COURT OF APPEAL FOR ONTARO

B E T W E E N:

HER MAJESTY THE QUEEN

(Respondent)

- and –

MICHAEL SCHMIDT

APPLICANT'S FACTUM

PART I – STATEMENT OF THE CASE

1. The applicant Michael Schmidt was tried in 2009 before Justice of the Peace Kowarski in the Ontario Court of Justice on 19 charges involving:

   (a) selling, offering for sale, distributing or delivering unpasteurized milk and cheese; and

   (b) operating a "plant" without a licence, contrary to the *Milk Act;*

   (c) being a "distributor" of milk without a licence, contrary to the *Milk Act*; and

   (d) disobeying a health inspector's written order.

2. The result at trial was an acquittal on all charges.

3. The Crown's appeal was heard in 2011 by Justice Tetley of the Ontario Court of Justice and resulted in convictions on 13 charges under items (a) and (b) above. The acquittal on item (c) was not appealed by the Crown, and the acquittals on item (d) were upheld.

4. The applicant was sentenced to pay fines totaling $9,150 and one year of probation.

5. The applicant now seeks leave to appeal both his conviction and sentence under section 131 of the *Provincial Offences Act*.

PART II – SUMMARY OF THE FACTS

(a) Facts Established at Trial

6. The applicant was the registered sole proprietor of Glencolton Farms, a business which included but was not limited to the operation of a dairy farm.

    - Statement of Agreed Facts, M. R.* Tab 21, paragraphs 2 and 3.

7. The applicant grew up in rural Germany, where the sale of raw milk is legal. He has worked on farms all his life. He obtained a masters degree in agriculture in 1978, writing his thesis on bio-dynamic farming, the earliest form of organic agriculture. He developed the "cow-share" concept in Germany for the purpose of reconnecting consumers and producers to ensure a safe milk supply. After farming for 10 years in Canada, he received "an ever-growing call by those with food allergies, especially those with lactose intolerance who apparently were unable to drink or consume unpasteurized milk." He was also approached by people who had begun to "question the food safety of mainstream large scale food production. Young parents especially with great concerns for the well being of their children kept knocking on [his] door and requested raw milk."

    - Evidence of Michael Schmidt, M.R. Tab 16, pages 6, 7 and 8

* M. R. refers to the Motion Record of the Applicant throughout this factum

8. The sale, distribution and delivery of raw milk is illegal in Ontario, but it is not illegal for individuals to consume raw milk if they can gain possession of it.

9. The applicant revived the concept of a "cow-share" program at his Canadian farm. The program is based on private contracts which were in part oral and in part embodied in a "Member's Handbook". The purpose was to give cow-share members the same legal access to unpasteurized milk that farmers have.

- Evidence of Michael Schmidt, M.R. Tab 16, page 13, lines 1-6 and lines 30-31.
- *Ibid.*, pages 25-26
- *Ibid.*, page 34, lines 22-34

10. Cow-share members were required to pay a capital sum of $300, $600 or $1,200 to acquire an interest in the cow or herd. Both the applicant and the cow-share members understood that the cows were owned by the cow-share members.

- Evidence of Michael Schmidt, M.R. Tab 16, page 13, lines 1-4
- *Ibid.*, page 37, lines 26-32 and page 38, lines 1-17
- Evidence of Eric Bryant, M.R. Tab 15, page 6, lines 14-19

11. Cow-share members would also pay the applicant for the services involved in boarding the cow, milking the cow, bottling the milk, and producing cheese. Payment was based upon the quantity of milk or cheese received by each member. Payment was made each time possession of the milk or cheese was transferred.

- Evidence of Michael Schmidt, M.R. Tab 16, page 18, lines 14-20
- *Ibid*., page 34, lines 28-34
- Evidence of Eric Bryant, M.R. Tab 15, page 6, lines 14-20

12. All milk and milk products were unpasteurized or "raw". Cow-share owners specifically wanted their milk raw and knew that they received it raw.

- Statement of Agreed Facts, M.R. Tab 21, paragraph 4
- Evidence of Michael Schmidt, M.R. Tab 16, page 14, lines 1-2
- *Ibid*., page 16, lines 12-13

- Evidence of Eric Bryant, M.R. Tab 15, page 6, lines 6-25

13. The applicant's general rule was that only cow-share members were entitled to take possession of raw milk or milk products. However, he would occasionally allow people who wished to become members to sample raw milk to ensure that they could digest it.

    - Evidence of Michael Schmidt, M.R. Tab 16, page 16, lines 19-25

14. Two pieces of cheese bearing price tags of $3.20 each were provided to Susan Atherton, an undercover investigator with the Ministry of Natural Resources, on two occasions prior to her purchasing a cow-share membership. There is conflicting evidence as to whether she paid for them. The applicant was convicted of "distributing" (but not "selling") raw milk products in these two incidents.

    - Evidence of Michael Schmidt, M.R. Tab 16, page 17, lines 18-27.
    - Evidence of Susan Atherton, M.R. Tab 49, page 26, lines 18-27 and page 30, lines 3-6
    - Reasons of Justice Tetley on conviction, M.R. Tab 5, par. 114-115.

15. Ms. Atherton then purchased a cow-share membership for $300 and acquired milk and milk products on 3 additional occasions. The applicant was convicted of 12 counts (6 for selling and 6 for distributing), on these 3 occasions, although he was sentenced to only 6 fines since Justice Tetley ruled that "selling" encompassed "distributing" and the "*Kienapple* principle" applied.

    - Evidence of Susan Atherton, M.R. Tab 49, page 35, lines 4-29, and pages 46-47
    - Reasons of Justice Tetley on sentencing, M.R. Tab 6, paragraph 11

16. There were approximately 150 individuals or families who were cow-share members at Glencolton Farms.

    - Evidence of Michael Schmidt, M.R. Tab 16, page 16, lines 8-10

17. The applicant did not at any relevant time possess a licence under the *Milk Act* to operate a plant.

18. There was no evidence that anyone ever became ill as a result of consuming the applicant's milk products.

- Reasons of Justice Kowarsky, M.R. Tab 4, par. 158

19. For purposes of the applicant's *Charter* challenge, extensive expert evidence on the safety of raw milk was called by both the applicant and the Attorney General for Ontario at trial.

- Evidence of Dr. Theodore Beals, Dr. Ronald Robert Hull, Dr. Mansel William Griffiths, and Dr. Jeffrey Boyd Wilson at M.R. Tabs 17 to 20 inclusive

(b) Facts Established After Trial, for Appeal to Justice Tetley

20. James McLaren is a raw milk consumer and active crusader for the legalization of raw milk in Canada who attempted in 2008 to seek intervener status in Michael Schmidt's trial so that the rights of consumers, especially under sections 7 and 15 of the *Charter*, could be argued before the court. Justice of the Peace Kowarski told him at a case management conference: "I believe that you can have your say through the defendant." McLaren was consequently not granted intervener status. However, on the appeal to Justice Tetley, McLaren's affidavit of May 12, 2010 was admitted as additional evidence.

- Affidavit of James McLaren, M.R. Tab 7
- Reasons of Justice Tetley on motion, M.R. Tab 11, par. 40

21. Prior to hearing the appeal, Justice Tetley granted leave to the applicant to advance a constitutional challenge founded on the affidavit of James McLaren dated May 12, 2010.

- Reasons of Justice Tetley on motion, M.R. Tab 11, par. 40

22. James McLaren believes that if he were unable to obtain raw milk, it would have a serious harmful impact on his health and well-being.

- Affidavit of James McLaren, M.R. Tab 7, par. 14-15

23. James McLaren authored an online petition for the legalization of raw milk sales in Ontario which had garnered more than 1,100 signatures of Ontario residents as of February 24, 2010.

- Affidavit of James McLaren, M.R. Tab 7, par. 31 and Exhibits "C" and "D"

24. Eric Bryant is a member of the Glencolton cow-share who believes that he requires raw milk in his diet both for the sake of his health and to fulfill the tenets of his religion, Essene Judaism. Bryant's teenaged daughter is unable to tolerate pasteurized milk without becoming physically ill but can consume raw milk without problems.

- Affidavit of Eric Bryant, M.R. Tab 8, par. 20 and 26

25. If Eric Bryant were unable to get raw milk legally from his cowshare arrangement with Michael Schmidt, he would seek out sources of raw milk on the black market.

- Affidavit of Eric Bryant, M.R. Tab 8, par. 21

26. At Michael Schmidt's sentencing hearing, numerous character reference letters were submitted as evidence, primarily from members of Mr. Schmidt's cowshare group. Spomenka Koledin, Zheni Nasi, Edward Tait and Howard Biller all indicated their belief that the health of the writers or members of their families was dramatically improved by the consumption of raw milk provided by Mr. Schmidt.

- Character reference letters, M.R. Tab 52

27. After the applicant was charged in 1994 for distributing raw milk, he adopted the Gandhian principle that if there are no material assets the authorities can take away from you, then they will be forced to deal with the issue of whether or not the law is a just law. Accordingly, the applicant gave up all his earthly belongings. He now owns nothing and has no regular income. He lives on the charity of others and has no resources to pay a fine of any size.

- Evidence of Michael Schmidt, transcript of sentencing proceedings, November 25, 2011, pages 31-32 ("Gandhian" mis-spelled "Gunyan")

(c) Facts Established for Motion for Leave to Appeal to Ontario Court of Appeal

28. According to an expert on food safety and distribution at the University of Guelph, 88.7 percent of Canadian dairy farmers acknowledge that they or members of their family consume unpasteurized milk from the farm's bulk milk tank. It is a routine practice for raw milk to be served on farms at the kitchen table to family members, farmhands and visitors.

- Affidavit of Sylvain Charlebois, M.R. Tab 56, par. 6 – 11.

29. Michael Schmidt personally instructed at least 45 other farmers on how to conduct a cow-sharing program during the interval between his acquittal and his conviction, and knows of at least 10 other current cow-sharing operations in Ontario.

- Affidavit of Michael Schmidt, M.R. Tab 59, paragraphs 3 and 4

30. In 2007, Jacqueline Fennell Conklin began operating a cow-share operation near Spencerville, Ontario, based upon the Michael Schmidt model, but with some differences. There are 40 cows and 150 cow-share members. Currently, the cow-

share carries on under the management of her husband John Conklin and their children. Ms. Conklin found the judgment of Justice Tetley confusing as to whether all cow-sharing is illegal, or whether only Michael Schmidt's cow-share was illegal because of its particular facts. She would appreciate clarification from the Ontario Court of Appeal on issues such as whether "distribution" of raw milk includes the act of a farmer handing a glass of raw milk to her husband, child, or farmhand.

- Affidavit of Jacqueline Fennell Conklin, M.R. Tab 57
- Supplementary affidavit of Jacqueline Fennell Conklin, M.R. Tab 58

31. Francis Hane, a commercial pilot residing near Thunder Bay, has been involved in a "raw milk co-operative" in which 3 families co-own a single cow. The families share the raw fluid milk and unpasteurized cheese made from it. Mr. Hane found that Justice Tetley's decision left him uncertain as to whether his cow-sharing arrangement was legal or not. He would like clarification from the Ontario Court of Appeal as to what constitutes an unlawful distribution or delivery of raw milk.

- Affidavit of Francis Hane, M.R. Tab 55

32. Sibernie James-Bosch belongs to a 40-member cow-share group that co-owns 12 cows that are cared for by farmers in Arthur, Ontario. She purchased her interest in the herd for $500 via an oral contract which she finds quite satisfactory. She was uncertain after reading Justice Tetley's decision whether her own cow-sharing contract was legal, or whether her arrangements differ sufficiently from Michael Schmidt's to be legal. She would like guidance from the Ontario Court of Appeal, particularly on what it means to "distribute" raw milk, which Justice Tetley did not define.

- Affidavit of Sibernie James-Bosch, M.R. Tab 54

33. Michael Schmidt's case and the raw milk issue have generated extensive media coverage over many years. This case has been the subject of more than 100 newspaper articles and several documentaries, indicating public interest.

- Affidavit of Michael Schmidt, M.R. Tab 59, par. 6

34. Justice Tetley relied upon numerous purported grounds of appeal which had not actually been advanced by the Crown either in their factum or in oral argument. He also relied extensively upon legal research performed by a student. Of the 36 cases referred to in his decision, 21 cases (58%) were cases which had not been cited by any counsel. At no time during the five months when Justice Tetley was preparing his decision did he contact counsel to permit them to respond to issues, arguments and jurisprudence that had not been raised at the hearing of the appeal.

- Affidavit of Michael Schmidt, M.R. Tab 59, paragraphs 7 to 15 and Exhibits "A" through "D"
- Reasons of Justice Tetley on conviction, M.R. Tab 5, par. 33, 34, 35, 36, 38, 39, 40, 47, 48, and 167

35. The applicant cannot pay the fine imposed upon him in this matter and would in any event feel as though paying the fine was tantamount to an admission of guilt. He would prefer to go to jail rather than admitting that he has been guilty of any wrongdoing.

- Affidavit of Michael Schmidt, M.R. Tab 59, par. 16

36. In the fall of 2011, the applicant went on a 37-day hunger strike to bring attention to the raw milk issue, ending his strike only upon obtaining a meeting with Premier Dalton McGuinty. The applicant is prepared to risk his liberty, his health and his life over this issue.

- Affidavit of Michael Schmidt, M.R, Tab 59, par. 17-18

PART III – ISSUES AND LAW

37. The issues on this motion for leave to appeal are the following:

(i) Do special grounds exist, for this appeal, in order to meet the requirements of subsection 131(1) of the *Provincial Offences Act (POA)*?

