to sections 22 and 291 ordering a defendant to do anything that may prevent the continuation of an offence or refrain from any activity that may result in the continuation of an offence are [page558] issued following judicial determination that an offence under the Act has occurred. As noted above, on a proceeding under subsection 311(1) of the Act it is not necessary for the Minister to prove that an offence has occurred, but only that it appears that a person has done, is about to do, or is likely to do an act or thing constituting or directed toward the commission of an offence under the Act. The respondents argue, and I accept, that it is to some degree anomalous for the same relief to be available pursuant to subsection 311(1) when it "appears" that an offence has occurred or may occur as is available after conviction of an offence under section 291 of the Act. However, an EPCO may issue ordering someone to refrain from contravening the Act or to comply with the Act simply where an enforcement officer has reasonable grounds to believe that the Act or its regulations have been contravened. While an EPCO is of limited duration, an EPCO may nonetheless direct a person to comply with the regulations and an enforcement officer may cause the measure to be taken. This reflects a legislative intent that sweeping remedial measures may be ordered on less than proof that an offence has occurred.

91 The anomaly asserted by the respondents does result in the situation that the procedural safeguards which would be available on a prosecution for an offence under the Act can be avoided where the Minister elects to bring proceedings for injunctive relief under

subsection 311(1) of the Act. The safeguards available to a person prosecuted for an offence include the right to full and proper disclosure from the Crown, the presumption of innocence and the right to be proven guilty beyond a reasonable doubt. Proceedings under subsection 311(1) of the Act, commenced in this Court by application, carry with them no right to discovery of the Crown, no presumption of innocence and, I have found, a civil standard of proof.

[page559]

92 This anomaly and the potential for abuse would be avoided by interpreting section 311 to be prospective and pro-active in nature, operating to maintain the status quo by restraining future acts or directing future acts so as to prevent the commission of an offence, other than one that has occurred and is ongoing. Under this interpretation section 311 would not be available to prevent an offence which has already been committed whether or not it is a continuing offence. In that circumstance, the issuance of an EPCO or the commencement of a prosecution would be appropriate enforcement options.

93 Such an interpretation would not, the respondents argue, be inconsistent with the objects and intent of the Act.

94 The objects of the Act may be taken from the preamble to the Act. There, Parliament expressed the commitment of the federal government to, among other things, "pollution prevention as a national goal" and to "implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". Those principles are said to be consistent with interpreting subsection 311(1) as applying to the prevention of offences and not to the remediation of already existing situations. The contrary interpretation is not necessary in order for there to be effective remedial tools. The provisions of the Act with respect to environmental protection actions, EPCOs and the scope of an order that may be made on conviction for an offence would provide full enforcement options and remedies.

(c) Conclusion with respect to the scope of subsection 311(1) of the Act

95 The use of inconsistent language in the Act makes it, in my respectful view, more difficult to attribute meaning to section 311 in the case of an existing and continuing situation. The failure to consistently and expressly refer to the prevention of the continuation of [page560] an offence and the use of language in section 276 which differs from that found in section 78.1 of the *Fisheries Act* do provide a basis for the interpretation urged by the respondents.

96 I am concerned at the potential to use section 311 as an alternate to a prosecution under section 291 and so deprive a respondent of his or her rights to disclosure of the Crown's case, the presumption of innocence, and to proof of the Crown's case beyond a reasonable doubt.

97 However ultimately, in light of my assessment of the evidence, it is not necessary to reach a final conclusion as to whether a mandatory injunction may issue to prevent the ongoing continuation of an offence where what is sought is the remediation of an already existing, static situation. The language used in paragraph 311(1)(*b*), when read in conjunction with section 276, is capable of supporting the interpretation that each day the offence continues is a new offence that may be prevented by the issuance of a mandatory injunction. My analysis will proceed on this basis.

Editor's note (replaces paragraphs 98 to 132):

The Court then reviewed the evidence as to whether some or all of the ASR was PCB material, considering first that supporting the application. Dr. Fingas, who holds a Master of Science Degree in Chemistry and a doctorate in Environmental Sciences, deposed in his affidavit that for statistically reliable results it was necessary to test samples from a sufficient number of locations in each ASR cell or pile. An excavating device was used to procure samples at all depths. PCB concentrations at both respondents' facilities were over the limit. His opinion was that the improper storage of this PCB material posed a risk to human, plant and animal health and safety. He disagreed with Dillon's methodology, explaining that by mixing many samples it indicated lower levels of PCB.

[page561]

David Clark gave an affidavit in opposition to the application. He is a managing partner with Dillon and holds a Master's Degree in environmental engineering. His findings were that the ASR did not contain mean concentration of PCBs over the limit. He had taken three sets of ASR samples from XPotential's cell 5 in order to test the precision of three field sampling protocols. The one adopted by Environment Canada had the highest variance and was, in Clark's opinion, the least appropriate of the three. He explained why the protocol utilized in preparation of the Dillon Report was to be preferred. Jan Merks, an expert in statistical analysis and sampling design, was of opinion that statistical analysis of the data in the departmental reports did not reveal that any cell or pile of ASR had a mean PCB concentration that statistically differed from the 50 ppm regulatory threshold. Dillon's use of stratified systematic sampling was the most appropriate methodology for sampling material such as the ASR in question. It allows for a more rigorous statistical analysis of the data generated by the sampling. In Merks' opinion, the 1999 Environment Canada Report was mistaken in indicating that procedures analogous to those recommended by the United States Environmental Protection Agency had been followed. Other expert witnesses explained why the Departmental findings were unreliable. Dr. Donald Davies, a toxicologist, had attended

at the General Scrap site to prepare a preliminary health and environmental risk assessment. His conclusion was that the PCBs were not such as to constitute a risk to the environment, the general public, employees, visitors or area wildlife. He was of that opinion regardless of whether the Dillon or the departmental concentration level findings be accepted.

(c) Analysis of the Evidence

133 In oral argument counsel for the applicant observed that having read the materials filed by the parties it appears that there are two different cases before the Court, reflecting two completely different views on a common set of facts. This is very much the case.

[page562]

134 In order for the applicant to succeed in this application Environment Canada must establish, on a balance of probabilities, that it appears that the ASR contains PCB material in a sufficient quantity that the Regulations require it to be labelled and stored in a particular fashion.

135 The analysis of the evidence logically begins with what is not in dispute. That is:

1. For the Regulations to apply the ASR must be "PCB material". This requires that the ASR be a "PCB solid" or "PCB substance", as those terms are defined in the Regulations [section 2]. This in turn requires that the ASR contain more than 50 mg of PCBs per kilogram (or more than 50 ppm), and there must be 100 kg or more of the PCB solid or substance.
2. Neither the Act nor the Regulations prescribe any particular sampling strategy or methodology.
3. In the present context a sampling strategy is the process which determines how many individual samples will be taken from each ASR cell or pile, and the locations at which they will be taken. Based on the analysis of those samples, inferences can be drawn about the ASR cell or pile as a whole, or about the other non-sampled portions of the ASR cell or pile. What is at issue is what is contained in the ASR which has not been analysed.
4. Environment Canada does not take issue with the individual analytical results which were obtained as a result of the respondents' sampling program, as reported by Dillon. Environment Canada takes issue with the respondents' interpretation and analysis of those results.
5. The respondents take issue with the individual analytical results obtained by Environment Canada and with the analysis and interpretation of those results by Environment Canada.
6. The central dispute between the parties is whether the average of an entire cell or pile, or smaller individual [page563] areas within the pile or cell

referred to as hot spots should be used to determine whether there is 100 kg of ASR with a PCB concentration above 50 ppm.

Editor's Note (replaces paragraphs 136 to 176):

Three reasons had been given by respondents's experts as to why the Departmental data ought to be rejected: (1) it was based on an insufficient number of samples and an inappropriate sampling system; (2) the sampling plan was departed from, at least in the case of General Scrap's West Pile; and (3) use of an inferior sample selection method.

Under cross-examination, Dr. Fingas confirmed his heavy reliance on a 1992 United States Environmental Protection Agency (EPA) Report in calculating the number of samples needed. The opinion of respondents' witness, Merks, was that the Department's method of stratified random sampling was appropriate for such applications as statistical quality control of consumer products while Dillon's stratified systematic sampling protocol was more precise for bulk materials. It was noteworthy that Merks was not cross-examined on this issue. Dr. Fingas acknowledged that, while the 1993 EPA Report on sampling with respect to scrap metal shredders recommended the taking of 20 samples from each pile, he had taken far fewer samples than that. He relied upon the 1992 EPA Report which concerns solid waste and not ASR. The Court was convinced that use of an appropriate sampling plan was of crucial importance in evaluating the PCB content of ASR. As noted in the 1992 EPA Report relied upon by Dr. Fingas "analytical data generated by a scientifically defective sampling plan have limited utility, particularly in the case of regulatory proceedings". On the question of the more appropriate sampling plan, the evidence of Merks was preferred over that given by Dr. Fingas in view of the former's recognized expertise. He has written a text on this subject and been qualified as an expert witness in numerous court and administrative proceedings.

[page564]

Applicant conceded that it departed from its own sampling plan in the case of the West Pile, from which only surface samples were taken, using a shovel, from a small portion. Its plan contemplated use of a back-hoe to obtain samples from randomly selected locations and varying depths. The idea was that each sample be "representative of a slice through the entire pile". The departure was necessitated because scrap metal had been placed on top of the pile rendering parts of it inaccessible. In the result, the accuracy of the Departmental findings regarding the West Pile had to be discounted.

The next question was whether the Department had employed an inferior sample selection method. Both sides agreed that it was important that the primary increment be homogenized to the greatest extent possible. Merks' evidence was that respondents' use of a machine called a riffle splitter carefully homogenized the primary samples while the Departmental method homogenized samples in a haphazard manner. Witnesses Clark and Bertram agreed that the Departmental method was less reliable. Their opinion evidence was not shaken upon cross-examination. The 1992 EPA Report explained why a haphazardly selected sample was not a suitable substitute for a randomly selected sample. Under the former method, the person collecting the sample might consciously or subconsciously favour the selection of certain units of the population thereby causing the sample to be unrepresentative. Here, the Departmental method resulted in collecting finer material from the bottom of the pit which has higher PCB levels. The Court was concerned that the Departmental method would result in higher PCB levels being reported. According to applicant, the Dillon method serves to conceal the true character of the material contained in a cell and that use of the interleaving riffle split protocol artificially produces the lowest possible result. Yet applicant chose not to cross-examine Merks -- the one who prescribed the interleaving protocol. The 1992 EPA Report stressed the importance of collecting and analysing a large number of composite samples; there was no evidence that Dillon failed to comply with that recommendation. The Court preferred the evidence of Merks, that compositing samples through interleaving was an appropriate procedure. The Court was not convinced that it was adopted to artificially yield the lowest possible PCB levels.

[page565]

177 To summarize my conclusions with respect to the validity of the Environment Canada data, I conclude that:

1. The sampling plan implemented by Dillon is preferable to that implemented by Environment Canada because of Dillon's use of stratified systematic sampling and because of the greater number of samples it took.
2. Environment Canada departed from its sampling plan with respect to the West Pile.
3. Dillon's method of sample selection was superior in that samples were carefully homogenized with the riffle splitter and were randomly and objectively selected.
4. It was appropriate to composite samples for analysis.

178 I turn now to consider the use which can be made of the individual test results, particularly those obtained by Dillon.

Editor's Note (replaces paragraphs 179 to 193):

Respondents submitted that the individual sample results are no basis for conclusions as to the characteristics of a given volume of ASR. Clark's evidence was that it could not be assumed from the individual test results that PCBs were uniformly distributed within each two-litre [page566] sample; they might be contained in a very small portion thereof. Sampling error arises due to the fact that not all of the material in the primary sample is analysed and there is thus variability from one sample to another. The Court preferred the evidence of respondents' expert witnesses to that of Dr. Fingas as to the use which may be made of individual sample results. Applicant's premise, that it is undisputed that the analytical results reveal the content of each two-litre sample, had to be rejected. It having been demonstrated that samples taken from the same primary sample can yield different analytical results, one result from a primary sample cannot logically be extended to a larger area such as the material in a 20-litre back-hoe bucket, or the entire mass of a hole. Dr. Fingas admitted that sampling and measurement errors are inherent in dealing with ASR because of its heterogeneous nature and that different results might be obtained from samples taken just two feet apart. EPA's authoritative 1992 Report states that "the term 'representative sample' can be misleading unless one is dealing with a homogeneous waste from which one sample can represent the whole population". The conclusion reached by EPA was that it is best to consider a representative data base and that danger lies in placing reliance upon one sample.

3. The Use of Statistical Analysis

194 The nub of the dispute between the parties is characterized by Environment Canada as being whether the average of an entire cell or pile or of smaller individual areas within the pile or cell (known as hot spots) should be used to determine whether there is 100 kg of ASR with a PCB concentration of 50 ppm or more.

195 Environment Canada takes the position that statistical inferences (the applicability of the mean, standard deviation and confidence intervals for entire cells and piles) are irrelevant to the issue of compliance with the Regulations.

[page567]

196 The respondents, however, take the position that the relevant question is whether there is PCB material. This is stated to be essentially "an exercise in hypothesis testing". In order to determine whether particular ASR is PCB material the respondents' experts developed a sampling and analytical program and determined that the appropriate approach

in order to characterize the ASR was by identifying each entire pile and cell at issue as a sampling unit. This approach is said to be consistent with the 1992 EPA Report.

197 Environment Canada relies upon the evidence of Dr. Fingas. He testified on cross-examination that:

(i) If one looks at the literature, the distribution of the PCBs in the ASR is not in a normal or logged normal or other known distribution. It is a very random distribution. Therefore, one should not by any form of science use statistics on that type of data.

(ii) It is well-known scientifically that it is inappropriate to apply statistical methods to non normal data.

(iii) Notwithstanding the reference to statistical applications in the 1992 and 1993 EPA Reports in order to analyse sample data, those statistical applications could not be made to ASR.

(iv) Dr. Fingas also took issue with the following statement from the 1993 EPA Report (the field manual to provide sampling guidance for scrap metal shredders):

> Because of the sampling error and laboratory error, it is not possible to determine exactly the concentration of toxic substances. However, by using the methods in this section, you will be able to make statements such as, "As a result of our study, we are 95% certain that the concentration of PCBs in this pile of stored fluff is between 40 and 100 ppm".

The basis for Dr. Fingas' disagreement with this statement was his view that statistics could not be [page568] applied to material that is not normally distributed.

198 In addition to relying upon the evidence of Dr. Fingas, Environment Canada argues that the language of the Regulations does not support the use of averages. In material part, the Regulations provide:

> 3. (1) Subject to subsections (2), (4) and (5), these Regulations apply in respect of any of the following PCB material that is not being used daily:
>
> (*a*) PCB liquids in an amount of 100 L or more;
>
> (*b*) PCB solids or PCB substances in an amount of 100 kg or more;
>
> ...
>
> (3) <u>For the purposes of subsection (1), the amount of PCBs, PCB liquids, PCB solids or PCB substances, as the case may be, shall be considered to be the following</u>:

(*a*) in the case of a person who owns, controls or possesses PCB material that is in or on a property or on a parcel of land, the aggregate of all amounts of PCBs, PCB liquids, PCB solids or PCB substances, as the case may be, owned, controlled or possessed by that person

(i) in or on the property,
(ii) on the parcel of land, including the parcel of land on which the property referred to in subparagraph (i) is located,
(iii) on any parcel of land adjoining the land referred to in subparagraph (ii), and
(iv) within 100 m of any point situated on the outer limits of the land referred to in subparagraph (ii) and of the adjoining land referred to in subparagraph (iii); and

(*b*) in the case of a person who owns or manages a property in or on which PCB material is located or a parcel of land on which PCB material is located, the aggregate of all amounts of PCBs, PCB liquids, PCB solids or PCB substances, as the case may be, located

(i) in or on that property,
(ii) on that parcel of land,

[page569]

(iii) on any parcel of land owned or managed by that person adjoining the land referred to in subparagraph (ii), and
(iv) within 100 m of any point situated on the outer limits of the land referred to in subparagraph (ii) and of the adjoining land referred to in subparagraph (iii). [Underlining added.]

Environment Canada argues that the respondents' reliance upon an "average" as the basis for determining whether the PCB Regulations apply, contradicts the word "aggregate" used in the Regulations. This is said to be so because the word "aggregate" in the context of the PCB Regulations is effectively the opposite of the word "average". To aggregate is to collect only similar units together, where as to average is to collect all dissimilar units together.

199 The respondents rely upon the affidavit and expert report of Mr. Merks whose report was based upon statistical analysis of the test results. The respondents argue that statistical methods and applications are crucial to proper interpretation of the sampling data.

200 Dealing first with the applicant's argument flowing from the use of the word "aggregate" in the Regulations, I disagree, respectfully, with the submission that the use of the

word "aggregate" is inconsistent with the use of statistical averages. I accept the submission of the respondents that what is first required is that the suspect material be categorized. If some or all is categorized to be PCB material, then one must consider if the amount of PCB material when added up equals 100 kg or more.

201 As to the exercise of characterizing suspect material, the Act is express in paragraph 2(1)(*i*) that in the administration of the Act the Government of Canada is to apply science and technology to identify and resolve environmental problems. Dr. Fingas was express in his affidavit that his task was to implement a program so "the results would scientifically determine" whether the ASR in question was PCB material. The proper characterization of ASR is therefore a question to be [page570] answered by science.

202 Before one considers the conflicting evidence of Dr. Fingas and Mr. Merks it is necessary to deal with the argument that the opinion of Mr. Merks is irrelevant because his evidence relates to the calculation of the average concentration of PCBs in each cell or pile. I am unable to conclude that when dealing with a heterogeneous substance such as ASR the mean or average PCB concentration in each pile is irrelevant for the following reasons.

203 First, Dr. Fingas swore that he was required to design and implement a methodology that would provide results that would be "representative of each entire cell". This is inconsistent with the position that Environment Canada now takes that what is relevant is smaller individual areas within each pile or cell.

204 Second, in the 1997 and 1999 Environment Canada Reports, Dr. Fingas' results were expressed as an average for each entire cell or pile. Thus, for the 1997 and 1999 reports, the results were:

	Average (1997 Report)	Average (1999 Report)
General Scrap		
East pile	33.4 ppm	59.7 ppm
Central pile	35.9 ppm	41.2 ppm
West pile	85.4 ppm	54.6 ppm
XPotential		
Cell 5	61.3 ppm	50.7 ppm
Cell 6	96.7 ppm	42.0 ppm

On the basis of the 1999 Environment Canada Report, Dr. Fingas swore that "at the minimum, the east and west ASR cells at General Scrap, and both storage cells 4 and 5 and the drying cell at XPotential have average PCB concentrations in excess of 50 ppm, and are therefore properly considered PCB Material" (underlining added).

[page571]

205 In addition to Dr. Fingas' evidence, the affidavit of Shannon Kurbis, the Environment Canada enforcement officer, speaks to the use of average concentrations. At paragraphs 74 and 76 she states:

> The Emergencies Science 1999 Report indicates that two ASR piles at General Scrap and three of the four storage areas at XPotential had average PCB concentrations that exceeded 50 ppm.
>
> ...
>
> The average results taken from the Emergencies Science 1999 Report reflect the minimum PCB concentration. The letter accompanying the Emergencies Science 1999 Report states that General Scrap should take immediate steps to ensure that all PCB Material is stored in compliance with the *PCB Regulations*.

206 This use by Environment Canada's own expert and enforcement officer of the average concentration of each entire cell or pile in order to characterize whether the cell or pile is PCB material belies this argument now advanced by Environment Canada that the average concentration is irrelevant.

207 Finally, as Ms. Kurbis' affidavit shows, Environment Canada determined whether or not to bring enforcement proceedings on the basis of the average pile and cell concentrations set out above. Thus in February of 1998, Environment Canada advised the respondents that the General Scrap West Pile, and cells 5 and 6 at the XPotential site contained quantities of PCB in excess of the regulatory limit. On the basis of the 1999 Environment Canada Report the applicant asserts that both the East and West Pile at General Scrap and the drying cell and cells 4 and 5 at the XPotential site contain PCB material.

208 In sum, Environment Canada (through Dr. Fingas) designed a sampling plan to provide results [page572] representative of the whole of each pile or cell and calculated the average concentration per pile and cell, then used the average concentrations as a basis for enforcement proceedings, and adduced evidence in this proceeding in terms of these average concentrations. I therefore do not now accept Environment Canada's submission that the average concentration per cell or pile is irrelevant.

209 Having determined that average concentrations are relevant, what then of the conflicting opinion of Dr. Fingas and Mr. Merks as to the appropriateness of applying a statistical analysis?

210 Mr. Merks was not cross-examined on his opinion, Dr. Fingas was. The following extract from Dr. Fingas' cross-examination is, in my view, telling:

> 393. Q And you keep coming back to that and we've had a lot of questions around that. So you're saying the application of statistics just doesn't apply with this type of material.

A That's correct.

394. Q And what's your authoritative source for that, other than yourself? Do you have a source that you can point me to that says statistical applications don't apply with ASR?

A Yes. Every textbook says one should not use normal statistics or statistics of that type on heterogenous non normal distributions.

395. Q ASR, do you have -- in any publications, because I've only got one and the one I've got says you should do it. So you show me the publication that says you can't do statistical application with ASR to determine whether it meets a regulatory threshold, because that's the issue we have before the Court today. Where's your authority? I'd like to see it.

A Well I have the authority in the sense that it's authority well known scientific principal one does not do normal statistics on non normal samples. This is you know, the first page of statistic textbooks.

[page573]

211 Unfortunately no specific texts or articles were identified by Dr. Fingas nor did he demonstrate that these were non normal samples. The reference by counsel in the extract quoted above to the publication dealing with ASR was to the 1992 EPA Report which specifically dealt with ASR and which stated that because of sampling and analytical errors "we must use statistical analysis" to obtain confidence intervals and levels of confidence.

212 As noted, the 1992 and 1993 EPA reports deal extensively with the use of statistics. Environment Canada, however, submits that there is no evidence before the Court that the EPA reports are appropriately considered "best practices" for ASR sampling. Therefore, Environment Canada says that they ought not to be used to support or challenge the appropriateness of any sampling plan.

213 My difficulty with this submission stems from the fact that the 1999 Environment Canada Report specifically lists both the 1992 and 1993 reports as references. Dr. Fingas agreed in cross-examination that the EPA is a recognized, reputable environmental regulatory authority, and stated that he specifically referenced reports in his 1999 Environment Canada Report that he used very heavily in his preparation. Dr. Fingas sent his sampling

plan to the EPA for review where a statistician looked at it. This was presumably done because Dr. Fingas had no prior experience with the sampling and characterization of ASR.

214 Further, by letter dated September 11,1997 Environment Canada responded to questions put forward on the respondents' behalf and stated that "[i]n response to your questions regarding sampling and analysis methodology, Environment Canada will be following standard sampling procedures as outlined in *Test Methods for Evaluating Solid Waste, Chapter 9, Sampling Plan*, Environmental Protection Agency, 1992. Analysis of all samples will be carried out according to [page574] the test methods specified in the Storage of PCB Material Regulations," as more specifically defined in the letter. The document referenced as being *Test Methods for Evaluating Solid Waste, Physical/Chemical Methods*, Chapter 9, "Sampling Plan" is the document which is described in these reasons as the 1992 EPA Report.

215 In light of this use of the 1992 EPA Report and Dr. Fingas' reliance, in part, upon the EPA, I am persuaded that it is relevant to consider what the 1992 EPA Report says about the use of statistics.

216 The following extracts from that Report are relevant:

> This section of the manual addresses the development and implementation of a scientifically credible sampling plan for a solid waste and the documentation of the chain of custody for such a plan. The information presented in this section is relevant to the sampling of any solid waste, which has been defined by the EPA in its regulations for the identification and listing of hazardous wastes to include solid, semisolid, liquid, and contained gaseous materials. However, the physical and chemical diversity of those materials, as well as the dissimilarity of storage facilities (lagoons, open piles, tanks, drums, etc.) and sampling equipment associated with them, preclude a detailed consideration of any specific sampling plan. Consequently, because the burden of responsibility for developing a technically sound sampling plan rests with the waste producer, it is advisable that he/she seek competent advice before designing a plan. This is particularly true in the early developmental stages of a sampling plan, at which time at least a basic understanding of applied statistics is required. Applied statistics is the science of employing techniques that allow the uncertainty of inductive inferences (general conclusions based on partial knowledge) to be evaluated.
>
> 9.1.1 Development of Appropriate Sampling Plans
>
> An appropriate sampling plan for a solid waste must be responsive to both regulatory and scientific objectives. Once those objectives have been clearly identified, a suitable sampling strategy, predicated upon fundamental statistical concepts, can be developed. The statistical terminology associated with those concepts is reviewed in Table 9-1;

> [page575] Student's "t" values for use in the statistics of Table 9-1 appear in Table 9-2.
>
> ...
>
> 9.2.2.1 Statistics
>
> A discussion of waste sampling often leads to a discussion of statistics. The goals of waste sampling and statistics are identical, i.e., to make inferences about a parent population based upon the information contained in a sample.
>
> Thus it is not surprising that waste sampling relies heavily upon the highly developed science of statistics and that a sampling/analytical effort usually contains the same elements as does a statistical experiment. [Underlining added.]

217 The evidence of Dr. Fingas and Mr. Merks as to the appropriateness of statistical analysis are opposed. Mr. Merks was not cross-examined on his opinion, which opinion (for the reasons set out above) I have found to be relevant. The 1992 EPA Report which Dr. Fingas states he relied upon contemplates the use of statistics for the purpose of making inferences about a parent population based upon the information generated from a sample. Shannon Kurbis advised the respondents that Environment Canada would be following the standard sampling procedures outlined in the 1992 EPA Report. Dr. Fingas did not point to any specific article or book that would provide support for his view that statistics could not be applied to ASR, nor did he give evidence that he did any calculation to determine whether there was in fact a normal distribution.

218 For these reasons, I find the opinion of Dr. Fingas to be less persuasive on this point than the opinion of Mr. Merks. I therefore accept the opinion of Mr. Merks that a statistical analysis is relevant, and for the reasons given by the respondents' witnesses and in the 1992 EPA Report I also accept that a statistical analysis is required in order to interpret properly the data.

219 Having concluded on the evidence adduced in this application that a statistical analysis is required in order to interpret properly the data, it follows that I accept the opinion of Mr. Merks that the mean PCB [page576] concentration in each of the sampling units is lower that the regulatory threshold and that the ASR does not constitute PCB material. In accepting Mr. Merks' opinion I have regard to the fact that Environment Canada did not challenge any of the primary data he relied upon, and did not challenge the propriety of his actual statistical analysis. Rather, Environment Canada challenged the appropriateness of the use at all of statistical applications.

220 In so concluding, I have considered the submission of counsel for the applicant that the statistical analysis is an exercise performed by "mathemagicians" and its "poof and all the high numbers are gone". While an evocative image, logically all of the low numbers

vanish as well. I accept on the evidence that recourse to the mean concentrations is appropriate in view of the error that is inherent in individual sample results.

221 In this regard, I think that it is of some assistance to compare the results Dr. Fingas obtained in his 1997 and 1999 reports as set out above at paragraph 204. The sampling plan and methodology did not differ significantly between the two reports. While the analytical chemical protocols differed (in that 1/RM/3 was used in 1999 and 1/RM/31 was used in the 1997 report), Dr. Fingas testified that some studies showed that there was no difference in qualification between using the two different analytical protocols. The results therefore may properly be compared.

222 Comparing the results, in 1997 Environment Canada determined the areas containing PCB material to be the West Pile at General Scrap and cells 5 and 6 at XPotential. In 1999, the East Pile at General Scrap was said to contain PCB materials, but cell 6 at XPotential did not. In 1997 Environment Canada reported that the East Pile had an average PCB concentration of 33.4 ppm compared with 59.7 ppm in 1999. The West Pile was reported to have a PCB concentration of 85.4 ppm in 1997 and 54.6 ppm in 1999. No new ASR had been added to either pile after around 1994. An Environment Canada publication in evidence states that PCBs do not decompose or biodegrade significantly in the natural [page577] environment.

223 On the basis of logic and common sense, it would seem that a scientifically valid and reliable methodology ought not to produce such disparate results for the East and West Piles.

224 I have also considered the submissions of the applicant that the EPA Final Rule (1998) (Final Rule) provides support for the Environment Canada approach.

225 The Final Rule is a statutory instrument, an extract of which was put in evidence, by consent, as a result of questions addressed to Mr. Clark by the Court. No other witness or affidavit referred to the Final Rule.

226 Mr. Clark advised that under subpart R the Final Rule prescribes procedures for developing representative samples. The 1993 EPA Report is specifically referenced in the Final Rule as one of the methods to be used and followed for determining the PCB concentration of samples. Mr. Clark relied upon the Final Rule with respect to sample size, subsampling and the concept of compositing samples.

227 Environment Canada argues that there is no reference in the Final Rule to any statistical analysis and so it is persuasive evidence of how analytical results ought not to be applied to PCB contaminated ASR. Environment Canada also asserts that it is informative that the Final Rule makes no mention of the 1993 EPA Report and only mentions the 1992 EPA Report in addressing laboratory protocols. Environment Canada also relies upon portions of subpart N of the Final Rule.

[page578]

228 Given the limited use of the Final Rule by Mr. Clark, and the fact that no other witness referred to the document I am not prepared to give any significant weight to the document.

229 No evidence was adduced as to the applicability of subpart N to the situation at issue and it was not suggested to Mr. Clark that subpart N was applicable. No evidence was adduced as to the interrelationship, if any, between the 1992 and 1993 EPA Reports and what is apparently a statutory instrument.

230 Further, if in 1998 the EPA departed in a significant manner from views or positions expressed in the 1992 and 1993 EPA reports it is reasonable to infer that Dr. Fingas would have referenced this either in his report of January 1999, or in his affidavit sworn in 2000 in this proceeding, or in his oral evidence. He did not refer at all to the Final Rule, but specifically referenced in his report and his testimony the 1992 and 1993 EPA reports.

231 One final argument advanced by Environment Canada must be considered. That is its submission that if the appropriate method for determining compliance is the statistical calculation of the average concentration and the confidence intervals for the cell or pile as a whole, the respondents' data establishes that the drying cell and cell 5 at XPotential and the West Pile at General Scrap are PCB materials. This is said to be so because these cells and this pile returned averages which, combined with the statistical confidence intervals, have the upper limit of the confidence interval over 50 ppm. Environment Canada relies upon the following extract from the 1992 EPA Report:

> If the upper limit is less than the threshold, the chemical contaminant is not considered to be present in the waste at a hazardous levels; otherwise, the opposite conclusion is drawn.

232 However, close examination of the relevant portion of the 1992 EPA Report shows that in that report [page579] the applicable equation for determining the confidence interval determined an 80% confidence interval. The numbers relied upon by Environment Canada in the respondents' data were determined at an 95% confidence level. If the respondents' data is recalculated at an 80% confidence level (which is the level contemplated by the EPA Report, and which calculation was done in Court) the upper limit of the confidence interval is less than the regulatory threshold. Therefore, the data does not support the contention that the two cells and pile contain or constitute PCB material.

III. IF SOME OR ALL OF THE ASR IS PCB MATERIAL, WHICH RESPONDENTS ARE IN BREACH OF THE REGULATIONS?

233 My finding that Environment Canada has failed to establish that some of the ASR is PCB material makes it unnecessary for me to deal with this. However, even if some ASR at the General Scrap site was PCB material, I see no basis in the evidence for any liability on the part of either individual respondent or on the part of Jamel in respect of the General Scrap site.

234 Mr. Lazareck's evidence was clear and unchallenged that IPSCO now owns 100% of General Scrap, that Jamel provides employee services to General Scrap, but Jacob and Melvin Lazareck are no longer involved in the day-to-day operations of General

Scrap. The only evidence of the nature of the employment services provided by Jamel was that the payment of the General Scrap payroll is handled through Jamel.

235 The obligation imposed by the Regulations with respect to PCB material is placed upon a person who owns, controls or possesses PCB material.

236 On the evidence none of Jamel, Melvin Lazareck or Jacob Lazareck own, control or possess PCB material at the General Scrap site.

[page580]

IV. CONCLUSION, ORDER AND COSTS

237 In view of my findings on the evidence, I see no reason to consider whether in the ultimate exercise of the Court's discretion an injunction should issue.

238 For the reasons given, the application for injunctive relief is dismissed. It follows, and the parties agree, that the interim consent order should be set aside.

239 As requested by counsel the issue of costs is reserved. Before January 31, 2004 counsel for the respondents should contact the Registry to request a teleconference for the purpose of discussing how the outstanding issue of costs is to be dealt with.

ORDER

240 IT IS HEREBY ORDERED THAT:

1. The application for injunctive relief is dismissed.
2. The interim consent order issued in this proceeding by Madam Justice Heneghan is set aside.
3. The issue of costs is reserved for further submissions.

Case Name:

Law Society of Upper Canada v. Chiarelli

Between
The Law Society of Upper Canada, Applicant (Respondent), and
Enzo Vincent Chiarelli, Respondent (Appellant)

[2014] O.J. No. 2328

2014 ONCA 391

120 O.R. (3d) 561

373 D.L.R. (4th) 320

239 A.C.W.S. (3d) 1060

321 O.A.C. 116

2014 CarswellOnt 6275

Docket: C56952

Ontario Court of Appeal
Toronto, Ontario

R.G. Juriansz, C.W. Hourigan and M.L. Benotto JJ.A.

Heard: December 10, 2013.
Judgment: May 14, 2014.

(84 paras.)

Legal profession -- Regulation of profession -- Practice of law -- Unlawful practice -- What constitutes practice -- Paralegal practitioners and other agents -- Appeal by Chiarelli from injunction dismissed -- Appellant operated property management company and appeared before Landlord and Tenant Board on behalf of clients -- He contended he was not required to comply with paralegal licensing regime on basis he was self-representing as landlord -- Even assuming appellant qualified as self-represented landlord, he did not have right to do so -- Appellant was acting on behalf of clients, providing legal services to third

parties -- To find otherwise would allow improper circumvention of legal and regulatory oversight -- Injunction amended to specify nexus with Board -- Law Society Act, ss. 26.1 -- Residential Tenancies Act, s. 2(1).

Legal profession -- Practice by unauthorized persons -- What constitutes practice -- Injunctions against -- Paralegals and other agents -- Appeal by Chiarelli from injunction dismissed -- Appellant operated property management company and appeared before Landlord and Tenant Board on behalf of clients -- He contended he was not required to comply with paralegal licensing regime on basis he was self-representing as landlord -- Even assuming appellant qualified as self-represented landlord, he did not have right to do so -- Appellant was acting on behalf of clients, providing legal services to third parties -- To find otherwise would allow improper circumvention of legal and regulatory oversight -- Injunction amended to specify nexus with Board -- Law Society Act, ss. 26.1 -- Residential Tenancies Act, s. 2(1).

Professional responsibility -- Self-governing professions -- Professions -- Legal -- Appeal by Chiarelli from injunction dismissed -- Appellant operated property management company and appeared before Landlord and Tenant Board on behalf of clients -- He contended he was not required to comply with paralegal licensing regime on basis he was self-representing as landlord -- Even assuming appellant qualified as self-represented landlord, he did not have right to do so -- Appellant was acting on behalf of clients, providing legal services to third parties -- To find otherwise would allow improper circumvention of legal and regulatory oversight -- Injunction amended to specify nexus with Board -- Law Society Act, ss. 26.1 -- Residential Tenancies Act, s. 2(1).

Appeal by Chiarelli from an order permanently enjoining him from engaging in the practice of law, the provision of legal services, or holding himself out as such. The appellant operated Landlord Services, a company that offered property management services for a monthly fee. The services included appearances before the Landlord and Tenant Board. Following amendments in 2007, the appellant was required to be licensed as a paralegal. He withdrew from the licensing process when faced with a good character hearing. In 2011, the Law Society investigated the appellant following complaints advertising the provision of unauthorized legal services and acting on behalf of a landlord before the Board. The appellant took the position that he fit within the definition of a landlord under the Residential Tenancies Act by acting as a personal representative of the landlord. He therefore submitted he was not required to comply with the licensing regime for paralegals. The Law Society obtained permanent injunctive relief. The judge specifically rejected the appellant's argument that as a property manager, he was able to self-represent as a landlord before the board. The judge concluded that the appellant was providing legal services and was not exempt from the licensing requirements under the Law Society Act. Chiarelli appealed.

HELD: Appeal dismissed. The evidence clearly supported the finding that the appellant was providing unlicensed legal services. The appellant did not take issue with such characterization, but instead contended he had a right to do so as a landlord self-representing before the Board. There was nothing in the Act that explicitly granted any right to self-represent. Under the Law Society Act, self-representation was permitted in the limited

circumstance where an individual acted on his or her own behalf. Such exception was not applicable here, as the appellant acted on behalf of clients. Nothing detracted from the fact that the appellant provided legal services to a third party. The appellant's interpretation of the Law Society Act would vitiate the purpose of the Law Society Act by permitting him to provide legal services free of oversight and regulation and would constitute a significant exception to the paralegal licensing regime. The injunction order was amended to prohibit the appellant from appearing before the Board on behalf of his clients or himself, save for situations in which he was the owner of a property.

Statutes, Regulations and Rules Cited:

An Act respecting Overholding Tenants, S.O. 1868, c. 26, s. 13

Law Society Act, R.S.O. 1990, c. L.8, s. 1(5), s. 1(6), s. 1(6)2, s. 1(7), s. 1(8), s. 1(8)3, s. 8(3), s. 26.1, s. 26.1(1), s. 26.3(1)

Legislation Act, 2006, S.O. 2006, c. 21, Schedule F, s. 46, s. 47, s. 50

Residential Tenancies Act, 2006, S.O. 2006, c. 17, s. 2(1), s. 2(4), s. 3(4), s. 184(1), s. 187, s. 187(1), s. 204, s. 205

Statutory Power Procedures Act, R.S.O. 1990, c. S.22, s. 5, s. 10, s. 10.1

Appeal From:

On appeal from the order of Justice Robert F. Goldstein of the Superior Court of Justice, dated March 19, 2013, with reasons reported at 2013 ONSC 1428.

Counsel:

Joseph Kary, for the appellant.

Simon Bieber and Erin Pleet, for the respondent.

Reasons for judgment were delivered by C.W. Hourigan J.A., concurred in by M.L. Benotto J.A. Separate concurring reasons delivered by R.G. Juriansz J.A.

C.W. HOURIGAN J.A.:--

A. INTRODUCTION

1 This is an appeal from the order of Justice Goldstein, dated March 19, 2013, permanently enjoining the appellant from engaging in the practice of law or in the provision of legal services in Ontario, or holding himself out as a person who may do so.

2 For the reasons that follow, I would dismiss the appeal, save for a restriction on the breadth of the injunction order.

B. FACTS

3 The appellant operates a sole proprietorship called "Landlord Services". Through that business he provides a wide variety of property management services to property owners for a flat monthly fee.

4 Included in the services provided are appearances before the Landlord and Tenant Board (the "Board"). The appellant has stated that any prohibition on appearing before the Board would "greatly impact on [his] livelihood."

5 In 2007, the *Law Society Act*, R.S.O. 1990, c. L.8 was amended to provide for the regulation of paralegals by the Law Society of Upper Canada (the "Law Society"). Prior to the change in the law, the appellant operated as a paralegal. When the law was amended, he applied to be licensed as a paralegal under the Law Society's licensing regime. However, the appellant withdrew from the licensing process when faced with the prospect of a good character hearing.

6 In July of 2011, the Law Society began an investigation of the appellant after receiving two complaints about his provision of unauthorized legal services. The first complaint was that the appellant was advertising legal services. Specifically, the appellant was alleged to have distributed a flyer in which he stated that, for a one-time fee, Landlord Services would provide, "Free Legal Advice and Consultation" and "Representation at the L & T Board."

7 The second complaint came from a lawyer, who alleged that the appellant was acting on behalf of a landlord before the Board in a matter for which she was acting for the tenants. Tenants' counsel brought a motion in that proceeding to have the appellant removed as the landlord's legal representative. In response to that motion, the appellant took the position that he was a landlord as defined in the *Residential Tenancies Act, 2006*, S.O. 2006, c.17.

8 The motion was granted by Board Member Carey on September 8, 2011. In her written decision, Member Carey found that the appellant did not fall within the definition of landlord under the *Residential Tenancies Act.* The appellant filed a notice of appeal of Member Carey's decision in the Divisional Court but did not pursue that appeal.

9 In the course of its investigation, the Law Society determined that the appellant had appeared on multiple occasions before the Board. The appellant took the position with the Law Society that he fit within the definition of "landlord" under the *Residential Tenancies Act* because he acts as a "personal representative" of the landlord. Therefore, he submitted that he was not required to comply with the licensing regime for paralegals.

10 At one point the appellant took out observer-like memberships in both the Appraisal Institute of Canada and the Human Resources Professional Association of Ontario in an

apparent effort to obtain the benefit of limited licensing exemptions granted to those organizations by the Law Society.

11 After receiving numerous written submissions from the appellant, the Law Society brought an application seeking a permanent order prohibiting the appellant from providing, or holding himself out as able to provide, legal services.

C. THE DECISION OF THE APPLICATION JUDGE

12 The Law Society's application for a permanent injunction was granted. In making that order, the application judge concluded that the appellant was providing legal services and that he was not exempt from the licensing requirements found in the *Law Society Act*.

13 The application judge specifically rejected the appellant's argument that, as a property manager, he is a landlord's "personal representative" and therefore a landlord who is able to self-represent before the Board, holding at para. 15:

> The Respondent's cases certainly support the proposition that the definition of "landlord" can be a broad one. In my view, however, these cases do no more than deal with the question of who may exercise the substantive legal rights of a landlord. It would be a real stretch to say that they regulate who may appear in front of a tribunal as a paid representative. That issue has nothing to do with the substantive legal rights of a landlord. These cases do not go that far. The *Residential Tenancies Act* provides very detailed sections as to what a landlord may do, and what a landlord's agent may do. I have no doubt that the Respondent can be the Landlord's agent but I would go no further than that.

14 The application judge went on to find that, even if the cases cited by the appellant supported his argument, they "have surely been overtaken by the enactment of s. 26.1 of the *Law Society Act*". He concluded that there was no basis to depart from the ordinary meaning ascribed to the term "personal representative" in estates law.

15 Relying on the test set forth in *R. v. IPSCO Recycling Inc.*, 2003 FC 1518, [2003] F.C.J. No. 1950, at paras. 50-51, the application judge found that a statutory injunction should be granted, concluding at paras. 24 and 26:

> I stated the following in *Law Society of Upper Canada v. Augier*, [2013] O.J. No. 350:
>
> > The Law Society has an important role in protecting the public from the activities of unlicensed and unregulated persons. The Respondent, for example, is not required to carry professional liability insurance, keep books and records for inspection by the Law Society, or maintain a trust account for client funds that can be audited by the Law Society. Indeed, the Law Society would have no right or

> ability to carry out a spot audit or any other kind of check in relation to the activities of the Respondent, as it would for a licensed legal professional. That is why the Law Society has a duty to seek remedies against unauthorized persons practicing law or holding themselves out as legal professionals.
>
> ...
>
> I find that it is in the public interest to issue an injunction in this case. The Respondent acts as a legal professional without a licence when he appears before the Board as a paid representative. The public interest is best served when properly licensed legal professionals appear before administrative tribunals. I see nothing inequitable about the injunction and therefore no basis to exercise my discretion against granting one.

16 The application judge also accepted the Law Society's argument regarding abuse of process. He found that that doctrine prevented Board Member Carey's finding that the appellant was not a landlord from being "re-litigated" before him.

D. POSITIONS OF THE PARTIES ON APPEAL

17 The appellant has abandoned his argument that he qualifies as a landlord because he is a personal representative. His argument on appeal is limited to the assertion that he fits within the definition of a landlord under the *Residential Tenancies Act* because he is a person "who permits occupancy of a rental unit" and/or because he is a person who is "entitled to possession of the residential complex and who attempts to enforce any of the rights of a landlord under a tenancy agreement or this Act, including the right to collect rent". The appellant submits that, because he is a landlord, he is entitled to self-represent. He further submits that, to the extent that there is any conflict between his rights under that legislation and the *Law Society Act*, the provisions of the *Residential Tenancies Act* prevail. Finally, he argues that the application judge erred in relying upon the doctrine of abuse of process and in issuing the injunction in a factual vacuum.

18 The Law Society argues that the provisions of the *Law Society Act* require the appellant to be licensed when providing legal services to a third party and that nothing in the *Residential Tenancies Act* permits the appellant to provide such services. It submits, therefore, that there is no conflict between the two pieces of legislation. With respect to abuse of process, the Law Society's position is that to re-litigate the issue of whether the appellant is a landlord under the *Residential Tenancies Act* is an abuse of process because the issue was determined by Member Carey and the appellant abandoned his appeal of that decision. Finally, the Law Society submits that there was ample evidence on which the application judge could base his decision to issue an injunction.

E. STATUTORY PROVISIONS

19 The relevant provisions of the *Law Society Act* are as follows:

Provision of legal services

1.(5) For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.

Same

(6) Without limiting the generality of subsection (5), a person provides legal services if the person does any of the following:

1. Gives a person advice with respect to the legal interests, rights or responsibilities of the person or of another person.
2. Selects, drafts, completes or revises, on behalf of a person,

    i. a document that affects a person's interests in or rights to or in real or personal property,
    ii. a testamentary document, trust document, power of attorney or other document that relates to the estate of a person or the guardianship of a person,
    iii. a document that relates to the structure of a sole proprietorship, corporation, partnership or other entity, such as a document that relates to the formation, organization, reorganization, registration, dissolution or winding-up of the entity,
    iv. a document that relates to a matter under the *Bankruptcy and Insolvency Act* (Canada),
    v. a document that relates to the custody of or access to children,
    vi. a document that affects the legal interests, rights or responsibilities of a person, other than the legal interests, rights or responsibilities referred to in subparagraphs i to v, or
    vii. a document for use in a proceeding before an adjudicative body.

3. Represents a person in a proceeding before an adjudicative body.
4. Negotiates the legal interests, rights or responsibilities of a person.

Representation in a proceeding

(7) Without limiting the generality of paragraph 3 of subsection (6), doing any of the following shall be considered to be representing a person in a proceeding:

1. Determining what documents to serve or file in relation to the proceeding, determining on or with whom to serve or file a document, or determining when, where or how to serve or file a document.
2. Conducting an examination for discovery.
3. Engaging in any other conduct necessary to the conduct of the proceeding.

Not practising law or providing legal services

(8) For the purposes of this Act, the following persons shall be deemed not to be practising law or providing legal services:

...

3. An individual who is acting on his or her own behalf, whether in relation to a document, a proceeding or otherwise.

...

Prohibitions

Non-licensee practising law or providing legal services

26.1(1) Subject to subsection (5), no person, other than a licensee whose licence is not suspended, shall practise law in Ontario or provide legal services in Ontario.

...

26.3(1) On the application of the Society, the Superior Court of Justice may,

(a) make an order prohibiting a person from contravening section 26.1, if the court is satisfied that the person is contravening or has contravened section 26.1;
(b) make an order prohibiting a person from giving legal advice respecting the law of a jurisdiction outside Canada in contravention of the by-laws, if the court is satisfied that the person is giving or has given legal advice respecting the law of a jurisdiction outside Canada in contravention of the by-laws.

20 The relevant provisions of the *Residential Tenancies Act* are as follows:

Interpretation

2.(1) In this Act,

"landlord" includes,

(a) the owner of a rental unit or any other person who permits occupancy of a rental unit, other than a tenant who occupies a rental unit in a residential complex and who permits another person to also occupy the unit or any part of the unit,
(b) the heirs, assigns, personal representatives and successors in title of a person referred to in clause (a), and
(c) a person, other than a tenant occupying a rental unit in a residential complex, who is entitled to possession of the residential complex and who attempts to enforce any of the rights of a landlord under a tenancy agreement or this Act, including the right to collect rent; ("locateur")

...

Conflict with other Acts

(4) If a provision of this Act conflicts with a provision of another Act, other than the *Human Rights Code*, the provision of this Act applies.

...

Parties

187.(1) The parties to an application are the landlord and any tenants or other persons directly affected by the application.

21 The *Residential Tenancies Act* is subject to the provisions of the *Statutory Power Procedures Act,* R.S.O. 1990, c. S.22. The relevant provisions of the latter legislation are as follows:

Parties

5. The parties to a proceeding shall be the persons specified as parties by or under the statute under which the proceeding arises or, if not so specified, persons entitled by law to be parties to the proceeding.

...

Right to representation

10. A party to a proceeding may be represented by a representative.

Examination of witnesses

10.1 A party to a proceeding may, at an oral or electronic hearing,

(a) call and examine witnesses and present evidence and submissions; and
(b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding.

F. ANALYSIS

22 A review of the evidence before the application judge clearly supports his finding that the appellant has been providing unlicensed legal services. There can be no doubt that these services, including participating in a mediation and attending hearings, qualify as the provision of legal services under the *Law Society Act*. Indeed, the thrust of the appellant's submissions both before the application judge and on appeal was not that he was not engaged in the provision of legal services, but that he had a right to do so because he was a landlord and thus had a right to self-represent. Accordingly, there was ample evidence upon which the application judge could base his decision to issue an injunction.

23 Having made a decision that he would not face a good character hearing, the appellant has raised various arguments and taken various steps to avoid the licensing regime of the Law Society. Those arguments are narrowed considerably on this appeal. The question is whether the provisions of the *Residential Tenancies Act* permit the appellant to self-represent because he is a person "who permits occupancy of a rental unit" and/or because he is a person who is "entitled to possession of the residential complex and who attempts to enforce any of the rights of a landlord under a tenancy agreement or this Act, including the right to collect rent."

24 For present purposes, it is not necessary to consider whether the appellant has provided a sufficient evidentiary basis for the application judge or this court to determine whether he fit within the definition of landlord in the proceeding before Member Carey or in any given case. It is also unnecessary to consider the practical issue of how, in each case, he would prove that he fit within the definition of landlord. I do note, parenthetically, that this new line of inquiry would presumably add a layer of complexity to a landlord and tenant adjudicative process that is designed to be informal and efficient. While these are important issues, I am prepared to accept for the purposes of my analysis that the appellant can establish that he qualifies as a landlord pursuant to the *Residential Tenancies Act*.

25 The question that remains is whether the appellant as a landlord under the *Residential Tenancies Act* has a right to self-represent. For the following reasons, I conclude that he does not.

26 First, there is nothing in the *Residential Tenancies Act* that explicitly grants the appellant any right to self-represent. The act is silent on whether a landlord can be self-represented.

27 Reference to the provisions of the *Statutory Power Procedures Act* is of no assistance to the appellant. That legislation speaks primarily to the rights of a party to a proceeding. The only mention of representation is found in s. 10, which provides that a "party

to a proceeding may be represented by a representative." The legislation does not purport to confer any right to self-representation.

28 The only legislation which explicitly deals with the right to self-representation is the *Law Society Act*. Section 8(3) of that statute permits self-representation in the limited circumstance where an individual "is acting on his or her own behalf". That exception is not applicable in the case at bar, because, quite simply, the appellant is not acting on his own behalf; he is acting on behalf of his client.

29 Although the appellant may be considered a landlord for the purposes of certain aspects of the *Residential Tenancies Act*, this does not change the fact that he is providing legal services to a third party. Any obligations or rights flowing from proceedings before the Board, to the extent that they impact on the appellant at all (e.g. orders under ss. 204 or 205 of the *Residential Tenancies Act* to pay monies or costs to a tenant), are derivative in nature. They flow from the fact that the appellant is providing services to the property owner. If the appellant were not acting for a client in any given case, he would not have any interest in the proceeding and thus no standing.

30 Statutes are to be interpreted harmoniously. It is presumed that the legislature spoke with one voice and did not intend to contradict itself: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008), at p. 412.

31 The interpretation urged upon us by the appellant would unnecessarily import conflict between the two statutes. By contrast, the interpretation tendered by the Law Society does not add any element of conflict between the two statutes. This interpretation simply requires any right of self-representation to be subject to the provisions of the *Law Society Act*.

32 Statutes are also to be interpreted purposively. The appellant's interpretation of the *Residential Tenancies Act* would vitiate the purpose of the *Law Society Act* by permitting him to provide legal services free of oversight and regulation. This would amount to a significant exception to the paralegal licensing regime - an exception that is nowhere explicitly stated in any piece of legislation and is premised entirely upon an inference which the appellant invites us to draw. In my view, the inference urged upon us to create this significant licensing exemption cannot be made and ought not to be made on the wording of the statutes referred to above.

33 Finally, with respect to the breadth of the order made, I note that the application judge granted a broad order which prohibits the appellant from engaging in the practice of law or in the provision of legal services in Ontario, or holding himself out as a person who may do so. In effect, this is a recitation of the prohibition in s. 26.1 of the *Law Society Act*.

34 It is preferable that a statutory injunction not simply repeat the language of the statute relied upon. This is for the practical reason that such an injunction may be difficult to enforce by way of a contempt proceeding if the terms of the order are not sufficiently specific and clear: Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Toronto: Thomson Reuters, 2013), at paras. 3.265, 6.10.

35 In the case at bar, the order enjoins the appellant from practising or holding himself out as someone engaged in "the practice of law" or the "provision of legal services" in ac-

cordance with section 26(1) of the *Law Society Act.* Section 1(6) of the act provides a very specific definition of the provision of legal services. The order must be read in that context.

36 Notwithstanding the foregoing, I find that the order is overly broad because the conduct complained of by the Law Society in its application for the injunction was that the appellant has represented and continues to represent parties at the Board. That was the impugned activity argued before the application judge. It is clear that the focus of the application was the appellant's representation of his clients at the Board.

37 The provisions of the injunction prohibit conduct which is much wider than the appellant's appearances before the Board. The injunction is, therefore, overly broad because it goes beyond the *lis* between the parties. Accordingly, I would limit the injunction to an order which prohibits the appellant from appearing before the Board on behalf of his clients or on behalf of himself, save for situations where he is an owner of a property subject to a proceeding before the Board.

38 Given the foregoing, it is unnecessary to consider whether the determination of the issue of the appellant's status as a landlord amounts to an abuse of process.

G. DISPOSITION

39 I find that the appellant has no right to self-represent before the Board. The appeal is, therefore, dismissed, save for an amendment to the terms of the injunction to limit the prohibition contained therein to an order prohibiting the appellant from appearing before the Board on behalf of his clients or on behalf of himself, save for situations where he is an owner of a property subject to a proceeding before the Board.

40 On the issue of costs, I reject the argument made by the appellant that this was a novel issue and that costs should not be awarded. Such a submission could be made on virtually any argument premised on a statutory interpretation. I see no reason to depart from the ordinary rule that the Law Society, as the successful party, is entitled to its costs on a partial indemnity scale. However, because there is some degree of mixed success given the amendment to the wording of the injunction, I would make a slight reduction to the amount of costs that I would otherwise order. I fix those costs at $6,000, inclusive of all disbursements and H.S.T.

C.W. HOURIGAN J.A.
M.L. BENOTTO J.A.:-- I agree.

R.G. JURIANSZ J.A. (concurring):--

A. INTRODUCTION

41 I have read the reasons of Hourigan J.A. and I agree with him that the application judge was correct in deciding that the Law Society was entitled to an injunction in this

case. I also agree with him that the injunction granted is overly broad and must be restricted. However, my reasons for concluding the injunction must be limited are more fundamental and touch on the merits.

42 Hourigan J.A. concludes that "the appellant has no right to self-represent before the Board" and would reword the injunction to prohibit the appellant from appearing before the Board on behalf of his clients or on behalf of himself, save for situations where he is an owner of a property subject to a proceeding before the Board.

43 I would conclude that the appellant has the statutory right to appear in person before the Board in cases in which the statute recognizes him as a "party", whether he owns the subject property or not. I see in the statute no language that permits a differentiation between a landlord who is an "owner" and a person who otherwise meets the statute's definition of "landlord" in terms of the right to appear before the Board. I would reword the injunction to permit the appellant to appear before the Board in cases in which the Board finds that he is a "landlord" within the meaning of the *Residential Tenancies Act.*

44 Since Hourigan J.A. has ably set out the relevant facts, the decision of the application judge, the positions of the parties on appeal, and the relevant statutory provisions, I can proceed directly to explaining where my reasoning differs.

B. THE FORM OF THE INJUNCTION

45 The prohibitive injunctive powers of the court are extraordinary and must be exercised carefully so as not to not interfere with an individual's liberty any more than required by law. Because this case aptly illustrates the importance of this principle I provide additional reasons for my agreement with Hourigan J.A. that the injunction as granted in this case is overly broad.

46 The injunction granted in this case prohibits the appellant from engaging in the practice of law or in the provision of legal services in Ontario, or holding himself out as a person who may do so. Justice Hourigan comments that it is "preferable that a statutory injunction not simply repeat the language of the statute relied upon". However, his reason for tailoring the injunction more precisely is that the injunction granted is broader than the conduct that was the subject of the Law Society's application. I agree but would go further. I would adopt the principle stated in Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Toronto: Thomson Reuters, 2013), at para. 3.265, which Hourigan J.A. cites. In the cited passage the author says:

> Like other injunctions, a statutory order should not be overly broad. It should be framed so as to clearly indicate what conduct is prohibited or commanded and should not just reproduce the general language of the statute.

47 The practical reason for this is that injunctions are enforced by contempt proceedings. Persons who bring contempt proceedings to enforce injunctions must show that the court order allegedly breached states "clearly and unequivocally what should and should

not be done", demonstrate the breach was wilful and establish the contempt beyond a reasonable doubt: *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686 (C.A.), at para. 27. See also *Bell ExpressVu Limited Partnership v. Corkery*, 2009 ONCA 85, 94 O.R. (3d) 614, at para. 22. As Sharpe notes, at para. 6.160, when seeking to establish contempt, "[m]uch will depend upon the clarity and specificity of the original order."

48 If the court fails to set out the specific conduct it intends to prohibit in clear and unambiguous terms, its order may ultimately prove to be unenforceable. Specifically worded injunctions foster the interest of judicial economy by foreclosing disputes about the ambit of the order in subsequent contempt proceedings.

49 Apart from this practical consideration, the manner in which the court exercises its injunctive powers is important in itself. It should be apparent to the public that the court exercises its extraordinary powers with great care. As well, persons whose actions are constrained by the power of the court are entitled to know precisely what the court is telling them they can and cannot do.

50 I would conclude that it is a requirement and not merely a preference that statutory injunctions not simply reproduce general prohibitions in a statute. The injunction granted in this case repeats the general prohibition in s. 26.1 rather than a focused and precise prohibition in the statute. The proper construction of a statute is a complex task, one about which judges disagree (as, for example, in this case). This complex task is not appropriately placed on the person subject to an injunctive order.

51 It is interesting to note that the scope of the order granted in this case has already been disputed in legal proceedings. See *CEL-30549-13-RV (Re),* 2013 LNONLTB 1393, an Ontario Landlord and Tenant Board proceeding in which a tenant relied on the injunction in arguing that the appellant had committed an abuse of process by completing a notice of termination and application to the Board and by naming himself as landlord. The Board agreed with the tenant, but the Vice Chair reversed the decision on review. She noted that s. 28 (2) of Bylaw 4 of the Law Society of Upper Canada states that for the purpose of the *Law Society Act* the following persons shall be deemed not to be practicing law or providing legal services:

> A person whose profession or occupation is not the provision of legal services or the practice of law, who acts in the normal course of carrying on that profession or occupation, excluding representing a person in a proceeding before an adjudicative body.

The Vice Chair observed, at para. 21, that "the completion of the Board's forms is part of the necessary clerical work done by many property management companies."

52 Board proceeding *CEL-30549-13-RV (Re)* illustrates that the injunction does not clearly and specifically indicate what activities it prohibits. The phrase the "provision of legal services in Ontario" is capable of encompassing a great many activities. In addition to the preparation of documents for use before an adjudicative body, the definition of "legal services" in s. 1(6) 2 of the *Law Society Act* includes giving a person advice with respect to the legal interests, rights or responsibilities of the person or another person, drafting or

completing a document that affects a person's interests in or rights to real or personal property, and negotiating the legal interests, rights or responsibilities of a person.

53 The activities of some property managers in Ontario, such as negotiating leases and working out schedules for the payment of overdue rent, may well touch on some aspects of these provisions. In his reasons, the application judge stated that the injunction was not intended to impair the appellant's ability to make a living as a property manager. He did not, however, specify what the appellant could and could not do.

54 For these reasons, I agree with Hourigan J.A. that the injunction must be more precisely tailored. However, Hourigan J.A. does not recognize the appellant's right to appear in person in cases in which he is himself a statutory party, excepting when he is the owner of the subject property. I turn to my reasons for disagreeing with this restriction.

C. THE APPELLANT'S RIGHT TO APPEAR IN PERSON

55 I begin by reiterating that I agree that the appellant should be enjoined from appearing before the Board in any case to represent any other party and from holding himself out as a person who may do so, as the record indicates he has done in the past.

56 However, there is a subset of cases in which the appellant, like other property managers, is entitled to possession of the property, permits occupancy and collects rent. In some of these cases, the property manager is indicated as the "lessor" on the lease and the tenant deals only with the property manager and has no idea who the legal owner of the premises is. In such cases, the property manager is a "landlord" in the proceeding. The following discussion applies only to such cases.

57 In those cases in which the Board has found that the appellant meets the statutory definition of "landlord", I would conclude that the appellant has all the rights and obligations of a "landlord" under the statute, including the right to appear in person before the Board.

(1) The statutory definition

58 For convenience, I set out the statutory definition of "landlord" again:

> "landlord" includes,
>
> (a) the owner of a rental unit or any other person who permits occupancy of a rental unit, other than a tenant who occupies a rental unit in a residential complex and who permits another person to also occupy the unit or any part of the unit,
> (b) the heirs, assigns, personal representatives and successors in title of a person referred to in clause (a), and
> (c) a person, other than a tenant occupying a rental unit in a residential complex, who is entitled to possession of the residential complex and who attempts to enforce any of the rights of a landlord under a tenancy agreement or this Act, including the right to collect rent.

59 Clearly a person, not being the owner of the premises, who permits occupancy of a rental unit, collects rent and attempts to enforce the rights of the owner does so on the basis of authority derived from the owner. Without doubt, however, the statutory definition includes a person who exercises such derivative authority within its definition of "landlord". For example, para. (a) refers to the "owner...or any other person".

60 Wording substantially similar to that of the current definition has been in place since 1868: *An Act respecting Overholding Tenants*, S.O. 1868, c. 26, s. 13; *Re Mitchell and Fraser* (1917), 40 O.L.R. 389 (A.D.) at p. 392, per Middleton J. It seems this expansive definition was first adopted to protect tenants. Tenants who dealt only with property managers and did not even know the identity of the owner of the premises could not initiate applications against the owner. It has also been suggested that the expansive definition serves the purpose of providing an informal and efficient procedure for determining disputes between landlords and tenants; this purpose "is facilitated by permitting such individuals as property managers to assume the role and status of landlords for the purpose of invoking the procedures and remedies of the [landlord and tenant legislation]": *Lachance v. Auzano Asset Management Inc.*, 1999 SKQB 1, 184 Sask. R. 107, at para. 16; see also *Delcozzo v. Prompton Real Estate Services Corp.*, [2004] O.R.H.T.D. No. 4, at para. 3. Certainly the legislature intended that the process before the Landlord and Tenant Board should be more informal and efficient than the former regime in which landlord and tenant matters were dealt with by the Superior Court of Justice.

61 The term "landlord" has its defined meaning throughout the *Residential Tenancies Act*. Section 2(1) provides that the definition applies "In this Act". The appellant is a "landlord" for the purposes of other provisions of the *Residential Tenancies Act*.

(2) The appellant is a statutory party in proceedings before the Board

62 The provisions of the *Residential Tenancies Act* link together in a chain that leads to the conclusion the appellant is a statutory party in proceedings before the Landlord and Tenant Board with all the rights and liabilities of a party.

63 Section 187 of the *Residential Tenancies Act* provides that the "landlord" is a party to the application before the Board. Therefore, in those cases in which the appellant is a "landlord" under the statutory definition, he is a party to the application before the Board.

64 Section 184(1) provides that the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 "applies with respect to all proceedings before the Board." The few exceptions are not pertinent here. Section 5 of the *SPPA* provides that "The parties to a proceeding shall be the persons specified as parties by or under the statute under which the proceeding arises". Section 10.1 of the *SPPA* provides that a "party to a proceeding" at an oral hearing may "call and examine witnesses and present evidence and submissions" and "conduct cross-examinations of witnesses at the hearing".

65 In the face of these provisions, I do not find persuasive the reasoning of Hourigan J.A. that "the legislation does not purport to confer any right to self-represent." I do not view a litigant without legal representation as representing himself or herself, but rather as appearing "in person". As I see it, the *Residential Tenancies Act* makes a person who

meets the statutory definition of "landlord" a "party" to proceedings before the Board and grants that person the statutory right to call and examine witnesses, present evidence, make submissions and conduct cross-examinations of witnesses.

66 The wording of s. 187 of the *Residential Tenancies Act* is worth noting: "The parties to an application are the landlord and any tenants or other persons directly affected by the application." The recognition of a landlord as a "party" is statutory. In cases where the appellant is a landlord, he need not demonstrate that he is "directly affected by the application". That said, the appellant does have an interest in the proceeding because, as a "party", he faces personal liability to satisfy any Board order made against him in his capacity as "landlord".

(3) The appellant, as a party, faces personal liability

67 I disagree with Hourigan J.A.'s reasoning that the appellant as a party in proceedings before the Board would not be acting on his own behalf. A person who is not the owner but who meets the expansive statutory definition of "landlord" will be personally liable to satisfy any order made against him or her as "landlord". Under ss. 204 and 205 of the *Residential Tenancies Act*, the Board may order the "landlord" to pay to the tenant "any sum of money that is owed", and may order costs against a "party" to the proceeding. Monetary orders could include, for example, rent abatement and damages. These provisions permit the Board to include in an order "whatever conditions it considers fair in the circumstances". Section 184(1) of the *Residential Tenancies Act* and s. 19 of the *Statutory Powers Procedure Act*, read together, provide that a Board order may be enforced as an order of the Superior Court of Justice. Any order against a property manager as "landlord" must necessarily be enforced against the person to whom it is directed.

68 Perusal of the case law shows that it is not unusual for the Board to make an order against a "landlord" who is a property manager. In cases where the property manager is the only "landlord" named in the proceeding, the order can be enforced only against the property manager and not the unknown owner who is not a party to the proceeding. In cases where both the owner and the property manager are named as "landlords", it seems to be a common practice of the Board to make orders against both: see *e.g.*, *TST-10899-10 (Re)*, 2011 LNONLTB 830, 2011 CanLII 34682; and *TST-20332-11 (Re)*, 2012 LNONLTB 339, 2012 CanLII 21616.

69 Of course, the property manager can be expected to pass on the liability for complying with any Board order to the owner. That depends on the business relationship between the property manager and the owner. The risk of the business relationship failing, for example, by the owner's insolvency, dissatisfaction with the property manager's services or simple refusal to pay, falls on the property manager and not the tenant.

(4) Courts must apply the clear statutory definition

70 In his analysis at para. 25, the application judge stated his view that protecting the public from the unauthorized practice of law was "the most important factor for a court to consider". I would approach the matter differently. In my view, the most important principle is that the courts apply the enactments of the legislature. This begins by recognizing that the legislature in a statutory definition "can deem 'red' to mean blue, or 'land' to include sky

and ocean": Ruth Sullivan, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 68. In her most recent edition, *Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008), at pp. 61-62, Prof. Sullivan puts it this way:

> When a word is defined by statute, the binding character of the stipulated meaning depends not on shared linguistic convention among lawyers and judges, but on legislative sovereignty. The legislature dictates that for the purpose of interpreting certain legislation the defined term is to be given the stipulated meaning. This meaning may closely resemble the conventional meaning of the defined term (whether ordinary or technical) or it may effect a significant departure (although too much of a departure would violate current drafting standards). In either case, interpreters are bound to apply the meaning stipulated by the law-maker, which may or may not incorporate conventional meaning.

71 Courts can decline to apply a statutory definition in the exceptional case in which a contrary legislative intention appears, or the context demands a different meaning: *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, ss. 46, 47 and 50. I have scrutinized the entire *Residential Tenancies Act* with these exceptions in mind, and see no reason to diverge from the defined meaning of "landlord". I begin with a consideration of the purpose of the *Residential Tenancies Act*. While Hourigan J.A. recognizes that interpretation must be purposive, he focuses on the *Law Society Act* and does not discuss the purpose of the *Residential Tenancies Act*.

(5) The purpose of the *Residential Tenancies Act*

72 This court has held that "The purpose of [the *Residential Tenancies Act*] is to provide protections to tenants", especially from unfair rental increases and arbitrary evictions: *Matthews v. Algoma Timberlakes Corp.*, 2010 ONCA 468, 102 O.R. (3d) 590, at para. 32. This court has also stated that any ambiguity should be resolved in favor of the tenant protection objects of the Act: *Price v. Turnbull's Grove Inc.*, 2007 ONCA 408, 85 O.R. (3d) 641, at para. 44.

73 As I see it, the expansive statutory definition of "landlord" furthers the *Residential Tenancies Act*'s purpose of protecting tenants. The expansive definition protects tenants by enhancing their ability to obtain and enforce Board orders. It provides tenants with someone against whom they can initiate applications when they do not know who the legal owner is. It also provides them with a person against whom they can enforce Board orders when they do not know who the legal owner is. In cases where both the property manager and the legal owner are named as parties, the expansive definition provides tenants with an increased range of enforcement options.

74 Another purpose of the *Residential Tenancies Act* is to provide a simplified and fair framework for the resolution of landlord-tenant disputes. The expansive definition of landlord serves this purpose by ensuring that the person most familiar with and responsible for the tenancy can be made a party to the proceeding and subject to the Board's authority.

75 The application judge points out that the *Residential Tenancies Act* is replete with references to the landlord's "agent". I see no significance in this. The references to "agent"

are necessary as a "landlord", whether owner or property manager, may contract others to maintain and otherwise deal with the premises and tenants. The legislature also uses the term "owner" in some places in the *Residential Tenancies Act* where it wishes to distinguish from the broader term "landlord." The Legislature could have used the word "owner" in ss. 187, 204 and 205, discussed above, but instead used the terms "landlord" and "party", which by definition includes "landlord".

76 On reading the *Residential Tenancies Act* as a whole, I see nothing that suggests that the ordinary and grammatical sense of the definition of "landlord" should not apply. Considering the *Residential Tenancies Act* alone, I consider the conclusion is inescapable: in those cases in which the appellant meets the statutory definition of "landlord", he is a party to the proceedings for all purposes. As a party, he has the statutory right to appear before the Board in person. Any contrary legislative intent must have its roots in the *Law Society Act*.

(6) The *Law Society Act*

77 I agree with Hourigan J.A. that when interpreting statutes one should strive to avoid disharmony between different enactments of the legislature. I see no disharmony between the *Law Society Act* and my reading of the *Residential Tenancies Act*.

78 Section 1(8)3 of the *Law Society Act* includes among the persons who were deemed not to be practicing law or providing legal services "An individual who is acting on his or her own behalf, whether in relation to a document, a proceeding or otherwise."

79 There is no disharmony between the ordinary grammatical meaning of this provision and the ordinary grammatical meaning of provisions of the *Residential Tenancies Act* that make the appellant a "party" and give him the right to call and examine witnesses, present evidence, make submissions and conduct cross-examinations of witnesses before the Board.

80 Interpreting s. 1(8)3 of the *Law Society Act* so that it does not apply to the appellant when he appears as a statutory party before the Board results in disharmony between the *Residential Tenancies Act*, which makes the appellant a party to proceedings before the Board, and the *Law Society Act*, which would prohibit the appellant from fully exercising the rights of a party in those proceedings.

81 If there were a conflict, the legislature has turned its mind to how disharmony between these statutes should be resolved. The clear legislative intent is that the public interests fostered by the *Residential Tenancies Act* should prevail over the public interests fostered by the *Law Society Act*.

82 Section 3(4) of the *Residential Tenancies Act* provides that "[i]f a provision of this Act conflicts with a provision of another Act, other than the *Human Rights Code*, the provision of this Act applies." The legislature did not include the same general primacy provision in the *Law Society Act*. If there is any disharmony between the two statutes, the legislature has decided that the overriding public interest lies in preserving the scheme of the *Residential Tenancies Act*.

83 I would conclude that in cases in which the Board finds the appellant meets the statutory definition of "landlord", he is a party to the proceedings for all purposes and has the right to appear in those proceedings in person.

D. CONCLUSION

84 I would allow the appeal in part and modify the order granted. I would order that the appellant is permanently enjoined from appearing before the Board in any case to represent any other party and from holding himself out as a person who may do so. He may appear before the Board in person in cases in which the Board finds that he is a "landlord" within the meaning of s. 2(1) of the *Residential Tenancies Act.*

R.G. JURIANSZ J.A.

Attorney-General for Ontario v. Grabarchuk et al.

(1976), 11 O.R. (2d) 607

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT

DONOHUE, KEITH and REID, JJ.

6TH JANUARY 1976

Injunctions -- Interim injunctions -- Availability -- Enforcement of penal statute -- Statute providing penalties for violation of its provisions -- Whether interim injunction should be granted in circumstances -- Public Commercial Vehicles Act, R.S.O. 1970, c. 375.

Injunctions -- Interim injunctions -- Criteria -- Penal statute continually flouted by party -- Whether usual criteria of balance of convenience and irreparability of apprehended damage applicable -- Public Commercial Vehicles Act, R.S.O. 1970, c. 375.

Statutes -- Enforcement -- Statute providing penalties for violation -- Whether interim injunction may be granted to Attorney-General where statute continually flouted by party -- Public Commercial Vehicles Act, R.S.O. 1970, c. 375 -- Ministry of the Attorney General Act, R.S.O. 1970, c. 116, ss. 5(d), 19.

The Attorney-General, as the protector of public rights and the custodian of the public interest, is entitled to obtain an injunction where a statute is being flouted. This is so even though the statute in question provides penalties for violation of its provisions where the statute continues to be disregarded despite the imposition of such penalty. Furthermore, in determining whether an interim injunction should issue in such a case, the usual criteria of the balance of convenience and the irreparability of the apprehended damages are irrelevant, since there is irreparable damages in any event.

[Attorney-General v. Premier Line, Ltd., [1932] 1 Ch. 303; Attorney-General v. Ashborne Recreation Ground Co., [1903] 1 Ch. 101; A.-G. Alta. ex rel. Rooney v. Lees and Courtney, [1932] 3 W.W.R. 533; Attorney-General v. Harris, [1961] 1 Q.B. 74; Attorney-General v. Smith et al., [1958] 2 Q.B. 173, apld; Public Accountants Council v. Premier Trust Co., [1964] 1 O.R. 386, 42 D.L.R. (2d) 411; Cowan v. Canadian Broadcasting Corp., [1966] 2 O.R. 309, 56 D.L.R. (2d) 578; Terra Communications Ltd. et al. v. Communicomp Data

Ltd. (1973), 11 O.R. (2d) 682, 41 D.L.R. (3d) 350; American Cyanamid Co. v. Ethicon Ltd., [1975] 2 W.L.R. 316, refd to]

APPEAL from the judgment of Galligan, J., 9 O.R. (2d) 465, 60 D.L.R. (3d) 633, dismissing an application for an interim injunction.

D.W. Brown and J. Kelly, for plaintiff.

Donald J. Catalano, Q.C., for defendants.

DONOHUE, J., concurs with KEITH and REID, JJ.

KEITH, J. (orally):-- I agree with the judgment that has been pronounced on behalf of the Court by my brother Reid. I would like to add, however, several points.

In the first place, I think it should be emphasized that the Attorney-General appellant has brought before this Court a very strong prima facie case which, of course, is the first of the criteria that one normally looks for in an application for either an interim or an interlocutory injunction.

I would also like to add, with respect to the status of the Attorney-General, a quotation from the judgment of Lord Goddard, then Chief Justice, in the case of Attorney-General v. Smith et al., [1958] 2 Q.B. 173 at p. 185:

> It has been submitted to me that because the Act provides penalties, and because there is no offence committed before an enforcement notice has been disregarded, I ought not to grant an injunction. I think that the cases which have been cited -- particularly Attorney-General v. Wimbleton House Estate Co. Ltd., [1904] 2 Ch. 34, cited and followed by Devlin J. in Attorney-General v. Bastow, [1957] 1 Q.B. 514 -- show that, although a statute may provide a penalty for acts done in breach of it, if it is a matter of public right, then the Attorney-General is entitled, on behalf of the public, to apply for an injunction.

Finally, I would like to say that it is perhaps regrettable that s. 5(d) of what was at one time the Department of Justice Act and now the Ministry of the Attorney-General Act, R.S.O. 1970, c. 116, was drawn to the attention of Mr. Justice Galligan who heard this application in the first instance. It seems to me that the language of that statute in its initial part, is so applicable to bring into play and effect the English cases and those words that I have in mind are as follows:

> 5. The Minister,

> (d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario ...

