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IN THE SUPERIOR COURT OF SANTA CLARA COUNTY

STATE OF CALIFORNIA

FARM-TO-CONSUMER LEGAL DEFENSE FUND, and

MIKE AND XIAODAN HULME (as husband and wife), and

IAN GERBODE AND SARA-JANE SKIWSKI (as husband and wife) and

SARAH SULLIVAN,

Plaintiffs,

v.

STATE OF CALIFORNIA and KAREN ROSS, Secretary of California Department of Food and Agriculture, and

COUNTY OF SANTA CLARA and JEFFREY E. ROSEN, District Attorney

Defendants.

Case No. 111CV205584

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Now come Plaintiffs Farm-to-Consumer Legal Defense Fund, Mike and Xiaodan Hulme, Ian P. Gerbode and Sara-Jane Skiwski and Sarah Sullivan, by their attorney, J. Kenneth Gorman, and as and for their complaint against Defendants State of California and its Secretary of Department of Food and Agriculture ("CDFA"), Karen Ross, and the County of Santa Clara and

its District Attorney, Jeffrey E. Rosen, and pursuant to Cal Code Civ Proc § 1060 hereby files this complaint for declaratory judgment and injunctive relief and allege as follows:

Parties

1. Plaintiff Farm-to-Consumer Legal Defense Fund (hereinafter "the Fund") is an Ohio nonprofit organization with tax exempt status under Section 501(c)(4) of the Internal Revenue Code, with its principal place of business at 8116 Arlington Blvd., Suite 263, Falls Church, VA 22042.
2. As of June 30, 2011, the Fund has approximately 1,700 members nationwide, with approximately 300 members residing in the State of California.
3. Plaintiffs Mike and Xiaodan Hulme (hereinafter "the Hulmes") are members of the Fund and reside at 4140 Cadwallader Avenue, San Jose, Santa Clara County, CA.
4. The Hulmes are also the owners of Evergreen Acres, a goat farm that is located at 4140 Cadwallader Avenue, San Jose, Santa Clara County, CA.
5. Plaintiffs Ian Gerbode and Sara-Jane Skiwski (the "Gerbodes") reside at [redacted] CA.
6. Plaintiff Sarah Sullivan ("Sullivan") resides at [redacted] CA.
7. Defendant California Department of Food and Agriculture ("CDFA") is an agency of the State of California with its principal place of business located at 1220 N Street, Sacramento, California, 95814. Karen Ross is the Secretary of the Defendant CDFA and is being sued in her representative capacity.
8. According to CDFA's website, "In partnership with other governmental agencies, the agricultural industry and the community, the California Department of Food and Agriculture will continue to protect agriculture, promotes its growth, and progress towards a thriving and abundant agriculture."
9. Defendant County of Santa Clara is a subdivision of the State of California. Jeffrey Rosen is the Santa Clara District Attorney (hereinafter "the DA") and is being sued in

his representative capacity. The District Attorney's office is located at 70 West Hedding Street, San Jose, CA, 95110.

Jurisdiction and Venue

10. This action is brought pursuant to Cal Code Civ Proc Sec.1060.

11. Venue is proper in this Court pursuant to Cal Code Civ Proc Sec. 392.

Nature of the Action

12. This is an action brought under California's declaratory judgment statute. Plaintiffs are not seeking damages in this action, but rather, only a proper interpretation of applicable law that would provide prospective relief, i.e., such relief that would allow Plaintiffs to engage in the conduct described below.

13. Agrarian-based communities are an integral part of the fabric of American custom and culture and Plaintiffs help to preserve and protect that custom and culture.

14. The Gerbodes and Sullivan have entered into a private, separate contract with the Hulmes for the purchase of an interest in a dairy goat.

15. The contract entered into between the Hulmes, Sullivan, and the Gerbodes is manifested in a Bill of Sale and in a Boarding Agreement.

16. The Gerbodes and Sullivan have agreed to have the Hulmes tend to, manage and take care of their goats.

17. The Gerbodes and Sullivan have agreed to board their goats at the Hulmes' farm in order to allow the Hulmes to take care of, tend to and manage the goats.

18. In exchange for boarding their goats at the Hulmes' farm, the Gerbodes and Sullivan pay the Hulmes a boarding fee commensurate with the costs of taking care of, managing and tending to their goats.