(ii) Do the proposed grounds of appeal include questions of law alone?

(iii) In the circumstances of this case, should leave to appeal be granted, either in the public interest, or for the due administration of justice, in accordance with ss. 131(2) of the *POA*?

(i) Special Grounds

38. Special grounds for granting leave have been found in previous cases based upon:

(a) the fact that a significant number of other individuals besides the applicant for leave are affected by the same law[1];

(b) the fact that conflicting jurisprudence exists, particularly if conflicting decisions were reached in the two courts below[2];

(c) the absence of any previously decided cases interpreting the statutes in question[3];

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1 *R. v. Krukowski*, [1991] O.J. No. 255 at paras. 11 and 14 (*Krukowski*);
R. v. Sheehan, [2011] O.J. No. 901, at para. 6 (*Sheehan*);
R. v. Cranbrook Swine Inc., [2001] O.J. No. 4256, at paras. 10 and 11

2 *R. v. Rankin*, [2007] O.J. No. 719, at para. 32 (*Rankin*);
Sheehan, supra note 1, at para. 4;
R. v. Hy and Zel's Inc., [2003] O.J. No. 10, at para. 20 (*Hy and Zel's*)

(d) the undesirability of relying on prosecutorial discretion to provide adequate guidance to members of the public as to how they can meet the requirements of the law[4];

(e) the fact that the decision under appeal created uncertainty regarding the meaning of the statute[5];

(f) the importance of ensuring the constitutionality of legislation, given the continually evolving nature of constitutional law[6];

(g) a clear miscarriage of justice arising from the actions of the judge below[7].

39. It is submitted that all of the factors listed above come into play in this case. Items (a) and (b) are apparent from reading the summary of facts. It is anticipated that counsel for the Attorney General will concede item (c).

40. **Prosecutorial Discretion—item (d) above**. Although Justice Tetley repeatedly referred to a "farm family exemption" in the decision sought to be appealed (see paragraphs 1, 2, 6, and 97), no such exemption exists in the legislation. No cases have been found of dairy farmers being charged for distributing raw milk to their spouses, children and farmhands even though intra-household distribution is a widespread practice. This apparently stems from the exercise of prosecutorial

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3 *Memorial Gardens Ontario Ltd. v. Ontario*, [1991] O.J. No. 257, at para. 9 (*Memorial Gardens*)

4 *Ontario (Minister of the Environment) v. Castonguay Blasting Ltd.,* [2011] O.J. No. 1720, at paras. 20-21

5 *Rankin*, *supra* note 2, at para. 32
Memorial Gardens, supra note 3

6 *Hy and Zel's, supra* note 2, at paras. 18 and 23

7 *R. v. Harry*, [1998] O.J. No. 2569, at para. 4-6 (*Harry*)

discretion. There is no significant difference, conceptually, between a farmer giving raw milk to his child or farmhand, and Michael Schmidt giving a raw cheese sample to the would-be cow-share member Susan Atherton; yet Schmidt was charged while farmers never apparently get charged. In light of Justice Tetley's interpretation that Schmidt was "distributing" raw milk, farmers should have the right to know whether their practice is legal or not so that they do not have to continue to rely on prosecutorial discretion.

41. **Decision creating uncertainty—item (e) above.** Paragraphs 53 and 54 of Justice Tetley's decision raise the possibility that "a valid transfer of ownership or the conferring of an equity interest in the cows or in the herd" might negate an alleged violation of subsection 18(1) of the *Health Protection and Promotion Act* ("*HPPA*"). In other words, cow-sharing might be legal if only it were done correctly. However, the court's comments are inconclusive on this point. The listing of the "legal deficiencies" of the applicant's operations in paragraphs 51 and 52 of the decision has raised questions in the minds of other individuals involved in cow-share operations in Ontario. It would be desirable for other farmers and cow-sharers to know whether cow-sharing is always illegal or whether only Michael Schmidt's particular arrangement is illegal.

42. **Constitutionality of the Legislation—item (f) above.** The applicant's Amended Notice of Constitutional Question (Tab 45, motion record) sets out the details of the

challenges made under sections 7 and 15 of the *Charter*. The applicant is entitled not to be convicted under a law which may be unconstitutional[8].

43. **Miscarriage of Justice—item (g) above.** Details of the miscarriage of justice are set out below in connection with the issue of the denial of natural justice and a fair hearing.

(ii) Questions of Law Alone

44. The following questions of law are raised in this appeal:

(a) Was the applicant denied natural justice and a fair hearing by the actions of Justice Tetley who in effect usurped the role of prosecutor in the appeal?

(b) Were the contracts between Michael Schmidt and the cow-share members shams, or valid contracts of agistment (livestock boarding)?

(c) What is the meaning of the word "distribute" in the *Health Protection and Promotion Act*?

(d) What is the meaning of the word "plant" in the *Milk Act*?

(e) Did Justice Tetley err in applying the wrong test for standing to the applicant with respect to the constitutional rights of consumers?

(f) Does section 7 of the *Charter* give consumers the right to determine what foods they put into their bodies?

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8 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at para. 38-43 (*Big M*); *Canadian Egg Marketing Agency v. Richardson,* [1998] S.C.J. No. 78, at paras. 37, 38, 40 and 44 (*Canadian Egg Marketing*)

(g) Is the applicant's liberty or security of the person under section 7 of the *Charter* infringed by the *HPPA* or the *Milk Act* or the manner in which those statutes have been applied in this case?

(h) Was the sentence imposed appropriate for an individual in the applicant's financial circumstances?

(a) Was the applicant denied natural justice and a fair hearing by the actions of Justice Tetley?

45. Justice Tetley addressed a substantial portion of his decision to grounds of appeal that were not advanced by the Crown either in its factum or in oral argument. It is improper for the judge to inject new issues into the case without giving the parties the opportunity to argue their respective positions. By doing so, the judge improperly assumes the multi-faceted role of both advocate and judge, and loses the appearance of a neutral arbiter. In *R. v. Hamilton*, the Ontario Court of Appeal clarified the judge's role as follows:

> **"**….Usually, the parties are the active participants in the process and the judge serves as a neutral, passive arbiter. Generally speaking, it is left to the parties to choose the issues, stake out their positions, and decide what evidence to present in support of those positions. The trial judge's role is to listen, clarify where necessary, and ultimately evaluate the merits of the competing cases presented by the parties….
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> **"**Judges must be very careful before introducing issues into the sentencing proceeding….
>
> **"**It is also important that the trial judge limit the scope of his or her intervention into the role traditionally left to counsel.[9]"

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9 *R. v. Hamilton*, [2004] O.J. No. 3252, at paras. 7, 33, 63-65, 67-72

46. Where a judge does his own research after the parties have already argued the case, and then forms his conclusions on the basis of his own findings without giving the parties the opportunity to respond, it is an error in law.[10]

(b) Were the contracts between Michael Schmidt and the cow-share holders shams, or valid contracts of agistment?

47. Justice Tetley concluded in paragraph 51 of his decision that the contract between Michael Schmidt and the cow-share members was "in reality" something other than it purported to be: in effect, a sham contract.

48. The leading case on sham contracts is the 1967 English case of *Snook v. London and West Riding Investments Ltd.*, where Lord Diplock wrote as follows:

> "I apprehend that, if it ["sham"] has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the Court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* and *Stoneleigh Finance Ltd. v. Phillips*) that for acts or documents to be a 'sham', with whatever legal consequences follow from this, **all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating**." [emphasis added][11]

49. The Supreme Court of Canada has accepted the *Snook* definition of "sham" as correct in at least two cases: *Stubart Investments Ltd. v. Canada*, and *Minister of National Revenue v. Cameron.*[12]

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10 *R. v. Paul*, [1998] N.B.J. No. 126, at paras. 22 and 24

11 *Snook v. London and West Riding Investments Ltd.*, [1967] 2 Q.B. 786, at page 802

12 *Stubart Investments Ltd. v. Canada,* [1984] 1 S.C.R. 536 (highlighted at pp. 3, 4, and 23 of printed version in Applicant's Book of Authorities);
Minister of National Revenue v. Cameron [1974] S.C.R. 1062 (highlighted at pp. 5 and 6 of printed version in Applicant's Book of Authorities).

50. The *Snook* definition of "sham" contract was applied by the B.C. Supreme Court in *B.C. (Milk Marketing Board) v. Bari Cheese Ltd*.[13], which in turn was approved by the B.C. Court of Appeal. In that case, the defendant Bari Cheese Ltd. had contracted with 34 farmers to act as their agent in processing milk into cheese and selling the cheese outside the province on their behalf. The B.C. Milk Marketing Board alleged that the contracts were "shams" and that the farmers were actually selling milk to Bari, who was in turn re-selling it within British Columbia. If the Marketing Board's allegation were correct, the farmers would have had to pay (and Bari should have withheld from them) substantial levies to the Milk Marketing Board. The court found "a great deal of ignorance and confusion" among the farmers about many aspects of their agreements with Bari. Although Bari failed to comply with several terms of the agreement, many of the farmers simply assumed that Bari was complying, or else did not care whether or not Bari was complying. However, there was no proof that the parties on both sides of the contracts had signed them without intending the terms of the contracts to govern, or that they had actually intended something different. Accordingly, the contracts were not shams. Even though lack of sophistication, ignorance and indifference as to the terms of the contract were proven, these were insufficient to prove fraud or to make the contracts "shams".

51. English common law has long recognized contracts of *agistment*: namely, contracts under which the owners of livestock arrange for the care and boarding of their animals by another individual (the "agister") on the agister's land. The manner of

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13 *British Columbia (Milk Marketing Board) v. Bari Cheese Ltd*. [1993] B.C.J. No. 1748 **(B.C.S.C.)**; [1996] B.C.J. No. 1789 **(B.C.C.A.)**, at paras. 71 to 79.

paying for services of the agister varies from one contract to another. Canadian courts have recognized and enforced contracts of agistment; see, for example, the cases of Macleod v. Brown[14], Langstock (Med. Hat) Ltd. v. Gyorfi[15], and Deeg v. Jacques.[16]

52. All of the evidence regarding the nature of the cow-sharing contract in the case at bar (both from Michael Schmidt and from cow-share member Eric Bryant) was consistent with the existence of a contract of agistment. There was no evidence that the parties to the contract intended to give an appearance of having created legal rights or obligations different from the actual rights or obligations under their agistment contract. Therefore, there was no basis on which Justice Tetley could validly conclude that the contact was something different than what it purported to be.

(c) What is the meaning of the word "distribute" in the *Health Protection and Promotion Act*?

53. According to Sullivan on the Construction of Statutes[17]:

> "Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. The governing principles was stated by Lord Mansfield in *R. v. Loxdale*:
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> "Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other."

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14 *Macleod v. Brown*, [1947] A.J. No. 4, at paras. 9 and 11
15 *Langstock (Med. Hat) Ltd. v. Gyorfi*, [2006] A.J. No. 1706, at paras. 2 and 8
16 *Deeg v. Jacques*, 2008 SKQB 68, at paras. 7, 35 and 36
17 Ruth Sullivan, *Sullivan on the Construction of Statutes, Fifth Edition*, (LexisNexis Canada Inc., 2008), at page 412

54. Section 18 of the *Health Protection and Promotion Act* makes it illegal to "distribute" unpasteurized milk, without defining the word "distribute" or any related word. However, the word "distributor" is defined in the *Milk Act*, and the two statutes are *in pari materia* with each other. Indeed, section 18 of the *HPPA* refers to the *Milk Act*.

55. At trial, Michael Schmidt was acquitted of being a "distributor" without a licence under the *Milk Act*. The Crown elected not to appeal that acquittal.

56. The applicant submits that he could not have been found to be a "distributor" under the *Milk Act* pursuant to the following chain of definitions:

(a) "distributor" means a person engaged in selling or distributing fluid milk products directly or indirectly to consumers; (*Milk Act*, section 1)

(b) "fluid milk products" means the classes of milk and milk products processed from Grade A milk and designated as fluid milk products in the regulations; (*Milk Act*, section 1)

(c) "Grade A milk" means milk designated as Grade A milk in the regulations; (*Milk Act*, section 1)

(d) "Milk that complies with and is produced and stored in compliance with Regulation 761 of the Revised Regulations of Ontario, 1990 is designated as Grade A milk." R.R.O. 1990, Reg. 753, s. 2 (1).

57. In other words, it would have to be proven that the applicant complied with Regulation 761 in order for him to be a "distributor" within the *Milk Act* or to have "distributed" within the *HPPA,* since those statutes are *in pari materia* with each other.

58. According to Black's Law Dictionary, the word "distributor" means:

> "A wholesaler, jobber, or other manufacturer or supplier that sells chiefly to retailers and commercial users."[18]

59. Justice of the Peace Kowarsky concluded at trial (M.R. Tab 4, at paragraphs 121-122) (correctly, the applicant submits) that the prohibitions on distribution in section 18 of the *HPPA* were intended by the legislature to apply to public, commercial enterprises, and not to private arrangements such as the applicant's. If the word "distribute" were interpreted as Justice Tetley did on appeal, to include a single instance of raw milk being handed to an individual, it would catch many instances of such actions which the legislature surely could not have intended to include: for instance, where a cow is co-owned by two persons and one of them hands a glass of raw milk to the other. Since the application of "distribute" must necessarily be restricted in order to avoid this obvious mis-application, the appropriate place along the continuum of possible interpretations is the dividing line between public, commercial enterprises and private co-ownership arrangements such as the applicant's.

(d) What is the meaning of the word "plant" in the *Milk Act*?

