

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

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

Applicants

– and –

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

Respondents

– and –

**OUR FARM OUR FOOD COOPERATIVE INC.**

Intervener

**FACTUM OF THE REGIONAL MUNICIPALITY OF YORK, SIMCOE MUSKOKA  
DISTRICT HEALTH UNIT and THE REGIONAL MUNICIPALITY OF PEEL**  
*(Application for Injunction and Ancillary Relief)*

Date: May 9, 2017

**BORDEN LADNER GERVAIS LLP**  
Bay Adelaide Centre, East Tower  
22 Adelaide Street West, Suite 3400  
Toronto, ON M5H 4E3  
Fax: (416) 367-6749

**Doug Smith (LSUC #36915R)**  
Tel: (416) 367-601 / dsmith@blg.com

**Alannah Fotheringham (LSUC #70882F)**  
Tel: (416) 367-6394 / afotheringham@blg.com

Lawyers for the Applicants, The Regional  
Municipality of York, Simcoe Muskoka  
District Health Unit and The Regional  
Municipality of Peel

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

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

**AND TO: HUMMINGBIRD LAWYERS LLP**  
Suite 301  
8800 Dufferin Street  
Vaughan, ON L4K 0C5

**Darren J. Smith (LSUC #49677U)**  
Tel: (905) 731-1911  
Fax: (905) 731 1913

Lawyer for the Respondents Markus Christian Schmidt, Agri-Cultural Renewal Co-operative Inc., and The Church of the Christian Community in Canada

**AND TO: Lewis Scott Taylor**  
10 Valleyview Court  
Kleinburg, Ontario  
L0J 1C0  
Tel: (905) 893-5550

Representative for the Intervenor, Our Farm Our Food Co-Operative Inc.

**AND TO: ATTORNEY GENERAL OF ONTARIO**

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

**Sunil Mathai (LSUC #496160)**  
sunil.mathai@ontario.ca

**Anathan Sinnadurai (LSUC #60614G)**  
anathan.sinnadurai@ontario.ca

**Nansy Ghobrial (LSUC #68740N)**  
n.ghobrial@ontario.ca

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

## Table of Contents

PART I - OVERVIEW .....	1
PART II - THE FACTS .....	3
The Parties.....	3
The Legal History.....	5
From Cow Share to Farm Share.....	12
The Creation of OFOF .....	14
PART III – ISSUES AND LAW .....	17
a. The Scope of this Application.....	18
b. The Bases for the Applicants’ Claim for Injunctive Relief .....	19
i. Section 102 of the <i>HPPA</i> .....	20
ii. Public Nuisance.....	23
iii. Common Law Injunction under section 101 of the <i>CJA</i> .....	24
c. The Scope of the “Family Farm Exemption” .....	25
i. The Agreements are Sham Transactions.....	28
ii. The Property of OFOF is not the Property of its Members.....	32
iii. The Milk is Not Consumed on a Family Farm.....	35
PART V – ORDER REQUESTED.....	38
SCHEDULE “A” – AUTHORITIES CITED.....	39
SCHEDULE “B” – STATUTES CITED.....	41
<i>Health Protection and Promotion Act</i> , R.S.O. 1990, c. H.7 .....	41
<i>Courts of Justice Act</i> , R.S.O. 1990, c. C.43 .....	44
<i>Municipal Act, 2001</i> , S.O. 2001, c. 25 .....	45
<i>Co-operative Corporations Act</i> , R.S.O. 1990, c. C.35.....	46

## PART I - OVERVIEW

1. In this application, The Regional Municipality of York (“**York Region**”), The Regional Municipality of Peel (“**Peel Region**”) and Simcoe Muskoka District Health Unit (“**SMDHU**” and collectively, the “**Applicants**”) seek declaratory and injunctive relief against the Respondents and the intervener, Our Farm Our Food Co-Operative Inc. (“**OFOF**”), in respect of the Respondents’ offering for sale, selling, delivering and/or distributing unpasteurized (raw) milk and unpasteurized milk products within the jurisdiction of York Region, contrary to s. 18 of the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 (the “**HPPA**”).

Affidavit of Vito Chiefari sworn March 2, 2016 (“**Chiefari Affidavit**”) at para 3, Application Record of The Regional Municipality of York (“**AR**”), Vol. 1, Tab 1, p. 20.

2. Gavin Downing, in his capacity as Director appointed under the *Milk Act*, R.S.O. 1990, c. M.12 (the “**Milk Act**”), has also brought an application bearing court file number CV-16-125371 against the same Respondents, with the exception of The Church of the Christian Community of Canada (the “**Church**”), in which similar relief is sought (the “**Downing Application**”).
3. The Respondents’ dairy operation is known as Glencolton Farms<sup>1</sup>. Originally, Glencolton Farms was owned and operated by the Respondent, Michael Schmidt (“**Schmidt**”). According to the Respondents, Glencolton Farms is now owned and operated by Agri-Cultural Renewal Co-Operative Inc. (“**ARC**”) and/or OFOF.

---

<sup>1</sup> Glencolton Farms is a registered Business Trade Name. The term is also used in reference to the physical farm property.

4. Glencolton Farms has been, contrary to the *Milk Act* and the *HPPA*, producing, offering for sale and distributing raw milk for a number of years in Ontario and the operations of Glencolton Farms have been the subject of a number of previous convictions, fines, penalties and injunctive orders of this and other courts.
5. In attempts to avoid the effect of the *Milk Act* and the *HPPA*, the Respondents have over the years structured the operations of Glencolton Farms in different forms including (as will be discussed below) a “lease-a-cow” scheme and a “cow-share” scheme, which have been found to be illegal by the Health Services Appeal and Review Board and the courts of Ontario, respectively.
6. Glencolton Farms, and the group of consumers to whom it sells and distributes the raw milk and raw milk products, has now implemented a new scheme for the sale and distribution of raw milk, known as a “farm-share” scheme, the details of which are discussed below.
7. In this application, the Applicants seek to establish that the sale and distribution of raw milk through the current farm-share scheme adopted by the Respondents continues to contravene the *HPPA*, and previous orders made thereunder, and further seek to prevent the continued sale and distribution of raw milk within the areas under the Applicants’ respective jurisdictions.

## PART II - THE FACTS

### *The Parties*

8. York Region and Peel Region are upper-tier municipal corporations as defined by the *Municipal Act, 2001*, S.O. 2001, c.25 (the “**Municipal Act, 2001**”).

9. SMDHU is a board of health established under the *HPPA*.

Affidavit of Steven Rebellato sworn June 13, 2016 (“**Rebellato Affidavit**”) at para 7, Supplementary Application Record of The Regional Municipality of York, Simcoe Muskoka District Health Unit, and The Regional Municipality of Peel (“**Supp AR**”), Tab 2.

10. York Region, Peel Region and SMDHU are all “Boards of Health”, as established by the *HPPA*, and are mandated under the *HPPA* 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 citizens within their jurisdictions.

Chiefari Affidavit at para 8, AR, Vol. 1, Tab 2, p. 22.

Rebellato Affidavit at para 7, Supp AR, Tab 2.

Affidavit of Danny Martin sworn July 6, 2016 (“**Martin Affidavit**”) at para 7, Supp AR, Tab 3.

11. Schmidt is a dairy farmer who is a strident advocate for the legalization of the sale of raw milk, and was the originator of Glencolton Farms. The Respondent, Elisa Vander Hout (“**Vander Hout**”) is the current spouse of Schmidt.

Chiefari Affidavit at paras 10 and 12, AR, Vol. 1, Tab 1, pp. 22 and 23.

12. The operations of Glencolton Farms, including the selling, distributing, and delivering unpasteurized or raw milk and raw milk products, were, according to the Respondents,

transferred in or about 2009 to ARC, an Ontario corporation incorporated under the *Co-operative Corporations Act*, R.S.O. 1990, c. C.35 (“**CCA**”).

Chiefari Affidavit at para 13, AR, Vol. 1, Tab 2, p. 23.

13. The Respondents Vander Hout, Markus Schmidt (“**Markus**”) and Nikolaus Alexander Johannes Osthaus (“**Osthaus**”)<sup>2</sup> are Directors and Officers of ARC.

Chiefari Affidavit at para 14, AR, Vol. 1, Tab 2, p. 23.

14. The Intervenor, OFOF, is a member-owned co-operative corporation, incorporated under the CCA, whose members are consumers of the raw milk produced at Glencolton Farms by ARC.

Affidavit of William Denny sworn March 28, 2017 (“**Denny Affidavit**”) at paras 1 and 7; OFOF RR, Vol. 1, Tab. 1.