19. This type of arrangement has historically been known as an Agistment Agreement.

20. An Agistment Agreement is basically a livestock lien, and such liens are recognized by Cal Civil Code 3080.01 *et seq*.

21. There is no California law that makes Agistment Agreements illegal or void as against public policy.

22. The Gerbodes and Sullivan periodically visit the Hulmes' farm in order to obtain and collect their milk that is produced by their goat.

23. The Gerbodes and Sullivan provide and utilize their own bottles and caps for this purpose.

24. The Gerbodes and Sullivan then take their milk produced by their goat back to their own respective homes where it is consumed by them.

25. On May 18, 2011, the DA's office sent a letter to the Hulmes, alleging that the Hulmes were "engaging in the manufacturing and sale of dairy products at Evergreen Acres located at [their] property on Cadwaller (sic) Avenue."

26. The DA's letter copied the CDFA on it and alleged that the Hulmes' conduct constituted a violation of the California Food and Agriculture Code ("Ag Code"), Sections 35011 and 35283, "punishable by a fine of up to $10,000 and/or imprisonment of up to one year in the county jail."

27. Ag. Code 35011 provides, in part, that no person shall operate a "place of business" or a "milk products plant" without first receiving a license from CDFA if the person is engaged in "dealing in, receiving, manufacturing, freezing, or processing milk, or any product of milk."

28. Ag. Code 35283 provides, in part, that any person who manufactures or processes *for resale* any milk or milk product in a milk products plant, or who provides milk or milk products to any person for the manufacturing or processing *for resale* of any milk or milk product is guilty of a felony.

29. The DA's letter stated that the Hulmes need to be licensed by the CDFA to avoid any further "appropriate action against you."

30. Based on information and belief, the DA's letter was requested by the CDFA, was submitted to the CDFA for review and approval, was sent at the request of CDFA,

and was an orchestrated attempt to put the Hulmes' lawful herdshare operation out of business and prevent the shareholders from enjoying the use and benefit of their private property.

31. Based on information and belief, a recent article published by the San Francisco Chronicle mentioned that CDFA has made at least five separate referrals for criminal enforcement action to various District Attorney's offices.

32. Upon receipt of this letter from the DA, the Hulmes continued to take care of, tend to and manage Gerbodes' and Sullivan's goat but the Hulmes stopped distributing the milk from Gerbodes' and Sullivan's goat to them.

33. The Hulmes' conduct continues to this day, i.e., they continue to take care of Gerbodes' and Sullivan's goat but they do not distribute the Gerbodes' and Sullivan's goat milk to them.

34. Since the issuance of the DA's letter, the Gerbodes and Sullivan have not been allowed to enjoy the benefits of their property and the fruits of their contracts they entered into with the Hulmes, i.e., they have not been allowed to obtain or consume the unpasteurized, unprocessed milk from their own goat.

35. Since the issuance of the DA's letter, the Hulmes have not been allowed to enjoy the fruits of the contract they entered into with the Gerbodes and Sullivan, i.e., they have not been allowed to distribute the goat's milk to the Gerbodes, or Sullivan.

36. The Gerbodes and Sullivan have not bought and do not buy raw milk or raw dairy products from the Hulmes.

37. The Hulmes do not sell and have not sold raw milk or raw dairy products to the Gerbodes or to Sullivan.

38. The Hulmes do not engage in retail or wholesale sales of any fresh, unpasteurized goat milk to any person.

39. All Plaintiffs are being damaged and are suffering an injury in fact by the action taken by the DA and CDFA.

40. Specifically, the Gerbodes and Sullivan are being deprived of their fundamental and inalienable right of (a) using their own property; (b) providing for their care and their well being by consuming the food of their own choice; and (c) enjoying the benefits of their contracts with the Hulmes.

41. The Hulmes are being deprived of their fundamental and inalienable right of engaging in a lawful business and of enjoying the benefits of their contract with the Gerbodes and Sullivan.

42. The Gerbodes and Sullivan seek declarations that (1) they have the inalienable right to own a goat, (2) they have the inalienable right to consume the milk from their own goat, and (3) they have the inalienable right to enter into an Agistment agreement with the Hulmes to provide for, tend to, take care of and manage their goat.