REID, J. (orally):-- The Attorney-General moved to enjoin the defendants from carrying on business without a licence contrary to the provisions of the Public Commercial Vehicles Act, R.S.O. 1970, c. 375. The motion came on before Mr. Justice Galligan, who dismissed it on two grounds. First, he was not satisfied that the remedies provided in the statute itself were shown to be insufficient for the enforcement of the statute and, second, that the question whether the Ontario Courts should follow the English practice in such cases was one of novelty and difficulty and should not be decided on a motion for an interim injunction.

The motion was supported by the affidavit of William Gregory dated March 25, 1975. Some objection to its form, but no real challenge to its content, was offered by the respondents. The affidavit was tested by a lengthy cross-examination comprising 121 pages of transcript. The grounds for the statements made by Mr. Gregory were vigorously probed. As a result, voluminous documents were produced by the Attorney-General and entered as 39 exhibits. The affidavit of Mr. Gregory itself had a number of exhibits attached. Further affidavits were filed by the Attorney-General. No evidence was filed by any respondent, apart from cross-examination and exhibits alluded to.

The result was a formidable parcel of documents and testimony. The cross-examination did not seriously challenge Mr. Gregory's affidavit, indeed, it appears to have supplemented and substantiated it.

Exhibit D to the Gregory affidavit is a decision of the Ontario Highway Transport Board dated March 7, 1973. Mr. Gregory's affidavit, in relation to the events leading up to that date, is consistent with the facts established before the Board, as evidenced by the Board's decision.

The events leading up to the hearing before the Board can be summarized. Respondent Vanstor Transport Company Limited held a number of licences enabling it to operate within and outside Ontario as a carrier of goods. This commenced in 1963. As a result of Vanstor's failure to obtain complementary licences from the transport boards of other Provinces, numerous public complaints about its service, and frequent convictions for various offences, including carrying on business without a licence under the Public Commercial Vehicles Act, the Ontario Highway Transport Board was obliged to call the company in for a review of its licences on six different occasions before February, 1973. In February, 1973, the final review occurred.

Vanstor operated from a warehouse and terminal in Richmond Hill, Ontario. It carried on business under a variety of names, including World-Wide Shipping and Central Van & Storage. The final review conducted by the Board occurred on three days in February, 1973, and resulted in the Board's order of March 7th to which I have referred.

On the hearing Mr. Grabarchuk appeared to be the chief witness for Vanstor. The Board found that he was known also as Frank Gray, that he was the president and a majority shareholder of Vanstor and that he also operated the business of World-Wide Shipping, whose offices were in the same building as Vanstor and Central Van & Storage.

The Board further found that Vanstor had violated the Public Commercial Vehicles Act, had operated the business of transporting household effects while its licence was suspended, had booked shipments into places outside Ontario, notwithstanding that it had no licence to do so and that it carried on business with "disregard" for the Public Commercial Vehicles Act and the Motor Vehicle Transport Act, R.S.C. 1970, c. M-14, and that Frank Grabarchuk had been arbitrary and abusive with customers. It concluded that in the public interest all the licences of this company should be withdrawn, and revoked all the company's existing certificates.

We were told that this decision was challenged in the Divisional Court and in the Court of Appeal during the balance of 1973, but apparently without effect.

By virtue of s. 9 [am. 1971 (Ont.), Vol. 2, c. 50, s. 71(5)] of the Public Commercial Vehicles Act, Vanstor's licences appear to have expired for having failed to be renewed on July 1, 1973. I make that observation because it was suggested that the Board's order withdrawing the licences might be ineffective because it had been challenged in the Courts. The operation of s. 9, however, would appear to have effectively deprived Vanstor of its licences, irrespective of the action of the Transport Board.

After the Board's decision a new company was incorporated. It was called 270012 Ontario Limited and it came into being on May 2, 1973. Again, Mr. Grabarchuk was the president and was as well one of the two directors. The company's head office was 360 Newkirk Rd. in Richmond Hill, the address of the warehouse referred to. The company carried on business as Central Truck Rentals, Central Leasing and Central Van Leasing and its business appears to have been substantially the business that Vanstor had previously carried on. Vanstor, however, continued to carry on its business without regard to the decision of the Transport Board. Both companies were by then carrying on the business of movers and storers under their own and various other names without concern for the fact that the Board had acted to withdraw Vanstor's authority and that the numbered company had never troubled to apply for and, of course, had never received a licence under the Public Commercial Vehicles Act.

From March, 1973, to April, 1973, Vanstor was convicted on at least seven occasions of carrying on business without a licence contrary to s. 2(1)(a) [rep. & sub. 1973, c. 166, s. 2] of the Public Commercial Vehicles Act. The numbered company was convicted of a number of offences. One was registered under a business name, either Central Leasing or Central Leasing Limited (the latter appears to be a misnomer). This conviction was for operating without a licence contrary to s. 2(1)(a) of the Public Commercial Vehicles Act. These offences occurred at various places throughout Ontario, well outside the urban limits of Richmond Hill and they therefore brought the respondents' conduct within 2(1)(a) of the Public Commercial Vehicles Act.

Mr. Grabarchuk's name appears on numerous applications and documents submitted on behalf of various of the defendants including applications for licences and permits. There appears to be not the slightest doubt that he has been the instigator and the operator of these companies both limited and unlimited, and that he has carried on with a striking disregard for the Public Commercial Vehicles Act and the Motor Vehicle Transport Act. Numerous fines levied against various of the respondents have not been paid. The process of charge, conviction and fine has been without any ascertainable effect. Mr. Grabarchuk

goes on his merry way, secure behind his various names and leaving in his wake grumbling customers and frustrated officialdom.

This, as I have said, is the clear impression left by the evidence. Nothing to contradict it was filed by any respondent. Nor was the basic thrust of this evidence seriously contested by respondents' counsel.

To the application, two major defences were raised. First it was submitted that the criteria applying to an application for an interim injunction in suits between private parties had not been satisfied. Second, that there is no precedent in Ontario for the Court to assist in this way the enforcement of a statute which contains its own penalty. I shall deal with these submissions but first, I must refer to the ground upon which the Attorney-General rests his application.

The Public Commercial Vehicles Act states:

> 2(1) No person shall operate a commercial vehicle on a highway for the transportation for compensation of goods of any other person unless,
>
> (a) pursuant to an operating licence;

At s. 16 [am. 1973, c. 166, s. 12] the Act provides:

> 16. Every person who contravenes any of the provisions of this Act or the regulations is guilty of an offence and on summary conviction is liable to a fine of not less than $50 and not more than $1,000.

There are numerous precedents in England and Australia for the proposition that the Attorney-General, as the protector of public rights and the public interest, may obtain an injunction where the law as contained in a public statute is being flouted. This is so notwithstanding that, (a) the statute itself may contain penalties of a different kind, and (b) all possible alternative remedies have not been exhausted. The position of the Attorney-General as custodian of the public interest is the same whether one speaks of England, Australia or Canada. This is clear from such decisions as the Public Accountants Council v. Premier Trust Co., [1964] 1 O.R. 386, 42 D.L.R. (2d) 411, and Cowan v. Canadian Broadcasting Corp., [1966] 2 O.R. 309, 56 D.L.R. (2d) 578. In the latter case, Mr. Justice Schroeder said for the Court of Appeal [at p. 314 O.R., p. 583 D.L.R.]:

> Under our law, the Attorney-General is by law the representative of the public interests which are vested in the Crown and are enforceable by the Attorney-General as the Crown's officer.

The Attorney-General's position is established not only by statements of our Courts, but as well by the Department of Justice Act [renamed Ministry of the Attorney General Act by 1972, c. 1, s. 9(1)], R.S.O. 1970, c. 116, which states, in reference to the Attorney-General:

> 5. The Minister,
>
> . . . . .
>
> (d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage ...

Next, is there precedent for the Attorney-General's request? There is in my view ample authority for an exception to the general rule that where an Act creates an offence and provides a remedy, the only remedy is that provided by statute.

In Attorney-General v. Premier Line, Ltd., [1932] 1 Ch. 303 at p. 313, Eve, J., stated the rationale of the exception. He said:

> The public is concerned in seeing that Acts of Parliament are obeyed, and if those who are acting in breach of them persist in so doing, notwithstanding the infliction of the punishment prescribed by the Act, the public at large is sufficiently interested in the dispute to warrant the Attorney-General intervening for the purpose of asserting public rights, and if he does so the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land.

In numerous decisions cited before us, this concept has been applied to enjoin conduct that was otherwise apparently beyond restraint. As Buckley, J., said in Attorney-General v. Ashborne Recreation Ground Co., [1903] 1 Ch. 101 at p. 108:

> Moreover, there may be good reason why an injunction should be granted although a penalty is imposed. If there were no remedy except the statutory remedy, a public authority might by circumstances be rendered singularly impotent although it had made by-laws ... that cannot be the intent of the statute.

This principle is firmly embedded in the law of England and of Australia as the extracts given to us from Professor Thio's and Professor Hogg's works show: S.M. Thio, Locus Standi and Judicial Review (1971), p. 133, ff.; Peter Hogg, Crown Liability (1971), p. 401, ff.

It has as well been recognized in Canada. In A.-G. Alta. ex rel. Rooney v. Lees and Courtney, [1932] 3 W.W.R. 533 (Alta. S.C.), McGillivray, J.A., said at p. 542:

> In the case at bar it is shown that the violations of the Act by these defendants have been open and continuous and that the imposition of penalties has had no effect as a deterrent. It is also clear that the defendants intend to continue as in the past unless restrained by the Court from so doing. In these circumstances I think that I should exercise my discretion in favour of granting an injunction.

In A.-G. Ont. v. Wilson (unreported, released October 11, 1974), Weatherston, J., granted an injunction to prevent conduct that could have been the subject of a prosecution under the Public Lands Act, R.S.O. 1970, c. 380.

I turn to the argument with respect to the application of what might be called the usual criteria. As between private parties, the justice and convenience of an interlocutory injunction is usually decided in the light of a number of elements. These include the balance of convenience and the irreparability of the apprehended damage (see Terra Communications Ltd. et al. v. Communicomp Data Ltd. (1973), 1 O.R. (2d) 682, 41 D.L.R. (3d) 350). There has in England been some recent reappraisal of these criteria and how they should be applied. I refer particularly to American Cyanamid Co. v. Ethicon Ltd., [1975] 2 W.L.R. 316, and Fellowes v. Fisher, [1975] 2 All E.R. 829, and I refer to these cases for the purpose of indicating that the criteria are not unvarying and are not written in stone. Nor do they appear to me to be easily applicable to a claim of the type before us. Many actions go no further than the interim injunction. The criteria are then to assist a Court to decide whether to grant a party some kind of relief other than damages, that is, to interpose a kind of relief rather than the usual relief sought in the law Courts, which is damages. There is no claim for damages here nor could one be asserted. The criteria would therefore appear to be irrelevant.

But even if this were not so, it would appear to me to be eminently just -- to get back to the criteria stated in s. 19 of the Judicature Act, R.S.O. 1970, c. 228 -- that an injunction should go in the circumstances before us. One who knowingly and deliberately flouts the plain law can hardly argue that it is not just that he be stopped. Damages are not an adequate remedy, for none can be claimed.

As for convenience, it is one thing to argue (as in Fellowes v. Fisher) that the balance of convenience lies with a clerk, notwithstanding that he appears to be in violation of a restrictive covenant, because the hardship to him of a wrongly granted interlocutory injunction would exceed the hardship to his former employers -- a firm of solicitors -- caused by withholding one. It is another thing, however, to see how the concept applies to assist skilled, persistent, substantial defendants who include two corporations and whose record for violating the law goes back a long time and who can only profit by continuing such conduct.

Mr. Catalano pointed to some of the words used by Weatherston, J., in Attorney-General v. Wilson as a recognition of the applicability of the test of irreparable damage. To me, in the context of that judgment, they mean no such thing. Rather, they appear merely to be another way of expressing the futility of invoking the penalties provided in the statute as a rationale for the grant of the injunction in that case.

In my opinion, there is no basis for the application of the usual criteria. If, however, they were applicable I would think that the justice and convenience of the matter lie on the Attorney-General's side. He has a strong prima facie case. If irreparable damage to the public interest must be shown I agree with and apply the following. In Attorney-General v. Harris, [1961] 1 Q.B. 74 at p. 95, Pearce, L.J., observed:

> ... a breach with impunity by one citizen leads to a breach by other citizens, or to a general feeling that the law is unjustly partial to those who have the persistence to flout it.

Respondents argued that the authorities relied on by the Attorney-General are for the most part judgments made after trial and therefore are inapplicable to an application on an interlocutory motion. I cannot see how the principle expressed in those judgments is affected by the time when an application is made or granted. It applies equally to the grant of an interim or a permanent injunction.

The application made to Galligan, J., was one that sought to enforce the Public Commercial Vehicles Act from at least March of 1973. It is obvious from the material filed, that throughout 1973 and indeed throughout 1974, respondents managed to carry on business without regard either for the Act or for the decisons of the Board. I have difficulty in accepting that it would be just or convenient to defer the decision on this matter until trial when it is well known that a trial would take some time to reach.

There appears to be little room for doubt about the material facts of this case. There is no doubt that defendants have persistently flouted the law. That being so, deferring the application until trial so that material facts may be developed would appear to be unjustified. In my view, Galligan, J., and we, sitting as the Divisional Court, are at least as well positioned as a Judge at trial to decide questions of law. I therefore fail to see the force of the argument that the principle expressed in the judgments I have referred to should be invoked only after trial and not on an interlocutory motion.

It is also argued that the injunction should not be invoked as an added penalty to enforce the criminal law but that is not the case before us.

Galligan, J., referring to precedent, expressed reluctance to decide a difficult and novel point on a motion for interim injunction. With great respect, I do not find the point novel in light of the formidable amount of authority that has been cited to us although it is true that the bulk of the authority has been developed in other jurisdictions. Nor is there any great difficulty apparent in its application. We have had the advantage of a lengthy argument by capable counsel. I cannot see how any advantage would be gained in a case where the material facts are so plainly established and indeed are basically uncontested, to defer the decision to trial.

Mr. Catalano finally argues that if the injunction goes, it should not go against all named respondents because there is insufficient or no evidence in respect of some of the various respondents. My impression is that the names are, to a large extent, a smoke screen for operations carried on by Mr. Gray behind various partnership names and corporate identities that are little more than names. They are not really different entities. If an injunction were restricted to some names and not to others, then Mr. Gray's purpose would be fulfilled and this proceeding largely frustrated notwithstanding its apparent success. It would leave Mr. Gray and his companies free to create other companies, either incorporated or by way of partnership, who would then be free of the effect of an injunction and permit him to carry on a conscious flouting of the law. Future possible names would be limited only by the extent of their progenitors' vocabulary or the list of numbers available for limited companies. In my view, if an injunction should be granted, it should be granted in such a way

so as to prevent this pattern from being continued and Mr. Gray restrained, whatever his disguises.

The following has been endorsed on the record:

1. Appeal allowed.
2. Order to go restraining until trial or other disposition of the action defendants Frank Grabarchuk, also known as Frank Gray, Vanstor Transport Company Limited, 270012 Ontario Limited, their servants or agents and anyone acting on their behalf from carrying on business without a licence under the Public Commercial Vehicles Act or an extraprovincial operating licence and thus contravening s. 2(1)(a) of that Act, either directly or indirectly, through the use of the partnership names included among the respondents or other names or through the use of limited companies.
3. Costs throughout to applicant.
4. Leave granted to either party to apply to Judge presiding in assignment Court for a fixed date for trial as soon as case placed on ready list.

Appeal allowed.

Indexed as:

Maple Ridge (District) v. Thornhill Aggregates Ltd.

Between
District of Maple Ridge, plaintiff, defendant by counterclaim (respondent), and
Thornhill Aggregates Ltd., Montcalm Aggregates Ltd., Maple Ridge Ready-Mix Ltd., defendants, plaintiffs by Counterclaim (appellants), and
Allard Contractors Ltd., Albion Aggregates Ltd., Maple Ridge Ready-Mix (1993) Ltd., plaintiffs by counterclaim
And between
District of Maple Ridge, plaintiff, defendant by counterclaim (respondent), and
Thornhill Aggregates Ltd., Montcalm Aggregates Ltd., Maple Ridge Ready-Mix Ltd., defendants, plaintiffs by counterclaim (appellants), and
Allard Contractors Ltd., Albion Aggregates Ltd., Maple Ridge Ready-Mix Ltd., plaintiffs by counterclaim

[1998] B.C.J. No. 1485

162 D.L.R. (4th) 203

[1999] 3 W.W.R. 93

109 B.C.A.C. 188

54 B.C.L.R. (3d) 155

47 M.P.L.R. (2d) 249

1998 CanLII 6446

80 A.C.W.S. (3d) 891

Vancouver Registry Nos. CA020643 and CA022685

British Columbia Court of Appeal
Vancouver, British Columbia

McEachern C.J.B.C., Cumming and Finch JJ.A.

Heard: June 1-2, 1998.
Judgment: filed June 23, 1998.

(39 pp.)

Administrative law -- Natural justice -- Duty of fairness -- Exceptions, legislative acts -- Unfairness -- Abuse of power -- Evidence and proof -- Land regulation -- Land use control, zoning bylaws -- Variances.

These were appeals by property owners from injunctions granted on summary applications to the respondent District. The owners operated a gravel pit. The property on which the pit was located was rezoned by the District as part agricultural and part residential. The owners moved a portable cement plant to an existing concrete pad on the property. They refused to remove it. They relied on a provincial permit to operate a mine that included the processing of cement on the property. The owners applied for a minor variance to legalize the addition of the portable cement plant. The municipal clerk refused to put the application before the Board of Variance. The District argued that the owners were using their land in an unlawful manner. It obtained an injunction to restrain the appellant property owners from using the ready-mix cement plant on their land. The counterclaim by the appellant owners for an order that the respondent District reconsider their application for an amendment of the Official Community Plan and rezoning and their application for a temporary industrial use permit was dismissed. The trial judge concluded that there was no bad faith on the part of the District.

HELD: Appeal dismissed. The District acted within the procedures adopted by its council pursuant to the Municipal Act in the consideration of development applications. There was no right to a hearing in the case of legislative acts. The right to make submissions as to a change to zoning or the Community Plan arose only where the council decided to take the bylaw to third reading. The application for an amendment to the Community Plan and issuance of a permit did not involve the loss of any existing privilege where the appellant owners had unlawfully operated the plant for some time. The District had not acted contrary to the rules of natural justice or procedural fairness in failing to proceed with a public hearing or to give reasons for its refusal of the requested permit where it was plain and obvious that no permit could be issued in the absence of an amendment to the plan.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 18A.
Municipal Act, R.S.B.C. 1979, c. 290, ss. 205(1), 750, 890(1), 890(2), 895, 962(1)(a)(ii).
Municipal Act, R.S.B.C. 1996, c. 323, s. 281.

Counsel:

C.F. Willms and S.R. Coval, for the appellants. F.T. Williamson and J.G. Yardley, for the respondent.

Reasons for judgment were delivered by Cumming J.A., concurred in by Finch J.A. Dissenting reasons were delivered by McEachern C.J.B.C. (para. 39).

1 **CUMMING J.A.**:-- These are appeals from the orders of Madam Justice Huddart dated 23 June 1995, following a summary trial under Rule 18A, granting injunctive relief to the plaintiff District of Maple Ridge ("Maple Ridge") pursuant to s. 750 of the Municipal Act, R.S.B.C. 1979, c. 290 (now s. 281, R.S.B.C. 1996, c. 323) and of Mr. Justice Robinson dated 27 December 1996, following a trial dismissing the defendants' counterclaim for an order that the municipal council of Maple Ridge reconsider both the defendants' application for the amendment of the Official Community Plan ("OCP") and rezoning and their application for a Temporary Industrial Use Permit ("TIUP").

2 Maple Ridge argues that the defendants (Allard) are using their land in an unlawful manner. In the first matter on appeal, Maple Ridge successfully sought an injunction restraining Allard from using a ready-mix cement plant on the land. In the second matter on appeal Allard counterclaims, arguing bad faith and procedural unfairness as regards Maple Ridge's denial of the rezoning application and the application for a TIUP.

3 The decision of Robinson J. is reported at (1996), 38 M.P.L.R. (2d) 121; that of Huddart J. (as she then was) remains unreported.

4 The background in this protracted and convoluted matter is fairly summarized by Madam Justice Huddart as follows:

> Thornhill has operated a gravel pit on the property since 1969. An earlier ready-mix operation had been discontinued before it purchased the gravel pit, but the concrete pad for the cement plant was still there. In 1985, Maple Ridge re-zoned the property in part agricultural and in part residential. The property is now designated as part of the Urban Reserve on the Official Community Plan. Residents of the area have come to anticipate the eventual change in use of the three neighbouring gravel pits on Industrial Avenue. Many resent the heavy traffic.
>
> One of the three pits is owned by Maple Ridge. It is leased to Imperial Paving who operates an asphalt plant on the site. The second is owned by the company whose complaint about the defendants' use of the property instigated enforcement proceedings. That company operates a ready-mix plant on its property.
>
> In 1987, Rempel Bros. installed a cement plant on the concrete pad on the Thornhill property, then removed it on the demand of Maple Ridge.

In the spring of 1990, Mr. Allard, the principal or controlling mind of all the defendants, moved a portable cement plant to the contract pad. When Maple Ridge asked him to remove it, he refused on the basis that he had a permit to operate a mine from the provincial government that allowed him to process cement on the property. In his view, the defendants' mining use was and is a lawful, non-conforming use. Maple Ridge agrees but says that the mixing of cement is a manufacturing use not included in that lawful, non-conforming gravel extraction use.

In an effort to be cooperative, Mr. Allard applied in August 1990 for a minor variance to make legal his addition of a portable cement plant to the existing concrete pad under s. 962(1)(a)(ii) of the Municipal Act, pleading hardship. The deputy municipal clerk, acting as secretary of the Board of Variance, refused to place that application before the Board on the ground that it was not within the Board's jurisdiction. When Mr. Allard made a second application to the Board of Variance on September 6, 1990, that same officer took the same position. Subsequently a municipal employee advised Mr. Allard that Maple Ridge had received legal advice that the Board had no jurisdiction to hear the application because the defendants' use of the property for cement processing was not a lawful, non-conforming use.

A few days earlier, the Municipal Council had resolved to seek an injunction to restrain the ready-mix operation. On January 29, 1991, it began this action. After a summary trial, in January 1993 Mr. Justice Clancy concluded that the "manufacture of concrete is not a permitted use under the zoning by-law" and granted the injunction. Mr. Justice Hollinrake stayed the injunction on February 9, 1993, pending an appeal.

On May 16, 1994, the defendants applied for a Temporary Industrial Use Permit. The Municipal Council refused the permit on July 11, 1994, after refusing to allow Mr. Allard to appear as a delegation because he had not given sufficient notice of his desire to do so. Mr. Allard had learned from a newspaper reporter that his application was on the Council agenda. It had been put on the agenda too late for him to give the required notice.

Meanwhile, on June 22, 1994, the Court of Appeal decided that an injunction could not be granted under s. 751 of the Municipal Act where the lawful use was of a "structure", because that section applied only to land and buildings. Mr. Justice Taylor, writing for the unanimous Court, concluded:

> I would remit the matter to the trial court so that Maple Ridge, if so advised, may take whatever steps are necessary in order to bring an application to enjoin the use in question, otherwise than under s. 751. Should such an application be brought, it would be open to the appellants to advance anew whatever arguments they wish to make on any ground pleaded that such relief ought not to be granted or ought not to be granted except on conditions or subject to delay in its effect. Whether such an application if brought should be dealt with in summary proceedings rather than at a full trial as the appellants seem to wish, is a matter to be considered by the trial court. We are not asked to make any order concerning the counterclaim, which has yet to be dealt with in the trial court.

That passage is taken from the reported decision in District of Maple Ridge v. Thornhill Aggregates Ltd. (1994) 21 M.P.L.R. (2d) 316 at 324.

On November 18, 1994, Maple Ridge amended its statement of claim to seek an injunction under s. 750 of the Municipal Act. In their statement of defence and counterclaim, the defendants allege that it would be unjust or premature to grant the injunction sought by Maple Ridge because of its refusal to put the variance application before the Board of Variance and its denial of the Temporary Industrial Use Permit without valid reason. The essence of the defence and counterclaim is an allegation of bad faith on the part of the Municipal Council and its servants. The evidence suggests that the real concern is about bias on the part of its Chief Administrative officer.

APPEAL FROM MADAM JUSTICE HUDDART

5 With respect to the appeal from the order of Madam Justice Huddart, the appellants contend that the learned chambers judge erred in holding that the respondent was entitled to the injunction regardless of whether there is merit to the appellants' allegations of, among other things, bad faith and procedural unfairness. For the following reasons I do not agree.

6 To begin with, a series of cases in the Supreme Court and this Court (Maple Ridge v. Thornhill Aggregates Ltd. (1993), 14 M.P.L.R. (2d) 288 (S.C.B.C.); Maple Ridge v. Thornhill Aggregates Ltd. (1994), 21 M.P.L.R. (2d) 316 (S.C.B.C.); Maple Ridge v. Maple Ridge Board of Variance (1996), 36 M.P.L.R. (2d) 215 (S.C.B.C.) and Maple Ridge (District) v. Maple Ridge (District) Board of Variance (1997), 43 M.P.L.R. (2d) 182 (B.C.C.A.); leave to appeal to the Supreme Court of Canada refused 14 May 1998), [1998] S.C.C.A. No. 44, make it clear beyond a doubt that the defendants' ready-mix concrete operation on the land in question from their commencement of it contravened the applicable zoning by-law and was and is illegal.

7 The source for the injunction in the case under appeal is statutory, and not equitable. Factors that might be considered by a court in an application for an equitable injunction will be of limited, if any, application to the grant of a statutorily based injunction. See:

Shaughnessy Heights Property Owners' Association v. Northup (1958), 12 D.L.R. (2d) 760 (B.C.S.C.) at 763, where Macfarlane J. said:

> Mr. Guild's primary submission was that the remedy that the statute provides is a remedy by way of injunction, that the action being in equity, failure on the part of the Association over many years to enforce the Act raises an equity against the plaintiff. Mr. McFarlane says this is not an equitable proceeding; nor is the remedy by way of an injunction asked for in this action an equitable remedy; that the action is based on a statute and the remedy asked is a statutory remedy. Here again I think the reasons of the Court of Appeal make it clear that the right of action is a right based on the statute. As that judgment is unreported, I quote the relevant part of the reasons. Mr. Justice O'Halloran says: "In my judgment the statute speaks clearly and leaves no room for doubt as to its purpose, namely, that any violation of the statute such as occurred here, or any attempted violation, may be restrained by injunction. Proof of violation or attempted violation in my judgment is the sole essential to obtain an injunction. For these reasons I would dismiss the appeal".

See also: Kamloops v. Baines (1996), 32 M.P.L.R. (2d) 264 (B.C.S.C.) and Nelson v. Kranz (1990), 3 M.P.L.R. (2d) 258 (B.C.S.C.).

8 The injunction awarded to Maple Ridge was sought and granted pursuant to s. 750 (now s. 281) of the Municipal Act, and enforces a public right.

9 Where an injunction is sought to enforce a public right, the courts will be reluctant to refuse it on discretionary grounds. To the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed. See: Saskatchewan (Minister of Environment) v. Redberry Development Corp., [1987] 4 W.W.R. 654 (Sask. Q.B.); aff'd [1992] 2 W.W.R. 544 (Sask. C.A.), where Barclay J. said at p. 660:

> I am of the opinion that although I have a discretion under s. 18 of the Environmental assessment Act to refuse the Crown injunction relief, the nature of the discretion to be exercised in such cases appears to differ from that applied in cases between private litigants simply because the court is required to weigh the public interest. The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship an injunction would impose upon the defendant. It has been held that where the Attorney General sues to restrain breach of a statutory provision and where he is able to establish a statutory provision the courts will be very reluctant to refuse him on discretionary grounds: A.G. v. Premier Line, Ltd., [1932] 1 Ch. 303.
>
> In the case of A.G. v. Bastow, [1957] 1 Q.B. 514, [1957] 2 W.L.R. 340, [1957] 1 All E.R. 497, Devlin J. held that although the court retains a discretion once the Attorney General has determined that injunctive relief

> is the most appropriate mode of enforcing the law. Once a clear breach of the right has been shown the court should only refuse the application in exceptional circumstances.

10 Maple Ridge's application for the injunction came on for hearing before Madam Justice Huddart in February, 1995. After two days of argument on 15 and 16 February, the matter was adjourned. On 29 March 1995, Madam Justice Huddart handed down a Memorandum to Counsel as follows:

> I have now had an opportunity to review all the materials filed on the Rule 18A application in the light of your argument. In my view the application should be heard in full. If at its conclusion I decide that there was impropriety in the handling of the TIUP or Board of Variance application I can deny the injunction. If I decide that the plaintiffs are entitled to a review of one or both of those applications, I can dismiss the application.
>
> Because of this view I prefer not to express an opinion on the merits of the two arguments that go to the heart of the plaintiff's defence to the action and counterclaim.
>
> This matter can be set down via the Registry.

11 The matter proceeded before Madam Justice Huddart on 12 and 13 June 1995 and reasons for judgment were delivered 23 June 1995.

12 In her reasons for judgment Madam Justice Huddart noted:

> The defendants say that Maple Ridge is not entitled to an injunction on this summary trial or at all. They plead breach of its duty of fairness and bad faith in its dealing with two applications they made to it.

and further:

> Unless the claim and counterclaim are dealt with by way of summary trial, the action itself will be moot. The defendants want to use the property to produce ready-mix only until the summer of 1996. The trial is set for one week to commence May 27, 1996.

She continued:

> Whether there is merit to this claim cannot be decided without regard to the facts. Again, in the absence of an application to dismiss the counterclaim, I consider that it would be unfair to determine them from the evidence on this summary trial.

My conclusion that I should not determine facts that are fundamental to the counterclaim on this summary trial does not prevent me, however, from determining that Maple Ridge is entitled to the injunction it seeks.

* * *

In my view, there is no defence to the claim of Maple Ridge for an injunction, because the public interest is at stake in the enforcement of a zoning by-law. It is the task of Council, not this court, to determine where that public interest lies. If the public interest is engaged and a permanent injunction is being sought, the court's only role is to determine whether a defendant has breached the by-law the municipality seeks to enforce.

Until such time as the Board of Variance permits the addition of the cement plant to the cement pad, or Maple Ridge amends its Official Community Plan and grants a Temporary Industrial Use Permit, the use of the concrete pad to hold the present cement plant is unlawful. The Court of Appeal has decided that. This means that Maple Ridge is entitled to the injunction it seeks. It has no other way of enforcing its zoning by-law in the public interest.

If this court were to refuse to grant the injunction Maple Ridge seeks, it would be controlling municipal discretion in a matter affecting directly and substantially the public interest. Since at least City of Toronto v. Polai (1969), 8 D.L.R. (3d) 689 (Ont. C.A.), affirmed, [1973] S.C.R. 38, it has been clear that courts should not insist that municipalities exercise their discretion to enforce by-laws in a manner agreeable to the court, when the public interest is in issue. This is particularly so when a permanent injunction is being sought against defendants whose complaint is that they did not obtain a right they were seeking, rather than that they lost a right to which they were entitled.

In reaching this conclusion, I have been guided by these words from Wellbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg, [1972] 3 W.W.R. 433 (S.C.C.) (at 440):

> A re-zoning application merely invokes the defendant's legislative authority and does not bring the applicant in respect of his particular interest into any private nexus with the defendant, whose concern is a public one in respect of the matter brought before it.

I do not see the defendants' claims as going to the root of the plaintiff's claim, nor indeed as affecting it. The allegations of bad faith on the

> part of Council and its employees concern the application for a T.I.U.P. and the ancillary by-law to amend the Official Community Plan, not the decision to enforce the zoning by-law. But the public interest cannot be invoked without any regard to the private interests that will be affected. I have determined that, in the absence of an application to dismiss the counterclaim, it would be unfair to make findings of fact relevant to it. I am also of the view that it would be unfair for me to make comments on the strength of the defendants' case or on the extent to which this court may wish to invoke the rules of natural justice to assist the defendants.
>
> In this difficult situation, I have decided that fairness to the defendants requires that the enforcement of the injunction be stayed until the counterclaim is resolved by agreement or after a trial, summary or otherwise. ... If one or other of the orders the defendant seeks is granted, it is likely that the stay of the enforcement of the injunction will continue.

13 The stay directed by Madam Justice Huddart preserved the defendants' position pending the resolution of their counterclaim. It was within her discretion to proceed as she did to deal with the legal issue before her and I would not interfere. I would add that if the defendants were to succeed in having the zoning regulations amended and the TIUP granted, thus rendering their illegal activity lawful, appropriate steps could be taken to have the injunction vacated.

14 In my view, Madam Justice Huddart arrived at the correct conclusion for the reasons which she gave and with which I find myself in agreement.

APPEAL FROM MR. JUSTICE ROBINSON

15 With regard to the appeal from the order of Mr. Justice Robinson, the appellants contend that: (a) the learned trial judge erred in law or made a palpable and overriding error in concluding that the representatives of the respondent did not exercise bad faith in relation to the appellants and (b) acted in a manner contrary to the principles of natural justice or procedural fairness.

16 The focus of the appellants' case in these proceedings is on the first aspect of bad faith identified by Mr. Justice Finch in MacMillan Bloedel v. Galiano Island Trust Committee (1995), 28 M.P.L.R. (2d) 157 at 217 (B.C.C.A.) where he said:

> To the extent that the allegation focuses on the way the delegated power was exercised, or on the conduct of the administrative body, there is an issue of fact.

17 In his reasons for judgment, Mr. Justice Robinson stated that he was aware that he did not in his reasons:

> ... canvass every instance of alleged wrongdoing or omission that Allard makes against [the Respondent]. However, I have nonetheless considered them in detail, in association with the careful argument advanced by

> Allard. I conclude that they are not singly or in total, sufficient to give Allard the relief he seeks.

18 The appellants argue in their factum that the learned trial judge failed to adequately consider the evidence led on behalf of the appellants to establish their allegations of bad faith. I am unable to accept this submission.

19 Rather than failing to consider the evidence tendered by the appellants, the learned trial judge did not accept the evidence and rejected the characterizations placed upon that evidence by counsel for the appellants. The appellants' argument amounts to challenging the trial judge's assessment of the evidence as a whole; however, it is not open to this Court to overturn a trial judgment when the only point in issue is the interpretation of the evidence as a whole. See Wilson v. Guichon, (1993) 76 B.C.L.R. (2d) 191 at 198 (C.A.), citing Schreiber Brothers Ltd. v. Currie Products Ltd., [1980] 2 S.C.R. 78.

20 With respect to the appellants' contention that the respondent acted contrary to the principles of natural justice or procedural fairness in failing to give them adequate notice of the hearing and in denying them the opportunity to be heard it is appropriate at this point to outline the applicable legislative and by-law provisions governing the procedures of municipal council meetings and the enactment and amendment of zoning by-laws.

21 The Municipal Act requires a municipal council to establish a by-law to regulate the procedures of council meetings. Section 205(1) of the Municipal Act states that "the council must, by by-law, regulate council meetings and their conduct".

22 The current procedure by-law of Maple Ridge that was enacted pursuant to s. 205 of the Municipal Act is Maple Ridge Procedure By-law No. 3100-1982 which governs the procedure of general council meetings and prescribes rules of conduct and debate and rules and procedures for the making of motions. Section 5(a) and (b) of By-law No. 3100 provide:

> (a) Delegations may be received by the council, but must submit a written application to appear, to the municipal clerk, one week before the date of the meeting it is desired to attend. The application must indicate the names of the delegates, the purpose for which it is desired to appear, and the name of the spokesman for the delegation.
> (b) Any delegation appearing without notice will be received at the discretion of council.

23 Section 5(a) of By-law No. 3100 does not create a substantive right for a party to receive notice or to make submissions with respect to any particular matter being heard by council. Instead, s. 5 establishes a mechanism by which persons who wish to address council on any matter may get on the council agenda.

24 The Municipal Act provides, in s. 895, that municipal councils must establish procedures by which they will consider development applications:

> (1) A local government that has adopted an official community plan, a zoning bylaw, or rural land use bylaw must, by bylaw, define proce-

dures under which an owner of land may apply for an amendment to the plan or bylaw or for the issue of a permit under this Part.

25 Pursuant to s. 895(1), the municipal council of Maple Ridge adopted Maple Ridge Procedure By-law No. 3770-1986. By-law No. 3770 establishes the procedures by which applications for, among other things, amendments to an Official Community Plan and the issuance of a temporary commercial industrial permit will be considered. Specifically, By-law No. 3770 provides

Scope

2. This By-law shall apply to the following:

(1) Amendments to:

(a) an Official Community Plan,
(b) a zoning by-law.

(2) Issuance of:

(a) development variance permits,
(b) temporary commercial and industrial permits,
(c) development permits.

Amendments Approval or Refusal

6. The Council may, upon receipt of the report under Section 5 of this by-law proceed with an amendment by-law, or reject the application.

Permits Issuance or Refusal

7. The Council may, upon receipt of the report under Section 5 of this by-law:

(a) authorize the issuance of the permit;
(b) authorize the issuance of the proposed permit as amended by the Council in its resolution;
(c) refuse to authorize the issuance of the permit.

Refusal Amendments and Permits

8. Where an application, amendment by-law or a permit has been refused by the Council, the Municipal Clerk shall notify the applicant in writing within 15 (fifteen) days immediately following the date of refusal and give reasons for refusal.

26 Section 890(1) of the Municipal Act states that a local government must not adopt a community plan by-law without holding a public hearing on the by-law for the purpose of allowing the public to make representations to the local government respecting matters contained in the proposed by-law. Section 890(2) provides that the public hearing must be held after first reading of the by-law and before third reading.

27 Section 890 of the Municipal Act is a codification of the procedural fairness deemed necessary by the Legislature for those whose interests may be affected by a land use or development by-law.

28 In order to obtain a TIUP, an OCP must first designate the area in question as one where a TIUP may be allowed. Maple Ridge's OCP has not designated the Allard land to permit a TIUP. The amendment of an OCP requires a public hearing.

29 The decision of the Maple Ridge council not to proceed with the proposed amendment to the OCP is a legislative function. As stated by Crossland J. in Blyth v. Northumberland (County) (1990), 2 M.P.L.R. (2d) 155 at 165 (Ont. C.J. Gn. Div.)):

> ... the council is not dealing with a matter involving a conflict of interest between private individuals. There is no duty to conduct a public hearing before coming to the decision of passing the by-laws. Nor is the council required to determine disputable questions of law and fact or to exercise a limited or "judicial" discretion. As such, the county council in passing the by-laws is not acting in a quasi-judicial capacity: see J.M. Evans, de Smith's Judicial Review of Administrative Action, 4th ed. (London: Stevens & Sons, 1980) at pp. 175-177. Rather, the county council is exercising a legislative function which does not involve council in judicial procedures requiring a fair hearing: Rogers, The Law of Canadian Municipal Corporations, supra, at pp. 221-222.

30 There is no common law right to a hearing in the case of legislative acts. In Bates v. Lord Hailsham of St. Marylebone and Others, [1972] 1 W.L.R. 1373 at 1378, Megarry J. said:

> In the present case, the committee in question has an entirely different function: it is legislative rather than administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally; and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative authority is a

> commonplace; but although a few statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections (see, for example, the Factories Act 1961, Schedule 4), I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. I accept that the fact that the order will take the form of a statutory instrument does not per se make it immune from attack, whether by injunction or otherwise; but what is important is not its form but its nature, which is plainly legislative.

31 The right of an applicant to make submissions concerning a change to zoning or OCP only arises if the municipal council decides to take the consequent by-law to third reading, in which case the Municipal Act requires that a public hearing be held.

32 At common law, the right to a hearing may arise where a decision may lead to the loss of some existing right or privilege, but not where a party is seeking a right or privilege. In McInnes v. Onslow-Fane, [1978] 1 W.L.R. 1520 at 1528-1529 (Ch. D.), Megarry V.-C. said:

> ... where the court is entitled to intervene, I think it must be considered what type of decision is in question. I do not suggest that there is any clear or exhaustive classification; but I think that at least three categories may be discerned. First, there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or a licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refused to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence to do certain acts. Third, there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority: see, for instance, Weinberger v. Inglis [1919] A.C. 606; Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175; and see Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch. 149, 170, 173 and Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook [1976] 1 W.L.R. 1052, 1058.
>
> It seems plain that there is a substantial distinction between the forfeiture cases and the application cases. In the forfeiture cases, there is a threat to take something away for some reason: and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges (which in Ridge v. Baldwin

> [1964] A.C. 40, 132, Lord Hodson said were three features of natural justice which stood out) are plainly apt. In the application cases, on the other hand, nothing is being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges. Instead, there is the far wider and less defined question of the general suitability of the applicant for membership or a licence. The distinction is well-recognised, for in general it is clear that the courts will require natural justice to be observed for expulsion from a social club, but not on an application for admission to it.

33 The application of the appellants for an amendment to the OCP and the subsequent issuance of a TIUP did not involve the revocation or loss of any existing right or privilege of the appellants. The appellants had been unlawfully operating the ready-mix plant for approximately four years at the time of their application.

34 In Smith v. Surrey (City) (4 February 1998), Vancouver A972692 (B.C.S.C.), [1998] B.C.J. No. 250, the petitioners brought an application for judicial review seeking a declaration that the respondent had acted contrary to the rules of natural justice and/or procedural fairness in failing or refusing to proceed with a public hearing concerning a by-law dealing with the rezoning of their land. In dismissing the petition, Burnyeat J. said:

> However, nothing in the Municipal Act requires the respondent to proceed to first and second reading, to proceed to a Public Hearing once first and second reading has been given, to set a date for a Public Hearing once first and second reading has been given, to proceed with a Public Hearing even after the date for it has been set, to conclude a Public Hearing once it has commenced, to re-set a specific date if a Public Hearing is not concluded on the date originally set for it, or to set another date for a Public Hearing if no specific date is set when a Public Hearing which has commenced is adjourned. The "Code of Procedure" set out in the Municipal Act only requires a Public Hearing prior to third reading of a zoning bylaw. Nothing which was done by the respondent failed to comply with the "Code of Procedure" set out under the Municipal Act relating to the passing of bylaws.

35 In my respectful view, Mr. Justice Robinson was correct in holding, as he did that:

> ... Allard was not deprived of any opportunity to present his views on the second TIUP application to an extent sufficient ... to characterize [the respondent's] refusal to hear him, as contrary to natural justice or procedural fairness or as constituting an injustice or discrimination.

36 The appellants also complain that Maple Ridge acted contrary to the principles of natural justice and in violation of the specific requirements of s. 8 of the zoning by-law in failing to give reasons for its refusal of the TIUP. It is true that no such reasons were given although, it seems to me, it is plain and obvious no TIUP could be issued in the absence of an amendment to the OCP and, as that was not to be, for all practical purposes that is the end of the matter.

37 In Kirkfield Park & Arthur Oliver Residents Assn. Inc. v. Winnipeg, [1996] 4 W.W.R. 393 (Man. C.A.), the city council gave no stated reasons when it approved an application to which the appellant objected. The relevant legislation specifically provided that council "shall decide with stated reasons to approve the proposed by-law or application, reject it or approve it with conditions". In dismissing this ground of attack on the council's decision, Helper J.A. for the court said, at 405-406:

> Council is charged with the responsibility for making the final decision in the legislative process. There are no public hearings and no submissions to Council by interested parties. Only the filed reports and committee recommendations are available to the Council members. By giving Council stated reasons for its recommendation, the community committee enables Council to assess the application as it affects the entire municipality, to debate the entire issue in the context of the public interest, not just the community interest, and to determine, if it decides to approve an application, whether conditions must be attached to that approval. The councillors themselves engage in the debate and examine all the issues raised in the reports and recommendations. The debate is as extensive as the councillors require to address all the relevant issues.
>
> Ultimately a vote is taken. Council does not confer and then make a decision. The decision is made by a majority vote and there is no review from that vote. The outcome of the vote is the decision of Council.
>
> Council's reasons cannot be determined by a vote. The reason why a particular councillor votes in favour of a rezoning application may be entirely different from the reasons given by a second councillor who also supports that application. The reasons for a councillor's vote may or may not be evident in the debates. They certainly are not evident in the ultimate vote and they do not constitute the reasons of Council.
>
> Just as Parliament and the legislature do not and could not be required to give reasons as a body for their legislative decisions, so too Council cannot give stated reasons as a body for its decisions, even if the vote was unanimous. In this case the vote was 9 to 7. The resulting vote represented the will of the majority of Council, not its reasons.
>
> * * *
>
> Although the occasions are rare, it will happen that courts are inclined to place little or no meaning on the words used in legislation where those words result in absurdity or lead to an unwarranted conclusion: Association of Parents Dist. 50 v. Minority Language Board (1987), 40 D.L.R. (4th) 704 (N.B.C.A.), and Paul v. The Queen, [1982] 1 S.C.R. 621.

> Professor S.A. de Smith in his text Judicial Review of Administrative Action (3rd ed. 1973) London, Stevens & Sons Ltd., stated (at p. 123):
>
> > Although "nullification is the natural and usual consequence of disobedience," breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned.
>
> To attack Council's decision on the basis that the legislation requires Council to provide reasons for its vote leads to an absurd result. It is for this reason that the leave application on this issue was refused.

I would reject the appellants' appeal based upon the failure of counsel to give reasons for its refusal of a TIUP.

38 For these reasons I would dismiss these appeals with costs.

CUMMING J.A.
FINCH J.A.:-- I agree.

The following is the judgment of:

39 McEACHERN C.J.B.C. (dissenting):-- I have had an opportunity to read the Reasons for Judgment prepared by Mr. Justice Cumming on these two appeals. I regret that I am unable to agree that they should be dismissed.

40 Mr. Justice Cumming has provided most of the history but I think it necessary to add a few more words from a slightly different perspective.

41 There are at least three adjacent gravel pits in the Municipality of Maple Ridge which have been in operation since at least the 1960's. The Respondent Municipality of Maple Ridge, which I shall call "Maple Ridge", operated one of these pits. The Appellants, whom I shall call "Thornhill", owned and operated another gravel pit and a third party operated the other one. At one time or another there was a related industrial operation on each of these gravel pits all of which, as it now turns out, were operated in breach of municipal by-laws. In Thornhill's case it most recently operated a cement ready-mix plant in conjunction with its gravel pit.

42 For some time, Maple Ridge has contemplated the closure of all these operations so as to make the land available for residential use pursuant to an Official Community Plan ("OCP"), but it appears, as the trial judge found, that the time for this development has not yet arrived. Starting in the early 1990's Maple Ridge began to take steps to limit the related industrial use of the gravel pits so that their operators could continue only with their non-conforming gravel extraction operations. These operations may be coming to the end

of their gravel reserves anyway although there is some doubt about the timing of that eventuality as Thornhill owns its gravel pit and will presumably operate it as long as it remains economical.

43 Steps taken by Maple Ridge brought it into seemingly endless conflict with Mr. Allard, the principal of Thornhill. I can understand the anxiety of Maple Ridge to get on with its OCP but there may be merit in the views strongly held by Mr. Allard, and shared in part by the trial judge, that the time for residential development has not yet arrived. Mr. Allard has assiduously pursued his position that his industrial operations should be allowed to continue in light of the fact there is no urgency and the further fact that there is no alternative site in Maple Ridge and he provides employment for a number of employees.

44 That the ready-mix plant is not permitted under the existing zoning has now been decided conclusively against Thornhill, but that conclusion was only reached recently after a number of legal false starts. In the meantime, serious animosity had developed between Mr. Allard and some members of the Maple Ridge staff. This is cause for concern and should have alerted the Council to be careful to avoid unfairness.

45 Departing from the chronology for a moment, the uncontradicted evidence discloses extreme animus on the part of the Municipal Manager against Mr. Allard. A former mayor (November 1990 - November, 1993) gave evidence and identified a letter she had written on May 10, 1995, at the time of the second Temporary Industrial Use Permit ("TIUP") application:

> The conflict between Mr. J. Allard and the Municipality of Maple Ridge has been going on for many years - with no equitable solution and no compromise.
>
> I believe the "flames of disagreement" are deliberately fanned thus making any solution impossible.
>
> I have seen letters from the District Inspector of Mines, the Subdivision Co-ordinator of the Municipality, Deputy Director of Inspection Services and other memoranda, which in my mind should make the outcome quite positive for Mr. Allard.
>
> In my opinion this situation fits my definition of a "vendetta" against Mr. Allard.

46 She testified at trial as follows:

> Q. And could you elaborate a little bit, please, on what you meant when you used the word "vendetta"?
> A. Well, to me a vendetta is when all the obstacles in the world are put up against somebody so that they are not able to accomplish anything. This was very evident.
> Q. And when you said that this situation fit your definition of a vendetta against Mr. Allard, who were you referring to?

A. Certain people in the municipal government in Maple Ridge.
Q. Ms. Morse, you knew a man named Jerry Sulina?
A. Yes, I did.
Q. And he was municipal administrator for some years?
A. Yes, mm-hmm.
Q. Yes?
A. Yes.
Q. Did you ever have a discussion with Mr. Sulina about the sorts of attitudes you've just described towards Mr. Allard?
A. Yes, I did. I used to frequently discuss it with him because I felt even at that it was very much a vendetta and we would -- how would I say? -- argue about this? He probably did not feel it was, being the administrator, but I felt it was and let him know in no uncertain terms.

[Emphasis added.]

47 Another witness, a former Alderman and a journalist also provided an affidavit as follows which he verified at trial:

> I have known Mr. Jerry Sulina since 1975 when I first ran for office in Maple Ridge. Between November 1977 and December 1983, I served as an alderman in Maple Ridge and came to know Mr. Sulina quite well in his position, first as a municipal treasurer, and later as municipal administrator.
>
> During all these times, Mr. Sulina exhibited a marked hostility and vehemence in any council business with gravel pit operators but he had a particular venom when the subject of Mr. Jim Allard or Allard Contractors came up.
>
> Sometime between the middle of June and the end of July 1994 I spoke to Mr. Sulina in the parking lot of Maple Ridge municipal hall. I had stopped to talk with Mr. Sulina regarding the many litigations and legal problems the municipality had been embroiled in over the past several years and the associated cost to taxpayers.
>
> When I mentioned Jim Allard's name Mr. Sulina responded in an almost apoplectic fashion. I had said: "And what about Allard?" Mr. Sulina replied: "Allard! That asshole. We're going to stomp on him. We're going to put that son of a bitch out of business." I then discontinued the conversation and left.
>
> Mr. Sulina's attitude towards Mr. Jim Allard had been known to me previously but, on this occasion, it seemed to me totally personal and quite irrational.

48 This conversation took place during the currency of Thornhill's application for the second TIUP.

49 While this distasteful conduct on the part of a Municipal official may not have direct legal consequences, it may explain in part how it came about that the Municipality, in my view, did not treat Thornhill fairly. I should add, however, that I do not believe the conduct and attitude of the Municipal Manager supports a finding of bias or corruption against the Municipality or its Council even though I find it remarkable that this matter would proceed as it did. I suspect the Council was weary of the fight and just wished to rid itself of a troublesome ratepayer. This was also the view of the learned trial judge.

50 Returning to the chronology, it must be recognized that Mr. Allard and his companies have been a continuing thorn in the side of the Municipality. Recognizing that these operations must eventually be discontinued, Thornhill has been fighting a delaying game, hoping to hang on to its business opportunity for as long as possible. While most legal battles have been decided against Thornhill, the final determination that he must close his ready-mix plant has been made only recently.

51 It is sufficient to say that upon Mr. Allard learning that the courts had decided his ready-mix plant was not authorized by municipal regulation, he sought a TIUP which is authorized by the by-laws of the Municipality. A TIUP permits continued use for up to two years with the possibility of an additional two year extension. This is Thornhill's second effort to obtain a TIUP, but I understand the first one was turned down at a time when residential development was thought to be much closer than is now the case.

52 In the proceedings under appeal, however, a TIUP could not be authorized without an amendment of the OCP which, if favoured by the Council, would require a public hearing. As a result, Mr. Allard applied by letter dated May 16, 1994 for both an amendment to the OCP and for a TIUP. While this application was pending, this Court decided that an injunction previously obtained by the Municipality was invalid because it was granted under the wrong section of the Municipal Act.

53 For reasons which are not explained in the material, (and Maple Ridge called no evidence about how it reached its decision), Thornhill's double application was placed, without notice to Thornhill, on the agenda for a Council meeting to be held in less than 14 days. The procedural by-laws of Maple Ridge requires two weeks notice of intention to seek delegation status at a meeting of the Council. As this matter was placed on the agenda within two weeks of the date of the meeting, the required notice for delegation status could not be given. When he learned his application was on the agenda just a day or so before the meeting, and that it was accompanied by a staff report, Mr. Allard called the Municipality to advise that the report was factually wrong in a number of material particulars. He was told that he could not speak at the meeting because the requisite 14 day notice for delegation status had not been given.

54 Notwithstanding this, Mr. Allard attended at the meeting for the purpose of informing the Council that the report was incorrect. The Council refused to hear him even though the Council had authority to waive the lack of requisite delegate status. The Council then proceeded, wrongly in my view, to dismiss Thornhill's double application.

55 It seems arguable that the report placed before the Council contained some inaccuracies, particularly with respect to the timing of residential development and the intensity of traffic if the ready-mix plant continued operations.

56 I do not find it necessary to decide whether the Municipality had an obligation to give specific notice of the agenda to Thornhill, or even to provide him with a hearing. Procedural fairness can sometimes be attained without those formalities, such as by accepting written briefs. The question here is whether the events as they unfolded satisfied the requirements of fairness.

57 What happened next was legally unusual. The Municipality moved under Rule 18A of the Rules of the Supreme Court of British Columbia before Huddart J., (as she then was), for a permanent injunction under s. 750 of the Municipal Act restraining Thornhill from continuing to operate its ready-mix plant. Thornhill defended on the ground that the Municipality by its conduct was not entitled to an injunction and counterclaimed, inter alia, for a declaration that the Council reconsider Thornhill's double application.

58 Huddart J. found that she had no discretion to refuse to grant a statutory injunction. She then went on to find that there would have to be a trial to resolve Thornhill's counterclaim. For this reason she stayed the operation of her injunction until the counterclaim had been "resolved". I assume the counterclaim has not yet been "resolved" if there should be a further appeal from this Court's decision to the Supreme Court of Canada.

59 I digress for just a moment to say that I agree with Mr. Coval that there is a marked difference between granting and then staying an injunction and in not issuing one in the first place even though an injunction found not to have been properly issued can usually be aside promptly. Everyone prefers not to have an injunction outstanding against him or her, and the fact that the operation of the injunction was stayed does not make the question moot.

60 Thornhill's counterclaim was later heard by Robinson J., who accepted the contention that "...residential development is some distance from a time point of view in the future ..." and that "there was some substance to [Thornhill's] allegations", and that he would have "some concern that there was an absence of procedural fairness in the refusal of the Council of [Maple Ridge] to hear Allard if this were the first TIUP application." Robinson J., however, went on to hold that the counterclaim should be dismissed.

61 In my view, Robinson J. based his decision upon two findings, which I set out from his Reasons for Judgment as follows:

> Mr. Allard was not deprived of any opportunity to present his views on the second TIUP application to an extent sufficient extent (sic) to characterize [Maple Ridge's] refusal to hear him, as contrary to natural justice or procedural fairness or as constituting an injustice or discrimination.
>
> . . .
>
> It is my ultimate view that far from there being evidence of bad faith or serious misconduct bordering on the corrupt or discriminatory [Maple Ridge] has patiently considered all actions and representations and applications

> made or asserted by Allard and dealt with them in an adequate fashion over the several years that this matter has been before the council of [Maple Ridge] or before the court.

62 With respect, it seems to me that the first finding is clearly wrong as Mr. Allard was not heard at all on the pending applications, and the second finding is based on the assumption that past good conduct precludes a finding based upon present circumstances. Regretfully, I find myself constrained to find that the learned trial judge misapprehended the unfairness of what happened with respect to Thornhill's double application.

63 This is not to say that Thornhill was bound to succeed. I regard that as a highly doubtful prospect having regard to the history and the circumstances. But we are here concerned with ensuring fairness, not results.

64 Notwithstanding what I regard as an obvious lack of fairness in refusing to hear Mr. Allard's factual objections to the report Council was considering and in not giving him an opportunity to submit his observations in some way, the question remains whether there was, in the circumstances of this case, an obligation to be fair.

65 Generally speaking, of course, municipal councils are expected to always be fair even though councils are sometimes entitled to make apparently unfair decisions in what the council considers is the greater good. Even in such cases, however, procedural fairness is usually required.

66 In this respect, Mr. Yardley for Maple Ridge contended that a refusal to entertain an application to amend an OCP, which was a prerequisite to the granting of a TIUP, was a legislative function for which procedural fairness was unnecessary. Mr. Yardley particularly relied upon authorities such as Birch Builders v. Esquimalt (Township) (1992), 66 B.C.L.R. (2d) 208 (C.A.); Westfair Foods v. Saanich (1997), 100 B.C.A.C. 223; Bates v. Lord Hailsham of St. Marylebone and Others, [1972] 1 W.L.R. 1373 (Ch.D.); McInnes v. Onslow-Fane and Another, [1978] W.L.R. 1520 (Ch.D.); Kirkfield Park & Arthur Oliver Residents Assn. Inc. v. Winnipeg, [1996] 4 W.W.R. 393 (Man. C.A.); and MacMillan Bloedel Ltd. v. Galiano Island Trust (1995), 28 M.P.L.R. (2d) 157 (B.C.C.A.).

67 In reply, Mr. Willms relied upon Wiswell et al v. The Metropolitan Corporation of Greater Winnipeg, [1965] S.C.R. 512, which questions the wisdom of trying to classify various acts as judicial, quasi-judicial or legislative. The point was well put by Freedman J.A., (as he then was), in the Court of Appeal decision which was quoted with approval by Hall J. at 520:

> But to say that the enactment of By-law No. 177 was simply a legislative act is to ignore the realities and the substance of the case. For this was not a by-law of wide or general application, passed by the Metropolitan Council because of a conviction that an entire area had undergone a change in character and hence was in need of re-classification for zoning purposes. Rather this was a specific decision made upon a specific application concerned with a specific parcel of land. Metro had before it the application of Dr. Ginsburg, since deceased, for permission to erect a high-rise apartment building on the site in question. Under then existing

> zoning regulations such a building would not be lawful. To grant the application would require a variation in the zoning restrictions. Many residents of that area, as Metro well knew, were opposed to such a variation, claiming that it would adversely affect their own rights as property holders in the district. In proceeding to enact By-law No. 177 Metro was essentially dealing with a dispute between Dr. Ginsburg, who wanted the zoning requirements to be altered for his benefit, and those other residents of the district who wanted the zoning restrictions to continue as they were. That Metro resolved the dispute by the device of an amending by-law did indeed give to its proceedings an appearance of a legislative character. But in truth the process in which it was engaged was quasi-judicial in nature; and I feel I must so treat it.
>
> Then counsel argues as well that the governing statute does not call for notice. Hence, he says, notice was not required. I am unable to accept this contention. A long line of authorities, both old and recent, establish that in judicial or quasi-judicial proceedings notice is required unless the statute expressly dispenses with it. The mere silence of the statute is not enough to do away with notice. In such cases, as has been said, the justice of the common law will supply the omission of the legislature. Some of the authorities dealing with this subject are referred to by Kirby J. in the recent case of Camac Exploration Ltd. v. Oil and Gas Conservation Board of Alberta, (1964), 47 W.W.R. 81.

68 As a result, the majority of the Supreme Court of Canada decided that the municipality was engaged in a quasi-judicial matter and was in law required to act fairly and impartially. This seems to include a requirement of reasonable notice.

69 Although Judson J. dissented on the sufficiency of the notice that was actually given, that learned judge expressed the same view about classification of functions. At 526 he wrote:

> I do not think that it helps one towards a solution of this case to put a label on the form of activity in which the Metropolitan Council was engaged when it passed this amending by-law. Counsel for the municipality wants to call it legislative and from that he argues that they could act without notice. The majority of the judges prefer the term quasi-judicial. However one may characterize the function, it was one which involved private rights in addition to those of the applicant and I prefer to say that the municipality could not act without notice to those affected.

70 I do not rely in this case on any lack of actual notice because Mr. Allard did ultimately learn that his application was on the agenda prior to the meeting. What I find unfair was the act of Maple Ride setting the agenda at a time when it was too late to seek delegation status, and its subsequent refusal to hear Mr. Allard on factual matters by a simple waiver of the delegation status requirement. Reasonable persons, acting fairly, might on hearing submissions have been persuaded that a two year delay would not do violence to

the OCP. I have no idea, of course, whether that would have been the result, and at the risk of repeating myself, I have no doubt that the Council could have done fairly what it actually did unfairly.

71 In my view, Council was not exercising a legislative function in dismissing Thornhill's double application. This was a straight question of private rights coming into conflict with the terms of an OCP where these rights, on one view of the matter, would have done no violence to the OCP. While the establishment of the OCP may have been a legislative function, for which fairness was ensured by the requirement for a public hearing, the decision to seek an amendment in these circumstances, subject to later scrutiny at a public hearing, was much closer to a judicial or quasi-judicial function. This was clearly Council's decision to make but it could properly be made only in a context of procedural fairness. That context was absent in this case.

72 As a result, I would allow the appeal against the judgment given at trial, set aside the decision reached by the Council on Thornhill's double application and remit the matter to the Council to reconsider it in accordance with the requirements of procedural fairness as I have described them above.

73 This brings me to the appeal against the granting of the stayed injunction. Although I think, with respect, that it might have been better to leave the entire matter to the trial judge, I am satisfied that the Chambers judge had jurisdiction to entertain the injunction application. However, I accept Mr. Coval's argument that the Chambers judge erred when she concluded at A.B., Vol. 5, p. 936 that she had no alternative but to grant an injunction once it was established that Thornhill was carrying on business in breach of the OCP or the municipal by-laws.

74 Further, at A.B. Vol. 5, p. 937 the learned Chambers judge said:

> Until such time as the Board of Variance permits the addition of a cement plant to the cement pad, or Maple Ridge amends its Official Community Plan and grants a [TIUP], the use of a concrete pad to hold a cement plant is unlawful...This means that Maple Ridge is entitled to the injunction it seeks.

75 The judge, in my view, had a discretion to grant the injunction or to refer the matter to the trial judge or to just dismiss the application when it became apparent to her that the injunction would have to be stayed, in any event, until at least the trial of the counterclaim.

76 With respect, Polai v. City of Toronto, [1973] S.C.R. 38 does not support the view that a judge has no discretion but to grant an injunction when a breach of a by-law is established. In that case, the only defence was that other persons were also breaching the by-law. It was held that that was not a defence and that there were no other reasons not to grant the injunction. In my view, a judge should always give great weight to the public interest when it can reliably be ascertained, but a judge always has a discretion to refuse to grant an injunction when there are circumstances where some other course may suffice.

77 I would also allow this appeal, set aside the injunction and remit the Maple Ridge injunction application to the Supreme Court of British Columbia to be decided upon the final resolution of Thornhill's counterclaim.

78 I would allow both appeals accordingly.

McEACHERN C.J.B.C.

Case Name:

Chicken Farmers of Ontario v. Drost

Between
Chicken Farmers of Ontario, appellant (plaintiff), and
Chuck Drost, Peter Drost, et al., respondents (defendants), and
Chicken Farmers of Canada, intervenor

[2005] O.J. No. 3973

258 D.L.R. (4th) 177

204 O.A.C. 17

142 A.C.W.S. (3d) 1036

2005 CarswellOnt 4925

Court File No. 270/04 (St. Catharines 45,323/04)

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

G.D. Lane, P.G. Jarvis and K.E. Swinton JJ.

Heard: March 3 and 4, 2005; written submissions, May, 2005.
Judgment: September 14, 2005.

(49 paras.)

Administrative law -- Administrative powers or function -- Granting and revocation of licences -- Civil procedure -- Injunctions -- Considerations affecting grant -- Natural resources law -- Agriculture -- Statutory interpretation -- Statutes -- Enabling statutes -- Scope.

Appeal by Chicken Farmers of Ontario from an order dismissing its motion to prohibit the Drosts from producing and marketing chicken until trial. CFO was a local board, created by legislation, that controlled and regulated production and marketing of chicken within On-

tario. The Drosts produced and marketed chicken from farms they owned in Ontario. All their chicken was shipped directly to the United States. They sold their CFO quotas in 1995 and continued to operate without quotas. They refused to stop selling chicken despite being ordered to do so by CFO, and the CFO brought the lawsuit. The Drosts did not appeal the order through administrative channels. The Drosts argued CFO was expanding beyond its scope of authority in trying to regulate exports, contrary to Canada's international trade obligations under NAFTA. CFO moved for an injunction preventing the Drosts from continuing their operation. The motion was dismissed because CFO did not establish irreparable harm. The motions judge considered the common law remedy of damages sufficient to deter others from embarking on similar enterprises as the Drosts. He found no public interest as CFO was considered a litigant. The balance of convenience favoured the Drosts because granting the injunction would destroy their business.

HELD: Appeal allowed. The injunction was granted. The motions judge erred in principle by failing to recognize the public law element in the case. He wrongly characterized CFO as a private litigant. He failed to apply a specific provision in CFO's enabling statute providing for the granting of an injunction enjoining marketing of chicken contrary to law. There was a serious issue to be tried regarding whether international obligations affected the chicken marketing and production scheme in Ontario. Irreparable harm was established, as the impact of the Drosts' continued defiance of the law could not be measured in dollars. The balance of convenience favoured prohibiting the Drosts from continuing to profit from their defiance of the law. The Drosts' possible business losses could be adequately compensated in damages if they successfully defended the action.

Statutes, Regulations and Rules Cited:

Agriculture Products Marketing Act, R.S.C. 1985, c. A-6

Farm Products Agencies Act, R.S.C. 1995, c. F-4

Farm Products Marketing Act, R.S.O. 1990, c. F.9, s. 13

Farm Products Marketing Act, Regulation 402

Farm Products Marketing Act, Regulation 403

Ministry of Agriculture, Food & Rural Affairs Act, R.S.O. 1990, c. M.16

NAFTA Implementation Act, S.C. 1993, c. 44

Counsel:

Geoffrey Spurr, for the Appellant.

James McIlroy, for the Respondents.

David Wilson, for the Intervenor.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 G.D. LANE J.:-- Chicken Farmers of Ontario ("CFO") appeals from the Order of Dandie J. dated May 10, 2004 dismissing its motion to prohibit the defendants from producing and marketing chicken until the trial of this action. The appeal is by leave granted by Whalen J.

2 The appellant CFO is a "local board" created under the Farm Products Marketing Act, R.S.O. 1990, c. F.9 ("FPMA"), which exercises delegated authority from the Province and, through other legislation, from Canada, to control and regulate the producing and marketing of chicken within Ontario, interprovincially and for export. The cornerstone of CFO's regulatory authority is the requirement that all production and marketing of chicken must be undertaken pursuant to a quota. CFO constitutes the Ontario agency acting within a federal-provincial scheme pertaining to the producing and marketing of chicken in Canada. "Federal quotas", which permit producers to market chicken in interprovincial and export trade are derived specifically from provincial quotas fixed and allotted to chicken producers by provincial boards, such as CFO.

3 The intervenor, Chicken Farmers of Canada ("CFC"), operates under federal legislation and is charged with the responsibility of regulating and administering the federal aspects of the federal-provincial scheme for chicken. Through the dovetailing of federal and provincial legislation CFO and CFC administer an integrated cooperative federal-provincial scheme that regulates all chicken produced by Ontario producers whether destined for intraprovincial, interprovincial or export trade.

4 The respondents are collectively engaged in the production and marketing of chicken from farms owned by them and located in the Niagara peninsula. All of their chicken is shipped directly to the United States, for sale there through a broker. Previously, four of the personal respondents operated their chicken businesses within the marketing scheme administered by CFO, but they sold their quotas in 1995 and no longer hold any quota from CFO. Since mid-2002, the respondents have produced and marketed chicken on a daily basis, and currently ship 8,000-10,000 live chickens per week to a wholesaler in New York State.

5 Despite being advised by CFO of the requirement to hold quotas in order to legally produce chicken, and despite being ordered by CFO, through formal Directions, to cease and refrain from engaging in any new and additional production of chicken, the respondents have continued unabated. They have neither complied with the Directions nor appealed them through the administrative appeal system established by the legislation. The respondents' position is that the appellant, CFO, lacks the necessary authority to restrict the respondents' export of live chickens to the United States.

6 Faced with this situation, CFO brought this action and moved for an interlocutory injunction to prohibit the respondents from producing chicken without quota until the trial of the action.

Outline of the Legislative Framework of the Chicken Marketing Scheme

7 The legislation is conveniently summarized in the appellant's factum on which I have based this part of the reasons.

8 The Farm Products Marketing Act, R.S.O. 1990, c. F.9 ("FPMA") provides for the establishment and empowerment of local boards created and charged with responsibility in respect of farm products. "Farm products" become "regulated products" when a local board is given jurisdiction over a farm product. "Chicken" is a regulated product and the appellant is a "local board".

9 Pursuant to the FPMA, the Ontario Farm Products Marketing Commission has delegated to CFO certain enumerated powers necessary for CFO to carry out its functions. The Ontario Farm Products Marketing Commission is established by the Ministry of Agriculture, Food & Rural Affairs Act, R.S.O. 1990, c. M.16 ("MAFRA"). Commission members are appointed by the Ontario Minister of Agriculture and Food.

10 Included in the authority delegated to CFO is the authority to make regulations in relation to chicken. Various provisions of the FPMA, the provisions of Regulations 402 and 403 made under the FPMA and the regulations made by CFO, when taken together, constitute a comprehensive scheme regulating the production and marketing of chicken within Ontario.

11 The CFO General Regulations enumerate the specific requirements that must be met in order to produce and market chicken. Chicken must be produced on a quota basis. Chicken may not be produced by any person unless that person has been fixed and allotted a quota. Chicken must be marketed on a quota basis. Chicken cannot be marketed by any person unless that person has been fixed and allotted a quota. Producers, transporters and processors of chicken are licenced by CFO to engage in the producing and marketing of chicken as the case may be.

12 Through its quota authority, CFO operates a supply management system. CFO controls the amount of chicken produced and marketed so that these activities occur in an orderly manner. This enables chicken producers over time to receive a reasonable return and provides stability in the marketplace. The price for all chicken marketed by Ontario chicken producers is established through a negotiation process involving CFO and licenced chicken processors.

13 There are approximately 1,100 licenced chicken producers in Ontario producing in excess of 60,000,000 kilograms of chicken every eight weeks of the year.

14 Regulations made under the Farm Products Agencies Act, R.S.C. 1995, c. F-4 require that persons engaging in interprovincial and export trade, must be licenced by CFC. Producers of chicken in each province are allottees of federal quotas which are quotas determined with reference to the size of each producer's provincial quota. Therefore, all CFO licenced producers, as well as holding quotas fixed and allotted by CFO, are the allottees of federal quota and have the right to market chicken in interprovincial and export trade. The scheme pursuant to which federal quotas are allotted is administered by CFO and CFO is authorized to establish the rules relating to such allotment, including the following:

* The entitlement to a quota.

* The basis on which the amount of a quota is determined.
* An increase in or a reduction of a quota.
* The allotment of quotas to producers.
* The period during which a quota is valid.
* Maximum and minimum quota sizes.
* The cancellation, suspension or variation of quotas for breach of the orders, regulations and rules in relation to quotas or for non-payment of levies imposed by the Appellant or CFC.
* Marketing arrangements with processors.
* The information, documents and reports to be submitted by producers.

15 For the supply management system for chicken to function effectively, a national system was established in 1978 pursuant to a Federal-Provincial Agreement (the "FPA"). The Minister of Agriculture and Agri-Food Canada, each provincial agricultural minister, each provincial supervisory board (in Ontario, the Ontario Farm Products Marketing Commission) and each provincial chicken commodity board (in Ontario, the CFO) as well as the CFC are signatories to the FPA. The purpose of the FPA is to provide for an orderly marketing system for chicken in Canada.

16 The national scheme contemplates that in advance of each eight week quota period, each signatory province submits an estimate of its provincial market requirements for chicken production to CFC. CFC then establishes the provincial allocation. Upon receipt of the provincial allocation, CFO ensures that its producers grow their respective portion of the provincial allocation. Each individual producer's portion is determined based on the size of the quota fixed and allotted to that producer.

17 Separate and apart from the CFC regulations and the delegation of authority over federal quotas to CFO, CFO is empowered pursuant to the Agriculture Products Marketing Act, R.S.C. 1985, c. A-6 ("APMA") to regulate the marketing of chicken in interprovincial and export trade with respect to persons situated in the Province of Ontario. Regulations made by CFO pursuant to its APMA authority require that persons engaging in the marketing of chicken in interprovincial and export trade must do so on a quota basis and persons are prohibited from being so engaged in the absence of being fixed and allotted a quota for that purpose by CFO.

18 All licenced chicken producers are allowed to produce and market chicken for export. Pursuant to CFO's Market Development Policy, producers can grow and deliver chicken to Ontario processors that are authorized to engage in the export of processed chicken. Such processors are authorized under the provisions of CFC's Market Development Policy.

19 CFC's licensing authority pertains to interprovincial and export trade. CFO's licensing authority is concerned with intraprovincial trade. However, in the context of its authority to administer the scheme of federal quotas for CFC, CFO regulates the terms pursuant to which chicken is sold by quota-holding producers in interprovincial and export trade. Ontario producers are permitted to enter into contracts to sell chickens to out-of-province processors. Producers marketing chicken in interprovincial or export trade must also meet the terms of CFO's interprovincial and export regulation made under the APMA.

20 All licenced chicken producers in Ontario pay licence fees to CFO on every kilogram of chicken sold and marketed.by them at the rate of $ 1.05 per 100 kilograms, live weight and additional charges when producers market chicken in excess of their crop quota allotments.

21 As a signatory of the FPA, CFO is obliged to ensure that its producers do not collectively exceed their quotas so that Ontario chicken is not marketed in excess of the provincial allocation established by the CFC. The CFC audits whether the provincial allocation of a province has been exceeded on a four quota period basis.

Motion for Injunction Pending Trial

22 On May 10, 2004, Dandie J. dismissed CFO's motion for an injunction. He found that CFO had not established irreparable harm, as the common law remedy of damages was sufficient to deter others from embarking on similar enterprises. He also found that no public interest issue was involved, as CFO and CFC are not to be distinguished as anything but private litigants. The balance of convenience therefore favoured the respondents, as an injunction would in effect destroy their business.

Motion for Leave to Appeal

23 Whalen J. granted CFO's motion for leave to appeal. Although the motion judge had found no public interest issue involved in this case, Taliano J., when granting intervenor status to the CFC, had concluded that the claim involved a substantial public interest. There was thus a fundamental conflict between two judgments of this court, and an appeal was merited to clarify the issue of the public/private nature of the case. In addition, he found that the motion judge had failed to address the statute-based injunction that is available under the FPMA where there has been marketing contrary to the regulation. This led the Court to doubt the correctness of the order dismissing the request for an injunction. Whalen J. wrote:

> "The legislation in question involves an integrated, co-operative, federal-provincial approach that has been established and accepted in Canada for decades. Because of this, I conclude there is good reason to doubt the correctness of Dandie J.'s decision that this case was one of private rather than public interest. He gave little or no consideration to the legislative issues in concluding as he did.
>
> Public law was also a basis of claim for interim injunction under section 13 of the Farm Products Marketing Act. Statute-based injunction is available where there has been marketing contrary to regulation. Dandie J. did not address this. In failing to do so, he likely erred. This is another basis to question the correctness of his decision both in direction and result. There is strong evidence that the respondents were marketing in contravention of the legislation. Yet none of this was addressed in Dandie J's reasons.
>
> ...

> The likely presence of a public interest combined with my concerns about the correctness of Dandie J.'s decision elevates the importance of the matter before me considerably. The public interest in a stable marketing system and the potential negative impact of a breach of that system on other producers and marketers makes it worthy of attention by appeal."

The Standard of Review

24 This is an appeal from the refusal of an interlocutory injunction and is governed by the principles set out in RJR MacDonald Inc. v. Canada (Attorney-General) [1994] 1 S.C.R. 311 and by the deference to be accorded to the decision of the motion judge. As to the latter, the decision is ultimately a discretionary one and we should not interfere unless there has been an error in the principles applied by the motion judge. In Friends of the Oldman River Society v. Canada (Minister of Transport) [1992] 1 S.C.R. 3, the Court (Stevenson J. dissenting) held at paragraph 104:

> The principles governing appellate review of a lower court's exercise of discretion were not extensively considered, only their application to this case. Stone J.A. cited Polylok Corp. v. Montreal Fast Print (1975) Ltd., [1984] 1 F.C. 713 (C.A.), which in turn approved of the following statement of Viscount Simon L.C. in Charles Osenton & Co. v. Johnston, [1942] A.C. 130, at p. 138:
>
> > The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such [page 77] as those urged before us by the appellant, then the reversal of the order on appeal may be justified.
>
> 105. That was essentially the standard adopted by this Court in Harelkin v. University of Regina, [1979] 2 S.C.R. 561, where Beetz J. said, at p. 588:
>
> > Second, in declining to evaluate, difficult as it may have been, whether or not the failure to render natural justice could be cured in the appeal, the learned trial judge refused to take into consideration a major element for the determination of the case, thereby failing to exercise his discretion on relevant grounds and giving no choice to the Court of Appeal but to intervene.