60. The *Milk Act* prohibits operating a "plant" without a licence, and defines "plant" as "a cream transfer station, a milk transfer station or premises in which milk or cream or milk products are processed."

61. The *Milk Act* then defines "processing" as follows:

> "heating, pasteurizing, evaporation, drying, churning, freezing, packaging, packing, separating into component parts, combining with other substances by

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[18] *Black's Law Dictionary, Seventh Edition,* 1999 (West Group, St. Paul, Minnesota), at page 488, s.v. "distributor"

any process or otherwise treating milk or cream or milk products in the manufacture or preparation of milk products or fluid milk products;"

62. The foregoing definitions, if interpreted broadly, would make a "milk plant" out of the households of every mother who warms store-bought milk for her baby's bottle, or every person who makes yogurt, ice-cream or a latté with small kitchen appliances. The definition of "plant" must therefore necessarily be given a restrictive interpretation in order to make sense. Again, the appropriate dividing line would seem to be that between public, commercial enterprises and private arrangements.

63. In *Construction of Statutes*, author Sullivan writes:

> "…for legislation drafted in general terms, a purposeful interpretation often requires a restrictive interpretation—one in which the scope of the general language is narrowed so as to exclude applications that are outside the purpose.
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> "The legislative direction [in the *Interpretation Act*, for instance] to interpret *all* legislation as remedial is also unfortunate in so far as it suggests that courts should no longer rely on the values underlying strict construction—the enjoyment of individual liberty, privacy, property rights and the like. While these are not the only values worth protecting, they remain an important part of Canadian legal culture. Legislation that invades privacy or takes away rights should be interpreted strictly—unless other, more compelling considerations suggest otherwise."[19]

(e) Did Justice Tetley err in applying the wrong test for standing?

64. Justice Tetley ruled at paragraphs 81-82 of his decision that Michael Schmidt has no standing to advance charter claims for individuals other than himself. However, Justice Tetley applied a test for *public interest standing*, but that test applies only where litigants commence civil actions for declarations regarding the

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[19] Sullivan, *op. cit. (supra,* note 17) at page 469.

constitutionality of legislation. It does not apply where individuals are brpight before the courts defending themselves against criminal or regulatory charges.

65. The law is clear that where an individual faces either criminal or regulatory prosecution and does not come to court of his own volition, but because he has been compelled to face charges brought by the state, he has standing to make constitutional arguments against the validity of the legislation even if the constitutional rights upon which he relies are those of persons other than himself.

66. According to Chief Justice Dickson of the Supreme Court of Canada:

> **"**Section 52 [of the *Charter*] sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfill the status requirements laid down by this Court in the trilogy of "standing" cases (*Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575) but that was not the reason for its appearance in Court.
>
> **"**Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid."[20]

67. This applies likewise to individuals charged with regulatory offences who are before the court involuntarily.[21]

68. *R. v. Morgentaler*[22] is an example of a case in which the *Charter* rights of one group of individuals (i.e., pregnant women desiring abortions) gave a different group of individuals (three male physicians) standing to contest the validity of the law, and

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20 *Big M, supra* note 8, at paras. 38-39
21 *Canadian Egg Marketing*, *supra* note 8
22 *R v. Morgentaler,* [1988] 1 S.C.R. 30

the right to a constitutional remedy—namely, a declaration that the law was *ultra vires* and an acquittal on criminal charges.

69. In *R. v. Wholesale Travel Group Inc.*[23], a corporation charged with false advertising under the *Competition Act* was held to have standing to challenge the constitutionality of the statute even though it was the constitutional rights of natural persons, not of the accused corporation, that were relied upon in making the argument of unconstitutionality.

(f) Does section 7 of the *Charter* give consumers the right to determine what foods they put into their bodies?

70. The right to security of the person under section 7 of the *Charter* includes the right of individuals to make decisions pertaining to their own bodies and their own health. For instance, in the *Rodriguez* case, La Forest J. said on behalf of the majority of the Supreme Court of Canada:

> In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, Lamer J. also expressed this view, stating at p. 1177 that "[s]ection 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.[24]

71. This was echoed by McLachlin J. (as she then was) in the dissenting decision:

> It is established that s. 7 of the *Charter* protects the right of each person to make decisions concerning his or her body: *Morgentaler*, *supra*. This flows from the fact that decisions about one's body involve "security of the person" which s. 7 safeguards against state interference which is not in accordance with the principles of fundamental justice. Security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body. This

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23 *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, at paras. 21, 24, 25, 29

24 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at para. 136

> is in accordance with the fact, alluded to by McEachern C.J.B.C. below, that "s. 7 was enacted for the purpose of ensuring human dignity and individual control, so long as it harms no one else."[25]

72. At common law, preceding the *Charter*, there was a right to bodily integrity and personal autonomy. Even where the state disagrees with the health regimen chosen by an individual, and even when the individual's choice is generally regarded as foolhardy, the principles of self-determination and individual autonomy override the state's interest in the preservation of life and health. Thus, for instance, in *Malette v. Shulman*, it was held that members of the Jehovah's Witness faith are entitled to reject blood transfusions notwithstanding the doctor's belief that the decision was contrary to the individual's best interests.[26]

73. In *Fleming v. Reid*, the Ontario Court of Appeal held that the common-law right to control what happens to one's body is co-extensive with the *Charter* right to security of the person:

> The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s. 7. Indeed, in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.[27]

74. The *Fleming v. Reid* case involved the right of individuals to refuse psychiatric drugs recommended by their doctors. The court stressed that "informed consent" must be respected, even if serious risks may result to the individual who is refusing to accept the opinions of experts:

> The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our

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25 *Ibid*., at para. 200

26 *Malette v. Shulman*, [1990] O.J. No. 450 (Ontario C.A.)

27 *Fleming v. Reid,* [1991] O.J. No. 1083, at para. 39

> common law. This right underlies the doctrine of informed consent. With very limited exceptions, every person's body is considered inviolate, and, accordingly, every competent adult has the right to be free from unwanted medical treatment. The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self- determination. The doctrine of informed consent ensures the freedom of individuals to make choices about their medical care. It is the patient, not the doctor, who ultimately must decide if treatment -- any treatment -- is to be administered.[28]

75. The *Fleming v. Reid* court also noted:

> "The right to personal security is guaranteed as fundamental in our society. Manifestly, it should not be infringed any more than is clearly necessary. ...To completely strip these patients of the freedom to determine for themselves what shall be done with their bodies cannot be considered a minimal impairment of their *Charter* rights."[29]

76. The Ontario Court of Appeal also held in *R. v. Parker* that the right to use marijuana for medicinal reasons is protected as part of liberty and security of the person, despite the general illegality of marijuana.[30]

77. In *Canada (Attorney General) v. PHS Community Services Society*[31] (the Insite safe drug injection case), the Supreme Court of Canada recognized that the section 7 right of security of the person was engaged when drug users sought to continue injecting illegal drugs into themselves. For the clients of Insite, the continued consumption of substances generally considered dangerous to human health was actually more healthful than other alternatives. The particular circumstances and physical needs of some individuals can give them the constitutional right to consume substances generally prohibited by law as dangerous.

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28 *Ibid*., at para. 31
29 *Ibid*., at para. 60
30 *R. v. Parker,* [2000] O.J. No. 2787, at paras. 102, 104, 110 and 111
31 *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, at para. 92

78. It is a well-recognized principle of fundamental justice that laws must not be arbitrary. To avoid being arbitrary, any limitation on life, liberty or security of the person requires not only a theoretical connection to the legislative goal, but a real connection on the facts.[32] While there is theoretically the possibility that some individuals may become ill from drinking unpasteurized milk, the evidence in this case is that nobody ever has, and that some people believe it has improved their health.

79. Furthermore, the law on what constitutes "arbitrariness" as a principle of fundamental justice is itself unsettled, as the Supreme Court of Canada said in the Insite case.[33]

80. Another well-recognized principle of fundamental justice is that laws must not be overbroad or disproportionate. If the state, in pursuing a legitimate objective, uses means that are broader than necessary to accomplish its objective, the individual's rights are limited for no good reason.[34] In this case, s. 18 of the *HPPA* prohibits the sale of both raw milk that is unfit to drink and raw milk that is perfectly safe to drink. Section 18 is overbroad, since s. 17 of the *HPPA* already prohibits the sale of "any food that is unfit for human consumption by reason of disease, adulteration, impurity or other cause."

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32 *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35 at paras. 129 and 131.

33 *Canada (Attorney General) v. PHS Community Services Society*, see footnote 31 *supra*, at par. 132

34 *R. v. Heywood,* [1994] 3 S.C.R. 761, at par. 49

(g) Is the applicant's liberty or security of the person under section 7 of the *Charter* infringed by the *HPPA* and/or the *Milk Act*?

81. The right to make decisions of fundamental personal importance without interference from the state falls within the scope of liberty and security of the person[35]. The applicant has demonstrated over his entire adult lifetime, and by the personal sacrifices he has made, that his commitment to the cow-sharing program as a means of connecting consumers and producers is of fundamental personal importance to him.

82. While Canadian courts have frequently expressed doubt that economic activities fall within the scope of section 7, they have never completely ruled out the possibility that in some circumstances, cases with an economic component should be considered to engage section 7 rights. The evidence demonstrates that profit was not a significant motivating factor for the applicant's actions; rather, his campaign to empower consumers to acquire raw milk is philosophically and altruistically motivated.

83. In light of the applicant's determination that he would rather go to jail than concede guilt by paying the fine imposed on him, there is a realistic possibility that his liberty rights under s. 7 will be engaged by his imprisonment under subsection 69(14) of the *Provincial Offences Act*.

84. Although the Attorney General may argue that the law is "settled" that there is no constitutional right to distribute raw milk, the trial record contains hundreds of pages of Crown expert witness affidavits and testimony intended to demonstrate that raw milk is dangerous to the public. This evidence was clearly intended to

35 *R. v. Morgentaler*, *supra* note 22, at par. 230

address section 1 of the *Charter*, and would not have been required had the Attorney General genuinely believed that there was no possibility of the court finding that section 7 was engaged.

85. The law is constantly changing, and even the Supreme Court of Canada has demonstrated that established legal doctrines which no longer make sense should be reversed. Professor Adam Dodek of the University of Ottawa Faculty of Law, in a paper delivered at a 2009 Canadian Bar Association conference, wrote as follows of this phenomenon:

> "In recent years, the McLachlin Court has demonstrated surprising willingness to revisit established constitutional precedents. In 2008 it tossed aside *Law's* complicated and confusing dignity test in *R. v. Kapp* and returned to the *Andrews* framework. In 2007, it abandoned the common law bar to recovery for *ultra vires* taxes in *Kingstreet Investments*. Then *in Canadian Western Bank v. Alberta*, it reversed course on the longstanding doctrine of inter-jurisdictional immunity. And in *R. v. Hape*, the court repudiated its earlier jurisprudence on the extra-territorial application of the *Charter* and severely restricted the circumstances in which the *Charter* will have effect on foreign soil. Perhaps the most dramatic decision that year was *B.C. Health Services* where the Court explicitly overruled certain aspects of the 1987 Labour Trilogy and held that the right to bargain collectively is guaranteed by section 2(d) of the *Charter*. All of this is to say that at this point in time, the Supreme Court of Canada has demonstrated an openness to revisiting constitutional doctrines.[36]

86. The applicant submits that the process by which Canada's courts have narrowly circumscribed the meaning of "liberty" in section 7 of the *Charter* has been irrational, contrary to the expectations of the drafters of the *Charter*, and harmful to Canadian society. The applicant submits that the courts should reconsider the scope of "liberty" under the *Charter*, recognizing as Justice Bertha Wilson did in

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[36] Adam M. Dodek, "Where Did Section 1 Come From?" (paper presented at the 8th Annual Charter Conference of the Ontario Bar Association, September 18, 2009) [unpublished]

1985 that "all regulatory offences impose some restriction on liberty broadly construed."[37] However, contrary to Justice Wilson's views, the place where the balancing should take place is under section 1.

(h) Was the sentence imposed appropriate for an individual in the applicant's financial circumstances?

87. It is an error in principle to impose a fine which the defendant lacks the ability to pay within a reasonable time. There must be "clear evidence" that means exist or will exist out of which a fine can be paid within a reasonable period of time after sentence has been imposed.[38] There was no evidence whatsoever in this case that the applicant would be able to pay the fine imposed.

(iii) Public Interest, Due Administration of Justice

88. When there are many individuals affected by the issues at stake in a proposed appeal, it is in the public interest that leave to appeal be granted.[39]

89. When a defendant has not been afforded due process and a miscarriage of justice would otherwise arise, it is essential for the due administration of justice that leave to appeal be granted.[40]

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37 *Reference re Motor Vehicle Act (British Columbia) S. 94(2),* [1985] 2 S.C.R. 486, at para. 105

38 *R. v. DiGiuseppe,* 2008 ONCJ 127 at para. 32

39 *Krukowski*, *supra* note 1, at para. 11

40 *Harry*, *supra* note 7

PART IV – ORDER REQUESTED

90. The applicant requests an order granting leave to appeal from the judgments of the Honourable Justice Peter Tetley rendered on September 28, 2011 and November 25, 2011 on the grounds of appeal enumerated in paragraph 44 above.