15. The Respondents allege that while ARC owns the farm property on which Glencolton Farm is situate (the “**Farm**”), OFOF currently owns the cows and all the dairy and other equipment involved in the production of raw milk.

Affidavit of Elisa Vander Hout sworn April 4, 2017 (“**Vander Hout Affidavit**”) at para 21; Responding Record of Agri-Cultural Renewal Co-Operative Inc. (“**ARC RR**”), Tab 1, p. 5.

16. The Respondents are currently distributing, selling offering for sale and delivering unpasteurized or raw milk to members of OFOF in York Region every Tuesday from the parking lot of property owned and operated by the Respondent, the Church, at 901 Rutherford Road in Vaughan, Ontario.

---

<sup>2</sup> The Applicants have been advised by the Respondents that Osthaus has resigned from his position as director of ARC, but his resignation has not yet been confirmed by the Ministry of Government and Consumer Services.



Chiefari Affidavit at para 15, AR, Vol. 1, Tab 2, p. 24.

Transcript of Cross-Examination of Elisa Vander Hout held April 20, 2017 (“**Vander Hout Transcript**”) at Qs 613-614, Supp AR, Tab 6.

17. The Respondents are also currently distributing, selling offering for sale and delivering unpasteurized or raw milk and raw milk products to members of OFOF at locations within Peel Region and within the jurisdiction of the SMDHU.

Vander Hout Transcript at Qs 432-439, Supp AR, Tab 6.

### ***The Legal History***

18. Schmidt originally operated a dairy farm within the milk quota system governing the distribution of milk in the Province of Ontario. In 1992, Schmidt cancelled his contract with the Milk Marketing Board and created a “lease-a-cow” scheme, whereby interested consumers of unpasteurized milk could ostensibly hold leasehold interests in Schmidt’s cows in an effort to avoid the effect of legislation prohibiting the production, sale and distribution of unpasteurized milk and milk products.

Chiefari Affidavit at para 25, AR, Vol. 1, Tab 2, p. 26.

19. On February 17, 1994 an order was issued by the Grey-Bruce Health Unit under section 13 of the *HPPA* directing Schmidt to cease the manufacturing, processing, and preparation etc. of unpasteurized milk and unpasteurized milk products on the grounds that such constituted a health hazard (the “**Grey Bruce Order**”).

Chiefari Affidavit at para 26, AR, Vol.1, Tab 2, p. 26.

Exhibit “K” to the Chiefari Affidavit, AR, Vol. 1, Tab 2K, pp. 202 – 204.

20. An appeal of the Grey Bruce Order was taken by Schmidt to the Health Protection Appeal Board (“**HPAB**”). For reasons given on September 1, 1994, Schmidt’s appeal was dismissed by the HPAB.

Chiefari Affidavit at para 27, AR, Vol. 1, Tab 2, pp. 26 – 27.

Exhibit “L” to the Chiefari Affidavit, AR, Vol. 1, Tab 2L, pp. 205 – 233.

21. Schmidt was also charged by the Grey Bruce Health Unit with contravening s. 18 of the *HPPA*, which prohibits the sale or distribution of milk or milk products that have not been pasteurized or sterilized in a plant that is licensed under the *Milk Act*. Schmidt was subsequently convicted of that offence and an offence under the *Milk Act*, fined \$3,500 and placed on probation for a period of two years.

Chiefari Affidavit at para 28, AR, Vol. 1, Tab 2, p. 27.

22. In 1994, York Region Public Health issued an order under section 13 of the *HPPA* to Mr. Schmidt requiring him to cease selling and distributing raw milk in York Region (the “**York Region Order**”).

Chiefari Affidavit at para 29, AR, Vol. 1, Tab 2, p. 27.

Exhibit “M” to the Chiefari Affidavit, AR, Vol. 1, Tab 2M, pp. 234 – 237.

23. After the lease-a-cow scheme proved ineffective, Schmidt, again in an effort to avoid the effect of legislation prohibiting the sale and distribution of unpasteurized milk, developed a “cow-share” scheme whereby an interested consumer of unpasteurized milk could enter into a contractual agreement with Schmidt, the intent of which was to create a fractional ownership interest in one of his cows.

Chiefari Affidavit at para 31, AR, Vol. 1, Tab 2, p. 28.

24. Under the cow-share scheme, individual cow share members paid \$300 to Schmidt in exchange for a one quarter interest in one of the cows on the Farm. The raw milk was transported first to the parking lot of the Waldorf School and then, later on, to the Church where the milk was collected by the cow share members upon payment. By the end of the cow share program, there were approximately 150 members. Every member was fully aware that he or she was receiving raw milk and no one could receive milk from Glencolton Farms unless he or she was a cow share member. In return for the cow share fee and the payment by members for raw milk upon delivery, Schmidt provided a service for the members including feeding, cleaning and housing the cows, and bottling, cooling and transporting the milk. The members had access to the cows' health records and milk test results. An independent dairy inspector inspected the operation annually.

*R. v. Schmidt*, 2010 ONCJ 9 (“**Schmidt 2010 ONCJ Decision**”) at para 61, Brief of Authorities of The Regional Municipality of York, Simcoe Muskoka District Health Unit and The Regional Municipality of Peel (“**BOA**”), Tab 1.

25. In 2006, nineteen charges (the “**2006 Provincial Charges**”) were instituted by the Province of Ontario against Schmidt for contraventions of s. 18 of the *HPPA* and s. 15 of the *Milk Act*.

Chiefari Affidavit at para 32, AR, Vol. 1, Tab 2, p. 28.

26. In 2006, York Region discovered that Schmidt was still delivering and distributing raw milk and other products from the Farm to his clients in Thornhill in a recognizable blue bus (the “**Blue Bus**”).

Chiefari Affidavit at para 33, AR, Vol. 1, Tab 2, p. 28.

27. On December 5, 2006, Schmidt c/o Glencolton Farms was served with a second order issued by York Region's Public Health Services Branch pursuant to s. 13 of the *HPPA* (the "**Second York Region Order**") whereby he was ordered to cease the offering for sale, sale, or distribution of unpasteurized milk and milk products within the jurisdiction of York Region.

Chiefari Affidavit at para 34, AR, Vol. 1, Tab 2, p. 28.

Exhibit "O" to the Chiefari Affidavit, AR, Vol. 1, Tab 2O, pp. 241 – 243.

28. Schmidt refused to abide by the terms of the Second York Region Order and continued to distribute unpasteurized milk within the jurisdiction of York Region. Accordingly, York Region applied to the Superior Court of Justice for an order pursuant to s. 102 of the *HPPA* that Schmidt be restrained from contravening the Second York Region Order.

Chiefari Affidavit at para 35, AR, Vol 1, Tab 2, pp. 28 – 29.

29. On May 17, 2007 Justice Ferguson issued an order (the "**2007 Court Order**") restraining Schmidt from contravening the Second York Region Order and from offering for sale or distributing unpasteurized milk and milk products within the jurisdiction of York Region.

Chiefari Affidavit at para 36, AR, Tab 2, p. 29.

Exhibit "P" to the Chiefari Affidavit, AR, Tab 2P, pp. 244 – 246.

30. Schmidt refused to abide by the terms of the 2007 Court Order and York Region brought a motion in the Superior Court of Justice against Schmidt for contempt. The motion was heard by way of a trial of an issue by Justice Boswell on September 10 to 12, 2008. On October 20, 2008 Justice Boswell released reasons for decision in which he found Schmidt in contempt of the 2007 Court Order in that he continued to distribute

unpasteurized milk in York Region in deliberate disregard to the 2007 Court Order (the **“Ontario Contempt Order”**).

Chiefari Affidavit at para 37, AR, Vol. 1, Tab 2, p. 29.

Exhibit “Q” to the Chiefari Affidavit, AR, Vol. 1, Tab 2Q, pp. 247 – 258.

31. By way of reasons for decision dated December 2, 2008, Justice Boswell sentenced Schmidt to a fine of \$5,000 and awarded costs to York Region in the amount of \$50,000. A judgment dated December 2, 2008 was obtained by York Region against Schmidt for the \$55,000 owing.

Chiefari Affidavit at para 38, AR, Vol. 1, Tab 2, p. 29.

Exhibit “R” to the Chiefari Affidavit, AR, Vol. 1, Tab 2R, pp. 259 – 268.

32. The 2006 Provincial Charges went to trial before Justice of the Peace Kowarsky in 2010. Schmidt argued that he did not violate the *HPPA* or the *Milk Act* as he had only supplied unpasteurized milk to individuals who had entered into the cow-share agreements. Schmidt also argued that the statutory provisions prohibiting the sale of unpasteurized milk were contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*.