Analysis

25 In the present case, I am satisfied that the learned motion judge erred in principle in failing to recognize the public law element in the case. He wrongly characterized CFO as no more than a private litigant and treated the matter as a private law dispute where damages would be an adequate remedy. He failed to take into consideration a major element in the case: that the appellant and the intervenor are publicly designated bodies administering a public scheme of market organization on behalf of the federal and Ontario governments pursuant to statutes of both Parliament and the Legislature. He also did not deal with the regulatory scheme, which includes in section 13 of the Farm Products Marketing Act (R.S.O. 1990, c. F.9) specific provision for the granting of an injunction enjoining the continued marketing of a regulated product contrary to the Act or regulations.

26 I agree with the language of Whalen J. in granting leave:

> The impact of the presence of a public interest on the application of the legal tests and exercise of discretion in an application for injunctive relief ... operates at the level of principle. It is not merely a question of exercise of discretion. If Dandie J. was incorrect in failing to recognize the public law nature of the claim, as I believe he was, then the principles operating on the exercise of discretion would be significantly different and a different result might well ensue.

27 In the light of the existence of an error in principle, it is the duty of this court to review the case and make the order which ought to have been made below. In so doing, we have regard, to the principles in RJR, supra. In conducting this review and analysis, we do not discard the possibility that it will lead us, by a different route, to the same result as was reached by the motion judge.

Serious Issue to be Tried

28 The first requirement of the three-fold test in that case is the existence of a serious issue to be tried. The motion judge considered that there was such an issue raised by the appellant's motion and I see no error in that conclusion. The activities of the respondents are clearly contrary to the chicken marketing scheme administered by CFO and CFC and to the Directions which have been issued to them to cease the marketing of chicken without a quota and there is a serious issue as to their right to continue to do so. Federal-provincial agreements, statutes and dovetailed regulations of the sort which form the basis of the authority of CFO and CFC have been found to be constitutional in several cases, including the judgment of the Supreme Court in the "Egg Reference" (Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198) where Pigeon J. observed that "no operator can claim exemption from provincial control by electing to devote his entire output to extraprovincial trade."

29 On April 21, 2005, after this case was argued, the Supreme Court released its decision in Fédération des producteurs de volailles du Québec v. Pelland, [2005] 1 S.C.R. 292, 2005 SCC 20, which dealt with the Quebec legislation implementing the national scheme in that Province and re-affirmed the constitutionality of the scheme. Counsel were

invited to make submissions as to the impact of Pelland on this case and did so in May 2005.

30 Mr. Pelland, a chicken farmer holding a quota, produced far more than his quota and the Federation took action against him, reducing his quota to zero and seeking an interlocutory injunction. The Superior Court of Quebec granted the injunction. The motions judge found that Mr. Pelland produced and sold about 29 times his quota, representing almost 50 percent of the surplus produced in Quebec for the relevant periods. The Court of Appeal of Quebec dismissed Mr. Pelland's appeal on the grounds that the Supreme Court's decision in the Egg Reference was determinative of the constitutional issue raised by the appellant: [2003] Q.J. No. 3331 (QL). The Supreme Court dismissed Mr. Pelland's appeal.

31 Beginning at paragraph 2, Abella J. described the Plan before the Court:

> In a landmark 1978 case which has come to be known as the "Egg Reference" [1978] 2 S.C.R. 1198, this Court unanimously affirmed the constitutional validity of a national agricultural marketing scheme collaboratively crafted by Parliament and the provinces in response to the Court's evolving jurisprudence. The Egg Reference has since become the blueprint for federal-provincial marketing schemes.
>
> 3. After the release of the Egg Reference, the federal and provincial governments entered into the 1978 Federal-Provincial Agreement with respect to the establishment of a Comprehensive Chicken Marketing Program in Canada ("Federal-Provincial Agreement").
> 4. To ensure effective marketing and a dependable supply of chicken to Canadian consumers, the Federal-Provincial Agreement was designed to weave together the legislative jurisdiction of both levels of government in order to ensure a seamless regulatory scheme.

32 She continued with a detailed description of the way in which the federal and provincial legislation is integrated and concluded at paragraph 10 of the reasons:

> 10. In this way, the federal-provincial scheme combines in one body, the Fédération, provincial jurisdiction over production and intraprovincial marketing, and federal jurisdiction over extraprovincial marketing. The federally and provincially assigned quotas dovetail so that the total quantity of chicken produced in Canada does not exceed the agreed-upon national marketing total.

33 Later in her judgment, Abella J. concluded at paragraphs 37 and 38:

> 37. The core character of the provincial legislative component of the federal-provincial chicken marketing scheme is not to set quotas or fix prices for exported goods or to attempt to regulate interprovincial or export trade. As in the Egg Reference, its purpose is to establish rules that allow for the organization of the production and marketing of chicken within

> Quebec and to control chicken production to fulfil provincial commitments under a cooperative federal-provincial agreement. Any impact of this legislation on extraprovincial trade is incidental.
>
> 38. With respect, I see no principled basis for disentangling what has proven to be a successful federal-provincial merger. Because provincial governments lack jurisdiction over extraprovincial trade in agricultural products, Parliament authorized the creation of federal marketing boards and the delegation to provincial marketing boards of regulatory jurisdiction over interprovincial and export trade. Each level of government enacted laws and regulations, based on their respective legislative competencies, to create a unified and coherent regulatory scheme. The quota system is an attempt to maintain an equilibrium between supply and demand and attenuate the inherent instability of the markets. To achieve this balance, it cannot exempt producers who seek to avoid production control limits by devoting all or any of their production to extraprovincial trade.

34 The scheme described by Abella J. is very similar to the scheme before us. In submissions made to us after the original hearing as to the impact of the Pelland case on this one, counsel for the respondents sought to distinguish Pelland because Mr. Pelland owned quota and received benefits, including price protection, from being a member of the Federation. Pelland, it was submitted, did not deal with such a situation. Rather, it was a case without an international dimension, whereas the present respondents deal only in international sales. There is no reasoning in Pelland as to the restriction of international sales.

35 In my view, these arguments do not distinguish the Pelland case, which clearly upholds the right of the federal and provincial governments to co-operatively create an agricultural supply management program for an agricultural product under which no production of that product for any purpose can take place without a quota. It still remains the case that, as Pigeon j. put it: "No operator can claim exemption from provincial control by electing to devote his entire output to extraprovincial trade." The case before us is not, as the respondents submit, a matter of CFO seeking to extend its "cartel" to chicken farmers who produce for the international trade; rather it is the respondents seeking to evade a constitutionally valid scheme which provides for limiting the total production of chicken within Ontario, without regard to the intentions of individual farmers as to where it will be sold, in order to create an orderly market in the product.

36 In my view, the serious issue to be tried is not so much the constitutional validity of the scheme, but whether there are international obligations which impact upon the scheme. The respondents defend upon the basis that CFO and CFC are conducting a "domestic cartel" which they are attempting to expand beyond the Canadian market which is beyond their delegated powers and contrary to Canada's international trade obligations. They base this position on certain provisions of NAFTA, and of the NAFTA Implementation Act, S.C. 1993, c. 44, including article 309 of NAFTA which they assert prevents the imposition of any restriction upon the export of goods destined for the U.S. The motion judge doubted whether such a defence would survive a summary judgement motion, and so do I. The constitutionally valid imposition of controls upon the production of a product, without reference to where it might be sold, seems unlikely to meet the test of restriction upon the

export of goods. But it was not his task, nor is it mine, to determine the issue; only to decide that it exists. Its apparent strength may need to be considered at a later stage of the analysis.

Irreparable Harm

37 The second element in the analysis is whether the applicant for the injunction has demonstrated that, in its absence, he will suffer irreparable harm. The motion judge found that CFO would be adequately compensated by damages after trial if it was successful. It is in this analysis that the decision appealed from fell into error. The action is to enforce the public right in the enforcement of a chicken marketing scheme enacted by co-operative federal and provincial legislation which created and empowered CFO and CFC to administer that scheme. One function of CFO under the scheme is to ensure that the total production of chicken in Ontario for internal, extraprovincial or export use does not exceed the quota allocated to Ontario.

38 Pursuant to that scheme, CFO issued Directions to the respondents to cease and desist in their production and marketing of chicken without having the necessary quota. The respondents did not appeal these Directions through the administrative appeal system provided in the legislation; they simply ignored them. As a result, the orderly marketing scheme contemplated by Parliament and the Legislature is frustrated. In my view, the authorities show that this is not a situation where monetary damages at the end of the day address the impact of the actions of the respondents.

39 In RJR supra, at paragraph 64, the Supreme Court stated:

> The decision in Metropolitan Stores, [1987] 1 S.C.R. 110 at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280, at pp. 303-4:
>
> > Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

40 In Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791, the Federal Court of Appeal overturned an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

> The Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is

> prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

41 In RJR supra, at paragraph 72, the Supreme Court said:

> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

42 This second branch of the RJR test includes a consideration of the harm to the regulatory system when individuals are able to knowingly and deliberately ignore it. Such harm is irreparable as no one can measure in dollars the impact of continued defiance of the law. In the present case, no evidence was provided to show that there was any public interest to be served by not applying the scheme to the activities of the respondents. Only their private interests are so served. The appellant has shown that it, as guardian of the public interest in maintaining the integrity of the scheme which it and CFC administer, will suffer irreparable harm if the injunction is not granted.

Balance of Convenience/Inconvenience

43 The third branch of the RJR test requires an assessment of the balance of convenience/inconvenience. At paragraphs 80-81 of RJR, the Supreme Court said:

> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.
>
> We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

44 The major consideration urged on us by the respondents is that the proposed injunction would put them out of the chicken business without having had their day in court to challenge the marketing scheme. It is certainly a drastic step to take to enjoin the continuation of a business from which persons are earning some of their livelihood before

there is a trial. There will likely be financial hardship involved. However, such hardship can be alleviated, should the respondents be successful in their action, by damages at the end of the day.

45 On the other hand, as the appellant points out, the respondents are experienced commercial chicken producers, formerly quota holders, who have not inadvertently come to this position. They have at all times been aware of the rules of the marketing scheme and have chosen to defy them for personal gain. Although they submit that they spent months discussing their proposed activities with government, the evidence shows that they were consistently informed of the need for compliance with the rules and the need for quota. For example, the Special Assistant to Lyle Van Clief, Minister of Agriculture & Agri-Food wrote to them clearly setting out the requirement for quota well before they began their business without acquiring quota.

46 The respondents have twice ignored Directions to cease, neither complying nor appealing. They have other lines of business not affected by the injunction sought; their damage is entirely financial and could be compensated for if they are ultimately successful.

47 Finally, it is not without significance that under the scheme, the respondents have no right to produce or market chickens within Ontario without quota, because of the broad definition of marketing in the Ontario legislation. The control of the production of chickens is clearly a provincial power, even if trading in chickens extraprovincially is federally regulated, and the respondents' NAFTA argument only attacks the delegation of federal power. The point is that no such delegation is necessary to enable a province to prohibit the production of chickens without quota. The contrary position has been untenable since the Egg Reference, as discussed above.

48 Weighing all the factors discussed above, I am of the view that the appellant has demonstrated a serious issue to be tried as to the respondents' right to do as they are doing, an irreparable harm to the integrity of the regulatory scheme if the respondents are permitted to continue to ignore it, and that the balance of convenience favours prohibiting the respondents from continuing to profit from their defiance of the legislation.

49 I would allow the appeal and issue the injunction requested, with costs. I would make no order as to the future conduct of the trial as we are not in as good a position to do this as a judge in the place where the trial is to be held. The quantum of the costs may be addressed in written submissions.

G.D. LANE J.
P.G. JARVIS J.
K.E. SWINTON J.

Case Name:

Vancouver (City) v. O'Flynn-Magee

Between
City of Vancouver, Plaintiff, and
Sean O'Flynn-Magee, Celina-Marie Webber Hay, Mathew Kagis, Betty Krawczyk, Ian Dakers, Telquaa-Helen Michell, Tavis Dodds, Jane Doe, John Doe, and Other Unknown Persons, Defendants

[2011] B.C.J. No. 2305

2011 BCSC 1647

91 M.P.L.R. (4th) 197

26 B.C.L.R. (5th) 155

342 D.L.R. (4th) 190

15 C.P.C. (7th) 370

[2012] 3 W.W.R. 575

2011 CarswellBC 3205

209 A.C.W.S. (3d) 698

Docket: S117498

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

A.W. MacKenzie A.C.J.S.C.

Heard: November 18, 2011.
Judgment: December 1, 2011.

(73 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Circumstances when granted -- Considerations affecting grant -- Balance of convenience -- Irreparable injury -- Public interest -- Serious issue to be tried or strong prima facie case -- Interlocutory or interim injunctions -- Application by City of Vancouver for interlocutory injunction to enforce compliance with City Land Regulation Bylaw allowed -- Occupy Vancouver protest movement erected structures and tents on City Art Gallery Lands -- City served three notices of violation of City Land Regulation Bylaw and issued Fire Order -- City met requirements for relief sought -- No special circumstances justified refusal of relief sought, as defendants intended continued flouting of Bylaw in manner Bylaw sought to address -- No legal basis for contention that constitutionally suspect bylaw, if established as such, provided colour of right as defence to trespass -- Vancouver City Land Regulation Bylaw, s. 3(d) -- Trespass Act, s. 4(3).

Municipal law -- Bylaws and resolutions -- Enforcement of bylaws -- Injunctions -- Application by City of Vancouver for interlocutory injunction to enforce compliance with the City Land Regulation Bylaw allowed -- Occupy Vancouver protest movement erected structures and tents on City Art Gallery Lands -- City served three notices of violation of City Land Regulation Bylaw and issued Fire Order -- City met requirements for relief sought -- No special circumstances justified refusal of relief sought, as defendants intended continued flouting of Bylaw in manner Bylaw sought to address -- No legal basis for contention that constitutionally suspect bylaw, if established as such, provided colour of right as defence to trespass -- Vancouver City Land Regulation Bylaw, s. 3(d) -- Trespass Act, s. 4(3).

Tort law -- Trespass -- To land -- Conduct constituting trespass -- Continuing trespass -- Application by City of Vancouver for interlocutory injunction to enforce compliance with the City Land Regulation Bylaw allowed -- Occupy Vancouver protest movement erected structures and tents on City Art Gallery Lands -- City served three notices of violation of City Land Regulation Bylaw and issued Fire Order -- City met requirements for relief sought -- No special circumstances justified refusal of relief sought, as defendants intended continued flouting of Bylaw in manner Bylaw sought to address -- No legal basis for contention that constitutionally suspect bylaw, if established as such, provided colour of right as defence to trespass -- Vancouver City Land Regulation Bylaw, s. 3(d) -- Trespass Act, s. 4(3).

Application by the City of Vancouver for an interlocutory injunction to enforce compliance with the City Land Regulation Bylaw. The defendants were part of the Occupy Vancouver protest movement, which advocated economic and political change. Beginning October 15, 2011, the defendants erected, maintained and occupied structures, tents and shelters at the Vancouver Art Gallery Lands without permission from the City. On November 4, 2011, the City notified the defendants that the continued use of their shelters at the Art Gallery Lands violated the City Land Regulation Bylaw. In addition, the Fire Chief of Vancouver issued a Fire Order to the defendants pursuant to the City Fire Bylaw. The defendants did not comply with the City's Notice or the Fire Chief's Order. A second notice was given to the defendants on November 7 stating that the tents and structures violated the Bylaws and were required to be removed. At the same time, the City served notice of a civil claim

and the predicate application. The matter was heard on November 8, continued the following day, and the defendants were granted an adjournment until November 16. On November 10, the City gave a third notice for removal of all structures on the Art Gallery Lands. City officials deposed that they observed non-compliance with the Fire Order and that the structures had not been removed as of November 15. Upon continuation, the City sought an order prohibiting certain activities and for the removal of the structures placed on the Art Gallery Lands by the defendants. The City did not seek to prohibit lawful protest or assembly. The defendants did not challenge the validity of the Bylaw, but submitted that their Charter rights were relevant and engaged such that the Bylaw was constitutionally suspect.

HELD: Application allowed. The City met the requirements for the relief sought under both the Maurice/Thornhill and the RJR-MacDonald tests. Under the Maurice/Thornhill test, the City established a clear and continuing breach of the City Land Regulation Bylaw through the construction and maintenance of structures, including tents, on the Art Gallery Lands without written permission from the City Manager. There were no exceptional circumstances which justified refusal of injunctive relief. Unlike other cases in which exceptional circumstances were established, the defendants expressed intention to continue flouting the Bylaw in a manner which the Bylaw was intended to address. Personal hardship was not an exceptional circumstance. Under the RJR-MacDonald test, there was a serious issue to be tried based on whether the defendant's activities breached the Bylaw. As a representative of the public, the City would suffer non-compensable irreparable harm to use of public property if an injunction was not granted. The balance of convenience favoured the City, given the public interest in open access to public space and the promotion of health and safety in respect of public spaces. The City established a trespass under s. 4(3) of the Trespass Act by virtue of the Bylaw violation. There was no legal basis to find that a constitutionally suspect bylaw, even if the City's Bylaw was established as such, amounted to a colour of right under the Act. The City was granted the relief sought with a police enforcement clause.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 15

Constitutional Question Act, RSBC 1996, CHAPTER 68, s. 8(2)

Trespass Act, RSBC 1996, CHAPTER 462, s. 4, s. 4(3), s. 4.1

Vancouver Charter, S.B.C. 1953, c. 55, s. 185, s. 185(2), s. 334, s. 334(1)

Vancouver City Fire Bylaw,

Vancouver City Land Regulation Bylaw, s. 3, s. 3(d)

Counsel:

Counsel for the Plaintiff: B. Parkin & I. Dixon.

Counsel for the Defendant, Sean O'Flynn Magee: J. Gratl.

Counsel for the Defendant, Celina-Marie Webber Hay: M. McCubbin.

Counsel for the Defendant, Mathew Kagis: K.L. Campbell.

B. Krawczyk: Appeared on her own behalf.

I. Dakers: Appeared on his own behalf.

T. Michell: Appeared on her own behalf.

T. Dodds: Appeared on his own behalf.

Reasons for Judgment

A.W. MacKENZIE A.C.J.S.C.:--

Introduction

1 On November 18, 2011, in a brief summary, I granted the interlocutory injunction sought by the City of Vancouver with written reasons to follow. These are those reasons.

2 This is an application by the City of Vancouver (the "City") for a statutory interlocutory injunction requiring the defendants, and all others having notice of the order, to comply with provisions of the City of Vancouver, By-law No. 8735, *A By-law to regulate city land* (3 December 2009), (the "*City Land Regulation By-law*"), with respect to the area of land bordered by Georgia, Howe, Robson, and Hornby Streets (the "Art Gallery Lands").

3 The City seeks an order prohibiting certain activities and for removal of structures, tents, and other objects that have been constructed or placed on the Art Gallery Lands by the defendants. The City is not seeking to enjoin lawful protest or assembly on the Art Gallery Lands.

Background

4 The defendants are part of the "Occupy Vancouver" protest movement which advocates for economic and political change. Beginning October 15, 2011, the defendants constructed, erected, maintained and occupied structures, tents and shelters on the Art Gallery Lands. The defendants do not have written permission from the City Manager for any activities on the Art Gallery Lands.

5 On November 4, 2011, the City notified the defendants that construction and continued maintenance and use of the structures, tents and shelters on the Art Gallery Lands violate the *City Land Regulation By-law*. Furthermore, the Fire Chief of Vancouver issued a Fire Order to the defendants, pursuant to the City of Vancouver, By-law No. 8191, *Fire By-law* (2 May 2000), (the "Fire By-Law").

6 The defendants did not comply with the City's Notice or the Fire Chief's Order. Mr. Johnston, the Chief Building Officer for the City, deposed that on November 6, 2011, he noticed people were building another structure on the Art Gallery Lands.

7 On November 7, 2011, the City gave a second notice to the defendants that their tents and structures were in violation of the by-laws and must be removed. At that time, the City served the defendants with a notice of civil claim and a notice of this application.

8 The City was granted short leave to bring this application for hearing on November 8, 2011. The matter continued on November, 9, 2011 when another defendant, Celina-Marie Webber Hay, was added to the proceedings. The court heard from Mr. Gratl, Mr. McCubbin and the City, as well as four other speakers, three of whom are members of Occupy Vancouver, and one of whom is a Chief of an aboriginal band. She gave submissions unsupported by evidence with respect to aboriginal rights.

9 The court granted the defendants an adjournment to November 16, 2001 and also made an interim order requiring compliance with the Fire Chief's Order. On November 9, 2011, copies of the interim order were posted on the Art Gallery Lands.

10 On November 10, 2011, the City gave a third notice that the tents and other structures on the Art Gallery Lands violated the *City Land Regulation By-law* and must be removed. This notice was posted on site and copies were hand delivered by Mr. Johnston.

11 While members of Occupy Vancouver made some progress toward compliance with the interim fire order, the Fire Chief, John McKearney, deposed that on November 11, 2011 he observed a burning barrel on the site. The Fire Chief attended again on November 12, 2011 and found the lands were not in full compliance with the interim order.

12 The Fire Chief supervised a fire crew on the lands to work toward compliance with the interim order. After four hours, the site was significantly improved. However, compliance with the interim order was not complete.

13 On November 15, 2011, the Fire Chief and a fire crew made another effort to obtain compliance with the interim order. When the Fire Chief and crew completed their work, the area had improved, but it was still not in full compliance with the interim order.

14 As of November 15, the defendants had not removed the structures, tents and shelters from the Art Gallery Lands.

15 On November 16, 2011, Mathew Kagis, a medical volunteer at Occupy Vancouver represented by Ms. Campbell, was added as a defendant. Over the course of the proceedings, four unrepresented litigants, Telquaa-Helen Michell, Betty Krawczyk, Ian Dakers and Tavis Dodds, were added as defendants.

Statutory Provisions and By-Laws

16 Pursuant to s. 185 (2) of the *Vancouver Charter*, S.B.C. 1953, c. 55, the City has the authority to regulate the use of and access to land owned or leased by the City.

17 Section 185 of the *Vancouver Charter* reads:

> 185. Council to provide for upkeep of city property
>
> 185(1) The Council may from time to time make the necessary expenditures for the maintenance, upkeep, conservation, repair and improvement of any property of the city.

185(2) In addition to the proprietary rights of the city to control the use of its property, the Council may, by by-law, regulate the use of, or access to, any land owned or leased to the city.

18 Pursuant to s. 334(1) of the *Vancouver Charter*, the City is granted the power to enforce its by-laws by bringing a proceeding and seeking an injunction in BC Supreme Court. Section 334(1) reads:

334. Civil proceedings by city

334(1) A by-law of the Council or of the Board of Parks and Recreation may be enforced, and the contravention of such a by-law may be restrained, by the Supreme Court in a proceeding brought by the city or by the Board of Parks and Recreation, as the case may be.

19 The City enacted the *City Land Regulation By-law*. Section 3 of the *City Land Regulation By-law* reads:

3. A person must not, without the prior written consent of the manager:
(a) cut, break, injure, damage, or destroy any tree, shrub, plant, turf, or flower on city land;
(b) remove any rock, soil, tree, shrub, plant, turf, or flower from city land;
(c) deposit any garbage, refuse, litter, or other waste material on city land, except in containers provided by the city for that purpose;
(d) construct, erect, place, deposit, maintain, occupy, or cause to be constructed, erected, placed, deposited, maintained or occupied, any structure, tent, shelter, object, substance, or thing on city land; or
(e) light any fires or burn any material on city land.

20 Section 4 of the *Trespass Act*, R.S.B.C. 1996, c. 462, prohibits activities by a person after that person has received notice from the occupier of lands that the activities are prohibited. Section 4 of the *Trespass Act* reads:

Trespass prohibited

4 (1) Subject to section 4.1, a person commits an offence if the person does any of the following:

(a) enters premises that are enclosed land;
(b) enters premises after the person has had notice from an occupier of the premises or an authorized person that the entry is prohibited;
(c) engages in activity on or in premises after the person has had notice from an occupier of the premises or an authorized person that the activity is prohibited
(2) A person found on or in premises that are enclosed land is presumed not to have the consent of an occupier or an authorized person to be there.

3) Subject to section 4.1, a person who has been directed, either orally or in writing, by an occupier of premises or an authorized person to

(a) leave the premises, or

(b) stop engaging in an activity on or in the premises,

commits an offence if the person

(c) does not leave the premises or stop the activity, as applicable, as soon as practicable after receiving the direction, or
(d) re-enters the premises or resumes the activity on or in the premises.

Defences to trespass

4.1 A person may not be convicted of an offence under section 4 in relation to premises if the person's action or inaction, as applicable to the offence, was with

(a) the consent of an occupier of the premises or an authorized person,
(b) other lawful authority, or
(c) colour of right.

The Appropriate Test

21 There is an issue about which test applies on this application for an interlocutory statutory injunction, the test from *Maple Ridge (District) v. Thornhill Aggregates Ltd.*, 54 B.C.L.R. (3d) 155, and *Vancouver (City) v. Maurice*, 2002 BCSC 1421, (affirmed on other grounds, 2005 BCCA 37), or the test from *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.). The case law is somewhat confusing. On the one hand, Pitfield J. said in *Vancouver Board of Parks and Recreation v. Mickelson*, 2003 BCSC 1271, that the test from *In Re Attorney-General of Manitoba v. Metropolitan Stores (MTS) Ltd. et al. (1987), 38 D.L.R. (4th) 321 (S.C.C.)* (which is the same test found in *RJR-MacDonald*) applies where *Charter* challenges would be made to the by-law or other legislation.

22 In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2000 BCCA 315, the court held that where there are complex issues of fact and law, they are best resolved at a trial on the merits. *Charter* arguments have complex factual foundations, and it is difficult to distinguish *Charter* arguments from other difficult factual and legal arguments.

23 Lowry J., in *Maurice* (S.C.) said that *Charter* rights were "engaged" by the defendants in that case, but nonetheless applied the test from *Thornhill*. This approach was implicitly upheld by the Court of Appeal, which heard an appeal on procedural issues only, but approved the approach taken by Lowry J., (2005 BCCA 37). The defendants in that case were not seeking to have the by-law declared unconstitutional. Similarly in this case, the defendants, while not challenging the validity of the by-law at this interlocutory stage,

contended that *Charter* rights were relevant and engaged such that the by-law was "constitutionally suspect".

24 Fortunately, in this case, it is unnecessary to resolve the interesting point as to which test is applied, whether the *Maurice/Thornhill*, or the *RJR-MacDonald* test because either way, this application for an interlocutory injunction must succeed.

25 I will first discuss the test in *Thornhill*.

The *Thornhill* Test

26 Although constitutional challenges and other complex arguments may be relevant to the dispute, at the interlocutory injunction stage, pending a trial on the merits, the public interest suggests that the statutory regime or status quo be maintained (*R. v. Bernard*, [2000] N.B.J. No. 138, para. 76; *Okanagan Indian Band,* para. 19).

27 There is a difference in principle and rationale between an equitable interlocutory injunction and one that is based upon statutory authority. The rationale for not requiring the equitable injunction test where the party seeking the injunction is a municipality, or other elected body, is that when elected officials enact by-laws or other legislation, they are deemed to do so in the public interest at large (*Toronto v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.) at p. 697).

28 Therefore, the irreparable harm and balance of convenience factors are pre-emptively satisfied in ensuring complying with law that is in the public interest (*Thompson-Nicola (Regional District) v. Galbraith*, [1998] B.C.J. No. 1436, para. 2). To the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed (*Thornhill,* para 9).

29 The appropriate test as set out in *Thornhill* was concisely explained by the Court of Appeal in *Maurice* at para. 34 as follows:

> Contrary to the submissions made by the appellants, where a public authority, such as the City, turns to the courts to enforce an enactment, it seeks a statutory rather than an equitable remedy, and once a clear breach of an enactment is shown, the courts will refuse an injunction to restrain the continued breach only in exceptional circumstances: *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 47 M.P.L.R. (2d) 249 (B.C.C.A.), and *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2000), 187 D.L.R. (4th) 664 (B.C.C.A.).

30 Thus, the onus is on the City to show that there has been a clear breach of the by-law. If it does, the court will grant the injunction unless there are exceptional circumstances that permit it to use its narrow discretion to deny it.

Issues

1. Has the City established a "clear breach" of the by-law in question; and if so,

2. Are there exceptional circumstances to justify the court's refusal of the injunction which is sought to restrain the continued breach?
3. Has the City established a trespass either at common law or under the *Trespass Act*?

General Position of the Defendants

31 Before addressing the issues, I will briefly address the defendants' positions generally. Counsel for the defendants divided up the issues and essentially adopted each others' positions. Mr. McCubbin focused on homelessness and the effect of the by-law on his client's s. 7 *Charter* right to security of the person and s. 15 right to equality based on gender. Mr. Gratl concentrated on the by-law's impact on the freedom of expression and association rights of the members of Occupy Vancouver. Ms. Campbell represented Mr. Kagis, a volunteer medic who was chosen by the general assembly of Occupy Vancouver as its representative. She expanded on the arguments of both Mr. McCubbin and Mr. Gratl.

32 Mr. McCubbin relied on affidavits of his client and others to describe the problem of homelessness in Vancouver with its insufficient shelter spaces and its dangerous conditions. He specifically addressed the challenges facing homeless women in Vancouver, pointing to reports that he claimed reflected a shortfall of approximately 500 shelter spaces in the city. He argued that women who do find shelter space face unsanitary conditions and the risk of theft, harassment, and assault. Mr. McCubbin claimed the by-law put his client's s. 7 and s. 15 rights at risk as the conditions in the shelters, if space could even be found, are far worse than at Occupy Vancouver's encampment.

33 Mr. Gratl made extensive submissions on the nature of the Art Gallery Lands, the global Occupy movement, and the expressive nature of the structures at Occupy Vancouver. He noted the Art Gallery Lands have been used historically as an area of political and social protest and expression. He pointed to communications between Occupy Vancouver and the City, and between Occupy Vancouver and other groups to demonstrate that Occupy Vancouver has been trying to accommodate other groups who also wish to use the Art Gallery Lands.

34 Mr. Gratl claimed the affidavit evidence refuted the City's claims about health and safety issues at the encampment.

35 On the issue of expressive content, Mr. Gratl submitted that the tents and structures on the Art Gallery Lands were essential to the expressive nature of Occupy Vancouver's message. He relied on *Weisfeld v. Canada (F.C.A.),* [1995] 1 F.C. 68, for the proposition that expression is not limited to words as long as it conveys a meaning. Like the tents and structures in *Weisfeld*, Mr. Gratl argued that the tents and structures at Occupy Vancouver were part of, and facilitated, its expression.

36 Ms. Campbell made further submissions refuting the health and safety concerns of the City and emphasizing the expressive content of Occupy Vancouver. She argued that to deny her client's individual expression through the provision of medical assistance to those encamped at the site would be to deny the message itself.

Issue 1: Has the City of Vancouver established a "clear breach" of the by-law in question?

37 The City submits the evidence establishes the defendants breached and continue to breach the *City Land Regulation By-law* by construction and maintenance of structures, including tents, on the Art Gallery Lands without written permission from the City Manager.

38 Mr. McCubbin and Ms. Campbell addressed the application of the test in *Thornhill* and *Maurice,* arguing that the City had not shown a clear breach of the by-law because it was essentially the same as the by-law declared inoperable in *Victoria (City) v. Adams,* 2009 BCCA 563 in indistinguishable circumstances.

Discussion:

39 I find the City has indeed established a clear breach of s. 3(d) of the *City Land Regulation By-law*. The City exercised its authority to regulate city property pursuant to s. 185(2) of the *Vancouver Charter* by enacting the *City Land Regulation By-law*. The Art Gallery Lands are leased by the City from the Province of British Columbia. Therefore, the Art Gallery Lands are governed by the *City Land Regulation By-law*.

40 From October 15, 2011, to November 15, 2011, the defendants maintained and occupied tents and other structures on the Art Gallery Lands. The defendants do not have the written consent of the City Manager for any activities on the Art Gallery Lands. The defendants were notified on several occasions their activities are in breach of the by-law. The breach of s. 3(d) of *City Land Regulation By-law* is clear.

41 The defendants also raise a constitutional argument regarding the validity of the *City Land Regulation By-law*. The argument is based on *Vancouver (City) v. Zhang*, 2010 BCCA 450 and *Adams*. However, an interlocutory injunction application is not the appropriate time to address constitutional arguments (*Okanagan Indian Band*). Rather, constitutional arguments are properly examined at the trial of the matter to provide the parties sufficient time to prepare and to allow the Attorney General the opportunity to intervene pursuant to s. 8 (2) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68.

42 Furthermore, even if a constitutional challenge to the by-law were appropriate at this stage, *Adams* and *Zhang* would not assist the defendants because both cases were decided on their own unique facts. The defendants here have urged an inappropriately broad interpretation of *Adams*. *Adams* only permitted temporary overnight shelter when the number of homeless people in Victoria exceeded the number of available shelter beds. Thus, it cannot be said that the decision in *Adams* supports an argument that the by-law in question in this case is "evidently unconstitutional" or "constitutionally suspect".

Issue 2: Are there exceptional circumstances so that this court should refuse the injunction sought to restrain the continued breach?

43 The defendants argued that the court should exercise its narrow discretion to refuse the injunction. Mr. McCubbin relied on *British Columbia (Minister of Environment, Lands & Parks) v. Alpha Manufacturing Inc. et al.* (1997), 150 D.L.R. (4th) 193 (B.C.C.A.), where the court identified examples of circumstances that might be considered exceptional. He submitted that several examples from that list could apply here. These included the existence of an arguable issue as to the validity of the by-law.

44 Finally, Mr. McCubbin contended that the risk of infringements of his client's *Charter* rights arising from an interlocutory injunction and its practical effects on his client's abil-

ity to prepare for trial on the merits are sufficient to constitute exceptional circumstances in this case.

45 The City says the defendants' arguments clearly fall outside the scope of exceptional circumstances as defined in the case law.

Discussion:

46 I agree with the City that there are no exceptional circumstances to justify a refusal of the statutory interlocutory injunction.

47 In *Alpha*, the court provided a non-exhaustive list of the type of exceptional circumstances that might justify the refusal of an interlocutory injunction. The exceptional circumstances listed in *Alpha*, namely, the willingness of the defendants to refrain from the unlawful act, the fact there may not be a clear case of "flouting" the law because the defendant has ceased the primary unlawful activity, or the absence of proof that the activity carried on was related to the mischief the statute was designed to address, do not exist in the present case.

48 Here, the evidence of "flouting" of the by-law is clear. The defendants have expressed their intention to continue their violation of the by-law and their activities are related to the mischief the *City Land Regulation By-law* is intended to address.

49 Finally, although an interlocutory injunction may result in inconvenience to the defendants, personal hardship is not an exceptional circumstance (*Maurice* (B.C.S.C.), para. 19). Therefore, based on the evidence, there are no exceptional circumstances to justify the court's use of its narrow discretion to refuse an interlocutory statutory injunction where there is a clear breach of the by-law.

50 Based on the above, I find the City has made out its case for an injunction.

51 In the alternative, on application of the *RJR-MacDonald* test, which Pitfield J. in *Mickelson* said did apply where *Charter* arguments are raised on an application for an interlocutory injunction, for the following reasons, I would still grant the City's application.

***RJR-MacDonald* Test**

52 The *RJR-MacDonald* test consists of three questions: has the applicant demonstrated there is a fair question to be tried? Will the applicant suffer irreparable harm if an injunction is not granted? Does the balance of convenience favour the granting of an injunction? These are assessed from the perspective of the applicant. (*Mickelson,* para. 21).

Serious Question to be Tried

53 The City says the application constitutes a serious question to be tried. Although two of the defendants conceded this point, Mr. Gratl argued that the City barely meets this threshold, if at all. He claimed that since the interim order addressed all the safety concerns of the City and that *Adams* and *Zhang* raise significant concerns as to the validity of the by-law, the City has not raised a sufficiently serious issue to justify granting the injunction.

54 The constitutional validity of the by-law is not at issue when determining whether there is a fair question to be tried because it is not part of the applicant's case. This is a low threshold (*Mickelson*, para. 23; *RJR-MacDonald*, p. 402).

55 The first stage of the test is easily met. The question of whether the defendants' activities breach s. 3(d) of the *City Land Regulation By-law* and justify an interlocutory injunction is a serious issue to be tried.

Irreparable Harm

56 The City says it would suffer irreparable harm if the injunction were not granted. Specifically, the public would suffer irreparable harm in terms of access to, and use of, public space.

57 As to irreparable harm to the City if the injunction were denied, Mr. McCubbin submitted that case law, including *Mickelson*, could not be relied upon in light of *Adams* and *Zhang*. In *Mickelson*, Pitfield J. found that denying the injunction would cause irreparable harm to the Parks Board as it could not be properly compensated in damages for the violation of the by-law.

58 Mr. McCubbin urged that to grant the injunction would prevent a challenge to this by-law. Mr. Gratl said the mischief the by-law is meant to address would not be affected by denying the injunction because Occupy Vancouver does not pose a safety concern and is cooperating with other groups who may want to use the Art Gallery Lands.

59 Ms. Campbell said there would be irreparable harm to the occupiers if an injunction were granted before the main issues were addressed.

60 I agree with the City that as the representative of the public, it will suffer irreparable harm if the injunction is not granted. "Irreparable" refers to the nature of the harm suffered rather than its magnitude (*RJR-MacDonald*, p. 405). It is harm that cannot be readily compensated by an award of damages (*Mickelson*, para. 24). In the circumstances, an award of damages cannot properly compensate the public for the irreparable harm in terms of the use of public property.

Balance of Convenience

61 The City says the balance of convenience clearly favours an injunction. The City argues there is a public interest in the enforcement of the *City Land Regulation By-law* as the by-law promotes several public interests, including the promotion of health and safety and open access to public space. The interlocutory injunction should be granted to allow the City to fulfill its obligation to regulate city lands for the benefit of the public.

62 Mr. McCubbin said there was considerable doubt as to whether *Charter* rights were engaged in *Mickelson*, but that is no longer the case since the decision in *Adams*. He added that deterrence of further erection of structures was a factor in *Mickelson*, but since there has not been expansion of the Occupy Vancouver site in over a month, deterrence is not a factor here.

63 As further considerations, Mr. McCubbin also pointed to the "suspect" constitutionality of the by-law, the deprivation to the public if this issue is not brought to trial, and the availability of solutions for the City if the injunction were denied.

64 Mr. Gratl argued that political expression would disappear if the injunction were granted. He said the City's case consisted only of vague apprehensions and speculative concern. Ms. Campbell asked the court to consider the irreplaceable loss to Occupy Vancouver in granting the injunction.

65 I agree the balance of convenience favours the City. The City has a right to regulate the use of its land, including the type and length of use of public lands. The defendants have chosen to protest at the Art Gallery Lands, but it is in the public interest to allow a variety of users access to public lands. Although Occupy Vancouver may not intend to exclude other groups, the very nature of its protest by the positioning of tents throughout the entire north plaza prevents others from using this public space.

66 The City has an obligation to regulate city lands to maintain safety. It is liable for the activities which occur on city lands. Therefore, it must have control over those lands. There are significant health and safety concerns at the site. There have been drug overdoses, an assault of a police officer and other concerns.

67 I cannot accept the defendants' argument that it is clear from *Adams* that the by-law at issue here is "evidently unconstitutional" or "constitutionally suspect". In *Adams*, the court did not strike down the by-law; rather it crafted an order that rendered certain provisions of the by-law inoperable in specific circumstances to allow for temporary shelter during the night hours only (*Adams* at para. 166).

Issue 3: Has the City established a trespass either at common law or under the *Trespass Act*?

68 The City says that the defendants' continued occupation of the Art Gallery Lands constitutes trespass under both s. 4(3) of the *Trespass Act* and at common law. Trespass under s. 4(3) is established because the tents and structures contravene the *City Land Regulation By-law* of which the City has given the defendants notice.

69 The City submits it has established trespass at common law because the City has a leasehold interest in the Art Gallery Lands. Therefore, the fact there is a serious question to be tried determines that the injunction should be granted (*Cariboo-Chilcotin School v. Van Osch et al*, 2004 BCSC 1827, leave to appeal refused 2004 BCCA 570).

70 Mr. Gratl argued that s. 4(1) of the *Trespass Act* provides an exception to trespass where a person has lawful authority or colour of right to do what would otherwise constitute trespass. He submitted that the constitutionally suspect nature of the by-law and his client's right of freedom of expression should be sufficient to find lawful authority or colour of right under this section.

71 The concept of a "constitutionally suspect" by-law in the circumstances is a dubious proposition. There is no legal basis to find that a "constitutionally suspect" by-law, even if it existed, could amount to a "colour of right" as defined in the *Trespass Act*. "Colour of right" is a right of property. It is not a defence based on *Charter* rights. I therefore agree with the City that the defendants are trespassing on the Art Gallery Lands under the *Trespass Act* and the common law.

Conclusion

72 The City's application for an interlocutory injunction pursuant to s. 334 of the *Vancouver Charter* is granted. I also order the police enforcement clause because, as McLachlin J. (as she then was) observed in *MacMillan Bloedel Ltd. v. Simpson,* [1996] 2 S.C.R. 1048, at para. 41, the inclusion of police authorization ensures "that orders which may affect members of the public clearly spell out the consequences of non-compliance".

Order

73 I order that:

1. By 2:00 p.m. on Monday, November 21, 2011, the Defendants, and all other persons having knowledge of this Order remove all structures, tents, shelters, objects and things owned, constructed, maintained, placed or occupied by them which are located on the lands legally described as Block 51 District Lot 541 Plan 14423, Group l New Westminster District (the "Art Gallery Lands");
2. By 2:00 p.m. on Monday, November 21, 2011, the Defendants, and all other persons having knowledge of this Order cease constructing, placing, or maintaining structures, tents, shelters, objects and things upon the Art Gallery Lands, without having first obtained a permit or written consent;
3. By 2:00 p.m. on Monday, November 21, 2011, the Defendants, and all other persons having knowledge of this Order cease burning materials and setting fires on the Art Gallery Lands;
4. By 2:00 p.m. on Monday, November 21, 2011, the Defendants, and all other persons having knowledge of this Order cease depositing garbage, litter or refuse on the Art Gallery Lands;
5. By 2:00 p.m. on Monday, November 21, 2011, the Defendants, and all other persons having knowledge of this Order cease removing soil form the Art Gallery Lands;
6. By 2:00 p.m. on Monday. November 21, 2011, the Defendants, and all other persons having knowledge of this Order comply with any and all Fire Orders relating to the Art Gallery Lands issued by the Fire Chief pursuant to the City of Vancouver *Fire By-law*;
7. All employees or agents of the City are hereby authorized to remove all structures, tents, shelters, objects and things owned, constructed, maintained, placed or occupied by the Defendants which are located on the Art Gallery Lands, should the Defendants and all other persons having knowledge of this Order fail to comply with this Order;
8. Any police officer with the Vancouver Police Department or other municipal police force or R.C.M.P. is hereby authorized to arrest and remove from the Art Gallery Lands any person who the police officer has reasonable and probable grounds to believe is interfering with or obstructing, or is attempting to interfere with or obstruct, any employee or agent of the City of Vancouver who is seeking to remove any structures, tents, shelters, objects and things owned,

constructed, maintained, placed or occupied by the Defendants which are located on the Art Gallery Lands;

9. Any police officer with the Vancouver Police Department or other municipal police force or R.C.M.P. is hereby authorized to arrest and remove from the Art Gallery Lands any person who the police officer has reasonable and probable grounds to believe is interfering with or obstructing, or is attempting to interfere with or obstruct, any defendant or person with notice of this Order who is seeking to remove all structures, tents, shelters, objects and things owned, constructed, maintained, placed or occupied by the Defendants from the Art Galley Lands;
10. Any police officer with the Vancouver Police Department or other municipal police force or R.C.M.P. is hereby authorized to arrest and remove from the Art Gallery Lands any person who the police officer has reasonable and probable grounds to believe is attempting to impede, obstruct or interfere with any person who is lawfully entitled to be present upon the Art Gallery Lands from being present thereon;
11. Any police officer with the Vancouver Police Department or other municipal police force or R.C.M.P. who arrests and removes any person from the Art Gallery Lands in accordance with this Order may release that person on receipt of a signed Undertaking by that person to not re-attend the Art Gallery Lands and to appear before this Court to have the alleged contempt of this Order dealt with by the Court;
12. This Order shall remain in force until this matter is tried, or until further Order of this Honourable Court;
13. This Order does not prohibit or limit the right of the Defendants, or any other persons, to lawfully assemble on the Art Gallery Lands;
14. Notice of this Order may be given to the Defendants by posting of this Order on the Art Gallery Lands; and
15. Approval of the form of the Order by unrepresented Defendants is hereby dispensed with.

A.W. MacKENZIE A.C.J.S.C.

Indexed as:

British Columbia (Minister of Environment, Lands and Parks) v. Alpha Manufacturing Inc.

Between
Her Majesty the Queen in Right of the Province of British Columbia, as Represented by the Minister of Environment, Lands and Parks, petitioner (respondent), and
Alpha Manufacturing Inc., Burns Development Ltd., Burns Developments (1993) Ltd., respondents (appellants)

[1997] B.C.J. No. 1989

150 D.L.R. (4th) 193

96 B.C.A.C. 193

25 C.E.L.R. (N.S.) 217

73 A.C.W.S. (3d) 618

Vancouver Registry No. CA021554

British Columbia Court of Appeal
Vancouver, British Columbia

Esson, Rowles and Huddart JJ.A.

Heard: May 29 and 30, 1997.
Judgment: filed September 5, 1997.

(21 pp.)

Pollution control -- Land -- Waste disposal, authorizations -- Storage of dangerous waste -- Enforcement -- Injunction.

This was an appeal from the granting of an injunction enjoining the appellants from carrying on activities for which it previously had a permit. In 1987, the appellants were issued a permit allowing them to dump demolition materials on a site in the Municipality of Delta. The permit was cancelled in late 1995, as the Minister determined that the permit was not

in the public interest. The appellants continued to challenge the validity of the cancellation. At the hearing of the injunction petition, the appellants took the position that there was no ground for an injunction because, as a matter of law, the appellants had not required a permit to carry on the operation begun in 1987. The appellants' argument involved an interpretation of the Waste Management Act. They asserted that the material was not "waste" within the meaning of the Act and that if it was waste, it was not introduced into the environment as the land in question was not "land" under the Act, and if it was waste introduced to the land, the operation constituted a "works".

HELD: The appeal was dismissed. The Waste Management Act had to be interpreted by reference to its legislative purpose. The approach put forward by the appellants, if accepted, would negate the essential object of the legislation. The processing of the discarded material did not change its character as waste. While the words "works" and "environment" were distinguished in the Act, something could only be "works", and therefore not part of the "environment" while it was under a permit granted under section 8(1) of the Act. The court rejected the subsidiary contention that the injunction should not have been granted because, after cancellation of the permit, the appellants carried on no operation other than the storing of waste. By placing waste on the ground, they were depositing it within the meaning of the Act. The fact it was deposited for storage was not a defence.

Statutes, Regulations and Rules Cited:

Interpretation Act, R.S.B.C. 1996, c. 238, s. 8.
Waste Management Act, S.B.C. 1982, c. 41, ss. 1, 3(1), 3(1.1), 3(1.2), 8(1)(a), 23(3)(h), 24(1).

Counsel:

Glen W. Bell, for the appellants.
Joyce Thayer and Clifton Prowse, for the respondent.

Reasons for judgment were delivered by Esson J.A. September 8, 1997; the correction has been made to the text and the Corrigendum is appended to this document.]

1 **ESSON J.A.**:-- I will refer to the three appellants jointly as "Alpha". They appeal from an order under s. 24(1) of the Waste Management Act, S.B.C. 1982, c.41 (the Act) which reads:

> 24. (1) Where a person by carrying on any activity or operation contravenes section 3, 4 or 5 or a suspension or cancellation made under section 23, the activity or operation may be restrained in a proceeding brought by the minister in the Supreme Court.

2 We have been told that this is the first case in which the Minister has sought an injunction under s. 24(1). The claim to an injunction is based on the Minister's contention

that Alpha carried on an activity or operation after its permit to do so was cancelled and thus in contravention of s. 3 of the Act which, so far as material, reads:

> 3. (1) For the purposes of this section, the conduct of an industry, trade or business includes the operation by any person of facilities or vehicles for the collection, storage, treatment, handling, transportation, discharge, destruction or other disposal of waste.
>
> (1.1) Subject to subsection (3), no person shall, in the course of conducting an industry, trade or business, introduce or cause or allow waste to be introduced into the environment.
>
> (1.2) Subject to subsection (3), no person shall introduce or cause or allow to be introduced into the environment, waste produced by any prescribed activity or operation.
>
> (2) Subject to subsection (3), no person shall introduce waste into the environment in such a manner or quantity as to cause pollution.
>
> (3) Nothing in this section or in a regulation made under subsection (1.2) prohibits
>
> (a) the disposition of waste in compliance with a valid and subsisting permit, approval, order or regulation, or with a waste management plan approved by the minister,

3 In 1987, the Minister issued to Alpha a permit to carry on an activity or operation on a 67 acre site located on the northern perimeter of Burns Bog in the Municipality of Delta. The site is zoned "heavy industrial". The purpose of the operation is to make the site suitable for industrial purposes in the form of an industrial park. Most of the property, which is adjacent to the Fraser River, consisted in 1987 of peat bog with the remainder lying on the flood plain silts. Permit PR-7707 authorized Alpha "to discharge refuse from selected demolition operations located in the Lower Mainland of British Columbia to the land ...". It limited the discharge of waste to "selected demolition and excavation waste containing inert materials such as concrete, bricks, framing lumber, arising from domestic, commercial, institutional or municipal authorities." Alpha describes the operation as the construction of a "foundation structure", the installation of which is required to stabilize the site for future development and to raise it above flood level. The operation involves the construction of containment berms which form cells of about one hectare in area. The principal steps in the operation are these. The debris resulting from the demolition of buildings is trucked to the site and dumped in a processing area where it is sorted to remove any inappropriate materials. The fill material, which mainly comprises wood but also roofing materials, concrete and other parts of the demolished structure, is compacted through crushing and rolling before being deposited in a cell. After further compaction, a layer of soil is placed over

the fill material. Each layer of fill material covered by soil (called a "lift") is about two metres thick. The foundation structure now consists of three to five lifts over the entire site except for buffer zones around the perimeter. At the time of the cancellation of the permit in late 1995, Alpha had anticipated that the area would be completed and ready for industrial development in three or four years.

4 The compaction of the material is essential in order to create adequate support for the foundations of future buildings. The process also serves an environmental purpose which is described this way in an affidavit of Allan Dakin, a professional engineer with particular expertise in groundwater engineering and hydrogeology, whose firm had been involved with advising Alpha with respect to the property since 1987:

> 4. ... Briefly, the site is surrounded by a perimeter berm constructed to control and renovate leachate emanating from the landfill. The underlying layers of compressed peat also form part of the treatment system for the leachate. Like a huge bathtub, the landfill holds water above the level of the surrounding water table, and renovates it as it slowly seeps through the perimeter berms and the surrounding peat. The interior cell berms and layers of mineral sediment also contribute to the treatment of the leachate. This has proven to be an effective method of containing toxic elements within the landfill and preventing pollution of the local environment, which is what it is designed to do.

5 The initial cancellation of the permit was by a letter from the Minister dated 22 August 1995 advising Alpha that the permit would be cancelled effective 28 August 1995. The decision, purportedly made under s. 23(3)(h) of the Act, was stated to be based on the Minister's opinion that "the permit is not, in my opinion, in the public interest." That step, which was taken without giving Alpha an opportunity to make representations, was stayed by consent after Alpha launched proceedings to set aside the Minister's decision. The purpose of the stay was to enable Alpha to be provided with the information upon which the Minister relied and to give it an opportunity to make submissions. After those steps were taken, the Minister reinstated his previous decision by letter dated 22 December 1995. Although Alpha continues to challenge the validity of the cancellation of the permit, that matter is not in issue in this proceeding which was launched by the Minister on 23 January 1996, and was heard by the learned Chambers judge on 1 February, with written reasons for granting the restraining order being issued on 13 February.

6 There are two aspects to the order. In the language of the formal order, the first is that Alpha (and the other appellants): "... are restrained from introducing waste into the environment on the lands legally described as ...".

7 The second aspect is that Alpha: "... are not authorized to store waste which is introduced into the environment on the lands legally described as ...".

8 The wording of the formal order, as this Court observed in the course of the hearing, is unsatisfactory in that it fails to describe the conduct which is being restrained. However, it seems clear that the parties understood that the effect of the order is not only to restrain Alpha from carrying on the operation which it had carried on under the permit since 1987 but also the more limited activity which it conducted after receiving notice of the second

cancellation on 10 January 1996. That activity consisted of continuing to receive demolition debris at the site as before, sorting out the environmentally objectionable materials and storing the balance on the surface for the purpose of "recycling".

9 By the terms of the letter of cancellation delivered on 10 January 1996, Alpha was forbidden to "introduce waste into the environment" after 10:00 a.m. on 11 January. Later that day Mr. Laird, an employee of the Ministry described as an environmental protection technician, visited the property and was told that the employees had been advised by Mr. Bauer, the General Manager of Alpha, that they could continue accepting waste for "storage". On 16 January the Ministry wrote to Alpha advising it:

> This letter is further to the cancellation of Waste Management Permit PR-7707 and an inspection of the previously permitted site on January 11, 1996.
>
> At the time of the inspection, my staff was advised that waste was continuing to be accepted and that as of 10:00 am January 11, 1996, all waste being received at the site was to be stored. However, our further inspection on January 16, 1996 reveals that waste is continuing to be accepted and introduced into the environment in contravention of the Waste Management Act.
>
> You have been notified of the cancellation of Waste Management Permit PR-7707 by the minister. The cancellation of the permit cancelled all authorization under the Waste Management Act for your facility to discharge any additional waste to the environment at the site. Consequently, any further discharge of waste at the site is a violation of the Waste Management Act and may be subject to legal action.

10 Mr. Bauer responded the next day with a somewhat heated letter denying that Alpha was "introducing waste into the environment". Mr. Laird visited the site on that day and again on the two following days. There appears to have been no further communication between the parties before the petition was issued on 23 January. Mr. Laird summed up the Ministry's position in these paragraphs of his affidavit in support of the petition:

> 18. I personally inspected the area w[h]ere the waste was being 'stored' on the former Permit lands. My observation confirmed that the waste was simply being stockpiled on the land.
> 19. The manner in which the waste is stored poses environmental risks. At permitted sites any waste discharged onto the site has to be compacted and covered with soil to prevent the generation of toxic leachate. The uncovered waste I observed poses a risk of toxic leachate generation. In addition the exposed waste I observed poses a potential fire risk. There has already been a serious three week fire at this site in January of 1994.

11 On the question whether storage of the material would pose any hazard to the environment, Alpha responded to Mr. Laird's assertions with the evidence of Mr. Dakin. He expressed the view, based on his detailed observations at the site, that it was "... highly

unlikely that any leachate flowing from the stored material will flow as surface run-off onto neighbouring properties." And, that "... the chances of toxic leachate being developed in this material are very remote." In the last two paragraphs of his affidavit he said:

> 13. There was no evidence of any combustion taking place in the stored material. If such combustion did occur, the silty sand landfill cover would prevent it from spreading into the landfill itself.
> 14. For the foregoing reasons I conclude that the demolition debris stored on Alpha's landfill does not pose a risk to the local environment. A very large quantity of this type of material, with metals and other inappropriate elements removed, could be stored on the site for an extended period (several years) without presenting any risk to the environment, even if it is not covered by a layer of soil. However, as a precaution it is recommended that if any water is observed flowing from the stored material, a sample should be collected for subsequent chemical analysis.

12 Alpha seems not to have expressed any intention, after receiving notice of the second cancellation, of carrying on the operation beyond the limited aspect of storing material on the site. It accepted that it could not carry on with the major aspects of the operation unless and until the cancellation was set aside.

13 When the petition came on for hearing, however, Alpha's counsel put forward a different position, i.e, that there was no ground for any injunction because as a matter of law Alpha had not required a permit to carry on the operation begun in 1987. That submission became the principal subject of contention throughout the proceedings in both courts. I agree with the chambers judge that it is an untenable submission.

14 The argument depends largely on a painstaking dissection of certain definitions found in s. 1 of the Act:

> "environment" means the air, land, water and all other external conditions or influences under which man, animals and plants live or are developed;
>
> "land" means the solid part of the earth's surface and includes the foreshore and land covered by water;
>
> "pollution" means the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment;
>
> "refuse" means discarded materials, substances or objects;
>
> "waste" includes
>
> (a) air contaminants,

(b) litter,
(c) effluent,
(d) refuse,
(d.1)biomedical waste,
(e) special wastes, and
(f) any other substance designated by the Lieutenant Governor in Council, under paragraph (f) has any commercial value or is capable of being used for a useful purpose;

"works" includes

(a) a drain, ditch, sewer and a waste disposal system including a sewage treatment plant, pumping station and outfall,
(b) a device, equipment, land and a structure that

(i) measures, handles, transports, stores, treats or destroys waste or a substance that is capable of causing pollution, or
(ii) introduces into the environment waste or a substance that is capable of causing pollution,

(c) an installation, plant, machinery, equipment, land or a process that causes or may cause pollution or is designed or used to measure or control the introduction of waste into the environment or to measure or control a substance that is capable of causing pollution, or
(d) an installation, plant, machinery, equipment, land or a process that monitors or cleans up pollution or waste.

15 Also relevant is this general provision in s. 1(2):

(2) For the purposes of this Act, introduction of a waste into the environment means depositing the waste on or in or allowing or causing the waste to flow or seep on or into any land or water or allowing or causing the waste to be emitted into the air.

16 I earlier set out those provisions of s. 3 which may be relevant here. Most important is s. 3(1.1) which prohibits anyone, in the course of conducting an industry, trade or business from introducing or causing or allowing waste to be introduced into the environment. The effect of the permit was to exempt Alpha from that provision.

17 The argument is a somewhat convoluted one involving a number of alternatives but, as I understand it, amounts to this:

1. The material was not "waste" because, after being cleaned and compressed in order to provide foundation support, it achieved a

value to Alpha and thus ceased to be "discarded" which it must be in order to be "refuse" which it must be in order to be "waste".

2. If it was waste, it was not introduced into the environment because the land in question is not "land" for the purposes of the definition of "environment".
3. If the material was waste, and if it was introduced into the land, it was still not introduced into the environment because the operation constituted a "works".

The second and third points are sought to be supported by the decision of this Court in R. v. Enso Forest Products Ltd. (1993), 85 B.C.L.R. (2d) 249.

18 The first point, which appears not to have been raised before the chambers judge, does not merit extended discussion. Undoubtedly there can be situations in which discarded material is put through some form of treatment or some process which alters its character and characteristics to the point where it could no longer be classified as waste. In this case, the discarded material was subjected to a process designed to make it suitable to be used as foundation material by giving it the requisite degree of solidity and by, in the words of Mr. Dakin in para.4 of his affidavit, "preventing pollution of the local environment". That process, in my view, did not alter its character as discarded material so as to take it out of the category of waste.

19 The second and third submissions, as I have said, rest on the decision of the majority of this Court in Enso, supra. The facts in that case are summarized in the headnote of the report of the decision of Shaw J. at first instance which is reported at (1992), 70 B.C.L.R. (2d) 145:

> Some 41,000 gallons of oil escaped from the accused's pulp mill due to a pump failure. The oil flowed into a runoff ditch and pooled in an adjacent landfill site. None of it left the mill site. A portion of the ditch had recently been excavated, but nearer the landfill site it was broader, less distinct and it had some grass and rushes growing in it. The ditch was part of a network of ditches in the area, built to collect runoff of natural and artificial materials from the area of the mill's pumping station. The accused had the liquid portions of the spill removed and all oil-saturated soil excavated down to clean soil. The contaminated soil was placed within a bermed area at the landfill site, and fertilizer was added to assist in the biodegradation of the oil.

20 Enso, the owner and operator of the mill, was charged with allowing "waste to be introduced into the environment" contrary to s. 3(1.1) of the Act and was convicted of that offence by a Provincial Court judge. On appeal, Shaw J. reversed that decision on the ground that, in the circumstances, to allow the Bunker C oil to enter the ditch on the mill premises was not an introduction of waste into the environment.

21 The point which is said to be established by the majority judgment of this Court in Enso is that the definition of "environment" and the definition of "works" are mutually exclusive so that, if the overall operation carried on by Alpha from 1987 on was a "works", it

was not part of the environment. In this case, the chambers judge accepted, on the basis of Mr. Dakin's description, that the overall operations constituted a "works" as defined by the Act, and that that which constitutes a "works" cannot be part of the environment. But he distinguished this case from Enso, supra, on the ground that, the permit having been cancelled, the works "... revert to the status of land, and therefore become part of the environment again, once the permit is cancelled."

22 In upholding the decision of Shaw J., in Enso, Carrothers J.A. for the majority said at p.252:

> I am of the view that the appellate judge was correct in his interpretation of the definitions of "environment" and "works" in holding that these definitions are mutually exclusive. I find no error in his holding that the ditch into which the Bunker C. oil was spilled was "works" and not "environment" and accordingly Eurocan did not "introduce waste into the environment". To find otherwise would, in the circumstances of this case, lead to an absurdity. (emphasis added)

23 The substance of that decision is that the question whether a given piece of land is part of the environment for the purpose of the Act must be decided in each case by an examination of the context having regard to the purpose of the legislation. The statutory definitions are so broad and general that it may not be possible in most cases to apply the plain meaning rule. In Enso, the majority in this Court, although expressing its own reasons, also adopted the reasons of Shaw J. who, at p.149, said this:

> 21 To test the validity of this submission I will examine the definitions of "environment" and "works" in the context of the statute and its objectives.
>
> 22 What the Act is aimed at is clear; the protection of the environment by stopping pollution where practicable, and otherwise by controlling and reducing its harmful effects.

24 In this case, the chambers judge rejected the submissions of Alpha by saying this:

> 22 Returning to the case at bar, it is abundantly clear from the Waste Management Act as a whole that it represents the legislative policy of controlling, ameliorating and where possible, eliminating the deleterious effect of pollution on the environment in a broad sense. The means adopted are in great measure the provision of permits and approvals before potentially polluting activities can be undertaken. Of greatest significance here is s. 8(1)(a) which provides for a permit to make lawful the construction of works and to allow the introduction of waste into the environment. That would otherwise be unlawful under s. 3(1.1). It would be anomalous if, when the permit for the works is cancelled, the operator could continue to introduce waste into the environment through the works. It would be as anomalous to say that something which meets the definition of works in s. 1(1) of the Act is not part of the environment even

> where a permit had never been granted simply because it fits that definition. The proper interpretation of the Act, necessary to give it efficacy in meeting the clear legislative purpose, is that something can only be works, and therefore not part of the environment, while it is under a permit granted under s. 8(1).
>
> 23 I reach the conclusion therefore that the meaning of the Act is that works are distinct from environment within the authority of the Enso Forest Products case only while the works are allowed by permit or approval under the Act. Once the permit is cancelled or the approval is withdrawn, the works cease to be works as defined in the Act. If it were otherwise, the Minister charged with the operation of the Act to control pollution would, once a permit to construct works was granted, lose his power to control their operation.

I agree with those conclusions and, in particular, with the emphasis in the last sentence in para. 22 on the necessity to interpret the Act by reference to the legislative purpose. The approach put forward by Alpha, were it to be accepted, would simply negate the essential object of the legislation and thus would not be in accord with the rule of interpretation laid down in s. 8 of the Interpretation Act, R.S.B.C. 1979, c.206 now R.S.B.C. 1996, c.238:

> 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

25 Having reached that conclusion, it is unnecessary to decide whether the statements in Enso, to the effect that "works" and "environment" are mutually exclusive, apply whenever an operation or a process is found to be a "works". I earlier quoted the conclusions of Carrothers J.A. in Enso and emphasised his reference to "the circumstances of the case" which were, of course, completely different from those of the case at bar. In Enso, the circumstances were that the oil escaped by accident into a ditch specifically created for the purpose of containing pollutants and was contained so completely that all of it was recovered without any leaching or permeating of oil into the groundwater below the ditch (para.51, reasons of Shaw J.). The operation carried on by Alpha was one for the permanent alteration of the land to make it suitable for construction purposes and only part of the purposes of the "works" was the avoidance of environmental harm. In those circumstances, I doubt that the element of environmental purpose would exclude the site from being environment. However, as I would uphold the decision of the chambers judge in relation to the principal contentions raised by Alpha, it is unnecessary to express any concluded opinion on that point.

26 A subsidiary contention was to the effect that no injunction should be granted because, after cancellation of the permit, Alpha carried on no operation other than storing waste. The chambers judge rejected that contention in these words:

> 24 It follows in this case that the respondents are acting unlawfully by continuing to introduce waste to the environment by placing it on their lands at the Burns Bog site after their permit was cancelled. The fact that they claim to be storing the waste is of no assistance to them. By placing waste on the ground they are depositing it within the definition of the words "introduction of waste into the environment" in s. 2 of the Act. It is not a defence to say it is deposited for storage.

27 That conclusion was reached without considering whether the limited operation created a risk to the environment. The Minister, in launching this proceeding, took the position that the mere storage of the waste did create such a risk. The evidence of Mr. Laird to that effect is set out in para.10 hereof and that of Mr. Dakin in response is set out at para.11. Given the relative qualifications of the two deponents, it would be fair to conclude the Crown did not establish as a fact that the limited operation presented any significant risk to the environment. The question then is whether it was error in principle to grant a restraining order under s. 24(1) in the absence of proof of such a risk. If this were a case of an application by one private citizen against another for an interlocutory injunction, the absence of risk would weigh heavily against, and perhaps preclude, the granting of an injunction. But this petition was brought, not by a private citizen, but by a Minister of the Crown acting on his view of the public interest. Furthermore, the order made was a final one in this proceeding although, in view of the unresolved challenge by Alpha in separate proceedings to the validity of the cancellation, the order is in some respects akin to an interlocutory order in that, were the cancellation to be found invalid, the restraining order would cease to have any effect.

28 It would not be right to hold that no order can be made under s. 24 without proof that the activity sought to be restrained creates a present risk to the environment. Section 3 creates a clear distinction between persons, such as Alpha, who carry on an activity "in the course of conducting an industry, trade or business" and those who carry on an activity for other purposes. Section 3(2) expressly provides that "no person shall introduce waste into the environment in such a manner or quantity as to cause pollution". In face of that provision, it is impossible to read into s. 3(1.1) a similar qualification. Clearly the legislative intent is that anyone who introduces waste into the environment in the course of conducting a business is in breach of the Act. Those who introduce waste into the environment other than in the course of conducting an industry, trade or business do not contravene the Act unless they "cause pollution".

29 The chambers judge was therefore correct in holding that Alpha, by dumping waste onto the land after the cancellation of the permit, contravened the Act. The final question, in respect of which we asked for and received written submissions, is whether, notwithstanding that contravention, Alpha should have been enjoined from that activity. Referring again to the language of s. 24, any activity or operation which contravenes s. 3 "may be restrained". That language clearly contemplates that the court will exercise its discretion in deciding such a question. The issue is whether the chambers judge in this case improperly exercised his discretion in granting the order.

30 The law dealing with the subject of granting injunctions to enforce public rights is extensive. For present purposes I need refer only to the discussion in Sharpe, Injunctions

and Specific Performance, 2nd ed. (Toronto: Canada Law Book, 1996) at c.3 which was relied on by both counsel. In para. 3.150, the author summarizes thus:

> The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship an injunction would impose upon the defendant. It seems clear that where the Attorney General sues to restrain breach of a statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse on discretionary grounds. In one case, it was held that "the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land". In another case, Devlin J. held that although the court retains a discretion, once the Attorney General has determined that injunctive relief is the most appropriate mode of enforcing the law, "this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances".

31 Counsel for the appellant has submitted that the court should, as a matter of principle, give less weight to the element of public interest where the application is brought as here by a Minister other than the Attorney General. While that distinction may have some validity in some cases, I cannot find that it is a matter of significance in this case.

32 The Minister having established a substantive case of breach of the statute, the question becomes whether there were circumstances which required the application to be refused. Clearly, there were circumstances capable of supporting an argument to that effect:

(a) the willingness of Alpha to refrain from carrying on the major activity which had been authorized by the permit;
(b) the existence of an arguable issue as to the validity of the cancellation;
(c) the absence of proof that the limited activity which Alpha sought to carry on posed any environmental risk;
(d) the fact that the petition was brought on for hearing very quickly at a time when Alpha's proceeding to declare the cancellation invalid was on foot;
(e) the fact that this was not a clear case of "flouting" the law. Alpha ceased the major activity and sought only to carry on a limited activity which has not been shown to create risk to the environment.

33 Had Alpha, in opposing this petition, relied on such grounds the court might well have exercised its discretion in its favour by refusing to enjoin the limited activity. The result would not likely have been a dismissal of the petition but could have been an adjournment until the question of the validity of the cancellation was resolved.

34 However, Alpha chose not to put those modest goals in the forefront of its case. Rather, it relied on a contention based on a strained and technical interpretation of the language of the Act; an interpretation which, if accepted, would have rendered the Act a

virtual dead letter. The position for which Alpha contended was, in effect, that it had always been free to discharge refuse from demolition operations and to incorporate that refuse into the land without the restrictions and supervision created by a permit under the Act. Rather than defending against the petition on the basis of the particular circumstances, it chose to launch a preemptive strike designed to rob the legislation of all effect. That is the case which was put before the chambers judge. He correctly rejected it. Having advanced at that stage a case which did not invoke the court's discretion, Alpha cannot succeed in this Court on the ground that the court should have exercised its discretion in its favour. In relation to these matters, I will note that Alpha even now has done little or nothing to pursue its claim that the cancellation was invalid. Had its attempted preemptive strike in this proceeding succeeded, that of course would have made it unnecessary to pursue the other proceeding. That bold strategy having failed, it must live with the consequences.

35 I would dismiss the appeal.

ESSON J.A.
ROWLES J.A.:-- I agree.
HUDDART J.A.:-- I agree.

* * * * *

CORRIGENDUM
Released September 8, 1997

ESSON J.A.:-- On page 20, in line 2, sub-paragraph (e) of my reasons for judgment dated September 5, 1997 the word "caused" should be replaced with the word "ceased".

ESSON J.A.

Case Name:

Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)

Between
Ontario Federation of Anglers & Hunters ("OFAH") and C. Davison Ankney, applicants (respondents), and Her Majesty the Queen in Right of Ontario as represented by The Ministry of Natural Resources and The Honourable John Snobelen, respondents (appellants)

[2002] O.J. No. 1445

211 D.L.R. (4th) 741

158 O.A.C. 255

93 C.R.R. (2d) 1

2002 CanLII 41606

113 A.C.W.S. (3d) 63

Docket No. C36139

Ontario Court of Appeal
Toronto, Ontario

Abella, MacPherson and Simmons JJ.A.

Heard: November 22, 2001.
Judgment: April 19, 2002.

(69 paras.)

Practice -- Discovery -- Examination, persons who may be examined -- Crown, ministers -- Appeals -- Evidence on appeal -- Admission of "new evidence."

Appeal by the defendant, the Ontario Ministry of Natural Resources, from an order requiring the Ontario Premier and its Minister of Natural Resources to submit to an examination

for discovery. The plaintiff, the Ontario Federation of Anglers & Hunters, sought to introduce fresh evidence to support its view that the Premier and Minister were proper parties for examination. The Federation brought an action alleging that the Premier and Minister acted unlawfully in cancelling the spring bear hunt. Specifically it alleged that, rather than exercising his independent judgment under the applicable law, the Minister responded to political pressure from the Premier. It also claimed that the cancelling regulation was invalid, as it was made for the extraneous reasons of humane hunting practices and political expediency, in response to pressure from animal rights activists and related groups.

HELD: Appeal allowed. The decision was set aside, and the summonses to witness to the Premier and the Minister were quashed. Even if the Federation had evidence supporting its allegations that the Premier unduly pressured the Minister, this was irrelevant to the regulation's validity. As well, the allegation that the Minister failed to exercise independent discretion ignored the fact that the passing of a regulation was not in itself an exercise of independent ministerial discretion. The regulation was a decision of Cabinet, not of the Premier. Concerns regarding animal welfare fell squarely within the policy and objectives of Ontario's Fish and Wildlife Conservation Act, and the evidence supported the Minister's concerns about the treatment of bears. The fact that the government consulted animal welfare groups amounted to part of its regular work in responding to public concerns. Taking political or partisan considerations into account did not by itself imply government impropriety The Federation raised no justiciable issue. Therefore, the fresh evidence was irrelevant. In any event, with due diligence the Federation could have presented the new evidence earlier in the proceedings.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 2(b), 7.

Fish and Wildlife Conservation Act, S.O. 1997, c. 41, s. 113.

Ontario Rules of Civil Procedure, Rule 39.03(1), 39.03(2).

Appeal from:

On appeal from an order of the Divisional Court (Southey, Kozak and Lederman JJ.) dated January 11, 2001, reported at 196 D.L.R. (4th) 367.

Counsel:

Robert Charney and Hart Schwartz, for the appellants. Timothy Danson, for the respondents.

The judgment of the Court was delivered by

1 **ABELLA J.A.**:-- The issue in this appeal is whether the circumstances surrounding the cancellation of the spring bear hunt in Ontario give rise to an entitlement to examine the Premier and the Minister of Natural Resources.

BACKGROUND

2 The Minister of Natural Resources, John Snobelen, announced the government's intention to cancel the spring bear hunt in a press release dated January 15, 1999, explaining the basis for the cancellation as follows:

> Many people have told us that the way the hunt is conducted and the inevitable loss of some cubs are unacceptable. We have reviewed current practices and considered modifications; but none provide assurance those young bears and their mothers would be protected as they emerge from their dens in the spring.

3 In October 1998, the Minister had asked his Deputy Minister to meet with representatives of the Ontario Federation of Anglers and Hunters ("OFAH"), the Northern Ontario Tourist Outfitters Association ("NOTO") and the Schad Foundation, an animal rights organization, in an attempt to find some common ground for changes to the spring black bear hunt. Three meetings were held. No consensus emerged from them.

4 That December, the Minister requested that the Ministry staff prepare a paper to consider alternatives to the status quo that would reduce or eliminate cub orphaning in the spring.

5 Early in January 1999, Premier Mike Harris called the Past President of NOTO to advise him of the government's intention to end the spring bear hunt.

6 On January 14, 1999, NOTO's President wrote to the Premier's Office to request an immediate meeting to discuss the proposed cancellation. As a result, the President of NOTO and other NOTO members were invited to meet with Minster Snobelen to discuss the proposed cancellation of the spring bear hunt.

7 The meeting with NOTO took place on January 21, 1999. During this meeting, the Minister explained the Ministry's obligations under the Environmental Bill of Rights process. He also discussed the possibility of compensation for the industry and listened to concerns about the economic consequences of the cancellation.

8 That same day, a Notice of Proposal for a regulation that would close the spring season for hunting black bears was posted by the Ministry of Natural Resources on the Environmental Bill of Rights Registry. The proposal's stated purpose was to "eliminate the mistaken shooting of female bears with young cubs during the spring open hunting season". The proposal also stated that "ending the spring bear hunt is the only way to guarantee that females with young cubs are not mistakenly shot during the hunt, thereby leaving orphans (which experience a high mortality rate at this time of year)".

9 The Notice of Proposal stated that written submissions could be made between January 21, 1999 and February 20, 1999. Thirty-five thousand, three hundred and forty-seven submissions were received by the government, 64 per cent opposing the government's proposal to end the spring bear hunt and 35 per cent in support of it.

10 The Minster held a meeting with his staff on March 3, 1999 to consider these responses and decided to end the spring bear hunt.

11 The Record of Decision, dated March 3, 1999, enumerates the following factors as influencing the Minister's decision:

* The growing concern from Ontario citizens that hunting bears in the spring when nursing cubs are dependent on their mothers is inappropriate.
* The majority of the submissions in the EBR process were made by hunters and bear hunt operators who opposed the proposed regulation, but that the EBR process is not a vote or plebiscite.
* The respondents in favour of the government's decision were mostly unaffiliated with any particular group and likely represent a view held by a large number of Ontarians.
* Cancellation of the spring bear hunt could cause some economic hardship and the province should offer financial assistance to bear hunt operators and assist the tourist industry to attract alternative forms of tourism.
* The decision to close the spring bear hunt was not required for sustainable management of black bears in Ontario.