43. The Hulmes seek declarations that their conduct as described herein does not constitute a violation of Cal Food & Ag. Code 35011 or 35283 and that they are not dealing in, receiving, manufacturing, freezing, or processing milk, or any product of milk for resale as those terms are used in the Ag. Code.

Standing

44. The FTCLDF is a nation-wide non-profit organization dedicated to protecting and promoting sustainable, environmentally sound farming practices and direct farm-to-consumer transactions which the FTCLDF believes furthers the common good and general welfare of all Americans. The FTCLDF defends and protects the right of farmers to directly provide, and for consumers to directly obtain, unprocessed and processed farm foods. Toward this end, the FTCLDF provides advocacy, education and legal services for farmers and consumers against any local, State, and federal government interference with the legal transfer of products produced and processed on the farm.

45. All of the Plaintiffs will be damaged and will suffer an injury in fact by CDFA's and the DA's illegal interpretation of Ag. Code 35011 and 35283. Specifically, Plaintiffs

are now subject to civil, criminal and/or administrative penalties and/or sanctions for allegedly being in violation of Ag. Code 35011 and 35283.

46. The threat of an enforcement action by CDFA and the DA's office guarantees standing to the individual Plaintiffs. *See Houston v. Hill,* 482 U.S. 451, 459, n. 7 (1987); *Steffel v. Thompson,* 415 U.S. 452, 459 (1974); *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 785, n. 21 (1978); *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 52-53 (1971); *New York Times Co. v. Sullivan,* 376 U.S. 254, 278 (1964).

47. A declaratory judgment action is the appropriate action to bring when faced with a Hobson's choice, i.e., either comply with an unlawful interpretation of a statute or ignore the unlawful interpretation and face the possible consequences of noncompliance. *See Abbott Laboratories v. Gardner*, 386 U.S. 136, 152-153, (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967).

48. A favorable ruling on the claims presented in this Complaint would redress Plaintiffs' injury in fact.

49. Specifically, a ruling that the DA's and CDFA's interpretation and application of Ag. Code 35011 and 35283 is illegal would allow Plaintiffs to exercise their fundamental and inalienable right of (a) possessing and using their own property; (b) providing for the care and well being of themselves and their families by consuming the food of their own choice; and (c) enjoying the benefits of their contracts.

50. The Fund Plaintiff has standing because the Hulmes have standing to sue in their own right.

51. The interest at stake in this suit, namely the halting of an arbitrary and capricious interpretation and application of Ag. Code 35011 and 35283 that interferes with farmers' ability to raise food and consumers' ability to obtain such foods, is germane to the Fund's purpose and mission.

52. None of the claims asserted nor the relief requested require the participation of individual members.

Legal Principles

53. Article 1, Section 1 of the Constitution of the State of California provides that "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

54. One of the property rights recognized by Article 1, Section 1 of the California Constitution is "the entrepreneur's property right of access to, and expectancy of customers." *Crittenden v. Superior Court of Mendocino County* (Cal. 1964), 61 Cal. 2d 565, 568. See also *McKay Jewelers, Inc. v. Bowron* (Cal. 1942) 19 Cal.2d 595; *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.* (Cal. 1953), 40 Cal. 2d 436, 441; *Guillory v. Godfrey* (Cal. 1955) 134 Cal.App.2d 628; *Uptown Enterprises v. Strand* (Cal. 1961) 195 Cal.App.2d 45, 50-51 ("Everyone has the right to establish and conduct a lawful business and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded.").

55. Article 1, Section 7(a) of the Constitution of the State of California provides, in part, that "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

56. Article 1, Section 7(b) of the Constitution of the State of California provides, in part, that "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."

57. Article 1, Section 9 of the Constitution of the State of California provides, in part, "A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed."

58. Article 1, Section 24 of the Constitution of the State of California provides, in part, "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution" and also provides that "This declaration of rights may not be construed to impair or deny others retained by the people."

59. The United States Constitution recognizes a fundamental right to privacy that is protected by the substantive Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

60. The fundamental right to privacy includes the fundamental right to raise one's family. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Stanley v. Illinois* 405 U.S. 645, 649 (1972); *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

61. The fundamental right to privacy also includes the fundamental right to be free from governmental interference with one's bodily and physical health. *See Rochin v. California*, 342 U.S. 165 (1952); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

62. Significantly, the right of privacy guaranteed by the California Constitution is greater than that afforded by the United States Constitution. *See American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 326 (1997).