Chiefari Affidavit at para 41, AR, Vol. 1, Tab 2, p. 30.

33. At trial, the Justice of the Peace accepted Schmidt’s argument that providing unpasteurized milk to individuals who had entered into cow-share agreements was not caught by the legislation and acquitted Schmidt of all charges.

Chiefari Affidavit at para 42, AR, Vol. 1, Tab 2, p. 30.

34. The Crown appealed the acquittals to the Ontario Court of Justice and the appeal was heard by Justice Tetley on April 13, 2011. For reasons released on September 28, 2011

Justice Tetley found that the Justice of the Peace had erred in his approach to statutory interpretation and found that by operating the Farm and selling and distributing milk to cow-share members, Schmidt had violated both statutes. Justice Tetley further concluded that there was no violation of the *Charter* by the statutory provisions in issue. Justice Tetley entered convictions on 13 of the 2006 Provincial Charges and imposed fines against Schmidt totaling \$9,150, and one year of probation.

Chiefari Affidavit at para 43, AR, Vol. 1, Tab 2, pp. 30 – 31.

35. Schmidt appealed the convictions entered by Justice Tetley in respect of the 2006 Provincial Charges to the Ontario Court of Appeal. The Ontario Court of Appeal dismissed the appeal with reasons released on March 11, 2014. The Court of Appeal rejected Schmidt's argument that the cow-share agreements amounted to an arrangement that took Schmidt's activities outside the reach of the *HPPA* and the *Milk Act*. The Court of Appeal found that the cow-share agreement did not transfer an ownership interest in a particular cow and that the member did not acquire the rights that ordinarily attach to ownership. The Court of Appeal further found that the cow-share program was nothing more than a marketing and distribution scheme.

Chiefari Affidavit at para 44, AR, Vol. 1, Tab 2, p. 31.

36. Schmidt sought leave to appeal the decision of the Ontario Court of Appeal in respect of the 2006 Provincial Charges to the Supreme Court of Canada and leave was denied on August 14, 2014.

Chiefari Affidavit at para 45, AR, Vol. 1, Tab 2, p. 31.

37. On October 2, 2013 Schmidt was found guilty of civil contempt in British Columbia for packaging and distributing raw milk for human consumption contrary to the terms of a permanent injunction order granted in 2010 (the “**BC Injunction Order**”).

Chiefari Affidavit at para 47, AR, Vol. 1, Tab 2, p. 32.

Exhibit “T” to the Chiefari Affidavit, AR, Vol. 1, Tab 2T, pp. 271 – 273.

38. The BC Injunction Order was obtained on application by the Fraser Health Authority originally against Alice Jongerden (“**Jongerden**”), who was found to have sold and distributed raw milk for distribution for human consumption contrary to BC’s *Public Health Act*, through an operation known as “Home on the Range” or “Our Cows”. The BC Injunction Order prohibited Jongerden and anyone having notice of the Order from packaging and/or distributing raw milk and/or raw milk products for human consumption.

Chiefari Affidavit at para 48, AR, Vol. 1, Tab 2, p. 32.

39. Schmidt took over operation of the Home on the Range farm in 2010 and purported to sell raw milk as a “cosmetic”. Schmidt was served with a copy of the BC Injunction Order and was ordered by the Fraser Health Authority to cease and desist from the production and distribution of raw milk. When Schmidt refused to do so, the Fraser Health Authority sought an order finding Schmidt in contempt of the BC Injunction Order.

Chiefari Affidavit at para 49, AR, Vol. 1, Tab 2, p. 32.

40. On October 2, 2013 Justice Wong of the Supreme Court of British Columbia found Schmidt to be in contempt of the BC Injunction Order (the “**BC Contempt Order**”). Justice Wong found that Schmidt had a central role in taking over the operations of Our

Cows and that the description of the raw milk being sold as a “cosmetic” was a ruse. Schmidt was sentenced to a term of imprisonment of 3 months, suspended with a probationary period of 1 year.

Chiefari Affidavit at para 50, AR, Vol. 1, Tab 2, pp. 32 – 33.

Exhibit “U” to the Chiefari Affidavit, AR, Vol. 1, Tab 2U, pp. 271 – 320.

41. Schmidt appealed the BC Contempt Order and the appeal was dismissed with costs by the BC Court of Appeal on February 12, 2015.

Chiefari Affidavit at para 51, AR, Vol. 1, Tab 2, p. 33.

Exhibit “V” to the Chiefari Affidavit, AR, Vol. 2, Tab 2V, pp. 321 – 324.

#### ***From Cow Share to Farm Share***

42. In 2007, Vander Hout changed the name of a co-op that she controlled from “Circle Sun Farm Workers Co-op” to “ARC”<sup>3</sup>. In 2010, title in the Farm property was transferred from Schmidt to his previous wife, Dorothea Schmidt (“**Dorothea**”), and then from Dorothea to ARC.

Vander Hout Affidavit at para 4, ARC RR, p. 2.

Chiefari Affidavit at paras 20-21, AR, Vol. 1, Tab 2, p. 25

Exhibit “G” to the Chiefari Affidavit, AR, Vol. 1, Tab 2G, pp. 122-179.

43. Many of the cow share members were offered an opportunity to purchase shares in ARC in order to become shareholders. Approximately 150 people purchased shares in ARC and for the most part most of the shareholders were former cow-share members.

Vander Hout Transcript at Qs 372 – 377 and 541, Supp AR, Tab 6.

Exhibit “W1” to the Chiefari Affidavit, AR, Vol. 2, Tab 2W1, pp. 329-342.

---

<sup>3</sup> ARC is a worker-owned co-op. Currently, there are only 2 issued and outstanding membership shares owned by Markus and Vander Hout.



Denny Affidavit at para 18, OFOF RR, Vol 1, Tab 1.

44. Generally, consumers paid \$2,000 for 20 Preference A (non-voting) shares in ARC. On top of that, consumers paid for any milk that they consumed at a price of \$3.00 to \$5.50 per litre.

Vander Hout Transcript at Qs 377-381, 983-984, Supp AR, Tab 6.

45. Vander Hout has admitted that people purchased shares in ARC in order to gain access to raw milk (i.e., not because they wanted to become dairy farmers). ARC only allowed its shareholders to purchase the raw milk produced at Glencolton Farms.

Vander Hout Affidavit at para 19, ARC RR, p. 4.

Vander Hout Transcript at Q 836, Supp AR, Tab 6.

46. ARC shareholders ordered raw milk and other products from Glencolton Farms by way of a website known as FarmMatch. Once the orders were placed, FarmMatch would calculate the cost of the order.

Vander Hout Transcript at Qs 643-647,661-672, Supp AR, Tab 6.

47. The raw milk produced at Glencolton Farms was distributed by a few different methods: some of the ARC shareholders picked up their milk directly from the farm; Vander Hout delivered milk directly to an address in Brampton and an address in Cookstown<sup>4</sup>; and every Tuesday, milk was transported (usually by Vander Hout) from the Farm to the Church in a Mercedes van leased by ARC, where it would be collected by approximately 60 - 70 ARC shareholders.

---

<sup>4</sup> There is also evidence in the Affidavit of Steven Rebellato at paragraph 12 that milk is delivered to an address at 105 Toronto Street in Barrie, Ontario.

Vander Hout Transcript at Qs, 131-133, 226, 415-421 433-438, Supp AR, Tab 6.

***The Creation of OFOF***

48. OFOF was incorporated in January of 2016<sup>5</sup>. People who wanted to become members in OFOF were required to invest \$2,000 consisting of: the purchase one membership share at a cost of \$100; the purchase of nine Class A Preference Shares at a cost of \$100 for a total of \$900; and, the provision to OFOF of a non-interest-bearing loan in the amount of \$1,000.

Exhibit "B" to the Affidavit of Mascha Peronne dated March 31, 2017 ("**Perrone Affidavit**"); OFOF RR, Vol. 3, Tab 72B.

Transcript of Cross-Examination of Mascha Peronne, held April 24, 2017 ("**Peronne Transcript**") at Qs 149 - 151, Supp AR, Tab 8.

Transcript of Cross-Examination of William Denny, held April 24, 2017 ("**Denny Transcript**") at Qs 101 - 103, Supp AR, Tab 9.

49. There are currently about 150 members of OFOF. Most of the current OFOF members were former ARC shareholders. A number of the ARC shareholders sold back their ARC shares in order to make the \$2,000 investment in OFOF.