All of which is respectfully submitted

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Karen Selick, solicitor for the applicant

June 6, 2012

SCHEDULE A – AUTHORITIES TO BE CITED

R. v. Krukowski, [1991] O.J. No. 255

R. v. Sheehan, [2011] O.J. No. 901

R. v. Cranbrook Swine Inc., [2001] O.J. No. 4256

R. v. Rankin, [2007] O.J. No. 719

R. v. Hy and Zel's Inc., [2003] O.J. No. 10

Memorial Gardens Ontario Ltd. v. Ontario, [1991] O.J. No. 257

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R. v. Harry, [1998] O.J. No. 2569

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295

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R. v. Hamilton, [2004] O.J. No. 3252

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Minister of National Revenue v. Cameron [1974] S.C.R. 1062

British Columbia (Milk Marketing Board) v. Bari Cheese Ltd. [1993] B.C.J. No. 1748 (B.C.S.C.); [1996] B.C.J. No. 1789 (B.C.C.A.)

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Adam M. Dodek, "Where Did Section 1 Come From?", a paper delivered at the 8th Annual Charter Conference of the Ontario Bar Association on September 18, 2009

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R. v. DiGiuseppe, 2008 ONCJ 127

SCHEDULE B – RELEVANT LEGISLATIVE PROVISIONS

PROVINCIAL OFFENCES ACT, R.S.O. 1990, chapter P.33 (extracts)

Default

69. (1) The payment of a fine is in default if any part of it is due and unpaid for fifteen days or more.

(subsections 69(2) through 69(5) omitted)

Obtaining convicted person's attendance

(6) A justice may issue a warrant requiring that a person who has defaulted be arrested and brought before a justice as soon as possible if other reasonable methods of collecting the fine have been tried and have failed, or would not appear to be likely to result in payment within a reasonable period of time.

Alternative summons procedure

(7) The clerk of the court that imposed the fine that is in default may issue a summons requiring the person who has defaulted to appear before a justice if the conditions described in subsection (6) exist.

Service of summons

(8) The summons referred to in subsection (7) may be served by regular prepaid mail.

Hearing

(9) If a person who has defaulted in paying a fine is brought before a justice as a result of a warrant issued under subsection (6) or such a person appears before a justice as a result of a summons issued under subsection (7), the justice shall hold a hearing to determine whether the person is unable to pay the fine within a reasonable period of time.

Onus

(10) In a hearing under subsection (9), the onus of proving that the person is unable to pay the fine within a reasonable period of time is on the person who has defaulted.

Adjournment

(11) The justice may adjourn the hearing from time to time at the request of the person who has defaulted.

Warning

(12) When an adjournment is granted, the justice shall warn the person who has defaulted that if the person fails to appear for the resumption of the hearing, the hearing may proceed in the person's absence.

Failure to warn

(13) If a hearing was adjourned and the person who has defaulted does not appear when it is resumed, the hearing may proceed in the person's absence even if the warning required by subsection (12) was not given.

Warrant of committal

(14) If the justice is not satisfied that the person who has defaulted is unable to pay the fine within a reasonable period of time and that incarceration of the person would not be contrary to the public interest, the justice may issue a warrant for the person's committal or may order that such other steps be taken to enforce the fine as appear to him or her to be appropriate.

Inability to pay fine

(15) If the justice is satisfied that the person who has defaulted is unable to pay the fine within a reasonable period of time, the justice may,
(a) grant an extension of the time allowed for payment of the fine;
(b) require the person to pay the fine according to a schedule of payments established by the justice;
(c) in exceptional circumstances, reduce the amount of the fine or order that the fine does not have to be paid.

Term of imprisonment

(16) Subject to subsection (17), the term of imprisonment under a warrant issued under subsection (14) shall be for three days, plus,
(a) if the amount that has not been paid is not greater than $50, one day; or
(b) if the amount that has not been paid is greater than $50, a number of days equal to the sum of one plus the number obtained when the unpaid amount is divided by $50, rounded down to the nearest whole number.

Limit

(17) The term of imprisonment shall not exceed the greater of,
(a) ninety days; and
(b) half of the maximum number of days of imprisonment that may be imposed on conviction of the offence that the person who has defaulted was convicted of.

Effect of payments

(18) Subject to subsection (19), a payment in respect of the fine in default that is made after a warrant is issued under subsection (14) shall result in a reduction of the term of imprisonment by the number of days that is in the same proportion to the term as the payment is to the amount in default.

Restriction

(19) A payment that is less than the amount outstanding on the fine shall not result in a reduction of the term of imprisonment unless it is an amount that would reduce the term by a number of days that is a whole number.

Exceptions

(20) Subsections (6) to (19) do not apply if,
(a) the person who has defaulted is less than eighteen years old; or
(b) the fine was imposed on conviction of an offence under subsection 31 (2) or (4) of the *Liquor Licence Act*.

Exceptional circumstances

(21) In exceptional circumstances where, in the opinion of the court that imposed the fine, to proceed under subsections (6) to (14) would defeat the ends of justice, the court may order that no warrant be issued under subsection (6) and that no summons be issued under subsection (7).

Appeal to Court of Appeal

131. (1) A defendant or the prosecutor or the Attorney General by way of intervention may appeal from the judgment of the court to the Court of Appeal, with leave of a judge of the Court of Appeal on special grounds, upon any question of law alone or as to sentence.

Grounds for leave

(2) No leave to appeal shall be granted under subsection (1) unless the judge of the Court of Appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.

Appeal as to leave

(3) No appeal or review lies from a decision on a motion for leave to appeal under subsection (1). R.S.O. 1990, c. P.33, s. 131.

HEALTH PROTECTION AND PROMOTION ACT, R.S.O. 1990, chapter H.17 (Extracts)

Interpretation
1. (1) In this Act,

"milk" means milk from cows, goats or sheep;

Purpose

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.

Sale of diseased food

17. No person shall sell or offer for sale any food that is unfit for human consumption by reason of disease, adulteration, impurity or other cause.

Unpasteurized or unsterilized milk

18. (1) No person shall sell, offer for sale, deliver or distribute milk or cream that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*.

Milk products

(2) No person shall sell, offer for sale, deliver or distribute a milk product processed or derived from milk that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*.

Exception

(3) Subsection (1) does not apply in respect of milk or cream that is sold, offered for sale, delivered or distributed to a plant licensed under the *Milk Act*.

Definition

(4) In subsection (2),
"milk product" means a product processed or derived in whole or mainly from milk.

Offence, orders

100. (1) Any person who fails to obey an order made under this Act is guilty of an offence.

Offence, specified provisions

(3) Any person who contravenes section 16, 17, 18, 20, 39 or 40, subsection 41 (9), 42 (1), 72 (5), (7) or (8), clause 77.1 (3) (b), subsection 77.3 (3) or 77.5 (6), section 77.7, subsection 82 (13), (14), (15), (16) or (17), 83 (3) or 84 (2) or section 105 is guilty of an offence.

Offence, regulations

(4) Any person who contravenes a regulation is guilty of an offence.

Penalty

101. (1) Every person who is guilty of an offence under this Act is liable on conviction to a fine of not more than $5,000 for every day or part of a day on which the offence occurs or continues.

MILK ACT, R.S.O. 1990, chapter M.12 (extracts)

Definitions

1. In this Act,

"cream transfer station" means premises at which cream is received for the purpose of being transported to a plant for processing;

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

"distributor" means a person engaged in selling or distributing fluid milk products directly or indirectly to consumers;

"fluid milk products" means the classes of milk and milk products processed from Grade A milk and designated as fluid milk products in the regulations;

"Grade A milk" means milk designated as Grade A milk in the regulations;

"licence" means a licence provided for under this Act or the regulations;

"marketing" includes advertising, assembling, buying, distributing, financing, offering for sale, packing, processing, selling, shipping, storing and transporting and "market" and "marketed" have corresponding meanings;

"milk" means milk from cows or goats;

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

"milk transfer station" means premises at which milk is received for the purpose of being transported to a plant for processing;

"Minister" means the Minister of Agriculture, Food and Rural Affairs;

"plant" means a cream transfer station, a milk transfer station or premises in which milk or cream or milk products are processed;

"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;

"processor" means a person engaged in the processing of milk products or fluid milk products;

"producer" means a producer of milk, cream or cheese;

"regulations" means the regulations made under this Act;

"transporter" means a person transporting milk or cream;

Purpose of Act

2. The purpose and intent of this Act is,

(a) to stimulate, increase and improve the producing of milk within Ontario;

(b) to provide for the control and regulation in any or all respects of the producing or marketing within Ontario of milk, cream or cheese, or any combination thereof, including the prohibition of such producing or marketing in whole or in part; and

(c) to provide for the control and regulation in any or all respects of the quality of milk, milk products and fluid milk products within Ontario.

Licences

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

Offences

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

Rebuttable presumption

25. In any prosecution for an offence under this Act, the act or omission of an act, in respect of which the prosecution was instituted, shall be deemed to relate to the marketing within Ontario of milk, cream or cheese, or any combination thereof, unless the contrary is proven. R.S.O. 1990, c. M.12, s. 25.

R.R.O. 1990, REGULATION 753, made under the MILK ACT (extracts)

GRADES, STANDARDS, DESIGNATIONS, CLASSES, PACKING AND MARKING

2. (1) Milk that complies with and is produced and stored in compliance with Regulation 761 of the Revised Regulations of Ontario, 1990 is designated as Grade A milk.

R.R.O. 1990, REGULATION 761, made under the MILK ACT (extracts)

MILK AND MILK PRODUCTS

Duties and Powers of Fieldpersons

2. (1) A fieldperson shall inspect premises on which milk or cream is produced and shall make a report of the inspection in triplicate.

12. (1) Every producer of milk shall provide a milk house attached to or adjacent to buildings where animals are milked.

(3) Every milk house shall,
(a)…
(o) subject to clause 12 (7) (f), be provided with a milk hose transfer-port that shall be,
(i) located near the outlet valve on each farm bulk tank,
(ii) maintained in good condition,
(iii) equipped with a self-closing device, and
(iv) used only for the passage of hose in the transfer of milk from a farm bulk tank to the tank-truck.

(7) A producer of cow's milk may have two farm bulk tanks if,
(a) …
(f) each tank is situated in the milk house so that its milk can be transferred to the tank-truck by the bulk tank grader on one stop using a standard tank-truck hose; and
(g) there are two milk-house transfer ports in the milk house if two ports are necessary to permit the milk in both tanks to be transferred to the tank truck on one stop using a standard hose.

15. (2) Every milk house in which a farm bulk tank is located shall,

(a) be equipped with a properly grounded electrical outlet providing a service of 220 volts and having a capacity of 15 amperes to operate the tank-truck pump; and

(b) except for a farm bulk tank that is designed to extend through the wall and beyond the perimeter of the milk house, have at least 60 centimetres clear space between the tank and another farm bulk tank, a wall or a permanent fixture or device.

34.1 (1) This section applies to every producer of cow's milk.

(2) Every producer shall install and maintain as many time temperature recorders as necessary to monitor the farm bulk tanks and pipelines that the producer uses for cow's milk and the sinks that the producer uses for cleaning milking equipment used for cow's milk in accordance with this Regulation.

Court File No.: **M40828**

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

(Respondent on the motion
for leave to appeal)

-and-

MICHAEL SCHMIDT

(Applicant on the motion
for leave to appeal)

RESPONDENT'S FACTUM

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PART I – STATEMENT OF THE CASE

1. The Applicant seeks leave to appeal from his convictions for selling and distributing unpasteurized milk and milk products and operating a milk plant without a license. The Applicant admits that none of the milk or milk products at issue in this litigation were pasteurized or sterilized as required under ss. 18(1) and 18(2) of the *Health Protection and Promotion Act* and that he does not have a license as required under s. 15(1) of the *Milk Act*.

2. The issue on this motion is whether leave to appeal should be granted. Ontario submits that it should not. The statutory interpretation issues in this case are straightforward, and the *Charter* claim is without merit. Accordingly, the proposed appeal does not raise issues of public importance and it is not essential in the public interest or to the administration of justice that leave be granted.

PART II – SUMMARY OF THE FACTS

A. The statutory scheme

3. The Applicant was convicted of offences under the *Health Protection and Promotion Act* ("*HPPA*") and the *Milk Act*, statutes that regulate the safety and quality of milk and milk products in Ontario.

> ***Health Protection and Promotion Act*, R.S.O. 1990, c. H.7; *Milk Act*, R.S.O. 1990, c. M. 12**

4. The purpose of the *HPPA* 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.

***HPPA*, s. 2**

5. The purpose of the *Milk Act* is: (a) to stimulate, increase and improve the producing of milk within Ontario; (b) to provide for the control and regulation in any or all respects of the producing or marketing within Ontario of milk, cream or cheese, or any combination thereof, including the prohibition of such producing or marketing in whole or in part; and (c) to provide for the control and regulation in any or all respects of the quality of milk, milk products and fluid milk products within Ontario.

***Milk Act*, s. 2**

6. Sections 18(1) and (2) of the *HPPA* prohibit the sale and distribution in Ontario of unpasteurized milk and cream and unpasteurized cheese that has not been aged for at least sixty days to reduce the risks to human health.

***HPPA*, s. 2, 18;**

R.R.O. 1990, Reg. 562, s. 45

Affidavit of Dr. Mansel William Griffiths sworn January 14, 2009 [Griffiths Affidavit], Respondent's Record [RR], Tab 1 at pp. 42-43, ¶¶110-111; Examination-in-Chief of Dr. Mansel William Griffiths [Griffiths Examination], Applicant's Motion Record [MR], Vol. 2, Tab 19 at p. 110

7. Section 15 of the *Milk Act* provides that no person shall operate a plant that processes milk or milk products or carry on business as a distributor without a license from the Director. The licensing requirement, together with other aspects of the *Milk Act* such as the inspection provisions, are designed to monitor milk production, transport, processing and distribution so that milk and milk products marketed in the province are

of a high quality and that the risk of foodborne disease associated with the consumption of milk products is minimized.