12 On March 4, 1999, Ontario Regulation 670/98 was amended by Ont. Reg. 88/99 to delete the spring open season for black bears.

13 On April 12, 1999, as a result of the cancellation, OFAH and NOTO brought an application for judicial review challenging the regulation.

14 The primary challenge to the regulation was that it was ultra vires the Fish and Wildlife Conservation Act, S.O. 1997, c. 41 in the following ways: the Minister failed to exercise his discretion at all, since the cancellation came as a directive from the Premier in response to pressure from industrialist Robert Schad; and the Minister took unethical hunting practices and political expediency into account in issuing the regulation, thereby considering improper purposes and "extraneous" factors.

15 OFAH and NOTO also claimed that the regulation infringed their right to freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms on the grounds that hunting was a form of expression; and that the regulation infringed their liberty and security interests under s. 7 of the Charter.

16 The allegation of impropriety arises from the apparent change in the public position about the hunt taken by the Minister of Natural Resources. On December 17, 1998, the Minister had stated in a letter to major stakeholders that there was no basis for cancelling the spring bear hunt. Within a month, on January 15, 1999, the Ministry of Natural Resources issued its news release announcing its intention to end the spring bear hunt. There was, NOTO and OFAH claimed, no explanation for the abrupt reversal other than inappropriate influence on the Minister by the Premier.

17 An application for an interim injunction was brought before Justice Stach in the Superior Court on April 28, 1999 to suspend the operation of the regulation until the merits

of the judicial review could be heard by a full panel of the Divisional Court. Justice Stach dismissed the application on April 28, 1999.

18 NOTO formally withdrew from the litigation in October, 1999.

19 On March 9, 2000, the applicants served a Notice of Examination on the Minister of Natural Resources, the Honourable John Snobelen, and a Summons to Witness on the Premier, the Honourable Mike Harris, pursuant to rule 39.03 of the Rules of Civil Procedure.

20 On March 24, 2000, Yates J. quashed the processes, finding them to be an abuse of process.

21 The Divisional Court, whose majority reasons were written by Justice Lederman, overturned Justice Yates' decision on January 11, 2001 on the grounds that the evidence sought by OFAH was relevant to an issue in dispute, and ordered the examinations to proceed "limited to the sole issue of whether the Minister made his own decision in exercising his discretion to pass the regulation or whether he was merely directed to pass the regulation by the Premier without the exercise of any independent discretion."

22 Justice Kozak dissented on the basis that the subject matter of the dispute, a political decision, was not justiciable.

23 The Divisional Court unanimously dismissed OFAH's cross-motion seeking to prohibit the Crown from proceeding with its motion to strike out various affidavits and paragraphs in affidavits filed by the applicants.

24 This is an appeal by the Crown from the decision of the Divisional Court permitting the examinations to take place.

25 On appeal, OFAH brought an application to introduce fresh evidence from members of NOTO. The evidentiary record to date, in addition to the fresh evidence sought to be introduced, includes a thirteen-volume application record from OFAH.

APPLICABLE STATUTORY PROVISIONS

26 The relevant provisions of the Rules of Civil Procedure are rules 39.03(1) and (2):

> 39.03(1) Subject to subrule 39.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.
>
> (2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination.

27 Section 113(1) of the Fish and Wildlife Conservation Act states:

> 113.(1) The Minister may make regulations,

...

(2) prescribing open seasons or closed seasons for wildlife.

ANALYSIS

28 The application for judicial review challenges the validity of Ontario Regulation 670/98, as amended by Ontario Regulation 88/99, which terminated the spring open hunting season for black bears from April 15 to June 15.

29 The primary claim by OFAH is that the Minister followed the dictates of the Premier rather than exercising his independent judgment, and that the Regulation is invalid because the decision to cancel the spring bear hunt was made for the extraneous reasons of political expedience and humane hunting practices.

30 As the majority in the Divisional Court correctly observed, an examination under rule 39.03 is appropriate when the evidence sought is relevant to any issue raised on the main application. (See Payne v. Ontario (Human Rights Commission) (2000), 192 D.L.R. (4th) 315 (Ont. C.A.) and Consortium Development (Clearwater) Ltd. v. Sarnia, [1998] 3 S.C.R. 3). The onus is on the party seeking to conduct the examination to show on a reasonable evidentiary basis that the examination would be conducted on issues relevant to the pending application and that the proposed witness was in a position to offer relevant evidence.

31 The majority also acknowledged that courts should be careful to ensure that a summons to witness directed to a Minister of the Crown under rule 39.03 is not simply for the purpose of "turning the court process into an extended battle ground for extracting information pertaining to the ongoing political debate ..." (Ontario Teachers' Federation v. Ont. (A.G.) (1998), 39 O.R. (3d) 140 (Gen. Div.) at p. 148. See also Agnew v. Ontario Association of Architects (1987), 64 O.R. (2d) 8 (Div. Ct.) at p. 14-15).

32 However, it concluded that there was a live issue to which the evidence of the Premier and Minister would be relevant, namely, evidence that the Minister did not make his decision independently.

(a) Whether the Minister made the Decision at the Direction of the Premier

33 OFAH alleges undue pressure on the Minister from the Premier resulting from a meeting on January 5 or 7, 1999 between Robert Schad and the Premier. There is no evidence in this record of such a meeting. The paragraph containing this allegation was struck from the application record by the February 27, 2001 consent order of Dunnet J. and there is therefore no evidence regarding the alleged meeting in the record before this court.

34 Even if there were evidence of such a meeting, or of Mr. Schad's influence on the Premier, or evidence that it was the Premier who urged passage of the Regulation, none of these facts has any legal relevance to whether the Regulation is valid.

35 There is no doubt that Robert Schad and the Schad Foundation are well known animal rights activists, that they sought the cancellation of the spring bear hunt, and that they were committed to using their influence to try to persuade the government to end the

hunt. But evidence of the Premier's contact with Robert Schad, if there was any, or of his calling the past president of NOTO to let him know the government's intention in January 1999, shows only that the Premier contacted major stakeholders. These were some of the stakeholders that the Minister himself had asked his Deputy to meet with in October 1998.

36 The allegation that there has been a failure on the Minister's part to exercise any independent discretion in passing the Regulation also ignores the fact that the passing of a regulation is not in itself an exercise of independent ministerial discretion. Moreover, in Thorne's Hardware Limited v. The Queen, [1983] 1 S.C.R. 106, the Supreme Court of Canada confirmed the irrelevance of motives in determining the validity of a regulation:

> ... It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council.
>
> ...
>
> ... Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations. (at pp. 112-13)

(See also New Brunswick Broadcasting Company v. Donahue, [1993] 1 S.C.R. 319 at 389 per McLachlin J.).

37 Similarly, in Canadian Association of Regulated Importers v. Canada, [1994] 2 F.C. 247 (F.C.A.) at 260, 263:

> It is not fatal to a policy decision that some irrelevant factors be taken into account; it is only when such a decision is based entirely or predominantly on irrelevant factors that it is impeachable. It is not up to the Court to pass judgment on whether a decision is "wise or unwise" ... This Court, because these matters involve "value judgments", is not to "sit as an appellate body determining whether the initiating department made the correct decision."
>
> As this court stated in National Anti-Poverty Organization v. Canada (Attorney General), [1989] 3 F.C. 684 at page 707, "Even if one were to assume that the Governor in Council acted with a dual purpose in mind (one falling within his mandate ... and the other falling outside his mandate ...) I doubt that this could advance the respondents' case." For, as the Supreme Court of Canada has explained, "Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations." (See Thorne's Hardware Ltd. v. The Queen, supra at 112-113.)
>
> ...
>
> In conclusion, there is ample evidence in the record to support the decision made by the Minister to adopt the system he did. In doing so he relied on relevant factors. This is not to say that the evidence demonstrated

> that he necessarily made the right decision. That is not the standard of review that we must apply. Indeed, even if it could be shown that he may have made the wrong decision, this Court would have no business interfering with it in these circumstances.

38 This judicial deference was applied and reinforced by this court in TransCanada Pipelines Ltd. v. Beardmore (Township) (2000), 186 D.L.R (4th) 403 (Ont. C.A.), application for leave to appeal to the Supreme Court of Canada dismissed [2000] S.C.C.A. No. 264, where the court held:

> [I]t was not open to the respondents, by way of judicial review, to challenge the proposal on its merits. Whether a particular restructuring proposal is or is not "timely and efficient", or is or is not consistent with "the greatest good of society", do not represent questions of law answerable on judicial review. These are policy issues that the legislature intended the commission, not the court, to decide ... Indeed, with respect, the court had no institutional expertise in arriving at political, economic and social compromises ...

(See also East Luther Grand Valley v. Ontario (2000), 48 O.R. (3d) 247 at 254 (S.C.J.), appeal to the Divisional Court dismissed [1996] O.J. No. 511, and Masse v. Ontario (1996), 134 D.L.R. (4th) 20 at 36-7 (Ont. Div. Ct.), application for leave to appeal to the Ontario Court of Appeal dismissed (1996), 89 O.A.C. 81, application for leave to appeal to the Supreme Court of Canada dismissed (1996), [1996] S.C.C.A. No. 373, 97 O.A.C. 240.)

39 Even if the Regulation was influenced by the views of the Premier, the Regulation is a decision of Cabinet, not of the Premier or any individual minister. A minister opposed to such a decision may wish to resign, but as Sir Ivor Jennings pointed out in Cabinet Government 3rd. ed. (Cambridge University Press, Cambridge, 1963) at pp. 278-279:

> If a minister does not resign he is responsible' ... From the minister's point of view it means only that he must vote with the Government, speak in defence of it if the Prime Minister insists, and that he cannot afterwards reject criticism of his act, either in Parliament or in the constituencies, on the ground that he did not agree with the decision.

40 Therefore, even if the Premier had directed the Minister to enact the regulation, it represents no justiciable error for the Minister to comply.

(b) Whether the Minister took Extraneous Factors into Account

41 As for the argument that the minister lost jurisdiction by considering extraneous factors, namely ethical and humane hunting practices and political expediency, I start with the observation that the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant. This guiding principle is set out in Reference Re: Validity of Regulations in Relation to Chemicals, [1943] S.C.R. 1 at 12:

> [W]hen Regulations have been passed by the Governor General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth.

(See also Brown and Evans, Judicial Review of Administrative Action in Canada, (1998), at paras. 12:4441 and 12:4443.)

(i) Ethical and Humane Hunting Practices

42 The regulation was passed pursuant to s. 113(1) of the Fish and Wildlife Conservation Act, 1997, which gives the Minister authority to "make regulations prescribing open seasons or closed seasons for wildlife."

43 Regulation 670/98 established the open season for wildlife. Prior to March 4, 1999, the regulation prescribed a spring open season for black bears from April 15 to June 15 or 30, and a fall open season for black bear hunting from September 1 to October 15 or 31. Black bears were the only large game animals for which a spring hunting season was permitted.

44 The Fish and Wildlife Conservation Act received Royal Assent on December 18, 1997 and was proclaimed on January 1, 1999. It was enacted to provide a scheme of wildlife conservation and management including the establishment of ethical, humane and responsible hunting practices. The Act assigns to the government the responsibility for balancing the interests of people against the welfare of animals to determine what constitutes humane treatment or the unnecessary suffering of animals.

45 Concerns regarding animal welfare, including humane and ethical hunting practices, fall squarely within the policy and objectives of the Fish and Wildlife Conservation Act. This is accomplished by the Ministry of Natural Resources regulating the conduct of hunters. Section 6(1)(a) of the Act, for example, states that "except under the authority of a license and in accordance with the regulations, a person shall not hunt or trap a black bear ...".

46 The basis for the regulation cancelling the spring bear hunt, as explained by the Ministry at the time, was "a growing concern from Ontario's citizens that the hunting of bears in the spring could lead to orphaning of young cubs at a time when mortality of those cubs would be very high. The Minister is of the view that it is inappropriate to hunt big game animals in the spring when the young are very dependent."

47 The evidence supports his concerns. The statistics and methodology for the killing of the bears was described by the Crown in its factum as follows:

> Between 1990 and 1997, approximately 4,100 black bears per year were killed during the spring hunting season. Approximately 30% (1230) were females, and approximately 492 of the females were over 5 years of age. Ninety-eight per cent of the bears were hunted at bait sites, where the hunters remain hidden approximately 15 to 20 meters from the bait,

> and wait for the bears to approach the bait site. Up to 274 bear cubs per year may be orphaned during the spring hunting season, with the likely numbers being in the range of 20 to 90. Issues relating to black bear hunting, including the potential for orphaning cubs in the spring, have engendered controversy in Ontario for a number of years, and there was growing public concern over the issue in the period leading up to the cancellation decision.

48 The stated purpose for closing the spring bear hunt, namely, to prevent the mistaken shooting of nursing mothers of newly born cubs that would starve to death if orphaned by the hunt, is therefore consistent with the purposes of, and authorized by, the Fish and Wildlife Conservation Act. It was therefore not beyond the Minister's jurisdiction to take ethical or humane hunting practices into account in cancelling the spring hunt.

(ii) Political Expediency

49 The wisdom of government policy through regulations is not a justiciable issue unless it can be demonstrated that the regulation was made without authority or raises constitutional issues. Neither is the case here. (See Challenging Government Policy', Sara Blake, presented on October 20, 2000 to the Canadian Bar Association Ontario Continuing Legal Education Meeting; A & L Investments Ltd. et al. v. The Queen (1997), 36 O.R. (3d) 127 at 134-135 (C.A.), application for leave to appeal to the Supreme Court of Canada dismissed (1998), [1997] S.C.C.A. No. 657, S.C.C. File No. 26395; Cosyns v. Canada (Attorney General) (1992), 7 O.R. (3d) 641 at 655-656 (Div. Ct.); Gustavson Drilling (1964) Ltd. v. M.N.R., [1977] 1 S.C.R. 271 at 282-283.)

50 The majority in the Divisional Court said that the proposed examination was justified by the allegation that the government changed its policy based on political expediency rather than as a response to public concerns. With respect, it seems to me that there is no discernible difference between the two. There is nothing inappropriate, let alone unlawful, about the government consulting with and considering the public's reaction to a policy measure. To be politically expedient is to be politically responsive to selected and discrete public concerns. That is what governments do.

51 In any event, it is irrelevant whether the Premier and/or the Minister were influenced by political expediency, this being a consideration which is an accepted, expected, and legitimate aspect of the political process. Whether one characterizes taking public opinion into account as political expediency or political reality, taking it into account is a valid function of political decision making.

52 Similarly, attempting to influence the government to change a practice, as OFAH, NOTO, and Robert Schad did, is an accepted feature of our system of government. Where the result of the influence is a regulation, it is the regulation itself, not the motives of the people who enacted it, which is relevant.

53 Governments are motivated to make regulations by political, economic, social or partisan considerations. These motives, even when known, are irrelevant to whether the regulation is valid.

54 When the government takes political or partisan considerations into account, therefore, this does not, by itself, give rise to an inference of impropriety. Such an inference is, in any event, an ironic allegation from OFAH, since what it is seeking is the government's compliance with its opinion, the very result it challenges in asserting that the government inappropriately responded to the opinions of Mr. Schad.

55 Nor does the fact that the government may have changed its mind provide a basis for permitting cross-examination, since such changes are neither impermissible nor unusual. The fact that the Minster asked his Deputy to hold meetings with major stakeholders in October of 1998 in an attempt to find common ground for changes to the spring black bear hunt, shows, in any event, that changes to the existing policy were being considered by the Minister at that time. His December 17, 1998 letter indicates that the potential for cub orphaning in the spring hunt was a concern of the government. The change of policy was a decision to address the concern by attempting to eliminate rather than merely reduce the orphaning. As the Minister said on January 15, 1999, "we have reviewed current practices and considered modifications; but none provide assurances these young bears and their mothers would be protected as they emerged from their dens in the Spring".

Conclusion

56 While I concede that Ministers of the Crown are not immune from testifying under rule 39.03, in my view there is no justiciable issue raised by the evidence in this case as to the validity of the Regulation. It was made, according to the record, within and under the relevant legislation and based on proper factors. Nor is there any reasonable evidentiary basis for concluding that the evidence sought to be obtained from the proposed examinations is relevant. Instead of the requisite evidence, what is offered is speculation and allegations, neither of which, even if true, gives rise to a valid challenge to the regulation.

57 Moreover, in Re: Canada Metal Co. Ltd. et. al v. Heap et. al (1975), 7 O.R. (2d) 185 (C.A.), this court held that the test is not only whether the evidence is relevant to an issue in dispute, but also whether the right to examine would be an abuse of process, which includes considering whether the underlying application has merit. There is, with respect, no merit in the underlying application in this case. No justiciable constitutional issues are raised in the underlying application since the Charter of Rights and Freedoms creates no constitutionally protected right to hunt in either s. 2(b) or s. 7. And even if the decision to cancel the spring bear hunt was made unilaterally by the Premier, or if he directed the Minister to cancel the hunt, or if the Minister took political expediency or humane hunting practices into account, none of these facts would provide any justification for setting aside the Regulation.

58 The Minister was creating public policy through the statutory authority to enact delegated legislation under s. 113(1) of the Act. The regulation is authorized by the enabling legislation and there is therefore no need for an examination of the Minister's motives or for evidence about whether he agrees with the Premier.

59 The only recourse for this type of decision, based on the evidence before us, is in the political not the judicial arena. In the absence of a reasonable evidentiary foundation, therefore, permitting the applicants to examine the Premier and the Minister about why the

final decision to cancel the spring bear hunt was made, would amount to sanctioning a fishing expedition.

60 There is therefore no reasonable evidentiary basis to permit the examinations of the Premier or the Minister to proceed.

FRESH EVIDENCE

61 The test for the admission of fresh evidence is set out in R. v. Palmer, [1980] 1 S.C.R. 759:

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

62 The fresh evidence is from members of NOTO, which had originally joined in the application for judicial review. Their evidence, compendiously, seeks to elaborate on their understanding of how and why the spring bear hunt was cancelled. In my view, for the following reasons, this evidence does not meet the due diligence, relevance or determinative branches of that test.

63 The stated purpose of the fresh evidence is to create a foundation for cross-examining the Premier of Ontario and his Minister about the decision-making process and their motivation for passing the Regulation. Since, for reasons stated above, neither the process nor motivations behind the Regulation is relevant or reviewable in this case, the proposed fresh evidence is accordingly irrelevant.

64 Moreover, the fresh evidence does not meet the threshold for admission for the following additional reasons:

> * The fresh evidence, far from "having been discovered", demonstrates a lack of due diligence. The evidence was known or available by the time the application was brought. The fact that there was some reluctance on the part of the deponents to provide the information previously does not change its character as evidence that could or should have been produced as part of the application record.
> * There is nothing in the evidence to support the conclusion that OFAH was not able to obtain co-operation from counsel for NOTO during the period prior to the application. The court still has no evidence from OFAH as to what steps, if any, it took to obtain this fresh evidence before NOTO withdrew from the litigation.
> * The fresh evidence consists of allegations, not evidence.

65 OFAH suggests, without evidentiary support, that NOTO voted to withdraw from the litigation because of government intimidation and that evidence from its members was not previously available.

66 The evidence demonstrates the contrary, indicating that NOTO's decision to withdraw from the litigation was based not on any intimidation or coercion, but on the advice of its counsel. His advice was that even if NOTO were successful before the Divisional Court, the government could restart the process and terminate the hunt differently and in accordance with a court's directions. He also told his client that the court system was not a timely forum for resolving this case and that the better expenditure of funds by NOTO would be on political advocacy.

67 From April to September 1999, NOTO and OFAH were working together. Even after NOTO withdrew from the litigation, it "encouraged any operators who want to, to continue to help OFAH with their legal challenge". The deponents of the affidavits submitted as fresh evidence were not previously asked about any information they had by counsel either for OFAH or NOTO. NOTO's counsel stated in his evidence that he never talked to counsel for OFAH about, and no one from OFAH asked him to interview, any of the NOTO members for any information they had about any pressure put on the Minister by the Premier. But in any event, as previously indicated, such pressure, even had there been evidence of it, is not relevant to determining the validity of this Regulation.

68 In summary, the fresh evidence does not meet the requirements of the Palmer test for the introduction of fresh evidence. The motion for its introduction is therefore dismissed.

69 Accordingly, the appeal is allowed, the decision of the Divisional Court is set aside, and the Summons to Witness to the Honourable Mike Harris, Premier of Ontario, and the Notice of Examination to the Honourable John Snobelen, Minister of Natural Resources, are quashed, with costs throughout if sought.

ABELLA J.A.
MacPHERSON J.A. -- I agree.
SIMMONS J.A. -- I agree.

Case Name:

Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)

Ontario Federation of Anglers & Hunters (O.F.A.H.) and C. Davison Ankney
v.
Her Majesty the Queen in Right of Ontario as represented by the Ministry of Natural Resources and the Honourable John Snobelen

[2002] S.C.C.A. No. 252

101 C.R.R. (2d) 376

File No.: 29237

Supreme Court of Canada

Record created: June 27, 2002.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Status:

Application for leave to appeal dismissed with costs (without reasons) March 27, 2003.

Catchwords:

Canadian Charter of Rights and Freedoms -- Civil rights -- Administrative law -- Jurisdiction -- Judicial Review -- Whether appellate court erred in quashing examinations of Premier and Minister on issue of whether Minister made own decision in exercising his discretion to pass regulation closing spring bear hunt -- Does regulation infringe rights under sections 2(a), 2(b), 7 and 15 of the Charter -- Fish and Wildlife Conservation Act, 1997, S. O. 1997, c. 41 -- Fresh Evidence -- Costs.

Counsel:

Timothy S.B. Danson (Danson, Recht & Freedman), for the motion. Robert Earl Charney (Attorney General for Ontario), contra.

Chronology:

1. Motion to extend the time in which to serve and file the application for leave granted June 27, 2002. Before: Binnie J. S.C.C. Bulletin, 2002, p. 1020.

   Time extended to September 10, 2002, and in support of the application for leave to appeal, the applicants may file one set of the Divisional Court record and one set of the fresh evidence motion record filed with the Ontario Court of Appeal.

2. Application for leave to appeal:

FILED: September 6, 2002. S.C.C. Bulletin, 2002, p. 1404.

3. Motion to extend the time in which to serve and file the applicants' reply granted December 31, 2002. Time extended to October 22, 2002, nunc pro tunc. Before: A. Roland, Registrar. S.C.C. Bulletin, 2003, p. 52.
4. Application for leave to appeal:

   SUBMITTED TO THE COURT: February 3, 2003. S.C.C. Bulletin, 2003, p. 210.
   DISMISSED WITH COSTS: March 27, 2003 (without reasons). S.C.C. Bulletin, 2003, p. 532.
   Before: Iacobucci, Binnie and LeBel JJ.

   The motion to strike out certain materials is granted with costs to the Respondents on a party and party basis and the application for leave to appeal is dismissed with costs on a party and party basis.

Procedural History:

Judgment	at first instance: Applicants' Notice of Examination to the Honourable John Snobelen, Minister of Natural Resources, quashed; Applicants' Summons to Witness to the Honourable Michael Harris, Premier of Ontario, quashed. Ontario Superior Court of Justice, Yates J., March 24, 2000.

Judgment on application: Applicants' motion to set aside the Order of Yates J., granted.
Ontario Superior Court of Justice - Divisional Court, Southey, Kozak and Lederman JJ., January 11, 2001. 196 D.L.R. (4th) 367; [2001] O.J. No. 86.

Judgment on appeal: Respondents' appeal allowed; Applicants' motion for the introduction of fresh evidence, dismissed.
Ontario Court of Appeal, Abella, MacPherson and Simmons JJ.A., April 19, 2002.
211 D.L.R. (4th) 741; [2002] O.J. No. 1445.

Case Name:

Ontario (Ministry of Labour) v. Hamilton (City)

Between
Her Majesty the Queen In Right of Ontario (Ministry of Labour), appellant, and
The Corporation of the City of Hamilton, respondent

[2002] O.J. No. 283

58 O.R. (3d) 37

155 O.A.C. 225

2002 CanLII 16893

52 W.C.B. (2d) 484

Docket No. C35814

Ontario Court of Appeal
Toronto, Ontario

Weiler, Sharpe and Simmons JJ.A.

Heard: December 7, 2001.
Judgment: January 29, 2002.

(36 paras.)

On appeal from the judgment of Justice Nick Borkovich dated December 1, 2000 dismissing a summary conviction appeal from the acquittal by Justice Stanley W. Long.

Counsel:

Bruce Arnott and Brian Blumenthal, for the appellant. Mark Mills and Jacqueline Lund, for the respondent.

The judgment of the Court was delivered by

1 **SHARPE J.A.**:-- This appeal arises from a prosecution under the Occupational Health and Safety Act, R.S.O. 1990, c. O.1 ("OHSA"). An employee of the respondent was fatally injured by a reversing dump truck. After five days of evidence, the trial judge granted the respondent's motion for a directed verdict. The charges particularized the duty of the employer under s. 104 of Ontario Regulation 213/91 (the "Regulation") to provide a signaller in certain circumstances. The trial judge ruled that while there was evidence that a signaller was required, the evidence also established that the deceased worker was acting as the signaller on the day in question. The trial judge ruled that in view of the wording of the charge, it was not open to the Crown to prove the offence by showing that the signaller failed to carry out the duties prescribed by s. 106 of the Regulation. The Crown's appeal to the Superior Court of Justice was dismissed. The Crown appeals, with leave, to this court.

FACTS

2 On July 17, 1997 Paolo Faustini, an employee of the respondent, was killed when he was run over by a reversing dump truck. At the time of the accident, Faustini was the lead hand on a construction crew resurfacing a road. The resurfacing work included the deposit of a layer of crushed stone from a spreader attached to the back of a dump truck. The spreader was used while the truck reversed.

3 The evidence at trial established that on the day in question, Faustini was acting as both signaller and as the operator of the spreader. There was evidence that when the truck is reversing and stone is being laid, the attention of the operator of the spreader must be on the flow of the crushed stone. The rate of flow of the stone has to be adjusted, using the lever at the side of the spreader, to compensate for changes in the speed of the truck. There are also levers at the back of the spreader used to adjust the width of the spread. These levers are ordinarily adjusted when the truck is stationary, but occasionally they are adjusted by hand or with a shovel while the truck is reversing. To operate or adjust these levers, the worker has to stand directly behind the spreader where the driver cannot see him. The box of the truck obstructs the truck driver's view of the path of travel in reverse. In particular, the driver can see nothing behind the box, including the spreader.

4 The driver of the truck testified that on the day in question Faustini was operating the spreader and giving him signals. As the truck reversed for the final time, the driver could see Faustini in the driver's side rear view mirror. Faustini was standing on an embankment within one foot of the spreader. He had one hand on the handle of the spreader and one hand on the lever controlling the gate of the spreader. He appeared to be looking underneath the spreader to regulate the flow of the stone. The driver reversed on Faustini's signal. The road turned to the left and the driver looked at his passenger side mirror. As the truck reversed, the driver looked back through the driver's side mirror. He saw no one and continued to reverse. No one actually saw the truck strike Faustini. The driver felt a bump, but only realized the truck had run over Faustini when another worker saw Faustini's body laying fifteen to twenty feet in front of the truck.

5 The respondent was charged on an information containing the following three counts:

(1) ... failing, as an employer, to ensure that the measures and procedures prescribed by section 104 of Ontario Regulation 213/91, were carried out at a project located in a laneway known as Jackson's Lane, running off Lake Avenue, in the City of Hamilton, contrary to section 25(1)(c) of the Occupational Health and Safety Act, R.S.O. 1990, c. O.1.

Particulars: The accused failed to ensure that the operator of a dump truck was assisted by a signaller. A worker, Paolo Faustini, was killed.

(2) ... failing, as an employer, to take every precaution reasonable in the circumstances for the protection of a worker at a workplace located in a laneway known as Jackson's Lane, running off lake Avenue, in the City of Hamilton, contrary to section 25(2)(h) of the Occupational Health and Safety Act, R.S.O. 1990, c. O.1.

Particulars: The accused failed to take the reasonable precaution of implementing procedures whereby a worker operating levers at the back of a dump truck would not be endangered by the truck reversing. A worker, Paulo Faustini, was killed.

(3) ... failing, as an employer, to take every precaution reasonable in the circumstances for the protection of a worker at a workplace located in a laneway known as Jackson's Lane, running off Lake Avenue, in the City of Hamilton, contrary to section 25(2)(h) of the Occupational Health and Safety Act, R.S.O. 1990, c. O.1.

Particulars: The accused failed to take the reasonable precaution of having a signaller assist the operator of a dump truck where the operator did not have a clear view of the intended path of travel. A worker, Paolo Faustini, was killed.

LEGISLATION

6 As appears from the information, the respondent was charged under s. 25(1)(c) and 25(2)(h) of the OHSA:

25.(1) An employer shall ensure that,

(c) the measures and procedures prescribed are carried out in the workplace;

...

25.(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

(h) take every precaution reasonable in the circumstances for the protection of a worker; ...

7 "Prescribed" is defined by s. 1(1):

"prescribed" means prescribed by a regulation made under this Act.

8 Sections 104, 105 and 106 of the Regulation provide as follows:

104. No vehicle, machine or equipment, or crane or similar hoisting device, or shovel, backhoe or similar excavating machine shall be operated unless the operator is assisted by a signaller,

(a) where the operator's view of the intended path of travel of any part of it or its load is obstructed; or
(b) where it is in a location in which a person may be endangered by any part of it or its load.

105. An operator of a vehicle, machine or equipment, or crane or similar hoisting device, or shovel, backhoe or similar excavating machine who is required to be assisted by a signaller shall operate as directed by the signaller.

106.(1) A signaller shall be a competent worker and shall not perform other work while acting as a signaller.

(2) A signaller,

(a) shall be clear of the intended path of travel of the vehicle, machine or equipment, crane or similar hoisting device, shovel, backhoe or similar excavating machine or its load;
(b) shall be in full view of the operator of the vehicle, machine or equipment, crane or similar hoisting device, shovel, backhoe or similar excavating machine;
(c) shall have a clear view of the intended path of travel of the vehicle, machine or equipment, crane or similar hoisting device, shovel, backhoe or similar excavating machine or its load; and
(d) shall watch the part of the vehicle, machine or equipment, crane or similar hoisting device, shovel, backhoe or similar excavating machine or its load whose path of travel the operator cannot see.

(3) The signaller shall communicate with the operator by means of a telecommunication system or, where visual signals are clearly visible to the operator, by means of prearranged visual signals.

JUDICIAL HISTORY

(a) Trial judgment

9 After five days of evidence, the respondent brought a motion for a directed verdict. The trial judge found that the evidence was clear that the deceased, Paul Faustini "was, at all material times, a signaller. That was his job and that is what he was doing." The trial judge rejected the Crown's submission that a signaller in s. 104 means a signaller performing the duties defined by s. 106, and ruled that evidence that Faustini was also doing the work of a spreader could not be relied upon as evidence of the offence charged. The trial judge held that s. 106 was a different offence and that as the charges had been laid under s. 104, the Crown could not ask for a conviction on the basis of a departure from the requirements of s. 106:

> The accused could have been charged that the signaller was doing other work, such as spreader, that the vehicle was not clear of the intended path of travel, etcetera. These are all under Section 106, not 104. ...
>
> In my view there is no ambiguity in Section 104. There is no ambiguity what the word "signaller" means ... I do not agree with the Crown that I should read in Section 106 in order to find what the duties of signaller are because the witnesses told me. The section [104] is clear, "a signaller". The deceased was giving the truck driver, Mr. Carducci, signals at various times on the relevant day of July the 17th, 1997.

10 Count 3 made no reference to s. 104, but the Crown had particularized that charge in terms of failure to have a signaller. The trial judge ruled that as the evidence demonstrated that Faustini was the signaller on the day in question, there was no evidence to support that charge.

(b) Summary Conviction Appeal

11 The Crown's summary conviction appeal to the Superior Court of Justice was dismissed by Borkovich J. who gave brief oral reasons stating that he could find no error in the judgment of the trial judge.

(c) Leave to Appeal

12 Leave to appeal to this court was granted by Carthy J.A. who stated: "This is an important statute, and if it is to be enforced there must be no doubt as to how to lay charges for its breach." It was noted that the same point had been differently decided in other cases [see R. v. Hard-Rock Paving Company, unreported, January 14, 2000, Ont. C.J.; R. v. Briscoe and Smith Construction Company Arnprior Ltd., [1993] O.J. No. 2265, September 7, 1993, Ontario Court (Prov. Div.)].

13 The appellant appeals the trial judge's ruling that a directed verdict be entered on counts 1 and 3 of the information.

ISSUE

14 The following issue arises on this appeal:

> Where an employer is charged under the OHSA with failing to provide a signaller as required by s. 104 of the Regulation, may the offence be proved by evidence showing that the signaller failed to satisfy the requirements of s. 106 of the Regulation?

ANALYSIS

15 I respectfully disagree with the way the trial judge and the summary conviction appeal judge interpreted the Regulation and the charges faced by the respondent. It is my view that on a proper construction of the Regulation and the charges the respondent faced, there was some evidence upon which a properly instructed trier of fact could make a finding of guilt and as such the motion for a directed verdict should have been dismissed. I arrive at that conclusion for the following reasons.

16 The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

17 This principle has been recognized and applied in several recent decisions of this court. In R. v. Timminco Ltd. (2001), 54 O.R. (3d) 21 (C.A.) at 27, Osborne A.C.J.O. stated:

> The Occupational Health and Safety Act is a public welfare statute. The broad purpose of the statute is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. It should be interpreted in a manner consistent with its broad purpose.

18 Laskin J.A. adopted the same principles when interpreting the Highway Traffic Act, R.S.O. 1990, c. H.8, s. 84.1 dealing with the hazard of "flying truck wheels" in Ontario (Minister of Transport) v. Ryder Truck Rental Canada Ltd. (2000), 47 O.R. (3d) 171 at 174:

> The modern approach to statutory interpretation calls on the court to interpret a legislative provision in its total context. The court should consider and take into account all relevant and admissible indicators of legislative meaning. The court's interpretation should comply with the legislative text, promote the legislative purpose, reflect the legislature's intent, and produce a reasonable and just meaning [Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994), at p. 131.] The Supreme Court has repeatedly affirmed this approach to statutory interpretation, most recently in R. v. Gladue, [1999] 1 S.C.R. 688 at p. 704, 171 D.L.R. (4th) 385, where Cory and Iacobbucci JJ. wrote:
>
> > As this Court has frequently stated, the proper construction of a statutory provision flows from reading the words of the provision in

> their grammatical and ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament. The purpose of the statute and the intention of Parliament, in particular, are to be determined on the basis of intrinsic and admissible extrinsic sources regarding the Act's legislative history and the context of its enactment ...

19 In Ontario (Workplace Safety and Insurance Board) v. Hamilton Health Sciences Corp. (2000), 51 O.R. (3d) 83 at p. 87, Rosenberg J.A. adopted a similar approach when interpreting the Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A:

> The starting point for the interpretation of the statutory provisions involved in this appeal is s. 10 of the Interpretation Act, R.S.O. 1990, c. I.11.
>
> 10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and *shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit*.
>
> (Emphasis added)
>
> By its terms, s. 10 applies to penal statutes. Iacobucci J. considered the application of s. 10 in Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193. He held that s. 10 directs the court to not only consider the plain meaning of the specific provisions in question, but the scheme of the Act as a whole, its object and the intention of the legislature.

20 It remains true, of course, that penal legislation, even of the public welfare variety, must also be interpreted in a manner consistent with the procedural rights of the accused. The accused is entitled to have full and fair notice of the charges and to make full answer and defense to those charges. In the end, a balance must be struck to arrive at an interpretation that promotes the larger objects of the legislation and at the same time respects the procedural rights of the accused.

21 The charges at issue here were brought pursuant to the Provincial Offences Act, R.S.O. 1990, c. P.33. The legislative intention reflected in that Act was well captured by MacDougall J. in Ontario (Ministry of Labour) v. Discovery Place Ltd., [1996] O.J. No. 690 at para. 18, a case dealing with a prosecution under the OHSA:

> The overall philosophy of the Provincial Offences Act is to ensure that technical objections do not impede the arrival of a verdict on the merits.

22 Guided by these interpretive principles, I cannot accept the respondent's submission that ss. 104 and 106 of the Regulation should be read as, in effect, creating two distinct offences, each of which must be read and prosecuted without reference to the other section. In my view, both provisions reflect the legislature's intention to deal with precisely the same occupational risk of harm, and on a fair reading of their terms, they are properly read together as complementing each other. This interpretation best promotes the public safety and welfare purpose of the legislation, while fully respecting the procedural rights of the accused.

23 Section 104 creates a duty on employers to provide a signaller in certain very well defined situations. Section 106 prescribes the duties of a signaller where one is required. While I agree with the respondent that s. 106 is not, strictly speaking, a definition section, I cannot read it as reflecting a legislative intent to create a separate and distinct offence that must be prosecuted without reference to s. 104. It is, rather, a provision that explains and amplifies the duty created by s. 104 and the other sections of the Regulation that require a signaller. Section 106 does not, standing by itself, create an offence distinct from and independent of s. 104 or some other provision creating a duty to have a signaller. Unless a signaller is required by some other provision, there is no basis for charging an accused for failing to have a signaller perform the duties prescribed by s. 106. Thus, if a charge were laid or particularized under s. 106, it would be necessary to have reference to s. 104 or some other provision requiring a signaller.

24 In my view, this feature of s. 106 seriously undermines the foundation of the respondent's argument that ss. 104 and 106 prescribe different and distinct duties and are therefore separate and distinct charging sections that must be read independently from one another. If the charge were particularized under s. 106, as the respondent says it should have been, it would be necessary also to have reference to s. 104 or to some other section that creates a duty to have a signaller. If a charge under s. 106 could only be made out by reference to some other section, I fail to see why it is not proper to read a charge that particularizes s. 104 in the light of the requirements of s. 106.

25 In the circumstances of the present case, it is my view that the charge was properly laid with reference to s. 104 as that section is the source of an employer's duty to have a signaller. We are not dealing with independent offences, each of which has its own definition and each of which must be separately and distinctly charged to avoid confusion or unfairness to the accused. We are dealing with a single duty that is created by s. 104 and more fully elaborated by reference to s. 106, and that can give rise to an offence by reference to either section.

26 This feature of the relationship between ss. 104 and 106 distinguishes the decision of this court in R. v. Art Ellis Construction (St. Catherines) Ltd., [1968] 1 O.R. 491. In that case, the accused was charged with failure to furnish prescribed equipment and materials, but the evidence proved the different offence, created in a different subsection, of failing to use and to maintain materials in the manner prescribed. There, the statute created two separate and distinct duties giving rise to separate and distinct offences. Here, as I have indicated, the same duty created by one section is elaborated by another section.

27 There is no suggestion that the respondent was in any way misled by the wording of the information as to the nature of the charge it faced. Nor would reading s. 104 together with s. 106 cause the respondent any prejudice in the preparation of its defense.

28 Given the relationship between ss. 104 and 106, it is my view that the principle expressed in cases such as R. v. Saunders, [1990] 1 S.C.R. 1020 that the Crown must prove the charge as particularized is not applicable. In Saunders, the Crown particularized the offence as conspiracy to traffic in heroin, but proved a conspiracy to traffic in a different drug. The Supreme Court of Canada found that the accused could only be convicted of the offence as particularized. In the case at bar, the Crown has not alleged one offence and then proved another to the prejudice of the accused. Here the Crown led evidence on the very same offence that was charged with no prejudice to the accused.

29 Quite apart from s. 106 and its use to explain or amplify the extent of the duty created by s. 104, it seems to me that there was some evidence of an offence under s. 104 alone. I would read the charges against the respondent as relating to a specific moment in time, namely, the point at which the dump truck was reversing with the driver's view of the intended path of travel obstructed when the fatal accident occurred. If there had been a signaller assigned to the job that day who had gone off for a break while the truck was reversing without watching to make sure the movement could be safely made, surely the respondent would have been in breach of s. 104. The respondent was required, at that precise and critical moment, to have a signaller directing the reversing dump truck. In my view, there is no meaningful distinction between the example I have just given and the situation where the signaller ceases to act as signaller and turns his attention to spreading the stone. The driver's evidence was that while the deceased signalled him to reverse the truck, as he reversed, he could see no one behind the truck. This amounted to some evidence that at the precise moment the accident occurred, no one was acting as the signaller. In my view, it was open to a properly instructed trier of fact to make a finding on that evidence that the employer failed to live up to its duty to provide a signaller as required by s. 104.

30 In any event, even if there is a defect in count 1 on account of the specific reference to s. 104, the same cannot be said of count 3. That count does not refer to s. 104, and is not based upon an allegation that a specific regulation was breached, but rather that the respondent failed "to take every precaution reasonable in the circumstances for the protection of a worker" contrary to s. 25 (2)(h) of the Act. As there was, in my view, some evidence that the employer failed to provide a signaller at the relevant time, I do not agree that there was a complete absence of evidence of the charge as particularized by the Crown.

31 Finally, I turn to the question of amendment. Although the appellant did not seek an amendment at trial or in its factum, we invited counsel to provide us with written submissions as to whether it would be appropriate at this stage of the proceedings to allow the appellant to amend the information to include further particulars related to the requirements of s. 106. While the appellant maintains that no amendment is required, it submits that if necessary, the information should be amended in the following manner. Count 1 should be amended by adding the words "who was not performing other work while acting

as a signaller: "after the word "signaller". Count 3 should be amended by adding the words "as described in Ontario Regulation 213/91" after the word "signaller".

32 I reject the submission of the respondent that we lack the power to amend the information in the circumstances of this appeal. The Provincial Offences Act makes generous provision for the powers of an appellate court:

> s. 121 Where an appeal is from an acquittal, the court may, by order,
>
> (a) dismiss the appeal; or
> (b) allow the appeal, set aside the finding and,
>
> (i) order a new trial, or
> (ii) enter a finding of guilt with respect to the offence of which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted in law.
>
> s.125 Where a court exercises any of the powers conferred by sections 117 to 124, it may make any order, in addition, that justice requires.

33 These provisions are essentially the same as the Criminal Code provisions considered by the Supreme Court of Canada in Elliott v. The Queen (1977), 38 C.C.C. (2d) 177. There it was held to be appropriate to amend a charge to conform with the evidence adduced at trial and to order a new trial on the amended charge. Ritchie J., writing for the majority, stated at p. 204 that an order allowing an amendment could be made even where the order for a new trial depended upon the amendment:

> In my view, When Parliament authorized the Court of Appeal, in the exercise of its power, to order a new trial, to "make any order, in addition, which justice requires" it must be taken as having authorized that Court under those circumstances to make any additional order which the ends of justice require whether the order for a new trial is dependent upon the additional order or not. I do not think that the wide powers conferred on the Court of Appeal by s. 613(8) are to be narrowly construed but rather that they are designed to ensure that the requirements of the ends of justice are met, and are to be liberally construed in light of that overriding consideration.

34 I accept the respondent's submission that an amendment should not be allowed under s. 125 where the effect would be to charge a completely different offence. However, in this case, as in Elliott, the effect of the amendment is not to substitute a different charge, but rather to provide further particulars of the same charge: namely, failure to provide a signaller as required by the Regulations, contrary to OHSA s. 25(1)(c), and failure to take every precaution reasonable in the circumstances for the protection of a worker, contrary to OHSA s. 25(2)(h).

35 In my view, in view of all the circumstances, the respondent would not be unfairly prejudiced by amending the information at this stage. Accordingly, while it is my view an amendment is not, strictly speaking required, for the avoidance of any possible uncertainty, I would allow the appellant to amend the information in the terms set out above.

CONCLUSION

36 For these reasons, I would allow the appeal, set aside the directed verdict of acquittal and order a new trial.

SHARPE J.A.
WEILER J.A. -- I agree.
SIMMONS J.A. -- I agree.

Case Name:

McLennan Estate (Re)

IN THE ESTATE OF John Keith McLennan, deceased
IN THE MATTER OF a Passing of Accounts for the period June 29, 1999 to May 31, 2002

[2002] O.J. No. 4716

[2002] O.T.C. 948

48 E.T.R. (2d) 59

118 A.C.W.S. (3d) 763

Court File No. 02-107/01

Ontario Superior Court of Justice

Day J.

Heard: August 14 and September 3, 2002.
Judgment: December 3, 2002.

(52 paras.)

Executors and administrators -- Appointment, qualification and tenure -- Administrators, appointment -- Pendente lite -- Administrators, tenure -- Compensation -- Amount of compensation -- Calculation -- Receivers -- Appointment of.

Motion by the McLellan Estate for directions regarding the calculation of fees to be paid to the Trust Company of Bank of Montreal as the Estate Trustee During Litigation and directions as to when the Trust Company's authority ended. The Trust Company moved for an order appointing it the receiver of the Estate. McLellan's second wife was appointed as executrix and beneficiary under McLellan's will. McLellan's son from a previous marriage challenged the validity of the will. The Trust Company was appointed as Estate Trustee During Litigation. Its compensation was set out as percentages relating to the size of the estate. The litigation was settled and the court ordered that the Trust Company continue in its role until the determination of whether it had a first charge over the estate assets for its fees. The court later determined this matter in favour of the Trust Company.

HELD: Motion allowed and cross-motion dismissed. The Trust Company's authority ended when it was determined that it had a first charge over the estate assets. The percentages set out for its compensation were not modified by the words "shall be related to the work done and time spent during the administration of the estate". The value of any encumbrances on real property was to be deducted from the gross value of the estate for the purpose of determining the Trust Company's fees. The Trust Company did not qualify to be a receiver, as any receiver for the estate had to be a disinterested party without a conflict of interest.

Statutes, Regulations and Rules Cited:

Estates Act, R.S.O. 1990, c. E-21, s. 28.

Counsel:

Bryan Finlay, Q.C. and Malcolm S. Archibald, Q.C., for Nelson Duncan McLennan as Executor and Trustee under the Last Will and Testament of John F. McLennan, deceased. Harry Underwood and Erica J. Baron, for the Estate Trustee during Litigation, Trust Company of Bank of Montreal.

DAY J.:--

Introduction

1 The Estate of John F. McLennan ("JFM's Estate") brings this motion seeking directions from the Court regarding the proper calculation of the fees to be paid to the Estate Trustee During Litigation, the Trust Company of Bank of Montreal ("TCBM"). JFM's Estate also seeks directions as to when TCBM's authority ended (or will end) as Estate Trustee During Litigation.

2 TCBM brings a cross-motion seeking to be appointed as receiver of the Estate of John Keith McLennan ("JKM's Estate").

History of Proceeding

3 John Keith McLennan ("JKM") was the son of John F. McLennan (McLennan Sr.). JKM was in the business of property development and used various corporations to carry on his business. JKM relied heavily on his father's financial support in his business endeavours.

4 JKM died on May 21, 1998. His second wife, Hilary McLennan ("Hilary"), is sole executrix and beneficiary under his will. A Certificate of Appointment of Estate Trustee with a Will was issued to Hilary on April 7, 1999.

5 Shortly after the Certificate of Appointment was issued, Kevin Lee McLennan, a son from JKM's previous marriage, challenged the validity of JKM's will by issuing and serving a Notice of Objection. The Notice of Application issued June 18, 1999 ("Will Application");

the Will Application sought directions and the appointment of a trustee for JKM's Estate during the litigation.

6 By order dated June 25, 1999, Lissaman J. appointed TCBM Estate Trustee During Litigation to administer the estate during the validity challenge of JKM's will. Lissaman J.'s Order includes the following two paragraphs regarding TCBM's compensation:

> 14. THIS COURT ORDERS that The Trust Company of Bank of Montreal, as Estate Trustee During Litigation, shall be compensated for its services as follows:
>
> a) 2.00% on the first $10,000,000.00;
>
> b) 1.50% on the next $10,000,000.00;
> c) 1.00% on the balance,
>
> with a minimum fee of $15,000.00 payable. The foregoing shall be payable in interim amounts, on a monthly basis or such frequency as The Trust Company of Bank of Montreal shall consider reasonable, and shall be related to the work done and time spent during the administration of the Estate during the first year of its appointment. At the end of the first year, any assets not then realized shall be deemed to be realized at fair market value.
>
> [...]
>
> 18. THIS COURT ORDERS that, in the event the administration of the Estate exceeds one year from the date of the appointment of The Trust Company of Bank of Montreal, as Estate Trustee During Litigation, that a Care & Management Fee shall be payable on the average market value of assets held on a per annum basis at the following rates: (a) 2/5ths of 1.00% on the average market value of assets held; and, 5.00% on all income collected. [Emphasis added.]

Settlement of the Will Application

7 On a motion for directions on May 18, 2000, Cullity J. made the following Endorsement on advice from the parties that they expected to settle the matter shortly:

> In view of the parties' confidence that a settlement has been reached that, if necessary, will be approved by the Court, the motions of the Estate Trustee During Litigation were not proceeded with. The Estate Trustee During Litigation is to endeavour to reach agreement with the interested parties with respect to its compensation and, pending determination of the matter, is to move for an order granting or confirming that it has a lien on the assets of the estate for such compensation and any disbursements. Such motion is to be brought at the earliest practicable opportunity and, pending its determination, the Estate Trustee During Litiga-

> tion shall continue to act in that capacity for the purposes of preserving the assets of the estate and may retain possession of the assets of the estate without prejudice to the right of any interested party or person to move to vary this order on 24 hours notice to the other parties in the event that any matter of urgency requires such a variation. [Emphasis added.]

8 The will challenge litigation settled and the Will Application was discontinued on June 9, 2000 by Order of Cullity J. However, the parties were not able to agree on TCBM's fees.

September 6, 2000 Order of Greer J.

9 As a result of the parties' inability to agree on TCBM's fees, TCBM brought a motion before Greer J. for a declaration that it had a first charge against the income and assets of JKM's Estate, and for relief regarding the payment of its fees and disbursements. Hilary brought a cross-motion for an order declaring that TCBM was discharged from its duty as Estate Trustee During Litigation when the will challenge litigation settled (i.e. TCBM was functus).

10 By Order dated September 6, 2000, Greer J. granted TCBM a first charge over JKM's Estate's assets including the shares of the companies holding the assets and the underlying assets themselves (held by those companies). Greer J. dismissed Hilary's cross-motion seeking to declare TCBM functus.

11 Although JFM's Estate appealed Greer J.'s order, it formally abandoned its appeal on January 30, 2002.

Issues

12 The issues before the Court on this motion as set out in the Notice of Motion are as follows:

1) Have the functions of TCBM as Estate Trustee During Litigation terminated with or changed after the determination on September 6, 2000 of the motion regarding TCBM's compensation? If TCBM's functions as Estate Trustee During Litigation did not terminate on September 6, 2000, when did or will they terminate?
2) Does the provision in paragraph 14 of the Order of Lissaman J. dated June 25, 1999 that TCBM's compensation "shall be related to the work done and time spent during the administration of the Estate during the first year of its appointment" qualify the application of the percentages set out in the same paragraph?
3) Are the percentages set out in paragraphs 14 and 18 of the Order of Lissaman J. dated June 25, 1999 to be applied to the net or gross value of real property?
4) Are the percentages set out in paragraphs 14 and 18 of the Order of Lissaman J. dated June 25, 1999: (a) to be applied to the value of the shares owned by John Keith McLennan; or (b) to be directly applied to the

value of the assets owned by the various corporations in which John Keith McLennan owned shares?

13 The issues before me on the cross-motion are as follows:

1) Should TCBM be appointed as receiver of the Estate of John Keith McLennan ("JKM's Estate") effective August 14, 2002 with the same powers as set out in the Order of Lissaman J. dated June 25, 1999?
2) In the event that TCBM should be appointed as receiver of JKM's Estate, should TCBM be entitled to compensation as receiver in the same manner as set out in paragraph 18 of that Order calculated on gross values?

Findings

Issue 1:

Have the functions of TCBM as Estate Trustee During Litigation terminated with or changed after the determination on September 6, 2000 of the motion regarding TCBM's compensation? If TCBM's functions as Estate Trustee During Litigation did not terminate on September 6, 2000, when did or will they terminate?

14 The litigation for which TCBM was appointed Estate Trustee During Litigation was completed on June 9, 2000. The sole authority for TCBM continuing to act as Estate Trustee During Litigation after the discontinuance of the Will Application on June 9, 2000 was Cullity J.'s Endorsement dated May 18, 2000. Cullity J. only authorized TCBM to continue to act as Estate Trustee During Litigation for the purposes of preserving the assets of the estate. The authorization continued only pending the determination of a motion for an order confirming that TCBM had a lien on the assets of JKM's Estate for its compensation.

15 Greer J. granted the lien in her Order dated September 6, 2000; this arose from the motion referred to in Cullity J.'s Endorsement of May 18, 2000. Since Greer J. determined the motion and the issue of the lien, her Order dated September 6, 2000 ended TCBM's authorization to act as Estate Trustee During Litigation.

16 TCBM argues, that because part of the motion before Greer J. was adjourned, it still has the authority to act as Estate Trustee During Litigation pursuant to the Endorsement of Cullity J. dated May 18, 2000. I agree with the moving party's submission that such a position is untenable, because the Order of Greer J. dated September 6, 2000 met the requirements set out in Cullity J.'s Endorsement dated May 18, 2000. The motion that Cullity J. referred to in his Endorsement dated May 18, 2000 was a motion "for an order granting or confirming that [TCBM] has a lien on the assets of the estate for such compensation and any disbursements." Greer J. made such an order on September 6, 2000. Such is therefore the motion contemplated by Cullity J. Although paragraph 12 of Greer J.'s Order dated September 6, 2000 adjourned parts of the motion to be brought before her if needed, this Order was made two years ago. TCBM did not bring on this part of its motion before Greer J. TCBM cannot rely on a delay for which it is responsible to assert that it is still acting as Estate Trustee During Litigation more than two years after the discontinuance of the Will Application. As well, Cullity J. specified in his Endorsement dated May 18,

2000 that TCBM's motion for an order confirming that it had a lien on the assets of JKM's Estate for its compensation had to be brought "at the earliest practicable opportunity."

17 Greer J. recognized in her Reasons dated September 6, 2000 that "the duties of an Estate Trustee During Litigation come to an end when the litigation ceases" and that Cullity J.'s Endorsement dated May 18, 2000 "extends the authority of TCBM until this Motion has been heard and determined." Accordingly, the functions of TCBM as estate trustee terminated on September 6, 2000.

18 At first glance, it seems contradictory to interpret Greer J.'s Order as ending TCBM's authority when she explicitly dismissed Hilary's cross-motion seeking a declaration that TCBM was discharged. However, Hilary's cross-motion requested TCBM be discharged if Greer J. dismissed its application. Greer J. did not dismiss TCBM's application; she granted most of the relief requested and adjourned certain issues. Hilary was, in essence, asking the Court to declare that TCBM's authority had ended as of June 9, 2000. Greer J. refused, correctly, as TCBM's authority continued until the issue of the lien for compensation was resolved. It was Greer J.'s Order that resolved the issue of the lien; therefore, TCBM's authority ended on September 6, 2000, the date of Greer J.'s Order, and not before that.

Issue 2:

> Does the provision in paragraph 14 of the Order of Lissaman J. dated June 25, 1999 that TCBM's compensation "shall be related to the work done and time spent during the administration of the Estate during the first year of its appointment" qualify the application of the percentages earlier set out in the same paragraph?

19 The authority for payment of compensation to an Estate Trustee During Litigation is set out in section 28 of the Estates Act (R.S.O. 1990, c. E-21). This provision states, in part:

> ... the court may direct that [the estate trustee] shall receive out of the property of the deceased such reasonable remuneration as the court considers proper.

20 Paragraph 14 of the Order of Lissaman J. dated June 25, 1999 outlined the manner in which compensation of TCBM is to be calculated (reproduced above at paragraph 6).

21 In its Statement of Accounts, TCBM calculates its fee for its first year as Estate Trustee During Litigation strictly by applying the percentages set out in the first part of paragraph 14 of the Order of Lissaman J. The moving party takes the position that the application of the percentages is qualified by the last part of paragraph 14 stating that the compensation "shall be related to the work done and time spent during the administration of the Estate during the first year of its appointment."

22 Paragraph 14 of the Order of Lissaman J. is consistent with the principle set out in section 28 of the Estates Act that the remuneration of an Estate Trustee During Litigation must be reasonable. It is also consistent with the two-step approach adopted by the courts

when determining an estate trustee's compensation. That approach is as follows: first, the court applies the "percentages approach;" second, it tests the result of the percentages approach against the "five factors approach" in order to make sure that the application of the percentages leads to an amount that is fair and reasonable. The five factors to consider are the following:

(1) the size of the trust;
(2) the care and responsibility involved;
(3) the time occupied in performing the duties;
(4) the skill and ability shown; and
(5) the success resulting from the administration.

See Re Jeffery Estate (1990), 39 E.T.R. 173 at 177-178, 179 (Ont. Surr. Ct.); and Laing Estate v. Hines (1998), 41 O.R. (3d) 571 at 573-574 (C.A.).

23 The moving party argues the compensation of TCBM should be determined by applying the percentages set out in paragraph 14 of the Order of Lissaman J., and testing the result against the "five factors approach" to arrive at an amount of compensation that is reasonable and related to the work done and time spent by TCBM.

24 The Responding Party takes the position that TCBM is entitled to compensation calculated on the following basis for the first year of administration:

(a) 2.00% on the first $10,000,000.00;
(b) 1.50% on the second $10,000,000.00; and
(c) 1.00% on the balance.

25 The fees claimed by TCBM are calculated on the formula set out in the Lissaman Order, taking into account the gross value of all assets held either directly or beneficially for the Estate. TCBM argues that since the Lissaman Order clearly set out TCBM's fees on a percentage basis, it did not keep track of its time spent administering the Estate. It would be time-consuming and expensive for TCBM to perform this exercise after the fact to justify its fees.

26 In my view, a parsing of paragraph 14 of the Lissaman Order is revealing: First, it provides for compensation on the basis of a calculable mathematical formula. Second, it provides for interim payments in TCBM's reasonable discretion. Third, it provides that the foregoing compensation shall be related to work done and time spent in the first year following appointment.

27 The third such provision describes what the foregoing compensation is for. It does not say that the foregoing compensation shall be modified by or subject to an assessment of work done and time spent. In fact, the order says nothing about the foregoing compensation being anything other than just that, namely the foregoing compensation. It simply says that the formulated compensation shall relate to the work done and time spent from which I can only conclude that it is the formulated compensation that will be the basis of compensation for the work done and time spent. I regard the moving party as inviting a tortured interpretation beyond what the language supports.

28 Therefore, the language "shall be related to the work done and time spent during the administration of the estate during the first year of its appointment" does not compromise or qualify the percentages earlier set out in the same paragraph.

Issue 3:

> Are the percentages set out in paragraphs 14 and 18 of the Order of Lissaman J. dated June 25, 1999 to be applied to the net or gross value of real property?

29 My approach in considering paragraph 14 of the Lissaman J. Order differs from my approach in considering paragraph 18, whether or not there will be any ultimate consequences on the difference.

30 The issue of whether paragraph 14 refers to net or gross value emerges out of a deficiency in the language of paragraph 14 of the Order of Lissaman J. I am told by counsel that the form and content of the Order of Lissaman J. was drafted by counsel and that the Order issued as a consent order which would call for no judicial input. Paragraph 14 provides for compensation as follows:

a) 2.00% on the first $10,000,000.00;
b) 1.50% on the next $10,000,000.00; and
c) 1.00% on the balance.

This language begs the question: 2.00% of net or 2% of gross on the first $10,000,000? The same applies for the next two levels.

31 Counsel for the moving party refers to the Laing Estate v. Hines (1999), 41 O.R. (3d) 571 a decision of the Ontario Court of Appeal at 573:

> The five factors set out by Teetzel J. have been recognized as appropriate considerations in determining "fair and reasonable" compensation under s. 61 of the Trustee Estate: e.g. see Re Mortimer, [1936] O.R. 438 at p. 441, [1936] 3 D.L.R. 380 (C.A.).
>
> In a further effort to bring predictability to the assessment of a trustee's compensation, the practice developed of determining the trustee's compensation as a percentage of the probate value of the estate. These percentages are sometimes referred to as the "tariff guidelines." These guidelines are not sanctioned by statute or regulation, but were developed by the estates bar and judges of the former Surrogate Court: B. Schnurr, Quantifying Executor's Compensation, Canadian Bar Association, Continuing Legal Education, November 8, 1991, pp. 5-7. Those guidelines are described in Re Jeffery Estate (1990), 39 E.T.R. 173 at p. 178 (Ont. Surr. Ct.):
>
> > There are many later cases which show that, in Ontario at least, a practice has developed of awarding compensation on the basis of 2 1/2 per cent percentages against the four categories of capital re-

> ceipts, capital disbursements, revenue receipts and revenue disbursements, along with, in appropriate cases, a management fee of 2/5 of 1 per cent per annum on the gross value of the estate ...

32 This is the standard by which compensation for executors is generally calculated where there is no order stating otherwise. In the present case, there is an Order departing from this general standard. Thus, the law as it applies to estates generally should be reviewed for persuasive influence only and not for binding principles. It should be noted that the rights and obligations spelled out in paragraph 14 emerge from the Order, not from estate practice generally. To begin with, the percentages are significantly different from general estate practice. Moreover, the dynamics of receipts and disbursements of capital and of revenue are absent in the facts of the case.

33 The Order of Lissaman J. dated June 25, 1999 does not specify whether the value of encumbrances on real property should be deducted when applying the percentages set out in paragraphs 14 and 18. The general practice in Ontario is to determine the estate trustee's compensation as a percentage of the probate value of the estate. The probate value of the estate is the gross value of the estate, without any reduction for the value of liabilities other than encumbrances registered against real property.

34 The moving party refers to C.S. Thériault, Widdifield on Executors and Trustees, 6th ed. (Scarborough: Carswell, 2002) at 11-12 and 11-13 which confirms that the value of any encumbrance on real property must be deducted when computing compensation:

> An executor is entitled to charge fees for the sale of real estate on the basis of capital realizations. If there was a mortgage outstanding at the date of death, resulting in a reduced probate value equal to the equity of the property, the realization fee will be the proceeds of sale less the mortgage paid off from those proceeds. If a mortgage is taken back on the sale, the amount capable of compensation as a capital receipt is only the cash down payment received on sale. The balance of the capital realization compensation is chargeable only as the capital of the mortgage is collected.
>
> See also: Re McColl (1881), 8 P.R. 480 at 480; and Re Johnson (1925), 29 O.W.N. 53 at 53.

Accordingly, encumbrances on real property should be deducted from the value of the estate for the purpose of calculating the executor's management fee.

35 I am persuaded by the logic of Widdifield when it comes to mortgaged property. The value of a specific piece of property against which there is a mortgage should not be more than the equity net of the mortgage in that piece of property. I do not arrive at the same conclusion as regards debts generally, which do not compromise the net value of any specific asset other than from a balance sheet perspective.

36 Unlike paragraph 14, paragraph 18 of the Order of Lissaman J. attaches a subject for calculation, namely, "2/5ths of 1.00% on the average market value of assets held; and, 5.00% on all income collected." On reflection, I see no reason to apply any different stand-

ard for interpretation of section 18 from section 14. Moreover, neither side raised any issue on interpretation of the terms "average market value of the assets held" or "income collected." Accordingly, the same criteria apply for interpretation of paragraphs 14 and 18 in the Order of Lissaman J. Therefore, the value of real property against which there is a mortgage is the net value.

Issue 4:

> Are the percentages set out in paragraphs 14 and 18 of the Order of Lissaman J. dated June 25, 1999: (a) to be applied to the value of the shares owned by John Keith McLennan; or (b) to be directly applied to the value of the assets owned by the various corporations in which John Keith McLennan owned shares?

37 JKM used various corporations to carry on business. The percentage of shares held by him in these corporations varied.

38 It is trite law that (i) a corporation is a legal entity distinct from its shareholders; (ii) the corporation's assets are legally owned by the corporation, not the shareholders; and (iii) shareholders hold shares in the corporation, not the assets of the corporation.

39 When it comes to an estate owning shares, the value of the assets owned by the estate is the value of the shares. No authority was presented to me in this matter that would allow piercing or lifting the corporate veil to value the underlying assets of the corporation as if they were owned directly by the estate. Thus, the percentages set out in paragraphs 14 and 18 of the Lissaman J. Order are to be applied to the value of the shares owned by JKM's estate, not the value of the underlying assets owned by the corporations in which the JKM owned shares.

Issue 5: The Cross-Motion by TCBM to be Appointed Receiver of the JKM Estate

40 In the circumstances of the findings above on the first issue, TCBM seeks to be appointed as receiver of the Estate with the same powers granted to it by the Lissaman J. Order. TCBM also seeks to be compensated as receiver in accordance with paragraph 18 of the Lissaman Order (based on the gross value of the Estate assets).

41 The court has a discretionary power to appoint a receiver where it is just and convenient to do so.

42 TCBM argues that:

(i) It is just and convenient to appoint TCBM as receiver having regard to the nature of the property and the rights of the parties.
(ii) TCBM and agents employed by TCBM to act for the Estate are significant creditors of the Estate.
(iii) Hilary McLennan may not be financially able, nor disposed, to continue to conduct the litigation, which will determine the solvency of the Estate. It would be unjust to the many unsecured creditors if that occurred.

(iv) Recovery of TCBM's fees and disbursements will be difficult, it not impossible absent a receiver.

(v) Given the complexity of the Estate, it would be time-consuming, expensive and inefficient for a receiver coming cold to the matter to familiarize itself with the convoluted affairs of the Estate. TCBM is the person most qualified to act for this Estate.

(vi) In any event, it may be impossible to find a party qualified to act as receiver willing to take on the administration of the Estate, given the Estate's lack of liquidity.

43 The moving party takes the following positions:

(i) A receiver may be appointed by the court where it appears to be just and convenient to do so. Given that the appointment of a receiver is particularly intrusive, this relief is granted sparingly. A court-appointed receiver is an officer of the court, not an agent of the creditor who applied for the appointment or the debtor. The receiver is accountable to the court which made the appointment. It is also accountable and owes fiduciary duties to all interested parties. The appointment of a receiver being an equitable remedy, the conduct of the parties is a relevant factor to be considered by the court.

(ii) The court has an obligation to appoint a receiver who is reasonably competent to perform the duties, as well as disinterested, impartial and able to deal fairly with the rights of all persons having an interest in the assets of the debtor. Not only must the receiver be impartial, disinterested and able to deal with the rights of all persons in a fair and even-handed manner, it must also appear to have those qualities. A conflict of interest, either real or reasonably to be apprehended, is the very antithesis of the state of disinterestedness required of a court-appointed receiver.

(iii) TCBM should not be appointed as receiver of JKM's Estate. TCBM is a major creditor of JKM's Estate and has received no compensation for its services to date. Consequently, it is not a disinterested party. TCBM would have a conflict of interest if it were appointed as receiver, and there would be a reasonable apprehension that it might lack impartiality and be unable to deal fairly with the rights of all interested parties.

(iv) TCBM should not be appointed as receiver of JKM's Estate because of its conduct. It has been in control of JKM's Estate without authority for almost two years, and has purported to act as Estate Trustee During Litigation while it was, in fact, acting in its personal capacity and trying to obtain payment of its fees. TCBM has done so despite the objections of Hilary, Executrix and beneficiary of JKM's Estate, and the Moving Party, a major creditor of JKM's Estate.

(v) The Order of Greer J. dated September 6, 2000 gave TCBM the right to move to have a receiver appointed for JKM's Estate within

60 days of the Order. TCBM did not bring such a motion. TCBM's Cross-Motion two years later is merely a tactic to remain in control of JKM's Estate and to continue to secure its claim for compensation which already totals more than $1.2 million, exclusive of legal fees.

44 At this time, Hilary is entitled to resume her responsibilities as executrix and trustee of JKM's estate. She has been so entitled since September 6, 2000.

45 If there were to be appointed a receiver in the interest of creditors, it should be a disinterested party without a conflict of interest. TCBM does not qualify in either respect even though it is well versed, competent and experienced in the estate.

46 Accordingly, the cross-motion of TCBM for its appointment as receiver of JKM's estate is denied.

Summary

47 On the first issue, TCBM's authority to act as Estate Trustee During Litigation ended on September 6, 2000, the date of Greer J.'s Order.

48 On the second issue, TCBM is entitled to compensation according to the percentages set out in paragraph 14 of Lissaman J.'s Order dated June 25, 1999. This compensation for the first year of appointment is not limited by "the work done and time spent during the administration of the Estate."

49 On the third issue, the percentages are to apply to the gross value of all property held by the Estate except real property against which there is a mortgage; the percentages apply to the net value of encumbered real property.

50 On the fourth issue, the percentages are to apply to the value of shares owned by JKM not the value of the assets owned by the corporations in which JKM owned shares.

51 On the cross-motion, TCBM's cross-motion to be appointed as a receiver is denied.

Costs

52 If the parties are unable to come to terms as to costs, I will be available to make a determination by appointment.

DAY J.

Indexed as:

McGauley v. British Columbia (B.C.C.A.)

Between
Alma McGauley, Dennis Guest, Margaret Jull, Barbara Hunter, Leonard Grodzki, Harold Dietrich Funk, Ross McLachlan, Evelyn Ruby Metke, John and Margaret Davidson, Arthur John Sansom, Bernard Webber, Ted Davies, Mary Louise Baehr, Vince Rabbitte, Charles Watson, Jean Morrison, Paul J. Pulle, Katherine Chernowski, Don McGreggor, Grace Brankley, Wanda Hewitt, Elizabeth Monthey, Plaintiffs, (Respondents), and Her Majesty the Queen in Right of the Province of British Columbia, James Henry Thomas, Douglas Jennings, Keith Sandercock, James Buchanan, Janice Barnes, Arild Dalsvaag, John P. Husdon, John R. Pitman, Dorothy E. Sleigh, Barbara Stafford, T. Eric Tongue, Penny A. Jones, Gail P. Thurber, W. Douglas Clarke, J.R. Bentley, Davis & Company, Pannell, Kerr, MacGillivray (formerly Pannell Kerr Forester, formerly Pannell Kerr Forester, formerly Campbell Sharp Nash and Field), Montreal Trust Company and Montreal Trust Company of Canada, Defendants, (Appellants)

[1989] B.C.J. No. 1699

39 B.C.L.R. (2d) 223

19 A.C.W.S. (3d) 678

Vancouver Registry: CA10945, CA10950, CA10994, CA10996 and

CA10967

British Columbia Court of Appeal

Macdonald, Southin and Cumming JJ.A.

Heard: August 17, 1989
Judgment: September 19, 1989

Corporations -- Cooperative suing defendants through trustee -- Individual depositors suing for same claims against same defendants -- Individuals' statement of claim struck out on appeal -- Only corporation entitled to sue for wrong done to it -- No fiduciary relationship established between defendants and individual depositors -- Cooperative Association Act, R.S.B.C. 1979, c. 66, ss. 1(a)(i), (iv), (vi), 3(1), (2)(b), 6(c)(i), 13(1)(i), (q), 14, 27(1), 30(2), 48(1) -- British Columbia Supreme Court Rules, 1976, R. 19(24).

This was an appeal from an order (88 DRS paragraph 55-109) dismissing an application under R. 19(24) for an order that the statement of claim of individual depositors of a cooperative be struck out on the ground that it disclosed no reasonable claim. The cooperative had suffered a financial collapse and actions were brought by the trustee of the cooperative and by individual depositors. The individual depositors claimed damages against defendants for negligence, breach of statutory duty, breach of fiduciary duty and breach of trust. The trustee's claims against the same defendants were the same. The pleadings in the actions were strikingly similar. The essence of the individual depositors' damage claim was that they suffered a diminution in the value of their deposits. The defendants submitted that the individual depositors' statement of claim should be struck out on the ground that they were claiming personally for damages sustained as a consequence of the wrongs suffered by the cooperative.

HELD: The appeal was allowed and the statement of claim was struck out. The true basis of the individual depositors' claims were for consequential losses occasioned by damage to the cooperative. A corporation was a legal entity distinct from the shareholders of the corporation. Nothing in the pleadings established a fiduciary relationship between the individual depositors independent of the cooperative. The rule in Foss and Harbottle applied as a result of which the claim was barred.

Counsel for the Appellants, Davis & Co.: R.R. Sugden and D.J. Taylor.
Counsel for J.R. Bentley: R.M.L. Basham and D.M. Rush.
Counsel for Pannell, Kerr, MacGillivray: B. Wallace, Q.C. and P.C. Behie.
Counsel for all other appellants: D.C. Harbottle and M. Baird.
Counsel for the Respondents: K.C. MacKenzie, Q.C. and M.M. MacKinnon.
Counsel for Third Party, Coopers & Lybrand Ltd.: R.G. Ward and T. Pearkes.

CUMMING J.A. (for the Court, allowing the appeal):-- This appeal is from the decision of the chambers judge dismissing the applications of the defendants other than Her Majesty the Queen and James Henry Thomas for an order under Rule 19(24) that the statement of claim be struck out as disclosing no reasonable claim. It falls to be decided on the pleadings as they stand.

The genesis of the dispute is the financial collapse in 1985 of the Teachers' Investment and Housing Cooperative (TIHC) as a result of which lawsuits have been commenced by both:

(a) the TIHC through its trustee, Coopers & Lybrand Ltd.;
(b) the individual depositors in TIHC.

The principal issue is whether, under the rule in Foss v. Harbottle (1843), 2 Hare 461, 67 E.R. 189, namely that only a corporation (which TIHC is) may sue for a wrong done to it, the learned chambers judge erred in failing to strike out the statement of claim on the basis that the plaintiffs are claiming personally for damages sustained as a consequence of the wrongs suffered by the cooperative.

At present four actions, two at the suit of Coopers & Lybrand, the trustee of the estate and assets of TIHC, and two brought by the individual depositors have been ordered to be heard together at the trial scheduled to commence January 2, 1990. In addition, a fifth action, known as the Abbott action, in which some 3,000 of TIHC's approximately 45,000 member depositors are plaintiffs and in which, we are told, the claims are identical to those in the case at bar, is pending.

The plaintiffs claim damages from the defendants for alleged negligence, breach of statutory duty, breach of fiduciary duty and breach of trust.

The defendants include the directors and chief executive officer, the solicitors and the accountants to the TIHC as well as the Superintendent of Credit Unions, Cooperatives and Trust Companies and the Province of British Columbia.

Coopers & Lybrand, as trustee, has claimed damages allegedly suffered by TIHC arising from alleged negligence, breach of statutory duty, breach of fiduciary duty and breach of trust by the defendants.

Both statements of claim are founded on the following transactions entered into by the TIHC:

(A) joint venture transactions entered into by the TIHC; loss claimed, $37,000,000.00.
(B) commercial loans entered into by the TIHC; loss claimed, $18,000,000.00.
(C) acquisition by title of a trust company; loss claimed, $14,000,000.00.

An examination of the present pleadings in these actions reveals the striking similarity in the basis of the claims made.

(A) This action:

> 18. From 1981 to January 1982 the TIHC acquired four parcels of land in Calgary and one parcel in Vancouver for development or resale in joint venture with certain real estate agents. The TIHC loaned to the agents their share of the purchase price of the properties. ...
> 25. The TIHC's purchase of these properties through partnership or joint venture arrangements was imprudent, of a high risk nature, contrary to the purpose of the TIHC and the public interest, ultra vires the TIHC and beyond the mandate of the TIHC as reflected in its Memorandum, its Rules and the Act.

29. When the TIHC closed its doors on November 5, 1985 the book value of the properties referred to in paragraph 4 [sic] hereof was $45,505,168.00 while their appraised value in December 1985 was only $9,205,000.00, representing a loss to the TIHC of $37,000,000.00.

The Coopers action:

14. During the period 1980 through 1982, TIHC entered into partnership or joint venture arrangements for the purpose of developing real property with H. Haebler Co. Ltd. in Vancouver and Donray Investments Ltd. in Calgary, Alberta and Phoenix, Arizona. Donray's principals were Raymond Kureluk and Donald Flatt.
19. As at November 5, 1985, the book value of the properties purchased through partnership or joint venture arrangements was $46,505,168 while their appraised value in December of 1985 was only $9,105,000, representing a loss to TIHC of approximately $37,000,000.
20. TIHC's purchase of such properties through partnership or joint venture arrangements was imprudent, of a high risk nature, contrary to the purposes of TIHC and the public interest, ultra vires TIHC and beyond the mandate of TIHC as reflected in its Memorandum, its Rules and the Act.

(B) This action:

30. At all material times, the Act and the TIHC's Memorandum and Rules provided that the TIHC could only loan money to its members. At the date of its incorporation, the TIHC's original Rules provided that:

'Any person over the age of 16 years who is actively engaged as a teacher or who has taught school within the preceding five years, or who is a member of the B.C. Teachers Federation, or who is an employee of the B.C. Teachers Federation, or any corporate body having as one of its objectives the promotion of education may be admitted to membership.