Denny Transcript at Qs 74-76, Supp AR, Tab 9.

Vander Hout Transcript at Qs 541-543, Supp AR, Tab 6.

50. The officers and directors of OFOF admitted that individuals purchased shares in OFOF in order to gain access to raw milk.

Denny Affidavit at para 24, OFOF RR, Vol. 1, Tab 1.

Perrone Transcript at Q 120, Supp AR, Tab 8.

---

<sup>5</sup> According to paragraph 19 of the Affidavit of William Denny, OFOF was created because there was some advice received that ARC, as a worker owned co-op, could not have more than 35 non-worker shareholders without issuing an offering statement. Note that this advice does not seem to be correct according to s. 34 of the CCA and O. Reg 178, but nothing turns on this.

51. By way of a purchase and sale agreement dated March 1, 2016 (the **“Purchase Agreement”**) ARC purported to sell to OFOF all of the cows and dairy equipment on the Farm. As well, by way of a lease agreement dated March 1, 2016 (the **“Lease Agreement”**) OFOF purported to lease from ARC certain areas of the Farm involved in the production of milk and milk products. Finally, by way of a Management Agreement dated March 1, 2016 (the **“Management Agreement”**), OFOF purported to retain ARC to care for the cows and manage the dairy operations.

Exhibits “G”, “H”, and “I” to the Denny Affidavit, OFOF RR, Vol. 1, Tabs 1G, 1H and 1I.

52. Almost all aspects of the dairy operation have remained unchanged since March 1, 2016. The ordering of raw milk is by the same means: OFOF members order raw milk and other products from Glencolton Farms by way of FarmMatch. The FarmMatch orders are received at the Farm and acted on by an employee/contractor of ARC named Carl Natiuk (**“Carl”**). Currently, OFOF members pay \$5.50 per litre of raw milk (including the jar deposit)<sup>6</sup>.

Affidavit of Carl Natiuk sworn March 30, 2017 (**“Natiuk Affidavit”**) at paras 2-3, OFOF RR, Vol. 3, Tab 74.

Vander Hout Transcript at Qs 1179-1182, Supp AR, Tab 6.

Perrone Transcript at Q 206, Supp AR, Tab 8.

53. The delivery of and payment for raw milk is also by the same means. The van is usually driven by Vander Hout, who is assisted by Carl<sup>7</sup>. OFOF members attend at the Church

---

<sup>6</sup> Note that a dairy farmer selling milk pursuant to the “Quota” receives about \$1 per litre of milk (see Transcript of the Cross Examination of Michael Schmidt taken April 20, 2017 (**“Schmidt Transcript”**) at Q 75, Supp AR, Tab 7.

<sup>7</sup> Both Vander Hout and Carl are apparently OFOF members.

every Tuesday to collect the milk and other products that they have ordered. To pay for their orders, the OFOF members provide cheques and cash to Vander Hout, who deposits the funds in OFOF's bank account. OFOF then makes a payment to ARC, based on a per-unit price of the amount of product received by OFOF members.

Vander Hout Transcript at Qs 613-614, Supp AR, Vol. 1, Tab 6.

Peronne Transcript at Qs 265 – 271 and 289 - 299, Supp AR, Tab 8.

Denny Transcript at Qs 242 - 248, Supp AR, Tab 9.

**PART III – ISSUES AND LAW**

54. This factum addresses the following issues:
- i. The scope of the evidence to be considered on this Application;
  - ii. The basis for the Applicants' claim for injunctive relief; and
  - iii. Whether the current operations of Glencolton Farms come within the "Farm Family Exemption" to the prohibition against the sale, offering for sale or distribution of raw milk under the *HPPA*.
55. It is the Applicants' position that:
- i. Evidence and argument related to the relative risks and benefits of raw milk and whether the prohibition against selling and distributing raw milk is fair and just is beyond the scope of this Application and ought not to be received by this Court;
  - ii. There are numerous bases for their request for injunctive relief; and
  - iii. The current operations of Glencolton Farms do not bring the Respondents within the Family Farm Exemption to the prohibition against the sale, offering for sale or distribution of raw milk under the *HPPA*, and are therefore precluded.

*a. The Scope of this Application*

56. The sale, offering for sale and distribution of raw milk is prohibited in all provinces of Canada. In Ontario, the sale, delivery and distribution of raw milk and milk products is prohibited by operation of s. 18 of the *HPPA*, which provides as follows:

**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*.

*Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 (“*HPPA*”) at s. 18, Schedule “B” to this Factum.

57. The Respondents wish to present evidence and arguments about the social, health and religious benefits of drinking raw milk and the relative absence of hazards associated therewith. Such evidence and arguments are not, however, at all relevant to this Application.
58. This Application is an exercise in the enforcement of the rule of law, and not a debate about health policy. Justice of the Peace Kowarsky commented on the function of the Court in hearing the 2006 Charges:

Do all the people of Ontario still require this protection seven decades

later in light of technical advances throughout the world in milk farming and agriculture? This is not my decision to make; rather it is the decision of the legislature.

Is it my task to rule on the comparative health risks and hazards related to the consumption of unpasteurized milk and milk products as opposed to pasteurized milk and milk products? The answer, of course, is negative. That is not my role as the presiding justice. Is the prohibition against selling and distributing raw milk fair and just legislation? I have no authority to pronounce on this.

*Schmidt* 2010 ONCJ Decision, *supra* at paras 9-10, BOA, Tab 1.

59. As stated by the Ontario Court of Appeal in its decision in *R. v. Schmidt*:

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

*R. v. Schmidt*, 2014 ONCA 188 ("***Schmidt* ONCA Decision**") at para 21, BOA, Tab 2.

60. Accordingly, the Applicants submit that the affidavit of Nadine Ijaz, and all articles referenced therein along with the various affidavits submitted by OFOF members about the religious basis for and health benefits of their consumption of raw milk are completely irrelevant to this Application and ought not to be considered by this Court.

***b. The Bases for the Applicants' Claim for Injunctive Relief***

61. There are three bases for the Applicants' claim for injunctive relief:

- i. A statutory basis pursuant to section 102 of the *HPPA*;
- ii. A public authority's ability to restrain activities for reasons of public safety; and

iii. Section 101 of the *Courts of Justice Act*.

i. Section 102 of the HPPA

62. Section 102 of the *HPPA* allows a municipality to enforce an order made under the *HPPA* by way of application to the Superior Court of Justice.

*HPPA, supra* at s. 102, Schedule “B” to this Factum.

63. The previous York Region Order was made against “Michael Schmidt c/o Glencolton Farm” at a time when Schmidt *was* Glencolton Farms, and Applicants submit that this order should be enforceable as against the Respondents: the evidence clearly establishes that the operation has proceeded uninterrupted, with the interposition of various corporate vehicles such as ARC and OFOF, who purport to now operate Glencolton Farms. To require a board of health to restart the entire administrative procedure under the *HPPA* due to a purported transmission of interest in respect of the same operation that was the subject of a previous order under the *HPPA* would be contrary to the statute’s core purpose of health protection.

64. Further, section. 13(8) of the *HPPA* provides that an order under the *HPPA* has broader application than to only the person named in the order. Section 13(8) provides that “it is sufficient in an order under this section to direct the order to a person or persons described in the order, and an order under this section is not invalid by reason only of the fact that a person to whom the order is directed is not named in the order”.

*HPPA, supra* at s. 13(8), Schedule “B” to this Factum.



65. Accordingly, it is submitted that the Respondents (or whichever of them currently own and operate Glencolton Farms) are still subject to the operation of the Second York Region Order, which can be enforced by way of application to this Court under s. 102 of the *HPPA*.

66. The applicable test in determining whether a statutory injunction should be granted is different from the test applicable to equitable injunctions set out in *RJR–MacDonald*.

*The Law Society of Upper Canada v. Coulson*, 2013 ONSC 2448 (SCJ) (“*Coulson*”) at para. 6, BOA, Tab 3.

67. Where a statutory injunction is sought to prevent ongoing unlawful conduct, factors which are normally considered in an application for equitable injunctive relief do not apply.

*City of Vancouver et al. v. Maurice et al.*, 2002 BCSC 1421 (SCJ) (“*Maurice*”) at paras 10-14, BOA, Tab 4.

68. This is because the public authority is presumed to be acting in the best interests of the public, the public has a direct and substantial interest in the enforcement of the law and a breach of the law constitutes irreparable harm to the public interest.

*Vancouver (City) v. Zhang*, 2009 BCSC 84 (SCJ) (“*Zhang*”) at paras 18-19, BOA, Tab 5.