***Milk Act*, s. 15**

8. The prohibition on the sale and distribution of unpasteurized milk and unpasteurized milk products in the *HPPA*, and the prohibition on the operation of a plant without a license in the *Milk Act*, work together to promote the safety and quality of milk and milk products in Ontario.

9. It is an offence to contravene the *Milk Act* or s. 18 of the *HPPA*. Offences are punishable by the imposition of fines, not imprisonment. Where charges are laid by information under the *HPPA* or the *Milk Act*, the court may impose a probation order under s. 72 of the *Provincial Offences Act*. The probation order must contain the requirements that the defendant (i) not commit the same or a similar offence, (ii) appear before the court as required, and (iii) notify the court of any change in address. The Court may also require the defendant to report to a designated person where it is necessary for the purpose of implementing the conditions of the probation order.

***HPPA*, ss. 100(1), (3)**
***Milk Act*, s. 21**
***Provincial Offences Act*, R.S.O. 1990, c. P.33, ss. 72(1), (2), (3) [*POA*]**

B. The facts relevant to the leave application

10. The Respondent does not accept the facts as they have been characterized in the Applicant's factum. In any event, many of the facts included in the Applicant's factum are irrelevant to the leave application.

11. The Respondent submits that the following facts are relevant to the question of whether leave to appeal should be granted.

(i) The Applicant sells and distributes unpasteurized milk

- The Applicant's business, Glencolton Farms, includes the operation of a dairy farm, which features a detached barn containing dairy equipment, refrigerated storage rooms and milking and processing areas;

Agreed Statement of Facts, MR, Vol. 2, Tab 21 at ¶¶2-3; Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶7

- The Applicant admits that there was no pasteurization or sterilization of any of the milk or milk products at issue in this proceeding;

Agreed Statement of Facts, MR, Vol. 2, Tab 21 at ¶¶4, 8; Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶16

- The Applicant admits that he does not have a license under the *Milk Act* to operate a milk plant;

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶17, 19

- The Applicant sells what he calls "cow share memberships" for the sum of $300, $600 or $1200. He had sold 150 such memberships at the time of trial. There is no dispute that the Applicant regularly provides unpasteurized milk and cheese to cow share members for a fee;

Agreed Statement of Facts (Appendix C), MR, Vol. 2, Tab 24; Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶10, 17, 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". There is "no evidence that the cow-share members were involved in

the purchase of the cows in the herd, their subsequent sale or replacement or the management of the herd or the distribution of the milk product." Legal title appears to remain with the Applicant;

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶51

- The Applicant's cow share notices describe cow share members as customers of Glencolton Farms, who buy a range of products including unpasteurized milk and cheese;

Agreed Statement of Facts (Appendices C-D), MR, Vol. 2, Tabs 24-25

- The Applicant charges cow share members a fee to purchase unpasteurized milk and cheese both at his farm and from the "Blue Bus", which he uses to transport unpasteurized milk and milk products from his farm to customers in the greater Toronto area;

Agreed Statement of Facts (Appendices C-F), MR, Vol. 2, Tabs 24-27; Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶17, 23

- The Applicant has also provided unpasteurized milk and milk products from the farm and the "Blue Bus" to non-cow share members, including to the undercover officer Susan Atherton;

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶11, 21-22, 32

(ii) Unpasteurized milk poses a significant public health risk

- The scientific evidence at trial overwhelmingly supports the conclusion that unpasteurized milk represents a significant public health risk;

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶85

- The evidence of the Respondent's experts, Dr. Mansel Griffiths and Dr. Jeffrey Wilson, with respect to why unpasteurized milk poses a significant public health risk was that:
    - because it is practically impossible to eliminate pathogens from unpasteurized milk, outbreaks of foodborne illness from the consumption of unpasteurized milk continue to occur;
    - while outbreaks of illness have been linked to pasteurized milk and milk products, these outbreaks are commonly associated with either ineffective pasteurization or post-pasteurization contamination;
    - severe consequences can result from the contraction of foodborne illness transmitted by unpasteurized milk, including permanent disability or death;
    - children, pregnant women, the elderly and the immuno-compromised are particularly vulnerable;
    - people who drink unpasteurized milk can become ill or can become asymptomatic carriers of disease and transmit illness by person-to-person contact to non-drinkers of unpasteurized milk. Secondary transmission commonly occurs from food handlers, children attending daycare and within families;
    - good on-farm hygiene procedures are inadequate to control milkborne disease given the many possible sources of contamination of unpasteurized milk with pathogens, including bovine fecal shedding of pathogens (several potential human pathogens are naturally present in

the intestinal tract of even healthy cattle); infections within the bovine mammary gland (*i.e.*, mastitis); and contaminated feedstuffs, water, bedding, milking and storage equipment or bulk milk tank; and

- microbiological testing does not ensure the safety of unpasteurized milk because milk contamination occurs sporadically so it is difficult to develop reliable sampling strategies; contamination may not be evenly distributed in the milk; the numbers of organisms present in the milk may be below the numbers that can be detected by a particular method used but still be large enough to produce illness due to their low infectious dose; extremely low numbers of organisms that are below the limit of detection may be present in the product but can then grow to levels that are unacceptable after testing; and it is impossible to test for all the pathogens that may be present in the milk.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶76-77

Griffiths Affidavit, RR, Tab 1 at pp. 7-25, 29-48, 60, ¶¶8, 9, 16-68, 78-79, 80-85, 86-111, 112-115, 116-125, 147; Griffiths Examination, MR, Vol. 2, Tab 19 at pp. 85-90, 91-95; Cross-Examination of Dr. Mansel William Griffiths, MR, Tab 19 at pp. 120-21; Affidavit of Dr. Jeffrey Boyd Wilson sworn January 15, 2010, RR, Tab 2 at pp. 232-233, 234-241, 246-247, 253-275, 280-289, ¶¶11-13, 19-32, 33-38, 57-60, 77-104, 105-106, 120-141; Examination-in-Chief of Dr. Jeffrey Boyd Wilson, MR, Vol. 2, Tab 20 at pp. 12-14, 21-26, 27-30 34-35, 44-47

(iii) Admissions by the Applicant's witnesses

- The Applicant's witnesses, Dr. Theodore Beals and Dr. Ronald Hull, both acknowledged under cross-examination that:
    - there is a substantial volume of scientific literature documenting illness from the consumption of unpasteurized milk;

- pasteurization kills many of the pathogens that can cause illness and a substantial volume of scientific literature demonstrates that pasteurization is an effective method of reducing the risk to acceptable levels;
- the view that unpasteurized milk is a safe food is the minority view; and
- there is no contemporary peer-reviewed scientific literature to support the Applicant's theory that any distinction can be drawn between unpasteurized milk destined directly for consumers (*i.e.*, milk from his farm) and unpasteurized milk destined for pasteurization in terms of the presence of pathogens, and thus the risk to the public.

Examination-in-Chief of Dr. Ronald Robert Hull, MR Vol. 2, Tab 18 at pp. 31, 44; Cross-Examination of Dr. Ronald Robert Hull, MR Vol. 2, Tab 18 at pp. 50-51, 59-63; Re-Examination of Dr. Ronald Robert Hull, MR, Vol. 2, Tab 18 at pp. 69-70; Cross-Examination of Dr. Theodore F. Beals, MR, Vol. 2, Tab 17 at pp. 106-108, 110-111, 114-117, 124-25

C. The decisions below

(i) The trial decision

12. At trial, Kowarsky J.P. concluded that the prohibitions against selling and distributing unpasteurized milk and operating a milk plant without a license under the *HPPA* and the *Milk Act* did not apply to the Applicant. Kowarsky J.P. acknowledged that "[i]f I 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." Notwithstanding this observation, he went on to conclude that the *HPPA* and the *Milk Act* should be given a "restrictive interpretation" pursuant to which the meaning

of "public" and "people of Ontario" did not extend to or include "a small group of people who have come together by private agreement." Given his acquittal of the Applicant on the basis of this interpretation of the legislative scheme, it was not necessary for Kowarsky J.P. to determine the constitutional issue.

Kowarsky J.P. Reasons for Judgment, MR, Vol. 1, Tab 4 at ¶¶94, 96, 119, 121, 126, 145, 154

(ii) The appeal

13. On appeal, Tetley J. held that Kowarsky J.P. made several palpable and overriding errors that merited overturning the acquittals and entering convictions on the charges under s. 18 of the *HPPA* and s. 15 of the *Milk Act*. He found that Kowarsky J.P. failed to interpret "the legislative provisions consistently with the language of the sections in issue, the context in which the language is used and the express purpose of the legislation". More particularly, Kowarsky J.P.:

- did not give the legislation the broad interpretation it requires as public welfare legislation;
- did not afford appropriate consideration to the restrictions inherent in the *HPPA* according to their plain meaning; and
- did not adopt an interpretation consistent with the legislative aim of the *HPPA* and the *Milk Act*, instead imposing one that defeated their legislative purpose.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶66

14. Tetley J. concluded that, had Kowarsky J.P. appropriately applied the principles of statutory interpretation and the governing jurisprudence, the Applicant would

necessarily have been found guilty of the offences under ss. 18(1) and (2) of the *HPPA* and s. 15 of the *Milk Act*.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶66

15. Tetley J. dismissed the Applicant's s. 7 *Charter* challenge, holding that the Applicant had not established that his liberty or security of the person was engaged by the impugned provisions and that, in any event, it could not be concluded that the restriction on the sale and distribution of unpasteurized milk was either arbitrary or overbroad. In this regard, he noted that the "preponderance of scientific evidence" before the Court supported the conclusion 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." Tetley J. also dismissed the discrimination claim, holding that an "on-farm/off-farm distinction" is not an analogous ground under s. 15 of the *Charter*. Finally, Tetley J. dismissed a claim, which the Applicant has not advanced on the leave application, that the legislation infringed freedom of religion under s. 2(a) of the *Charter*.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶85, 90, 94-95, 98-100, 101-106, 107

16. The Applicant was convicted of ten counts of selling and distributing unpasteurized milk or milk products under ss. 18(1) and 18(2) of the *HPPA* and two counts of distributing unpasteurized milk products under s. 18(2) of the *HPPA*.[1] With respect to the convictions for distributing, Tetley J. found that while there was conflicting evidence with respect to whether the Applicant sold the unpasteurized cheese to an

[1] With respect to the first ten counts under the HPPA ss. 18(1) and (2), Tetley J. found that the act of "selling" the unpasteurized milk or cheese also encompassed the prohibited act of "distributing" (Tetley J. Reasons for Sentence, MR, Vol. 1, Tab 6 at ¶11). He stayed the convictions for distributing on the basis that "no one should be subject to double or multiple convictions for the same office, or punished twice for a singular offending act" (Tetley J. Reasons for Sentence, MR, Vol. 1, Tab 6 at ¶12).

undercover officer, his provision of the cheese to her fell within the meaning of distribution.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶66, 114-115

17. Tetley J. imposed a fine of $5000 in relation to the s. 15(1) *Milk Act* offence and fines totalling $4150 in relation to the sale and distribution charges under *HPPA* ss. 18(1) and (2). He also imposed a one-year probation order, during which time the Applicant is not to commit any further offences, to appear before court when required and to notify the court of any change in address.

Tetley J. Reasons for Sentence, MR, Vol. 1, Tab 6 at ¶¶29, 33

PART III – ISSUES AND LAW

A. The test for leave to appeal

18. The issue on this motion is whether it is essential in the public interest or for the due administration of justice to grant leave to appeal under s. 131 of the *Provincial Offences Act*. The Respondent submits that it is not.

***POA*, ss. 131(1), (2)**
***Ontario (Ministry of Labour) v. Dofasco Inc.* [2005] O.J. No. 3852 at ¶3 (C.A.) [*Dofasco*], Respondent's Book of Authorities [BOA] Tab 25**

19. This Honourable Court has repeatedly held that the s. 131 requirement that leave be "essential in the public interest" is a high threshold, and that leave is limited to exceptional cases. This case does not meet the test for leave.

***Ontario (Ministry of Labour) v. Enbridge Gas Distribution Inc.*, 2011 ONCA 13 at ¶34 [*Enbridge Gas*], BOA Tab 26**

> The threshold for granting leave to appeal is very high: *R. v. Zakarow* [citation omitted], *R. v. Krukowski* [citation omitted]. The clear import of

> the provisions of ss. 131(1) and (2) of the *POA* is that the decisions of the Superior Court of Justice, in its appellate capacity, are intended to be final in the overwhelming majority of cases: *Krukowski*.

***R. v. Krukowski* (1991), 2 O.R. (3d) 155 at 159 (C.A.), BOA Tab 40**

> As a general rule, decisions made by the Ontario Court of Justice (Provincial Division) in its appellate capacity are intended to be final. They can only be reviewed in exceptional cases where the resolution of a question of law alone may have an impact on the jurisprudence in a way that is of general interest to the public or to a broad segment of the public.

***R. v. Zakarow* (1990), 74 O.R. (2d) 621 at 625–26 (C.A.), BOA Tab 55**

> ... s. 114 [now s. 131] of the *Provincial Offences Act* sets a very high threshold for granting leave to appeal. There must be special grounds on a question of law and it must be essential in the public interest or for the due administration of justice that leave be granted. No matter how wrong the judgment under appeal may be, these other criteria must be met. The section was clearly drafted to eliminate all but appeals on the most significant issues.

