

**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

SUPPLEMENTARY APPLICATION RECORD

(Application returnable on May 29 and 30, 2017)

Date: May 9, 2017

ATTORNEY GENERAL OF ONTARIO
Crown Law Office (Civil)
8-720 Bay Street
Toronto, ON M7A 2S9
Tel.: 416-326-4086
Fax: 416-326-4181

Sunil S. Mathai, LSUC No. 49616O
sunil.mathai@ontario.ca

Ananthan Sinnadurai, LSUC No. 60614G
ananthan.sinnadurai@ontario.ca

Nansy Ghobrial, LSUC No. 68740N
nansy.ghobrial@ontario.ca

*Counsel for the applicant,
Gavin Downing, Director appointed under
the Milk Act, R.S.O. 1990, c M.12*

TO: **HUMMINGBIRD LAWYERS LLP**
8800 Dufferin Street, Suite 301
Vaughan, Ontario, L4K 0C5
Tel.: 905-731-1911
Fax: 905.731.1913

Darren Smith, LSUC No. 49677U
darren@hummingbirdlaw.com

*Counsel to the Respondents,
Agri-Cultural Renewal Co-operative
Inc. and Markus Schmidt*

AND TO: **ELISA VANDER HOUT**
R.R. #1, 393889 Concession 2
Durham, ON N0G 1R0

Self-represented Respondent

AND TO: **NIKOLAUS OSTHAUS**
R.R. #1, 394633 Concession 1 NGW
Durham, ON N0G 1R0

Self-represented Respondent

AND TO: **MICHAEL SCHMIDT**
R.R. #1, 393889 Concession 2
Durham, ON N0G 1R0

Self-represented Respondent

AND TO: **LEWIS TAYLOR**
10 Valley View Court
Kleinburg, ON L0J 1C0

*Representative of the Intervener,
Our Farm Our Food Cooperative Inc.*

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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UNDER THE *MILK ACT*, R.S.O. 1990, c M.12**

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

THE HONOURABLE
JUSTICE MULLINS

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MONDAY, THE 26TH AND
TUESDAY, THE 27TH OF
SEPTEMBER, 2016

BETWEEN:



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

Applicant / Responding Party

- and -

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

Respondents / Moving Parties

ORDER

THIS MOTION made by the proposed intervenor Our Farm, Our Food Inc. ("OFOF") seeking leave to intervene in the within application was heard this day at the Courthouse at 50 Eagle St. West in Newmarket, Ontario.

UPON READING the motion record of OFOF, the Book of Authorities of the Applicant, Gavin Downing, Director appointed under the *Milk Act*, R.S.O. 1990, c. M. 12, and upon hearing the oral submissions of the parties present:

1. **THIS COURT ORDERS** that OFOF be and is hereby granted leave to intervene in the within application as a party, with full participation rights;
2. **THIS COURT ORDERS** that OFOF be and is hereby subject to the terms of any costs orders made by this Court during the course of the within application;
3. **THIS COURT ORDERS** that OFOF has such rights of appeal as are available to intervenors as provided under the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194;
4. **THIS COURT ORDERS** that leave is granted to OFOF to be represented in the within application by Lewis Taylor, a non-lawyer; and,
5. **THIS COURT ORDERS** that no costs be awarded for this motion.



Mullins J.

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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.

Applicant/Responding Party

Respondents/ Moving Parties

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceedings commenced at Newmarket

ORDER

ATTORNEY GENERAL OF ONTARIO

Crown Law Office - Civil Law
8-720 Bay Street
Toronto, ON M7A 2S9
Fax: 416-326-4181

Sunil Mathai (LSUC No. 496160)

Tel: 416-326-4086

Ananthan Sinnadurai (LSUC No. 60614G)

Tel: 416-314-2540

Counsel for the applicant/responding
party, Gavin Downing, Director appointed
under the *Milk Act*, R.S.O. 1990, c M.12

CV-16-125371-00

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

THE HONOURABLE
JUSTICE MULLINS

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MONDAY, THE 26TH AND
TUESDAY, THE 27TH OF
SEPTEMBER, 2016

B E T W E E N:

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

Applicant / Responding Party

- and -

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

Respondents / Moving Parties

ORDER

THIS MOTION made by the Respondents for an Order converting this application to an action was heard this day at the Courthouse at 50 Eagle St. West in Newmarket, Ontario.