69. The authorities have made it clear that because upholding the rule of law is an essential function of courts, factors such as irreparable harm and the balance of convenience are not required to be considered on an application for a statutory injunction.

*Peachland (District) v. Peachland Self Storage Ltd.*, 2011 BCCA 466 (CA) at paras 27-28 and 37, BOA, Tab 6.

70. Once a breach of a regulatory statute has been established, it is not necessary for the applicant to prove that actual damage has been suffered.

*College of Opticians of British Columbia v. Coastal Contacts Inc. and Clearly Contacts Ltd.*, 2009 BCCA 459 (CA) at paras 28 and 30, BOA, Tab 7.

71. Further, it is not necessary for the applicant to lead “compelling evidence” that an injunction is warranted. In the absence of exceptional circumstances, where a clear breach of an enactment has been established the Court will grant a statutory injunction on an interlocutory application.

*Newcastle Recycling v. Clarington (Municipality)*, 2005 CanLII 46384 (ON CA) at para 32, BOA, Tab 8.

*Maurice, supra* at para 13, BOA, Tab 4.

72. Examples of circumstances that would qualify as “exceptional” in this context include: where there was a right that pre-existed the enactment that was breached; where there has been a clear and unequivocal expression that the unlawful conduct will cease; where there is real uncertainty as to whether a breach is being “flouted”; or where the conduct is not what the enactment was intended to prevent.

*Maurice, supra* at para 20, BOA, Tab 4.

73. Where an injunction is authorized by a statute, the following principles apply:

- The court’s discretion is “more fettered”;
- An applicant does not have to prove that damages are an inadequate remedy or that irreparable harm will result if the injunction is refused;
- There is no need for other enforcement remedies to have been pursued;
- The court retains a discretion as to whether to grant injunctive relief; and

- It remains more difficult to obtain a mandatory injunction.

*Canada v. Ipsco Recycling Inc.*, [2004] FCR 530 (FC) (“**Ipsco Recycling**”) at paras 50-51, BOA, Tab 9.

74. The fact that the Defendants may suffer some hardship from the imposition and enforcement of an injunction will not outweigh the public interest in having the law obeyed.

*Ipsco Recycling, supra* at para 51, BOA, Tab 9.

*Coulson, supra* at para 6, BOA, Tab 3.

75. It is not a defence to a proceeding such as this to suggest that there may be other cases of infringement of a statutory provision which have not been addressed by the municipality.

*Air Ronge (Village) v. Werchola (La Family Taxi)*, 2011 SKQB 237 (QB) at para 7, BOA, Tab 10.

ii. Public Nuisance

76. The role of public authorities to enjoin public nuisances in the public interest is one “of great antiquity.”

*The Corporation of the Town of Newmarket v. Halton Recycling Ltd.*, 2006 CanLII 33316 (SCJ) (“**Halton Recycling**”) at para 81, BOA, Tab 11.

77. The principles that apply to a statutory injunction also apply to an injunction sought by a public authority to prevent a public nuisance. Once a public nuisance is established, unless special circumstances exist, an injunction should issue.

*Lanark (County) v. Morrow*, 2011 ONSC 4028 (SCJ) at paras 19-25, BOA, Tab 12.

*Regional Municipality of York v. DiBlasi*, 2014 ONSC 3259 (CanLII) at para 95, BOA, Tab 13.

*Kent County v. Batchelor*, [1978] 3 All ER 980 (UK QB), BOA, Tab 14.

78. The Supreme Court of Canada has adopted the following definition of a public nuisance:

“A public nuisance has been defined as any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience”: see *Klar, supra*, at p. 525.

*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (SCC) at para 52, BOA, Tab 15.

iii. *Common Law Injunction under section 101 of the CJA*

79. The test for obtaining a permanent injunction pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“**CJA**”) is the “just and convenient test.” In determining whether or not to grant a permanent injunction, the court will first fully evaluate the legal rights of the parties to determine whether the applicant has proved its case on the merits. Once the merits of the case are established, the court will then determine whether an injunction is an appropriate remedy.

*Courts of Justice Act*, R.S.O. 1990, c. C.43 at s. 101, Schedule “B” to this Factum.

*Cambie Surgeries Corporation v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 (“**Cambie Surgeries**”) at para 28, BOA, Tab 16.

80. In determining whether an injunction is an appropriate remedy, the court will usually examine the nature of the wrong, the availability of other sanctions and the relative effectiveness of those sanctions.

*Simard Westlink Inc. v. Wallance*, 2013 BCSC 2218 (“**Simard**”) at para 49, BOA, Tab 17.

81. The three-pronged *RJR-MacDonald* test does not apply to the determination of the granting of a permanent injunction, but some of the evidence that would be used to

establish entitlement to an interlocutory injunction might still be considered.

*Simard, supra* at para 50, BOA, Tab 17.

*Cambie Surgeries, supra* at para 28, BOA, Tab 16.

1711811 Ontario Ltd. (Adline) v. Buckley Insurance Brokers, 2014 ONCA 125 at para 79, BOA, Tab 18.

82. While there is some older case law that questions whether an injunction is an appropriate remedy in situations where a public authority has administrative mechanisms available to it, more recent case law has recognized that if a public authority is given a specific statutory responsibility which it is required to perform in the public interest, then in the absence of a provision to the contrary in the statute, the public authority has standing to apply to the court for an injunction to prevent any interference with the performance of its public mandate.

*Broadmoor Hospital Authority v. R*, [1999] EWCA Civ 3039 at paras 20, 57, BOA, Tab 19.

83. Further, the courts have recognized that injunctions may be granted where the remedies provided by a statutory regime are inadequate, for example to restrain persistent breaches of statutory provisions enacted for the public benefit.

*Cambie Surgeries, supra* at para 35, BOA, Tab 16.

*Ontario (Attorney General) v. Grabarchuk* (1976), 1976 CanLII 574 (ONSC) (Div. Ct.) at pp. 10, 12, BOA, Tab 20.

***c. The Scope of the “Family Farm Exemption”***

84. This Court has recognized that it is not illegal to consume raw milk *per se* and that, accordingly, a dairy farmer and members of his or her immediate family who live on a dairy farm have access to raw milk by means not prohibited by the *HPPA*. This is the so called “Farm Family Exemption.”

*R. v. Schmidt*, 2011 ONCJ 482 (“**Schmidt 2011 ONCJ Decision**”) at para 2 and 5, BOA, Tab 21.

*Schmidt* ONCA Decision, *supra* at para 1, BOA, Tab 2.

85. The Applicants take the position that the current operations of Glencolton Farms do not come within the “Farm Family Exemption” to the prohibition against the sale, offering for sale and distribution of raw milk under the *HPPA*.
86. This Court has commented on the defined parameters of the legal entitlement to consume unpasteurized milk pursuant to the Farm Family Exemption as follows:

The *H.P.P.A.* does not state clearly that members of “farm families” may consume unpasteurized milk and milk products; rather, the exception which allows them to do so is implicit. Section 18 of the *Act* does not prohibit the consumption of unpasteurized milk or milk products in a private residence. ... The only reason that a private residence of a “family farm” differs from a private residence of anyone else vis-à-vis consumption of unpasteurized milk and milk products, is that the members of “farm families” have access through a means not prohibited by section 18 of the *Act*

*Schmidt* 2011 ONCJ Decision, *supra* at para 5, referring to the reasons for decision of the Health Services Appeal and Review Board dated September 1, 1994, p. 11, BOA, Tab 21.

87. The narrow construction of the Farm Family Exemption is based on the fact that public welfare legislation like the *HPPA* is to be afforded a broad and liberal interpretation. As stated by the Court of Appeal in *R. v. Schmidt*, in respect of the interpretation to be applied to the provisions of the *HPPA*:

It is well-established that public welfare legislation is to be accorded a broad and liberal interpretation that is consistent with its purpose. Narrow interpretations that would frustrate the legislature’s public welfare objectives are to be avoided: [citations omitted]

*Schmidt* ONCA Decision, *supra* at para 23, BOA, Tab 2.

88. Further, section 8 of the *Municipal Act, 2001* provides that the powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues. The Ontario Court of Appeal has commented that the purpose of the new *Municipal Act, 2001* was to give municipalities "the tools they need to tackle the challenges of governing in the 21<sup>st</sup> century."

*Municipal Act, 2001*, S.O.2001, c. 25 at s. 8, Schedule "B" to this Factum.

*Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357 (CA) ("**Croplife**") at paras 6 and 8, BOA, Tab 22.