20. The high threshold in s. 131 is part of the balance struck by the *POA* as a whole between the benefits of having an appeal process and the benefits of coming to a final determination of the issues. Under s. 116 of the *POA*, parties enjoy a very broad right of first level appeal. The second level of appeal, under s. 131, is limited to exceptional cases that have some effect beyond the parties to the dispute.

***POA*, s. 116**
***R. v. R.R.*, 2008 ONCA 497 at ¶18 (see footnote 1), BOA Tab 50**

21. While the inquiry under s. 131 is directed at issues of public importance, the test for leave to appeal remains grounded in the case appealed from in two ways. First, s, 131(2) of the *POA* states that no leave to appeal shall be granted under s. 131(1) unless the judge of the Court of Appeal considers that the test for special grounds has been met *in the particular circumstances of the case*. Second, the determination of whether the

appeal is essential in the public interest or to the administration of justice relates *specifically to the question or questions of law raised*, not to the whole subject matter of the appeal.

> ***POA*, s. 131(2)**
> ***R. v. Baker*, 2008 ONCA 29 at ¶14, BOA Tab 29**
> ***R. v. Rankin*, 2007 ONCA 127 at ¶30, BOA Tab 51**

B. The test for leave to appeal is not met

(i) No statutory interpretation question of public importance

22. The proposed appeal turns on the proper interpretation of the terms "sale" and "distribution" in the *HPPA* and "plant" in the *Milk Act*, which the Respondent agrees are questions of law. However, not all questions of law warrant an appeal.

> ***Dofasco, supra* at ¶6, BOA Tab 25**

23. This Honourable Court has held that a question of statutory interpretation is not an "open sesame" to leave to appeal under s. 131 of the *POA*. Not every question of statutory interpretation – even those involving a statute that, *in general*, has an impact on a large number of people – raises an issue of public importance. This Court has denied leave in cases where:

- the interpretation of a statute by the court below was consistent with the purpose of the statute;
- the interpretation of the statute put forward by the moving party would lead to absurd results;
- the applicable legal principles are well settled; and/or
- there is no merit to the moving party's arguments.

All of these factors are present in this case.

***Enbridge Gas, supra* at ¶¶34-38, BOA Tab 26**
***Rankin, supra* at ¶31, BOA Tab 51**
***R. v. Hemrayeva*, 2010 ONCA 194 at ¶¶11-12, 15, BOA Tab 36**
***R. v. Peric*, 2008 ONCA 827 at ¶9, BOA Tab 48**

(ii) The appeal judge correctly applied the modern approach to statutory interpretation

24. Tetley J. correctly applied the modern approach to statutory interpretation pursuant to which "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." Further, he correctly recognized that, as public welfare legislation, s. 18 of the *HPPA* and s. 15 of the *Milk Act* should be given a broad and liberal interpretation that is consistent with their purpose, not the restrictive interpretation that the Justice of the Peace applied. Tetley J. concluded that "[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."[2] There is no basis on which to disturb this conclusion.

***Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at ¶21, BOA Tab 57**
***Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at ¶¶26-28 [*Bell ExpressVu*], BOA Tab 2**
***Blue Star Trailer Rentals Inc. v. 407 ETR Concession Company Ltd.*, 2008 ONCA 561 at ¶23, 91 O.R. (3d) 321, cited in Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶66, BOA Tab 4**
***Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685 at ¶¶43-45 [*Kennedy*], leave to appeal refused, [2009] S.C.C.A. No. 478, BOA Tab 20**
***R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 at ¶22 (C.A.), BOA Tab 54**
Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008) at 467, BOA Tab 63

[2] Tetley J. agreed with the trial judge that there was conflicting evidence with respect to whether the Applicant sold the unpasteurized milk cheese to the undercover officer. However, he found that there was sufficient evidence to convict the Applicant of distributing with respect to these charges.

25. The transactions between the Applicant and the undercover officer, and between the Applicant and cow share members, fall squarely within the ordinary meaning of "sale" and "distribution". Similarly, the Applicant's dairy operations on Glencolton Farms clearly fall within the meaning of milk "plant", *i.e.*, "premises in which milk or cream or milk products are processed." When the proper approach to statutory interpretation is applied, there is no genuine ambiguity in the *HPPA* or the *Milk Act* that requires resolution by this Honourable Court.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶62-63
Kowarsky J.P. Reasons for Judgment, MR, Vol. 1, Tab 4 at ¶96

26. The Applicant's attempts to rely on statutory interpretation principles such as *in pari materia* are of no assistance here. Such principles of interpretation are intended to be used to resolve ambiguity as to the meaning of a provision after the modern approach has been applied, not to create an ambiguity where none would otherwise exist, or to support an interpretation of the statute that is internally inconsistent and clearly at odds with the purpose of the legislative scheme as a whole. It would be counter to the *HPPA*'s purpose of preventing the spread of disease and promoting and protecting the health of the people of Ontario to accept the Applicant's argument that since the milk produced on his farm does not meet the definition of Grade A milk under Regulation 761 of the *Milk Act* (because it is not produced and stored in compliance with Regulation 761) he is exempt from the prohibition on the sale and distribution of unpasteurized milk and milk products under the *HPPA*.

Applicant's Factum at ¶¶54-57
***Bell ExpressVu*, *supra* at ¶¶27–28, BOA Tab 2**
***Re Canada 3000,* 2006 SCC 24 at ¶84, [2006] 1 S.C.R. 865, BOA Tab 56**
***Interpretation Act*, R.S.O. 1990, c. I.11, s. 10**
Sullivan, *supra* at 411-416, BOA Tab 63

(iii) No basis on appeal to engage in a freestanding inquiry into cow share contracts or "contracts of agistment"

27. Contrary to the suggestion of the Applicant, and the supporting affidavits of various cow share owners and members, leave should not be granted to provide a reference on whether there is a particular form of cow share agreement that could exempt its parties from the legislative scheme. The question of whether the Applicant's activities are legal is an issue of statutory, not contractual, interpretation. The applicable principles of statutory construction and their application here is not open to any material doubt.

28. This Honourable Court's decision in in *Kennedy v. Leeds, Grenville and Lanark District Health Unit* is instructive in this regard. In *Kennedy*, the Court considered whether the appellant could avoid the provisions of the *Smoke Free Ontario Act, 1994*, which prohibited smoking in any enclosed public place. The appellant had devised a scheme purporting to restrict entry to members of the public who signed a membership form, and took the position that the premises constituted a private club to which the public was not ordinarily invited or permitted access and was therefore not an "enclosed public place" within the meaning of the legislation. This Court applied the modern approach to statutory interpretation and the governing authorities holding that as public welfare legislation the Act attracted a broad and remedial interpretation consistent with its purpose, and concluded that:

> Read as a whole, the Act is clearly designed to eliminate smoking in public places and thus protect members of the public from 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. ... 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.

***Kennedy, supra* at ¶¶45–47 [emphasis added], BOA Tab 20**

29. This Court's analysis in *Kennedy* is equally applicable to the interpretation of s. 18 of the *HPPA* and s. 15 of the *Milk Act* in this case, which, as Tetley J. correctly concluded, are public welfare legislation that must attract an interpretation consistent with their objectives. To conclude that Applicant's provision, for a fee, of unpasteurized milk and milk products to 150 members of the public (at a minimum) at his farm and via delivery on the "Blue Bus" falls outside of the meaning of "sale" or "distribution" would defeat the legislative objective of protecting the public from milkborne disease.

***Kennedy, supra* at ¶¶43-45, BOA Tab 20**
***R. v. Timminco Ltd., supra* at ¶22, BOA Tab 54**

30. The Ontario Superior Court of Justice reached a similar conclusion in *Universal Game Farm Inc. v. Ontario*, in which the Court considered an argument that private contractual arrangements prevented the activities of the appellant from constituting "hunting" under the *Fish and Wildlife Conservation Act*. The Act prohibited the hunting of wildlife if the wildlife was in captivity at the time that it was hunted. The appellant developed a business that allowed his customers to purchase individual elk and shoot "their" elk in a fenced "harvesting preserve". The appellant argued that "harvesting" was not caught by the Act's prohibition on "hunting". The Court disagreed, holding that describing the activity as "harvesting" did not prevent it from also falling within the definition of "hunting". The Court found further that:

> ...the legislators enacted the [Act] which is remedial legislation with a purpose. It was the legislators' purpose to prohibit the hunting of elk *et al.* in captivity. I have found, on the facts put forward by the responding party, that the activity whatever it is called and whether or not it is proceeded [*sic*] by the sale of the animal in advance of its "harvest", the activity remains a "hunt". That is why people want to do it. That is why they pay to do it rather than being paid for harvesting on behalf of a farmer.

***Universal Game Farm Inc. v. Ontario* (2007), 86 O.R. (3d) 752 at ¶32 (S.C.J.), aff'd 2008 ONCA 334, BOA Tab 62**
***Hastings & Prince Edward Counties Health Unit v. Paul Kelly (1993) Ltd.*, [2001] O.J. No. 2778 at ¶¶9, 13-15 (S.C.J.), BOA Tab 14**
See also: *Kingshott v. Brunskill*, [1952] O.J. No. 312 (C.A.), BOA Tab 21

31. Finally, to the extent that the Applicant relies on a cow share agreement or "contract of agistment" to avoid the application of the *HPPA* and the *Milk Act*, the law is clear that parties affected by legislation enacted for public welfare purposes are not competent, by private arrangement, to abridge the public interest protected by the statute. The Applicant and cow share members may be willing to assume the risks posed to their own health, but the sale and distribution of unpasteurized milk pursuant to cow share agreements risks the health of others and of the public at large and abrogates the public interest in minimizing dangers including secondary transmission from asymptomatic carriers. This is precisely the type of harm that the legislation was enacted to address. Such agreements are contrary to the legislative objective of protecting the public from the risks of milkborne illness and in violation of the prohibitions in s. 18 of the *HPPA* and s. 15 of the *Milk Act*.

***Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at 213, BOA Tab 24**
***SCC Construction Ltd. v. U.A.*, [1987] N.J. No. 224 at 9 [QL] (NLCA), BOA Tab 60**

> The parties cannot make legal that which a competent legislative body has determined, for the public's welfare and in execution of public policy, should be illegal.

C. The *Charter* claim is without merit

32. There is no merit to the *Charter* issues raised by the Applicant and therefore no issue of public importance that warrants leave to appeal.

(i) No deprivation under s. 7 of the *Charter*

33. Tetley J. correctly dismissed the Applicant's s. 7 *Charter* claim. There is no basis on which to find that the Applicant has been deprived of his liberty or security of the person.

> ***R. v. Beare*, [1988] 2 S.C.R. 387 at ¶28, BOA Tab 31**
> ***Blencoe v. B.C. (Human Rights Commission)*, 2000 SCC 44 at ¶47, [2000] 2 S.C.R. 307, BOA Tab 3**

34. Offences under the *HPPA* and the *Milk Act* are punishable by the imposition of fines, not imprisonment. Tetley J. correctly determined that the possibility of imprisonment for failure to pay a fine is sufficiently remote under the *POA* that the s. 7 liberty interest is not engaged. The Applicant's publicly declared intent to default on the payment of fines does not render a *Charter* complaint legislative scheme unconstitutional. If this were not the case, s. 7 could be triggered in any case by any law where a claimant professed an unwillingness or inability to pay a fine.

> **Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶82**
> ***R. v. Polewsky* (2005), 202 C.C.C. (3d) 257 at ¶4 (Ont. C.A.), leave to appeal refused, [2006] S.C.C.A. No. 37, BOA Tab 49**
> ***R. v. Asante-Mensah*, [1996] O.J. No. 1821 at ¶137 (S.C.J.), rev'd on other grounds (2001), 204 D.L.R. (4th) 51 (Ont. C.A.), Ont. C.A. aff'd, [2003] 2 S.C.R. 3, BOA Tab 28**

35. Nor do the mandatory conditions for a probation order under the *POA* (¶11, above) engage the liberty interest. A requirement that a defendant report to a designated person may only be imposed where it is necessary for the purpose of implementing the conditions of the order. The possibility of such a reporting requirement under the *HPPA* or *Milk Act* is again remote and no such order was made in this case.

> ***R. v. Nickel City Transport (Sudbury) Ltd.*, [1993] O.J. No. 1277 at ¶68 (C.A.), Arbour J., BOA Tab 45**
> ***POA*, ss.72(2), (3)**

36. Further, as Tetley J. correctly concluded, and as the Applicant acknowledges, s. 7 does not protect economic interests, such as the interest in practising a particular profession, or selling a particular product. Section 7 does not protect "the right to engage in the economic activity of [one's] choice". Contrary to the submissions of the Applicant, this is not an appropriate case in which to grant leave in order to consider fundamentally revisiting the scope of the s. 7 guarantee, particularly given that, in light of the strength of the expert evidence in support of the legislative measure, there can be no question that any deprivation is in accordance with the principles of fundamental justice.

Peter W. Hogg, *Constitutional Law of Canada,* looseleaf, 5th ed. supplemented, Vol.2 (Scarborough: Carswell, 2007) at 47-10, BOA Tab 64
***Siemens v. Manitoba (A.G.)*, 2003 SCC 3 at ¶¶45-46, [2003] 1 S.C.R. 6, BOA Tab 61**
***Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at ¶¶57-60, Lamer J., BOA Tab 58**
***Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at ¶95, BOA Tab 18**
***Mussani v. College of Physicians and Surgeons of Ontario* (2004), 74 O.R. (3d) 1 at ¶¶40-43 (C.A.), BOA Tab 23**
***Clitheroe v. Hydro One Inc.*, [2009] O.J. No. 2689 at ¶¶72-79 (S.C.J.), aff'd 2010 ONCA 458, leave to appeal refused, [2010] S.C.C.A No. 316, BOA Tab 7**
***Cosyns v. Canada (A.G.)*, [1992] O.J. No. 91 at ¶¶11-15 (Div. Ct.) [*Cosyns*], BOA Tab 10**

37. The decision to sell unpasteurized milk is not a fundamental life choice going to the core of what it means to enjoy individual dignity and independence. The Applicant does not have a protected "liberty interest" to engage in behaviours that are dangerous to others. The sale or distribution of unpasteurized milk poses a danger not only to those who chose to drink it, but also to the broader community given the risks of infection for non-drinkers of unpasteurized milk.