UPON READING the motion record, factum and book of authorities of the Respondents, and the responding motion record, factum and book of authorities of the applicant, Gavin Downing, Director appointed under the *Milk Act*, R.S.O. 1990, c. M. 12, and upon consent of the parties:

CV-16-125371-00

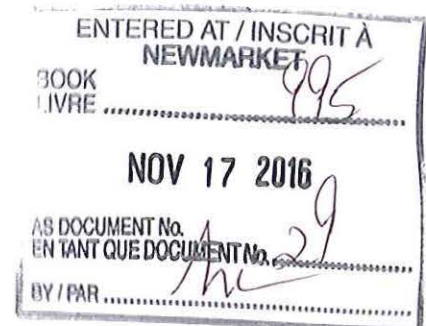
1. THIS COURT ORDERS that the motion by the respondents to convert the within application into an action be and is hereby withdrawn, without prejudice to the Respondents' right to bring a further motion for the relief sought;

2. THIS COURT ORDERS that the costs of this motion are payable by the Respondents to the applicant, Gavin Downing, Director Appointed Under The *Milk Act*, R.S.O. 1990, c M.12, in any event of the cause, if requested; and,

3. THIS COURT ORDERS that no costs are awarded against the intervenor, Our Farm, Our Food Inc., in respect of this motion.



Mullins J.



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.

Applicant/Responding Party

Respondents/ Moving Parties



**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceedings commenced at Newmarket

ORDER

ATTORNEY GENERAL OF ONTARIO
Crown Law Office - Civil Law
8-720 Bay Street
Toronto, ON M7A 2S9
Fax: 416-326-4181

Sunil Mathai (LSUC No. 49616O)
Tel: 416-326-4086

Ananthan Sinnadurai (LSUC No. 60614G)
Tel: 416-314-2540

Counsel for the applicant/responding
party, Gavin Downing, Director appointed
under the *Milk Act*, R.S.O. 1990, c M.12

CITATION: Regional Municipality of York v. Michael Schmidt et al., 2016 ONSC 7580

COURT FILE NO.: CV-16-125371-00

CV-16-125250-00

DATE: December 6, 2016

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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,
NIKOLAUS ALEXANDER JOHANNES OSTHAUS, JOE DOE(S), JANE
DOE(S), and PERSONS UNKNOWN, Respondents

AND:

THE REGIONAL MUNICIPALITY OF YORK, Applicant

AND:

MICHAEL SCHMIDT, ELIS VANDER HOUT, MARKUS CHRISTIAN
SCHMIDT, AGRI-CULTURAL RENEWAL CO-OPERATIVE INC.,
NIKOLAUS ALEXANDER JOHANNES OSTHAUS, JOHN DOE, JANE DOE
and PERSONS UNKNOWN and THE CHURCH OF THE CHRISTIAN
COMMUNITY IN CANADA, Respondents

BEFORE: Justice M.L. Edwards

COUNSEL: Douglas O. Smith, Counsel for the Regional Municipality of York
Sunil Mathai, Counsel for the Ministry of the Attorney General
Darren Smith, Counsel for the Defendant Agri-Cultural Renewal Co-Operative
Inc. and The Church of the Christian Community in Canada
Davin Charney, Counsel for Markus Schmidt
Lewis Taylor, Self-Represented
Michael Schmidt, Self-Represented

HEARD: In Writing

ENDORSEMENT

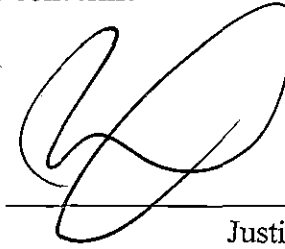
- [1] I am in receipt of various pieces of correspondence from counsel and the parties addressing the chronology in the above-noted matters. As I indicated to counsel and the parties in our last case conference call, I would be conducting a form of “baseball arbitration” in the fixing of the timetable.
- [2] Given the lapse of time since the various communications and my delay in response, largely caused as a result of my involvement in a criminal trial, I have made some minor alterations to the timetable proposed in Mr. Smith’s letter to me of November 7, 2016. I have considered the various representations made by Mr. Taylor, as well as Darren Smith’s letter to me of November 4, 2016.
- [3] This case has been outstanding for some considerable period of time and, in my view, the timetable proposed in Mr. Smith’s letter is the one that will bring about the most timely, fair and orderly conclusion to these proceedings. The timetable that the parties will therefore comply with is set forth as follows:

Remaining Steps to be Completed	Deadline for Completion
Motions re production of documents to be heard in writing or via teleconference by Justice Edwards	On or before January 10, 2017, subject to availability of Justice Edwards
Respondents and OFOF serve and file motion material re challenge of admissibility of evidence obtained during search of the Farm (“s. 8 Motion”)	On or before January 15, 2017
Applicants serve and file any material in response to the s. 8 Motion	On or before January 27, 2017
Cross-examinations on affidavit material served in respect of the s. 8 Motion	On or before February 14, 2017
Facta served and filed by Respondents and OFOF in respect of the s. 8 Motion	On or before February 21, 2017
Facta served and filed by Applicants in respect of the s. 8 Motion	On or before February 28, 2017
Hearing of the s. 8 Motion	March of 2017, subject to Court availability for a one day motion
Delivery of Responding Application materials by the Respondents and Intervener	On or before March 31, 2017