89. The Court of Appeal further stated that the powers of municipalities under the new *Municipal Act, 2001* should not be interpreted restrictively and that a broad new purposive approach should be used to interpret the powers the *Municipal Act, 2001* grants.

*Croplife, supra* at paras 16 – 20 and 37, BOA, Tab 22.

*Halton Recycling, supra* at paras 79 – 80, BOA, Tab 11.

90. The Applicants take the position that the current operations of Glencolton Farms do not come within the "Farm Family Exemption" to the prohibition against the sale, offering for sale and distribution of raw milk under the HPPA for the following reasons:

- i. The agreements between OFOF and ARC are shams and have not effected any legal change in effective ownership of the cows and the dairy operation as compared to the "cow share" scheme;

ii. In any event, the property of OFOF is entirely distinct from the shares of stock issued by it, and the individual members of OFOF are not the owners of its property, including the cows and dairy equipment; and

iii. The only OFOF members who are consuming the unpasteurized milk on a “family farm” are Vander Hout and Carl.

*i. The Agreements are Sham Transactions*

91. According to the Respondents, OFOF now owns the cows and the dairy equipment and ARC manages the dairy operation on behalf of ARC pursuant to a Management Agreement. That being said, on the basis of the wording of the agreements themselves and on the evidence regarding the current operation, it is submitted that the transactions between ARC and OFOF are sham transactions.

92. Importantly, there is no evidence to suggest that the cows were actually owned by ARC at the time of the purported sale to OFOF. The evidence of Vander Hout is that the herd of cows is “self-sustaining”, in other words new cows are born into the herd instead of being purchased. At the time of the *R. v. Schmidt* proceedings commenced in 2006 it is clear that the cows were owned by Schmidt. There is no evidence that title in the cows was at any time transferred from Schmidt to ARC.

93. Further, the agreements between OFOF and ARC omit many provisions that would be included in a bona fide transaction between two arm’s length parties. For example, in



respect of the Purchase Agreement:

- There are no covenants by the Vendor as to the fitness of the cows or the dairy equipment;
- There are no lists of excluded assets, assumed liabilities and/or excluded liabilities;
- There are no representations and warranties of the Vendor as to itself, including, for example: (i) organization and status; (ii) corporate power and authorization to enter into the Purchase Agreement and sell the Purchased Assets; (iii) enforceability; (iv) ownership of the Purchased Assets; (v) no other agreements; (vi) bankruptcy and insolvency; (vii) no conflict or breach by entering into the Purchase Agreement or selling the Purchased Assets; (viii) no litigation affecting the ability to enter into the Purchase Agreement or sell the Purchased Assets; (ix) residency; and (x) *Excise Tax Act* registration;
- There are no representations and warranties of the Vendor as to the business / assets being sold, including, for example: (i) conduct of business in compliance with laws; (ii) equipment and other assets owned and/or leased; (iii) inventories and accounts receivable; (iv) intellectual property owned, leased and/or licenced; (v) information technology owned, leased and/or licenced; (vi) insurance policies maintained; (vii) material contracts with continuing obligations and/or which cannot be terminated upon notice of 30 days or less; (viii) no default under existing contracts; (ix) regulatory permits and third-party approvals to conduct the business have been obtained; (x) customers and suppliers; (xi) product warranties and liabilities related thereto; and (xii) full disclosure in the agreement;
- There are no representations and warranties of the Purchaser as to itself, including, for example: (i) organization and status; (ii) corporate power and authorization to enter into the Purchase Agreement and purchase the Purchased Assets; (iii) enforceability; (iv) bankruptcy and insolvency; (v) no conflict or breach by entering into the Purchase Agreement or purchasing the Purchased Assets; (vi) no litigation affecting the ability to enter into the Purchase Agreement or purchase the Purchased Assets; (vii) residency; and (viii) *Excise Tax Act* registration;
- There are no provisions as to the survival period of specific representations and warranties. For example, we would expect the fundamental representations of the Vendor as to itself and as to title of the Purchased Assets would survive without the limitation of time. All other representations and warranties would typically survive the closing of the transactions for a period negotiated between the parties,

usually around 18 months to 8 years depending on the subject matter of the applicable representation or warranty;

- There are no interim period covenants (if the agreement provides for an interim period between signing and closing) and post-closing covenants, including, for example: (i) exclusive dealings during the interim period; (ii) transfer of documentation on closing; (iii) investigations by the Purchaser during the interim period; (iv) risk of loss during the interim period; (v) restrictions on business and conduct during the interim period; and (vi) notification of certain matters during the interim period;
- There are no indemnification provisions from the Vendor to the Purchaser for matters specifically negotiated between the parties, and which would typically include: (i) accuracy of representations and warranties of the Vendor related to the Purchased Assets / business; (ii) breach or non-performance of a covenant or obligation; (iii) failure to comply with *Bulk Sales Act*; (iv) excluded liabilities; and (v) excluded assets; and
- The Purchase Agreement does not address compliance with the *Bulk Sales Act* (Ontario).

94. And in respect of the Management Agreement:

- There are no representations and warranties of the Vendor as to itself and as to the services;
- There are no representations and warranties of the Purchaser as to itself;
- There are no indemnification and insurance provisions from the Vendor to the Purchaser in connection with the Vendor housing and caring for cattle owned by the Purchaser and the other services being provided by the Vendor; and
- There are no provisions as to audit rights, intellectual property ownership rights, confidentiality, non-competition / non-solicitation, term and termination, events of default, the relationship of the parties, payment of costs, and remittance of taxes.

95. Further, no money actually changed hands in respect of the purported sale of the cows and the dairy equipment. Instead, two promissory notes (copies of which have not been produced) were apparently provided.

96. Neither the cows nor the dairy equipment were appraised or inspected prior to purchase by OFOF. The purchase prices were apparently suggested by ARC's accountant.

Vander Hout Transcript at Qs 725 - 734, Supp AR, Tab 6.

Denny Transcript at Qs 199 – 206 and 213 - 214, Supp AR, Tab 9.

97. The Management Agreement does not clearly set out how much financial consideration the ARC is to receive for the provision of the services. Section 13 of the Management Agreement provides that OFOF will compensate ARC for the services “on a per unit basis and at a price to be agreed to by [the Purchaser and the Vendor] from time to time.”

Exhibit “I” to Denny Affidavit, OFOF RR, Vol. 1, Tab 11.

Denny Transcript at Qs 241 - 248, Supp AR, Tab 9.

98. Aside from the agreements themselves, the operation is essentially unchanged since the “cow share” days, prior to the creation of OFOF. Specifically:

- The business name “Glencolton Farms” is currently registered to ARC and not OFOF;
- ARC still pays all farm expenses, and is then “reimbursed” for those expenses by payment of the management fees;
- The cows still live on the Farm as they did prior to OFOF coming into existence;
- The cows are still milked by same people as they were prior to OFOF coming into existence;
- Raw milk is still prepared and bottled in same place as it was prior to OFOF coming into existence;
- Many OFOF members were ARC members and cow share members prior to that;
- Members of OFOF still make weekly orders of milk products via FarmMatch like they did prior to OFOF coming into existence;
- Vander Hout still drives the van to the Church parking lot for many of the OFOF members to collect their milk;

- Members still pick up milk products from van in Church parking lot;
- Vander Hout attends at distribution sites in Peel and Simcoe Regions to deliver the milk to OFOF members who reside there;
- OFOF's head office is at the Farm in Vander Hout's office;
- Vander Hout attends all meetings of directors of OFOF and all filing and updating of the OFOF minute book is done by Vander Hout and Carl;
- Vander Hout and Carl draw up most of the cheques for OFOF signature;
- Members still make payment for the milk to Vander Hout; and
- The cost of the milk is still \$5.50 per litre.

Vander Hout Transcript at Qs 1181 - 1183, Supp AR, Tab 6.

Denny Transcript at Qs 20 – 53, 85 - 87, 93 – 94, 183 – 184, Supp AR, Tab 9.

Exhibit “V” to the Affidavit of Rick Bond (the “**Bond Affidavit**”), Application Record of the Director, Volume 1, Tab 3V.

ii. *The Property of OFOF is not the Property of its Members*

99. Even if there was a valid transmission of ownership interest in the cows and dairy operation to OFOF, such does not invest the individual members of OFOF with ownership rights in the cows and dairy equipment or, ultimately, in the raw milk.
100. The situation in this case is very similar to that at issue in the Iowa Supreme Court case of *Johnson County, Iowa v. Guernsey* (“**Johnson County**”). In *Johnson County*, the Supreme Court of Iowa heard an appeal from an order of the Johnson District Court enjoining a non-profit corporation (the “**Corporation**”) from selling and distributing unpasteurized milk to its members, which was prohibited in Iowa. One of the stated purposes of the corporation was to provide a source of milk from a particular herd of

cows known as Golden Guernsey cows.