63. Freedom to contract is a fundamental liberty right protected by the due process clause of the Fifth Amendment to the United States Constitution. *See Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525 (1923) (*revd. on other grounds*).

64. One's use of one's property, the right to privacy, the right to carry on a lawful business, and the right to make contracts may not be arbitrarily interfered with by the government in the exercise of its police power. *See Pacific Palisades Ass'n v. City of Huntington Beach*, 196 Cal. 211, 216 (1925). *See also Dobbins v. Los Angeles*, 195 U.S. 223 (1904).

65. Not only is the government prohibited from interfering with the right of contract, the courts are not allowed to disregard the provisions of contracts or to deny either party

to the contract their rights thereunder. *See Bradley v. Superior Court*, 48 Cal.2d 509, 519 (1957).

66. Substantive due process protects individuals from arbitrary, wrongful governmental actions regardless of the fairness of the procedures used to implement them. *See Daniels v. Williams,* 474 U.S. 327, 331 (1986).

67. The concept of personal liberties and fundamental human rights entitled to protection against an oppressive government is not limited to those expressly mentioned in either the bill of rights or elsewhere in the Constitution, but instead extends to basic values implicit in the concept of ordered liberty and to the basic civil rights of man. *See City of Carmel-By-The-Sea v. Young*, 2 Cal.3d 259, 265 (1970). *See also Palko v. Connecticut*, 302 U.S. 319 (1937).

68. Due process prevents governmental interference with rights that are implicit in the concept of ordered liberty. *See United States v. Salerno,* 481 U.S. 739, 746 (1987).

69. A law that impacts a constitutional guarantee or a personal liberty is subject to strict scrutiny and can pass constitutional muster only if the law is substantially related to promoting a compelling governmental interest. *See City of Carmel-By-The-Sea v. Young*, 2 Cal.3d 259, 268 (1970). *See also Griswold v. Connecticut*, 381 U.S. 479 (1965).

70. Strict scrutiny means that legislative infringements on liberty interests must be narrowly tailored to serve a compelling state interest. *See Zablocki v. Redhail,* 434 U.S. 374, 388 (1978); *Reno v. Flores,* 507 U.S. 292 (1993). *See also Arp v. Workers' Comp. Appeals Bd.*, 19 Cal.3d 395, 406 (1977).

71. Courts employ a multi-part balancing test to determine whether conduct is private or public in nature. *See U.S. v. Trustees of Fraternal Order of Eagles, Milwaukee Aerie No. 137*, 472 F.Supp. 1174, 1175 (E.D. Wis. 1979); *United States v. Lansdowne Swim Club,* 713 F.Supp. 785 (E.D. Pa. 1989).

72. Private conduct is beyond the reach of the government's police powers. *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Rochin v. California*, 342 U.S. 165 (1952); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

73. Plaintiffs' conduct in this case is purely private and is beyond the reach of the State's police powers and the jurisdiction of CDFA or the DA.

74. When a regulatory program is overly broad and encompasses private conduct within its reach, citizens have the right to opt out of the protection provided by the public health laws if they make informed decisions. *See Regina v. Schmidt*, Reasons for Judgment, January 21, 2010 http://www.canlii.org/en/on/oncj/doc/2010/2010oncj9/2010oncj9.html, a true and correct copy of which is attached hereto as Exhibit A.

75. Plaintiffs have opted out of the alleged protections allegedly afforded by the California Food and Agriculture Code and have instead chosen to engage in the conduct described herein.

COUNT ONE
DEFENDANTS' ACTION VIOLATES PLAINTIFFS' INALIENABLE RIGHT TO POSSESS, USE AND ENJOY THEIR PROPERTY

76. Paragraphs 1 through 76 are incorporated into this Count as if rewritten herein.

77. Every California citizen, including the Gerbodes and Sullivan, has the inalienable right to own a goat and to use their own goat in a manner that does not cause harm to third parties.

78. The Gerbodes and Sullivan have exercised her inalienable right to purchase a goat for their own use, enjoyment and benefit by purchasing one from the Hulmes.

79. The DA's letter and CDFA's interpretation of the law deprives the Gerbodes and Sullivan of their use, benefit and enjoyment of the goat they have purchased.