Delivery of any Reply Material by the Director and the Region	On or before April 7, 2017
Cross-examinations on affidavit material in respect of the Application	On or before April 14, 2017
Delivery of facta of Region and Director in respect of the Application	By April 18, 2017
Delivery of facta of Respondents and OFOF in respect of the Application	By April 21, 2017
Hearing of the Applications	May Sitzings
Respondents and OFOF deliver Notice of Constitutional Question "NCQ", and all evidence to be relied on in support of the NCQ, if necessary	By May 31, 2017
Delivery of material in response to NCQ	On or before July 30, 2017
Delivery of material in reply by Respondents and OFOF	On or before August 15, 2017
Completion of all cross-examinations re NCQ	On or before August 31, 2017
Service of factum and authorities of Respondents and OFOF re NCQ	On or before September 22, 2017
Service factum and authorities in response to NCQ	On or before October 20, 2017
Hearing of Motion re NCQ	November 2017 Trial Sitzings

- [4] With respect to any motion for productions that I have indicated should be completed before January 10, 2017, if there are any issues in this regard I will deal with them by teleconference at a time to be arranged through my assistant Diane Massey, at diane.massey@ontario.ca. As for the hearing of the s. 8 motion, the parties are to consult amongst themselves and provide me with three dates during the month of March 2017 that can be agreed upon, and I will endeavour to ensure that the Court makes available a day that reflects one of the three dates that the parties have agreed upon. Similarly, with respect to the hearing of the applications and the hearing of the motion regarding NCQ to be heard respectively during the May and November sittings, counsel and the parties are to consult and provide me with three dates during the May and November sittings and I will endeavour to ensure that the Court has availability for one of the dates selected by you.

- [5] If there are any other issues that are not addressed by the timetable or anything else that arises that may require further case management, please let me know and we will arrange an 8:30 a.m. telephone conference to address those concerns.

A handwritten signature in black ink, consisting of a large, stylized 'E' with a loop, positioned above a horizontal line.

Justice M.L. Edwards

Date: December 6, 2016







Tab 4D:

CD containing Exhibit 5: Video –the Office at Glencolton
Farms, dated October 2, 2015

Tab 5A:

CD containing Exhibit 2: Video –edited YouTube video taken
on October 2, 2017 at Glencolton Farms

Cross-Examination of Gavin Downing – April 25, 2017

Undertakings:

No.	Question	Answer
1.	To provide a copy of a licencing package referred to in paragraph 8 of Downing Affidavit.	<p>A copy of the licencing package provided to applicants is attached at Tab A.</p> <p>In the event an applicant expresses an interest in processing dairy products on site, the applicant is provided with a slightly modified covering letter and OMAFRA's Guidelines for on-farm dairy processing. Copies of both documents are attached at Tab B.</p>
2.	To advise the relevant section in the <i>Milk Act</i> , which regulates the safety of milk.	<p>Elements of food safety are present in many aspects of the <i>Milk Act</i> and regulations made under thereunder.</p> <p>Section 2 of the Act, which sets out the purpose of the Act, says in part:</p> <p>2. The purpose and intent of this Act is,</p> <p>...</p> <p>(c) to provide for the control and regulation in any or all respects of the quality of milk, milk products and fluid milk products within Ontario. R.S.O. 1990, c. M.12, s. 2.</p> <p>Within the Act, licencing and permit requirements set out in ss 15 and 16 establish a base for which food safety in a plant is achieved. Further, safety requirements may be imposed under several paragraphs under s 19(1) of the Act.</p> <p>The Act also empowers the Ontario Farm Products Marketing</p>

	<p>Commission with regulation making powers. O.Reg 761 contains several provisions that govern food safety at a plant, including: plant construction (s 77); plant equipment (ss 78-79); processing in a plant (ss 80-81); pasteurization requirements for specific products (ss 82-85); cleaning (s 86); and the plant licencing and permitting process (ss 95-102, 109). Further, clause 100(1)(f) provides that the Director may refuse to issue or renew a licence for the operation of a plant “where the applicant does not comply with the Health Protection and Promotion Act and the regulations thereunder”.</p> <p>Justice Tetley, in his decision on <i>R v Schmidt</i>, 2011 ONCJ 482, recognized that the purpose of the <i>Milk Act</i>, in part, is the safety and quality of milk products:</p> <p>74 ... In support of this contention the Attorney General submits both the <i>H.P.A.</i> and the <i>Milk Act</i> are directed, at least in part, to the regulation of the safety and quality of milk products in Ontario. The <i>H.P.A.</i> 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 <i>Milk Act</i> also contains legislated directives governing all aspects of the production and marketing of milk and milk products in the province.</p> <p>Depending on the nature of the issues at hand, other provisions of the <i>Milk Act</i> and the regulations thereunder may be applicable.</p>
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Under Advisements:

No.	Question	Answer
1.	To provide a copy of the regulatory compliance audit checklist.	A copy of the compliance audit checklist is attached at Tab C.
2.	To advise where in the <i>HPPA</i> there is reference to the quality of milk and milk products.	<p>Section 2 of the <i>Health Protection and Promotion Act (HPPA)</i> sets out the purpose of the Act as follows:</p> <p>Purpose</p> <p>2. The purpose of this Act is to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario. R.S.O. 1990, c. H.7, s. 2.</p> <p>Sections 13, 16, 17 and 18 of HPPA also address the safety and quality of food products, including milk. Further Regulation 562 to the HPPA regulates food premises. Section 42-53 of Regulation 562 set out specific requirements in relation to milk and milk products.</p> <p>Depending on the nature of the issue at hand, other provisions of the HPPA and the regulations thereunder may be applicable.</p>
3.	To provide a job description for a dairy plant specialist.	A position description report for Dairy Plant Specialist is attached at Tab D.
4.	To look through Director Downing's records to see if he is able to locate the information he received from the Ontario Public Health that inform Ontario's regulatory efforts and produce copies of same.	While not conceding the relevance of the question, Director Downing has searched his files and has confirmed that he received a summary of illness associated with the consumption of raw milk on October 8, 2015. A copy of the summary is attached at Tab E.

Refusals:

No.	Question	Answer
1.	Advise in 2006, who in the Minister's office Director Downing reported to.	Director Downing did not report to the Minister's office in 2006 on the dairy file.
2.	Advise in 2006, who in cabinet office did Director Downing report to.	Director Downing did not report to Cabinet office in 2006 on the dairy file.
3.	Reference to Vol 3 of Michael Schmidt's Responding record, Tab H, pg 6, 3 rd paragraph – reference to a change in approach by regulatory agencies in 2007 in the Affidavit of James McLaren. Is that in reference to Director Downing?	Refused – witness cannot speak to what James McLaren was referencing in his Affidavit.
4.	Referring to the article found at Exhibit I of Director Downing's Affidavit – everything in that article is hearsay, correct?	The article found at Exhibit I to Director Downing's Affidavit is hearsay.
5.	Does Director Downing regulate all farmers?	Refused – not relevant to the Director's Application and the question, as framed, is overly broad.
6.	Is there a distinction between private individuals and the general public as far as Director Downing or OMAFRA is concerned with respect to the enforcement of the <i>Milk Act</i> and the Regulations?	The definitions of "plant" and "processing" under the Act are broad and apply irrespective of who access milk or milk products. As found by the Court of Appeal in <i>R. v. Schmidt</i> , "[t]he <i>Milk Act</i> makes no exception for "private" operations" (see para. 27).
7.	To have Director Downing contact the chief medical officer's office, ask for the sources of information that is contained in Dr. William's memo of November 10, 2015, and produce same if received.	Refused – not relevant to the Director's Application.
8.	To advise whether Director Downing is aware of other unlicensed facilities operating in Ontario.	While not conceding the relevance of the question, Director Downing is aware of other unlicensed facilities in Ontario.

Cross-Examination of Rick Bond – April 18, 2017

Undertakings:

No.	Question	Answer
1.	To advise as to who commissions Mr. Bond's Affidavit.	Mr. Bond's Affidavit was commissioned Shannon DeLeskie (counsel with OMAFRA). Ms. DeLeskie commissioned all three affidavits filed in support of the Director's application.

Cross-Examination of Glenn Jarvie – April 19, 2017

Undertakings:

No.	Question	Answer
1.	To review Exhibit F to Mr. Jarvie's Affidavit and confirm the date of the transfer of Lots 48 & 49 from Schmidt to Schilly.	Mr. Jarvie has reviewed Tab F and confirms that the date of the transfer is September 22, 1993.

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

- and -

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FARMS, ELISA VANDER HOUT, MARKUS CHRISTIAN SCHMIDT, JOHANNES
OSTHAUS NIKOLAUS ALEXANDER, JOHN DOE(S), JANE DOE(S) AND
PERSONS UNKNOWN**

Applicant

Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT
NEWMARKET

**SUPPLEMENTARY APPLICATION
RECORD**

ATTORNEY GENERAL OF ONTARIO

Crown Law Office (Civil)
8-720 Bay Street
Toronto, ON M7A 2S9
Tel. 416-326-4086
Fax: 416-326-4181

Sunil Mathai, LSUC No. 49616O
sunil.mathai@ontario.ca

Ananthan Sinnadurai, LSUC No. 60614G
ananthan.sinnadurai@ontario.ca

Nansy Ghobrial, LSUC No. 68740N
nansy.ghobrial@ontario.ca

*Counsel for the applicant,
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