101. The Corporation entered into an agreement with a dairy farmer to lease the entire herd, and the agreement included a provision that all milk produced by the cows would be the property of the corporation. The dairy farmer entered into an agreement with the Corporation for the care of the leased heard.
102. To become a member of the Corporation, one had to pay a \$1.00 membership fee and have an understanding of the objects and purposes of the Corporation. To pay for the cost of the care of the herd, each member was assessed a fee based on his or her consumption of dairy products.
103. The trial court found that the Corporation's distribution of unpasteurized milk to its members constituted a sale prohibited by a Public Health Code of Iowa. The Iowa Supreme Court agreed. The Iowa Supreme Court stated that the Corporation, not the members or shareholders, held title to all corporate property. The Court quoted the following pronouncement from an earlier decision as follows:

The doctrines are fundamental and familiar that the corporation itself is a legal personality, and holds the full title, legal and equitable, to all corporate property. A stockholder does not, by virtue of his stock, acquire any estate, legal or equitable, in the corporate property; he obtains only a right to participate in the lawful dividends while the corporation is in being, and to his proportionate share of the net assets upon its dissolution and final settlement.

*Johnson County, Iowa v. Guernsey*, 232 N.W.2d 84 (Iowa Supreme Court, 1975), at p. 5, BOA, Tab 23.

See also *Slippy v. Northy*, EQCV067968 (Linn County Circuit Court, Iowa 2012), BOA, Tab 24.

104. The Corporation also argued that the Code was not intended to prohibit the distribution of raw milk as its members were genuinely interested in obtaining unpasteurized milk because they believed it was healthier and more wholesome than pasteurized milk. In rejecting this argument, the Iowa Supreme Court noted that the section of the Code was a law providing regulation conducive to the public good and welfare and, accordingly, had to be liberally interpreted to affect its purpose.
105. The legal principles upon which the decision in *Johnson County* is based are the same in Canada. The law in Ontario is that a corporation is a distinct legal personality, so that it holds the full title, legal and equitable, to all corporate property. In *McClurg v. Canada*, the Supreme Court of Canada enunciated the axiomatic “separate legal identity” principle of corporate law as follows:

Since the famous decision of the House of Lords in *Salomon v. Salomon and Co.*, [1897] A.C. 22, it has been a settled proposition of law that a corporation has a separate legal existence, independent from that of its shareholders. Even before *Salomon*, it had been said that it was this proposition that lay at the "root" of corporate law: *Farrar v. Farrars, Limited* (1888), 40 Ch. D. 395, at pp. 409-10.

The independent legal existence of the corporation means that, while the shareholder remains a proportionate owner of the corporation, he does not actually own its assets. These assets belong to the corporation itself, as a separate legal entity. Management of the corporation is entrusted to its officers and directors with the shareholder's interest protected through the distribution of shareholder votes. Thus, the corporate entity is unique in that it allows the shareholder to alienate ownership of property by placing it in a structure where the ownership of the property is separated from the effective control over that property. The sole link between the shareholder and the company is the share, which provides both a measure of the shareholder's interest in the company, as well as of the extent of the shareholder's liability for the actions of that company.

*McClurg v. Canada*, [1990] 3 SCR 1020 at pp. 1056-1057, BOA, Tab 25.

106. This is so as well in respect of corporations incorporated under the CCA.

*Co-operative Corporations Act*, R.S.O. 1990, c. C.35 at s. 15, Schedule “B” to this Factum.

*McGauley v. B.C.*, 1989 CanLII 2809 (BC CA) at para 24, BOA, Tab 26.

107. Accordingly, even if OFOF currently owns the cows and dairy production equipment, the members did not themselves acquire ownership of the cows and dairy production equipment by virtue of their membership. As a result, the delivery and payment transactions between OFOF and its members regarding the milk still amount to sale and distribution of the milk, which is prohibited by s. 18 of the *HPPA*.

iii. *The Milk is Not Consumed on a Family Farm*

108. The evidence is clear that the only OFOF members that live on the Farm are Vander Hout and Carl. Accordingly, none of the other OFOF members consume the raw milk in a private residence on the Farm.

Vander Hout Transcript at Qs 549 – 551, Supp AR, Tab 6.

109. Further, the OFOF members did not purchase shares in ARC and OFOF in order to become dairy farmers. The reason that people bought shares in ARC and then in OFOF is to gain access to raw milk.

Denny Affidavit at para 24, OFOF RR, Vol. 1, Tab 1.

Perrone Transcript at Q 120, Supp AR, Tab 8.

110. While the Respondents take great pains to point out that all members of ARC and OFOF fully understand and accept all risks associated with the consumption of raw milk, there is little done to prevent redistribution of the raw milk by such individuals. The members themselves do not have to attend but may send a family member or agent to collect the milk, without any requirement that such family member or agent be an OFOF member.

Vander Hout Transcript at Q 615, Supp AR, Tab 6.

Denny Affidavit at para 30, OFOF RR, Vol. 1, Tab 1.

111. Furthermore, there is nothing in the Articles or By-laws of OFOF that prohibit resale or redistribution of the raw milk. The milk jars themselves are not labeled with any warning that the milk is not to be resold or redistributed or that they contain unpasteurized milk<sup>8</sup>.

Vander Hout Transcript at Qs 410 – 411, Supp AR, Tab 6.

*d. Conclusion*

112. In order for the farm share scheme to be a legal exception to the prohibition in s. 18 of the *HPPA* against the sale and distribution of raw milk, there would have to be a legislated permissive provision. For example, in some states in the United States of America the sale of raw milk pursuant to a cow share agreement is permitted by specific legislative

---

<sup>8</sup> For example, Perrone is the only member of her household that is an OFOF member, but she provides the raw milk that she obtains from Glencolton Farms to her husband and two children, who are not members (see Perrone Transcript at Q. 195 – 200).



provisions<sup>9</sup>.

Col. Rev. Stat. § 25-5.5-117, BOA, Tab 27.

Idaho Code Ann., § 37-1101 (2010), BOA, Tab 28.

N.D. Cent. Code § 4-30-41.4, BOA, Tab 29.

W. Va. Code § 19-1-7, BOA, Tab 30.

113. Based on all of the above, the Applicants submit that the Respondents' current operations do not fit within the Farm Family Exception to the prohibition in the *HPPA* against the sale, offering for sale or distribution of raw milk and that the current operations of Glencolton Farms continue to violate s. 18 of the *HPPA*.

114. Accordingly, the Applicants submit that this Court should enjoin the current operations of Glencolton Farms on the following bases:

- i. Pursuant to s. 102 of the *HPPA*, as the operations of Glencolton Farms represent a continued violation of the Second York Region Order;
- ii. The operations of Glencolton Farms represent a public nuisance as they represent a breach of public welfare legislation; and
- iii. Pursuant to s. 101 of the *CJA* as it is just and convenient to do so.

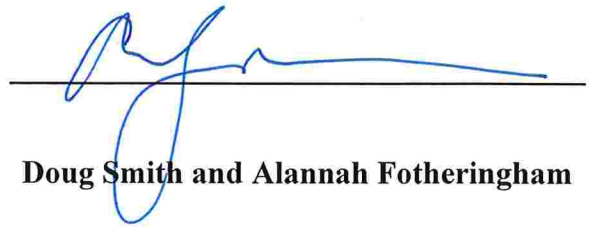
---

<sup>9</sup> Note that the regulations enacted in each of these States prohibits the redistribution of the raw milk to a person who is not an owner of a cow share and requires labeling advising of such. The ARC/OFOF operation would not comply with such regulations.