31. The definition of "member" was expanded through numerous amendments to the rules including:

(a) In 1964 bodies corporate "having a membership mainly of teachers" became eligible for membership, but only with the approval of the directors;
(b) in 1965, the Board of Directors approved "in principle, the lending of money to commercial borrowers up to 15 per cent of the total assets of the Association at any time";
(c) an amendment was made by Extraordinary Resolution dated February 21, 1969 which permitted admission to membership of "any body corporate with the approval of the Directors", without any

quallfications associated with education or the teaching profession, or without any qualifications whatsoever.

34. Between 1978 and 1984, the TIHC entered into loans of a commercial nature (more particularly set out and described in attachment "C" hereto). Losses sustained on these loans are estimated to be $18,000,000.00 by the trustee of the TIHC.

40. The commercial loans extended by the TIHC were imprudent investments, of a high-risk nature, contrary to the purposes of the TIHC and the public interest, ultra vires the TIHC, prohibited by the Act (particularly Sections 14 and 15 thereof) and beyond the mandate of the TIHC as reflected in its Memorandum, its Rules and the Act.

The Coopers action:

20A. At all material times, the Act and TIHC's Memorandum and Rules limited TIHC's powers to loan money, except to its members. At the date of its incorporation, TIHC's original Rules provided that:

> "Any person over the age of 16 years who is actively engaged as a teacher or who has taught school within the preceding five years, and who is a member of the B.C. Teachers' Federation, or who is an employee of the B.C. Teachers' Federation, or any corporate body having as one of its objects the promotion of education may be admitted to membership".

20B. The definition of "member" was expanded through numerous amendments to the Rules, including:

(a) In 1964, bodies corporate "having membership mainly of teachers" became eligible for membership but only with the approval of the Directors;
(b) In 1965, the Board of Directors approved "In principle, the lending of money to commercial borrowers up to 15% of the total assets of the Association at any time";
(c) An amendment was made by Extraordinary Resolution dated February 21, 1969 which permitted admission to membership of "any body corporate with the approval of the Directors", without any qualifications associated with education or the teaching profession or indeed without any qualifications whatsoever.

21. Through these provisions TIHC diversified from loans made solely to individual members (mainly for the purposes of residential housing mortgages) into commerial loans to any body corporate willing to pay a nominal membership fee (secured usually by second mortgages). Commercial loans increased from 19% of the total mortgage portfolio in 1970 to 30%

by 1982. Such commercial loans were approved and granted by TIHC without proper or any appraisals, financial statements, net worth statements or other supporting financial information or security.

24. During the period 1978 to 1984, TIHC entered into loans of a commercial nature, some of which are more particularly set out and described in Attachment "B" hereto. Losses sustained by TIHC as a result of these loans are estimated to be approximately $18,000,000.
25. The commercial loans extended by TIHC were imprudent investments, of a high risk nature, contrary to the purposes of TIHC and the public interest, ultra vires TIHC, prohibited by the Act (and particularly Sections 14 and 15 thereof) and beyond the mandate of TIHC as reflected in its Memorandum, its Rules and the Act.

(C) This action:

41. In 1976 the TIHC began operating its wholly owned subsidiary Teachers Trust Company, the business of which was restricted to estate, trust and agency services.
42. In approximately 1982, the TIHC began investigating the possibility of purchasing an existing federally incorporated trust company which would later amalgamate with Teachers Trust Company and operate as a full-service trust company for the benefit of the general public as well as its members.
48. In 1985 the Norfolk Trust Company changed its name to Discovery Trust Company. Pursuant to the approvals referred to in paragraphs 44 to 47 herein, the TIHC acquired shares of Discovery Trust Company of Canada (hereinafter referred to as "Discovery"), increasing the actual TIHC investment in Norfolk/Discovery to a total of $15,852,705.00.
50. Upon the sale of Discovery in 1986, the Plaintiffs realised only $1,500,000.00 for a loss of approximately $14,352,000.00.
51. The TIHC's purchase of the shares of Norfolk was specifically prohibited by the Act (in particular, Section 2 thereof), which excludes from the business of an association "the business of banking or insurance, or of a trust company as defined by the Trust Company Act".
52. Further, the TIHC's purchase of the shares of Norfolk was an imprudent investment, ultra vires the objects of the TIHC, contrary to the purposes of the TIHC and the public interest and beyond the mandate of the TIHC as reflected in its Memorandum, its Rules and the Act, and could and did result in significant loss to the TIHC and its members.

The Coopers action:

25A. In 1976 TIHC began operating its wholly owned subsidiary, Teachers' Trust Company, the business of which was restricted to estate, trust and agency services.

25B. In approximately 1982, TIHC began investigating the possibility of purchasing an existing Federally incorporated trust company which would later amalgamate with Teachers' Trust Company and operate as a full-service trust company for the benefit of the general public as well as its members.

* * *

25C. In 1983, TIHC purchased in excess of 75% of the common shares and all the preferred shares of Norfolk Trust Company (later renamed Discovery Trust Company of Canada) for a purchase price of approximately $11,700,000.00.

29. Pursuant to those approvals, TIHC acquired further shares of Discovery Trust to increase its investment to a total of $15,852,705.
30. Upon the sale of Discovery Trust Company of Canada in 1986, the Plaintiff realized only $1,500,000 for a loss of approximately $14,352.00.
31. TIHC's purchase of the shares of Norfolk Trust Company was specifically prohibited by the Act (and in particular, Section 2 thereof), which excludes from the business of an association "the business of banking or insurance, or of a trust company as defined by the Trust Company Act".
32. Further, TIHC's purchase of the shares of Norfolk Trust Company was an imprudent investment, ultra vires the objects of TIHC, contrary to the purposes oiTIH -C an d the public interest and beyond the mandate of TIHC as reflected in its Memorandum, its Rules and the Act, and could and did result in significant loss to TIHC.

The essence of the plaintiffs' damage claim is that they suffered a diminution in the value of their deposits. It is set out in para. 103 of their statement of claim in the following terms:

103. As a result of the fault of the Defendants and each of them as hereinbefore set out, the Plaintiffs have each sustained loss and damage, equal to 46 cents for each dollar which they had on deposit with the TIHC on November 4 1985, and interest thereon. There may be a further distribution from the trustee of the TIHC which could reduce the amount of the Plaintiffs' losses by 5 to 20 cents per dollar. Particulars of the deposits of each of the Plaintiffs will be provided on request.

Specifically, as against the defendant Davis & Company, the plaintiffs' claims relate entirely to these three impugned sets of transactions as appears from the following paragraphs in their statement of claim:

95. The Defendant, Davis & Company, did in fact attend all meetings of the Directors of the TIHC and owed duties to the TIHC, its members and depositors to advise in respect of all matters coming before such meetings for discussion and decision, and more particularly, to properly advise and

ensure that the TIHC acted legally, prudently, and within its powers and mandate.

96. The Defendant, Davis & Company, was in breach of its duties as aforesaid to the TIHC, its members and depositors in that it failed to advise the TIHC, its Directors and senior management properly, or at all, and failed to warn the TIHC, its depositors and members:

(a) that the approval of the Superintendent pursuant to s. 13(2) of the Act was required and for the exercise of the powers granted by s. 13(1)(1) of the Act with respect to the said partnership or joint venture arrangements (as set out in Attachment "B" hereto) without which such arrangements would be null and void and unenforceable by the TIHC;
(b) that the arrangements in Attachment "B" hereto and the loans of a commercial nature made by the TIHC (as set out in Attachment "C" hereto) were ultra vires the objects of the TIHC:
(c) that the loans set out in Attachment "C" hereto were prohibited by the Act and s. 14 and s. 15 in particular;
(d) that the arrangements in Attachment "B", and the loans in Attachment "C", were imprudent investments, contrary to the purposes of the TIHC and beyond the mandate of the TIHC as reflected in its memorandum, its rules and the Act;
(e) that the purchase of Discovery and the carrying on of trust business was ultra vires the objects of the TIHC, contrary to the purposes of the TIHC and beyond the mandate of the TIHC as reflected in its memorandum, its rules and the Act;

all of which could result in loss to the TIHC, its members and depositors, and all of which duties were within the scope of the retainer of Davis & Company as solicitors to the TIHC at the material times.

97. At all material times, the Defendant, Davis & Company, had special expertise in cooperative and credit union matters an dealt directly with the Superintendent as representatives and agents of the TIHC, and they failed to cause the TIHC to seek the Superintendent's approval with respect to certain of the aforesaid joint venture arrangements, they caused the TIHC to seek his approval in some instances pursuant to the wrong Section of the Act, and caused the TIHC to seek and receive his approval when they knew, or should have known, by virtue of, at least in part, the facts herein alleged, that the

Superintendent was failing to conduct a proper, or any, investigation of the affairs of the TIHC, and to satisfy himself with respect to the purpose of the request, all as required by the Act. Further, by virtue of the facts herein alleged with respect to seeking the approval of the Superintendent, Davis & Company knew or should have known that the TIHC was denied

> any opportunity to obtain or to benefit from the advice of the Superintendent and the exercise of his powers, all of which caused damage to the TIHC, its members and depositors.

and, by an amendment allowed by the chambers judge,

> 97A. The Defendant, Davis & Company, was aware at all material times that the Plaintiffs were relying upon their skill and expertise and counsel to the TIHC to ensure that the Plaintiffs' funds were being employed for properly authorized purposes within the statutory powers of the TIHC. The Defendant, Davis & Company, expressly and by necessary implication as counsel to the TIHC, represented that all loans and investments were properly and legally authorized and within the statutory powers of the TIHC.

In Rogers v. Bank of Montreal, [1985] 5 W.W.R. 193 (affirmed [1987] 2 W.W.R. 364) McKenzie J. at 195 succinctly stated the rule in Foss v. Harbottle as follows:

> As I see it, I must answer two basic questions:
>
> (1) What are the plaintiffs trying to do? and, having decided that:
> (2) Are they entitled by law to do it?
>
> The defendants' answer to the first question is that as personal plaintiffs, rather than as a corporate plaintiff, they are trying to get around the ancient barricade erected by Foss v. Harbotile (1843), 2 Hare 461, 67 E.R. 189, as reinforced by its numerous offspring, and their answer to the second question is that they are not entitled by law to take the action which only the corporation as plaintiff can take, that is, to sue for consequential damage to themselves resulting from damage inflicted on their company in which they own shares.
>
> In its simplest expression Foss v. Harbottle stands for the fundamental principle of company law that a company and its shareholders are different entities and only the company can sue for a wrong done to it.

McKenzie J. went on at p. 210 to quote with approval the following passages from the judgment of the English Court of Appeal in Prudential Assur. Co. v. Newman Indust. Ltd., [1982] 2 W.L.R. 31, [1982] 1 All E.R. 3 54:

> It is also correct that if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; this might include the expense of attending the meeting. But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the

> likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themslves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property
>
> * * *
>
> The plaintiffs in this action were never concerned to recover in the personal action. The plaintiffs were only interested in the personal action as a means of circumventing the rule in Foss v. Harbottle. The plaintiffs succeeded. A personal action would subvert the rule in Foss v. Harbottle and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his votingr rights in general meeting.

Immediately following the first of the two extracts I have referred to from Prudential Assurance which were quoted by Mr. Justice McKenzie, the English Court of Appeal had gone on to say:

> The deceit practised on the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing L100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching L100,000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover

personally some L100,000 damages in addition to the L100,000 damages recoverable by the company.

Counsel for the Prudential sought to answer this objection by agreeing that there cannot be double recovery from the defendant, but suggesting that the personal action will lie if the company's remedy is for some reason not pursued. But how can the failure of the company to pursue its remedy against the robber entitle the shareholder to recover for himself? What happens if the robbery takes place in year 1, the shareholder sues in year 2, and the company makes up its mind in year 3 to pursue its remedy? Is the shareholder's action stayed, if still on foot? Supposing judgment has already been recovered by the shareholder and satisfied, what then?

But this simple ihustration, accurate though I consider it to be, may itself tend to oversimplify the issue, postulating as it does that the measure of the loss sustained by the aggrieved shareholder is identical to that sustained by the company. The question as to whether loss suffered by the shareholder is or is not identical to or co-extensive with that sustained by the corporation is irrelevant: the question which is relevant is whether the shareholder's loss is the result of some wrong committed against him in his personal capacity or is simply a consequence of the wrong committed against the corporation. That this is so is apparent from the decision in Rogers case. At pp. 199 to 200 of the report, [1985] 5 W.W.R. 193 Mr. Justice McKenzie quoted some and summarized other parts of the statement of claim as follows:

Paragraph 56 is reproduced in its entirety:

"56. The plaintiffs plead that the Defendants knew and intended that as result of their wrongful actions culminating in the trespass to the business and assets of Abacus and the wrongful seizure and conversion of the business and assets of Abacus by the Respondent Morrison, Abacus would suffer the following harm, loss and damage, namely:

"(a) Abacus would become incapable of carrying on its business;

"(b) Abacus would suffer damage to its reputation;
"(c) Abacus would ultimately be placed in bankruptcy;

"(d) Abacus would be forced to sell many of its assets at substantially less than their value;

"(e) Abacus would become liable for major financial losses of developer/clients by reason of its inability to carry out its obligations to its developer/clients;

"(f) Abacus would be obliged to pay substantial legal fees, Receiver costs, consWting fees and other expenses;

"(g) Abacus would have all of its common and preferred stock delisted from the Alberta and Toronto Stock Exchanges and that all value of those shares would be eliminated;

"(h) Abacus' subsidiary and related companies and entities would be detrimentally affected;

"(i) Abacus woWd lose all of its management, operating, accounting and sales personnel and its going concern nature and value;

"(j) The aforesaid causes of action of Abacus would be destroyed."

Note that all the particulars exclusively specify harm to Abacus except for the loss of share value in (g) which would in turn redound to the plaintiffss detriment because they owned a lot of them.

Paragraph 57 pleads the vicarious liability of the chartered accountant partnership for Morrison's wrongful acts.

Paragraph 58 details the loss, injury and damage caused individually to each of the three plaintiffs. The paragraph begins with this:

"58. The Plaintiffs plead that as a result of the wrongful actions of the Defendants leading to the wrongful appointment of the Defendant Morrison as Receiver and Manager of the business and assets of Abacus by the Defendant Bank of Montreal, acting through the Defendant Scalf, who instigated the appointment for personal reasons, and by the Defendant Guaranty, resulting in the trespass to and wrongful seizure and conversion of the business and assets of Abacus by the Defendant Morrison, the Plaintiffs suffered loss, injury and damages, particulars of which are as follows ..."

It then lists the damage to W. Rogers, who had 3,957,375 shares, which can be summarized as follows:

"Loss of salary and position as an employee;

"Damages to business reputation; and damages to livelihood as a result;

"Loss of dividends that arise from shares;

"Loss of joint control;

"Loss of costs"

"Losses and costs resulting from legal actions by others as a result of the demise of Abacus."

Similar details are then supplied concerning the plaintiff K. Rogers who had 4,176,957 shares of Abacus, and J.F. Cornwall who had 413,395 shares, except that with respect to Cornwall there is no allegation of loss of joint control.

This is the final paragraph:

"59. The Plaintiffs plead that the Defendant Scalf deliberately and with intent to injure Abacus and in turn the Plaintiffs, set into motion the chain of events described in paragraph '53' herein, and that such acts were unreasonable, without legal justification or excuse and an abuse of process. The Plaintiffs plead that the purpose of the Defendant Scalf in setting this chain of events into motion was for the purpose of causing injury to Abacus and to the Plaintiffs, and not for the purpose of protecting any legitimate business interest of the Defendant Bank of Montreal. The Plaintiffs plead that the Defendant Bank of Montreal is liable for the wrongful acts of its officer and employee, the Defendant Scalf."

Having done so, he said, at pp. 206-207:

The statement of claim, even with its proposed amendments, seems to reiterate that the damage had its impact upon Abacus with only derivative damage to the plantiffs. In the American case of Martens v. Barrett, 245 F.2d 844 (C.A. 5th Circ., 1957), the action was by sole stockholders as individual plaintiffs concerning the operation of a service station which was wholly owned by a corporation with the stockholders' salaries and compensation being paid for as a corporate obligation. The claim was made against the defendants for their alleged committal of certain anti-trust acts. The judge said p. [846]:

"And it is universal that where the business or property allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders (few or many), officers, directors, creditors or licensors, who has a right of recovery, even though in an economic sense real harm may well be sustained as the impact of such wrongful acts bring about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership."

McKenzie, J. then reviewed the decisions of the British Columbia Court of Appeal in Brown v. Menzies Bay Timber Co., 24 B.C.R. 27, [1917] 2 W.W.R 658, 34 D.L.R. 452, and of Ruttan, J. in Chow v. Patterson (1973), 38 D.L.R. (3d) 721 (B.C.S.C.), Prudential As-

surance, supra, and Green v. Victor Talking Mach. Co. 24 F. 2d 378 (C.A. 2nd Circ., 1928), and at pp. 216-217 said:

> My comment is that in fact the pleadings allege the activities were directed against Abacus and were unlawful against Abacus and that the intention was against Abacus, and then the words are added "and the plaintiffs". The pleading conveys to me the idea that the unlawful acts are solely directed to the company with the intention and purpose of injuring the company and then there is hitched to that allegation an intention to injure the plaintiffs.
>
> Mr. Jeffery then agreed that it gets down to an intention to injure both the company and the plaintiffs as separate targets.
>
> To me the two ideas are inseparable and I cannot extract or isolate a predominant purpose to injure the plaintiffs. That seems to be what the cases required to found a personal action. The cases require direct damage to the plaintiffs, not indirect damage as a consequence of damage to the company.

In my view Mr. Justice McKenzie's comment in the first paragraph of this last quoted passge from his judgment aptly describes the situation in the case at bar. In many of the paragraphs of the plaintiffs' statement of claim which I have quoted there has simply been added to the allegations of duties owed to the corporation TIHC by persons in the position of the appellants and said to have been breached by them the words "its members and depositors" or words to like effect. But is that enough? I think not. The "gravamen", "substance", "real character", or "true basis" of the plaintiffs' claims are for consequential losses occasioned by damage to the Cooperative.

Their claims, as previously noted, are, in effect, for diminution in their deposits as a result of the collapse of the TIHC which itself, it is alleged, was triggered by the losses resulting from the impugned transactions which the plaintiffs say are the result of wrongdoing by the defendants. But the wrongs committed by the defendants were wrongs to the TIHC.

> "For a shareholder to obtain a personal right of action tbere must be relations between him and the tortfeasor independent of those which the shareholder derives through his interest in the corporate assets and business."

This proposition is taken from the American case of Green v. Victor Talking Mach. Co., supra, and at P. 214 McKenzie, J. said of it:

> I am not aware of this decision ever being adopted in Canada or the United Kingdom but I understand it to be a leading case in the United States and it does constitute a good analysis of law which seems to be

> consistent generally with Canadian and British law and it is an excellent exposition of that law.

In dismissing the defendants' applications based on the rule in Foss v. Harbottle, supra, the learned chambers judge stated in his reasons:

> It would seem to me that the nature of a co-operative is such that the relationship which the plaintiffs seek to establish could have occurred.

That relationship, of course, must be one giving rise to duties, fiduciary and otherwise, owed by the defendants to the plaintiffs distinct from and independent of the duties owed by them to the TIHC itself.

In the factum filed on behalf of Coopers & Lybrand, reference is made to a number of sections of the Cooperative Association Act, R.S.B.C. 1979, c. 66, which are said to be pertinent in this regard. They are summarized as follows:

Section	
1(a)(i):	One member one vote;
1(a)(iv):	Services primarily for members;
1(a)(vi):	Services and goods as nearly as possible at cost;

> 3(1): A cooperative is not to operate as a company, nor to be confused therewith. Prohibition against the use of the word "company" or the word "limited";
>
> 3(2)(b): No one can use the word "cooperative" unless substantially organized, operated and administered on a cooperative basis, and then only with the Superintendent's approval:
>
> 6(c)(i): Superintendent must be satisfied as to the services which the cooperative will perform for its members;
>
> 13(l)(i): A cooperative may not enter into any profit sharing arrangement with anyone unless the arrangement is for the "genuine intention of ena-

> bling the association to improve its services to its members" and then only with the approval of the Superintendent under section 13(2).
>
> 13(1)(q): It is an ancillary power of every cooperative to carry on, encourage and assist educational and advisory work relating to cooperative activity;
>
> 14 Prohibition against lending money except to a company organized to do business on a cooperative basis;

27(1): One member one vote;

30(2): Every Director must be a member;

> 48(1): The Superintendent will exercise all powers and duties to facilitate organization, operation and administration on a cooperative basis and to protect the public interest.

Mr. Ward was frank to concede that he had no authority, and I have found none, to support the proposition that a co-operative incorporated as was the TIHC is exempt from the rule in Foss v. Harbottle. The most he could say was that the sections of the Act to which he referred could make it easier to find that the fiduciary relationships contended for do in truth exist.

It is trite law that a cooperative corporation is an entity separate from its members and depositors. See Ish, The Law of Canadian Co-operatives (1981) at p. 17:

> Since a co-operative corporation is a corporate entity the usual attributes of a corporation apply to it. A corporation is a legal entity distinct from the members or shareholders of the corporation. This distinct legal personality has many consequences. The full recognition of the corporation as being completely separate from its members, and being thus "capable of enjoying rights and of being subject to duties which are not the same as those enjoyed or borne by its members", was made in the now classical House of Lords case of Salomon v. Salomon, [1897] A.C. 22 (H.L.).

(See also: Henuset Ranches & Construction Ltd. v. East Central Gas Cooperative et al. (1977), 87 D.L.R. (3d) 298 (Alto. C.A.)). It is this existence as an independent entity which attracts the rule in Foss v. Harbotue. Thus, to find that fiduciary relationships and duties such as the plaintiffs allege exist we must search elsewhere.

In conducting that search in this case we are confined to the framework of pleadings as they stand. In this regard I have in mind the rule that on an application under Rule 19(24)(a) every averment of fact in the statement of claim must be taken to be true (as to which see: British Columbia Power Corporation Limted v. Attorney General of British Co-

lumbia (1962), 38 W.W.R. 657 at 675 (B.C.C.A.) and Kelly Logging Company Limited v. Pacific Coyle Navigation Company Limited, [1940] 2 W.W.R. 655 (B.C.S.C.) and, as well, its companion rule that on argument of a demurrer (which these applications are) where facts are not averred which might possibly have been denied by a plea if they had been, the presumption runs the other way (as to which see Foss v. Harbottle, supra, at p. 207).

What then is necessary to form the basis of a finding that there is or could be a fiduciary relationship between the defendants and the personal plaintiffs apart from the duties the defendants owe to the TIHC itself?

The latest pronouncement of the Supreme Court of Canada on this subject is found in its judgment rendered August 11, 1989 in the case of Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] S.C.J. No. 83, No. 20571. LaForest, J. said, at p. 14:

> There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship. In specific circumstances and in specific relationships, courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which that obligation is based is unclear.

and at pp. 15-16, he continued:

> In Guerin v. Canada, [1984] 2 S.C.R. 335, Dickson J. (as he then was) discussed the nature of fiduciary obligations in the following passage, at pp. 383-84:
>
> The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery.
>
> . . .
>
> Professor Ernest Weinrib maintains in his article The Fiduciary Obligation (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is tbat the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by stat-

> ute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.
>
> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

[Emphasis added]

> Wilson J. had occasion to consider the extension of fiduciary obligations to new categories of relationships in Frame v. Smith, [[1987] 2 S.C.R. 99]. She found (p.136) that:
>
> ... there are common features discernible in the contexts in which fiduciary duties have ben found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[Emphasis added]

At pp. 18-20 he said:

> It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. In determining whether the categories of relationships which should be presumed to give rise to fiduciary obligations should be extended, the rough and ready guide adopted by Wilson J. is a useful tool for that evaluation. ...

> This brings me to the second usage of fiduciary, one I think more apt to the present case. The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations woWd not normally be expected. I agree with this comment of Professor Finnin "The Fiduciary Principle", supra, at p. 64:
>
> What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the "fiduciary expectation". Such a role may generate an actual expectation that that other's interests are being served. This is commonly so with lawyers and investment advisors. But equally the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. And this may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility.
>
> It is in this sense, then, that the existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship; see D.W. Waters, The Law of Trusts in Canada (2nd ed. 1984), at p. 405. If the facts give rise to a fiduciary obligation, a breach of the duties thereby imposed will give rise to a claim for equitable relief.

The third sense in which the term fiduciary is used is discussed at p. 20 and following but this is not of concern in the present case.

In separate reasons Madam Justice Wilson wrote at p. 2 of her judgment:

> It is, in other words, my view of the law that there are certain relationships which are almost per se fiduciary such as trustee and beneficiary, guardian and ward, principal and agent, and that where such relationships subsist they give rise to fiduciary duties. On the other hand, there are relationships which are not in their essence fiduciary, such as the re-

> lationship brought into being by the parties in the present case by virtue of their arm's length negotiations towards a joint venture agreement, but this does not preclude a fiduciary duty from arising out of specific conduct engaged in by them or either of them within the confines of the relationship. This, in my view, is what happened here when Corona disclosed to Lac confidential information concerning the Williams property. Lac became at that point subject to a fiduciary duty with respect to that information not to use it for its own use or benefit.

And Mr. Justice Sopinka at pp. 14-15 of his reasons for judgment wrote:

> While equity has refused to tie its hands by defining with precision when a fiduciary relationships will arise, certain basic principles must be taken into account. There are some relationships which are generally recognized to give rise to fiduciary obligations: director corporation, trustee-beneficiary, solicitor-client, partners, principal-agent, and the like. The categories of relationships giving rise to fiduciary duties are not closed nor do the traditional relationships invariably give rise to fiduciary obligation.
>
> * * *
>
> When the Court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. In special circumstances, if they are shown to be absent, the relationship itself will not suffice. Conversely, when confronted with a relationship that does not fall within on of the traditional categories, it is essential that the Court consider: what are the essential ingredients of a fiduciary relationship and are they present? While no ironclad formula supplies the answer to this question, certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide. I agree with the enumeration of these features made by Wilson J. in dissent in Frame v. Smith, [1987] 2 S.C.R. 99.

These passages which I have quoted from the judgments in Lac Minerals lend support to the proposition set out in in the respondents' factum as follows:

> 3. "Fact intensive" is underlined in breach of fiduciary cases. The same can be said for the alternative claim for damages for negligent breach of duty in a special relationship. One recent commentator has stated:
>
> > To say that fiduciary duty cases are fact intensive is to imply that the phrase "fiduciary duty" cannot be confined to any definition. It is, rather, a Protean concept which imposes more or less stringent duties on a person depending on the nature of the relationship, the subject matter of the impugned act, the form of that act and other factors. That is why a sustained, detailed study of the facts is essential to

> characterize the issue and, if they do give rise to the inference that a fiduciary duty exists, to determine the scope of that duty."
>
> John L. Howard Q.C. "Fiduciary Applications - Directors and Officers" Continuing Legal Education, British Columbia, April 1989.

But the focus must be on the facts and deeds which are relied upon to give rise to these special relationships and, in order to maintain an action based upon alleged breach or breaches of the duties said to flow from the special relationship asserted to exist, it seems elemental to say that it is necessary they be pleaded. It is in this respect that, in my view, the statement of claim before us is deficient.

I have read and re-read the statement of claim and nowhere in it can I find any pleading of facts, of anything done or said by the defendants to the plaintiffs, of any inquiries directed by the plaintiffs to the defendants or any of them, of any representations, oral or written, made by any of the defendants to any of the plaintiffs affecting the individual plaintiffs in their personal capacity, nor the provision of any particulars which could lend substance to any of the foregoing, which could be said to carry the defendants' obligations and duties to the plaintiffs individually beyond the scope of those they already owed to the TIHC or to establish any direct nexus or relationship between them and the plaintiffs independent of the Cooperative.

Paragraph 78 of the statement of claim warrants comment. It is in the following terms:

> 78. The Plaintiffs were financially unsophisticated. They deposited their savings with the TIHC relying on the appearance of the TIHC as a sound and stable financial institution managed and regulated in accordance with reasonable standards of prudent financial management which would reasonably protect their savings against loss. At all material times, the Crown and the Defendant Thomas knew or ought to have known that the Plaintiffs were relying on them to discharge their responsibilities competently and without negligence to maintain the prudent investment of their savings and the protection of their capital, and to require that the financial statements published by the TIHC provided reasonably fair and informative particulars of the true financial condition of the TIHC and not misleading and deceptive information.

Significantly, this paragraph is found in that portion of the statement of claim relating to the plaintiffs' claim against the Crown and the defendant Thomas, the Superintendent of Credit Unions, Cooperatives and Trust Companies, who are not parties to this aspect of the appeal. No such allegation is found in the pleadings against the other defendants. And even if it were, it is deficient for want of particularity in the same way I have already described the rest of the statement of claim.

I turn now to consider more particularly the claims against the directors and Bentley, the chief executive officer of the TIHC.

As against them the plaintiffs base their claim in (a) negligence, (b) negligent misrepresentation (Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465 (H.L.)), (c) ultra vires or (d) breach of fiduciary duty.

(a) Negligence

Paragraphs 86 to 90 of the statement of claim clearly show that the negligence asserted is the failure of these defendants to carry out their duties to the TIHC, i.e. as a result of which the TIHC has suffered losses. But the plaintiffs' claims in this respect add nothing to the claim brought on behalf of TIHC by its trustees in respect of those losses.

(b) Negligent Misrepresentation

The requirements of tort liability on the basis of Hedley Byrne are summarized in the judgment of McLachlin, J.A. (as she then was) in Kingu et al. v. Walmar Ventures Ltd. et al., [1986] B.C.J. No. 597, 38 C.C.L.T. 51 at 60 as follows:

> (1) A false statement negligently made;
> (2) A duty of care on the person making the statement to the recipient. A duty of care does not arise unless
>
> > (a) the person making the statement is possessed of special skill or knowledge on the matter in question, and
> > (b) the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment;
>
> (3) Reasonable reliance on the statement by its recipient;
> (4) Loss suffered as a consequence of the reliance.

The plaintiffs have not alleged that they sought the advice of the directors nor have they provided any particulars of any advice given or relied upon. Neither have they alleged that the directors ever held themselves out as either providing advice or as having any special skill or knowledge to do so - indeed, in para. 86 the plaintiffs assert that the directors were teachers by training and, as such, they would not reasonably be expected to have any special skill or expertise to offer.

With regard to the defendant Bentley:

(i) There is no allegation that he was acting as an accountant or adviser to the plaintiffs or was communicating with them in that capacity.
(ii) There is no allegation that Bentley communicated directly with the members in annual general meetings or through the Cooperative's annual reports or newsletters in any capacity other than as an officer of the Cooperative in the performance of his duty.
(iii) While the plaintiffs say that Bentley was aware that the plaintiffs relied upon his skill and expertise they do not say that they relied on his skill

and expertise to do anything other than to act in the best interests of the Cooperative as its Chief Executive Officer.

(iv) There are no facts pleaded to establish any special relationship between the plaintiffs and Bentley, the reliance by them on Bentley as a result of that relationship or circumstances such as would make it reasonable for the plaintiffs to rely on Bentley and for him to know that they were doing so.

(v) There is no allegation that the plaintiffs acted on that reliance and suffered individual damage as a consequence thereof.

(c) Ultra Vires

The plaintiffs' claim of ultra vires does not given them a personal right of action for damages. It merely permits the plaintiffs to commence an action in a representative capacity on behalf of the Cooperative in the event that the Cooperative does not itself take proceedings. This recognized exception to the rule in Foss v. Harbottle has no application in the case at bar, TIHC through Coopers & Lybrand, the trustee in bankruptcy having, in fact, commenced an action against the defendants for the same relief the plaintiffs seek in this action: see: Rose v. British Columbia Refining Company (1911), 16 B.C.R. 215 (B.C.C.A.); Sass v. St. Nicholas Mutual Benefit Association of Winnipeg, 11937] S.C.R. 415; Wheeler v. Annesley (1957), 11 D.L.R. (2d) 573 (B.C.S.C.); Balsdon v. Good Shepherd Shelter Foundation (1984), 56 B.C.L.R. 369 (B.C.C.A.); and Gower, Modern Company Law, (4th ed., 1979 at 644-654).

(d) Breach of Fiduciary Duty

For the reasons I have already set out I am of the view that the pleadings as they stand do not disclose the existence of any fiduciary relationship between the plaintiffs in their personal capacity and the defendants.

With regard to the defendant Pannell Kerr MacGUEvray (PKM), the auditors, who have not been joined as a defendant in the actions brought by Coopers & Lybrand, although they have been added as a third party therein, it appears that the plaintiffs are claiming against them on the basis of the tort of negligent misstatement in the presentation of the financial statements of TIHC.

In the original statement of claim, para. 91 read as follows:

91. The defendant auditors owed a duty to the TIHC, its members and depositors, to report whether the financial statements issued by the TIHC presented fairly the financial position of the TIHC and its subsidiary trust company.

On the return of the motions to strike out the statement of claim, the plaintiffs brought an application to amend their statement of claim which was allowed by the learned chambers judge. As a result para. 91 now reads:

> 91. The Defendant auditors addressed their published opinions to the members and were aware that the Plaintiffs relied directly and indirectly on the published financial statements of the TIHC as fairly presenting the financial position of the TIHC. The Defendant auditors were aware of the Plaintiff's reliance and intended the Plaintiffs to rely upon the published financial statements of the TIHC which gave the TIHC the appearance of a sound financial institution in which the Plaintiffs' deposits were adequately protected against loss. The Defendant auditors allowed their opinions to be published with the intent that they be relied upon as aforesaid.

It is PKM's position that the pleading as it now stands is deficient in that it fails to plead two of the essential elements in the tort of negligent misstatement, namely (a) reasonable reliance on the statement by its recipient and (b) loss suffered as a consequence of the reliance.

While the issue of reliance is, at best, inartistically raised (and is singularly devoid of particularity) the amended pleading is clearly deficient in that it does not allege loss suffered as a consequence.

In Victoria Grey Metro Trust Company v. Fort Gary Trust Company (1982), 30 B.C.L.R. (2d) 45 (B.C.S.C.), McLachlin J. (as she then was) said, at p. 47:

> ... it seems to me obvious that the court will not give its sanction to amendments which violate the rules which govern pleadings. These include the requirements relating to conciseness (R.19(1)); material facts (R.19(1)); particulars (R. 19(11)); and the prohibition against pleadings whicb disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious (R. 19(24)). With respect to the latter, it may be noted that it is only in the clearest cases that a pleading will be struck out as disclosing no reasonable claim; where there is doubt on either the facts or law, the matter should be allowed to proceed for determination at trial: Minnes v. Minnes (1962), 39 W.W.R. 112, 34 D.L.R. (2d) 497 (B.C.C.A.); B. Power Corp. v. A.G.B.C. (1962), 38 W.W.R. 577, 34 D.L.R. (2d) at 211 (B.C.C.A.). If there is any doubt, it should be resolved in favour of permitting the pleadings to stand: Winfield v. Interior Engr. Services Ltd. (1969), 68 W.W.R. 383, 4 D.L.R. (3d) 71 (B.C.S.C.). While these cases deal with striking out claims already pleaded, consistency demands that the same considerations apply to the question of amendment to permit new claims.

Applying this reasoning, I do not think that the amendment should have been allowed, but I do not rest my decision on that basis. Even if the amended para. 91 does not raise a new cause of action but, as the plaintiffs contend, simply provides more detail of the facts upon which the plaintiffs rely to establish a duty on the part of the defendant auditors, the pleading against PKM as amended discloses no reasonable claim and cannot stand.

It was urged upon us on the authority of Alcan Smelters and Chemicals Limited v. Canadian Association of Smelter and Allied Workers (1977), 3 B.C.L.R. 163 (B.C.S.C.) and Federal Business Development Bank v. Shearwater Marine Limited (1978), 9 B.C.L.R. 380

(B.C.S.C.), that Rule 19(24) is only to be used in plain and obvious cases and where the issue is absolutely beyond doubt. In applying these principles I do not think that the court should shrink from performing its duty even though the question may be one of some difficulty. In this regard I adopt what was said by Hunter, J. of the High Court of Hong Kong in Wharf Properties Ltd. and Another v. Eric Cumine Associates and Others, [1985] L.R.C. (Comm) 401 at 409-410:

> (3) Finally Mr. Lane argued that it was not open to the court to construe clause 5(e) on a striking out application. This defendant's proper course, he submitted, was to file a defence and then ask for and argue the matter upon a preliminary issue. It was not suggested that the court or the parties would then have been in any better or different position. But on the authority of Hubbuck and Sons Ltd v. wilkinson, Heywood and Clark Ltd. [1899] QB 86 it was said, in the words of Lindley, M.R., that the preliminary issue procedure is "appropriate to cases requiring argument and careful consideration. The second and more summary procedure (striking out) is only appropriate to cases which are plain and obvious". Therefore submitted Mr. Lane the court should do no more than say that the matter was not plain and obvious and defer its decision on consideration to some future date. The submission echoes the discussion in other authorities, when the court's summary powers are invoked purely on a question of law, as to whether the court is free to decide the point, or whether it has first to decide whether it is a sufficiently "plain case" to be decided in that particular manner, see for example Bigg v. Boyd Gibbins [1971] 2 All E.R. 183.
>
> Whilst recognising the value of the warning given in Hubbuck's case, I cannot accept that it can be said literally to represent the modern practice. A glance at some of the major rulings given on striking out applications in recent years such as Rondel v. Worsley 11969] 1 A.C. 191 and Arenson v. Arenson 1977 A.C. 405 shows the court's readiness not to postpone, but to decide difficult questions on such an application, when appropriate. In a case where all the relevant facts are known and undisputed, and where the point in issue is purely one of law or construction, I think that the court can and should decide the point at any convenient stage in the proceedings. If all the necessary material is before the court, it would be lamentable to postpone a decision and force the parties to incur further costs. I think that Lord Denning, M.R.'s observations in Tiverton Ltd. v. Wearwell Ltd. [1975] Ch. 145, 156, about the futility of repeating the same argument at a trial, and the court's practice of deciding "difficult and arguable points" under both Order 14 and Order 86 are really of general application, and apply in proper circumstances to Order 18, rule 19. Carl-Zeiss-Stiftung v. Rayner No. 3) [1969] 3 All E.R. 897, per Buckley, J., at p. 908. In my judgment this application is a proper time to decide the points of law raised, and further to decide them without any pre-

liminary claim or assertion to the effect that they were "plain and obvious", see Forster v. Outred & Co. [1982] 1 W.L.R. 86, per Dunn, L.J.

"Plain and obvious" does not necessarily"easy".

I conclude with this caution. These reasons for judgment must be read in relation to the pleadings as they stand before us. There is a line of authority, of which such cases as Gadsden v. Bennetto (No. 2) (1913), 9 D.L.R. 719 (Man. C.A.), Allen v. Hyatt (1914), 17 D.L.R. 7 (P.C.), and Caparo Industries Plc. v. Dickman, [1989] 1 All E.R. 798 (C.A.), are examples, where special or fiduciary duties of care have been found to exist between directors of a corporation and its shareholders (as distinct from the directors' duties to the corporation itself) or between auditors of a corporation and its shareholders (as distinct from the auditors' duties to the corporation itself) and it is possible that some of the plaintiffs or other members and depositors in TIHC may be in a position to plead and prove facts and circumstances sufficient to entitle them to maintain an action for relief in their personal capacity. But that is not this case.

Accordingly, I would allow the appeal and direct the statement of claim be struck out.

CUMMING J.A.

MACDONALD J.A.:-- I agree.

SOUTHIN J.A.:-- I agree.

232 N.W.2d 84
Supreme Court of Iowa.

JOHNSON COUNTY, Iowa, Appellee,
v.
GUERNSEY ASSOCIATION OF JOHNSON COUNTY, IOWA, INC., Appellant.

No. 2—56796.
|
July 31, 1975.
|
Rehearing Denied Sept. 27, 1975.

Nonprofit milk producing corporation appealed from a judgment of the Johnson District Court, Harold D. Vietor, J., enjoining it from selling unpasteurized milk to any final consumer, including its own members. The Supreme Court, Moore, C.J., held that (1) the distribution of milk to its members by the corporation constituted the transfer of title to property for a fixed price, notwithstanding the corporation's claim that no sales took place since title to the milk was at all times in the members of the corporation; and (2) under statute prohibiting sales of unpasteurized milk to the 'final consumer,' the trial court properly issued an injunction against the corporation, notwithstanding the corporation's argument that its members were genuinely interested in obtaining unpasteurized milk because they believe it is healthier and more wholesome than pasteurized milk.

Affirmed.

Attorneys and Law Firms

***84** Honohan, Epley & Lyon, Iowa City, for appellant.

J. Patrick White, Asst. County Atty., for appellee.

Heard by MOORE, C.J., and MASON, RAWLINGS, LeGRAND and McCORMICK, JJ.

Opinion

MOORE, Chief Justice.

Defendant Guernsey Association of Johnson County, Iowa, Inc., appeals from trial court's order enjoining it from selling unpasteurized ***85** milk to any final consumer, including its own members.

Plaintiff Johnson County on March 31, 1972 filed its petition asking that defendant be permanently enjoined and restrained from distributing non-pasteurized milk for human consumption, in violation of Code chapter 192. Defendant's answer denied selling unpasteurized milk to the final consumer as prohibited by Code section 192.11, alleging it distributed milk only to its members.

On trial to the court, August 8, 1973, most of the evidence was stipulated. Little, if any, factual dispute is involved in this appeal. Defendant is a non-profit corporation organized by Eldon and C. E. Moss under the Iowa Non-Profit Corporation Act, Chapter 504A of the 1973 Code of Iowa. One of defendant's stated purposes is to provide a source of milk from Golden Guernsey cows for its members. The corporation by its officers and directors entered into an agreement with Eldon and C. E. Moss to lease from them their herd of Guernsey cattle. It included a provision all milk produced by the cows would be the property of the corporation. Eldon Moss entered into an agreement for the care of the leased herd.

To pay the cost of leasing and care of the herd each member was assessed a fee based on his consumption of the corporation's dairy products. Unpasteurized milk was distributed at the corporation's milk house. Pursuant to the corporate

by-laws milk was not available to nonmembers. Members deposited $.87 for each gallon taken, making their own change from the corporation's funds at the milk house. Milk not distributed to members was sold to dairies.

To become a member of the corporation one had to pay a $1.00 membership fee and have an understanding of the objects and purposes of the corporation. There were about 450 members of the corporation at trial time. Five members testified they joined the corporation because they believed unpasteurized milk to be superior to pasteurized milk.

The corporation's milk was regularly tested by both the operator Eldon Moss and a professional testing service recognized by the State of Iowa. Tests revealed the milk produced by the corporation was maintained at a standard maximum bacterial count of 50,000 per milliliter. For delivery to dairies the state requirement is a maximum bacterial count of 100,000 per milliliter. Code section 192.19. Thus the corporation's milk betters the bacterial requirements for milk delivered to dairies. However, the corporation's milk fails to meet the State's 20,000 per milliliter bacterial limit for Grade 'A' pasteurized milk. Code section 192.19.

The trial court found defendant's distribution of unpasteurized milk to its members constituted a sale prohibited by section 192.11. The court cited Code section 192A.1(9); Code section 422.42(2) and section 554.2106 of the Uniform Commercial Code, Code 1973. The court enjoined defendant from further such sales as authorized by section 192.32.

Defendant-appellant states the issue on this appeal as: 'Does the distribution of unpasteurized milk by defendant to its members constitute a sale prohibited by section 192.11 of the Code of Iowa.'

Code section 192.11 in pertinent part provides:

> 'Only grade 'A' pasteurized milk and milk products shall be sold to the final consumer, * * *.'

Code section 192.32 provides:

> 'Any person who shall violate any of the provisions of chapters 190, 191 and 192 may be enjoined from continuing such violations. Each day upon which such a violation occurs shall constitute a separate violation.'

As part of the chapter dealing with marketing of dairy products this definition is set out; "Sale' or 'sell' means and includes any commercial transfer for consideration, exchange, barter, gift, or offer for sale and ***86** distribution in any manner or by any means.' Section 192A.1(9).

Practically the same definition is found in Code section 422.42(2) in reference to sales tax and in Code section 554.2106(1), a part of the Uniform Commercial Code. A similar definition of 'sale' is approved in Baird v. City of Webster City, 256 Iowa 1097, 1109, 130 N.W.2d 432, 439.

[1] I. Defendant-appellant first argues a sale did not take place as title to the milk was at all times in the members of the corporation. Its first hurdle is this provision in its lease of the Moss cattle: '7. All milk produced by the original cows, replacements therefor, supplied by the Lessor, and the progeny of either during the term of this Lease shall belong to the Lessee.'

[2] Next defendant is confronted with the prevailing view that the corporation, not the members or shareholders, holds title to corporate property.

In Dawson v. National L. Ins. Co., 176 Iowa 362, 378, 157 N.W. 929, 934, we quote the following from 3 Pomeroy, Equity Jurisdiction (3d Ed.) section 1090:

> '* * * The doctrines are fundamental and familiar that the corporation itself is a legal personality, and holds the full title, legal and equitable, to all corporate property. Stockholders, individually and separately, hold the full title, legal and equitable, to their respective shares of stock. A stockholder does not, by virtue of his stock, acquire any estate, legal or equitable, in the corporate property; he obtains only a right to participate in the lawful dividends while the corporation is in being, and to his proportionate share of the net assets upon its dissolution and final settlement. * * *.'

In Liken v. Shaffer, 64 F.Supp. 432, 438 (N.D.Iowa 1947) Judge Graven wrote:
'* * * It is well settled that the property of a corporation is not the property of the individual stockholders. Stewart v. Pierce, 1902, 116 Iowa 733, 89 N.W. 234. On page 240 of the Northwestern citation in that case, the Iowa Supreme Court states: 'The property of a corporation is also entirely distinct from the property in the shares of stock issued by it, and the stockholders are not the owners of its property as individuals.' In the case of Klein v. Board of Tax Supervisors, 1930, 282 U.S. 19, on page 24, 51 S.Ct. 15, on page 16, 75 L.Ed. 140, 73 A.L.R. 679, Justice Holmes succinctly states: 'But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with the intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members.''

The general rule is also stated in 18 C.J.S. Corporations s 512 and 18 Am.Jur.2d, Corporations, section 486.

The corporation's distribution of milk to its members was a transfer of title to property for a fixed price. A contrary holding could be reached only by 'piercing the corporate veil.' The record discloses no compelling reason for doing so.

II. Defendant-appellant's second argument is that Code section 192.11 was not intended to prohibit the distribution of milk involved in this case. It points out it is a Bona fide corporation whose members are genuinely interested in obtaining unpasteurized milk because they believe it is healthier and more wholesome than pasteurized milk. Defendant then argues section 192.11 was designed to prohibit sales to the general public and that the corporation distributes milk to its members, not the public. Like the trial court, we do not agree.

Assuming arguendo statutory construction of section 192.11 is necessary the following from Iowa Nat. Indus. Loan Co. v. Iowa State, etc., Iowa, 224 N.W.2d 437, 439, 440, is relevant here:
'In the countless cases this court has considered over the years, many rules of statutory construction have evolved. ***87** With one exception none of them is to be used to the exclusion of the others and all must be applied together in the light of the particular facts of the case then under examination. The single departure from this relates to the polestar of all statutory construction—the search for the true intention of the legislature. The other interpretative guides are all designed, in one way or another, to help us reach that goal. Among the cases emphasizing this primary rule are (Citations).

'Our previous holdings also establish the following general guidelines:

'(1) In considering legislative enactments we should avoid strained, impractical or absurd results. (Citations).

'(2) Ordinarily, the usual and ordinary meaning is to be given the language used but the manifest intent of the legislature will prevail over the literal import of the words used. (Citations).

'(3) Where language is clear and plain, there is no room for construction. (Citations).

'(4) We should look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. (Citations).

'(5) All parts of the enactment should be considered together and undue importance should not be given to any single or isolated portion. (Citations).

'(6) * * *.

'(7) * * *.'

[3] Additionally it must be noted that a law providing regulations conducive to the public good and welfare, is ordinarily remedial, and as such liberally interpreted. State ex. rel. Turner v. Koscot Interplanetary, Inc., Iowa, 191 N.W.2d 624, 629, and citations. See also 3, Sutherland, Statutory Construction (4th Ed.) section 71.01; 73 Am.Jur.2d, Statutes, section 281 and 82 C.J.S. Statutes s 388.

[4] [5] Section 192.11 is a statute enacted to protect public health, and as such must be construed liberally to effect its purpose. The statute prohibits sales of unpasteurized milk to the 'final consumer.' The members of the corporation were final consumers within the meaning of section 192.11. The trial court properly issued the injunction to prevent further sales of unpasteurized milk to them.

Affirmed.

All Citations

232 N.W.2d 84

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IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

MINDY SLIPPY, Plaintiff vs. BILL NORTHEY, Secretary of Iowa Department of Agriculture and Land Stewardship Defendant.	)	No. EQCV067968 **RULING**

On this 26 day of January, 2012, Defendant's Motion for Summary Judgment, Resistance thereto and Motion to Strike filed by Petitioner, Defendant's Resistance to Plaintiff's Motion to Strike, and Defendant's Reply to Plaintiff's Resistance to Summary Judgment came before the undersigned. Upon review of the file, the Court finds a hearing on the Motions is unnecessary. Having considered the file, relevant case law, and written arguments of counsel, the Court hereby enters the following ruling:

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff (hereinafter Slippy), with former Plaintiff Freitag, filed a Petition for Declaratory Judgment and Other Injunctive Relief on January 25, 2010. Plaintiffs sought four specific declarations: 1) they are entitled to own personal property in the form of a cow; 2) they are entitled to consume unpasteurized milk (raw milk) and other unpasteurized dairy products from their personal cow; 3) they are entitled to enter into a boarding agreement with a farmer for that farmer to tend to, manage, and care for their personal cow on their behalf; and 4) they are entitled to enter into a service contract with the farmer to convert some of the unpasteurized milk produced by their cow into other unpasteurized dairy products such as butter, yogurt, or kefir. Freitag dismissed his claim on March 10, 2011.

In addition, Slippy sought a permanent injunction to enjoin the Iowa Department of Agriculture and Land Stewardship (hereinafter IDALS) from interpreting Iowa Code §192.103 as prohibiting her from owning a cow, boarding a cow, and consuming raw milk and raw milk products from her personal cow, alleging they would suffer permanent, irreparable and actual harm if IDALS were to interpret and apply the statute in this manner. In the Petition, Slippy stated she entered into a private contract, or Bill of Sale, with an Amish farmer[1] for the purchase of a cow(s). Slippy and former Plaintiff Freitag had separate but identical contracts with the same farmer to board, care for, manage, and tend to their cow(s). In addition to the fee Slippy paid in the Bill of Sale,

[1] The farmer and Herd Manager referred to in this action has been identified by Defendant as Jesse Yoder. Mr. Yoder is not a party to this action.

under the Herd Boarding Agreement she paid the farmer a monthly fee. Slippy refers to this arrangement in her pleadings as an "Agistment Agreement."

Slippy and the farmer executed their first agreements on August 26, 2008. One agreement is titled "Initial Bill of Sale, Undivided Interest in a Dairy Herd." The other is a "Herd Boarding Agreement." Under the Bill of Sale (BOS), Slippy acquired seven shares in a herd of dairy cattle consisting of at least forty (40) dairy cows for $210, equaling $30 per share. The BOS expressly prohibits Slippy from selling her shares to anyone other than the Seller (Yoder), who would purchase the shares at the current market value. The agreement also states:

> "Buyer's interest in the herd also includes a share of the milk production from the herd. The amount of milk production attributable to Buyer's percentage interest in the herd shall be an amount that is equivalent to the Buyer's percentage interest in the herd. . . . Buyer's duties for receiving his/her quota of milk production from the herd shall be in accordance with a Herd Boarding Agreement that is being executed by the Buyer and Seller simultaneously with this initial Bill of Sale."

The BOS states the Buyer insisted the milk derived from her share be unpasteurized. The BOS required the Buyer to place her initials indicating she had read provisions regarding the possible presence of harmful bacteria in unpasteurized milk, as well as an acknowledgment that the unpasteurized milk she acquired were solely for her own use and was not to be used for re-sale. The BOS explicitly states Slippy is not entitled to any profits from the management of the herd, nor is she responsible for any losses incurred. Slippy testified in her deposition that her seven shares entitled her only to a corresponding seven gallons of raw milk.

The Herd Boarding Agreement (HBA), executed the same day, classified Slippy as "joint and several owner ("Herdshare Owner") of an undivided interest in a herd" of dairy cows located at the farmer's dairy. The HBA requires Slippy pay $175 per month ($25 per share) for boarding her share of the herd. Like the BOS, the HBA prohibits Slippy from disposing of her shares by any manner other than selling them back to the Herd Manager, who was to purchase them at the price he was currently selling the shares.

Other than the monthly fee, Slippy's only duties were to pick up her share of milk at a time agreed upon by the parties, to provide all jugs, bottles, and caps for bottling the milk, and to transport the milk to her home herself. The Herd Manager was responsible for bottling and cooling the milk, maintaining and caring for the herd, and paying all expenses incurred for the care of the herd other than "extraordinary" veterinary expenses, which would be assessed to each shareholder on a pro rata basis. Section 5 of the HBA states the parties may not transfer any ownership or possession of the milk production from the "Herdshare Owners'" interest in a transaction which would violate the laws of the State of Iowa.

According to the HBA, if any Boarding Agreement in place within the herd is terminated, the remaining "Boarders" must find a replacement(s) Boarder for that share of the herd. If they are unable to find a replacement, the HBA is terminated and the Boarders must sell their shares in the herd back to the Herd Manager. In the event either Slippy or Yoder wished to terminate the HBA, Yoder was required to buy back her shares and return all outstanding boarding fees pro rata. Yoder retained a possessory lien in Slippy's shares, which he could sell if she failed to pay her boarding fee for two consecutive months. Any profit realized by a sale under these circumstances was to be retained by Yoder.

Section 11(A) of the HBA states the parties do not intend the agreement to be construed as a sale of raw milk. Section 11(B) states:

> "No Consumer Transaction – The parties agree and state it is their intention that the acquisition of milk by the Boarder is not a consumer transaction subject to regulation under applicable Iowa law."

Slippy regularly paid her fees and visited the farm to pick up milk produced by her herd share in accordance with the BOS and HBA. She took the raw, unpasteurized milk home where it was consumed only by Slippy and her family members. Slippy and Yoder also agreed he was to use some of her share of the raw milk to make raw dairy products such as yogurt, butter, and kefir for her personal consumption.

On February 2, 2009, IDALS sent a cease and desist letter to Yoder. The letter notified Yoder that IDALS had received information that he was involved in several herd share arrangements in violation of Iowa Code §192.103, which expressly prohibits the sale of raw, unpasteurized milk. The letter advised Yoder that if he continued to sell raw milk, his State milking permit would be terminated. Neither Slippy nor any of the other herdshare owners were identified or mentioned in IDALS' letter. Slippy did not receive a copy of the letter and it is undisputed that IDALS has never initiated an enforcement action against her or sent her any similar correspondence. Slippy's legal claims are all linked to IDALS' letter to Yoder, and IDALS' interpretation of her herd share arrangement as a sale. Slippy claims that as a result of the IDALS letter, Yoder stopped tending to, caring for, and managing her cow(s) on her behalf. Slippy stopped visiting the farm to pick up raw milk and raw milk products produced by her "shares" and discontinued her monthly payments. The agreements were never explicitly terminated and Yoder did not buy back Slippy's shares or sell them to another Boarder as directed in the HBA.

After filing this action on January 25, 2010, Slippy executed another BOS and HBA with Yoder on February 18, 2010. Both agreements were similar to the first, however, this time Slippy purchased eight shares for $75 per share for a total of $600. Yoder deducted her previous payment of $210 under the first BOS from this total, thus, Slippy paid $390. In addition, the 2010 BOS granted Slippy eight (8) shares in a herd of four (4) cows set aside for the herd share. Again, Slippy could not dispose of her shares other than by selling them back to Yoder. The BOS provided that Slippy's interest in the

herd includes a share of milk production from the herd equivalent to her interest of eight (8) shares in the herd.

Slippy also executed a second HBA outlining the parties' responsibilities regarding the care and management of the herd. The 2010 HBA is also similar to the 2008 agreement, however, the monthly boarding fee dropped to $19.50 per share. Slippy testified in her deposition that Yoder lowered the HBA fee because he was concerned that the former fee would pose a financial burden given the increased sale price in the new BOS. Termination of the agreement results in Slippy selling her shares back to Yoder. Unlike the first HBA, the second states Slippy is responsible for bottling her own milk and the farmer is responsible for providing the bottles and caps. Slippy testified in her deposition, and it is undisputed, that despite this provision in the new HBA Yoder continued bottling and cooling her milk as he did under the first HBA. The milk produced by Slippy's herd share is commingled with the milk of the other share owners in a large vat, cooled, and bottled in plastic gallon-size jugs. There are no markings or labels on the jugs indicating they are set aside for any particular herd share owner.

Sections 5 and 11(A) of the 2010 HBA again state the agreement is not a sale of raw milk. However, Section 5 contains a caveat that the section only applies "if it is illegal to sell raw milk in your state" and contains blanks where the parties may enter the name of the state if it is, in fact, illegal to sell raw milk in their state. In the 2010 HBA in question, "Iowa" has been written in the blanks on Slippy's HBA.

Slippy claimed IDALS' actions and enforcement of Iowa Code § 192.03 against Yoder injured her and deprived her of the fundamental right to own and use her personal property, her inalienable right to consume the food of her choice, and her right to enjoy the benefits of her private contract. In addition, Slippy claimed IDALS' threat of enforcement action against Yoder guarantees her standing to challenge the regulation because a declaratory ruling in her favor would redress her injury and allow her to use her personal property to provide for the care and well being of her family by consuming the food of her choice. Slippy denied that she purchased raw milk or raw milk products from Yoder.

In her Petition, Slippy raised several arguments on Constitutional grounds and claimed the IDALS's action was not subject to Iowa's Administrative Procedure Act. She stated IDALS did not have the authority to address the constitutional issues she had raised and judicial review was her only remedy.

Slippy claimed IDALS actions violated her rights under the Iowa Constitution to possess, use, and enjoy one's property, the right to privacy; and right to contract. She sought the following relief:

1) A declaration that Slippy and her family have the inalienable right to purchase, own, possess and use a cow;
2) A declaration that Slippy and her family have the inalienable right to consume the raw milk and dairy products produced by their cow;

3) A declaration that Slippy and her family have the inalienable right to enter into a boarding contract or Agistment Agreement with an Iowa farmer to tend to, manage, and take care of her cow;
4) A declaration that Slippy and her family have the inalienable right to enter into a services contract with a third party for the conversion of some raw milk produced by her cow into other raw milk dairy products;
5) A declaration that IDALS February 2, 2009, letter to Yoder is unconstitutional as applied to Slippy;
6) A declaration that Iowa Code §192.103 is unconstitutional as applied to Slippy;
7) A permanent injunction enjoining IDALS from commencing or continuing any enforcement action, civil, criminal, administrative or otherwise of Iowa Code §192.103 against Slippy or anyone else who wishes to engage in conduct engaged in by Slippy;
8) Attorney's fees and costs.

In its Answer, IDALS denied all allegations adverse to them and set forth the affirmative defenses that Slippy lacks standing to challenge their actions and she has failed to join all indispensible parties for the adjudication of her claims. IDALS admitted sending the February 2, 2009 letter to Yoder, but denied their actions infringed upon any of Slippy's rights or injured her. IDALS denied Plaintiff's agreements with Yoder were contracts for the purchase of a cow or to care for her cow. Rather, IDALS asserts Slippy's contracts are an attempt to circumvent the law and are essentially sham agreements to lease a cow for the sole purpose of purchasing raw milk, the sale of which is prohibited by Iowa Code § 192.103. IDALS asserts the arrangement essentially allows Slippy to pre-pay the farmer for her milk, thus avoiding payment at the time of pick-up and the appearance of a sale.

Defendant filed their Motion for Summary Judgment on September 8, 2011. IDALS argues they are entitled to judgment as a matter of law because Slippy lacks standing to maintain her claim. IDALS argues their enforcement action was not directed at her, but at the farmer from whom she obtained raw milk, and they have not taken further action against Yoder. Since she has never been under threat of prosecution, cannot be prosecuted for purchasing or consuming raw milk, and has not established a concrete and particularized injury, IDALS asserts Slippy has not demonstrated she has standing to challenge their action under Iowa Code § 192.103.

Defendant's second argument involves Slippy's BOS and HBA agreements. IDALS asserts Slippy's constitutional arguments need only be considered if the Court finds Slippy has standing and that her transactions with the farmer constitute a sale of raw milk. If the transaction is not a sale, IDALS concedes it does not have authority to regulate Slippy's agreements with Yoder. However, IDALS argues the undisputed facts establish the true substance of the transaction is an illegal sale of raw milk.

Defendant's third argument is that IDALS is entitled to summary judgment on Slippy's claim that their action violates her property rights because their actions are not

arbitrary and unreasonable, nor have they violated Slippy's right to own a cow and use that cow for her own enjoyment and benefit. IDALS argues Slippy has mischaracterized her contractual arrangement as one of property ownership of a cow or cows, when it is actually an agreement for the sale of raw milk.

Fourth, IDALS claims they are entitled to summary judgment on Slippy's Due Process claims because she has not carefully described the fundamental right she is seeking to protect. Further, IDALS claims they have a rational basis for prohibiting the sale of raw milk, and treating a herd share arrangement such as Slippy's as a sale does not qualify as a government activity that violates her substantive due process rights.

Fifth, IDALS claims they are entitled to summary judgment as a matter of law on Slippy's claim their action violated her constitutional right to privacy. IDALS does not dispute that Iowans have a right to consume raw milk or whichever food they please, but argues Slippy has not shown that the right to privacy entitles her to the right to enter into a contractual arrangement to purchase raw milk. Further, Defendant claims they have sought only to prevent the farmer from selling raw milk, and have not infringed upon Slippy's right to consume raw milk.

Finally, IDALS seeks judgment as a matter of law on Slippy's claims their action violates her inalienable right to contract under Iowa's Inalienable Rights Clause. IDALS argues the constitutional constraints of government interference with private contracts applies to legislative action, not administrative action. In addition, IDALS argues Slippy's claim cannot succeed because the statute she is challenging was enacted well before she entered into her arrangement with Yoder. Lastly, IDALS argues Slippy's claim cannot succeed because it is a scheme designed solely to skirt Iowa Code § 192.103 in contravention of public policy and regulation of such contracts falls within a legal exception to the right to contract.

Slippy filed her Resistance on October 24, 2011. In conjunction with her Resistance, Slippy filed a Motion to Strike Defendant's Appendix pages 2-3 as unauthenticated documents pursuant to Iowa R. Civ. P. 1.434. Defendant attached the documents as "Iowa Department of Public Health Memoranda on Raw Milk Consumption." One document is dated January 28, 2011, and the other is dated January 15, 2010. Both are on Iowa Department of Public Health letterhead but are not signed or accompanied with an affidavit attesting to their authenticity. Slippy argues the documents cannot be admitted unless they are authenticated, and Defendant did not establish authenticity by attaching an affidavit from a competent person who can attest that the documents are what they purport to be.

Defendant Resists Plaintiff's Motion to Strike by arguing under Iowa R. Civ. P 5.902, evidence of authenticity is not required for official publications "purporting to be issued by public authority." Defendant argues the documents were issued by the Iowa Department of Public Health, which is clearly a public authority and the Memoranda falls within the exceptions noted in Iowa R. Civ. P. 5.902(5) Therefore, Defendant claims the documents are self-authenticated and admissible.

As for her Resistance to Defendant's Motion for Summary Judgment, Slippy claims there are several outstanding issues of material fact that render summary judgment inappropriate. Specifically, Slippy disputes IDALS characterization of her agreements with Yoder as a contractual scheme meant to circumvent Iowa Code § 192.103. Rather, Slippy claims the first agreement was a legal purchase of an undivided interest in "a cow" and the second agreement was a legal purchase of an undivided interest in "a herd of dairy cows." She argues she has standing to maintain her action because she is faced with a "Hobson's Choice" of continuing to engage in conduct the State considers illegal or stop the activity even though she believes the State's interpretation of the law is illegal. Slippy claims her conduct is not an attempt to circumvent the law, rather, the State's enforcement of Iowa Code § 192.103 against her is an attempt to circumvent her constitutional rights.

Slippy argues either she has standing to challenge the State's actions or the State has no jurisdiction over her conduct. She argues that since her action is for declaratory judgment, she does not have to show injury in fact or causation. Slippy claims she has standing because she has a personal stake in the outcome of the case. In doing so, Slippy claims she has sustained sufficient injury because she is the target or object of IDALS action. Slippy argues since the State is attempting to enforce their regulations against the sale of raw milk, as the alleged buyer in the transaction, the State is also essentially accusing her of engaging in illegal activity by owning and boarding a cow and drinking the milk from her cow.

Additionally, Slippy disputes that her number of shares is equal to the number of gallons of milk she is entitled to under the agreements. She claims her shares entitle her to a percentage of milk produced by her herd share rather than a certain number of gallons. In support of this argument, Slippy provides an affidavit claiming her deposition testimony, in which she consistently equates her shares with gallons, is inaccurate. Among other issues, Slippy makes several statements in her affidavit regarding the benefits of drinking raw milk and the detriments of pasteurized milk and commercial dairy practices supported by the government. Slippy states her deposition testimony was inaccurate because she was nervous and did not understand the questions.

Although in her deposition she stated she never picked up more than seven (7) gallons per week under the first agreement and eight (8) gallons under the second, in her affidavit she states there were times when she picked up more or less milk when the cows in her herd share were freshening or drying up. In her first deposition, Slippy surmised a cow likely produced twenty (20) gallons of milk per week. She further explained that her seven (7) shares entitled her to seven (7) gallons of milk per week under the first agreement, and under the second agreement her eight (8) shares entitled her to eight (8) gallons per week. In her affidavit, Slippy states her seven (7) ownership shares entitled her to 35% of milk produced by the herd under the first agreement and her eight (8) ownership shares entitled her 40% of milk produced under the second agreement. Thus, Slippy claims, at times she picked up more or less than seven (7) or eight (8) gallons depending on the fluctuation of production of the herd due to the drying

up or freshening status of the herd. Slippy concedes that on the majority of occasions, she picked up seven (7) or eight (8) gallons of milk per week. Both BOS and HBA agreements give the farmer the right to dispose of any extra milk produced by Slippy's share in any way he sees fit.

In her Resistance, Plaintiff cites several instances in history of the government oppressing it's citizens or otherwise infringing upon their rights such as previous government regulations as those prohibiting interracial marriage, regulations mandating segregated schools, laws prohibiting parents from home schooling their children, and prohibitions on women's right to vote. Plaintiff argues the State of Iowa (via IDALS) enactment and enforcement of Iowa Code § 192.103 is essentially a statement that its citizens do not have the right to own a cow, enter into a contract to board their cow and have that farmer tend to their cow, or the right to drink the milk produced by that cow. Slippy argues IDALS' infringement upon those rights in the name of public health and welfare are "paternalistic and treat Iowa's citizens as wards of the State." Slippy further claims the State's public health basis for Iowa Code § 192.103 is invalid because consuming raw milk is less of a health hazard than consuming pasteurized milk. Finally, Slippy claims Iowa Code § 192.103 does not apply to her because her conduct is private and does not impact public health. Finally, Slippy requests that if the court finds the BOS and HBA are invalid that the court reform her agreements with Yoder to comply with the law as she intended.

Attached to Slippy's Resistance as an authority is an affidavit given by Peter Kennedy, an attorney licensed in Florida and President of the Farm-to-Consumer Legal Defense Fund. Mr. Kennedy has provided legal representation to members of the organization since its inception in 2007. Mr. Kennedy argues the requirement that milk for sale must first be pasteurized does not have a basis in our Nation's heritage, however, consumption of raw milk is part of our Nation's heritage and should be protected. He cites several statistical studies on food safety and concludes the dangers of consuming raw milk are very small and are not a threat to public health that is worthy of government regulation. He opines raw milk is actually safer than pasteurized milk. Mr. Kennedy also asserts he has reviewed Slippy's BOS and HOA and has come to the conclusion they are in compliance with Iowa law.

IDALS filed their Reply to Plaintiff's Resistance on November 7, 2011. IDALS reasserts their argument that Slippy lacks standing and states her claim is based on a mischaracterization of what conduct is prohibited by Iowa Code § 192.103. IDALS notes Slippy is not and cannot be subject to prosecution under Iowa Code § 192.103 for purchasing and consuming raw milk. Therefore, she is not faced with a "Hobson's Choice" and lacks standing. IDALS further argues Mr. Kennedy, as a lawyer for an advocacy group without a scientific background, is not a qualified or credible witness to speak to the innocuous nature of raw milk or the alleged danger to public health of pasteurized milk.

IDALS also states Slippy has failed to demonstrate there are genuine issues of material fact and all remaining disputes are matters of law. IDALS asserts Slippy has

improperly attempted to manufacture issues of material fact by disputing her own deposition testimony, but nonetheless the facts she attempts to place in dispute are not material to the outcome of the case.

IDALS argues the constitutional arguments raised by Slippy are red herrings because they either mis-state the fundamental rights she is seeking to protect or they fail to address IDALS' claims for summary judgment. As pertains to Slippy's claimed right to contract, IDALS argues Slippy waived her resistance to summary judgment on Defendant's claims under the Contract Clause by failing to address them in her resistance. IDALS also notes that Slippy has not met the burden required for reformation of contracts.

II. CONCLUSIONS OF LAW

A. Plaintiff's Motion to Strike Defendant's Appendix pages 2-3

I.C.A. Rule 5.902 lists the exceptions to the rule requiring evidence of authenticity before documents can be admitted. If a document falls within an exception, it is considered self-authenticating. I.C.A. Rule 5.902(5) grants self-authenticating status to official publications, which include "books, pamphlets, or other publications purporting to be issued by public authority." Iowa Rule of Evidence 5.803(8) grants a hearsay exception to public records and reports. Rule 5.803(8) states in part:

> "... records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to a duty imposed by law..."

Such documents are self-authenticating and do not require certification or testimony from a witness or custodian to lay a foundation. *State v. Redmond*, 2011 WL 3115845 *2.

The publications Plaintiff seeks to exclude are memoranda issued by the Iowa Department of Public Health (IDPH), which is a public authority charged with "promoting and protecting the health of Iowans." http://www.idph.state.ia.us. The Division of Environmental Health of the IDPH administers the IDPH "Grade 'A' Milk Certification Program." http://www/idph.state.ia.us/WhatWeDo/Profiles.aspx. Both memoranda purport to describe the harmful bacteria that may be present in unpasteurized milk and are submitted in support of Defendant's argument the prohibition on the sale of raw milk is based on the agency's goal protecting public health. Iowa Code § 189 outlines general provisions and definitions regarding agriculture-related products and activities. Iowa Code § 189.1(5) defines pasteurization as "the procedure of processing milk or a milk product, in order to ensure its safety from contaminants."

Although the publications do not bear a signature, they are on Iowa Department of Public Health letterhead, accurately state the relevant elected and appointed officials in place at the time each memoranda was issued, and purport to convey information

regarding unpasteurized milk that is consistent with the Iowa Department of Public Health's stated mission and promotion of Grade "A" pasteurized milk. It also speaks to recent outbreaks of illness in Iowa attributed to consumption of raw milk. The information in the Memoranda is consistent with the duties of IDPH and the definitions and goals set forth in Iowa Code.

The Court finds the documents contained in Defendant's Appendix in Support of Motion for Summary Judgment, pages 2 and 3, are self-authenticating official publications issued by a public authority. Therefore, the memoranda are admissible and Plaintiff's Motion to Strike is **DENIED**.

B. Defendant's Motion for Summary Judgment

1. Summary Judgment Standard

"Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to summary judgment as a matter of law." *Kolarik v. Cory Intern. Corp.*, 721 N.W. 2d 159, 162 (Iowa 2006) (citing Iowa R. Civ. P. 1.981(3)). A fact is considered material only if it affects the outcome of the suit. *Estate of Harris v. Papa John's Pizza,* 679 N.W. 2d 673, 677 (Iowa 2004)(citing *Phillips v. Covenant Clinic*, 625 N.W. 2d 714-718 (Iowa 2001)). The moving party bears the burden of showing the material facts are undisputed, and non-moving party must be given the benefit of any legitimate legal inference in evidence. *Faeth v. State Farm Mut. Auto Ins. Co.*, 707 N.W. 2d 328, 331 (Iowa 2005).

"When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgment motion, the court should rule in favor of the nonmoving party." *Eggiman v. Self-Insured Services Co.*, 718 N.W. 2d 754, 763 (Iowa 2006)(citing *Daboll v. Hoden*, 222 N.W. 2d 727, 733 (Iowa 1974). ("When reasonable minds could draw different inferences and conclusions, even if the facts are undisputed, the matter must be reserved for trial."). The court must consider every reasonable, legitimate inference that could be reasonably deduced on behalf of the nonmoving party. *Phillips* at 717. However, an inference is not legitimate if it is "based on speculation or conjecture." *Id.*,citing *Butler v. Hoover Nature Trail, Inc.*, 530 N.W. 2d 85, 88 (Iowa Ct. App. 1994). Speculation does not create a genuine issue of material fact. *Hlubeck v. Pelecky*, 701 N.W. 2d 93, 96 (Iowa 2005).

"To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law." *McVey v. National Organization Service, Inc.*, 719 N.W. 2d 801, 802 (Iowa 2006) (citing *Goodwin v. City of Bloomfield,* 203 N.W. 2d 582, 588 (Iowa 1973)). "To affirmatively establish uncontroverted facts that are legally controlling as to the outcome of the case, the moving party may rely on admissions in the pleadings...affidavits, depositions, answers to interrogatories by the nonmoving party, and admissions on file." *Id.* For their part, the resisting party "may not

rest upon the mere allegations of his pleading but must set forth specific facts showing the existence of a genuine issue for trial." *Hlubeck* at 95.

2. Is Defendant entitled to summary judgment because Plaintiff lacks standing to maintain her cause of action?

A complainant must have standing to support a claim that her constitutional rights have been violated. *Godfrey v. State*, 752 N.W. 2d 413 (Iowa 2008). The Iowa doctrine of standing parallels that of federal law. *Alons v. Iowa District Court for Woodbury County,* 698 N.W. 2d 858, 869 (Iowa 2005). For an action to stand, the plaintiff must demonstrate a specific personal or legal interest in the litigation and that she is injured by the action. *Banks v. Iowa Department of Public Safety*, 791 N.W. 2d 431, 432-33 (IA Ct. App. 2010) When standing is at issue, the focus is on the party bringing the action. *Alons* at 863-864 (citations omitted). "The question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded." *Id.* at 864, citing 59 Am. Jur. 2d Parties § 36 at 442 (2002).

Although Plaintiff argues otherwise, under Iowa law, the standards for establishing standing for declaratory judgments are no different than for any other action. *Banks* at 432. "Our cases have determined the complaining party must (1) have a specific personal or legal interest in the litigation, and (2) be injuriously affected." *Citizens for Responsible Choices v. City of Shenendoah*, 686 N.W. 2d 470, 475 (Iowa 2004). These are two separate requirements and both must be satisfied for the action to stand. *Hawkeye Bancorporation v. Iowa College Aid Comm'n*, 360 N.W. 2d 798, 801 (Iowa 1985). In other words, Slippy must demonstrate that IDALS' actions not only "produce a legally cognizable injury" but also that she is the one who sustained that injury. *Citizens* at 475, citing *Iowa Civil Liberties Union v. Critelli*, 244 N.W. 2d 564, 567 (Iowa 1976).

To be a legally cognizable injury, there must be (1) an injury-in-fact to a legally protected interest that is "concrete and particularized" and "actual or imminent", not 'conjectural 'or 'hypothetical'; (2) a causal connection between the injury and offensive conduct that is "fairly traceable" to the challenged action of the defendant; and (3) the injury must be "likely" as opposed to merely "speculative". *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citations omitted). In addition, the injury must be such that it can be redressed by a favorable decision. *Id.*

Speculation that an injury may occur does not establish the concrete and particularized injury required to show standing. *Citizens* at 475. In *Citizens*, the plaintiffs were landowners whose property was under consideration for possible government taking for development of a recreational area by the City of Shenendoah. Even though the plaintiffs were landowners who would potentially be subject to a government taking of real property, thereby directly affected by the City's actions, the Court found they did not have standing to challenge the action because the City was not close to finalizing the

funding and plans for the project, therefore, the property owners could not demonstrate a concrete, actual injury that was likely rather than speculative. Unlike the landowners in *Citizens,* Slippy's connection to IDALS is not nearly as direct as the property owners' interests were in *Citizens*.