***R. v. Malmo-Levine*, 2003 SCC 74 at ¶¶85-87, [2003] 3 S.C.R. 571, BOA Tab 42**

38. Nor do consumers of unpasteurized milk have a liberty or security of the person "right" to consume unpasteurized milk. Like the decision to sell unpasteurized milk, the choice of whether to drink unpasteurized milk is not a fundamental life choice that goes to the core of what it means to enjoy individual dignity and independence. There is, in any event, no expert evidence to support this claim, the substance of which appears to be that some consumers believe that unpasteurized milk provides them with health benefits. Expert evidence would be required to establish a deprivation of security of the person based on the claim of a health or nutritional need or benefit. This case can thus be distinguished from the *Parker* and *Insite* cases on which the Applicant relies. Leave should not be granted on this ground.

Affidavit of Eric Bryant sworn May 26, 2010, MR, Vol. 1, Tab 8 at ¶¶2-3; Cross-Examination of Eric Bryant, MR, Vol. 1, Tab 10 at p. 1-6; Affidavit of James McLaren sworn May 12, 2010, MR, Vol. 1, Tab 7 at ¶¶4-8, 15; Cross-Examination of James McLaren, MR, Vol. 1, Tab 9 at p. 2-5, 23-24

***R. v. Mohan*, [1994] 2 S.C.R. 9 at ¶¶27-28, BOA Tab 43**
***R. v. K.(A.)* (1999), 45 O.R. (3d) 641 at ¶¶70-104 (C.A.), leave to appeal quashed, [2000] S.C.C.A. No. 16, BOA Tab 38**
***K.B. (Litigation guardian of) v. Toronto District School Board*, [2008] O.J. No. 475 at ¶¶68-69 (Div. Ct.), BOA Tab 19**
***R. v. Parker* (2000), 49 O.R. (3d) 481 at ¶5, 36, 104 (C.A.), BOA Tab 46; *R. v. Parker*, [1997] O.J. No. 4923 at ¶15 (Prov. Div.), BOA Tab 47**
***Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at ¶9 [*Insite*]; *PHS Community Services Society v. Attorney General of Canada*, 2008 BCSC 661 at ¶¶47-59, 78-89, BOA Tab 5**

39. Finally, there is no issue here with respect to the Applicant's "standing" to raise the *Charter* rights of others. The consumption of unpasteurized milk is not itself prohibited, and individuals are at no legal jeopardy should they choose to consume unpasteurized milk. As Tetley J. correctly concluded, even if these individuals could establish a right to consume unpasteurized milk, or could establish that unpasteurized milk has had health benefits for them, the jurisprudence establishes that the Applicant

would not thereby acquire a right to sell or distribute unpasteurized milk. There is no basis to grant leave on this ground.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶83
***R. v. Malmo-Levine, supra* at ¶¶86-87, BOA Tab 42**
***R. v. Parker*, *supra* at ¶¶92-97, 102-111 (C.A.), BOA Tab 46**
***R. v. Parker*, *supra* at ¶11 (Prov. Div.), BOA Tab 47**

(ii) Any deprivation is in accordance with the principles of fundamental justice

40. Tetley J. correctly concluded that, even if the Applicant could establish the deprivation of an interest protected by s. 7, prohibiting the sale and distribution of unpasteurized milk is neither arbitrary nor overbroad, as alleged. As such, there has been no departure from the principles of fundamental justice and there is no reason to grant leave on this basis.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶85, 99

41. While the Applicant relies on *Insite* to suggest that leave should be granted because the test for arbitrariness is "not entirely settled", the Supreme Court's decision in that case does not assist him. In *Insite*, the Supreme Court refers to two tests for arbitrariness: (i) whether the impugned measure "bears no relation to, or is inconsistent with, the objective that lies behind the legislation" – the test that Tetley J. applied and that this Honourable Court has endorsed in its recent jurisprudence – or (ii) whether the impugned measure is "necessary" to further the state objective. Under either approach, to determine whether a law is arbitrary, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect. The prohibition on the sale and distribution of unpasteurized milk is intrinsically connected to, and crucial to achieving, the goal of protecting the public from milkborne illness.

Insite, _supra_ at ¶132, BOA Tab 27
Chaoulli v. Quebec (A.G.), 2005 SCC 35 at ¶¶130-131, [2005] 1 S.C.R. 791, McLachlin C.J. and Major J., BOA Tab 6
Abarquez v. Ontario, 2009 ONCA 374 at ¶¶47-49, leave to appeal refused, [2009] S.C.C.A. No. 297, BOA Tab 1

42. Nor does the fact that the legislation prohibits the sale and distribution of unpasteurized milk and milk products – rather than their private consumption – render the law arbitrary. The prohibition of sale and distribution, as opposed to consumption, is clearly a more effective means of achieving the regulatory objective. But, in any event, the role of the court is not to second-guess where the Legislature has chosen to drawn the line in addressing the public health risk posed by unpasteurized milk and milk products. Where, as here, there is "sufficient evidence to give rise to a reasoned apprehension of harm to permit the legislature to act", the Legislature is entitled to deference.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶89
R. v. Malmo-Levine, _supra_ at ¶133, BOA Tab 42
Cochrane v. Ontario (A.G.), 2008 ONCA 718 at ¶29 [_Cochrane_], leave to appeal refused, [2009] S.C.C.A. No. 105, BOA Tab 8

43. There is, similarly, no basis on which to disturb Tetley J.'s finding that the impugned provisions are not overbroad. As Tetley J. held, in connection with a claim of overbreadth, an applicant must show that the law deprives the life, liberty or security of the person in a manner that is "grossly disproportionate" to the state interest that the legislation seeks to protect. A court should not interfere with legislation merely because it may have chosen a different means to accomplish the legislative objective, but only where there is no "rational basis" for the legislation.

R. v. Clay, 2003 SCC 75 at ¶¶38-40, [2003] 3 S.C.R. 735, BOA Tab 33
R. v. Malmo-Levine, supra at ¶143, BOA Tab 42
R. v. Heywood, [1994] 3 S.C.R. 761 at ¶¶48-52, BOA Tab 37
R. v. Lindsay, 2009 ONCA 2700 at ¶¶20-21, leave to appeal refused, [2009] S.C.C.A. No. 540, BOA Tab 41

***R. v. Dyck*, 2008 ONCA 309 at ¶¶91-98, 124-125, BOA Tab 35**
***Cochrane, supra* at ¶¶18, 25, 31, 34, BOA Tab 8**
***Cunningham v. Canada*, [1993] 2 S.C.R. 143 at ¶¶17-18, BOA Tab 11**

44. The impugned provisions are clearly grounded in a *reasoned apprehension of harm* to the community. No higher standard of proof is required. In any event, in this case, the scientific evidence overwhelmingly supports the legislative measure. There is no basis to grant leave on this issue.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶89-100
***Harper v. Canada (A.G.)*, 2004 SCC 33 at ¶¶77, 98, [2004] 1 S.C.R. 827, BOA Tab 13**
***R. v. Sharpe*, 2001 SCC 2 at ¶85, [2001] 1 S.C.R. 45, BOA Tab 52**
***RJR MacDonald v. Canada*, [1995] 3 S.C.R. 199 at ¶67, BOA Tab 59**
***R. v. Butler*, [1992] 1 S.C.R. 452 at ¶¶103-107, BOA Tab 32**
***Cochrane, supra* at ¶¶26-29, BOA Tab 8**
***R. v. Malmo-Levine, supra* at ¶¶131-136, BOA Tab 42**

(iii) No infringement of s. 15 of the *Charter*

45. Tetley J. correctly concluded that there is no merit to the s. 15 claim. The Applicant demonstrated no distinction based on an enumerated or analogous ground, as required by *Charter* s. 15(1). Contrary to the Respondent's characterization of *Corbiere v. Canada*, the Supreme Court explicitly held that it was *not* recognizing place of residence as an analogous ground.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶101-106
***R. v. Kapp*, 2008 SCC 41 at ¶17, [2008] 2 S.C.R. 483, BOA Tab 39**
***Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at ¶15, McLachlin and Bastarache JJ. for the majority; at ¶62, L'Heureux-Dubé J. concurring, BOA Tab 9**

46. In any event, any distinction drawn between 'persons who live on a farm where cows live' and 'persons who do not live on a farm with cows' is not discriminatory. The proposed group is mutable and disparate in composition, and there is no evidence that the

group suffers from any disadvantage. The challenged provisions do not perpetuate any prejudice or stereotyping about the alleged group.

> ***R. v. Banks*, 2007 ONCA 19 at ¶¶99–100, 104, leave to appeal refused, [2007] S.C.C.A. No. 139, BOA Tab 30**
> ***Health Services and Support - Facilities Subsector Bargaining Assn. v. B.C.*, 2007 SCC 27 at ¶165, [2007] 2 S.C.R. 391, BOA Tab 15**
> ***Ermineskin v. Canada*, 2009 SCC 9 at ¶188, [2009] 1 S.C.R. 222, BOA Tab 12**
> ***Cosyns*, *supra* at ¶¶25–26, BOA Tab 10**

D. No denial of natural justice

47. There is no merit to the Applicant's argument that Tetley J. denied the Applicant a fair hearing by relying on grounds of appeal that were not raised by the Crown and by conducting his own legal research and relying on jurisprudence that had not been referred to by any of the parties.

48. After summarizing the Crown's ground of appeal, Tetley J. framed the issues on appeal in four broad categories: Misapprehension and Misapplication of Evidence; Misapplication of the Burden of Proof; Issues of Procedural Fairness and Natural Justice; and The Primary Issue ("the legitimacy of the Respondent's cow-share programme and consideration of issues of statutory interpretation"). An appellate court is entitled to frame its analysis of the legal issues involved in a case as it sees fit and to consider the legal authorities relevant to the issues involved, irrespective of whether all of those authorities were cited by the parties.

> **Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶33, 34-50**
>
> ***McCunn Estate v. Canadian Imperial Bank of Commerce* (2001), 53 O.R. (3d) 304 at ¶43 (C.A.), Feldman J.A. dissenting as to the result, leave to appeal granted, [2001] S.C.C.A. No. 203. Notice of discontinuance of appeal filed September 30, 2002. SC.C. Bulletin, 2002, p. 1353, BOA Tab 22**

> It is the obligation of the parties to bring the relevant authorities to the attention of the court. If the court finds further authorities which support or contradict the positions of the parties on the issues, it is the duty of the court to apply the law as it exists. In some circumstances, the court may wish to have the submissions of the parties on some case law which was not brought to the court's attention, for example, where the law has undergone a significant change and the court intends to base its decision on that change. That was not the case here. It was open to the application judge to consider all authorities which pertain to the matter as framed by the parties.

***Housen v. Nikolaisen*, 2002 SCC 33 at ¶9, BOA Tab 16**

> While the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application.

49. The cases that the Applicant relies on are not relevant here. This is not a case in which the court introduced new evidence on its own initiative (an error that Kowarsky J.P. committed at trial) or raised a new legal issue – for example, a cause of action that was not pleaded – without notice to the parties. In any event, even if Tetley J. had considered new legal issues, which the Attorney General submits that he did not, the rule is more relaxed with respect to legal issues than with respect to factual issues and there would be no basis to grant leave on this ground.

Tetley J. Reasons for Decision, MR, Vol. 1, Tab 5 at ¶¶47–48

Applicant's Factum at ¶¶34, 45

***International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 at ¶93 [emphasis added], BOA Tab 17**

> Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a "fair opportunity of answering the case against [them]": Evans, de Smith's Judicial Review of Administrative Action (4th ed. 1980), at p. 158. It is true that on factual matters the parties must be given a "fair opportunity . . . for correcting or contradicting any relevant statement prejudicial to their view": Board of Education v. Rice, [1911] A.C. 179, at p. 182; see also Local Government Board v. Arlidge, [1915] A.C. 120, at pp. 133 and 141, and Kane v. Board of Governors of the University of British Columbia,

> supra, at p. 1113. However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right does not encompass the right to repeat arguments every time the panel convenes to discuss the case. For obvious practical reasons, superior courts, in particular courts of appeal, do not have to call back the parties every time an argument is discredited by a member of the panel…

E. The Applicant received a fit sentence

50. There is no basis on which to disturb Tetley J.'s decision on sentence. A sentence should only be varied if it is not fit, or clearly unreasonable. Tetley J. did not err in principle, or impose a sentence that is disproportionate to what is merited in the circumstances of this case. Leave should not be granted on the issue of sentence.

***R. v. Cotton Felts Ltd.*, [1982] O.J. No. 178 at ¶19 (C.A.), BOA Tab 34**
***R. v. Stelco Inc.*, [2006] O.J. No. 3332 at ¶11 (S.C.J.), BOA Tab 53**
***R. v. Nichols*, 2012 ONCJ 24 at ¶79, BOA Tab 44**

51. Tetley J. was satisfied on the basis of the evidence adduced at the sentencing hearing that, given a reasonable period of time, the Applicant has sufficient resources to pay the fines imposed. In the event of default, if the Applicant is truly impecunious, as he alleges, the *POA* provides the court with the discretion to impose flexible measures with respect to the payment of fines.