**PART V – ORDER REQUESTED**

115. The Applicants request that this Court grant an order in the form of the relief sought in the Amended Notice of Application against the Respondents and the intervener, OFOF.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



**Doug Smith and Alannah Fotheringham**

**SCHEDULE “A” – AUTHORITIES CITED**

1. *R. v. Schmidt*, 2010 ONCJ 9
2. *R. v. Schmidt*, 2014 ONCA 188
3. *The Law Society of Upper Canada v. Coulson*, 2013 ONSC 2448
4. *City of Vancouver et al. v. Maurice et al.*, 2002 BCSC 1421
5. *Vancouver (City) v. Zhang*, 2009 BCSC 84
6. *Peachland (District) v. Peachland Self Storage Ltd.*, 2011 BCCA 466
7. *College of Opticians of British Columbia v. Coastal Contacts Inc. and Clearly Contacts Ltd.*, 2009 BCCA 459
8. *Newcastle Recycling Ltd. v. Clarington (Municipality)*, 2005 CanLII 46384 (O.N. C.A.)
9. *Canada v. IPSCO Recycling Inc.*, 2003 FC 1518
10. *Air Ronge (Village) v. Werchola (La Family Taxi)*, 2011 SKQB 237
11. *The Corporation of the Town of Newmarket v. Halton Recycling Ltd.*, 2006 CanLII 33316 (O.N. S.C.)
12. *Lanark (County) v. Morrow*, 2011 ONSC 4028
13. *Regional Municipality of York v. DiBlasi*, 2014 ONSC 3259
14. *Kent County Council v. Batchelor*, [1978] 3 All ER 980 (U.K. Q.B.)
15. *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, 1999 CanLII 706 (S.C.C.)
16. *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396
17. *Simard Westlink Inc. v. Wallance*, 2013 BCSC 2218
18. *1711811 Ontario Ltd. (Adline) v. Buckley Insurance Brokers*, 2014 ONCA 125
19. *Broadmoor Hospital Authority v. R.*, [2000] All E.R. 727 (U.K. Supreme Court of Judicature, Court of Appeal (Civil Division))

20. *Ontario (Attorney General) v. Grabarchuk*, 11 O.R. (2d) 607, 1976 CanLII 574 (O.N. H.C.J.)
21. *R. v. Schmidt*, 2011 ONCJ 482
22. *Croplife Canada v. Toronto (City)*, (2005), 75 OR (3d) 357, 2005 CanLII 15709
23. *Johnson County v. Guernsey Association of Johnson County*, 232 N.W.2d 84, 1975 Iowa Sup. LEXIS 1160 (Supreme Court of Iowa)
24. *Slippy v. Northey*, EQCV067968 (Linn County Circuit Court, Iowa 2012)
25. *McClurg v. Canada*, [1990] 3 SCR 1020, 1990 CanLII 28 (S.C.C.)
26. *McGauley v. B.C.*, 1989 CanLII 2809 (B.C. C.A.)
27. Col. Rev. Stat. § 25-5.5-117
28. Idaho Code Ann., § 37-1101
29. N.D. Cent. Code § 4-30-41.4
30. W. Va. Code § 19-1-7

## SCHEDULE "B" – STATUTES CITED

### *Health Protection and Promotion Act, R.S.O. 1990, c. H.7*

#### Community Health Protection

#### **Order by M.O.H. or public health inspector re health hazard**

13. (1) A medical officer of health or a public health inspector, in the circumstances mentioned in subsection (2), by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a health hazard. R.S.O. 1990, c. H.7, s. 13 (1).

#### **Condition precedent to order**

(2) A medical officer of health or a public health inspector may make an order under this section where he or she is of the opinion, upon reasonable and probable grounds,

- (a) that a health hazard exists in the health unit served by him or her; and
- (b) that the requirements specified in the order are necessary in order to decrease the effect of or to eliminate the health hazard. R.S.O. 1990, c. H.7, s. 13 (2).

#### **Time**

(3) In an order under this section, a medical officer of health or a public health inspector may specify the time or times when or the period or periods of time within which the person to whom the order is directed must comply with the order. R.S.O. 1990, c. H.7, s. 13 (3).

#### **Idem**

(4) An order under this section may include, but is not limited to,

- (a) requiring the vacating of premises;
- (b) requiring the owner or occupier of premises to close the premises or a specific part of the premises;
- (c) requiring the placarding of premises to give notice of an order requiring the closing of the premises;
- (d) requiring the doing of work specified in the order in, on or about premises specified in the order;
- (e) requiring the removal of anything that the order states is a health hazard from the premises or the environs of the premises specified in the order;
- (f) requiring the cleaning or disinfecting, or both, of the premises or the thing specified in the order;
- (g) requiring the destruction of the matter or thing specified in the order;

(h) prohibiting or regulating the manufacturing, processing, preparation, storage, handling, display, transportation, sale, offering for sale or distribution of any food or thing;

(i) prohibiting or regulating the use of any premises or thing. R.S.O. 1990, c. H.7, s. 13 (4).

### **Person directed**

(5) An order under this section may be directed to a person,

(a) who owns or is the occupier of any premises but where an order is directed to the occupier, the person making the order shall deliver or cause the delivery of a copy of the order to the owner of the premises;

(b) who owns or is in charge of any substance, thing, plant or animal or any solid, liquid, gas or combination of any of them; or

(c) who is engaged in or administers an enterprise or activity, in the health unit served by the medical officer of health or the public health inspector. R.S.O. 1990, c. H.7, s. 13 (5).

### **Reasons for order**

(6) An order under this section is not effective unless the reasons for the order are set out in the order. R.S.O. 1990, c. H.7, s. 13 (6).

### **Oral order**

(7) Where the delay necessary to put an order under this section in writing will or is likely to increase substantially the hazard to the health of any person, the medical officer of health or the public health inspector may make the order orally and subsection (6) does not apply to the order. R.S.O. 1990, c. H.7, s. 13 (7).

### **Description of person directed**

(8) It is sufficient in an order under this section to direct the order to a person or persons described in the order, and an order under this section is not invalid by reason only of the fact that a person to whom the order is directed is not named in the order. R.S.O. 1990, c. H.7, s. 13 (8).

[...]

### **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).

[...]

### Enforcement

#### **Proceedings to restrain contravention of order or directive**

102. (1) Despite any other remedy or any penalty, the contravention by any person of an order made under this Act or of a directive relating to a small drinking water system may be restrained by order of a judge of the Superior Court of Justice upon application without notice by the person who made the order or issued the directive or by the Chief Medical Officer of Health or the Minister. 2007, c. 10, Sched. D, s. 1 (10).

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

Interlocutory Orders

**Injunctions and receivers**

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

**Terms**

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).



***Municipal Act, 2001, S.O. 2001, c. 25***

General Municipal Powers

**Scope of powers**

8 (1) The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues. 2006, c. 32, Sched. A, s. 8.

**Ambiguity**

(2) In the event of ambiguity in whether or not a municipality has the authority under this or any other Act to pass a by-law or to take any other action, the ambiguity shall be resolved so as to include, rather than exclude, powers the municipality had on the day before this Act came into force. 2006, c. 32, Sched. A, s. 8.

**Scope of by-law making power**

(3) Without limiting the generality of subsections (1) and (2), a by-law under sections 10 and 11 respecting a matter may,

- (a) regulate or prohibit respecting the matter;
- (b) require persons to do things respecting the matter;
- (c) provide for a system of licences respecting the matter. 2006, c. 32, Sched. A, s. 8.

**Scope of by-laws generally**

(4) Without limiting the generality of subsections (1), (2) and (3) and except as otherwise provided, a by-law under this Act may be general or specific in its application and may differentiate in any way and on any basis a municipality considers appropriate. 2006, c. 32, Sched. A, s. 8.

**Exception**

(5) Subsection (4) does not apply with respect to a by-law made under Parts VII, VIII, IX, X, XI and XIII. 2006, c. 32, Sched. A, s. 8.

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

Powers

**Corporate powers**

15. (1) A co-operative has the capacity and the rights, powers and privileges of a natural person.

**Limitation in articles**

(2) The capacity or powers of a co-operative may be limited by the articles. 1992, c. 19, s. 3.

(3) Repealed: 1992, c. 19, s. 3.

**Powers to act outside of Ontario**

(4) Every co-operative may exercise its powers beyond the boundaries of Ontario to the extent to which the laws in force where the powers are sought to be exercised permit, and may accept extra-provincial powers and rights. R.S.O. 1990, c. C.35, s. 15 (4).

**THE REGIONAL MUNICIPALITY OF  
YORK, et al.**  
Applicants

- and -

**MICHAEL SCHMIDT et al.**

Respondents

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED AT  
NEWMARKET

**FACTUM OF THE APPLICANTS**  
*(Application for Injunction and Ancillary Relief)*

**BORDEN LADNER GERVAIS LLP**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West, Suite 3400  
Toronto, ON M5H 4E3  
Fax: (416) 367-6749

**Doug Smith (LSUC #36915R)**

Tel: (416) 367-6015  
dsmith@blg.com

**Alannah Fotheringham (LSUC #70882F)**

Tel: (416) 367-6394  
afotheringham@blg.com

Lawyers for the Applicants, The Regional  
Municipality of York, Simcoe Muskoka District  
Health Unit and The Regional Municipality of Peel