Plaintiff's argument that she has standing is based on her patent mischaracterization of the conduct regulated under Iowa Code § 192.103. The State has accurately asserted that Slippy's participation as a buyer or consumer of raw milk is not within the purview of IDALS' regulation. It is undisputed that Slippy has never sold raw milk. She is not subject to criminal or civil penalties under Iowa Code § 192.103, therefore, the "Hobson's Choice" she claims does not exist. Despite Slippy's attempts to establish herself as "a party who is a target or object of" IDALS' action, the undisputed facts in the record indicate otherwise. *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007). Slippy even claims outright in her Petition that IDALS action was directed at her, but was directed at Yoder. Plaintiff's Petition, pg. 10, lines 55-56. The threat of administrative action against Jesse Yoder, who is not a party to this action, has not created a "concrete and particularized" or "actual and imminent" injury for Slippy.

Slippy does not dispute that she has had continued access to the raw milk from her herd share other than the time period between Yoder's receipt of IDALS' letter and their execution of new agreements shortly after she filed this action. The fact that Yoder discontinued caring for Slippy's herd share (which she mis-names as a single cow in her argument), and that she stopped paying her fee under the 2008 HBA, thus eliminating her access to her preferred source of raw milk for some time, were not the result of IDALS' actions. In reality, Yoder didn't literally stop caring for the herd, allowing the cow Slippy claims to own to perish due to a lack of care, but stopped providing Slippy with her raw milk. This was the result of decisions made by Slippy and Yoder. The only person in this case subject to IDALS' enforcement action is Jesse Yoder. Yoder did not sell Slippy's shares to anyone else, and even deducted her previous purchase price from the purchase price under the second BOS. Thus, Slippy cannot even claim financial injury. Furthermore, Plaintiff does not dispute that IDALS has taken no further enforcement action against Yoder since their February 2009 warning letter. Plaintiff has failed to join him as a party to this action and has not provided any convincing legal authority that she can bootstrap herself to him and include herself as the target of IDALS' action.

Likewise, Plaintiff's argument that if she does not have standing, her agreements with Yoder are not a sale of raw milk and IDALS does not have jurisdiction over her conduct is without merit. IDALS doesn't dispute that they have no jurisdiction over her conduct unless the court finds she does have standing *and* her transactions with Yoder are a "sale" under Iowa law. IDALS is not seeking to regulate Slippy's conduct of buying or consuming raw milk. No matter how many times or how vehemently Slippy attempts to confuse the issue and assert that her alleged right to purchase and consume raw milk are the activities IDALS seeks to regulate, this does not make it so. Furthermore, they are based on plain misstatements of IDALS' arguments. IDALS' arguments on pages 6-14 of their Memorandum of Authorities are explicitly noted on page 3 as arguments

intended for the Court's consideration only upon a finding that Slippy does have standing.

Slippy does not dispute IDALS' statements "Slippy has never received any communication from Defendant concerning raw milk, let alone any communication threatening her with prosecution for buying or consuming raw milk." *Defendant's Statement of Undisputed Facts* ¶ 5. There is no evidence in the record that IDALS has taken further action against Yoder that would potentially interfere with Slippy's preferred source of raw milk in the future. Iowa Code § 192.103 speaks for itself in that it applies only to the sale of raw milk. Even if IDALS defines Slippy's agreements with Yoder as a sale, Slippy is the purchaser, not the seller. The undisputed facts show IDALS has not overstepped their bounds as applied to Slippy because she has not sold raw milk and is not the subject of any IDALS investigation or enforcement action.

Having considered the record in a light most favorable to Plaintiff, the Court concludes the undisputed facts and every reasonable inference under the law show Slippy has failed to establish she has suffered a concrete and particularized injury-in-fact, caused by IDALS, that could be corrected by a favorable decision by this Court. Slippy's claims to injury due to IDALS actions against Yoder are speculative at best. As noted early in this Ruling, speculation does not create an issue of material fact. *Hlubeck* at 96. Therefore, Slippy lacks standing to maintain her cause of action and IDALS' Motion for Summary Judgment is **GRANTED**.

However, should an appellate court find Slippy has standing to maintain her cause of action, the Court now enters the following findings of fact and conclusions of law as to IDALS remaining claims for summary judgment.

3. Is Defendant entitled to summary judgment as a matter of law on its claim that Plaintiff's contractual arrangement with Yoder constitutes a sale of raw milk and is therefore prohibited under Iowa Code § 192.103?

As previously noted, Iowa Code § 192.103 states that only "grade 'A' pasteurized milk and milk products shall be sold to the final consumer." The parties do not dispute that Slippy is the final consumer in this instance, thus the legal interpretation of the term "sale" in the statute as well as its application to Slippy's contractual arrangement with Yoder are the issues to be decided. Unless this Court decides Slippy's contracts with Yoder constitute a sale of raw milk, IDALS admits it does not have jurisdiction to regulate Slippy's (or Yoder's) conduct and the Court should not address Slippy's constitutional claims. *In the Interest of J.A.N.*, 346 N.W. 2d 495, 498 (Iowa 1984) (citing *State v. Davis,* 269 N.W. 2d 434, 439 (Iowa 1978)) (recognizing the court has a duty to avoid constitutional questions when the case can be decided without facing them).

Iowa Code § 190.2, the "Iowa Grade 'A' Milk Inspection Law," empowers IDALS to establish and publish standards for milk and dairy products when such standards are not already fixed by law. Iowa Code § 192.107 outlines the definitions and purposes

behind milk producer permits. It states that producers must be compliant with the requirements of the chapter. When producers are not compliant with the provisions of the chapter, "the department shall suspend a permit whenever there is reason to believe that a public health hazard exists." Although Slippy disputes that raw milk is a public health hazard, the parties do not dispute that Iowa's regulation of the sale of raw milk is based on an agency determination that unpasteurized milk is a threat to public health, safety, and welfare. "A law providing regulations conducive to the public good and welfare, is ordinarily remedial, and as such liberally interpreted." *Johnson County v. Guernsey Association of Johnson County, Inc.*, 232 N.W. 2d 84, 87 (Iowa 1975).

Iowa Code § 192.103 does not define the term "sale." In cases where terms are left undefined by a statute, the agency's interpretation of the term must conform to the power and authority vested in the agency enforcing the regulation. *City of Sioux City v. Iowa Dept. of Revenue & Finance,* 666 N.W. 2d 587, 589 (Iowa 2003). "The goal of statutory construction is to determine legislative intent. *Midland Power Co-op v. Swecker,* 787 N.W. 2d 480 (Iowa Ct. App. 2010).

Iowa Code § 159, IDALS' enabling statute, generally describes the duties and powers granted to the Iowa Department of Agriculture and Land Stewardship by the Iowa Legislature. Plaintiff argues IDALS actions are in opposition to the stated "objects" in Iowa Code § 159(5), which include promotion of agricultural interests and implementation of policies the instill confidence in the public in Iowa's agricultural industry. However, there are several sub-sections of IDALS' enabling statute, and in Iowa Code § 159.6(7), IDALS is charged with the duty of enforcing laws related to the "regulation and inspection of foods, drugs, and other articles." This power includes the ability to define and interpret terms related to this duty.

When an administrative agency is charged with administering and enforcing statutory provisions, it makes sense that the agency should also have the authority to define the terms left undefined by the Legislature in order to fulfill its enforcement responsibilities. *City of Sioux City* at 590. In the instant case, IDALS has interpreted Slippy's contractual arrangement with Yoder as a sale for the sole purpose of acquiring raw milk as opposed to the acquisition of private property in the form of a cow. In doing so, IDALS applied the definition of "sale" contained in Iowa Code § 423.1(48) which states:

> "Sales" or "sale" is any transfer, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, for consideration."

The application of Iowa Code § 423.1(48) to define the term "sale" in Iowa Code § 192.103 and other Iowa statutes has the support of the courts. *Johnson County* at 87.

There is really no dispute between the parties that Slippy's transactions with Yoder are "sales" under this definition. The dispute is whether the object of the sale is a cow(s) or shares of a herd, as Slippy asserts, or raw milk produced by cows owned by Yoder.

Iowa law recognizes the concept of undivided ownership in livestock. *Folkers v. Britt,* 457 N.W. 2d 578 (Iowa 1990). Slippy asserts in her pleadings that she has an undivided ownership interest in her cow/herd and the right to enter into an agistment agreement and pay a farmer to care for her cow/herd. The parties do not dispute the actual wording or written terms in the BOS and HBA agreements, but the construction and interpretation of those terms. Matters of construction and interpretation are legal issues, not factual issues, and are decided as a matter of law. *Fashion Fabrics v. Retail Investors Corp.*, 266 N.W. 2d 22, 25 (Iowa 1978). In matters of contract construction and interpretation tried in equity, we consider substance and intent over form. *Federal Land Bank of Omaha v. Bollin,* 408 N.W. 2d 56, 62 (Iowa 1987). The court looks to the subsequent conduct of the parties to discover the true intentions of the parties. *Id.*

Although Slippy's deposition testimony and discovery responses vacillate between Slippy owning shares of a herd of forty (40) cows, shares of one cow, one whole cow, and shares of a herd of four (4) cows, in her Petition and Resistance she claims she contracted with Yoder to purchase one single, particular cow and to pay Yoder to care for her cow and provide her with the raw milk produced by this one cow. For their part, IDALS claims the conduct of the parties and the results of the agreements indicate the transaction was the exchange of raw milk for a monthly fee in the form of the HBA, the rights to which were reserved by a down payment in the form of the BOS.

The parties do not dispute that the BOS and HBA do not entitle Slippy to any benefit other than raw milk and raw milk products in a proportionate amount equal to her shares, regardless of the size of the herd. Slippy does not dispute the material facts regarding the substance of the transaction. She cannot dispose of her shares or interest in her cow/herd in any way other than to sell them back to Yoder at the current sale price, which is entirely within his discretion. She is not entitled to any benefit or profit in proportion to her interest in the herd, nor is she obligated for any losses incurred. Her shares in the herd are contingent upon all of the other interests held by other Boarders remaining in effect. Yoder could terminate both agreements at any time without consequence so long as he returns Slippy's fees for that month pro rata.

The disclaimer in the 2010 HBA stating the transaction is not to be considered a sale of raw milk, *but only if it is illegal to sell raw milk in your jurisdiction*, is a strong indication that the parties were aware the transaction was actually a sale of raw milk prohibited by law in Iowa. In addition, Slippy does not dispute IDALS' statement that the price Yoder assigned to Slippy's shares in the BOS undervalued the price of a dairy cow by 150%, yet another indication that the transactions were not an exchange of property ownership in a cow for consideration. We agree with IDALS that Slippy's transactions with Yoder have all the markings of an animal-share leasing arrangement, in which the "renter" pays a fee, purportedly for a share of a dairy cow, and keeps the milk produced by that "animal/share," but has no other benefits under the contract. This is a common practice in states where it is illegal to sell raw milk and is meant solely for the purpose of exploiting loopholes in state raw milk sale prohibitions. See Damien C. Adams, Michael

T. Olexa, Tracey L. Owens & Joshua Crossly, *Deja Moo: Is the Return to Public Sale of Raw Milk Udder Nonsense?,* 13 Drake J. Agric. L. 305, 318-319 (2008).

The Iowa Supreme Court has defined property ownership as the "collection of rights to use and enjoy property, *including the right to transfer it to others*" and "the right of one or more persons to possess and use a thing to the exclusion of others. The right by which a thing belongs to some one (sic) in particular, to the exclusion of all other persons." *State v. TeBockhorst,* 305 N.W. 2d 705, 707 (Iowa 1981) (citing Black's Law Dictionary 997 (5th Ed. 1979), emphasis added. Slippy's property interest under the agreements, although it purports to be a share of a cow, is in reality only a share of raw milk produced by the cows in Yoder's herd. The BOS reserves title and the right to defend and exclude others from ownership of the cow to Jesse Yoder. We agree with IDALS that the arrangement lacks the permanency and landmarks of ownership interest expected in instances of true property ownership.

In *Johnson County*, the court was charged with determining whether a non-profit corporation's practice of distributing raw milk for a fee to corporation members constituted a sale of raw milk prohibited by Iowa Code § 192.A, the predecessor to Iowa Code § 192.103. The corporation argued that since its members were shareholders in the corporation, they each had an individual ownership interest in the cows and the milk produced, and the exchange of milk for a fee was not a sale. Although the facts are slightly different in this case, the *Johnson County* decision provides guidance on the issue. In *Johnson County*, the corporation argued the transactions were not a sale because the cows were owned as shares by the members of the corporation, who were the only individuals with access to the milk. The court found the cows were not the property of the individual shareholders, but of the corporation itself, therefore, an exchange of milk between the corporation and its members for a fee was a sale of raw milk. *Johnson County* at 85-86.

The similarity here is that although Yoder is obviously not a corporation, under the substance of the agreements, he retains complete ownership of the cows, or shares of a cow, or shares of a herd. The provisions of Slippy's BOS and HBA entitle her only to a share of raw milk produced in proportion to pre-paid fee in the form of the HBA. Likewise, the provisions of the lease agreement in *Johnson County* between the corporation and the cow's owners/boarders, entitled the corporation's members only to the milk produced by the corporation's herd share, and each shareholder was assessed a fee for the care of the herd that was based on his or her consumption of raw milk rather than the actual cost to care for the herd. *Johnson County* at 85. The court found the corporation's transfer of title, although it purported to be ownership shares in the herd, was actually ownership interest in the shares of raw milk produced by the herd. Thus, the corporation's distribution of milk to its members for a fixed fee was a sale of milk according to the legal definition of a sale. *Id.* at 86.

Despite the fact that Slippy's HBA's state they are not to be interpreted as a sale of raw milk, the substance of the agreements and the subsequent conduct of the parties demonstrate that those are empty words. The agreements are clear, and Slippy does

not dispute, that her "ownership" interest in the herd entitles her to nothing more than a reserved share of raw milk. She cannot dispose of her shares at her discretion and is at the mercy of Yoder's valuation of the shares when she sells them back. She cannot remove her "cow" or "herd" from Yoder's possession because her ownership interest under the agreements is not a "cow" or "herd." Although Slippy makes much about the validity and historical custom of agistment agreements this is irrelevant because Slippy does not dispute IDALS assertion that her HBA fees are not related to or measured by the actual cost of caring for the herd. Her agreement with Yoder is not an agistment agreement. Her property interest is solely in her shares, and her shares are only raw milk. Thus, the transaction between Yoder and Slippy is a down payment (BOS) reserving her shares and a fee for raw milk based on her consumption (HBA).

The BOS and HBA are nothing more than a set of guidelines for Slippy and Yoder in the exchange of raw milk for a pre-paid fee. Slippy's futile attempt to create an issue of fact by disputing her previous deposition testimony in regards to the amount of milk she received for her shares is neither convincing nor relevant. IDALS is correct in noting the questions posed in the deposition were clear and Slippy repeatedly and consistently equates her shares to gallons of raw milk, even when questioned by her own attorney. Nonetheless, whether her shares were measured in the form of gallons of raw milk or by a percentage of the total amount of raw milk produced by Yoder's herd is immaterial. The substance of the agreement is still an exchange of raw milk for consideration, which is the legal definition of a sale.

Therefore, the Court hereby finds that Slippy's transactions with Yoder constitute a sale of raw milk prohibited by Iowa Code §192.103. IDALS' interpretation of the BOS and HBA as a sale of raw milk accurately reflects the substance of the agreements. Therefore, Defendant's Motion for Summary Judgment on the grounds that Slippy's contractual arrangement constitutes a sale of raw milk prohibited by Iowa law is **GRANTED.**

4. Is Defendant entitled to summary judgment as a matter of law on Plaintiff's claim that IDALS' action violates her inalienable right to possess, use, and enjoy one's property?

In her Petition, Slippy claims IDALS actions violate the Inalienable Rights Clause and Unenumerated Rights Clause in Article 1, sections 1, 9 and 25 of the Iowa Constitution by interfering with her right to possess, use, and enjoy her property. The Inalienable Rights Clause states: "All men are, by nature, free and equal, and have certain inalienable rights-among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." Iowa Const. art. 1 § 1. The Inalienable Rights Clause has been interpreted by the court as a method by which the drafters of the Constitution secured common law rights that pre-dated the constitution. *Gacke v. Pork X-tra, L.L.C.*, 684 N.W. 2d. 168, 176 (Iowa 2004). While the courts have recognized these rights, also known as natural rights, neither the Inalienable Rights Clause nor Unenumerated Rights Clause has ever been interpreted to be absolute. *Id.*

The rights protected by the Inalienable Rights Clause are subject to reasonable regulation by the state's exercise of police power to protect the public welfare. *Id.* (citations omitted). The Inalienable Rights Clause "gives no right to own property as such, free from regulation." *May's Drug Stores v. State Tax Commission,* 242 Iowa 319, 329 (1951). "The clause does not prevent all legislative action taken pursuant to the police power that benefits the community and impacts an inalienable right." *Johnson v. American Leather Specialties Corp.*, 578 F. Supp. 1154, 1176 (N.D. Iowa 2008), citing *Gacke* at 176. Rather, it provides protection only from arbitrary and unreasonable government action that impacts an inalienable right. *Atwood v. Vilsack,* 725 N.W. 2d. 641, 652 (Iowa 2006). "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Benschoter v. Hakes,* 8 N.W. 2d. 481, 486 (Iowa 1943).

Slippy's claims are substantive due process claims and challenges under Iowa Const. Art. 1 § 9, known as the Unenumerated Rights Clause, are evaluated in the same manner as her Inalienable Rights claims. An inquiry into the validity of a statute under a substantive due process challenge is a two step process. First, the court must determine "the nature of the rights involved," *State v. Seering,* 701 N.W. 2d. 655, 662 (Iowa 2005). If the right in question is a fundamental right, it is protected and the court applies a strict scrutiny standard. *American Leather Specialties* at 1177. If the right involved is not a fundamental right, the statute need only pass a rational basis test. *Id.* In all instances, the challenger must prove the statute is unconstitutional "beyond a reasonable doubt." *Seering* at 661. Indeed, this burden is a heavy one as "statutes are cloaked with a presumption of constitutionality" and if the statute is capable of being construed in multiple interpretations, the court will adopt the construction which is constitutional. *Id.*, citing *State v. Hernandez-Lopez,* 639 N.W. 2d. 226, 233 (Iowa 2002).

In all instances, Slippy must show that the challenged statute impacts the right she is asserting. *American Leather* at 1177. If the court determines the right(s) Slippy seeks to protect are fundamental, the statute must be narrowly tailored to serve a compelling government interest. *State v. Groves,* 742 N.W. 2d. 90, 92 (Iowa 2007). If the right is not fundamental, then the statute merely must be a "reasonable fit between government interest and the means utilized to advance that interest. *Id.* citing *Hernandez-Lopez* at 238.

To ensure constitutional claims are properly considered, "claims involving fundamental rights must identify the claimed right with accuracy and specificity so that our analysis proceeds on appropriate grounds." *Seering* at 663, citing *Bowers v. Polk County Bd. of Supervisors,* 638 N.W. 2d. 682, 694 (Iowa 2002). In addition, an asserted right must be, objectively, "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702, 720-721 (1997), citations omitted. Traditionally, Iowa courts have followed the Supreme Court's line when evaluating rights that are asserted as fundamental. Both courts are reluctant to expand the scope of substantive due

process because of the limited guidance in our jurisprudence. *Id.* at 720. See also *In re Detention of Cubbage*, 671 N.W. 2d. 442 (Iowa 2003)

Substantive due process only protects individuals from the most shocking and offensive government intrusions. *State v. Smokers Warehouse Corp.*, 737 N.W. 2d. 107, 111 (Iowa 2007). It is "reserved for the most egregious governmental abuses against legal or property rights, abuses that shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity." *Id.* citing *Blumenthal Inv. Trusts v. City of West Des Moines*, 635 N.W. 2d. 255, 265 (Iowa 2001); *Rivkin v. Dover Twp. Rent Leveling Bd.*,671 A. 2d. 567, 575 (1975). When it comes to meeting these requirements, "the collective conscience of the United States Supreme Court is not easily shocked." *Id.* Classification of a right as fundamental is reserved only for the most blatant intrusions of an individual's privacy and bodily integrity. *Id.* There is no clear test to determine if an asserted right is fundamental. *Cubbage* at 447. Thus, both the Supreme Court and the Iowa courts proceed with extreme caution when expanding substantive due process rights.

On one hand, Slippy clearly and concisely states the rights she seeks to protect, which are listed in her Petition as the rights to own personal property in the form of a cow, to consume the raw milk produced by her cow, to enter into a boarding contract with a farmer to tend to her personal cow, and the right to enter into a services contract with a farmer to convert raw milk from her personal cow into other raw milk dairy products. On the other hand, we cannot analyze those issues as fundamental rights because IDALS concedes it has no jurisdiction to regulate her participation in any of those activities and the undisputed facts indicate IDALS has not intruded upon the rights Slippy asserts. The Court agrees with Defendant, that the rights Slippy states she is seeking to protect "is not the scenario that is before the court." *Defendant's MOA, page 15.* It has already been determined that Slippy's ownership interest is not in the form of a cow or even part of a cow, but in raw milk produced by Yoder's cows. The transaction in which Slippy obtains her milk is not through a BOS to purchase a cow or an HBA to board that cow. The undisputed facts show the documents executed by Yoder and Slippy constitute an animal leasing scheme that does not result in Slippy acquiring any property rights in a cow or paying for the board and care of a cow. As previously noted when the court addressed the issue of standing, it is undisputed that IDALS has not and is not regulating Slippy's purchase of or consumption of raw milk.

Slippy is correct in her assertion that Iowa courts have a long history or protecting substantive due process rights. Although Slippy provides a multitude of case law describing fundamental rights such as the right to marital privacy and the right to have children, she provides no legitimate legal authority supporting her assertion that she has the fundamental substantive due process right to engage in an animal lease agreement for the sole purpose of purchasing and consuming raw milk, or that Iowa has shown a willingness to expand the narrow definition of fundamental rights. Plaintiff's citation of an English common law case from 1777 regarding boarding and pasturing of livestock in an attempt to show agistment agreements are deeply rooted in our Nation's

history and traditions and should be granted status as a fundamental right is hardly convincing.

Furthermore, it is irrelevant because as previously noted, Slippy's and Yoder's agreement is an "agistment agreement" in name only. Slippy does not dispute IDALS' argument that the courts are wary of expanding fundamental rights. *Cubbage* at 447. Today, this court finds an English common law case from 1777 and Plaintiff's anecdotal and unsupported assertions are not an adequate basis for expansion of substantive due process rights to include the right to enter into an animal leasing agreement for the purchase of raw milk. Even if the court were to find IDALS had infringed upon the rights Slippy asserts, this Court does not find IDALS alleged intrusion upon Slippy's consumption of raw milk or agistment agreement as one that "shocks the conscience" or is "offensive to human dignity."

Slippy's argument that any legislative impact on liberty interests must be narrowly tailored to address a compelling government interest assumes this Court would find she actually holds a property interest in a cow or that she has an inalienable right to purchase raw milk. As this court finds Slippy's right to enter into agreements for the purchase of raw milk is not fundamental right, she must show beyond a reasonable doubt that the State's actions in regulating the sale of raw milk are arbitrary and unreasonable. *Atwood* at 652. But Slippy again mischaracterizes the conduct IDALS seeks to regulate. Iowa Code § 192.103 is a prohibition of the sale of raw milk, and Slippy has not shown beyond a reasonable doubt that Iowa Code § 192.103, or IDALS' interpretation of her agreements with Yoder as a sale of raw milk, is not a reasonable fit to promote the government's interest in public health and welfare. *Hernandez-Lopez* at 238.

The Court defers to State agency determinations on matters of public health and welfare. *Cannon v. Board of Psychology Examiners of the State of Iowa,* 707 N.W. 2d. 336 (Iowa App. 2005). The IDPH has an interest in limiting the number of Iowans who consume raw milk. See Defendant's Appendix pages 2-3. Prohibiting the sale of raw milk is a reasonable means to achieve that goal. Iowa has a long and vast line of case law that specifically allows government regulation of individual rights, including property rights, in the name of public health and welfare, including another case involving the government's public health interest in prohibiting the sale of raw milk. *Johnson County* at 87. See also *Iowa Coal Min. Co. v. Monroe County,* 494 N.W. 2d. 664 (Iowa 1993) (stating zoning regulations are within a County's power to regulate the health and welfare of the community, despite the regulation's impact on the use of property); *Borlin v. Civil Service Com'n of City of Council Bluffs,* 338 N.W. 2d. 146 (Iowa 1983) (holding the fundamental right to free enterprise is subject to reasonable government regulation to protect public health and welfare); *State v. Kirby,* 94 N.W. 2d. 254 (1903) (finding "preservation of public health is of paramount importance to the state at large"); *State v. Hartog*, 440 N.W. 2d. 852 (Iowa 1989)(finding Iowa statute requiring the use of a seat belt did not violate right to privacy).

The Iowa legislature has granted IDALS the power to regulate the sale of raw milk for the purpose of protecting public health and welfare. *Johnson County* at 87. See also Iowa Code § 159.6(7). Slippy has not shown beyond a reasonable doubt that she has a fundamental right to enter into private agreements for the purpose of purchasing raw milk. She has not shown Iowa Code § 192.103 is an unreasonable or arbitrary means for IDALS to limit the number of people exposed to raw milk for the protection of public health and welfare. As Slippy has not met the burden required by law, IDALS Motion for Summary Judgment as a matter of law on her claim that IDALS' actions violated her inalienable and unenumerated rights is **GRANTED.**

5. Is IDALS entitled to summary judgment as a matter of law on Slippy's claim that IDALS' action violates her inalienable right to privacy?

In her Petition, Slippy argues she has an inalienable right to consume raw milk produced by her cow, consume the foods of her choice, and be responsible for decisions regarding her health because these activities are protected by her fundamental right to privacy. The right to privacy is a substantive due process right and as such, the rights Slippy is seeking to protect must be clearly and accurately defined. *Seering* at 663.

If Slippy is seeking substantive due process protection of the conduct IDALS seeks to regulate, then she has not clearly articulated or defined that right. She asserts IDALS' action interferes with her rights as a parent, and claims unless the government can establish her as an unfit parent, then it has no business telling her what she can and cannot feed to her children, particularly raw milk. Yet again, Slippy's argument woefully misses the mark. The activity IDALS is regulating is the sale of raw milk, and in pursuit of this regulatory action IDALS has defined Yoder's transactions with Slippy as a sale of raw milk. Thus, the activity Slippy is truly seeking to protect is the right to enter into a contractual arrangement to purchase raw milk.

As a substantive due process right, an assertion of privacy rights follows the same analysis previously described in this ruling. First, the right must be defined. If the right is a fundamental one, the strict scrutiny standard applies and the government must demonstrate the regulation is narrowly tailored to serve a compelling government purpose. *Santi v. Santi,* 633 N.W. 2d. 312, 317 (Iowa 2001). "If the right at issue is not deemed fundamental, a reviewing court merely applies the familiar rational basis test to determine whether a reasonable fit exists between the government's purpose in enacting the statute and the means chosen to advance it." *Id.* citing *State v. Klawonn,* 609 N.W. 2d. 515, 519 (Iowa 2000).

"The right to privacy in this context simply means the freedom of choice to engage in certain activities." *Hartog* at 854. The U.S. Supreme Court has defined activities protected by the right to privacy "to include only child rearing and education, family relationships, procreation, marriage, contraception, and abortion." *Id.* at 854-855. The right to privacy is not expressly articulated in the Constitution, but is inferred. *State*

v. Price, 237 N.W. 2d. 813, 817 (Iowa 1976). The zone of privacy rights "encompasses and protects the personal intimacies of the home, families, marriage, motherhood, procreation, and child rearing." *Id.* at 818, citing *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973). In other words, not all regulations that impact an individual's freedom of choice to engage in certain activities are protected by the right to privacy. Only regulations with an impact on the most intimate decisions established by the U.S. Supreme Court as fundamental rights deserve strict scrutiny. *Id.* See also *Bowers v. Hardwick,* 478 U.S. 186, 191 (1986).

Both the U.S. Supreme Court and the Iowa Courts have refused to expand the fundamental right to privacy to other activities and there is "considerable reluctance to recognize new rights of privacy that stray from those categories already established." *Hartog* at 855. Even though the U.S. Supreme Court and Iowa courts have recognized certain aspects of child rearing as fundamental rights, they have declined to expand those rights to all aspects of child rearing. See *Wilson v. City of Council Bluffs,* 110 N.W. 2d. 569, 572 (Iowa 1961) (finding City's addition of fluoride to city water supply to prevent dental caries in children was within the City's police power to benefit the public health). For obvious reasons, not all conduct within the home is protected by the right to privacy. *State v. Coil,* 264 N.W. 2d. 293 (Iowa 1978) (an adult's right to privacy does not include sexual conduct with minors in violation of state statutes); *State v. Henderson,* 269 N.W. 2d. 404 (1978) (the protected zone of privacy for intimate matters did not extend to prostitutes plying their trade in their own home).

The rights Slippy articulates in her Petition and Resistance include the right to raise her family without government intrusion, the right to choose what foods to consume, and the right to be free from government interference with her health. But in support of her claim, Slippy yet again mischaracterizes her ownership interest as one of a single cow as a basis for her assertion that she has a right to consume milk from her cow in the privacy of her home. Despite Slippy's claim that the State is making an issue out of her consumption of the food of her choice, IDALS correctly notes it does not have jurisdiction to regulate Slippy's consumption of raw milk and they have not attempted to do so. There are no disputed facts in this regard.

Slippy argues that the court should expand the narrow list of established privacy rights to include the right to make decisions regarding her food and to consume the food of her choice. But her attempt to guard the right to consume raw milk as a fundamental right to privacy is blocked by the contractual arrangement IDALS is actually regulating. A statute is not unconstitutional on its face unless it is unconstitutional under every set of conceivable facts. *In Interest of Ponx,* 276 N.W. 2d. 425, 432 (Iowa 1979). A statute is "ordinarily not unconstitutional as applied unless it is unconstitutional as applied to the specific factual situation before the court." *Id.* quoting *Moorman Mfg. Co. v. Bair,* 254 N.W. 2d. 737, 755 (Iowa 1977).

In asserting her right to privacy, Slippy is not challenging Iowa Code § 192.103 on it's face. She is challenging IDALS application of the regulation to her. IDALS is not using Iowa Code § 192.103 as a means to infringe upon her alleged right to consume

raw milk. IDALS is enforcing the regulation prohibiting the *sale* of raw milk. The specific factual situation before the court is one of a government agency interpreting Slippy's arrangement with Yoder as a sale of raw milk proscribed by law. Slippy provided no legal authority that provides any guidance or support to the expansion of the fundamental right to privacy to include business transactions. Nor, for that matter, did she provide any legal authority or evidence other than her own opinion that the right to consume the food of her choice should be added to the narrow list of fundamental rights

Since the right to enter into her agreements with Yoder is not a fundamental right, IDALS action need only pass the rational basis test. To pass the rational basis test, IDALS need only show their actions are a "reasonable fit between the government interest and the means utilized to advance that interest." *In re Cubbage* at 446. Under the rational basis test, regulations are presumed to be constitutional. *Miller v. Board of Medical Examiners of the State of Iowa,* 609 N.W. 2d. 478, 482 (Iowa 2000). This presumption "can only be overcome by proof the law is patently arbitrary and bears no rational relationship to a legitimate government interest." *Id.*

The State's purpose behind Iowa Code § 192.103 is to limit the public's access to unpasteurized milk due to the potentially harmful effects on public health. Defendant's Appendix, pages 2-3. IDALS is empowered by the Legislature and obligated to the citizens of Iowa to define and enforce the provisions of the Code. Both IDALS and IDPH have jointly monitored food safety in the State of Iowa and continue to conclude that public distribution of raw milk would be adverse to public health. Slippy bears the heavy burden of proving beyond a reasonable doubt that IDALS actions are not rationally related to the goal of limiting public access to raw milk. *Miller* at 482. She falls far short of meeting this burden.

Slippy's arguments against the rational basis of IDALS' action consist of her and Peter Kennedy's completely unqualified and unscientific opinions that pasteurized milk is more dangerous than raw milk and that since she is consuming milk in her own home her activity is private and has no impact on public health. The only actual legal authority Slippy provides is Missouri state court opinion from *1926.* See Plaintiff's MOA in Opposition to Summary Judgment, page 36 (emphasis added) referencing *State ex. rel.Knese v. Kinsey,* 314 Mo. 80 (Mo. 1926). *Kinsey* is not binding on this Court. More importantly, 1926 is three (3) years before the discovery of antibiotics, and more than forty (40) years before the U.S. Department of Health and Human Services began issuing reports on the dangers of smoking cigarettes. See "A Report of the Surgeon General: How Tobacco Smoke Causes Disease," available at http://www.surgeongeneral.gov/library/tobaccosmoke/factsheet.html. Clearly, our knowledge and treatment of issues of public health have seen drastic changes since 1926. Even if Slippy were able to provide a multitude of scientific evidence that raw milk is perfectly safe, this is beside the point. The Court gives agency determinations as to matters of public health and welfare considerable deference. *Cannon.*

Given the unwillingness of the court to expand the definition of fundamental privacy rights to areas other than the most shocking intrusions on the most intimate activities, extension of the doctrine to Slippy's contractual arrangements would be inappropriate. IDALS' Motion for Summary Judgment as to Slippy's inalienable right to privacy claim is **GRANTED**.

6. Is IDALS entitled to summary judgment as a matter of law on Slippy's claim that IDALS action violates her inalienable right to contract?

Slippy claims IDALS actions interfere with her right to contract under Article 1, section 21 of the Iowa Constitution, and the U.S. Constitution Article 1, section 10. Both are known as the Contracts Clause. The Contracts Clause of the Iowa Constitution prohibits the passage of legislation that impairs the obligations of contracts. Iowa Const. art. 1, § 21. In their MOA in Support of Motion for Summary Judgment, IDALS challenged Slippy's claims on several grounds, including that the Contracts Clause only protects contracts entered into before the legislation was enacted, and that her contract is void because it is in contravention of public policy.

Slippy did not respond to either of these arguments in her Resistance. Iowa Rule of Civil Procedure 1.981(5) requires the adverse party to set forth specific facts showing there is a genuine issue for trial. If the adverse party fails to do so, those claims are effectively conceded and waived. Therefore, those claims related to the Contracts Clause in Slippy's Petition are dismissed. Thus, the only remaining issue on Slippy's right to contract claim is whether the Contracts Clause applies to the actions of an administrative agency.

There is not one single legal authority that applies the Contracts Clause analysis to private contracts entered into after the challenged legislation was enacted. Therefore, IDALS should be granted summary judgment on this basis alone, even if Slippy hadn't waived that argument. Her contract was always void because Iowa Code 192.103 existed long before her agreements with Yoder were executed. The landmark case on Contracts Clause protection is *Equipment Mfrs. Institute v. Janklow*, 300 F. 3d. 842 C.A. 8 (SD) 2002. The Contracts Clause is not absolute or literal, and does not protect private contracts entered into after a regulation has been promulgated. *Hawkeye Commodity Promotions v. Miller*, 432 F. Supp. 2d. 822, 841 (N.D. Iowa 2006). "Plaintiff may not complain about the enforcement of a police power to which it agreed." *Fort Dodge D.M. & S. Ry. v. American Commodity Stores Corp.*, 131 N.W. 2d 515, 522 (Iowa 1964). Thus, IDALS is entitled to summary judgment on this basis alone.

Slippy executed her agreements with Yoder in 2009 and 2010, and Iowa Code § 192.103 or its virtually identical predecessor were enacted decades before her agreements, rendering her agreements with Yoder invalid. However, even if this rule did not apply, the State may still regulate private contracts under certain circumstances.

"Preliminarily, we note that the guarantee of the Contract Clause in the federal and state constitutions must yield to a reasonable exercise of the police power for the public good. *Adair Benev. Soc. v. State, Ins, Div.*, 489 N.W. 2d. 1, 5 (Iowa 1992). Police power "is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 241 (1978). Without this exception, "one would be able to obtain immunity from state regulation by making private contractual agreements." *Id.*, quoting *Exxon Corp. v. Eagerton,* 462 U.S. 176, 190 (1983).

Slippy argues that since the legislature cannot enact laws in opposition to the Contracts Clause, the legislature also cannot delegate the power to do so to an administrative agency. For their part, IDALS argues in both their Motion and Reply that the Contracts Clause protects private contracts only from legislative action, not the actions of an administrative agency. Neither argument is entirely correct in form or as applied to this case. As noted above, the Contracts Clause is not absolute and must yield to the state's police power for the public good. *Adair Benev. Soc.* at 5. The legislature most certainly can legitimately delegate that police power to administrative agencies, even if it interferes with private contracts. *Fort Dodge* at 523. "We may interfere only if the acts or program ...are so arbitrary and unreasonable as to be beyond the police power of the State." *Id.* However, if the agency action affects private contracts it is subject to the protection of the Contract Clause and it must pass the same test the court applies to legislation.

The Contracts Clause of the Iowa and U.S. Constitution are substantially similar, and the same legal analysis applies to both. The 8th Circuit has adopted a 3-prong test for determining whether a statute violates the Contract Clause of the U.S. Constitution. Since the language of the Contracts Clause in the Iowa Constitution is substantially similar, the test guides our analysis. The first prong is a determination as to whether the state law has operated as a substantial impairment on pre-existing contractual relationships. *Hawkeye Commodity Promotions* at 842. If not, the law does not violate the Contracts Clause and there is no need to address the remaining prongs. *Id.* If it does operate as a substantial impairment, the State must have a substantial and legitimate public purpose behind the legislation. *Id.* If a substantial and legitimate purpose has been identified, the court must determine if the resulting adjustment of rights and obligations under the contract is "based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Id.* citing *Equip. Mfrs. Inst. v. Janklow,* 300 F. 3d. 842, 850 (8th Cir. 2002).

Iowa Code § 192.103 operates as a substantial impairment on Slippy's contracts with Yoder, because any statute the results in the total destruction of a contract is considered a substantial impairment. *Id.* at 847. The disputed issue is whether IDALS has a substantial and legitimate public purpose behind their enforcement actions against Yoder and whether their actions are reasonable. To meet this burden, IDALS must show the protective regulation address a "broad societal interest rather than a narrow class." *Janklow* at 859 quoting *Allied Structured Steel Co.* at 249. IDALS asserts

their regulation of the sale of raw milk is to protect the public health due to the potential presence of harmful bacteria in raw milk. Iowa Code § 192.103 is not directed at a narrow class of individuals, but benefits all citizens. *Janklow* at 861. We find that IDALS' rationalization is not *post hoc* and is supported by the evidence. *McDonald's Corp. v. Nelson,* 822 F. Supp 597, 609 (S.D. Iowa 1993). As previously mentioned in this Ruling, the evidence presented by Slippy disputing the public health issues posed by raw milk is not credible and is supported only by her allegations.

Since a legitimate public purpose has been established, the next inquiry is whether the resulting adjustment of rights and responsibilities of the parties to the contract is reasonable and appropriate to the identified public purpose. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.,* 459 U.S. 400, 412 (1983). When the contract in question involves only private parties, as it does in this case, the courts give wide and proper deference to legislative judgment as to the reasonableness of the restriction. *Id.* at 412-413. A key question as to whether the restriction is reasonable is whether the field involved is heavily regulated. *Id.* at 414. The agricultural industry is heavily regulated in Iowa as it involves everything from soil and water conservation, sale and care of livestock, local zoning regulations, food safety issues, and more. Furthermore, Slippy's contracts with Yoder expressly recognize the state regulation on the very object of their agreements in the provisions regarding whether they are meant to be interpreted as a sale of raw milk. The inquiry into the level of regulation of the industry is relevant to foreseeability by the parties that the contract may be subject to government regulation. *Id.* If the interference with the contract was foreseeable, it is generally considered reasonable.

Slippy clearly knew at the time she executed her agreements with Yoder that the sale of raw milk was illegal and she was operating in a highly regulated industry. Slippy *definitely* knew at the time she entered her second agreement with Yoder that IDALS interpreted her transactions with Yoder as a sale of raw milk. She cannot now say she did not foresee the potential for government intervention. Nor can we say Iowa Code § 192.103 is an unreasonable means to achieve the legitimate public purpose, particularly given the court's deference to the judgment of the legislature and the agency. *Energy Reserves Group* at 412-413. Therefore, IDALS interference with her agreements was a proper exercise of the police power and is a reasonable means to achieve the identified legitimate public purpose.

Slippy's actions as noted above also strongly support IDALS argument that Slippy's contracts are void as to public policy because they blatantly indicate the parties had full knowledge that their actions were illegal. *McBreary v. United States Taxpayers Union,* 668 F. 2d. 450 (8th Cir. 1982). A court "ought not enforce a contract which tends to be injurious to the public or contrary to the public good." *Rogers v. Webb,* 558 N.W. 2d. 155, 157 (Iowa 1997), citations omitted. Slippy waived IDALS' argument on this issue, does not dispute, and indeed cannot dispute that she knew, at the very least, that her 2010 agreement with Yoder would be interpreted as an illegal sale of raw milk.

"A promise or other form of agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." *Mincks Agri Center, Inc. v. Bell Farms, Inc.*, 611 N.W. 2d. 270, 275 (Iowa 2000), citations omitted. A contract intended to aid in effecting a transaction prohibited by law is void, and the prohibited act need not be criminal or even penalized. *Dodson v. McCurnin,* 160 N.W. 2d. 927, 929 (Iowa 1917). Therefore, even if Slippy hadn't waived her argument against IDALS assertion that her contracts are void as to public policy, she would be unsuccessful.

IDALS motion for summary judgment as a matter of law as to Slippy's right to contract claim is **GRANTED.**

7. **Is Slippy entitled to have her contract with Yoder reformed by the court to conform to their lawful intent?**

In both her Petition and Resistance, Slippy requests the Court reform her documents to avoid having them construed as an illegal sale of raw milk. Slippy is correct in noting the Court may reform agreements to reflect the intent of the parties. *Akkerman v. v. Gersema,* 149 N.W. 2d. 856, 859 (Iowa 1967). However, reformation is a method the Court applies in equity to prevent unjust enrichment to one party or the other as a result of mistake. *State, Dept. of Human Services ex. rel. Palmer v. Unisys Corp.*, 637 N.W. 2d. 142, 151 (Iowa 2001). Reformation is employed in the discretion of the Court only when it is absolutely essential to the ends of justice. *Akkerman* at 861.

Equity will reform a contract only when there is no doubt or ambiguity that a mistake occurred. *Akkerman* at 859. Slippy must establish by clear and convincing proof that the writing does not express the true agreement of the parties. *Id.* Absent this showing the court will not "make contracts" for the parties but must defer to the written instrument. *Id.* Unless Slippy can show there was a mutual mistake by Yoder and herself during formation of the contract, reformation is inappropriate. *Betz v. Swanson,* 200 Iowa 824 (Iowa 1925).

Slippy has not met this stringent burden. In fact, she does not even point to any specific provision in the contract that could be considered a mistake. The written terms of the contract are not disputed by IDALS, and Yoder is not before the court to defend his interests in the contract. Reformation is a remedy in equity associated with a claim of action brought by one party of a contract against another. It does not apply in instances where a contract is found void as a matter of law. The whole point of reformation is to change the terms of a contract to reflect the true intent of the parties, yet the only other party to Slippy's agreements, Yoder, is not present in this action. This is not an appropriate situation for the Court to exercise the discretion to reform a contract. Slippy's request for reformation of her contracts with Yoder is **DENIED.**

CONCLUSION

IDALS' Motion for Summary Judgment on the basis that Slippy lacks standing to maintain her cause of action is **GRANTED.**

Slippy's contractual arrangements with Yoder constitute a sale of raw milk prohibited by Iowa Code § 192.103.

IDALS' Motion for Summary Judgment on Slippy's claims if violation of her inalienable right to property, privacy, and contract is **GRANTED.**

Plaintiff has not met the burden required for reformation of her contracts with Yoder.

RULING

IT IS THEREFORE ORDERED THAT Defendant's Motion for Summary Judgment is **GRANTED.** Plaintiff's Petition is hereby dismissed. Costs are assessed to Plaintiff.

Clerk to notify

pdf/

Judge, Sixth Judicial District of Iowa

MAILED/DELIVERED ON 01-27-12
BY MD TO:
Jacob Larson-e
Timothy Benton
Wallace Taylor
David Cox

Indexed as:

Toronto (City) v. Polai

Magdalene Polai (Defendant), Appellant; and
The Corporation of the City of Toronto (Plaintiff), Respondent

[1973] S.C.R. 38

[1973] R.C.S. 38

1972 CanLII 22

Supreme Court of Canada

1972: May 5 / 1972: June 29.

Present: Martland, Judson, Ritchie, Spence and Pigeon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal law -- Zoning by-law -- Contravention -- City not to be denied injunction merely because others, in addition to defendant, guilty of similar violations and not restrained -- The Municipal Act, R.S.O. 1960, c. 249, s. 486.

Pursuant to the provisions of s. 486 of The Municipal Act, R.S.O. 1960, c. 249, the respondent municipality brought an action against the appellant claiming an injunction restraining her from using certain property for the purpose of a multiple family dwelling house in contravention of its zoning by-law. The trial judge dismissed the action. The Court of Appeal allowed an appeal and granted the injunction. On appeal to this Court, the appellant asked for a restoration of the judgment at trial.

Held: The appeal should be dismissed.

Where, as in this action, a municipality is seeking to protect and enforce a public right, it 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.

APPEAL from a judgment of the Court of Appeal for Ontario [[1970] 1 O.R. 483, 8 D.L.R. (3d) 689.], allowing an appeal from a judgment of Haines J. Appeal dismissed.

I.G. Scott, for the defendant, appellant. D.C. Lyons and M.J. Winer, for the plaintiff, respondent.

Solicitors for the defendant, appellant: Cameron, Brewin & Scott, Toronto. Solicitor for the plaintiff, respondent: W.R. Callow, Toronto.

The judgment of the Court was delivered by

JUDSON J.:-- The City of Toronto brought an action against Magdalene Polai claiming an injunction restraining her from using the building known as 169 Warren Road, Toronto, for the purpose of a multiple family dwelling-house in contravention of its zoning by-law. The trial judge dismissed the action. The Court of Appeal allowed an appeal and granted the injunction with a suspension of its operation for a period of twelve months. Mrs. Polai asks in this Court of a restoration of the judgment at trial.

Mrs. Polai bought the property in question in November 1963. There is a finding of fact by the learned trial judge that it was used only as a private detached dwelling-house until she bought it. She bought the property for the purpose of converting it into a multiple dwelling-house. She spent approximately $20,000 in making structural alterations. When these had been completed she had four rentable self-contained dwelling units with private sanitary, cooking and freezing facilities, and all of this work had been carried out without a permit from the city as required by the building by-laws. She herself has occupied the ground floor as a residence and has rented the apartments on the second and third floors.

In 1965 Mrs. Polai was charged with breach of the zoning by-law and convicted. Her appeal was dismissed. She continued to use the premises as a multiple family dwelling-house. The writ for an injunction was issued in September 1966. The principal witnesses against her were neighbours who objected to her use of the premises.

The trial judge dismissed the city's action because he found that it maintained a secret "deferred list" of infringers against whom no action, either by prosecution of application for an injunction, had been or would be taken. In the Court of Appeal, Schroeder J.A. did not accept this characterization of the list either as to its secrecy or its permanency and rigidity. He expressly found that the committee administering the list had not acted in bad faith or arbitrarily in the discharge of its assumed duties. Jessup J.A. and Brooke J.A. thought that the existence and operation of the list amounted to discrimination against Mrs. Polai, but all three judges held that the public has a direct and substantial interest in the enforcement of the by-law and that this public interest must prevail over the private interest of Mrs. Polai. In my opinion this conclusion is sound.

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, which provides:

> 486. Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened, in addition to any other remedy and to any other penalty imposed by the by-law, such contravention may be restrained by action at the instance of a ratepayer or the corporation or local board.

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. In this particular case, it is obvious that the immediate neighbours were the ones who were objecting. This gave the evidence. It makes no difference whether they bring the action or the municipality brings the action. 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.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Case Name:

Bierer v. Ontario

Between
Elfriede Bierer, Erhard Bierer, Georgina Fitzgerald and Philip Van Diepen, Plaintiffs, and
Her Majesty the Queen in the right of Ontario, Kevin Thomson, Mildred Thomson and The Parry Sound Powergen Corporation, Defendants

[2011] O.J. No. 1535

2011 ONSC 2020

2011 CarswellOnt 2264

200 A.C.W.S. (3d) 577

4 R.P.R. (5th) 204

Court File No. 03-B-6488T

Ontario Superior Court of Justice

G.P. DiTomaso J.

Heard: December 13-17, 2010; and by written submissions.
Judgment: March 30, 2011.

(198 paras.)

Counsel:

K.F. Dycha, for the Plaintiffs.

S. Fairley, for the Defendants Kevin Thomson and Mildred Thomson.

Table of Contents

REASONS FOR JUDGMENT

G.P. DiTOMASO J.:--

INTRODUCTION

1 For the past 17 years Mr. Van Diepen and Ms. Fitzgerald have enjoyed anything but happy neighbourly relations with Kevin and Mildred Thomson. The same can be said for the Thomsons regarding their dealings with Mr. Van Diepen and Ms. Fitzgerald. They have been dead-locked in a property access dispute both long and acrimonious.

2 The plaintiffs Philip Van Diepen and his sister-in-law Georgina Fitzgerald own a recreational property outside of Parry Sound, Ontario. The defendants Kevin Thomson and his wife Mildred Thomson make their home on property located nearby separated from the Van Diepen property by Martin's Creek which is also known as Martin's River. Each property consists of many acres.

3 Mr. Van Diepen and Mr. Thomson are the primary litigants involved in this property access dispute.

4 For many years, Mr. Van Diepen, supported by the plaintiffs Elfriede Bierer and her husband Erhard Bierer, sought to cross the Thomson lands in order to access the Van Diepen property. Despite Mr. Van Diepen's many pleas, proposals (even offers to purchase a remote small piece of the Thomson lands) and various court proceedings including this action, the Thomsons have been steadfast in denying any access to Mr. Van Diepen over their lands. The Thomsons had offered to purchase the Van Diepen property. Mr. Van Diepen and Ms. Fitzgerald refused resulting in a stalemate.

5 The Thomsons maintain Mr. Van Diepen already has his own access to his lands and that he has no legitimate claim for access over theirs.

6 To the contrary, Mr. Van Diepen and Ms. Fitzgerald claim a Declaration establishing the southern limit of the Thomson lands to permit Mr. Van Diepen and Ms. Fitzgerald access to their lands via a municipal unopened road allowance.

7 In the alternative, Mr. Van Diepen and Ms. Fitzgerald claim they are entitled to an easement of necessity permitting them to cross over the Thomson lands in order to access their property in the area where the municipal road allowance meets Martin's Creek. Not surprisingly, the Thomsons absolutely dispute and deny these claims.

8 After five days of trial, counsel delivered written submissions. The following are my reasons for judgment.

BACKGROUND AND CONTEXT

9 For ease of reference, the properties owned by Mr. and Mrs. Bierer, Mr. and Mrs. Thomson and Mr. Van Diepen and Ms. Fitzgerald shall be described as the "Bierer property", the "Thomson property", and the "Van Diepen property".

10 The Van Diepen property is located at Part of Lot 26, Concession 8, Township of Christie, (now in the Municipality of the Township of Seguin), District of Parry Sound consisting of approximately 65 acres lying south of Martin's Creek.

11 The Thomson property is located all of Lot 26, Concession 8, Township of Christie (now in the Municipality of Township of Seguin), District of Parry Sound lying north of Martin's Lake and the extension of Martin's Lake known as Martin's Creek subject to the PUC right-of-way in favour of the Parry Sound PowerGen Corporation (the "PUC right of way") further described as Part 1, Plan 42R-13620. The Thomson property consists of approximately 37 acres.

12 Another significant feature is the municipal unopened road allowance between Lots 26 and 25, Concession 8, Township of Christie running north/south from Highway 518 to the north to Martin's Creek to the south (the "URA"). The URA extends along the eastern boundaries of properties owned by Bierer, Thomson and Van Diepen.

13 The Bierer property figures less prominently and is located to the north of the Thomson property in the vicinity of Highway 518.

14 The parties agreed to certain background facts contained in an Agreed Statement of Facts as follows:

* PVD (PVD means Philip Van Diepen) purchased his property in 1970
* Shortly thereafter, he builds a cottage on the property
* At this point in time, the Thomson property was owned by the Wilsons
* The Wilsons, and their successors in title, permitted PVD and his family/guests to cross over their lands, by utilizing the PUC right of way, by both foot and vehicle
* They constructed a small parking spot near the foot of the dam for use of PVD
* This was the access that was utilized by PVD, his family and guests, until September of 1994
* The northerly limit of the Thomson property is bounded by an unopened road allowance that runs, generally speaking in an east/west direction
* To the north of that road allowance is the Bierer property
* To the south of the Thomson property is Martin's Lake, the dam and Martin's Creek/River
* The Van Diepen property is located to the south of Martin's Lake, the dam, and Martin's River/Creek
* To the south of the Van Diepen property is property owned by the Thomsons
* This southern section of property owned by the Thomsons is located on both sides of the aforementioned north south unopened road allowance
* These southern properties which are owned by the Thomsons extend south to the Seguin Trail
* Just north of the southerly limit of the Bierer property is highway 518, which bifurcates the southern portion of the Bierer property
* Extending from Highway 518, and crossing the Bierer lands, is the old roadbed of Highway 518
* Thomson sought and obtained an easement over Part 2 42R-14812 as well as a driveway permit
* Bierer and PVD sought the same easement and entrance permit and they were refused
* Thomson obtained the fee in Part 1 42R-14812 from the Ministry of Transportation
* Separating the Thomson and the Van Diepen properties is Martin's Lake, a dam, and Martin's River/Creek below the dam
* The eastern boundary of the Bierer, Thomson and Van Diepen properties is bordered by an unopened road allowance which runs, generally speaking, in a north/south direction
* To the west of their properties is Martin's Lake and Crown Land

* After litigation was commenced against the Ministry of Transportation, PVD was also granted a perpetual easement over Part 2 42R-14812 and an entrance permit

15 Subsequently proved a trial was the fact was that both the Thomson property and the Van Diepen property were zoned single-family residential.

16 Further, the parties agreed that certain documents found in the plaintiffs' and the defendants' Document Briefs be admitted into evidence without the need for further proof or authentication.[1]

17 In addition to the Agreed Statement Facts, I have made the following findings of fact that go to background and context based on the evidence given at trial by Mr. Van Diepen and Mr. Thomson.

18 Since 1970, Mr. Van Diepen gained access to his property by travelling along the eastern loop of the bed of old Highway 518. From there, he would travel south along a portion of the north/south URA, to the point where the PUC right of way began. At this point, he travelled along the length of the PUC right of way, parked his vehicle at the base of the PowerGen dam where the Wilsons' had built a parking area. Mr. Van Diepen was allowed to park his vehicle at that location and he and his family/guests accessed the Van Diepen property by crossing over the top of the dam on foot and onto their property. This was the same route which had been used by Mr. Van Diepen's predecessors in title (the Funais) since the early 1950's.[2] For almost 40 years, this was the route used by Van Diepen and his predecessors in title to access the Van Diepen property.

19 The Thomsons sought to acquire their property by negotiating with Mr. Van Duzen, a person who was previously known to them. The transaction involved a long closing period (summer 1993 to August 31, 1994) according to the evidence of Mr. Thomson. During the closing period, according to the evidence of Mrs. Thomson read into the record, the Thomsons were aware that Mr. Van Diepen owned the lands across the river and that Mr. Van Diepen used the PUC right of way as a means of access to his property. Mrs. Thomson admitted that she saw Mr. Van Diepen using the PUC right of way prior to purchasing the property.[3]

20 During the long closing period, the Thomsons also sought to obtain the ownership of the eastern loop. Essentially, Mr. Van Duzen was to purchase it from the MTO and the Thomsons were going to purchase it from Mr. Van Duzen.

21 When the real estate transaction closed, Mr. Thomson immediately placed a heavy chain with padlock in a position that would prevent Mr. Van Diepen and all others except the PUC from using the PUC right of way. At the same time, Mr. Thomson continued the process of attempting to acquire title to the eastern loop. Both steps would have precluded Mr. Van Diepen from accessing his property. Mr. Thomson admitted during the trial that he made the decision to erect the chain prior to purchasing his property.

22 Within a matter of days of erecting the chain in September of 1994, Mr. Van Diepen advised Mr. Thomson of the fact that the actions of erecting the chain resulted in Van Diepen's inability to access and enjoy his property.[4] Similarly, within a matter of days thereafter, Mr. Van Diepen drafted a lengthy and detailed letter advising Mr. Thomson of

the fact that Van Diepen was physically barred from using the Van Diepen property given the fact that the PUC right of way had been chained off.[5] Over a long series of subsequent letters, Mr. Van Diepen reiterated the various impediments to accessing the Van Diepen property given the fact that the chain had been placed by Thomson.[6] Mr. Thomson responded only once to Mr. Van Diepen's correspondence by handwritten noted dated September 17, 1994.[7] In that correspondence, Mr. Thomson acknowledged letters dated September 2 and September 11, 1994 from Mr. Van Diepen. In response, Mr. Thomson wrote that he did not intend to allow use of or access across the Thomson property to any persons except employees of the Parry Sound PUC while performing their duties. In closing, Mr. Thomson thanked Mr. Van Diepen for respecting Mr. Thomson's privacy.

23 Notwithstanding Mr. Thomson's response, Mr. Van Diepen continued to find a compromise solution. As early as October 17, 1994 Mr. Van Diepen proposed that Mr. Thomson sell to him a small sliver of land in the area where the north/south URA met the river.[8] Mr. Thomson did not accept Mr. Van Diepen's compromise solution and declined to sell Mr. Van Diepen any of the Thomson property.

24 Notwithstanding Mr. Van Diepen receiving legal advice, he did not taken any steps to remove the chain.

25 By the time that this action was commenced, Mr. Thomson had obtained an easement over Part 2 of 42R-14812 as well as an entrance permit.[9] In addition, he obtained the fee simple in Part 1 of 42R-14812. By so doing, Mr. Thomson was able to directly access current Highway 518. He then commenced to build a driveway a distance of some 2,500 feet in order to build his 3,700 square foot home overlooking Martin's Creek, the dam and Mr. Van Diepen's cabin across the river.

26 It is acknowledged that Part 2 on 42R-14812 bifurcates a part of the Bierer property. Mr. Bierer and Mr. Van Diepen requested the same easement given to the Thomsons from the MTO but the MTO refused to grant it. Similarly, Mr. Van Diepen was not granted an entrance permit. After the action was commenced the MTO granted the same easement to Mr. Bierer and Mr. Van Diepen and also granted Mr. Van Diepen an entrance permit for a single family dwelling. Mr. Van Diepen also concluded an agreement with the municipality that enabled him not only to utilize but also to improve the URA. In this regard he has expended the time and effort improving the URA in order to make it ultimately passable for a jeep type motor vehicle.

PROCEDURAL OVERVIEW

27 The focus of this litigation had shifted with the passage of time. Initially, the plaintiffs' claim revolved around the PUC right of way. Upon the resolution of issues involving PowerGen and MTO, the access issues no longer related to the PUC right of way but rather focused upon the "creek route".

28 The plaintiffs commenced this action on February 11, 2002. The Statement of Claim had been amended twice: the first amendment on February 22, 2002, before the claim was served and the second amendment on December 19, 2006.

29 The only route over which an easement was claimed in the Amended Statement of Claim was the PUC right of way. The Roadway, as defined in the Amended Statement of

Claim, followed a portion of the old bed of Highway 518 known as the Eastern Loop, and across the Thomson property on the PUC right of way to a point immediately adjacent to the dam. This area of the Thomson property adjacent to the dam is the location on which the Thomsons built their home. Mr. Van Diepen intended to use this PUC right of way to park his car on the Thomson property and then walk across the top of the PowerGen dam to obtain access to a cabin that he had built. Mr. Van Diepen had testified that he had used this route for many years. The plaintiffs commenced the action against the PUC, the Thomsons and the MTO. The MTO had granted an easement to the Thomsons over which a driveway was built in order to provide them access to Highway 518. The Bierers sought a Declaration that MTO had improperly granted a right of way to the Thomsons and improperly transferred a small parcel of property to the Thomsons and sought to set aside those transactions.

30 Although the plaintiffs had sought the same easement from the MTO over Part 2 Plan 42R-14812 as had been granted to the Thomsons, their Amended Statement of Defence did not seek an easement or entrance permit by way of relief. The Amended Statement of Claim only sought to set aside the easement and transfer granted to the Thomsons. If granted, this relief would have denied the Thomson's access to Highway 518 from their long driveway which they had constructed on their property.

31 The plaintiffs resolved their action against PowerGen and MTO on the basis of a dismissal without costs.

32 The claim advanced in the Amended Statement of Claim proceeded through Examinations for Discovery of all parties and to the eve of a previously scheduled trial date in relation only to the claimed roadway over the PUC right of way. On the eve of the scheduled trial, the plaintiffs entered into an agreement to settle with the defendants, MTO and PowerGen.

33 However, by Amended Amended Statement of Claim dated December 19, 2006, Mr. Van Diepen and Ms. Fitzgerald initiated a claim for a right of way over the "creek route" and for a Declaration as to the location of the southern boundary of the Thomson property which, in effect, posited that the Crown owned a piece of land between the Thomson property and Martin's Creek.

34 Essentially, Mr. Van Diepen and Ms. Fitzgerald abandoned their claim to an easement over the PUC right of way and amended their pleadings to make a claim for a new route. This new route described as the "creek route" was the same route that Mr. Van Diepen had proposed as a solution in 1994. It would have him travel down the north/south URA to the intersection with Martin's Creek and turn right on an angle across the Thomson property. The "creek route" was traced in pen by Mr. Van Diepen on exhibit 32 and it is this route in issue at this trial. Mr. Van Diepen and Ms. Fitzgerald seek the court to declare a right of way of necessity or a finding that the south boundary of the Thomson property is located north of where the "creek route" would turn and cross Martin's Creek at an angle. Further, Mr. Van Diepen and Ms. Fitzgerald asserted that no part of the "creek route" traversed the Thomson property. Rather, the "creek route" crossed land owned by the Crown. The expert evidence of Mr. Paul Forth O.L.S. was tendered in this regard.

35 With the foregoing contextual background and procedural overview in mind, it is clear the access point claimed by Mr. Van Diepen and Ms. Fitzgerald is located further south along the URA in the area where it intersects with Martin's Creek.

36 The Thomsons served a Request to Admit dated July 3, 2008, to which a response was delivered dated August 8, 2008.[10] Through the Request to Admit, Mr. Van Diepen and Ms. Fitzgerald admitted that:

> (a) they made no claim to an easement or right of way over the road-way as defined in the Amended Amended Statement of Claim (over the PUC right of way); and,
> (b) the only route of access over which a right is being claimed in this action following issuance of the Amended Amended Statement of Claim is along the "creek route" which avoids a 100 foot rock face on the south side of Martin's Creek.

THE ISSUES

37 The plaintiffs' filed a Statement of Issues as follows:

38 **Issue No. 1**: Are the plaintiffs, Georgina Fitzgerald and Philip Van Diepen entitled to a Declaration, establishing the southernmost limit of the Thomson lands for the purposes of permitting the said plaintiffs to access their land via the unopened municipal road allowance?

39 **Issue No. 2**: Are the plaintiffs, Georgina Fitzgerald and Philip Van Diepen entitled to an Easement or Way of Necessity permitting them to cross over such parts of the Thomson lands as the Court determines is necessary in order to access their property in or about the area where the unopened municipal road allowance meets the Martin Creek?

40 **Issue No. 3**: Are the plaintiffs, Georgina Fitzgerald and Philip Van Diepen entitled to damages including punitive damages?

POSITION OF THE PARTIES

(a) Position of the Plaintiffs Fitzgerald and Van Diepen

41 Ms. Fitzgerald and Mr. Van Diepen claim a Declaration establishing the southern-most limit of the Thomson lands to avoid the threat of trespass and to access their lands via the URA. There is a physical impediment to access the Van Diepen property by way of crossing Martin's River. In the area where the URA meets the river, there exists a large outcropping of Canadian Shield referred to at trial as the "rock face" or the "escarpment" which is approximately 100 feet high. The "creek route" would permit Mr. Van Diepen to avoid the marshy area located in the URA directly north of the river. Further, the rock face would be avoided as it tapers down to the ground some distance west of the URA. Mr. Van Diepen can enter his property at that point.

42 They further submit that a determination of the boundary issue is inextricability linked to the issue of navigability of the river. They assert that the river is navigable and by operation of statute the ownership of the river bed lies with the Crown.

43 They rely upon the evidence of surveyor Paul Forth that neither Van Diepen nor the Thomsons owned the land between their properties and that in his view, the land is Crown land.

44 Further, Martin's River is no longer a natural water course having been previously dammed. Its boundaries are altered on a regular and rapid basis by the PUC. It is submitted that the location of the boundary of Martin's River must be to the state of conditions before the dam was erected. Mr. Forth's survey confirms the location of a natural boundary of the river as evidenced by the placing of four iron bars. The land to the south of the iron bars including the river bed is Crown land. Mr. Van Diepen asserts that if it is found the boundary is as set out in the Forth survey, he has sufficient room to access his land by utilizing the route noted in red on exhibit 32 without fear of trespassing on the Thomson property.

45 In the alternative, if the court is not willing to declare the boundary as requested, the plaintiffs submit that they are entitled to an Easement of Necessity regarding the same access route.

46 The plaintiffs claim punitive including general damages for the loss of enjoyment of their lands and as of a result of Mr. Thomson's conduct.

(b) Position of the Plaintiffs Bierer

47 The plaintiffs Bierer did not attend at trial and did not participate in the re-focused issue advanced by Mr. Van Diepen and Ms. Fitzgerald.

(c) Position of the Defendants Thomson

48 With respect to the southern boundary of the Thomson property, they submit that the location of Martin's Creek as of 1869 determined by surveyor John Grant O.L.S. is irrelevant. The location of Martin's Creek at that time, prior to the construction of the dam, does not determine the location of their property's southern boundary. The Thomsons rely on their deed and title documents which contemplate the existence of the dam and state that the Thomson property is bounded at the south by the northern bank of Martin's Creek. Further, the transfer of the Thomson property under the *Veteran's Land Act* is the equivalent of a new Crown Patent at the time the dam existed. The Thomsons submit that it is incorrect to place the southern boundary of their property at the location of the Martin's Creek as determined by John Grant in 1869 or more recently, by surveyor Paul Forth.

49 The Thomsons deny that there is a dry parcel of Crown land lying between their property and the actual bank of Martin's Creek as this is inconsistent with the title documents, the law and statute. The Thomsons submit that Martin's Creek is not navigable and that the thread of Martin's Creek is the southern boundary of their property. Alternatively, if Martin's Creek is navigable, the southern boundary of the Thomson property is the bank of the creek at its low water level as specified by statute. They assert that there is no legal basis for the claim that the historical location of Martin's Creek before the installation of the dam is the location of the southern boundary of the Thomson's property for all time. They argue that the southern boundary of the Thomson property is not the historic location of Martin's Creek as set out in the Forth survey and as proposed by the plaintiffs.

50 The Thomsons also assert that the relief claimed by Mr. Van Diepen and Ms. Fitzgerald cannot be granted as neither the municipality nor the Crown were named as defendants or participants in this proceeding. The Thomsons request that the Van Diepen action be dismissed.

51 The Thomsons also submit that the Bierers action be dismissed. The Bierers have no use for the right of way sought by Van Diepen and Ms. Fitzgerald and effectively, the Bierers abandoned their claim regarding the Request to Admit. The Bierers did not attend trial or advance any claims although the claim was not resolved as between them and Thomsons. The Thomsons submit that Bierers' involvement in this action and encouragement of the Van Diepen claim is an abuse of process and is champertous.

52 With respect to the request for an easement of necessity, the Thomsons submit that Mr. Van Diepen and Ms. Fitzgerald have failed to meet the test for easement of necessity. When Van Diepen purchased the property, he did not have vehicular access or any deeded access. He was able to build a cabin and access his property for a period of time with the permission of prior owners of the Thomson property. The Thomsons assert that the Van Diepen property can be and has been accessed without crossing the Thomson property on foot, by an all-terrain vehicle and by boat. The requested relief is for more **convenient** access (emphasis mine) rather than an easement of necessity. The Van Diepen property itself can be accessed along the URA which runs north/south along the entire boundary of the Van Diepen property. Mr. Van Diepen has obtained permission from the township to improve the road allowance to create an access road. He has had a contractor provide a quotation to build a road. Access to the Van Diepen property without crossing the Thomson property can be had with the expenditure of funds to build a road. Mr. Van Diepen's request for an easement of necessity should be denied as it is a request for more convenient and possibly less expensive access.

53 The Thomsons submit that the requested route of access is not an existing path or historically travelled path. The plaintiffs request is for the court to create a right of way over a previously undefined path, in the absence of any prior use of that path, simply to make access more convenient.

54 In addition, the Thomsons assert that the claim to an easement of necessity over the "creek route" was not advanced until the Statement of Claim was amended on December 19, 2006, and is statute barred pursuant to the *Real Property Limitations Act*.

55 With respect to the claim for punitive damages, the Thomsons submit that they were entitled to close the PUC right of way to everyone but PowerGen when they purchased their property as a residential building lot. They request the claim for punitive damages be dismissed.

ANALYSIS

Additional Findings of Fact

56 Mr. Van Diepen and surveyor Paul Forth, O.L.S. testified at trial for the plaintiffs Van Diepen and Fitzgerald. Mr. Thomson testified on behalf of the defendants Thomson.

57 The only route of access claimed at trial following the issues of the Amended Amended Statement of Claim is along the "creek route".[11]

58 In addition to the Agreed Statement of Facts and findings already made, I make the following further findings.

59 What is clear from Mr. Van Diepen's evidence in both chief and cross-examination is that he was a somewhat naïve 21 year old when he purchased his vacant parcel of land for $3,200 in 1970.

60 He believed that he had some legal rights in respect of the PUC right of way given that his predecessors in title had used the route for an extended period of time. He was wrong. He had no legal rights of access when he acquired the property. None were deeded to him and he acquired none. His access along the PUC right of way was permitted only by the generosity of the Wilsons who also allowed him to park his car next to their house after which Mr. Van Diepen would walk over the PUC dam to his property. I find that the PUC knew of his use and acquiesced in it until a tragedy occurred at another dam elsewhere resulting in the PUC barring Mr. Van Diepen and any other members of the public from crossing over their dam. Mr. Van Diepen accepted and respected this position.

61 When Mr. Van Diepen purchased the Van Diepen property he only knew about access by way of the north/south URA and the PUC right of way. On cross-examination, Mr. Van Diepen admitted being told he was going to have an access problem before he purchased the property. He was aware of his access problem before closing but held the honest but mistaken belief he had some kind of access rights not unlike his predecessors in title. He testified that his real estate lawyer had not told him that Mr. Van Diepen did not acquire any prescriptive rights such a prescriptive easement over the PUC right of way as his property was registered in the land titles system. In fact, he first learned of this problem in 1994 after the Thomsons purchased their property. He received legal advice in this regard.

62 At the time of his purchase, Mr. Van Diepen had not looked at accessing his property via the north/south URA. He made no investigations prior to closing to see if he could construct a road on the URA.

63 After he purchased his property, Mr. Van Diepen never pursued with the Wilsons obtaining any legal rights to access from them.

64 Mr. Van Diepen admitted that at the time of the hearings under the *Road Access Act* in 1995, he did not believe he had prescriptive rights over the Thomson property.

65 After those hearings, Mr. Van Diepen agreed he started to investigate access to his property via the north/south URA. At that time, he felt that he had no prescriptive rights and that the *Road Access Act* process was not helpful.

66 In correspondence, he expressed concern that the Van Diepen property was totally land locked.[12] By September 1994, he had identified the "creek route" marked on exhibit 32 which he proposed to the Thomsons in his October 17, 1994 correspondence.[13] Mr. Van Diepen offered to purchase a small portion of the Thomson property which proposal was rejected. This led to the commencement of this action on February 11, 2002. The plaintiffs settled their claims against the MTO and PowerGen. Thereafter, the Statement of Claim was amended a second time on December 19, 2006 to claim a right of way over the "creek route" and for a Declaration as to the location of the southern boundary of the Thomson's

property. By virtue of the amendment, Mr. Van Diepen and Ms. Fitzgerald advanced a claim that in effect the Crown owns a parcel of land between the Thomson property and Martin's Creek.

67 The latter amendment of the Statement of Claim together with their response to the Thomsons Request to Admit shifted the focus of the dispute to a different physical point of reference together with different related issues.

68 Issue No. 1: Are the plaintiffs Georgina Fitzgerald and Philip Van Diepen entitled to a Declaration establishing the southernmost limit of the Thomson lands for the purpose of permitting the said plaintiffs to access their lands via the unopened municipal road allowance?

Evidence of the Plaintiff Philip Van Diepen

69 Mr. Van Diepen is a retired secondary school teacher. He testified that he purchased his property in 1970 when he was 21 years old. He built a cabin on the property in 1971. Between 1970 and 1994 he accessed the property by using the PUC right of way.

70 After the Thomsons purchased their property in 1994, they "chained out" Mr. Van Diepen and prevented Mr. Diepen from using the access route that he and his predecessors in title had used for many years.

71 Mr. Van Diepen reviewed the many letters he sent to the Thomsons regarding his access problem and possible solutions.

72 Those solutions included allowing Mr. Van Diepen to continue to use the PUC right of way, allowing him to cross over a small portion of the Thomson land near the intersection of the north/south URA and even offering to purchase that land. All proposals were without success. The Thomsons were unwilling to agree to any compromise solutions proposed by Mr. Van Diepen. However, the Thomsons offered to buy the Van Diepen property as Mr. Thomson knew that Mr. Van Diepen had an access problem. Mr. Van Diepen refused to sell.

73 Mr. Van Diepen testified about the road access proceedings leading up to the commencement of this action, the settlement with MTO and PUC and the amendment of the Statement of Claim to claim an easement of necessity and a Declaration determining the southern boundary of the Thomson property.

74 During the course of his evidence, Mr. Van Diepen described and located the various properties in question as well as numerous neighbouring properties. All of these properties were illustrated and colour coded in the plaintiffs' documents.[14] Also depicted in these documents was the location of various physical features such as Martin's Lake, Martin's Creek, the dam, Mr. Van Diepen's cabin and the rock face.

75 The plan prepared by Paul Forth O.L.S. dated February 6, 2001 was also referred to in Mr. Van Diepen's evidence as it depicted the north/south URA and the PUC right of way extending from it in a southwesterly direction towards the dam.[15]

76 Mr. Van Diepen identified and described various photographs which he took of Martin's Lake, Martin's Creek, the dam, the URA, the Van Diepen property, the Thomson property, the rock face and ledge at its base, fallen rocks on the ledge and the roadbed of

old Highway 518. There were various views of the dam opened and closed showing high water and low water levels of Martin's Creek. The photos of the rock face or escarpment depicted its location on the south side of Martin's Creek where the north/south URA meets the creek.[16] The escarpment is formidable. It abuts the creek on the south side and rises to approximately 100 feet. This is also supported by topographical maps referred to in evidence by Mr. Van Diepen.

77 I find that Mr. Van Diepen gave credible and reliable testimony about the physical features where the north/south URA intersects with Martin's Creek. I accept his evidence as trustworthy as I find the evidence of Mr. Forth as follows:

* Photographs found at exhibits 7, 8, 9, 11, 12, 13 and 14 show that there is an extremely steep hill and rock face in the area where the road allowance and the river intersect;
* Exhibit 2 agreed upon evidence from exhibit 3, tab 2 and 10 are topographical maps which show the existence of this insurmountable physical feature;
* The original survey conducted by John Grant, O.L.S. in 1869 shows the existence of this same feature measuring it at 100 feet high. See exhibit 5 at page 44;
* Surveyor Paul Forth confirmed the existence of this feature in the same position as noted by John Grant, both in his *viva voce* evidence, as well as in exhibit 35;
* When the level of the water is high, the water abuts and is contained by this physical feature as evidenced by the photographs 11, 12, 13, and 14; and
* Mr. Forth testified that when his crew accessed the top of the hill they did so by going around it.

78 When Mr. Thomson testified about the access issue, he introduced into evidence certain video tapes (exhibits 43 and 44). In those video tapes, Mr. Thomson did not try to travel straight up the hill.

79 The Martin's River or Creek is subject to variations in depth due to natural forces. However, this particular river is also subject to variations in depth as a result of human intervention, namely, by the opening and closing of dam by the PUC workers. There is no dispute on this point.

80 Particularly vivid are the photographs depicting variations in depth left on the rock face or cut into the ice as seen in exhibits 8, 11 and 12.

81 Mr. Van Diepen testified that at the base of the escarpment is a narrow ledge which he estimated to be four and a half feet in width. He removed some rock from this area to make a foot passage on the ledge. I accept Mr. Van Diepen's evidence that there are extended times during the year when the rock ledge is under water which he estimated to be the case 75 percent to 80 percent of the time.

82 I accept the evidence of Mr. Van Diepen who presented an extended series of photographs over time to show the water levels and conditions of Martin's Creek from Oc-

tober 2006 to July 2007. These photographs can be found at Exhibit 3 Tab 37 photos 2 through 83.