80. Defendants' conduct described in this Count constitutes a violation of Article 1, Sections 1 and 7 of the California Constitution pertaining to the fundamental right to possess, use and enjoy property, as guaranteed by due process, for which declaratory and other injunctive relief is available and should issue under Cal. Civ. Pro. Code §§ 1096, 526 and 527.

COUNT TWO
DEFENDANTS' ACTION VIOLATES PLAINTIFFS' INALIENABLE RIGHT TO PRIVACY

81. Paragraphs 1 through 81 are incorporated into this Count as if rewritten herein.

82. Every California citizen, including the Gerbodes and Sullivan, has the inalienable liberty to consume the raw milk produced by their own goat.

83. Every California citizen, including the Gerbodes and Sullivan, has the inalienable liberty to raise their family in their own way, which includes what foods they do and do not choose to consume for themselves.

84. Every California citizen, including the Gerbodes and Sullivan, has the inalienable liberty to their own bodily and physical health, which includes what foods they do and do not choose to consume for themselves.

85. The Gerbodes and Sullivan have the inalienable liberty to consume for themselves the raw milk produced by their own goat.

86. Defendants' action violates the Gerbodes' and Sullivan's fundamental liberty of providing themselves with the foods of their own choice, and in their ability to consume the raw milk produced by their own goat.

87. Defendants' conduct described in this Count constitutes a violation of Article 1, Sections 1 and 7 of the California Constitution pertaining to the fundamental right to privacy, as guaranteed by due process, for which declaratory and other injunctive relief is available and should issue under Cal. Civ. Pro. Code §§ 1096, 526 and 527.

COUNT THREE

DEFENDANTS' ACTION VIOLATES PLAINTIFFS' INALIENABLE RIGHT TO CONTRACT

88. Paragraphs 1 through 88 are incorporated into this Count as if rewritten herein.

89. Every California citizen, including the Hulmes, Gerbodes and Sullivan, has the inalienable right to enter into a boarding contract, historically known as an Agistment agreement, with a farmer to board their goat at the farmer's farm, who is historically known as the Agister.

90. The Gerbodes and Sullivan have contracted with the Hulmes to board their dairy goat at the Hulmes' farm.

91. Defendants' action violates Hulmes', Gerbode's and Sullivan's fundamental rights of entering into boarding contracts and service contracts.

92. Defendants' conduct described in this Count constitutes a violation of Article 1, Sections 1, 7 and 9 of the California Constitution pertaining to the fundamental right to contract, as guaranteed by due process, for which declaratory and other injunctive relief is available and should issue under Cal. Civ. Pro. Code §§ 1096, 526 and 527.

COUNT FOUR
DEFENDANTS' APPLICATION OF AG. CODE 35011 and 35283 TO PLAINTIFFS' CONDUCT VIOLATES SUBSTANTIVE DUE PROCESS

93. Paragraphs 1 through 93 are incorporated into this Count as if rewritten herein.

94. Every California citizen has the right to establish and conduct a lawful business and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded.

95. In this case, the property interest protected by substantive due process that the Hulmes' have is an interest in operating a goatshare, which is not an illegal business in California.

96. Defendants' action violates the Hulmes' fundamental right of substantive due process.

97. Defendants' conduct described in this Count constitutes a violation of Article 1, Sections 1, 7 and 9 of the California Constitution pertaining to the fundamental right to operate a lawful business, as guaranteed by due process, for which declaratory and other injunctive relief is available and should issue under Cal. Civ. Pro. Code §§ 1096, 526 and 527.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. A declaration that the Gerbodes and Sullivan have the inalienable right to purchase, own, possess and use a goat;

B. A declaration that the Gerbodes and Sullivan have the inalienable right to consume the raw milk produced by their goat;

C. A declaration that the Gerbodes and Sullivan and the Hulmes have the inalienable right to enter into a boarding contract or Agistment agreement with each other pertaining to the tending to, managing and taking care of the Gerbodes' and Sullivan's goat;

D. A declaration that the Plaintiffs' conduct as described herein does not constitute a violation of Ag. Code 35011 and 35283;