***POA*, s. 69(15)**

PART IV - ORDER REQUESTED

52. The Respondent respectfully requests that the application for leave to appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 29, 2012

Shannon Chace

Daniel Huffaker

Counsel for the Respondent

SCHEDULE A

LIST OF AUTHORITIES

Cases

1. *Ontario (Ministry of Labour) v. Dofasco Inc.*, [2005] O.J. No. 3852 (C.A.)
2. *Ontario (Ministry of Labour) v. Enbridge Gas Distribution Inc.*, 2011 ONCA 13
3. *R. v. Zakarow* (1990), 74 O.R. (2d) 621 (C.A.)
4. *R. v. Krukowski* (1991), 2 O.R. (3d) 155 (C.A.)
5. *R. v. R.R.*, 2008 ONCA 497
6. *R. v. Baker*, 2008 ONCA 29
7. *R. v. Rankin*, 2007 ONCA 127
8. *R. v. Hemrayeva*, 2010 ONCA 194
9. *R. v. Peric*, 2008 ONCA 827
10. *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27
11. *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42
12. *Blue Star Trailer Rentals Inc. v. 407 ETR Concession Company Ltd.*, 2008 ONCA 561, 91 O.R. (3d)
13. *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685, leave to appeal refused, [2009] S.C.C.A. No. 478
14. *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (C.A.)
15. *Re Canada 3000*, 2006 SCC 24, [2006] 1 S.C.R. 865
16. *Universal Game Farm Inc. v. Ontario* (2007), 86 O.R. (3d) 752 (S.C.J.), aff'd 2008 ONCA 334
17. *Hastings & Prince Edward Counties Health Unit v. Paul Kelly (1993) Ltd.,* [2001] O.J. No. 2778 (S.C.J.)
18. *Kingshott v. Brunskill*, [1952] O.J. No. 312 (C.A.)
19. *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202
20. *SCC Construction Ltd. v. U.A.*, [1987] N.J. No. 224 (NLCA)
21. *R. v. Beare*, [1988] 2 S.C.R. 387
22. *Blencoe v. B.C. (Human Rights Commission),* 2000 SCC 44, [2000] 2 S.C.R. 307
23. *R. v. Polewsky* (2005), 202 C.C.C. (3d) 257 (Ont. C.A.), leave to appeal refused, [2006] S.C.C.A. No. 37

24. *R. v. Asante-Mensah,* [1996] O.J. No. 1821 (S.C.J.), rev'd on other grounds (2001), 204 D.L.R. (4th) 51 (Ont. C.A.), Ont. C.A. aff'd, [2003] 2 S.C.R. 3

25. *R. v. Nickel City Transport (Sudbury) Ltd.*, [1993] O.J. No. 1277 (C.A.)

26. *Siemens v. Manitoba (A.G.)*, 2003 SCC 3, [2003] 1 S.C.R. 6

27. *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123

28. *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927

29. *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 74 O.R. (3d) 1 (C.A.)

30. *Clitheroe v. Hydro One Inc.*, [2009] O.J. No. 2689 (S.C.J.), aff'd 2010 ONCA 458, leave to appeal refused [2010] S.C.C.A No. 316

31. *Cosyns v. Canada (A.G.)*, [1992] O.J. No. 91 (Div. Ct.)

32. *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571

33. *R. v. Mohan*, [1994] 2 S.C.R. 9

34. *R. v. K.(A.)* (1999), 45 O.R. (3d) 641 (C.A.), leave to appeal quashed, [2000] S.C.C.A. No. 16

35. *K.B. (Litigation guardian of) v. Toronto District School Board,* [2008] O.J. No. 475 (Div. Ct.)

36. *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.)

37. *R. v. Parker*, [1997] O.J. No. 4923 (Prov. Div.)

38. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44

39. *PHS Community Services Society v. Attorney General of Canada,* 2008 BCSC 661

40. *Chaoulli v. Quebec (A.G.)*, 2005 SCC 35, [2005] 1 S.C.R. 791

41. *Abarquez v. Ontario*, 2009 ONCA 374, leave to appeal refused, [2009] S.C.C.A. No. 297

42. *Cochrane v. Ontario (A.G.)*, 2008 ONCA 718, leave to appeal refused, [2009] S.C.C.A. No. 105

43. *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735

44. *R. v. Heywood*, [1994] 3 S.C.R. 761

45. *R. v. Lindsay*, 2009 ONCA 2700, leave to appeal refused, [2009] S.C.C.A. No. 540

46. *R. v. Dyck*, 2008 ONCA 309

47. *Cunningham v. Canada*, [1993] 2 S.C.R. 143

48. *Harper v. Canada (A.G.)*, 2004 SCC 33, [2004] 1 S.C.R. 827

49. *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45

50. *RJR MacDonald v. Canada*, [1995] 3 S.C.R. 199

51. *R. v. Butler*, [1992] 1 S.C.R. 452

52. *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483

53. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203

54. *R. v. Banks*, 2007 ONCA 19, leave to appeal refused, [2007] S.C.C.A. No. 139

55. *Health Services and Support - Facilities Subsector Bargaining Assn. v. B.C.*, 2007 SCC 27, [2007] 2 S.C.R. 391

56. *Ermineskin v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222

57. *McCunn Estate v. Canadian Imperial Bank of Commerce* (2001), 53 O.R. (3d) 304 (C.A.), leave to appeal granted, [2001] S.C.C.A. No. 203

58. *Housen v. Nikolaisen*, 2002 SCC 33

59. *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282

60. *R. v. Cotton Felts Ltd.*, [1982] O.J. No. 178 (C.A.)

61. *R. v. Stelco Inc.*, [2006] O.J. No. 3332 (S.C.J.)

62. *R. v. Nichols*, 2012 ONCJ 24

Texts

63. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008)

64. Peter W. Hogg, *Constitutional Law of Canada,* looseleaf, 5th ed. supplemented, Vol.2 (Scarborough: Carswell, 2007)

SCHEDULE B

LIST OF STATUTES

1. *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7, ss. 2, 18, 100(1), (3), 101

2. *Milk Act*, R.S.O. 1990, c. M. 12, ss. 2, 15(1), (2), 21

3. *Food Premises*, R.R.O. 1990, Reg 562, s. 45

4. *Provincial Offences Act*, R.S.O. 1990, c. P.33, ss. 69(15), 72(1), (2), (3), 116, 131

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

6. *Canadian Charter of Rights and Freedoms*, ss. 7, 15

Health Protection and Promotion Act

R.S.O. 1990, CHAPTER H.7

Purpose

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.

Unpasteurized or unsterilized milk

18. (1) No person shall sell, offer for sale, deliver or distribute milk or cream that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*. R.S.O. 1990, c. H.7, s. 18 (1).

Milk products

(2) No person shall sell, offer for sale, deliver or distribute a milk product processed or derived from milk that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*. R.S.O. 1990, c. H.7, s. 18 (2).

Exception

(3) Subsection (1) does not apply in respect of milk or cream that is sold, offered for sale, delivered or distributed to a plant licensed under the Milk Act. R.S.O. 1990, c. H.7, s. 18 (3).

Definition

(4) In subsection (2),

"milk product" means a product processed or derived in whole or mainly from milk. R.S.O. 1990, c. H.7, s. 18 (4).

Offence, orders

100. (1) Any person who fails to obey an order made under this Act is guilty of an offence. R.S.O. 1990, c. H.7, s. 100 (1).

...

Offence, specified provisions

(3) Any person who contravenes section 16, 17, 18, 20, 39 or 40, subsection 41 (9), 42 (1), 72 (5), (7) or (8), 82 (13), (14), (15), (16) or (17), 83 (3) or 84 (2), clause 86 (3) (b), subsection 86.2 (3) or section 105 is guilty of an offence. 1997, c. 30, Sched. D, s. 14.

Offence, regulations

(4) Any person who contravenes a regulation is guilty of an offence.

Penalty

101. (1) Every person who is guilty of an offence under this Act is liable on conviction to a fine of not more than $5,000 for every day or part of a day on which the offence occurs or continues. R.S.O. 1990, c. H.7, s. 101 (1).

Milk Act

R.S.O. 1990, CHAPTER M.12

Purpose of Act

2. The purpose and intent of this Act is,

(a) to stimulate, increase and improve the producing of milk within Ontario;

(b) to provide for the control and regulation in any or all respects of the producing or marketing within Ontario of milk, cream or cheese, or any combination thereof, including the prohibition of such producing or marketing in whole or in part; and

(c) to provide for the control and regulation in any or all respects of the quality of milk, milk products and fluid milk products within Ontario. R.S.O. 1990, c. M.12, s. 2.

Licences

Licence to operate plant

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

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

Offences

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

R.R.O. 1990, REGULATION 562

FOOD PREMISES

45. Subsection 18 (2) of the Act does not apply to cheese made from unpasteurized milk if the cheese has been stored at a temperature not lower than 2° Celsius for a period of not less than sixty days following the time of manufacture. R.R.O. 1990, Reg. 562, s. 45.

Provincial Offences Act

R.S.O. 1990, CHAPTER P.33

Default

69. ...

Inability to pay fine

(15) If the justice is satisfied that the person who has defaulted is unable to pay the fine within a reasonable period of time, the justice may,

(a) grant an extension of the time allowed for payment of the fine;

(b) require the person to pay the fine according to a schedule of payments established by the justice;

(c) in exceptional circumstances, reduce the amount of the fine or order that the fine does not have to be paid. 1993, c. 31, s. 1 (26).

Probation order

72. (1) Where a defendant is convicted of an offence in a proceeding commenced by information, the court may, having regard to the age, character and background of the defendant, the nature of the offence and the circumstances surrounding its commission,

(a) suspend the passing of sentence and direct that the defendant comply with the conditions prescribed in a probation order;

(b) in addition to fining the defendant or sentencing the defendant to imprisonment, whether in default of payment of a fine or otherwise, direct that the defendant comply with the conditions prescribed in a probation order; or

(c) where it imposes a sentence of imprisonment on the defendant, whether in default of payment of a fine or otherwise, that does not exceed ninety days, order that the sentence be served intermittently at such times as are specified in the order and direct that the defendant, at all times when he or she is not in confinement pursuant to such order, comply with the conditions prescribed in a probation order. R.S.O. 1990, c. P.33, s. 72(1).

Statutory conditions of order

(2) A probation order shall be deemed to contain the conditions that,

(a) the defendant not commit the same or any related or similar offence, or any offence under a statute of Canada or Ontario or any other province of Canada that is punishable by imprisonment;

(b) the defendant appear before the court as and when required; and

(c) the defendant notify the court of any change in the defendant's address. R.S.O. 1990, c. P.33, s. 72(2).

Conditions imposed by court

(3) In addition to the conditions set out in subsection (2), the court may prescribe as a condition in a probation order,

(a) that the defendant satisfy any compensation or restitution that is required or authorized by an Act;

(b) with the consent of the defendant and where the conviction is of an offence that is punishable by imprisonment, that the defendant perform a community service as set out in the order;

(c) where the conviction is of an offence punishable by imprisonment, such other conditions relating to the circumstances of the offence and of the defendant that contributed to the commission of the offence as the court considers appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant; or

(d) where considered necessary for the purpose of implementing the conditions of the probation order, that the defendant report to a responsible person designated by the court and, in addition, where the circumstances warrant it, that the defendant be under the supervision of the person to whom he or she is required to report. R.S.O. 1990, c. P.33, s. 72(3).

Appeals, proceedings commenced by information

116. (1) Where a proceeding is commenced by information under Part III, the defendant or the prosecutor or the Attorney General by way of intervention may appeal from a conviction or dismissal or from a finding as to ability, because of mental disorder, to conduct a defence or as to sentence. R.S.O. 1990, c. P.33, s. 116 (1).

Appeal court

(2) An appeal under subsection (1) shall be,

(a) where the appeal is from the decision of a justice of the peace, to the Ontario Court of Justice presided over by a provincial judge; or

(b) where the appeal is from the decision of a provincial judge, to the Superior Court of Justice. R.S.O. 1990, c. P.33, s. 116 (2); 2000, c. 26, Sched. A, s. 13 (5, 6).

Notice of appeal

(3) The appellant shall give notice of appeal in such manner and within such period as is provided by the rules of court. R.S.O. 1990, c. P.33, s. 116 (3).

Appeal to Court of Appeal

131. (1) A defendant or the prosecutor or the Attorney General by way of intervention may appeal from the judgment of the court to the Court of Appeal, with leave of a judge of the Court of Appeal on special grounds, upon any question of law alone or as to sentence.

Grounds for leave

(2) No leave to appeal shall be granted under subsection (1) unless the judge of the Court of Appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.

Appeal as to leave

(3) No appeal or review lies from a decision on a motion for leave to appeal under subsection (1). R.S.O. 1990, c. P.33, s. 131.

Interpretation Act

R.S.O. 1990, CHAPTER I.11

REPEALED by S.O. 2006, CHAPTER 21, SCHEDULE F, s. 134, effective July 25, 2007.

All Acts remedial

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

Life, liberty and security of person

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

Equality before and under law and equal protection and benefit of law

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

Court File No.: **M40828**

HER MAJESTY THE QUEEN	-and-	**MICHAEL SCHMIDT**
Respondent		Applicant

COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

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(Motion for Leave to Appeal returnable: July 25, 2012)

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