83 It is the uncontroverted evidence of Mr. Van Diepen which I accept that one is precluded from driving in the stream bed for environmental reasons as doing so would impair the stream bed which is aquatic habitat.

84 It is also the evidence of Mr. Van Diepen which I accept that the approach to the river, i.e. the north approach to the stream contains a marshy area. Photos taken by Mr. Van Diepen (Exhibits 12, 13 and 14 plus Exhibit 3 Tab 37 photos 59-62, 72-76, 87, 89, 91, 92, 96 and 97) show that it is wet marshland. He testified that it was bog and it is. The evidence of Mr. Thomson was that this was marsh grass (also known as Beaver Hay). Numerous photos (Exhibits 11, 12, 13, 14, Exhibit 3 Tab 37 photos 2, 6, 7, 11, 25, 31, 44, 49 and 59 - 72) and the Thomson videos (Exhibits 43 and 44) indicate that the area is regularly submerged as no tree life exists in the area.

85 The route being proposed by Mr. Van Diepen is set out in red ink on Exhibit 32. According to his evidence, this route would permit Mr. Van Diepen to avoid the marshy area located in the road allowance directly north of the river. The 100 foot rock face would be circumvented because the escarpment tapers down to the ground some distance west of the road allowance. At that point, Mr. Van Diepen can enter onto his property (see Exhibit 10). He also has an agreement with the municipality for an easement so that he can build a road and improve the URA.

86 Mr. Van Diepen testified that he had a telephone conversation with Mr. Thomson on November 20, 1994. In that telephone conversation, Mr. Thomson threatened Mr. Van Diepen that if he crossed onto the Thomson property, Thomson would have Mr. Van Diepen charged with trespass. Contemporaneous with that telephone conversation, Mr. Van Diepen prepared a note (Exhibit 21) which I accept as confirmatory evidence of Mr. Thomson's threat.

87 In his cross-examination, Mr. Thomson admitted that he had made a similar threat during a discussion with Mr. Van Diepen in March of 1995. Mr. Van Diepen requires the court to rule on this issue in order to avoid the threat of trespass charges and also with a view to determining access for the future.

88 Mr. Van Diepen testified that the photos taken during eight month period from October 2006 to June 2007 shows the fluctuation of water levels in Martin's Creek. It was his evidence that when the water goes up it stays up and when it goes down it does so for a brief period of time. These are extremely short periods of time when the water level is low. Even when the water level was low, there is still water on the rock ledge.

89 In cross-examination, Mr. Van Diepen testified he went to Martin's Creek at different times of the year to show a pattern of flow as the water levels fluctuate up and down. His evidence remained unchanged that it was not uncommon for the rock ledge to be under water for a good portion of the summer months.

90 Mr. Van Diepen was cross-examined about whether Martin's Creek is navigable. While there was correspondence from Ocean and Fisheries and Transport Canada in 1999 indicating the river was not navigable, Mr. Van Diepen explained that conditions changed

from 1999 to present with the logs in the dam becoming less effective. The result was that water was flowing into the stream at a greater rate. He maintained that Martin's Creek was navigable.

Evidence of Surveyor Paul Forth, O.L.S.

91 Mr. Forth has been an Ontario Land Surveyor since 1972. He was born and raised in Parry Sound and has operated his business there since 1974. He was qualified as a land surveyor to give expert opinion evidence regarding land surveys and, in particular, determining physical boundaries relative to the subject properties. He has previously testified in court as an expert witness.

92 I found Mr. Forth to be extremely knowledgeable about his area of expertise and very familiar with the terrain of Northern Ontario and especially, the area in question. He spoke plainly and clearly. I found him to be a credible and trustworthy witness who knew what he was talking about from years of experience and from personal observation accessing the lands in question.

93 Mr. Forth described how he familiarized himself with the title documents including the Crown grant, various deeds relating to the Van Diepen and the Thomson properties and, in particular, the field notes of John Grant O.L.S. who originally surveyed this area in 1869.

94 Mr. Forth attended the intersection of the URA and Martin's Creek a number of times. At first, he was retained to locate the limits of the URA which he did.

95 He placed four iron bars - two of which delineate the boundaries of the URA. (see Exhibit 32) He also placed two more iron bars west of the URA which represent the original water's edge of Martin's Creek prior to the construction of the dam based on the edge of vegetation. These bars were placed after Mr. Forth considered the physical features on the ground and after he compared his observations and measurements with those taken by John Grant in 1869.

96 Mr. Forth testified that there was an excellent comparison between what he measured and those measurements and observations taken by John Grant.

97 He also made observation of the same physical features such as the rock face as did Mr. Grant.

98 Mr. Forth created a plan of survey dated March 16, 2009 (Exhibit 35). This survey depicted the same four iron bars depicted in his sketch (Exhibit 32). The iron bars were connected by a line denoting the original water's edge of Martin's Creek prior to the construction of the dam based on the edge of vegetation.

99 He further examined the PIN map (Exhibit 37), the original plan of the Township of Christie prepared by John Grant (Exhibit 38) and a later map of Christie Township (Exhibit 39) showing the location of Martin's Lake and Martin's Creek.

100 Mr. Forth testified that the double heavy line in Exhibit 37 with no PIN for the space in between meant that the land within the two lines was Crown land. His inspection of Exhibits 38 and 39 confirmed his opinion that Martin's Creek was a navigable stream as

creeks not navigable are shown with a single line. This is further confirmed by Mr. Grant's original field notes showing Martin's Creek as a river outlined by two lines.

101 Before going to the field, Mr. Forth also considered the field notes of J.T. Coltham O.L.S. regarding Mr. Coltham's 1949 survey (Exhibit 40). This survey refers to the dam between the Van Diepen property and the Thomson property.

102 Mr. Forth testified that he found no maps or surveys incompatible with the conclusion reached that Martin's Creek is a navigable body of water. On site, he made his own observations and saw the water of Martin's Creek deep enough to float a canoe.

103 Mr. Forth was also asked to establish the north boundary of Martin's Creek. He conducted research including a review of Mr. Grant's field notes.

104 From his research he concluded that Martin's Creek was navigable and treated it that way to determine its northern boundary. Mr. Forth did not accept the water's edge as the boundary but rather the physical features such as the edge of vegetation because of the influences of the dam upstream and downstream. He testified there was a change in the direction of the stream as a result of the dam and the actions of all waters now controlled by man. As normal actions of erosion and accretion had not been imperceptible, the best evidence of the northern side of the river would be the field notes of John Grant which coincide with the physical features found by Mr. Forth on the ground.

105 Historically, Mr. Forth testified that Martin's Creek was used to transport logs in lumber operations. The river was navigable then as it is now. His conclusions were summarized in his report dated March 16, 2009 (Exhibit 41) which accompanied his plan of survey of same date (Exhibit 35).

106 Having opined that Martin's Creek was a navigable body of water, Mr. Forth also gave his expert opinion regarding the parcel of land located between the north boundary line per his plan of survey and the water's edge. He referred to Exhibit 35 which is a colour coded document. Two iron bars denote the limits of the URA. To the west of the URA, another two iron bars were planted. All iron bars were joined with one line. Mr. Forth concluded that the line sets the north boundary of Martin's Creek and the south boundary of the Thomson property.

107 On cross-examination, he referred to Exhibit 35 and testified that in his opinion all land contained inside the pink lines is Crown land whether coloured blue or white. His opinion did not change notwithstanding cross-examination regarding the J.T. Coltham survey which showed the existence of the concrete dam and the location of title documents to the Thomson property locating boundaries with reference to the existence of the concrete dam. Mr. Forth's opinion remained unchanged regarding the navigability of Martin's Creek and the existence of the Crown land between the southern boundary of Mr. Thomson's land and the stream. I note that no surveyor was called by the defence to give expert opinion evidence.

Evidence of the Defendant Kevin Thomson

108 Mr. Thomson is a Construction Supervisor for a large construction company. He too was a credible witness for the most part. He testified as to how he acquired the Thomson property. Before purchasing the property he spoke to David Van Duzen who told Mr.

Thomson that no one other than the PUC had rights to go onto the property that Thomson eventually bought. People who used the PUC right of way only did so with permission. The right of way was to be used only for the PUC to maintain the dam.

109 Mr. Thomson did not know that Mr. Van Diepen used the right of way before he offered to buy the property. When he purchased the property he had in mind to put the chain up to keep everyone out except the PUC.

110 Mr. Thomson identified the title documents relating to the Thomson property. (Exhibit 4, tabs 1 to 6). The Thomson deed is found at Exhibit 4, tab 6. When the Thomsons purchased their property it was his understanding that they owned along Martin's Lake up to the water and along Martin's Creek to the bank and all the land to the north. He did not agree that Crown land exists between the Thomson property and the water of the creek. He described the level of water in Martin's Creek in the low state a lot of the time.

111 Mr. Thomson's house is located about 80 feet from the dam. He was able to observe the operations of the dam which he described in a regular cycle over various months of the year where employees of the PUC would attend at different times during the year to remove and replace logs of the dam which would cause the fluctuation of water levels in Martin's Creek.

112 Mr. Thomson testified that the typical water levels of Martin's Creek in the summer months beginning in June until October was shallow. One could walk across wearing rubber boots of step across where the creek was very narrow. In June to October, when the creek was low, the rock ledge was above the water level. If a log in the dam was pulled out, there would be a little bit of water on top.

113 Mr. Thomson presented video evidence (Exhibit 43 and Exhibit 44). The video taken in April and June 2003 (Exhibit 43) showed the rock ledge and Mr. Thomson's brother-in-law operating an all-terrain vehicle, crossing the stream onto the rock ledge and proceeding west.

114 Video number 2 was taken in April 2000 and June 2009 (Exhibit 44) after Mr. Forth completed his survey and the limits of the URA had been determined. The video showed Mr. Thomson operating all-terrain vehicle and crossing the stream at a different place. He crossed the creek to the south side, onto the rock ledge then turned west travelling along the rock ledge.

115 The last segment of the video was taken in June of 2009. This video showed a rock-filled stream bed to the east of the URA. The water level depicted was not very deep and choked-full of rocks. Mr. Thomson found it hard to imagine anyone paddling a canoe or floating a log in those conditions.

116 In cross-examination, Mr. Thomson acknowledged the photos taken over an eight month period (October 2006-June 2007) (found at Exhibit 3, tab 37) by Mr. Van Diepen showing the water levels in Martin's Creek in different seasons.

117 While he was shown Exhibit 8 depicting the exposed rock ledge, he would not concede that the staining on the rock face indicated different water levels but only different coloured rock.

118 Mr. Thomson agreed that while the videos taken by him showing the water level below the rock ledge, the video never showed high water levels as in the Van Diepen photos. Mr. Thomson would not concede that Mr. Van Diepen showed the water levels sometimes two to three feet over the rock ledge. While video (Exhibit 44) showed rocky conditions east of the URA, Mr. Thomson agreed no video was taken when the water was high. Nevertheless, it was Mr. Thomson's position that Martin's Creek was not navigable.

The Navigability of Martin's River also known as Martin's Creek

119 The Thomsons assert that Martin's Creek is not navigable and, in any event. navigability is not an issue for this court to decide when determining the southern boundary of the Thomson lands. Whether or not Martin's Creek is navigable, the southern boundary of Thomsons property is not the location of the creek in 1869 before the dam was installed.

120 I do not agree that the question of navigability is irrelevant in determining the southern boundary of the Thomson property. To the contrary, it is my view that the navigability and boundary questions are inextricably linked.

121 For the following reasons, I find that Martin's River or Creek is navigable.

122 First, the Thomsons admitted in their pleadings that the river is navigable.[17]

123 Second, beyond the Thomsons' admission, I find on the totality of the evidence that the river is navigable. While the video evidence led by the Thomsons shows certain conditions of Martin's Creek as found at the time the video was taken, I prefer the evidence of Mr. Van Diepen and Mr. Forth over the evidence of the Mr. Thomson.

124 I find the video evidence does not present the best evidence as to the fluctuation of water levels over various seasons and periods of time. The photographic evidence led by Mr. Van Diepen is much preferred as it purports to give a broader, fairer and more accurate representation of conditions as they existed over time. The video evidence is selective showing water levels when the dam was shut and water levels were low. The videos did not take into account water levels over various seasons or when the dam was open. Mr. Thomson's home overlooked the stream and he could easily view the day-to-day state of the stream from his house. However, he only chose to present video of the stream when it was low.

125 To the contrary, the evidence led by Mr. Van Diepen is more balanced and credible than Mr. Thomson's video evidence. Mr. Van Diepen's preferred evidence showed the stream at various levels and with the rock ledge both exposed and covered with water. The complete body of the Van Diepen photographs taken from October 2006 to July 2007 (Exhibit 3, tab 37) shows the water level was high at various and many points in time.

126 I accept the evidence of both Mr. Van Diepen and Mr. Forth that the water level was high enough at times to float a canoe. The Thomson video (Exhibit 43) shows a canoe located on the Van Duzen shoreline, east of the URA. In her evidence, Mrs. Thomson states that Mr. Van Diepen could use a canoe to access his property when the water levels were high.[18]

127 I accept Mr. Forth's testimony that the river was used to transport logs when logging was an important regional industry. He noted the vestiges of a logging dam east of the URA. I further find that based on the historical documentation entered into evidence,

Martin's River or Creek without the influence of man via the dam is a body of water of some significance. In particular:

(a) Mr. Forth noted that according to the John Grant survey, in the area where it crossed the road allowance, Martin's River consisted of two branches, the width of the north branch was 39.6 feet, the south branch was 19.8 feet. (Exhibit 5);
(b) Mr. Grant, in his pre-dam survey, used double lines to draw the river on Exhibit 38. He used double lines to draw only one other nearby river and that was the Seguin River, also a river of some significance. Mr. Forth concluded that Mr. Grant was utilizing this "mapping convention" to indicate that Martin's River was, also, significant in size;
(c) Other historical maps, being the Township of Christie map (Exhibit 39) and the John Grant plan of the Township of Christie (Exhibit 38) show the river as having two branches where it met the unopened road allowance;
(d) Mr. Forth testified that his own review of the natural boundaries of the river accord very closely with the findings of surveyor Grant (field notes of John Grant, Exhibit 5, Forth's survey, Exhibit 35);
(e) In addition, Mr. Forth's conclusions accord very closely with the original survey of John Grant. Both surveyors allow for a measurement of the river at the road allowance. These measurements are all consistent with a navigable river.

128 In *re*: *Coleman et al and AG Ontario et al*[19] it is stated that:

A stream is navigable if it satisfies the following criteria:

(a) It is navigable in law if it is navigable in fact;
(b) It is navigable in fact if it is capable in its natural state of being traversed at least by small craft, or even if it is floatable in the sense that it is used to float logs;
(c) It does not in fact have to be used for navigation so long as it is realistically capable of being so used;
(d) A stream may be navigable over part of its course and not navigable over other parts;
(e) It does not have to be navigable solely for the purpose of trading commerce;
(f) It must be an aqueous highway used or capable of use by the public and not be used solely for the private purposes of the owner;
(g) Navigation need not be continuous but may fluctuate seasonally; and
(h) Interruptions to navigation of a natural kind do not render the stream non-navigable if they may, by improvements be readily circumvented.[20]

129 For the reasons I have previously stated, Martin's River or Creek satisfies the criteria as set out in the *Coleman* case. Counsel for the Thomsons has also cited the *Canoe Ontario* and *Cassleman* decisions.

130 In satisfying the criteria set out in *re*: *Coleman*, the evidence supports my finding that Martin's Creek is navigable in fact. It is capable in its natural state of being traversed at least by a small craft namely a canoe. Historically, it has been used to float logs. It is realistically capable of being used for navigation. Martin's Creek may be navigable over part of its course and navigable over other parts depending on the season and depending on the activities involving the dam. Martin's Creek does not have to be navigable solely for the purpose of trade and commerce. Its use is capable of being used by the public and not solely for the private purposes of an owner. Members of the public could travel south along the URA and use Martin's Creek for canoeing or paddling depending on water levels. The evidence establishes that navigation need not be continuous but may fluctuate seasonally. Finally, interruptions to navigation of a natural kind does not render Martin's Creek non-navigable.

Application of the *Beds of Navigable Waters Act, R.S.O.,* 1990, c. B.4, as amended

131 The Crown Patent relating to the Lot 26, Concession 8 in the Township of Christie, District of Parry Sound states: "Saving, excepting and reserving, nevertheless unto Us, Our Heirs and Successors, the free use, passage and enjoyment of, in, over and upon all navigable waters which shall or may hereafter be found on or under, or be flowing through or upon any part of the said Parcel or Tract of land hereby granted aforesaid, and reserving also the right of access to the shores of all rivers, streams and lakes for all vessels, boats and persons, together with the right to use so much of the banks thereof, not exceeding one chain in depth from the water's edge, as may be necessary for fishery purposes."[21]

132 By operation of statute, I find ownership of the bed of Martin's River lies in the Crown. Section 1 of the *Beds of Navigable Waters Act* states:

> **Grant to be Deemed to Exclude the Bed**
>
> 1. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been or is granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.[22]

133 I find that the wording of the *Act* supercedes any boundary description that may incorporate the body of water known either as Martin's River or Martin's Creek.

134 The surveyor Mr. Forth testified that the PIN map showed that there was a piece of land situated between the lands owned Mr. Van Diepen and Ms. Fitzgerald and the Thomsons. (Exhibit 37). Further, he testified that there was no PIN associated with that property, and that those facts are consistent with the river being Crown Land.

135 I find that the deeds which grant property to Mr. Van Diepen and Ms. Fitzgerald and the Thomsons are consistent with the view that there is a piece of property, being the river bed, situated between the Van Diepen and Thomson lands. Specifically, the Thomson deed describes the property that they own as follows:

> Part of Parcel 6003 Parry Sound South Section being all of Lot 26, Concession 8, Township of Christie, District of Parry Sound, lying north of Martin's Lake and the extension of Martin's Lake known as Martin's Creek.[23]

136 The Van Diepen deed describes the property that they own as follows:

> Part of Lot 26, (26) in the eighth concession of the said Township of Christie, containing 65 acres, more or less, being all that part of said Lot lying South of Martin's Creek.[24]

137 The wording of the two deeds also caused Mr. Forth to conclude that neither Van Diepen or the Thomsons owned the land between their properties. In his view, which I accept, that land between their properties was Crown Land including the bed of Martin's Creek.

The Southern Boundary of the Thomson Lands

138 The Van Diepen position is that the location of the boundary must be to the state of conditions before the dam was erected. The Thomsons position is that they owned to the north bank of Martin's Creek. These plaintiffs rely upon the Forth survey which shows four iron bars planted by Mr. Forth marking the southern limit of the Thomson lands based upon the original water's edge of Martin's Creek prior to construction of the dam and based on the edge of vegetation. According to Mr. Forth, all lands contained within the pink outline on Exhibit 35 are Crown Lands. The Thomsons dispute this conclusion and rely upon their title documents which acknowledge the existence of the dam and speak to title of the Thomson property to the north bank of Martin's Creek.

139 We now arrive at the ultimate question which is a determination of the southern limit of the Thomson lands in the area where the north/south URA intersects with Martin's Creek.

140 It is acknowledged by all that the water levels in Martin's Creek fluctuates seasonally and in relation to the activities of the PUC at the dam. Both parties testified to man's regular intervention in the water levels by manipulating the dam. The current boundary of the water, from day-to-day, does not represent the natural boundary of Martin's Creek. The totality of the photographic evidence tendered by Mr. Van Diepen depicts the significant change in the depth and width of Martin's Creek on a regular basis from month to month, from season to season. The video evidence tendered by Mr. Thomson to the limited extent that it was accepted by this court also underscored the changes in the water levels of Martin's Creek. I accepted Mr. Van Diepen's evidence regarding the fluctuation of water levels as being the most reliable evidence on this point.

141 It is indisputable that the nature and purpose of the dam is to control to the waters both above and below it. The dam is a "control" dam. The evidence establishes that it has

been in existence at least since 1927. Also not in dispute is that Martin's Creek is no longer a natural water course given the erection and operation of the dam.

142 At trial, surveyor Paul Forth testified on behalf of the plaintiffs. The Thomsons called no expert survey evidence but rather relied upon the cross-examination of Mr. Forth and the title documentation relating to the Thomson property.

143 I accept the evidence of Mr. Forth regarding Martin's Creek being a navigable body of water. I also accept the uncontroverted evidence of Mr. Forth with respect to the location of the natural boundary of Martin's Creek. In that regard, he had the benefit of the original survey of John Grant from 1869. The pre-dam survey and Grant's survey notes enabled Mr. Forth to review the location of the river at the point where it met the URA and the original survey materials were available in great detail.

144 Mr. Forth attended the site and was able to correlate Mr. Grant's survey with the topographical features which existed on the ground with respect to locating the river's boundary. Mr. Forth was able to correlate the results fairly closely to the original Grant's survey. He considered other historical survey date in the form of historical maps also indicating the general topography of the river where it met the URA. In particular, these historical maps showed Martin's Creek consisting of two branches separated by an island and this was consistent with the findings of both Mr. Grant and Mr. Forth. In addition, comparison of the findings of the Grant survey with the findings of Mr. Forth resulted in a very accurate measurement of the width of the two branches and the island where they intersect with the URA. I find there is uncontroverted evidence before the court as to the existence of the natural state of the river in the area which concerns this dispute.

145 Mr. Forth placed four iron bars as monuments to the location of the natural boundary of the river in the area of the URA. He testified that in his view this represented the north boundary of the river and that the erection of the dam froze the boundary of the river in place. The natural boundary of the river currently on site is comparable to the boundaries presented in that location on the date of the Crown Grant, just prior to the building of the dam.

146 Mr. Forth testified that the normal actions of erosion and accretion had not been imperceptible. The best evidence Mr. Forth has of the north side of the river would be the field notes of Mr. Grant which coincide with the physical features Mr. Forth found on site.

147 With respect to natural waterways, the boundary of the waterway may be influenced by the concepts of "accretion" and "erosion/reliction". These concepts involve a process that must be slow and gradual; a process practically imperceptible. I accept the evidence of Mr. Forth that in this case, the normal actions of erosion and accretion have not been practically imperceptible so as to influence the location of the boundary.

148 In this case I find, the action of damming Martin's Creek, and the regular removal of or installation of logs to control water levels with its inherent fluctuations in the location of the water should not act to move the boundary.[25]

149 I accept the evidence of Mr. Forth that he did not accept the water's edge as the north boundary of the Martin's Creek. Rather, he accepted the physical features which he

found and compared with the findings of John Grant as a result of the influence of the dam on water levels both upstream and downstream of Martin's Creek controlled by man.

150 I accept Mr. Forth's evidence that with the building of the dam, the boundary of Martin's River or Creek must be considered as fixed in time as changes in the location of the river thereafter have been determined by the actions or interventions of man. From the evidence, it is clear that the changes are no longer imperceptible. The fluctuation in water levels occurred both with the building of the dam itself (as can been seen from a comparison of the historical documents) and regularly since then by the PUC actions of installing and removing logs from the dam in order to increase or decrease the flow of the river. The fact is that the location of the river is now artificially altered on a regular basis especially on the north side as the south side of the river is contained by the rock face or escarpment.

151 The evidence establishes that since the erection of the dam on Martin's River, that portion which flows between the Van Diepen and Thomson properties is no longer a natural water course. Once the dam was built, the location of the river ceased to be imperceptibly ambulatory. Rather, it became a non-natural river the boundaries of which were altered on a regular and rapid basis by the intervention of the PUC.

152 Having so found, I accept the evidence of Mr. Forth that the location of the north boundary of the river must be to the state of the conditions before the dam was erected. To find otherwise would necessarily contemplate a boundary which would be a constantly moving target.

153 I further accept Mr. Forth's evidence that the north boundary of Martin's Creek is the original water's edge prior to construction of the dam based on the edge of vegetation depicted on the Forth survey dated March 16, 2009 (Exhibit 35). On this survey Mr. Forth has colour coded various areas. He has identified the four iron bars which he planted marking the northern limit of Martin's Creek and the southern boundary of the Thomson property. Mr. Forth testified that the area within the pink outline on Exhibit 35 is Crown Land. I accept his expert evidence on this point. Accordingly, I declare that the northern boundary of Martin's Creek is identified by the four iron bars joined by a solid line on Mr. Forth's survey. (Exhibit 35). Similarly, I declare that the southern boundary of the Thomson property is identified as those lands being to the north of the three iron bars that Mr. Forth planted to the west from the westerly limit of the URA between lots 25 and 26 as shown on Mr. Forth's survey. (Exhibit 35).

154 The practical result of the court's finding and declaration is that Mr. Van Diepen and Ms. Fitzgerald, if permitted by the Crown, would be traversing Crown Land and not the Thomson property in order to access the Van Diepen property. Subject to the rights and reservations of the Crown, Mr. Van Diepen and Ms. Fitzgerald could cross freely across Crown Land without fear of trespassing on the Thomson property and without fear of prosecution for trespass. While there has been no challenge to this court's jurisdiction to grant declaratory relief, this court has jurisdiction to grant declaratory relief as found in section 97 of the *Courts of Justice Act* which states:

> The Court of Appeal and Superior Court of Justice, exclusive of the Small Claims Court may make binding declaration of right, whether or not any consequential relief is or could be claimed.[26]

155 The courts discretion to grant declaratory relief is very broad.

156 In *Edgar v. Canada (Attorney General)*, the court stated:

> The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the futility of the remedy, if granted, and whether, if it is granted it will settle the questions at issue between the parties.[27]

157 In *Canada v. Solosky* the court stated:

> ... if a substantial questions exists which one person has a real interest to raise, and the other two oppose, then the court has discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.[28]

158 On the facts of this case and the authorities cited, this court has exercised its discretion with the view to settling questions at issue between Mr. Van Diepen, Ms. Fitzgerald and the Thomsons. There is good reason to exercise the court's discretion to resolve this dispute as it has gone on for far too long. Without the declaratory relief granted, there is no doubt that the conflict between these parties would only continue without any peace between them.

159 I should note that there was evidence at trial by Mr. Van Diepen that he had spoken with a Mr. Chapman of the MNR at Parry Sound who had assured Mr. Van Diepen that he would have no problem accessing his property over Crown Land. I note that there was nothing more than Mr. Van Diepen's oral evidence at trial on this point. There were no documents filed in this regard although Mr. Van Diepen proved to be a careful record keeper. Neither did anyone from the MNR attend to give evidence on this point on behalf of the plaintiffs. Nevertheless, Mr. Van Diepen and Ms. Fitzgerald will no doubt have further discussions with the Crown as it is Crown Land over which they seek to traverse in order to gain access to the Van Diepen property.

Other Issues

The Limitation Period

160 Mr. Van Diepen and Ms. Fitzgerald initially claimed only an easement over the PUC right of way. On December 19, 2006, they amended their claim to alter the relief sought and the route over which they sought to pass. In the Amended Amended Statement of Claim, for the first time, they sought an easement over the "creek route". It also was the first request for a Declaration as to the southern boundary of the Thomson property. The issue using the "creek route" was raised by Mr. Van Diepen in his correspondence dated as early as October 17, 1994. The "creek route" was also revisited in Mr. Van Diepen's correspondence in the Fall of 1995.

161 The Thomsons rely upon section 4 and section 15 of the *Real Property Limitations Act*, R.S.O. 1990, c. L. 15 which provide as follows:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it. R.S.O. 1990, c. L.15, s. 5
> 15. At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished. R.S.O. 1990, c. L.15, s. 15

162 The Thomsons submit that there is a ten year limitation period applicable to claims to an interest in land such as the type of claim being advanced by Mr. Van Diepen through his Amended Amended Statement of Claim. They assert that Mr. Van Diepen was aware of the potential claim over the remote parcel of property in October of 1994 and was aware that the Thomsons had refused his suggestion. Both the issue of the access over the remote parcel of property and whether the remote parcel of land was Crown land were raised by letter dated September 12, 1995 from Mr. Connelly of the Ministry of Natural Resources who advised Mr. Van Diepen that Van Diepen would be required to commence an action to determine whether the Crown owned the lands questioned by Mr. Van Diepen at the time. Eleven years passed between the date of Mr. Connelly's letter and the Amended Amended Statement of Claim. The Thomsons submit that the relief being requested through the Amended Amended Statement of Claim is statute barred and should be dismissed.

163 Mr. Van Diepen and Ms. Fitzgerald take the position that section 4 of said *Act* has no application to the creation an easement of necessity or Declaration as to boundary.

164 Dealing first with a Declaration as to boundary, on a plain reading of section 4, this section deals with the claims of a person to make entry upon their land to distrain or to recover land or rent. Such a claim involves regaining property which was previously owned. This is not the fact situation involving our case. Section 4 limits the right by which a person is entitled to bring an action to recover any land or rent within ten years after the time at which the right to bring such an action first accrued. This provision does not confer a cause of action but rather, provides a defence to an action for the recovery of land or the exercise of distraint for rent.[29]

165 Mr. Van Diepen and Ms. Fitzgerald submit that there was a difference between a limitation period and "prescription" period. A prescription period is a period directed to the acquisition of an easement over the lands of another. In this case, these plaintiffs are not seeking to establish their easement by prescription, but rather easement by way of necessity. They submit that the way of necessity is an inchoate right which does not exist until a court makes a finding of fact that it does exist. Accordingly, there is no limitation issue.

166 I find that the ten year limitation period set out the *Real Property Limitations Act* does not apply.

167 While the focus of the area of access changed during the ongoing litigation, the Thomsons were aware from the outset of the litigation that the issue was access to the Van Diepen property and that issue continued to be litigated during the trial of this action whether it took the form of a Declaration as to boundary or the creation of an easement of necessity. Accordingly, section 4 of the *Act* does not apply to the facts of this case. Further, neither does it apply when considering the Amended Amended Statement of Claim and the refocusing of the access issue as it relates to the "creek route".

168 In the alternative, if the ten year limitation period found in the *Real Property Limitations Act* applies, I find the limitation period has not been breached based on the facts of this case. The easement of necessity was a live issue at trial and, in the alternative, was vigorously pursued by Mr. Van Diepen and Ms. Fitzgerald. The evidence clearly established that Mr. Van Diepen pursued other avenues of access to his property including correspondence with Park to Park regarding access over the Seguin Trail[30] and further correspondence with the MNR regarding access over Crown Land[31]. Both pieces of correspondence dated in October 2003.

169 The access issue never came to an end and I find the claim for an easement of necessity was brought well within ten years of this issue being tried. For these reasons, I would give no effect to the limitation period defence raised by the Thomsons.

Prescriptive Easement

170 The Thomsons submit that Mr. Van Diepen and Ms. Fitzgerald do not have a prescriptive easement by way of the "creek route" as they have not used that route for a period of twenty years. They rely upon section 51 of the *Land Titles Act*, R.S.O. 1990, c. L.5 and submit that the easement of necessity being sought by these plaintiffs is precluded by that provision.

171 I disagree. The plaintiffs are not seeking a prescriptive easement or any interest by way of adverse possession. Rather, they are seeking an easement of necessity which is not within the ambit of section 51 of the *Land Titles Act*.

Veterans' Land Act

172 The Thomsons rely upon section 5(3) of the *Veterans' Land Act*[32] which provides for the creation of new root of title at the date the Deputy Minister of Veterans' Affairs conveys any land. Section 5(3) of the *Act* provides:

> All conveyances from the Director constitute new titles to the land conveyed and have the same and as full effect as grants from the Crown of previously ungranted Crown lands.

173 The Thomsons argue the conveyance of the Thomson property in 1975 by the Director, *Veterans' Land Act* effectively reset the boundary of the Thomson property along Martin's Creek. According to the Thomsons, the location of the pre-dam boundary of Martin's Creek was rendered irrelevant once the *Veterans' Land Act* transfer was completed. The Thomsons assert that one must determine the boundary of their land with reference to the boundary of Martin's Creek, as controlled by the dam, on the date on the *Veterans' Land Act* transfer.

174 These plaintiffs submit that the Thomsons had misconstrued the purpose and application of section 5(3) of the *Veterans' Land Act* such that they have confused matters of title with matters of boundary. They assert that section 5(3) of the *Veterans' Land Act* deals with matters of title whereas the dispute between Mr. Van Diepen, Ms. Fitzgerald and the Thomsons is one relating to boundary.

175 The Thomsons have cited the following decisions.[33] These cases are distinguishable from the case at bar. They deal with the interpretation of section 5(3) of the *Veterans' Land Act* as that section relates to a dispute regarding title and not boundary.

176 The language of section 5(3) of the *Act* is directed at title to the land conveyed by the Director. Neither that subsection nor any other provision of the *Act*, is directed at boundary. I find the Director, *Veterans' Land Act* does not have the ability to convey more land that is conveyed to it.[34]

177 I accept that the Director, *Veterans' Land Act*, could only convey the land conveyed to it (albeit with a clear title). The land conveyed to the Director was bounded by Martin's Creek. The outstanding issue is where exactly does that boundary lie. I find that the answer to that question is not to be found in the *Veterans' Land Act* but rather in the common law principles respecting ambulatory water boundaries which I have considered in my reasons.

178 The *Veterans' Land Act* deed does not purport to grant the bed of Martin's Creek. The *Beds of Navigable Waters Act* clearly establishes that the bed of Martin's Creek remains in the Crown. Although the Thomsons submit that the southern boundary to their land is the northern bank of Martin's Creek, this assertion is not correct. The Thomson deed to which I have previously referred describes the Thomson land as being "All of Lot 26, Concession 8, Township of Christie, District of Parry Sound, lying north of Martin's Lake and the extension of Martin's Creek." For these reasons, I reject the argument advanced by the Thomsons based upon the application of section 5(3) of the *Veterans' Land Act*.

Issue No. 2: Are the Plaintiffs, Georgina Fitzgerald and Philip Van Diepen entitled to an Easement or Way of Necessity permitting them to cross over such parts of the Thomson lands as the court determines is necessary in order to access their property in or about the area where the unopened municipal road allowance meets the Martin's Creek?

179 Entitlement to an easement of necessity was an alternative argument advanced by Mr. Van Diepen and Ms. Fitzgerald.

180 Having declared that the land over which these plaintiffs seek to cross in order to access the Van Diepen property is Crown Land and not Thomson property, it is unnecessary for me to determine whether the plaintiffs are entitled to an Easement of Necessity.

Issue No. 3: Are the plaintiffs Georgina Fitzgerald and Philip Van Diepen entitled to damages including punitive damages?

181 I find that Mr. Van Diepen and Ms. Fitzgerald are not entitled to punitive damages. I find that the Thomsons did not act in a "malicious, oppressive and high-handed" manner. Nor were they engaged in misconduct that represents a "marked departure" from the ordinary standards of decent behaviour.[35] There is no reason in this case to punish the Thomsons.

182 The Thomsons had every right to chain off the PUC right of way to anyone save and except employees of the PUC that required the right of way to service the dam. Mr. Van Diepen knew when he purchased his property that he had access problems. Notwithstanding the fact that he had proposed a variety of "compromise" solutions, he had acquired no right whatsoever in respect of the PUC route. He could not compel nor was Mr. Thomson required to give Mr. Van Diepen access to his property over the route that Mr. Van Diepen had previously used. Mr. Van Diepen acknowledged that by operation of the *Land Titles Act*, he had not acquired a prescriptive easement over the PUC route. This left Mr. Van Diepen in the unfortunate position of having to find other access to his property. The Thomsons did not put Mr. Van Diepen in that position. Mr. Van Diepen put himself in that position by purchasing property in 1970 which had access problems. If he believed that he had access to his property over the PUC right of way as did his predecessors in title, then he was wrong. He had acquired no rights of access whatsoever. The Thomsons could not be faulted for not granting Mr. Van Diepen any further access across the PUC right of way. I find there is no misconduct on their part that would attract punitive damages in this regard.

183 Turning to Mr. Van Diepen's proposal to use the "creek route" which would involve travelling over a portion of the Thomson property, the Thomsons were under no obligation to sell Mr. Van Diepen any of their property. Although it would have been the neighbourly thing to do and could have avoided much rancour between the parties, again, the Thomsons were of the belief that they owned property to the north bank of Martin's Creek and they did not wish to sell any of that land to Mr. Van Diepen. Further, the Thomsons were of the view that, quite apart from any boundary dispute, Mr. Van Diepen was not entitled to an easement of necessity. They contended throughout the trial that Mr. Van Diepen had access to his property without resorting to any easement of necessity over the Thomson lands. The Thomsons were not unreasonable in maintaining and arguing the legal position that they did. Once more, their level of conduct does not reach the threshold that would warrant an award of punitive damages against them in favour of Mr. Van Diepen and Ms. Fitzgerald. Accordingly, their claim for punitive damages is dismissed.

184 This brings the court to consider the Van Diepen claim for general damages.

185 At trial, Mr. Van Diepen testified that he and his wife and sister-in-law had suffered an extended loss of enjoyment of their property, especially as the Van Diepen children were growing up. The Van Diepens could not enjoy nature and rustic outdoor activities associated with their property. Mr. Van Diepen's sister-in-law could not continue to bring groups of abused boys to the property for vacation. Another sister-in-law could not use the property from time to time for vacation as well. Only Mr. Van Diepen testified at trial in respect of these claims. These plaintiffs submitted that an award of $3,000 to $5,000 per plaintiff per year would represent a reasonable quantification of general damages suffered by them in respect of their loss of enjoyment of the property. They further submit that

the purchase and refusal to allow Mr. Van Diepen to cross over Part 1 42R-14812 (Thomsons property) would result in a loss of $4,000 and this amount was acknowledged by Mr. Thomson.

186 I am not satisfied on the balance of probabilities that Mr. Van Diepen and Ms. Fitzgerald are entitled to general damages. While it is true that Mr. Van Diepen and Ms. Fitzgerald were deprived of the enjoyment of their property over the years, I am not satisfied that this deprivation resulted directly from the actions of the Thomsons. I have already made findings in respect of Mr. Van Diepen having no right of access regarding the PUC route. Regarding the "creek route", the evidence is clear that Mr. Van Diepen had not used this route as an established way of accessing his property prior to being chained out in 1994. Rather, his resort to the proposed "creek route" arose because of the inherent access problems that related to his property from the very beginning. The Thomsons' refusal to permit access or to sell any of their land to these plaintiffs only underscored and aggravated the underlying problem of access which was a Van Diepen problem not a Thomson problem from the time that Mr. Van Diepen originally bought his property in 1970. While it can be said that Mr. Van Diepen and Ms. Fitzgerald did lose the enjoyment of their property, it cannot be said that such loss rests at the feet of the Thomsons.

187 Further, I am not satisfied that a reasonable quantification of general damages is the range proposed by these plaintiffs. They are not entitled to general damages from the commencement of their action of February 11, 2002 until they issued the Amended Amended Statement of Claim on December 19, 2006. Their claim for general damages absolutely has no basis over this time period.

188 From December 19, 2006 to the date of trial, I make the same finding. There were legitimate issues to be determined between the parties relating to boundary and easement of necessity. While it can be also said that the loss of enjoyment of their property was bound up with litigation, once more, the origins of the loss of enjoyment cannot be found in the conduct of the Thomsons, but rather in the very essence of the problem, namely, Mr. Van Diepen's access difficulties from when he originally purchased his lands.

189 As the claim for general damages has not been proven on a balance of probabilities by these plaintiffs, said claim is dismissed.

The Claim of the Bierers

190 The Thomsons submit that the Bierers are improperly involved in this proceeding. The Bierers had no interest in access to the Van Diepen property. Mr. Bierer chose to stand beside Mr. Van Diepen and support him in his cause. Mr. Bierer does not claim damages from the Thomsons and has no interest in the Van Diepen property. The Thomsons further contend that Mr. Bierer improperly encouraged this action, including retaining and instructing the surveyor, Mr. Forth. The Thomsons request that the action by Mr. and Mr. Bierer be dismissed as against them with costs. They also submit that Mr. Bierer's involvement in the proceedings is champertous and they request a finding in that regard.

191 The evidence establishes that the Bierers' involvement in the litigation related, for the most part to the claim against the MTO. The MTO granted a perpetual easement to the Thomsons with respect to the land which bifurcated the Bierer property. The MTO also granted a driveway entrance permit to the Thomsons. The Thomsons goal was to permit

them to have direct access to the improved Highway 518. The same request was made by the plaintiffs, Van Diepen and Bierer and the MTO refused to agree. However, once the action was commenced against the MTO, they relented. It is clear from the evidence that access by way of the eastern loop and old Highway 518 was an important issue for all the parties including the Bierers. To the extent that they were involved in this litigation, they were necessary parties certainly up to the point in time that issues were resolved with the MTO.

192 At the outset of trial, it was clearly stated that subsequent access issues involved only the plaintiffs Mr. Van Diepen and Ms. Fitzgerald. The Bierers did not assert such rights. There is no evidence whatsoever that the Bierers have received a promise to obtain a share of any proceeds or benefits accruing to Mr. Van Diepen and Ms. Fitzgerald. I find that the contention that there exists a champertous relationship as between the Bierers and Mr. Van Diepen and Ms. Fitzgerald to be without foundation. Neither is the court satisfied that Mr. Bierer funded this litigation against the Thomsons. They cannot be said to be stirring up the parties to litigate in an endeavor to enforce rights they would not otherwise pursue. The Bierers had legitimate rights which they pursued along side of Mr. Van Diepen regarding the eastern loop access. The Bierers' involvement came to an end once the MTO issue was resolved.

193 I agree that the costs of this litigation have not been increased by the Bierers involvement which became nominal only after Mr. Van Diepen and Ms. Fitzgerald pursued the proposed "creek route", boundary and easement of necessity issues against the Thomsons. The Request to Admit and the Response thereto, make it clear that the only outstanding issues were between Mr. Van Diepen, Ms. Fitzgerald and the Thomsons. Trial costs were not increased in any way as a result of the Bierers remaining nominal plaintiffs. They did not participate in the trial.

194 Neither the Thomsons nor the MTO brought a motion to dismiss the Bierers claim. To the contrary the MTO granted rights in land to the Bierers. The record shows that even before the Bierers were involved Mr. Van Diepen was involved in a lengthy access dispute with the Thomsons. The Bierers became involved when the MTO granted rights of access on property that bifurcated their lands. This occurred long after Mr. Van Diepen was trying to effect a solution to being locked out.

195 As the Bierer action against the Thomsons has not been formally dismissed, an order shall go dismissing their action against the Thomsons at this time.

CONCLUSION

196 Based on the findings of this court, Issue No. 1 being the boundary issue is determined in favour of the plaintiffs Mr. Van Diepen and Ms. Fitzgerald. Having so found, it is not necessary for this court to determine whether Mr. Van Diepen and Ms. Fitzgerald are entitled to an easement of necessity. Regarding Issue No. 3, the punitive and general damage claims of Mr. Van Diepen and Ms. Fitzgerald are hereby dismissed. As for the claims of the Bierers, said claims are also dismissed.

197 Regarding costs, this issue shall be determined by way of written submissions. If costs cannot be agreed upon, the plaintiffs shall submit their written brief on costs within

14 days of this decision and the defendants Thomson within the following 10 days. The plaintiffs will have a further 7 days to deliver any reply submissions.

198 All of the written materials are to be delivered to the Trial Co-ordinator at Barrie within the times prescribed. Written submissions will be brief and concise. They are not a vehicle for re-litigating issues determined at trial.

G.P. DiTOMASO J.

1 Exhibit 2 - Agreement as to evidence. Further, see plaintiffs' and defendants' Document Briefs, Exhibits 3 and 4

2 Letter dated September 6, 1994 (plaintiffs' Document Brief, exhibit 3, tab 11)

3 Transcript of the Examination for Discovery of Mildred Thomson dated November 15, 2004 page 11, question 59-61

4 Exhibit 15 - Letter dated September 2, 1994 to the Thomsons (plaintiffs' Document Brief exhibit 3, tab 15)

5 Exhibit 16 - Letter dated September 9, 1994 from Mr. Van Diepen to the Thomsons (plaintiffs' Document Brief exhibit 3, tab 16)

6 Exhibit 18 - Letter from Mr. Van Diepen to the Thomsons dated October 4, 1994 (plaintiffs' Document Brief exhibit 3, tab 18); Exhibit 23 - Letter dated November 25, 1994 from Van Diepen to the Thomsons (plaintiffs' Document Brief exhibit 3, tab 20); Exhibit 24 - Letter from Mr. Van Diepen to the Thomsons dated November 28, 1994 (plaintiffs' Document Brief exhibit 3, tab 21); Exhibit 25 - Letter from Mr. Van Diepen to the Thomsons dated January 17, 1995 (plaintiffs' Document Brief exhibit 3, tab 22); Exhibit 27 - Letter from Mr. Van Diepen to the Thomsons dated September 29, 1999 (plaintiffs' Document Brief exhibit 3, tab 29)

7 Exhibit 17 - Letter from Kevin Thomson to Mr. Van Diepen dated September 27, 1994 (plaintiffs' Document Brief exhibit 3, tab 17)

8 Exhibit 20 - Letter from Mr. Van Diepen to the Thomsons dated October 17, 1994 (plaintiffs' Document Brief exhibit 3, tab 19); Exhibit 25 - Letter from Mr. Van Diepen to the Thomsons dated January 17, 1995 (plaintiffs' Document Brief exhibit 3, tab 22)

9 Exhibit 2 - Agreed upon evidence see Exhibit 3, tab 6

10 Exhibit "A".

11 See Exhibit 32

12 Exhibit 4, tab 8

13 Exhibit 20

14 Exhibit 3, tabs 1 and 2

15 Exhibit 3, tab 9

16 Exhibit 6

17 Paragraph 1 Thomsons Amended Statement of Defence

18 Transcript of Examination for Discovery of Mildred Thomson dated November 15, 2004 page 21, question 111.

19 (1982), 143 D.L.R. (3d) 608, 27 R.P.R. 107 (Ont. H.C.J.)

20 *Canoe Ontario v. Reed* (1990), 69 O.R. (2d) 494 at page 501, *Cassleman v. Ontario (Ministry of Natural Resources)* [1994] O.J. No. 2180 O.C.J. (Gen. Div.)

21 Exhibit 3, tab 42

22 *The Beds of Navigable Waters Act*, R.S.O. 1990, c. B.4, section. 1

23 Exhibit 3, tab 31

24 Exhibit 2, Agreed upon Evidence from Exhibit 3, tab 38.

25 *Clark v. Canada (Attorney-General),* [1930] S.C.R. 137 at page 6; *Darrach (Re),* [1995] P.E.I.J. No. 143 at pages 8 to 10

26 *The Courts of Justice Act*, R.S.O., 1990, C. 43, section 97

27 *Edgar v. Canada (Attorney General)*, [1999] O.J. No. 4561

28 *Canada v. Solosky*, [1980] 1 S.C.R. 821

29 Graeme Mew, The Law of Limitations, Butterworths, Toronto: 2004 (2nd Ed) c. 11 and 14

30 Exhibit 30

31 Exhibit 29

32 *Veterans' Land Act*, R.S.C. 1970, c. V-4, section 5(3)

33 *Patterson v. Gallaugher* (1983), 46 O.R. (2d) 567 at paras. 6 and 12; and *Beman v. Harris* (2002), 48 R.P.R. (3d) 238, at para. 30

34 *Kolstee v. Metlin*, [2002] N.S.J. No. 282 (N.S.C.A.)

35 *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, *Whitten v. Pilot Insurance Company*, [2002] 1 S.C.R. 595

Indexed as:

Lieding v. Ontario

Lieding v. The Queen in right of Ontario

[1991] O.J. No. 186

2 O.R. (3d) 206

77 D.L.R. (4th) 193

43 O.A.C. 231

15 R.P.R. (2d) 54

25 A.C.W.S. (3d) 463

Action No. 494/89

Court of Appeal for Ontario

Tarnopolsky, Finlayson and Galligan JJ.A.

February 13, 1991

Counsel:

Robert E. Somerleigh, for appellant.

Kim Twohig, for respondent.

The judgment of the court was delivered by

1 FINLAYSON J.A.:-- The appellant appeals the judgment of the Honourable Judge J. deP. Wright (now reported at (1988), 1 R.P.R. (2d) 203), dismissing his claim for a declaration that he is the beneficial owner of all trees presently standing or growing subsequent to April 8, 1942 on Parcel 5592, Algoma West Section, Township of Lizar, District of Algoma and Province of Ontario.

2 The appellant is the registered owner of a block of 24 mining claims comprising Parcel 5592. He traces his title to a grant under letters patent dated April 8, 1942 by Her Majesty the Queen in right of Ontario, as represented by the Minister of Natural Resources, issued under authority of the Mining Act, R.S.O. 1937, c. 47. The Crown grant was in fee simple and was subject to the following reservations:

> The land herein granted is subject to the condition contained in Section One Hundred and One of The Mining Act, requiring that all ores or minerals raised or removed therefrom shall be treated and refined within Canada, and that in default thereof the land herein granted shall revert to His Majesty.
>
> Excepting and reserving five per cent of the acreage hereby granted for roads and the right to lay out the same where the Crown or its officers may deem necessary.
>
> Also excepting and reserving unto Us, Our Heirs and Successors, all Trees standing or being on said Land, together with the right to enter upon said land to remove said timber, as provided by section One Hundred and Two of the said Act, and also saving, excepting and reserving unto Us, Our Heirs and Successors, the free use, passage and enjoyment of, in, over and upon all navigable waters which shall or may hereafter be found on or under or be flowing through or upon any part of the said Parcel or Tract of Land hereby granted as aforesaid, and reserving also right of access to the shores of all rivers, streams and lakes for all vessels, boats, and persons, together with the right to use so much of the banks thereof, not exceeding one chain in depth from the water's edge, as may be necessary for fishery purposes.

(Emphasis added)

3 Since extensive reference will be made to it, I am setting out s. 102(1) of the Mining Act in full:

> 102.(1) Every patent of Crown lands sold or granted as mining lands shall contain a reservation of all pine trees and such pine trees shall continue to be the property of the Crown, and any person holding a license from the Crown to cut timber on such land may at all times during the continuance of the license enter upon the land and cut and remove such trees, and may make all necessary roads for that purpose; provided that the patentee may cut and use such trees as may be necessary for the purpose of building, fencing and fuel on the land so patented, or for any other purpose necessary for the working of the mines therein, and may also cut and dispose of all trees required to be removed in clearing such part of the land as may be necessary for mining purposes, but subject as

> regards pine trees to the payment of the value thereof to the Crown or to the timber licensee or other person authorized to cut such pine trees, as the case may be; provided, however, that where such land heretofore or hereafter granted is not under timber license or in a Provincial Forest, the owner thereof may without payment of Crown dues cut thereon and use for mining purposes thereon or on any adjoining lands owned by him any trees of the variety Pinus Banksiana, commonly known as "jackpine"; provided further that in any mining claim staked out and recorded on or after the 26th day of March, 1918, all trees or timber of whatever kind growing or being thereon shall be reserved to the Crown, but where such trees or timber are not covered by a timber license or permit to cut the same, the holder or owner of the claim may, on application, be granted permission to cut and use such trees or timber as he may require for mining and fuel purposes, either without payment or on such terms and conditions as the Minister of Lands and Forests may impose.

(Emphasis added)

4 The appellant relied on the language in the reservation in the grant (as opposed to s. 102) referring to "all Trees standing or being on said Land" and submitted that this language has been conclusively interpreted in Smith v. Daly, [1949] O.R. 601, [1949] 4 D.L.R. 45 (H.C.J.). In that case, Wells J. considered a transfer made in 1905 under the Land Titles Act (then R.S.O. 1937, c. 174), by one John Booth to the predecessor in title of the plaintiff Smith which reserved to the transferor [p. 602 O.R.] "all Pine trees and other merchantable timber of every kind standing or being on said lands". In finding that the new growth timbers were the property of the transferee, Wells J. held at p. 609 O.R., p. 53 D.L.R.:

> I think the words must have meant timber of every kind standing or being on the lands on the 28th June 1905 which might at any time be merchantable or saleable. The only limitation I can find in the exception is that the trees must have been in being in 1905.

5 This case was considered by this court in John Austin & Sons Ltd. v. Smith (1982), 35 O.R. (2d) 272, 132 D.L.R. (3d) 311, where Arnup J.A. stated at p. 282 O.R.:

> This is why Wells J., after correctly deciding what the rights of the parties were apart from the Act, was able to dispose of the issue under the Act by finding that no acts of adverse possession had been shown. No greater elaboration was required. In my view Smith et al. v. Daly and Booth Lumber Ltd., supra, was correctly decided, and should have been applied and followed by the trial judge.

6 The learned judge in appeal accepted this statement of the law and stated that if the grant in question was one between subject and subject that he would have decided this action in favour of the appellant. He then went on to say at p. 207 R.P.R.:

> This, however, is not a grant between subject and subject.

> Where, however, two interpretations may be given to the grant, both of which are good, that which is more favourable to the Crown is in many cases preferred.

(8 Hals., 4th ed. (Butterworths, 1975), para 1050)

7 This is one of those cases.

8 In my opinion, the case under appeal is distinguishable from Smith v. Daly because the title document in question is a Crown grant and specifically incorporates the language of s. 102 of the Mining Act. This language did not appear in the transfer as between subject and subject in Smith v. Daly or Austin v. Smith.

9 It is my opinion that s. 102(1) of the Mining Act has the effect of reserving to the Crown the ownership and control of all trees growing or in place at any particular time and provides a quasi-regulatory scheme to permit the cutting and clearing of the trees by those who acquire an interest in the surface rights or the trees thereon. The reservation contemplates basically that the patentee will be exploiting the mineral deposits in the claims and that the timber rights will be exploited separately under licence from the Crown. The reservation is designed to recognize and accommodate the rights of both interests. Section 102(1) can be broken down as follows:

> (a) every patent of Crown land sold or granted shall contain a reservation of all pine trees and such pine trees shall continue to be the property of the Crown;
> (b) any person holding a licence from the Crown to cut timber on such land may at all times during the continuance of the licence enter upon the land and cut and remove such trees, and may make all necessary roads for that purpose;
> (c) the patentee may
> (i) cut and use such pine trees as may be necessary for the purpose of building, fencing and fuel on the land so patented, or for any other purpose necessary for the working of the mines therein; and
> (ii) cut and dispose of all trees required to be removed in clearing such part of the land as may be necessary for mining purposes;
>
> but, subject as regards pine trees, to the payment of the value thereof to the Crown or to the timber licensee;
>
> (d) where the land is not under timber licence or in a provincial forest the owner may, without payment of Crown dues, cut and use for mining purposes thereon or any adjoining lands owned by him, any trees commonly known as "jackpine";
> (e) in any mining claim staked out and recorded on or after March 26, 1918, all trees or timber of whatever kind growing or being thereon shall be reserved to the Crown;

(f) where such trees (i.e., not pine trees or "jackpine") are not covered by a timber licence, the holder or owner of the claim may, on application, be granted permission to cut and use such trees or timber as he may require for mining and fuel purposes, on such terms and conditions as the Minister of Lands and Forests may impose.

10 It is thus apparent that the Crown preserves the ownership in all trees but, in particular, places a special value on pine trees (unless they are "jackpine"). It permits trees to be cut by a licensee of timber rights, or a patentee of mining rights, to the extent necessary to facilitate a mining operation.

11 Counsel for the appellant quite properly relies on Smith v. Daly for the proposition that the use of the present tense in the phrase "standing or being" in the language of the grant in the letters patent restricts the reservation to stands of timber in place at the date of the grant (April 8, 1942). However, the use of the present tense in a document that incorporates s. 102 of the Mining Act does not have the same effect because of the rules of statutory interpretation, most notably s. 4 of the Interpretation Act, R.S.O. 1937, c. 1 (now R.S.O. 1980, c. 219, s. 4). Section 4 [of the 1937 Act] reads:

> 4. The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, the same is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its true intent and meaning.

12 The use of the present tense in s. 102 of the Mining Act with respect to trees and timbers, combined with s. 4 of the Interpretation Act, means that the Crown is the owner of present growth trees and timber. This was the Crown's principal submission before this court. It was not accepted by the learned trial judge, but, in my respectful view, it is conclusive.

13 Even counsel for the appellant conceded that because of the language of s. 102, the appellant is not entitled to cut new growth pine trees but makes the distinction that the language in s. 102 refers to pine trees continuing "to be the property of the Crown", whereas the language with respect to other trees is restricted to "growing or being thereon". He submits that "growing", being in the present tense, must refer to trees in place at the time of the grant.

14 With respect, I am unable to see the distinction between the language describing pine trees and that referring to "all trees or timber of whatever kind growing or being thereon". Historically there was a special interest by the Crown in pine trees for the construction of naval vessels as indicated in the quotation by the trial judge at p. 205 R.P.R. from Graeme Wynn, "Timber Trade History", in the Canadian Encyclopedia, 2nd ed., vol. 4, p. 2160. This explains the early distinction made in the reservations between pine trees and other trees. The somewhat convoluted proviso in s. 102 in the 1937 Mining Act arose out of amendments from time to time to reflect the Crown's expanding interest in timber rights and by 1955 the distinction between types of trees had totally disappeared. The reservation now to the Crown is of "all timber and trees standing, being or hereafter found

growing upon the lands thereby granted or leased" (see the Mining Amendment Act, 1955, S.O. 1955, c. 45, s. 22, which re-enacted s. 103 of the Mining Act, R.S.O. 1950, c. 236).

15 This latter amendment also clarified any possible ambiguity as to whether the trees reserved covered later growth. In my opinion it did not expand upon the reservation of trees existing on or after March 26, 1918, as referred to in s. 102(1) of the 1937 Mining Act (see my para. (e), supra).

16 With respect to the history of the legislation, the trial judge held as follows (p. 208 R.P.R.):

> From the earliest days of this province, pine trees have been reserved without limitation. After 1955 it is clear that under the Mining Act all timber and trees were reserved, both present and future.
>
> From this I infer that the policy of the Crown was to retain control of the resource itself rather than specific trees. I infer that this policy has remained constant over the years notwithstanding variations in the wording of particular grants and statutes. I further infer from the article in the Canadian Encyclopedia that this policy was common knowledge.

17 In my view, whatever limitation there may be on the word "growing" in a deed as between subject and subject, when it appears in a document that incorporates s. 102(1) of the Mining Act, s. 4 of the Interpretation Act makes it clear that the reference is to trees growing at any point in time. It cannot be said that the reservation is restricted to trees which were in place and growing at the time of the grant. I think it is clear that the Crown intended to retain control over the vast timber resources throughout northern Ontario and did not intend to convey any timber rights in these grants under the Mining Act. They are a separate resource and can only be exploited under the suzerainty of the Crown.

18 In support of this traditional approach to the interpretation of the language of s. 102, we were referred to Eastern Construction Co. v. National Trust Co., [1914] A.C. 197, 83 L.J.P.C. 122, 110 L.T. 321 (P.C.). In that case the respondents held a patent and lease from the Crown of mining lands in Ontario subject to the reservations in ss. 39 and 40 of the then Mines Act, R.S.O. 1897, c. 36. These sections bear great similarity to s. 102. While the issue was not central to the judgment, Lord Atkinson, in giving the judgment of the Judicial Committee, was prepared to assume that the property in all pine trees on the lands covered not only those in place at the time of the patent but also future growth. The judgment quoted the reservation at p. 203 A.C.:

> ... subject, however, amongst other things, "to all the reservations, provisos, and conditions of the Mines Act (R.S.O., 1897, c. 36)," and saving and excepting the reservations and exceptions contained in s. 39 of the said statute, namely, <u>all pine trees standing or being on the said lands</u> as by the said section provided.

(Emphasis added)

19 Section 39(1) is quoted at pp. 203-04 A.C.:

> 39.(1) The patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or sawlogs on such lands may at all times during the continuance of the license enter upon the lands and cut and remove such trees and make all necessary roads for that purpose.

(Emphasis added)

20 On this basis Lord Atkinson stated at p. 208 A.C.:

> Under these circumstances the primary question for consideration appears to their Lordships to be the nature and extent of the right of the Crown to the pine trees growing, or to grow, on the mining locations of the plaintiffs under the patent and lease respectively granted to them.

(Emphasis added)

21 I have quoted the reasons of the trial judge at p. 207 R.P.R., supra, wherein he relied on Halsbury's (Halsbury's Laws of England, 4th ed., vol. 8 (London: Butterworths, 1975), para. 1050, p. 657) as authority for the proposition that when there are two interpretations of a Crown grant, both of which are good, the construction which favours the Crown will be preferred in the majority of cases. With great respect, I do not think the single sentence quoted can be relied upon for such a proposition. The full sub-paragraph of para. 1050 of Halsbury's reads as follows:

> If the grant is for valuable consideration it must be construed strictly in favour of the grantee, for the honour of the Sovereign; and where two constructions are possible, one valid and the other void, that which is valid ought to be preferred, for the honour of the Sovereign ought to be more regarded than the Sovereign's profit. Where, however, two interpretations may be given to the grant, both of which are good, that which is more favourable to the Crown is in many cases preferred.

(Footnotes omitted)

22 In my view the law is as follows:

(a) In the event of an ambiguity, grants from subject to subject are construed in favour of the grantee but grants from Crown to subject are construed in favour of the Crown.
(b) There are certain exceptions to this rule, including the exception cited by the appellant which permits construction in favour of the subject where valuable consideration has been given for the grant.

23 The statement in Halsbury's merely reiterates the specific rule that where there are two possible interpretations of a grant, the general practice is to construe the grant in fa-

vour of the Crown. This practice was adopted because of the view that while the public might be indifferent to the construction of a grant between subject and subject, it would not be similarly indifferent with respect to grants from the Crown because the Crown essentially represents the public interest (R. v. Meyers (1853), 3 U.C.C.P. 305 (C.A.) at pp. 350-51).

24 There is little in recent Canadian case law regarding the construction of Crown grants. It is clear, however, that the rules cited in Halsbury's apply in Canada as well. In Thompson v. Fraser Companies Ltd., [1930] S.C.R. 109, [1929] 3 D.L.R. 778, reversing [1929] 1 D.L.R. 168, 54 N.B.R. 481 (C.A.), where two grants gave different descriptions of the lands granted by the Crown the court adopted the description contained in the grant most favourable to the Crown. In so doing, Newcombe J., speaking for the Supreme Court of Canada, stated (p. 115 S.C.R., p. 783 D.L.R.):

> Furthermore, it is a rule of interpretation of Crown grants of this character that they shall be construed most favourably to the Crown ...

In another case, Wilson v. Codyre (1888), 27 N.B.R. 320 (C.A.), it was held that:

> It is established on the best authority that, in construing grants from the Crown, a different rule of construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another, every intendment is to be made against the grantor and in favour of the grantee, in order to give full effect to the grant; but in grants from the Crown an opposite rule of construction prevails: nothing passes except that which is expressed, or which is a matter of necessary and unavoidable intendment, in order to give effect to the plain and undoubted intention of the grant.

(Emphasis added)

25 The rule favouring the Crown does not permit the imposition of a forced construction on the grant. As one would expect, if the intention of the grant is clear, a party may not exploit a possible ambiguity for his or her benefit. It was stated by Crease J. in Ward v. Victoria Water Works (1874), 1 B.C.R. (Part 1) 114 (C.A.) that:

> It is true that the old and strict rule in favour of the prerogative still exists, but it does not mean that a forced construction was to be put upon the words of a Crown grant in favour of the Crown. That only obtains where the words are really doubtful and where the interpretation in favour of the Crown might be made without violation of the apparent object of the grant.

26 Counsel for the appellant submitted that the trial judge erred in relying on Hudson's Bay Co. v. Canada (Attorney General), [1929] A.C. 285, 98 L.J.P.C. 28, 45 T.L.R. 47, [1929] 1 D.L.R. 625, [1929] 1 W.W.R. 287 (P.C.), affg sub nom. Reference re Precious Metals in Certain Lands of Hudson's Bay Co., [1927] S.C.R. 458, [1927] 2 D.L.R. 897, for the proposition that "[c]ontrary to the ordinary rule applicable to grants by a subject, the

usual rule is that grants by the Crown are interpreted most favourably for the Crown" (p. 206 R.P.R.).

27 Counsel stated that the correct application of Hudson's Bay Co. v. Canada (Attorney General), supra, was made by Chilcott J. in Gibbs v. Grand Bend (Village) (1989), 71 O.R. (2d) 70, 64 D.L.R. (4th) 28, 7 R.P.R. 13 (H.C.J.) [supplementary reasons (1990), 72 O.R. (2d) 697, 68 D.L.R. (4th) 474 (H.C.J.)] in which he stated at p. 81 O.R. that:

> ... in interpreting the grant the exception or reservation must be construed in favour of the person from whose title it detracts, and that if the exception is uncertain but the grant is clear, the grant is operative but the exception fails.

28 Counsel for the appellant is correct in his submission. For reasons unclear, the learned trial judge relied on Hudson's Bay Co. v. Canada (Attorney General), supra, to support a point of law which it does not in fact address. However, the reference in the Hudson's Bay case referred to by Chilcott J. and raised by the appellant does not apply in the case on appeal to undermine the legal rule that grants from the Crown are to be construed in favour of the Crown. The Hudson's Bay case concerned a deed of surrender under which certain lands obtained by the Hudson's Bay Company through its royal charter were transferred back to the Crown. Consequently, since the specific rule of construction in favour of the Crown applies only to grants by the Crown, the applicable rule of construction in the Hudson's Bay case was the general one that requires that construction be in favour of the grantee. Hudson's Bay Co. v. Canada (Attorney General) dealt with a transfer to the Crown, not from the Crown, and as such was not governed by the rule that grants from the Crown be construed in favour of the grantor.

29 In fact, the Hudson's Bay case gives inferential support to the specific rule of construction in favour of the Crown. This is because in interpreting documents that provided for new transfers in fee simple of lands from the Crown to the Hudson's Bay Company, which followed the surrender of lands by the Hudson's Bay, the court construed the grant narrowly so as to exclude precious metals in the land and thereby chose a construction favourable to the grantor.

30 In the case on appeal, when the words of the grant and the reservation (including the reference to s. 102 of the Mining Act) are properly construed in accordance with s. 4 of the Interpretation Act, no difficulty in interpretation arises. There is a clear reservation of all trees and timbers, present and future, to the Crown. Accordingly, while I cannot agree with all of the reasons of the learned trial judge, he was correct in the result. I would dismiss the appeal with costs.

Appeal dismissed.

Case Name:

R. v. Mackie

Between
R., and
Robert Mackie

[2012] O.J. No. 4718

Docket: M41634

Ontario Court of Appeal
Toronto, Ontario

E.A. Cronk J.A.

Heard: September 19, 2012.
Judgment: September 19, 2012.

(10 paras.)

Criminal law -- Regulatory offences -- Defences -- Due diligence -- Application by defendant for leave to appeal conviction for non-compliance with restoration order, dismissed -- Defendant operated business on land in violation of regulations and legislation -- Province had authority to control activities on private land -- Defendant's reliance on Crown patent failed to ground due diligence defence, as there was no evidence that defendant's decision to ignore restoration order flowed from his understanding of his rights under Crown patent -- Crown patent did not displace provincial legislation -- Test for leave not met because matter did not raise question of law requiring resolution by Court and was not of public importance.

Criminal law -- Appeals -- Leave to -- Application by defendant for leave to appeal conviction for non-compliance with restoration order, dismissed -- Defendant operated business on land in violation of regulations and legislation -- Province had authority to control activities on private land -- Defendant's reliance on Crown patent failed to ground due diligence defence, as there was no evidence that defendant's decision to ignore restoration order flowed from his understanding of his rights under Crown patent -- Crown patent did not displace provincial legislation -- Test for leave not met because matter did not raise question of law requiring resolution by Court and was not of public importance.

Statutes, Regulations and Rules Cited:

British North American Act, s. 92, s. 92(13), s. 92(16)

Niagara Escarpment Planning and Development Act, R.S.O. 1990, c. 2

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 131(2)

Counsel:

No counsel mentioned.

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1 **E.A. CRONK J.A.**:-- The applicant argues that this case gives rise to several important questions of law warranting the consideration of this court in the public interest, thereby, he submits, satisfying the test for leave to appeal set out under s. 131(2) of the Provincial Offences Act, R.S.O. 1990, c. P. 33 (the "POA").

2 For several reasons, I disagree. In my view, the stringent test for leave under s. 131(2) of the POA has not been satisfied. Accordingly, I dismissed the applicant's motion for leave to appeal, with reasons to follow. These are those reasons.

3 First, the threshold for leave to appeal under s. 131(2) is exacting. In order to obtain leave, the case must involve a question of law alone, the resolution of which, in the circumstances, must be essential in the public interest - not merely in the interests of the litigants - or for the due administration of justice: see Ontario (Ministry of Labour) v. Enbridge Gas Distribution Inc., 2011 ONCA 13, at paras. 33-35.

4 The appellant says that the appeal judge below (and, inferentially, the trial judge as well) misinterpreted s. 92 of the British North America Act ("BNA Act'). He argues that s. 92 does not afford any authority to the provincial legislatures to legislate with respect to private - as opposed to public - property. Further, he contends that the province's legislative competency under s. 92 is constrained by, and subordinate to, the contractual rights of a private landowner under a Crown Patent regarding land.

5 There are numerous difficulties with this argument. First, the applicant pointed to no authority during oral argument in support of his interpretation of s. 92 of the BNA Act. Second, in effect, the applicant argues that to the extent that provincial legislation pertains to the regulation of both private and public land - like the Niagara Escarpment Planning and Development Act, R.S.O. 1990 c. 2 ("the "NEPD Act") - such legislation is ultra vires the legislative competency of the province. However, no challenge to the constitutional validity of the NEPD Act was brought in this case, nor was any notice of constitutional question served on the Attorney General for Ontario, as required to raise such an argument. Finally, at the end of the day, I agree with the Crown's submission that the authority of the province to control activities on private land is derived from ss. 92(13) and 16 of the BNA Act. As this court observed in Hamilton Harbour Comm. V. Hamilton, [1978] O.J. No. 3555 (C.A.), at para. 57, "legislative authority to control the use of land generally undoubtedly belongs to the Province under s. 92 of the B.N.A. Act within head 13 ... or head 16 ...".

6 The applicant next submits that the appeal judge, from whose decision he seeks to appeal, erred by holding that the applicant's reliance on his Crown Patent failed to ground a due diligence defence to the charge of non-compliance with the restoration order at issue in this case.

7 I disagree. As the appeal judge pointed out, there was unequivocal evidence of - indeed the applicant admitted - [his] the applicant's intention, from the outset of imposition of the restoration order to ignore its terms. There was no evidence that this decision by the applicant flowed from his understanding of, and reliance on, his legal rights under his Crown Patent. Indeed, the evidence indicated that the applicant did not even obtain a copy of the Crown Patent until after he formed the intention to ignore the terms of the restoration order.

8 Perhaps more importantly, however, nothing in the language of the Crown Patent itself or elsewhere in the evidentiary record is there support for the contention that the Crown Patent and the rights conferred under it displace otherwise validly enacted provincial legislation, like the NEPD Act, regulating land use.

9 Finally, the applicant maintains that his use of his property for the purpose of his archery business is exempt from the requirements under the NEPD Act and associated regulations for a development permit. This is not an issue of general public importance warranting review by and guidance from this court. In any event, the compliance of the applicant's use of his land with the relevant land use regulations and the NEPD Act was the subject of an appeal by the applicant to a Niagara Escarpment Hearing Officer. The decision of that official, in effect, was that the applicant's use of his land for his archery business was not in conformity with the requirements of the NEPD Act and regulations. No judicial review of that ruling appears to have been initiated by the applicant.

10 In all the circumstances, I conclude that the test for leave to appeal under s. 131 of the POA is not met. I see no question of law in this case requiring resolution by this court in the public interest, or for the due administration of justice. At its core, this dispute is particular to the parties; it is devoid of broad-ranging public import and concerns merely the applicant's deliberate non-compliance with a land use regulation/restoration order issued by the responsible land use authority in his community. The application for leave to appeal is dismissed.

E.A. CRONK J.A.

Case Name:

Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)

Between
Cambie Surgeries Corporation, Appellant (Plaintiff), and Medical Services Commission of British Columbia, Minister of Health Services of British Columbia and Attorney General of British Columbia, Respondents (Defendants), and Specialist Referral Clinic (Vancouver) Inc., Respondents (Defendant by Counterclaim)
And between
Cambie Surgeries Corporation, Respondent (Plaintiff), and Medical Services Commission of British Columbia, Minister of Health Services of British Columbia and Attorney General of British Columbia, Respondents (Defendants), and Specialist Referral Clinic (Vancouver) Inc., Appellant (Defendant by Counterclaim)

[2010] B.C.J. No. 1766

2010 BCCA 396

292 B.C.A.C. 8

323 D.L.R. (4th) 680

9 B.C.L.R. (5th) 299

2010 CarswellBC 2365

192 A.C.W.S. (3d) 947

Dockets: CA037741 and CA037747

British Columbia Court of Appeal
Vancouver, British Columbia

M.E. Saunders, S.D. Frankel and H. Groberman JJ.A.

Heard: June 24, 2010.
Judgment: September 9, 2010.

(47 paras.)

Civil litigation -- Civil procedure -- Appeals -- Injunctions -- Procedure -- Appeal by medical clinics from injunction requiring them to allow inspectors from Commission access to premises and records to perform audits allowed -- Clinics brought claim for declaration that legislation which prohibited them from directly billing and extra billing patients was unconstitutional -- Commission counterclaimed for injunctions and warrants authorizing audit of clinics -- Judge incorrectly set out test for granting injunction -- Manner in which application came before court was irregular and ought not to have been granted -- As legislation made adequate provision for orders facilitating audits, extraordinary powers of court to grant injunction ought not to have been engaged.

Appeal by medical clinics from an injunction requiring them to allow inspectors from the Medical Services Commission access to their premises and records in order to perform audits under s. 36 of the Medicare Protection Act. The clinics admitted that they engaged in practices whereby they directly billed patients for services covered by the province's medical services plan and/or charged patients more than the amount that the plan would pay for a medical service. Some patients signed acknowledgement forms which confirmed their understanding that they were being billed for amounts in excess of those provided for under the plan. The clinics contended that certain provisions of the Act were unconstitutional as they had the effect of preventing patients from using their own resources to obtain desired medical care in a timely manner and they commenced an action for a declaration that the impugned provisions were unconstitutional. The Commission filed a counterclaim for interim and permanent injunctions prohibiting the clinics from violating certain sections of the Medicare Protection Act and it sought warrants under s. 36 of the Act authorizing its inspectors to enter the clinics and inspect medical records in their premises and an injunction restraining the clinics from interfering with the inspectors. The Minister of Health Services also filed a counterclaim seeking various relief. The judge found that while she had jurisdiction to issue the warrant under the Medicare Protection Act, it was preferable to proceed under the court's inherent jurisdiction. In addition, she found that the application for an injunction presented an appropriate basis for the exercise of the court's jurisdiction to grant injunctions as it was sought for the purpose of enforcing a public right and the legislation itself did not provide for a penalty for refusing to cooperate in an audit. In applying the test for a final injunction, the judge found that the test was satisfied as the statutory conditions for an audit were satisfied and the clinics refused to allow an audit to proceed, the clinics would still be able to pursue their constitutional challenge and while they would suffer some inconvenience, it was outweighed by the public interest. The clinics appealed the order on the basis that the judge erred in not considering the constitutionality of the impugned legislation at the first stage of the test because the audits were sought for the purpose of determining a violation of the legislation.

HELD: Appeal allowed. The judge incorrectly set out the test for granting an injunction as she determined the Commission's application was for a final order, but she applied the test

for an interlocutory injunction. Furthermore, the manner in which the application for an injunction came before the court was irregular and it ought not to have been granted. As the Medicate Protection Act made adequate provision for orders facilitating audits where required, the extraordinary powers of the court to grant an injunction ought not to have been engaged. In addition, the procedure that was followed in this case obscured the legal issues surrounding the making of the order and created unnecessary difficulties.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7

Federal-Provincial Fiscal Arrangements Act, R.S.C. 1985, c. F-8,

Interpretation Act, RSBC 1996, CHAPTER 238, s. 29

Medicare Protection Act, RSBC 1996, CHAPTER 286, s. 1, s. 13, s. 14, s. 17, s. 18, s. 26(1)(a), s. 36, s. 36(7), s. 36(10), s. 45.1, s. 46(4)

Provincial Court Act, RSBC 1996, CHAPTER 379, s. 30(3)

Appeal From:

On appeal from the Supreme Court of British Columbia, November 20, 2009 (*Schooff v. Medical Services Commission*, 2009 BCSC 1596, Vancouver Registry Nos. S088484 and S090663)

Counsel:

Counsel for the Appellants: Irwin G. Nathanson, Q.C., Marvin R.V. Storrow, Q.C.

Counsel for the Respondents (Defendants): George H. Copley, Q.C., Jonathan G. Penner.

Reasons for Judgment

The judgment of the Court was delivered by

1 H. GROBERMAN J.A.:-- This is an appeal, with leave, from the granting, 2009 BCSC 1596, of an injunction requiring the appellant medical clinics to allow inspectors from the Medical Services Commission (the "Commission") access to their premises and records in order to perform audits under s. 36 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286.