E. A declaration that Ag. Code 35011 and 35283 is unconstitutional as applied to Plaintiffs;

F. A declaration that the Hulmes' goatshare operation is a lawful business in California;

G. Issue a permanent injunction enjoining Defendants from commencing or continuing any enforcement action, civil, criminal, administrative or otherwise, of Ag. Code 35011 and 35283 against Plaintiffs or against anyone else in California who wishes to engage in the conduct engaged in by Plaintiffs;

H. Issue a permanent injunction enjoining Defendants from spending or receiving federal, State or local taxpayer funds or monies on any activity related to enforcement

of Ag. Code 35011 and 35283 against Plaintiffs or against anyone else in California who wishes to engage in the conduct engaged in by Plaintiffs;

I. Pursuant to applicable law, award to Plaintiffs all of their attorneys fees incurred in this matter;

J. Pursuant to applicable law, award to Plaintiffs all of the costs they have incurred in this matter;

K. Award to Plaintiffs all other relief as applicable that the Court deems just and reasonable.

Dated: July 22, 2011

JOHNSON & MONCRIEF, PLC

By: _____
J. Kenneth Gorman
Attorneys for Plaintiffs

EXHIBIT A

R. v. Schmidt, 2010 ONCJ 9 (CanLII)

Citation: ***R. v. Schmidt*, 2010 ONCJ 9**

Ontario Court of Justice
Provincial Offences Court
(Newmarket)

Regina

V

Michael Schmidt

Before

His Worship P. Kowarsky
Justice of the Peace

Charges

Health Protection and Promotion Act, R.S.O. 1990, C. H.7, Sections 18(1), 18(2) and 100 (1)
Milk Act, R.S.O. 1990, c. M.12, Sections 15 (1) and 15(2)

Reasons for Judgment

Judgment: January 21, 2010

Counsel:

Alan Ryan: Counsel for the Ministry of Natural Resources

John Middlebro: Counsel for the Grey Bruce Health Unit

Shannon Chace: Counsel for the Intervener, Attorney General of Ontario

Michael Schmidt: Self-represented.

R. v. Schmidt

A. Introduction

1. The defendant is Michael Schmidt, a dairy farmer who carries on business as such in Durham, Ontario under the name of Glencolton Farms, which is registered as a sole proprietorship under the Business Names Act, R.S.O. 1990, c. B. 17. At any one time, he has about 30 cows on his farm.

2. On this organic farm the defendant produces a large variety of foodstuffs including breads, meats, confectionery, fruits and vegetables as well as milk and milk products of various kinds, including cheeses.

3. The products are sold by the defendant from a farm store which is located on the farm. In addition, the defendant owns a bus which he converted from a school bus into a bus for the display and sale of his farm products. Once a week, the defendant drives this bus, which he calls the blue bus, from his farm into the city of Vaughan, parks it in the grounds of a private school, and sells his products from the bus.

B. The Charges

4. The defendant was charged with the following 20 offences:

6 charges contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H7 ("HPPA");
8 charges contrary to section 18(2) of the HPPA;
3 charges contrary to section 100(1) of the HPPA;
2 charges contrary to section 15(1) of the Milk Act, R.S.O. 1990, c. M 12 ("Milk Act");
1 charge contrary to section 15(2) of the Milk Act.

5. During the course of the trial Crown Counsel Ryan withdrew one charge of operating a plant without a licence under section 15(1) of the Milk Act on Information number 073089, leaving 19 charges in all. Mr. Ryan advised that this charge was a duplication of count #1 on Information number 073270.

6. Three charges are contained in one Information, which was sworn by Andrew Barton, a Public Health Inspector employed by the Grey Bruce Health Unit. I will refer to these three charges as "the Grey-Bruce charges". With respect to the Grey-Bruce charges, it is alleged that Michael Erdmann Schmidt, operating as Glencolton Farms at L44 C3, Glenelg Township, 393889 2nd Concession Rd. Durham, Ontario:

(1) On or about the 20th day of October, 2006 did commit the offence of failing to obey the written Order of Public Health Inspector Susie McLeod dated 17 February 1994 made pursuant to section 13(1) of the Health Protection and Promotion Act, R.S.O. 1990 c. H. 7 by storing and displaying unpasteurized milk and milk products contrary to s. 100(1) of the said Act.

(2) On or about the 27th day of October 2006, at Concession Rd. 2 in the town of Durham, in Grey County, Ontario, did fail to obey the written Order of Public Health Inspector Susie McLeod dated 17 February 1994 made pursuant to s. 13(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H. 7 by storing and displaying unpasteurized milk and milk products contrary to s. 100(1) of the said Act.

(3) On or about the 21st day of November, 2006, at 393889 Concession Rd. 2 in the town of Durham, in Grey County, Ontario, did fail to obey the written Order of Public Health Inspector Susie McLeod dated 17 February 1994 made pursuant to s. 13(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H. 7 by storing and displaying unpasteurized milk and milk products contrary to s. 100(1) of the said Act.

7. The remaining 16 charges which are contained in 7 Informations sworn by Brett Campbell, investigator for the Ministry of Natural Resources, are that-

(4) Michael Schmidt, on or about the 22nd day of August, 2006 at 9100 Bathurst Street, Thornhill, City of Vaughan, Ontario, did commit the offence of sell to Susan Atherton a milk product, to wit cheese, processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(5) Michael Schmidt, on the 22nd of August, at 9100 Bathurst Street, Thornhill, City of Vaughan, Ontario, did distribute to Susan Atherton and others a milk product, processed or derived from milk that was [not] pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended. **(Note: This count charges the defendant with having distributed a milk product that was derived from milk that "WAS pasteurized". The intention of the Informant was clearly that the defendant is alleged to have distributed the product from milk that "WAS NOT pasteurized."** I found this to be a simple typographical error, and on my own motion, pursuant to section

34(1) (a) of the Provincial Offences Act, R.S.O. c. P. 33 ("P.O.A."), I have amended this count to reflect the obvious intention of the Prosecution.)

(6) Michael Schmidt, on or about the 17th day of October, 2006 at 9100 Bathurst Street, Thornhill, City of Vaughan, Ontario, did commit the offence of sell to Susan Atherton a milk product, to wit cheese, processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(7) Michael Schmidt, on October 17, 2006 at 9100 Bathurst Street, Thornhill, City of Vaughan, Ontario, did distribute to Susan Atherton and other persons, a milk product, to wit cheese, processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(8) Michael Schmidt, on or about the 20th day of October, 2006 did commit the offence of sell to Susan Atherton a milk product, to wit cheese, processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(9) Michael Schmidt, on October 20, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did distribute to Susan Atherton and other persons, a milk product processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(10) Michael Schmidt, on October 20, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did sell to Susan Atherton milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(11) Michael Schmidt, on October 20, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did distribute to Susan Atherton and other persons, milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(12) Michael Schmidt, on the 27th day of October, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did sell to Susan Atherton a milk product, to wit cheese, which was processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(13) Michael Schmidt, on the 27th day of October, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did distribute to Susan Atherton and other persons, a milk product, to wit cheese, which was processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(14) Michael Schmidt, on October 27, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did sell to Susan Atherton, milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(15) Michael Schmidt, on October 27, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did distribute to Susan Atherton and other persons, milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(16) Michael Schmidt, on or about the 7th day of November, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did sell to Susan Atherton, milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(17) Michael Schmidt, on 7th day of November, 2006 at 9100 Bathurst Street, Thornhill, City of Vaughan, Ontario, did distribute to Susan Atherton and other persons, milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(18) Michael Schmidt between the 17th day of August 2006 and the 22nd day of November 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did commit the offence of Operate a plant without a licence therefor from the Director contrary to section 15(1) of the Milk Act, R.S.O. 1990, c. M. 12, as amended.

(19) Michael Schmidt, between the dates of August 17, 2006 and November 22, 2006, at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did carry on business as a distributor of fluid milk products without a licence therefor from the Director, contrary to section 15(2) of the Milk Act R.S.O. 1990, c. M. 12, as amended.

C. Overview

8. Michael Schmidt is the Canadian crusader for the introduction of legislation legalizing the sale and distribution of raw milk. However, the power of legislative adjustment is vested in the Legislature; it is beyond the jurisdictional authority of this court. Is it time to abolish or amend the legislation which requires the pasteurization of all milk destined for distribution and sale? Only the Legislature has the authority to answer this question, and, if deemed necessary, to act accordingly. The legislation under consideration has its roots in The Health Protection Act of 1938. The legislation continues to be an integral part of our law; its declared purpose being the health protection and safety of the people of Ontario.