2 The clinics contend that certain provisions of the *Act* are unconstitutional. As the proposed audits may be aimed at documenting violations of those provisions, the clinics say that the chambers judge was required to consider the constitutionality of the impugned provisions before granting an injunction. The Commission, on the other hand, argues that its right to audit the clinics is not dependent on the impugned provisions, and that the injunction was, therefore, validly granted.

3 In my view, for reasons that follow, the manner in which the application for an injunction came before the Supreme Court was irregular, and the chambers judge ought not, in the circumstances, to have granted the injunction. The *Medicare Protection Act* makes adequate provision for orders facilitating audits where such orders are needed. The extraordinary powers of the Supreme Court to grant an injunction need not have been engaged in this case. Further, the procedure that was followed in this case obscured the legal issues surrounding the making of the order, and created unnecessary difficulties.

The Legislation and the Underlying Action

4 The *Medicare Protection Act* governs the administration of British Columbia's Medical Services Plan (the "Plan"), the primary public health insurance scheme in the province. Most residents of B.C. are enrolled as beneficiaries and most physicians are enrolled as practitioners entitled to payment for their services under the Plan. A number of the provisions of the *Act* are relevant to the appeal. Rather than setting them out in the body of these reasons, I have appended the relevant portions of the statute.

5 In the normal course, practitioners bill the Commission for services performed for beneficiaries, and the Commission pays the practitioners in accordance with its established payment schedules. Section 14 of the *Act* allows enrolled practitioners to opt out of the normal payment arrangements and to bill patients directly.

6 Unless a physician has opted out or is not enrolled in the Plan, s. 17 prohibits him or her from charging a beneficiary for the provision of a service covered by the Plan. Where a physician has opted out or is not enrolled, s. 18 prohibits him or her from charging a patient more than the amount that the Plan would pay for a medical service.

7 Together, ss. 17 and 18 greatly restrict the scope for medical practitioners to bill patients directly for their services. Section 18 also prohibits "extra billing" - i.e., billing a patient for an amount beyond that which the Plan pays for a service.

8 The clinics admit that they have engaged in practices that would violate the statutory prohibitions against direct and extra billing if those prohibitions are constitutional. Some patients have signed "acknowledgement forms" confirming their understanding that they are being billed for amounts in excess of those provided for under the Plan.

9 The clinics contend, however, that ss. 14, 17 and 18 of the *Act* are unconstitutional. They allege that those provisions have the effect of preventing patients from using their own resources to obtain desired medical care in a timely manner. Relying primarily on *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, the clinics argue that the impugned provisions of the *Medicare Protection Act* violate the rights of patients to life, liberty, and security of the person in a manner that is not in accordance with principles of fundamental justice, contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*. They have commenced an action seeking a declaration that the impugned provisions are unconstitutional.

10 The Minister of Health Services has filed a counterclaim, seeking a declaration that the acknowledgement forms signed by patients are of no effect. He also seeks damages from the clinics for economic losses that the Province claims to have suffered as a result of

the clinics' extra billing practices and of actions taken by the Federal Government under the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8.

11 The Medical Services Commission has also filed a counterclaim, seeking interim and permanent injunctions under s. 45.1 of the *Medicare Protection Act* prohibiting the clinics from violating ss. 17 and 18 of the *Act*. In addition, the Commission's counterclaim seeks a warrant under s. 36 of the *Act* authorizing its inspectors to enter the clinics and inspect medical records in their premises. It also seeks an injunction in similar terms. Finally, the counterclaim seeks an injunction restraining the clinics from "hindering, molesting or interfering with its inspectors".

12 The current appeal arises out of an interlocutory application by the Medical Services Commission seeking a warrant under s. 36, or, alternatively, injunctive relief allowing its inspectors to enter the premises of the clinics and inspect their records for the purpose of conducting an audit. The Commission also sought ancillary injunctive relief requiring the clinics to allow the inspectors access to their premises and records, and prohibiting them from interfering with the audit process.

The Reasons of the Chambers Judge

13 The chambers judge began by considering whether she had jurisdiction to issue a warrant authorizing the Commission's inspectors to enter the clinics under s. 36(7) of the *Act*. Such a warrant may be issued by a "justice", a term which by virtue of s. 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, means a justice of the peace.

14 The judge found that she had authority to issue a warrant because under s. 30(3) of the *Provincial Court Act*, judges of the Supreme Court are justices of the peace. She declined to act under s. 36, however, finding that it was preferable to proceed under the inherent jurisdiction of the Supreme Court. She did so for two reasons - first, she considered that her ability to consider equitable considerations was clearer when exercising inherent jurisdiction. She also thought it preferable that her decision not be subject to judicial review by another member of the Supreme Court, as it would be if she made it in her role as a justice of the peace.

15 The judge considered that the application presented an appropriate basis for the exercise of the court's jurisdiction to grant injunctions. She noted that the injunction was sought for the purpose of enforcing a public right, with the support of the Attorney General, and also noted that the statute itself did not provide for any penal sanction for refusing to cooperate in an audit, apart from a penalty for obstructing an inspector.

16 The judge then set out to determine the appropriate test for the granting of the injunction:

> [107] A threshold issue is whether the order sought is interlocutory or final. The underlying premise of an interlocutory injunction is that the Plaintiff must demonstrate that, unless an injunction is granted, his or her rights will be nullified or impaired by the time of trial (see Robert J. Sharpe, *Injunctions and Specific Performance*, loose leaf (Aurora: Canada Law Book, 1992) at para. 2.550). That is not the underlying premise of this application. Instead, the Commission seeks to enforce its previous

> decision to audit. The Commission could have brought the application whether or not the Action existed, and I do not believe that the fact the Commission has brought the application as part of its counterclaim necessarily makes it an interlocutory application.
>
> [108] It is true that the Commission in its counterclaim seeks declarations that Cambie and SRC have contravened and will contravene ss. 17 and 18 of the *MPA*, and interim and permanent injunctions restraining such contraventions. However, this application is not for interlocutory restraining orders with respect to alleged contraventions of ss. 17 and 18 of the *MPA*. Instead, it is to compel Cambie and SRC to permit the audit to be done under s. 36 of the *MPA*.
>
> [109] As Mr. Nathanson for Cambie observed, once the audit is done, it is done. The Commission is not seeking an order that records be preserved until the audit is completed or some other interim form of relief. Counsel for the Commission, Mr. Copley, conceded that the application is in some respects for a final order.
>
> [110] I conclude that the Commission is seeking a final order with respect to the audit and I will assess the application on that basis.

17 Having concluded that what was being sought was a final order, the judge referred to *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. She accepted that the normal test for the granting of an interlocutory injunction requires a three-stage analysis: first, the applicant must demonstrate that there is a serious question to be tried; second, the applicant must show that it may suffer irreparable harm if the relief is not granted; finally, the court must determine whether the balance of convenience favours the applicant or the respondent.

18 The judge then said:

> [114] If the injunction sought is a final order, as in this case, the first stage of the test is altered, in that the Court should go beyond a preliminary investigation and perform instead a more extensive review of the merits, with the anticipated results on the merits also being kept in mind at the second and third stages of the test. [Citation omitted.]
>
> [115] Thus, in these circumstances, it is not sufficient for the Commission to show a triable issue regarding its assertion that it is entitled to an audit, but instead it must establish on the balance of probabilities that the Commission is entitled under the legislation to perform the audit and that the audit has been refused.

19 The judge proceeded to consider whether the *Medicare Protection Act* authorized an audit and whether the clinics had refused to allow one to proceed. Having found "on the balance of probabilities" that the statutory preconditions for an audit were satisfied, and that the clinics had refused to allow one, she concluded that the applicant had passed the

first stage of the injunction test. She then proceeded to consider the questions of irreparable harm and balance of convenience, and concluded that an injunction ought to issue:

> [138] ... The public interest supports the enforcement of duly enacted legislation such as the *MPA*. There was no evidence that the audit will interfere with the ability of the Plaintiffs to pursue their constitutional challenge, especially if appropriate conditions are imposed. I am satisfied that the audit may cause the Clinics some inconvenience and possibly some expense (in the form of staff time), and that the private interests of the Clinics may thereby be affected. However there is nothing to suggest a countervailing public interest that would outweigh the public interest relied upon by the Commission. While the Clinics' challenge to the constitutionality of the legislation is a serious one, so is the defence to it as described by the Commission in its submissions. No conclusion can be reached as to the likely outcome of the challenge to the legislation, and I am satisfied that the balance of inconvenience favours granting the order sought, although not with immediate effect ....
>
> [148] I have concluded that the fair and just order in this case is that the injunction will be stayed for some months. During that time, counsel will attempt to reach agreement on the terms on which the audit will be conducted, and on the related issue of the scope of discovery (because to allow both full discovery and an audit could be unnecessary and possibly oppressive).
>
> [149] Absent further order, or agreement, the injunction ... will be effective on March 1, 2010.

20 The Commission subsequently agreed not to take any steps to carry out the audit or to enforce the injunction pending the determination of these appeals.

Positions of the Parties on the Appeal

21 The appellants contend that the judge correctly set out the test for the granting of the injunction, but say that she erred in not considering the constitutionality of the impugned legislation at the first stage of the *RJR-MacDonald* test. They say that because the audits are sought for the purpose of determining the extent of violations of ss. 17 and 18 of the *Medicare Protection Act*, the judge was required, at the first stage of the test, to reach a conclusion as to whether, on the balance of probabilities, those statutory provisions are constitutional. As the judge found that "[n]o conclusion can be reached as to the likely outcome of the challenge to the legislation", she ought not to have granted the injunction.

22 The Commission also agrees that the judge correctly set out the test for the granting of the injunction. It says, however, that the judge was not required to reach any conclusion on the constitutionality of the impugned sections because the Commission's right to perform an audit does not depend on there being any violation (or even suspicion of a violation) of ss. 17 and 18 of the *Act*. In its submission, those sections are simply irrelevant to the issue of whether the Commission has the right to an audit.

The Test for an Injunction

23 Unfortunately, despite the agreement of the parties that the trial judge correctly set out the test for the granting of an injunction in this case, it is my view that the test enunciated was incorrect.

24 *RJR-MacDonald* sets out the test for the granting of an interlocutory injunction. The normal test for such an injunction is the familiar three-part test discussed by the chambers judge. The test is designed to address situations in which a court does not have the ability to finally determine the merits of the case, but must nevertheless decide whether an interim order should be made to protect the applicant's interests.

25 *RJR-MacDonald* describes an exceptional category of cases where the court must undertake a more probing analysis of the strength of the applicant's case at the first stage of the analysis at 338-39:

> Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:
>
> > Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.
>
> Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.
>
> ...
>
> The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

26 It is important to appreciate that the Court was not, in describing this special category of cases, purporting to redefine the tests for the granting of a final, as opposed to interlocutory, injunction. Rather, it was describing a test that is applicable to a narrow class of interlocutory injunctions, where the granting or withholding of the injunction will have the practical effect of bringing the litigation to an end. In this category of cases, circumstances require that courts do their best to do justice between the parties, recognizing that a full hearing to finally determine the merits of the action will never take place.

27 Neither the usual nor the modified test discussed in *RJR-MacDonald* has application when a court is making a final (as opposed to interlocutory) determination as to whether an injunction should be granted. The issues of irreparable harm and balance of convenience are relevant to interlocutory injunctions precisely because the court does not, on such applications, have the ability to finally determine the matter in issue. A court considering an application for a final injunction, on the other hand, will fully evaluate the legal rights of the parties.

28 In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, *per se*, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief.

29 In the case before us, the chambers trial judge concluded that the application should be treated as one for a final order, because the claim for an injunction could have been brought as an independent action. Having made that determination, however, the judge proceeded to apply the test for the granting of an interlocutory injunction. She fell into error in that regard.

30 I agree with the chambers judge's conclusion that the application by the Commission for a warrant or injunction to facilitate an audit was an application for final relief. The application was not genuinely interlocutory - it was not an application for interim relief pending final determination of the litigation. Rather, it was an application for summary determination of one aspect of the Commission's counterclaim.

31 That aspect of the counterclaim was not closely connected with the balance of the litigation. As the Commission pointed out in argument, its statutory right to conduct an audit does not depend on it having suspicion that the impugned provisions of the statute are being violated, nor does it depend on it succeeding on the rest of the claim or counterclaim. It was, therefore, possible for the court to consider the Commission's application for injunctive relief on a summary basis, separately from the balance of the claim and counterclaims.

32 In considering the Commission's application, however, the chambers judge was required to determine whether a final order should be granted, and should not have applied the interlocutory injunction test.

Should an Injunction Have Been Granted?

33 On the face of it, the Commission established that it was legally entitled to conduct an audit under s. 36 of the *Act*. The first part of the test for the granting of a final injunction was, therefore, made out. Nonetheless, it is my view that, for reasons that follow, the court ought not to have granted injunctive relief in this case.

34 While courts have jurisdiction to grant injunctions to enforce statutory obligations, the jurisdiction must be exercised carefully. Where, as here, there is a clear method of enforcement set out in the statute, the court should not grant injunctive relief unless the statutory provision is shown to be inadequate in some respect.

35 There are a number of respects in which a statutory regime may be inadequate. For example, the penalty for breach of the statute may be so limited that a party chooses to treat it as a cost of doing business, and therefore flout the law (see Robert J. Sharpe, *Injunctions and Specific Performance* (Looseleaf Edition, Toronto: Canada Law Book, 1998-2009) s. 3.210; *A.G. v. Harris*, [1961] 1 Q.B. 74 (C.A.); *Alberta (Attorney General) v. Plantation Indoor Plants Ltd.* (1982), 133 D.L.R. (3d) 741 (Alta. C.A.), rev'd on other grounds [1985] 1 S.C.R. 366; *Attorney-General for Ontario v. Grabarchuk* (1976), 67 D.L.R. (3d) 31 (Ont. Div. Ct.).

36 A statutory provision may also prove inadequate where a party who suffers harm is unable to invoke the provision (*MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048), or where serious danger or harm would result from the delay inherent in invoking a statutory remedy. There are, undoubtedly, other situations in which deficiencies in a statutory remedy militate in favour of the granting of an injunction.

37 In the case before us, there is no basis on which the statutory provisions can be said to be deficient. They provide for inspections and audits, and allow the Commission to seek a warrant when it is necessary to enter a building in order to obtain information. The provisions specifically deal with audits, and are carefully tailored to ensure that they can be carried out. There is no basis, in this case, to expect that the clinics would refuse to allow inspectors access to documents if a warrant were issued. In the circumstances, it was unnecessary to resort to the injunction procedure.

The Scope of an Injunction

38 While I would set aside the injunction on the basis that the statutory remedies were entirely adequate, I believe that some comment is also appropriate with respect to the scope of the injunction granted in this case. The injunction requires the clinics to permit inspectors to enter the clinics and to inspect records and make copies of them. If the statute had been deficient in this case, an injunction including those provisions might well have been appropriate.

39 The injunction goes on, however, to prohibit the clinics from "hindering, molesting or interfering with the inspectors". The language appears to have been taken from s. 36(10) of the *Medicare Protection Act*. Unfortunately, it is common practice for parties to seek injunctions and similar orders in very broad terms, often parroting the language of a statute. A court should be cautious in adopting statutory language in an injunction. The purpose of a statute is to govern a wide variety of circumstances. Statutes are therefore often cast in broad terms, designed to cover all foreseeable eventualities. An injunction, on the other hand, should be tailored to an individual case. It is an extraordinary remedy, and

anyone who infringes an injunction is subject to the possibility of being found in contempt of court. Injunctions must, of course, be drawn broadly enough to ensure that they will be effective. They should not, however, go beyond what is reasonably necessary to effect compliance.

40 In the case before us, there is no reason to suspect that the clinics will hinder, molest or interfere with inspectors if a court requires that they submit to inspections. The injunction did not need to include a provision prohibiting such activities, and it should not have done so.

Should the Chambers Judge have Granted a Warrant?

41 The Commission applied for a warrant under s. 36(7) of the *Medicare Protection Act* to allow its inspectors to enter the clinic premises. Given that the chambers judge should not have issued an injunction, ought she to have, instead, granted a warrant?

42 In my view, the inclusion of the claim for a warrant in the Commission's counterclaim was not appropriate. The statute contemplates a procedure for applying for a warrant before a justice of the peace. It does not contemplate such an application being by way of a statement of claim (or counterclaim) in a civil suit. I would not rule out the possibility that exceptional circumstances might justify an application for a warrant to be brought within a civil claim. There are, however, no such circumstances in this case. As I have already noted, there is no demonstrated connection between the litigation and the Commission's right to conduct an audit.

43 The application for a warrant became entangled in the litigation, leading to a great deal of confusion. The parties and the chambers judge seemed, at times, to suggest that an audit could be used for the purpose of discovery in the litigation. In my view, that would not be an appropriate basis for conducting an audit. The statutory provisions allowing for an audit are designed to allow for the orderly administration and regulation of the Medical Services Plan, not as an adjunct to rights of discovery in litigation.

44 There was also confusion over how the constitutionality of the legislation impinged on a warrant application. Had the warrant application been brought as a stand-alone application, I think it would have been apparent that the appellants, as persons seeking to be relieved of a burden imposed by statute, would have had the onus of applying to suspend the operation of the audit provisions of the statute, as those provisions relate to them, pending the conclusion of their constitutional challenge. Such an application would have clearly fallen within the scope of *RJR-MacDonald*, and much of the confusion over the applicable test would have been avoided.

45 As matters now stand, the Commission is entitled, under the statute, to proceed with an audit. If it requires a warrant in order to enter premises so that it can conduct an audit, the *Medicare Protection Act* provides for an application to a justice of the peace for such a warrant. There is no reason that such an application should be part of the current litigation.

46 If the appellants consider that an audit should not take place pending determination of their constitutional challenge, they are entitled to apply to a judge of the Supreme Court for an order exempting them from the relevant provisions of the *Medicare Protection Act*

pending the determination of their challenge. Such an application could properly be brought as an interlocutory application in the extant proceedings. Such an application would clearly be an application for an interlocutory stay, and the *RJR-MacDonald* test would apply.

Conclusion

47 In the result, I would allow the appeal, and set aside the injunction, without prejudice to:

1) the Commission's right to apply for a warrant in properly constituted proceedings before a justice of the peace.
2) the appellants' rights to apply in the Supreme Court for a limited exemption from particular audit provisions of the *Medicare Protection Act* pending the resolution of the litigation.

H. GROBERMAN J.A.
M.E. SAUNDERS J.A.:-- I agree.
S.D. FRANKEL J.A.:-- I agree.

* * * * *

APPENDIX

Medicare Protection Act

R.S.B.C. 1996, c. 286

...

Definitions

1 In this Act:

...

"beneficiary" means a resident who is enrolled ...;

"benefits" means

(a) medically required services rendered by a medical practitioner who is enrolled under section 13, unless the services are determined ... by the commission not to be benefits, ...
(c) unless determined by the commission ... not to be benefits, medically required services performed

(i) in an approved diagnostic facility, and
(ii) by or under the supervision of an enrolled medical practitioner who is acting

(A) on order of a person in a prescribed category of persons, or

(B) in accordance with protocols approved by the commission;

...

"commission" means the Medical Services Commission ...;

...

"payment schedule" means a payment schedule established under section 26;

...

"plan" means the Medical Services Plan ...;

"practitioner" means

(a) a medical practitioner ...

who is enrolled under section 13;

....

Enrollment of practitioners

13(1) A medical practitioner or health care practitioner who wishes to be enrolled as a practitioner must apply to the commission in the manner required by the commission.

(2) On receiving an application under subsection (1), the commission must enroll the applicant if the commission is satisfied that the applicant is in good standing with the appropriate licensing body ....

(3) A practitioner who renders benefits to a beneficiary is, if this Act and the regulations made under it are complied with, eligible to be paid for his or her services in accordance with the appropriate payment schedule ....

Election

14 (1) A practitioner may elect to be paid for benefits directly from a beneficiary.

(2) An election under subsection (1) may be made by giving written notice to the commission in the manner required by the commission.

...

(7) If an election is in effect and the practitioner has complied with subsection (9),

(a) the beneficiary must make a request for reimbursement directly to the commission, and

(b) the beneficiary is only entitled to be reimbursed for the lesser of

(i) the amount that is provided in the appropriate payment schedule for the benefit, ... and
(ii) the amount that was charged by the practitioner.

(8) If a practitioner makes an election under subsection (1), he or she must not submit a claim on his or her own behalf ... for services rendered to a beneficiary after the date the election becomes effective.

(9) As soon as practicable after rendering a benefit, a practitioner who has made an election under subsection (1) must give the beneficiary a claim form that is completed by the practitioner in the manner required by the commission.

...

General limits on direct or extra billing

17 (1) Except as specified in this Act or the regulations or by the commission under this Act, a person must not charge a beneficiary

(a) for a benefit, or
(b) for materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of a benefit.

(2) Subsection (1) does not apply:

(a) if, at the time a service was rendered, the person receiving the service was not enrolled as a beneficiary;
(b) if, at the time the service was rendered, the service was not considered by the commission to be a benefit;
(c) if the service was rendered by a practitioner who

(i) has made an election under section 14 (1), ...;

(d) if the service was rendered by a medical practitioner who is not enrolled.

Limits on direct or extra billing by a medical practitioner

18 (1) If a medical practitioner who is not enrolled renders a service to a beneficiary and the service would be a benefit if rendered by an enrolled medical practitioner, a person must not charge the beneficiary for, or in relation to, the service an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the service if rendered by an enrolled medical practitioner ....

...

(3) If a medical practitioner described in section 17 (2) (c) renders a benefit to a beneficiary, a person must not charge the beneficiary for, or in relation to, the service an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the service ....

Payment schedules and benefit plans

26 (1) The commission

(a) must establish payment schedules that specify the amounts that may be paid to or on behalf of practitioners for rendering benefits under this Act ...

Audit and inspection - practitioners and employers

36 (1) In this Part:

...

"practitioner" includes

(a) a former practitioner, and
(b) a medical practitioner who is not enrolled and to whom section 18 (1) applies;

....

(2) The commission may appoint inspectors to audit

(a) claims for payment by practitioners and the patterns of practice or billing followed by practitioners under this Act,
(b) the billing or business practices of persons who own, manage, control or carry on a business for profit or gain and, in the course of the business, direct, authorize, cause, allow, assent to, assist in, acquiesce in or participate in the rendering of a benefit to beneficiaries by practitioners, and
(c) the billing or business practices of persons who own, manage, control or carry on a business for profit or gain and who the commission on reasonable grounds believes

(i) in the course of the business, direct, authorize, cause, allow, assent to, assist in, acquiesce in or participate in the rendering of a benefit to beneficiaries by practitioners, or
(ii) have contravened section 17, 18, 18.1 or 19.

(2.1) If the commission, on behalf of a prescribed agency, pays a practitioner, an owner of a diagnostic facility or a representative of a professional corporation for services rendered, or claimed to have been rendered, this Part applies to the services as though these services were benefits.
(2.2) The claims and patterns of practice or billing concerning a prescribed agency

(a) need not be under this Act, and
(b) can have arisen at any time since July 24, 1992.

(3) Medical records may only be requested or inspected under this section or section 40 by an inspector who is a medical practitioner.
(4) An audit under subsection (2) (a) may be made in respect of claims and patterns of practice or billing followed by practitioners before this Act came into force.
(4.1) An audit under subsection (2) (b) or (c) may be made in respect of billing or business practices followed by persons before the coming into force of this subsection.
(5) An inspector may, at any reasonable time and for reasonable purposes of the audit, enter any premises and inspect

(a) records of a person described in subsection (2) (b) or (c) or of a practitioner, and
(b) records maintained in hospitals, health facilities and diagnostic facilities.

(6) The power to enter a place under subsection (5) or (12) must not be used to enter a dwelling house occupied as a residence without the consent of the occupier except under the authority of a warrant under subsection (7).

(7) On being satisfied on evidence on oath or affirmation that there are in a place records or other things for which there are reasonable grounds to believe that they are relevant to the matters referred to in subsection (5) or (12), a justice may issue a warrant authorizing an inspector named in the warrant to enter the place in accordance with the warrant in order to exercise the powers referred to in subsection (5) or (12).

(8) A person must, on the request of an inspector,

(a) produce and permit inspection of the records referred to in subsection (5) or (12),

(b) supply copies of or extracts from the records at the expense of the commission, and

(c) answer all questions of the inspector respecting the records referred to in subsection (5) or (12).

(9) If required by the inspector, a person must provide to the inspector all books of account and other records that the inspector considers necessary for the purposes of the audit.

(10) A person must not hinder, molest or interfere with an inspector doing anything that the inspector is authorized to do under this section or prevent or attempt to prevent the inspector doing any such thing.

(11) An inspector must make a report to the chair of the results of an audit made under subsection (2).

(12) An inspector may, at any reasonable time and for the purposes of the audit, enter any premises and inspect the payroll, financial and membership records of an employer or an association responsible for collecting and remitting premiums under this Act.

Injunctions

45.1 (1) The commission may apply to the Supreme Court for an injunction restraining a person from contravening section 17 (1), 18 (1) or (3) ....

(2) The court may grant an injunction sought under subsection (1) if the court is satisfied that there is reason to believe that there has been or will be a contravention of this Act or the regulations.

(3) The court may grant an interim injunction until the outcome of an action commenced under subsection (1).

Offences

(4) A person who obstructs an inspector in the lawful performance of his or her duties under this Act commits an offence.

Case Name:

1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.

Between
1711811 Ontario Ltd. and Olga Maria Paiva, Operating as AdLine, Applicants (Respondents), and Buckley Insurance Brokers Ltd., Robert Buckley and 1730849 Ontario Ltd., Respondents (Appellants)

[2014] O.J. No. 697

2014 ONCA 125

315 O.A.C. 160

371 D.L.R. (4th) 643

237 A.C.W.S. (3d) 476

2014 CarswellOnt 1770

Docket: C57291

Ontario Court of Appeal
Toronto, Ontario

J.C. MacPherson, E.E. Gillese and C.W. Hourigan JJ.A.

Heard: January 22, 2014.
Judgment: February 18, 2014.

(104 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Form and operation of order -- Persons bound -- Permanent injunctions -- Setting aside -- Appeal by Buckley from permanent injunction imposing conditions on use of laneway it shared with Adline allowed -- Judge imposed interlocutory injunction, then changed it to permanent without explanation of why -- Permanent injunction would have significant impact on Buckley and successors in title -- No explanation of why judge preferred evidence from Adline about Buckley's misuse of laneway to evidence from Buckley and neighbours -- Permanent injunctive relief not avail-

able without underlying action in which evidence necessary would be provided -- Ontario Rules of Civil Procedure, Rules 1.03, 60.11.

Real property law -- Interests in land -- Easements -- Particular easements -- Positive easements -- Rights of way -- Appeal by Buckley from permanent injunction imposing conditions on use of laneway it shared with Adline allowed -- Judge imposed interlocutory injunction, then changed it to permanent without explanation of why -- Permanent injunction would have significant impact on Buckley and successors in title -- No explanation of why judge preferred evidence from Adline about Buckley's misuse of laneway to evidence from Buckley and neighbours -- Permanent injunctive relief not available without underlying action in which evidence necessary would be provided.

Appeal by Buckley from a mandatory, permanent injunction granted to Adline, relating to the use of a laneway behind the two neighbouring businesses. Adline had a right of way to use the laneway, which was located on Buckley's property. Problems arose between the parties when Buckley proposed construction to improve the laneway, but they ultimately settled their dispute on consent, and construction was completed. Some years later, Adline returned to court seeking a contempt finding against Buckley in relation to the consent order. Adline claimed Buckley was unreasonably restricting its use of the laneway by leaving its doors open, having vehicles frequently parked in the laneway for extended periods, and by undertaking construction that left too low a clearance over the laneway. Buckley claimed Adline was acting unreasonably, and provided evidence to this effect from other neighbouring businesses that also used the laneway. The judge did not find Buckley in contempt because she was unsure whether the consent order remained in effect. She granted Adline injunctive relief placing restrictions on the amount of time Buckley could have vehicles parked in the laneway, requiring Buckley to provide Adline with notice of deliveries scheduled to occur during business hours, permitting Adline to have vehicles towed from the laneway at Buckley's expense if it did not comply with the provisions of the injunction, and restricting Buckley's use of its rear doors. Buckley was prohibited from making further changes to the laneway without Adline's agreement. The injunction was made in three endorsements, the final endorsement clarifying that the injunction was permanent, not interlocutory.

HELD: Appeal allowed. The judge erred in making the injunction a mandatory permanent one in her third endorsement. This was not simply a clarification of her initial order, but a change in its substance, as she expressly stated in her first endorsement that Adline had met the test for interim and interlocutory relief. If the judge intended to change the injunction from interlocutory to permanent, she should have explained why, as a permanent injunction had the potential to significantly impact Buckley and any future holders of title to its property. The judge also erred in failing to explain why she rejected Buckley's evidence, confirmed by evidence from other neighbours, and accepted Adline's evidence. Her rationale for imposing such detailed restrictions on Buckley was unclear. Where the existence of a continuing consent order was in question, the judge erred in granting permanent relief in the absence of an underlying proceeding. The evidence necessary to decide whether to grant permanent injunctive relief was lacking.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1.03(1), Rule 60.11, Rule 60.11(1), Rule 60.11(5)

Appeal From:

On appeal from the order of Justice Susan G. Himel of the Superior Court of Justice, dated May 31, 2013, with reasons reported at 2013 ONSC 1512.

Counsel:

Jonathan L. Rosenstein, for the appellants.

Sara J. Erskine, for the respondents.

The judgment of the Court was delivered by

1 **E.E. GILLESE J.A.**:-- The order that spawned this appeal is a very restrictive permanent injunction relating to the use of a laneway. In my view, it was an error to have ordered a permanent injunction. Consequently, I would allow the appeal.

BACKGROUND

2 AdLine is a t-shirt printing business in Newmarket, Ontario. Olga Maria Paiva owns the business and operates it from a building located at 255 Main Street South. The building is owned by 1711811 Ontario Ltd. In these reasons, I will refer to AdLine, Olga Maria Paiva and 1711811 Ontario Ltd. collectively as "AdLine" or the "Respondents".

3 Robert Buckley owns Buckley Insurance Ltd., which operates out of a building located at 247 Main Street South in Newmarket. 1730849 Ontario Ltd owns the building. I will refer to Robert Buckley, Buckley Insurance Ltd. and 1730849 Ontario Ltd. collectively as "Buckley" or the "Appellants".

4 AdLine and Buckley are neighbours. They share the use of a laneway that runs at the rear of their buildings. The laneway provides both with shipping access.

5 Buckley purchased the property on which the laneway is located in 2008. AdLine has a registered right of way over the laneway.

6 The right of way, which has existed since 1957, gives AdLine:

> a free and uninterrupted right-of-way in common with all other persons entitled thereto for persons, animals and vehicles, in, over, along and upon that certain parcel of land ...

7 The laneway runs across Buckley's property. A portion of it passes beneath a ceiling that connects the building's east and west wings. The laneway then feeds into a loading

bay located on the side of AdLine's building. The loading bay is AdLine's only point of access for items that it sends and receives.

8 In May 2009, Buckley notified AdLine that it intended to renovate the laneway because it was in a state of disrepair.

9 AdLine voiced concerns that the laneway would be obstructed during the renovation period, and that the clearance height of the underpass would be affected.

10 On May 15, 2009, AdLine brought an application (the "Application") seeking, among other things, a declaration of its rights to the laneway and injunctive relief to prevent Buckley from constructing on, or obstructing, the laneway.

11 Before the Application was heard, the parties arrived at an agreement that resolved their dispute. On May 20, 2009, Pollak J. issued a consent order based on that agreement (the "Consent Order").

12 Under the terms of the Consent Order, Buckley would not block vehicular access during business hours and would give AdLine advance notice when such blockage was unavoidable. The Consent Order expressly dismissed the Application. It did not contain an expiry date.

13 The renovations to the laneway were completed in 2009.

THE CONTEMPT MOTION

14 The conflict between the parties subsided in the period following the Consent Order. However, in 2011, Buckley began further construction. Disputes again arose between the parties regarding the laneway. AdLine complained that Buckley was: obstructing its use of the laneway by allowing vehicles to park in it; leaving ajar the metal shipping doors that open into the laneway; engaging in construction that changed the clearance height of the underpass and the width of the laneway; and, failing to provide adequate notice of interruptions to vehicular access in the laneway.

15 AdLine filed a notice of motion dated October 3, 2012, within the Application proceeding, asking the court to find Buckley in contempt of the Consent Order and to grant "mandatory" injunctive relief beyond the terms of the Consent Order (the "Contempt Motion").

16 Buckley responded with affidavit evidence which painted a dramatically different version of events. The Buckley affidavit evidence showed that Buckley had acted reasonably throughout and that it was AdLine who acted unreasonably in respect of the laneway.

17 In his affidavit, Robert Buckley testified, among other things, that other businesses had a right to use the laneway for loading and unloading. He said that he had had no difficulty with these third-party businesses, however, the third parties had experienced many difficulties with AdLine's demands in respect of the laneway. One such third party was a florist that operated at 245 Main Street South in Newmarket. Affidavits from the florist and one of its suppliers, attached to the Buckley affidavit, supported Buckley's version of events.

18 In his affidavit, Mr. Buckley also responded to AdLine's allegations in the Contempt Motion. He set out the steps that had been taken to accommodate AdLine during the con-

struction period and attached supporting affidavit evidence to that effect from those involved in the construction. He also gave evidence about his employees' need to use the laneway to access their cafeteria and fitness facility, as well as the public parking areas at the rear of the building. He denied that the opening of the metal shipping doors materially impedes access to the laneway.

19 On November 20, 2012, in response to what it perceived to be persistent obstruction of the laneway, AdLine brought an *ex parte* motion for interim injunctive relief and to set an expedited hearing date for the Contempt Motion. Buckley's counsel was notified.

20 The parties appeared before Low J. on November 21, 2012. The matter was adjourned to December 10, 2012.

21 On December 10, 2012, Stinson J. ordered interim injunctive relief, pending argument on the Contempt Motion, and fixed February 27, 2013, as the hearing date for that motion (the "Interim Order").

22 Under the Interim Order, Buckley was required to provide AdLine with reasonable, unimpeded access to the laneway. As well, Buckley was ordered to ensure that none of its employees or those under its control parked on the laneway, with a 30-minute exemption being made for vehicles actively delivering goods to, or receiving goods from, Buckley's premises. In the event that a vehicle parked in the laneway in violation of the Interim Order, AdLine was to notify Buckley and Buckley was to take immediate steps to have the offending vehicle moved or removed. If that did not occur, AdLine was given the power to tow the offending vehicle, with a right to recover that expense from Buckley. Further, Buckley's employee entrance doors and shipping doors were required to remain closed when not in active use.

THE DECISION BELOW

23 The order under appeal flowed from three endorsements made by the motion judge. In light of the issues raised on appeal, it is necessary to consider all three endorsements.

The First Endorsement

24 In reasons dated March 12, 2013 (the "First Endorsement"), the motion judge allowed the Contempt Motion in part; she dismissed that part of the motion seeking to have Buckley found to be in contempt, but she granted that part in which AdLine sought further injunctive relief.

25 The motion judge refused to make a finding of contempt because she was not satisfied beyond a reasonable doubt that the Consent Order was in effect during the most recent bout of conflict between the parties. In her view, the Consent Order was a response to the specific circumstances concerning Buckley's proposed renovations to the laneway in 2009. As she noted, if she were unable to know with certainty whether the Consent Order was operative after those renovations had been completed, how could Buckley? And if there were no order in place, then contempt could not be found.

26 In relation to the order for further injunctive relief, for reasons that will become clear, it is necessary to consider the motion judge's reasons in more detail.

27 At the outset of the First Endorsement, the motion judge recited that through the motion, AdLine sought a finding that Buckley was in contempt and "a mandatory order concerning the use of the right of way" (at para. 1). In the section entitled 'Positions of the Parties', the motion judge said that AdLine sought "permanent injunctive relief" (at para. 9). The motion judge then applied the familiar three-part test for interlocutory injunctions set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (at para. 25).

28 The motion judge concluded that she would grant AdLine's request for "interim and interlocutory injunctive relief" (at para. 28). In her view, such relief was needed to protect AdLine's property right -- a right of way existing since 1957 -- from interference.

29 The motion judge recognized that Buckley also requires the use of the laneway for its business. In her view, this justified temporary blockages of the laneway for short periods of time.

30 The motion judge then made an order with a series of detailed terms respecting the use of the laneway. The specific terms of the order can be found below in the section entitled "The Order under Appeal".

31 Finally, the motion judge declined to grant a mandatory order compelling Buckley to restore the clearance height of the laneway to its original dimensions. Instead, the motion judge gave Buckley four months to remedy the matter voluntarily, failing which AdLine could return to court to seek that aspect of injunctive relief.

The Second Endorsement

32 Following the release of the First Endorsement, the parties disagreed on two of its provisions: whether written notice was required for deliveries outside of normal business hours, and the appropriate clearance height of the laneway.

33 The motion judge heard oral submissions from the parties on these two disputed aspects of the order and, on May 31, 2013, she issued an endorsement in which she resolved them (the "Second Endorsement").

34 In the Second Endorsement, the motion judge began by stating that in respect of AdLine's motion for "mandatory injunctive relief", she had been satisfied that the *RJR-Macdonald* test was met and thus she had ordered "interim and interlocutory injunctive relief". She then dealt with the two points of disagreement arising from the order contained in the First Endorsement.

35 The motion judge explained that the 24 hours' written notice provision was intended to apply only to regular business hours. Outside of these hours, prior written notice was not required. However, the maximum total time that vehicles could deliver or receive goods, regardless of the day, was 120 minutes in any given day.

36 The motion judge clarified that the clearance height of the laneway was 12.2 feet.

The Third Endorsement

37 Following the release of the Second Endorsement, Buckley retained new counsel. The parties again disagreed on the order. Specifically, they disagreed on whether the injunctive relief that the motion judge had ordered was permanent or interlocutory.

38 On July 3, 2013, the motion judge issued a third endorsement in which she addressed this disputed aspect of the order (the "Third Endorsement"). The Third Endorsement consists of four paragraphs.

39 In the first paragraph, the motion judge again recites that AdLine had sought "mandatory injunctive relief" and that she had granted "interim and interlocutory injunctive relief".

40 In the second paragraph, the motion judge gave a brief summary of the circumstances surrounding the making of the Second Endorsement.

41 In the third paragraph, the motion judge explained that Buckley had retained new counsel and that the parties had again been unable to agree on the terms of the order. She stated that counsel had appeared before her that day and made submissions concerning the issue and that she had signed a form of the order that reflected her decision.

42 The fourth paragraph contains the motion judge's reasons for concluding that she intended to order permanent injunctive relief. The full text of those reasons reads as follows:

> In the signed order, I clarify that the terms of injunctive relief ordered with the exception of the mandatory order to remedy the height clearance are imposed as permanent injunctive relief.

43 The motion judge concluded the fourth paragraph by stating that the issue of the height clearance had not been finally determined and that the matter was adjourned, on terms, to enable the parties to rectify the situation.

THE ORDER UNDER APPEAL

44 An order, dated May 31, 2013, was finally taken out in this proceeding (the "Order under Appeal").

45 In the Order under Appeal, the motion for contempt is dismissed and, in paras. 2 and 3, injunctive relief is ordered. The following analysis is informed by the nature and extent of that relief. Thus, paras. 2 and 3 of the Order under Appeal are set out now.

> 2. THIS COURT ORDERS that [AdLine's] motion for a mandatory order concerning the use of the right of way described as Parts 3, 4, and 5 on Plan 65R-7394 ("Right of Way"), is hereby [granted] on the terms set out in paragraph 3 below.
> 3. THIS COURT ORDERS that [Buckley] shall provide [AdLine] with reasonable, unimpeded access through the Right of Way in accordance with the following terms:
>
> (a) the [Appellants] and their agents and employees are prohibited from parking vehicles in the Right of Way;
> (b) the [Appellants] are permitted to allow vehicles to stop in the Right of Way that are delivering to or receiving goods from the [Appellants'] premises during the hours of 9:00 a.m. to 5:00 p.m. Monday

through Friday inclusive but such activity is limited to 30 minutes or less except with prior written notice of at least 24 hours to the [Respondents];

(c) outside of regular business hours... prior written notice by the [Appellants] is not required; however, the total amount of time that vehicles may deliver to or receive goods from the [Appellants'] premises, regardless of the day, is up to 120 minutes (two hours) on any given day;

(d) the [Respondents] shall notify the [Appellants] if they learn that a vehicle has been parked in the Right of Way in violation of this order and the [Appellants] shall take immediate steps to have the vehicle removed;

(e) if the [Appellants] do not take steps to have the vehicle which is improperly parked in the Right of Way removed within 20 minutes of being notified by the [Respondents] that access is being blocked, then the [Respondents] may arrange a towing service to remove the vehicles at the expense of the [Appellants] or the owner of the vehicle;

(f) during [business hours], the employee doors and the shipping doors of the [Appellants] shall remain closed except when they are actively used; they may not be used for more than 30 minutes at a time and for a total of 120 minutes in any given day;

(g) employees of the [Appellants] shall be directed to make way for delivery vehicles which require access through the Right of Way to the [Respondent's] premises. The [Appellants] are also required to direct their customers and others not to park in the Right of Way;

(h) any future construction work to the Right of Way shall be done on notice of 24 hours to the [Respondents] and shall be carried out in a way to allow vehicle access to 255 Main Street during business hours of 9:00 a.m. to 5:00 p.m., Monday through Friday inclusive each week; and

(i) there shall be no material change to the Right of Way that will restrict access to 255 Main Street by vans and vehicles as exists as of the date of this order unless there is agreement of both owners of 247 Main Street and 255 Main Street.

46 It will be noted that the Order under Appeal does not expressly state that the injunctive relief is permanent. In fact, as can be readily seen, para. 2 of the Order under Appeal refers to AdLine's motion for a "mandatory" order, not a permanent order. However, the Third Endorsement makes it clear that the motion judge intended to impose permanent injunctive relief.

THE ISSUES

47 Buckley accepts that the motion judge had the power to grant interlocutory injunctive relief. The error, it contends, was in making the injunctive relief permanent. Specifically, Buckley submits that the motion judge erred by:

1. changing the order from an interlocutory injunction to a permanent injunction without explanation;
2. imposing a permanent injunction on the basis of the test for an interlocutory injunction;
3. making findings of fact not available on the motion; and,
4. ordering a permanent injunction despite the absence of an underlying legal proceeding.

48 A lack of precision in the terminology associated with injunctive relief appears to have contributed to some confusion in these proceedings. Thus, the key terms will be clarified before I address the issues.

KEY TERMS RELATING TO INJUNCTIONS

49 Various types of injunctive relief have been sought or ordered in this proceeding: interim, interlocutory, mandatory and permanent. What do each of those terms mean and how do they differ from one another?

50 Let us first consider interim and interlocutory injunctions. While motions for pre-trial injunctive relief often term the relief that is sought as both interim and interlocutory, some distinctions can be drawn between the two.

51 A motion for an interim injunction can be made *ex parte* or on notice. Argument on the motion is generally quite limited and, if an order is made for interim injunctive relief, the order is typically for a brief, specified period of time: see Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Toronto: Canada Law Book, 2013), at para. 2.15. If an interim injunction is granted on an *ex parte* basis, the moving party must normally bring a further motion to have the interim injunction continued

52 An interlocutory injunction, like an interim injunction, is a pre-trial form of relief. It is an order restraining the defendant for a limited period, such as until trial or other disposition of the action: see Sharpe, at para. 2.15. Interlocutory injunctive relief typically follows much more thorough argument than that for an interim injunction, by both parties, and is generally for a longer duration than an interim injunction.

53 The present case provides an example of both an interim and an interlocutory injunction.

54 The Interim Order is an example of an interim injunction. AdLine originally moved for interim injunctive relief on an *ex parte* basis. However, both parties were present when the motion for interim relief was argued. Justice Stinson opened his endorsement by emphasizing the very limited nature of the question before him: should interim injunctive relief be granted pending the scheduled hearing of the Contempt Motion? The injunctive relief granted in the Interim Order was specified to last for that period of slightly less than two months.

55 The Consent Order, on the other hand, was the product of both parties' participation, and the duration of the injunctive relief restraining Buckley's use of the laneway, while not clear on the face of the Consent Order, appears to have been for the period of the laneway's renovation in 2009.

56 The next useful distinction to be drawn is between interlocutory and permanent injunctions. Interlocutory injunctions are imposed in ongoing cases whereas permanent injunctions are granted after a final adjudication of rights: see Sharpe, at para. 1.40, citing *Liu v. Matrikon Inc.*, 2007 ABCA 310, 422 A.R. 165, at para. 26. As will be seen, this conceptual distinction features prominently in the present case, where a key issue is whether the court must apply a different test for permanent injunctions than for interlocutory injunctions.

57 It is also important to distinguish between mandatory and permanent injunctions. A mandatory injunction is one that requires the defendant to act positively. It may require the defendant to take certain steps to repair the situation consistent with the plaintiff's rights, or it may require the defendant to carry out an unperformed duty to act in the future: see Sharpe, at para. 1.10. Mandatory injunctions are rarely ordered and must be contrasted with the usual type of injunctive relief, which prohibits certain specified acts.

58 Because of their very nature, mandatory injunctions are often permanent. However, permanent injunctions are not necessarily mandatory. An example illustrates this point. If, after trial, a court orders that a defendant can never build on a right of way, it will have made a permanent order enjoining the defendant from building on the right of way. But, the injunction would not be mandatory because it does not require the defendant to perform a positive act.

59 In short, the words "mandatory" and "permanent" are not synonymous, especially in the context of injunctive relief.

ANALYSIS

Issue 1 - Did the Motion Judge Change the Order Without Explanation?

60 The first issue arises because in the Third Endorsement, the motion judge altered the order that she had made in the First Endorsement, and granted permanent, rather than interlocutory, injunctive relief.

61 Buckley says that ordering permanent injunctive relief was not a clarification, as the motion judge said, but a change. Buckley concedes that the motion judge had the authority to change the order because it had not yet been formally filed with the court. However, Buckley submits, reasons must be given for such a change and, in this case, the motion judge failed in that regard.

62 AdLine submits that the motion judge did not change her order; rather, she simply clarified it. AdLine says that the motion judge's references to interlocutory injunctions in the First and Second Endorsements were inadvertent and that the motion judge had always intended to grant permanent injunctive relief. Consequently, AdLine maintains, the motion judge sufficiently explained the change in her order by stating that it was a clarification.

63 I would accept Buckley's submission on this issue.

64 As Buckley conceded, until the order was formally entered, the motion judge had a broad discretion to change it: see *Montague v. Bank of Nova Scotia* (2004), 69 O.R. (3d)

87 (C.A.), at para. 34. However, a judge exercising that discretion bears a "significant onus" to explain the change: *Montague*, at para. 40.

65 The first question, therefore, is whether making the order for injunctive relief permanent rather than interlocutory was a change. In my view, there can be no doubt that it was.

66 The First Endorsement contains the motion judge's reasons for granting relief. In it, the motion judge sets out and applies the *RJR-MacDonald* test, which she identifies as the test for an interlocutory injunction. The motion judge makes no mention of the test for permanent injunctions nor did she consider whether that test had been met.

67 Having found that the test for an interlocutory injunction had been met, the motion judge then expressly granted relief in those terms, saying at para. 28 of the First Endorsement, "The request for interim and interlocutory relief is granted with reference to the right of way, legally described as ..."

68 The sole reference to permanent relief in the First Endorsement is in para. 9, where the motion judge sets out AdLine's position and says it sought "permanent injunctive relief". However, according to the record, AdLine did not seek permanent injunctive relief. The word "permanent" does not appear in its notice of motion for the Contempt Motion. While AdLine repeatedly asked for mandatory injunctive relief in its notice of motion, as we have seen, the words mandatory and permanent have very different meanings in respect of injunctions.

69 Furthermore, in the first paragraph of each of the Second and Third Endorsements, the motion judge repeated that she was satisfied that the *RJR-MacDonald* test had been met and thus she had granted "interim and interlocutory relief" in respect of the right of way.

70 Having found that the motion judge made a change to the order, we must consider whether she explained the change. In my view, she did not.

71 As I have explained, the sole reason given for the change is that it was a clarification. Having made an order that the injunctive relief was interlocutory, when the motion judge declared it to be permanent, she was not clarifying the order, she was changing it. Thus, saying it was a clarification does not amount to a reason for changing the order.

72 As *Montague* points out, the onus to explain any change to an order is significant. The seriousness of the change in this case underscores that onus. If the Order under Appeal stands, Buckley and anyone who might later take title from Buckley will be permanently, seriously restricted in the use of its own laneway. A consideration of just one component of the Order under Appeal makes this clear: Buckley -- and any subsequent owner -- would have to ensure that the cumulative time in which delivery vehicles are on the laneway never exceeded 120 minutes in a day. This prohibition would extend to every day of the week, no matter the circumstances, and would remain so long as the right of way exists, even if AdLine were no longer operating from its premises. It is one thing for Buckley to face an order restricting its use for a limited period. It is quite another to contemplate such restrictions on a permanent basis, including if and when Buckley wished to sell its property.

73 A clear explanation for the change to the order was required so that the parties, and this court on review, could know the reason for the change. It was an error to fail to give that explanation.

Issue 2 - Is the Test for a Permanent Injunction Different than the Test for an Interlocutory Injunction?

74 The test for interlocutory injunctions is the familiar three-part inquiry set out in *RJR-MacDonald*: is there a serious issue to be tried; would the moving party otherwise suffer irreparable harm; and, does the balance of convenience favour granting the injunction.

75 Does that same test apply when the court is deciding whether to grant permanent injunctive relief? AdLine contends that it does and points to cases such as *Hanisch v. McKean*, 2013 ONSC 2727, at para. 111, and *Poersch v. Aetna*, 2000 CanLII 22613 (Ont. S.C.), at para. 103, where the courts have expressly applied the test when deciding whether to grant permanent injunctive relief.

76 I would not accept this submission. In my view, a different test must apply.

77 The British Columbia Court of Appeal recently considered the test for a permanent injunction and its relationship to the test for an interlocutory injunction. In the decision under review in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 323 D.L.R. (4th) 680, the trial judge granted permanent injunctive relief based on the test for an interlocutory injunction. Despite the parties' agreement that the trial judge correctly set out the test, the British Columbia Court of Appeal held that the wrong test had been applied and reversed the trial decision.

78 Justice Groberman, writing for the court, explained that the *RJR-Macdonald* test is for interlocutory -- not final or permanent -- injunctions. At para. 24 of *Cambie Surgeries*, he explained that the *RJR-Macdonald* test is designed to address situations in which the court does not have the ability to finally determine the merits of the case but, nonetheless, must decide whether interim relief is necessary to protect the applicant's interests.

79 In paras. 27-28 of *Cambie Surgeries*, Groberman J.A. explained:

> Neither the usual nor the modified test discussed in *RJR-MacDonald* has application when a court is making a final (as opposed to interlocutory) determination as to whether an injunction should be granted. The issues of irreparable harm and balance of convenience are relevant to interlocutory injunctions precisely because the court does not, on such applications, have the ability to finally determine the matter in issue. A court considering an application for a final injunction, on the other hand, will fully evaluate the legal rights of the parties.
>
> In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, *per se*, relevant to the granting of a final injunction, though some of

> the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief.

80 I would adopt this reasoning. The *RJR-Macdonald* test is designed for interlocutory injunctive relief. Permanent relief can be granted only after a final adjudication. Different considerations operate and, therefore, a different test must be applied, pre- and post-trial.

Issue 3 - Did the Motion Judge err by making Findings of Fact not available on the Motion?

81 In this case, there was no dispute that AdLine had a right of way over the laneway. The questions for the motion judge were whether Buckley was infringing AdLine's rights in the laneway and, if so, what type of interlocutory injunctive relief was appropriate.

82 To decide these questions, the motion judge had to weigh the competing evidence and make factual findings about the extent, if any, of Buckley's interference with AdLine's right of way.

83 It will be recalled that AdLine and Buckley offered dramatically competing versions of events. One version or the other had to be preferred in order to decide whether Buckley had infringed AdLine's rights. In this regard, I note that the motion judge's reasons do not refer to Buckley's contrary evidence and there is no indication why the motion judge accepted AdLine's evidence and (implicitly) rejected that given by Buckley.

84 Given the nature of the conflicting evidence in this case, credibility would play a large role in making the necessary factual findings. In my view, it is hard to conceive of how such credibility findings could be made without a trial.

85 There is a second reason why the factual findings in this case were not available, namely, the nature of the relief ordered.

86 In general terms, injunctive relief is onerous. It is available only when truly necessary to ensure that a party is not deprived of his or her rights. Even when injunctive relief is appropriate, the particulars of that relief must be determined so as to ensure a proper balancing of the parties' respective interests. That also demands a careful weighing of the evidence.

87 The detailed restrictions imposed by the Order under Appeal demonstrate this point. Under that order, not only is Buckley prohibited from using the laneway except under strictly supervised times and manners, it has been placed under a positive obligation to monitor third-party use of the laneway and has been made responsible for the costs of removing third-party vehicles parked on the laneway.

88 The motion judge gave no reasons for why she selected the particular terms of injunctive relief that she did. There is no evidence in the record to indicate why the terms in the Order under Appeal were selected nor how the motion judge determined that they constituted a fair and reasonable balancing of the parties' respective rights and interests in the laneway. Again, given the nature and extent of the conflicting evidence, it is hard to conceive of how such relief could be fashioned without a trial.

89 It is for these reasons that I accept that in this case, the findings of fact that were made were not available on the motion.

Issue 4 - Did the Motion Judge err in Ordering a Permanent Injunction in the Absence of an Underlying Legal Proceeding?

90 Buckley submits that the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 do not contemplate free-standing motions "unmoored" from a legal proceeding, extant or contemplated. It points to Rule 1.03(1), in which "motion" is defined to mean a motion in a proceeding or an intended proceeding. Because the Application had been explicitly dismissed by the Consent Order, and no effort had been made to revive it, amend it, or commence a new proceeding, Buckley says there was no proceeding within which to bring the motion for permanent injunctive relief.

91 Further, Buckley argues, to the extent that Rule 60.11(1) presupposes the existence of a proceeding when a party makes a motion for a contempt order, the motion judge exceeded the scope of the powers conferred by Rule 60.11(5) to make "such order as is just" when she purported to grant AdLine a permanent injunction.

92 I agree that the motion judge did not have the jurisdiction to grant permanent injunctive relief, but for somewhat different reasons.

93 In the Contempt Motion, AdLine sought two types of relief: a finding of contempt and further injunctive relief. Thus, Rule 60.11 was in play.

94 Rule 60.11(1) stipulates that a motion for contempt is to be brought in the proceeding in which the order to be enforced was made. It reads as follows:

> 60.11(1) Motion for contempt order -- **A contempt order to enforce an order** requiring a person to do an act, other than the payment of money, or to abstain from doing an act, **may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made**. [Emphasis added.]

95 The Contempt Motion was to enforce the Consent Order. The Consent Order was made in the Application. Thus, pursuant to Rule 60.11(1), AdLine properly brought the Contempt Motion in the Application proceeding, even though the Application had been dismissed.

96 Rule 60.11(5) allows a judge hearing a motion under Rule 60.11(1) to make orders short of a finding of contempt. The language of the rule is broad and contemplates any order that is "just": see *L.(S.) v. B.(N.)* (2005), 252 D.L.R. (4th) 508 (Ont. C.A.), at para. 22 .

97 The relevant part of Rule. 60.11 (5) reads as follows:

> (5) Content of order -- In disposing of a motion under subrule (1) **the judge may make such order as is just,** and where a finding of contempt is made, the judge may order that the person in contempt ... [Emphasis added.]

98 Accordingly, although the motion judge declined to find Buckley in contempt of the Consent Order, she retained the authority to make any order that was "just".

99 The question then becomes: did the scope of the motion judge's powers under Rule 60.11(5) encompass the right to make an order for permanent injunctive relief? In my view, it did not.

100 Rule 60.11(5) gives the judge the power to make such orders as are just when "disposing of a motion under subrule (1)". In this case, the motion was brought within the Application proceeding because the Consent Order had been made in that proceeding, and it was the Consent Order which AdLine sought to have enforced. But, AdLine could not rely on either the Consent Order or the Application for that part of its motion in which it sought further injunctive relief. On the findings of the motion judge, the Consent Order was spent because it related to the 2009 renovation. And, the Application had been dismissed. Consequently, there was no extant legal proceeding in which permanent injunctive relief had been sought. Put another way, once the motion judge found that the Consent Order was spent, that part of the Contempt Motion in which AdLine sought further injunctive relief was unmoored from a legal proceeding.

101 The requirement that a motion be brought within a legal proceeding is a matter of substance, not form. A proceeding creates the framework within which the issues are defined and sufficient evidence is adduced such that the court can make a proper adjudication. The absence of such a framework in this case demonstrates precisely why a proceeding is necessary as the foundation for a motion. Because there was no proceeding, the evidence necessary to decide whether to grant permanent injunctive relief and, if so, the terms of that relief, was not before the court.

102 Accordingly, it was an error to order permanent injunctive relief in the absence of an underlying proceeding.

DISPOSITION

103 For these reasons, I would allow the appeal and set aside paras. 2 and 3 of the Order under Appeal.

104 I would order costs of the appeal in favour of Buckley, fixed in the amount of $15,000, all-inclusive. The parties agreed that if this were the result on appeal, the costs order in para. 7 of the Order under Appeal should be set aside and costs of the Contempt Motion should be in the cause. I would so order.

E.E. GILLESE J.A.
J.C. MacPHERSON J.A.:-- I agree.
C.W. HOURIGAN J.A.:-- I agree.

Title Page

CANADA LAW BOOK

Injunctions
and
Specific Performance

LOOSELEAF EDITION

The Honourable

Mr. Justice Robert J. Sharpe

Court of Appeal for Ontario

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CHAPTER 3 — INJUNCTIONS TO ENFORCE PUBLIC RIGHTS

1. — Introduction

3.10 Injunctions are primarily private law remedies but they also play an important role in public law. While a general account of administrative and public law remedies is beyond the scope of this book, an analysis of the role played by injunctions in public and administrative law is called for.

3.20 Although the courts were at one time cautious in the use of injunctions in the public law area, injunctions have been employed with increasing frequency to enforce public rights;[1] and in Canada the *Canadian Charter of Rights and Freedoms* has provided fresh impetus for innovation.[2]

2. — Injunctions at the Suit of the Attorney General

3.30 There is a well-established jurisdiction to award injunctions at the suit of the Attorney General to enjoin public wrongs.[3] The Attorney General is said to invoke the *parens patriae* jurisdiction when suing in the public interest.[4] There is a substantial body of law involving injunctions to restrain corporations and statutory or public bodies from exceeding their powers.[5] The jurisdiction was especially appropriate with respect to corporations or bodies exercising public functions but was not limited to such entities.[6] Modern examples are much less frequent, perhaps because other instruments of regulatory control are more prevalent, but there is no doubt that the power to issue such injunctions remains.

3.40 Another important aspect of the *parens patriae* jurisdiction relates to charities, and injunctions at the suit of the Attorney General to control management of charities to protect funds is well recognized.[7]

3.50 Often, the Attorney General acts completely on his or her own initiative. A private litigant can also initiate proceedings in the name of the Attorney General "on the relation of" the private party if the Attorney General consents to such action being brought. Many of the cases to be examined here are relator actions.[8]

3.60 In relator proceedings, the private party has carriage of the action and is responsible for the costs.[9] However, the Attorney General has the right to supervise the conduct of the action. The Attorney General is entitled to review and approve the pleadings and to be consulted on other pre-trial proceedings including discovery. The Attorney General has the right to stay the action or to take it over if that is deemed appropriate. The courts have refused to review the Attorney General's decision to grant or withhold consent to relator proceedings.[10] So long as the Attorney General is properly named, the decision to grant or withhold injunctive relief appears unaffected by whether the action was brought on the Attorney General's own initiative or as a relator action. The problem of standing, posed where an individual sues in respect of a public

wrong without the fiat of the Attorney General, is discussed under a separate heading.[11]

(1) — Public nuisance

3.70 The role of the Attorney General in suing in the public interest to enjoin public nuisances is of great antiquity[12] and continues to have importance. Definition of what constitutes a public nuisance is a difficult aspect of substantive law.[13] Lord Denning's explanation has been quoted with approval by Canadian courts:

> The classic statement of the difference [between public and private nuisance] is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But this does not help much . . . I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.[14]

3.80 The term has been used to describe a wide variety of public wrongs ranging from interference with uses of land similar to private nuisance but affecting many people to cases involving a more general interference with public convenience, health or safety, including interference with rights of way on highways[15] and rights of navigation on public waterways,[16] and many other public annoyances.[17]

3.90 On occasion, the Attorney General has sought to enjoin conduct ordinarily subject to the criminal law on the basis that it constitutes a public nuisance. An Ontario case dealt with the picketing by anti-abortion protesters of the homes and offices of doctors who provided abortion services.[18] After an exhaustive review of the circumstances, Adams J. concluded that the conduct of the protesters constituted a variety of offences under provincial law and the *Criminal Code.* In addition, the protesters' activities constituted both public and private nuisance, and an invasion of the privacy interests of both the doctors and the women seeking abortion services which, with respect to the latter, impinged on their physiological and psychological well-being. Adams J. considered the Charter and other rights of the protesters, and concluded that an injunction limiting and constraining, but not prohibiting, the picketing was appropriate. A detailed order defining the permissible limits of the picketing was issued.[19]

3.95 Two cases dealing with widespread street prostitution, one in British Columbia and the other in Nova Scotia, produced conflicting results. In the British Columbia case,[20] McEachern C.J.S.C. granted an interlocutory injunction which enjoined anyone having knowledge of the order from committing a nuisance by engaging in any of a long list of activities in an area which covered a substantial part of down-town Vancouver. McEachern C.J.S.C. held that the power to enjoin public nuisance could properly be employed where the criminal law has proved inadequate:

> Those who would defile our city must understand that in addition to the criminal law, the citizens of this country are protected by the common law which is a statement of the accumulated wisdom of history. But it is a dynamic force which is always ready to respond to the reasonable requirements of civilization.
>
> . . . . .
>
> The case at bar is a perfect example of how the common law supplements legislation for the protection of the public. Public nuisance for the purpose of prostitution has had too long a grasp upon this city and it is time for its dreadful regime to come to an end. If the legislative branch of the government has failed in this regard, the common law will not be found wanting.[21]

3.100

The Nova Scotia Court of Appeal[22] took a very different approach, refusing to interfere with the discretion of the chambers judge to deny an injunction in similar circumstances. Hart J.A. emphasized the need for caution:

> In my opinion, a judge when being asked by an Attorney-General to grant such an injunction must consider whether it is really necessary in the light of other procedures available to accomplish the same end. He should consider, as well, the dangers of eliminating criminal conduct without the usual safeguards of criminal procedure available to the accused. He should also consider whether the evil complained of should more properly be eliminated by a change in legislation. Only in very exceptional cases where by reason of lack of time or otherwise no other suitable remedy is available should such an injunction be granted to prevent the commission of a crime.[23]

3.110 There is much to be said in favour of this analysis. It is argued below[24] that the use of injunctions to enjoin criminal conduct gives rise to serious problems of procedural fairness which apply with equal force here. Moreover, the injunction granted in the British Columbia case amounted to a legislative act in a highly controversial area where Parliament has experienced great difficulty in settling on an appropriate formulation of forbidden conduct. This, it is submitted, lies beyond the outer limits of the judicial function.[25]

3.120 The use of the remedy of injunction with respect to private nuisances is examined in detail in Chapter 4. There, it is seen that although the injunction is the primary remedy, difficult issues of remedial choice do arise, and damages rather than an injunction are sometimes appropriate. In the case of public nuisance, there is much less scope for choice of remedy.[26] If the Attorney General establishes that a public nuisance exists, it is difficult to imagine a court awarding damages rather than an injunction.[27] In some cases, however, the courts may refuse a remedy altogether and the extent of the court's discretion where the Attorney General sues is considered under a separate heading.[28]

3.130 In some circumstances, an individual occupier specially affected may sue with respect to a public nuisance.[29] There, damages in place of an injunction may be awarded but as seen from the discussion on standing,[30] there will be relatively few cases where a private plaintiff is able to sue in respect of a public nuisance if it does not also constitute a private nuisance. Where an individual does sue in respect of a public nuisance, it would seem that the remedial principles discussed in Chapter 4 with respect to the choice between damages and an injunction will apply.[31]

(2) — Discretion

3.140 It has often been said that the Attorney General is not entitled to an injunction as of right[32] and there are several cases in which the Attorney General has been refused injunctive relief on discretionary grounds.[33] However, the nature of the discretion to be exercised in such cases appears to differ from that applied in cases between private litigants simply because the court is required to weigh the public interest.

3.150 The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship an injunction would impose upon the defendant.[34] It seems clear that where the Attorney General sues to restrain breach of a statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse on discretionary grounds.[35] In one case, it was held that "the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land".[36] In another case,[37] Devlin J. held that although the court retains a discretion,

once the Attorney General has determined that injunctive relief is the most appropriate mode of enforcing the law, "this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances".[38]

3.160 It has also been held that where the Attorney General sues to restrain a breach of the law, actual damage need not be shown, on the theory that Parliament is taken to have declared the harm injurious and the public is injured automatically by any breach of the law.[39] This will be reinforced where the legislation specifically provides for injunctive relief.[40] Injunctions have not infrequently been granted to restrain activity which, although it appeared to have been generally beneficial to the community, was strictly illegal.[41]

3.165 Similar principles apply where a public authority sues to restrain a breach or compel compliance with a statutory or regulatory standard[42] or where a municipality sues to restrain the clear breach of a bylaw.[43] The courts naturally incline towards enforcing public rights, but do retain a discretion where an injunction would cause undue hardship to the defendant.[44]

3.170 Delay by the Attorney General in commencing suit would appear to be a relevant factor if it prejudices the position of the defendant.[45] However, its effect must be considered in light of the fact that the Attorney General asserts the public interest. This was explained by Lord Wilberforce as follows:

> It is necessary . . . to base the granting or denial of equitable relief on broader grounds than would normally apply as between private citizens . . . the courts are somewhat slower to deny the Attorney-General, as the custodian of the public rights, relief on [the ground of delay] than in the case of an individual. The injury to a public interest by denial of relief, its extent and degree of irremediability, must be weighed against any loss which the defendant may have sustained by the plaintiff standing by while the defendant incurs expense or, if such is the case, misleading the defendant into supposing that its activities were or would be permitted . . .[46]

3.180 The courts have regarded hardship arguments with great scepticism where public rights are involved.[47] In so holding they have dealt with an even hand for, as will be seen in Chapter 4, hardship on public authorities is not often accepted as a reason for denying injunctive relief to which the plaintiff is otherwise entitled.[48]

3. — Criminal Law and Statutory Prohibitions

(1) — Historical

3.190 The accepted traditional doctrine was that equity had no jurisdiction with respect to the criminal law and that injunctive relief could not be had to enforce compliance.[49] This extended even to libel which had the criminal law as its origin. Chancery was said to have no jurisdiction to grant injunctive relief in defamation actions.[50] One reason for the refusal to become involved with the administration of criminal justice may have been the unfortunate experience of the Star Chamber which had dealt with such matters ostensibly on the same prerogative authority to see justice done that was the underpinning of equitable jurisdiction.[51] After the abolition of the Star Chamber, the administration of criminal law became the exclusive preserve of the common law courts and the type of equitable discretion so familiar in other areas of the law has never been employed in the criminal law.

3.200 The jurisdictional impediment to injunctive relief to enforce the criminal law was removed by the *Common Law Procedure Act, 1854*.[52] Still, injunctions which merely supplemented the

penalties provided for already existing offences were unheard of until the 20th century. As late as 1894 in *Institute of Patent Agents v. Lockwood*,[53] the House of Lords maintained the traditional equitable refusal to become embroiled in the administration of criminal law. An injunction was sought to restrain an unregistered patent agent from practising in contravention of a statute which stipulated a £20 penalty. Lord Herschell thought that the submission that the defendant should be subjected to the additional expense of proceedings in the High Court and be made subject not to the summary procedure and fine provided by statute but to civil proceedings possibly leading to imprisonment, was so out of the question that it was "scarcely necessary to do more than state the contention to shew that it is impossible that it can be supported".[54] However, the practice of enforcing by injunction statutory prescriptions, especially those regulatory in nature, has become increasingly common.[55] The more traditional granting of injunctive relief, noted previously,[56] to keep statutory bodies and corporations within the limits of their powers perhaps provided an analogue and a starting point.

(2) — Enjoining "flouters"

3.210 Although English cases are more common, there are also many Canadian decisions in which injunctions have been granted to enforce penal legislation.[57] The most common situation is one where the law has been "flouted" and the statutory penalty has proved to be an inadequate sanction.[58] In one of the leading English cases, *A.-G. v. Harris*,[59] the defendants had been convicted 95 and 142 times respectively of selling flowers in the street outside a public cemetery, contrary to a century-old statute. Although, the court noted, this activity caused no harm to the public — indeed, the flower stall was a positive benefit to many visitors to the cemetery — still, Sellers L.J. observed: "It cannot, in my opinion, be anything other than a public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law."[60]

3.220 There is now considerable authority in favour of injunctions in such cases in Canada.[61] An Alberta court granted an injunction enjoining the unauthorized practice of dentistry, although there was no evidence of actual harm from the practice in question, on the grounds that there had been open, continuous, flagrant and profitable violation of the statute for which the statutory penalties were completely ineffective.[62] In Ontario, a trucking company which persistently operated without the required licence notwithstanding numerous convictions, was enjoined at the suit of the Attorney General, the court holding that such relief was appropriate "where the law as contained in a public statute is being flouted".[63] The Alberta Court of Appeal[64] has held that an injunction may be awarded at the suit of the Attorney General to prevent further violations of Sunday closing legislation where the facts demonstrated[65] "an open and continuous disregard of an imperative public statute and its usual sanctions which is unlikely to be thwarted without the intervention of the Court". A marketing board was granted an interlocutory injunction to restrain attempts by a group of producers from evading the scheme on the ground that "when individuals are able to knowingly and deliberately ignore" the regulatory system, "continued defiance of the law" engages the public interest and constitutes irreparable harm.[66]

3.230 The rationale in this type of case seems clear: despite the absence of actual or threatened injury to persons or property, the public's interest in seeing the law obeyed justifies equitable intervention where the defendant is a persistent offender who will not be stopped by the penalties provided by statute.[67] However, the proposition that any breach of the law entitles the Attorney General to an injunction was rejected in a case refusing an injunction to restrain public

school teachers from engaging in an unlawful strike on the ground that the motion was premature, irreparable harm had not been established and the balance of convenience did not favour injunctive relief.[68]

(3) — Danger to public safety

3.240 Injunctions have also been granted where there is an immediate threat or danger to public safety which would not be met by the ordinary process or procedure prescribed by statute. The leading example is *A.-G. v. Chaudry*[69] where the defendants violated building and fire safety regulations by altering the construction of a hotel, thereby creating a serious risk to the safety of hotel patrons. Summary proceedings under the statute (which could lead to an order prohibiting occupancy of the premises) were delayed in the magistrates' court and the Court of Appeal upheld an immediate interlocutory injunction. In other cases, injunctions have been granted to restrain the erection of buildings which would constitute a permanent infraction of by-laws or legislation,[70] as well as to forbid an act which would irreparably damage the environment[71] and to protect vulnerable adults threatened by their bullying son.[71a]

(4) — Criminal offences proper

3.250 The extent to which injunctive relief may be had to prevent violations of the criminal law proper — in Canada, an offence created under Parliament's criminal law power — as distinct from statutory or regulatory offences is uncertain. The traditional refusal of equity to become involved in the criminal law evolved with truly criminal offences in mind before the age of regulation and the proliferation of statutory offences. There is a strong body of case-law in Ontario to the effect that an injunction will not be granted to restrain *Criminal Code* offences.[72] These cases arose in the context of labour disputes where a property owner sought to enjoin conduct amounting to watching and besetting.[73] In the leading case, *Robinson v. Adams*, a decision of the Ontario Court of Appeal, Middleton J.A. said:

> The equitable jurisdiction of a civil Court cannot properly be invoked to suppress crime. Unlawful acts which are an offence against the public, and so fall within the criminal law, may also be the foundation of an action based upon the civil wrong done to an individual, but when Parliament has, in the public interest, forbidden certain acts and made them an offence against the law of the land, then, unless a right to property is affected, the civil Courts should not attempt to interfere and forbid by their injunction that which has already been forbidden by Parliament itself.[74]

More recently, injunctions to prevent allegedly illegal abortions have been refused, although primarily on the grounds of standing.[75]

3.260 On the other hand, in a decision of the Manitoba Court of Appeal, it was said that this line of authority did not apply where the Attorney General sued as plaintiff.[76] Reliance was placed on the dictum of Hodgins J.A. in another Ontario Court of Appeal decision, *A.-G. Ont. v. Canadian Wholesale Grocers Ass'n*,[77] suggesting that the Attorney General did have the right to sue to restrain the carrying out of any criminal conspiracy in restraint of trade as defined by the *Criminal Code*. It is submitted, however, that the analysis of the Manitoba Court of Appeal is open to question. First, there is no indication in *Robinson v. Adams*[78] that the decision rested on the plaintiff's want of standing although admittedly that could provide alternate justification for the result. Secondly, in the *Canadian Wholesale Grocers* case, no injunction was in fact granted and the dictum of Hodgins J.A. was distinctly a minority view. Both Meredith C.J.O. and Ferguson J.A. held that no injunction would be granted had an offence been made out "because the public can be protected by proceeding against the respondents by indictment".[79]

(5) — Statutory injunctions

3.265 Where the public interest requires, it is possible for Parliament to include specific statutory authorization for such injunctions, as in the present *Competition Act*,[80] and the *Canadian Environmental Protection Act, 1999*.[81] Even where the statute does not explicitly authorize injunctive relief, the authority to grant an injunction may be inferred from statutory language giving the court broad remedial discretion.[81a] Municipalities are often given statutory authorization to seek an injunction to restrain breaches of by-laws[82] and professional bodies are often given like authority to control unauthorized practice.[83] The nature and extent of the court's discretion will turn on the particular terms of the statute. The applicant will not ordinarily have to prove inadequacy of damages or irreparable harm[84] and in view of Parliament's express declaration that injunctive relief is appropriate, the public interest in having the law obeyed will ordinarily outweigh hardship or inconvenience to the defendant.[85] The British Columbia Court of Appeal has held that "[f]actors that might be considered by a court in an application for an equitable injunction will be of limited, if any, application to the grant of a statutorily based injunction".[85a] Exceptional circumstances that will justify refusing a statutory injunction include "the willingness of the defendants to refrain from the unlawful act, the fact there may not be a clear case of 'flouting' the law because the defendant has ceased the primary unlawful activity, or the absence of proof that the activity carried on was related to the mischief the statute was designed to address".[85b] It has been held, however, that where the injunction application is based on an alleged Charter breach, the usual *RJR-Macdonald* test applies.[85c] However, even where an injunction is expressly authorized by statute, the discretion to make an order should be exercised with careful attention to the consequences. A municipality was refused an injunction to require the demolition of a building that encroached on a road allowance given the hardship such an order would impose and the court directed a process to determine the fair market value of the land encroached.[85d] *South Bucks District Council v. Porter*[86] dealt with claims for injunctions against gipsies living in mobile homes contrary to planning controls. Planning legislation explicitly gave the court the power to grant an injunction. In the Court of Appeal, Simon Brown L.J. stated that the court might well be reluctant to grant an injunction where other enforcement measures had not been taken. He added: " . . . the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he would not be of this mind unless he had considered for himself all questions of hardship for the defendant and his family if required to move . . . ". The House of Lords agreed with this approach. Lord Bingham added that while "[a]pprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate," when considering whether to grant an injunction, "[t]he court should ordinarily be slow to make an order which it would not at that time be willing, if need be, to enforce by imprisonment".[87] In *Abbotsford (City) v. Shantz*,[87a] the court declined to order a permanent injunction to enforce a municipal by-law against erecting structures in a public park in part because "the injunction would arguably impact the city's homeless most profoundly, [and] the vagueness of its language means that it could apply to an overly broad, unspecific group of people and an equally wide ranging spectrum of activity".[87b] Like other injunctions, a statutory order should not be overly broad. It should be framed so as to clearly indicate what conduct is prohibited or commanded and should not just reproduce the general language of the statute.[88] If the language of the statute is narrow, an injunction should correspond to and reflect the prohibitions contemplated in the statute, and should not go beyond them.[89]

GAVIN DOWNING, DIRECTOR APPOINTED UNDER THE *MILK ACT*, R.S.O. 1990, c. M. 12	- and -	**AGRI-CULTURAL RENEWAL CO-OPERATIVE INC., o/a GLENCOLTON FARMS, et al.**	- and -	**OUR FARM OUR FOOD COOPERATIVE INC.**
Applicant		Respondents		Intervener

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Newmarket

BOOK OF AUTHORITIES OF THE APPLICANT

(Application returnable on May 29 and 30, 2017)

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