9. 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.

10. 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.

11. During the course of these proceedings, prior to the commencement of the trial, the defendant brought a constitutional challenge, in which he claimed that his rights under section 7 of the Charter of Rights and Freedoms had been infringed. I allowed two expert witnesses on either side of the debate as to whether unpasteurized milk is or is not safe for human consumption.

12. Two internationally renowned expert witnesses gave strong supportive evidence for each side of the debate. The defendant's experts testified that unpasteurized milk is perfectly safe and healthy. On the other hand, the Crown's expert witnesses testified that such milk is a health hazard. I am convinced that if I had allowed 22 expert witnesses on each side, the result would have been the same – a draw, as far as the court is concerned. But not only is it beyond my jurisdiction to declare a winner, it is not the determination of this issue which is the task of this court.

13. The ultimate issue for this court is to determine whether the defendant broke the law, and if so, to what extent he should be punished under the punitive segments of the legislation concerned. Essentially, this requires an extensive examination of the law, its meaning and intention in the context of all the circumstances of this case.

D. The Motion for a Consolidation Order

14. The Grey-Bruce charges are with respect to offences alleged to have been committed in the township of Durham, Grey-Bruce County, Ontario. Prior to the commencement of the proceedings in this case, Crown Counsel Mr. J. Middlebro for the Grey-Bruce Health Unit, Ministry of Natural Resources, brought a motion under section 38(1) of the P.O.A. for an order of consolidation with respect to all the charges against the defendant in these proceedings. With the consent of all the parties I granted the motion.

E. The Charter Challenge

15. The defendant filed a constitutional challenge alleging that his Charter rights under section 7 of the Canadian Charter of Rights and Freedoms have been violated by virtue of the charges under the HPPA and the Milk Act. Section 7 of the Charter provides as follows:

> *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.*

16. Prior to the commencement of these proceedings, all the parties presented a joint application to the court, requesting that I hear the trial first, and then reserve my decision until after I have heard the Charter challenge; and then deliver my judgment on the proceedings at trial before considering my decision on the Charter challenge. I granted the application. This is my judgment with respect to the proceedings at trial.

F. Classification of the Charges

17. Before dealing with the evidence, it is necessary to determine whether these are *mens rea,* strict liability or absolute liability offences. The seminal decision on the classification of offences in Canada is the judgment of the Supreme Court of Canada in **R. v. Sault Ste. Marie (City), 1978 CanLII 11 (S.C.C.), [1978] 2 S.C.R. 1299,** in which the court concluded that there are three categories of offences, namely:

> *a. Mens rea offences in which the Crown must prove the actus reus as well as some positive state of mind such as intent, knowledge or recklessness;*
>
> *b. Strict Liability offences in which the doing of the prohibited act, prima facie, imports the offence, leaving it up to the accused to avoid liability by establishing that he took all reasonable care; and*
>
> *c. Absolute Liability offences where it is not open to the accused to exculpate himself by showing that he was free of fault.*

18. Mr. Justice Dickson found that public welfare offences would, *prima facie*, be classified as strict liability offences.

19. In **Reference re: Section 94(2) of the Motor Vehicle Act 1985 CanLII 81 (S.C.C.), (1985), 23 C.C.C. (3d) 289,** Mr. Justice Lamer, as he then was, affirmed the presumption against absolute liability offences which was established in **Sault Ste. Marie,** in the following statement:

> *In penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence; it offends Section 7 of the Charter if, as a result, anyone is deprived of his life, liberty or security of the person, irrespective of the requirement of public interest. In such cases it might only be salvaged for reasons of public interest under Section 1 [of the Charter].*

20. In **R. v. Nickel City Transport (Sudbury) Limited, 82 C.C.C. (3d) 541,** Tarnopolsky, J.A. of the Ontario Court of Appeal explained Lamer, J.A.'s *dictum* as follows:

> *In other words, if a person faces the possibility of imprisonment or probation for the commission of an absolute liability offence, the interests in Section 7 [of the Charter], would be offended.*

21. In **Nickel City** the court posed this question: *What type of legislative direction must be given before a court will be prepared to rule against the presumption of strict liability?* Madam Justice Arbour J.A., as she then was, pointed out that Section 69 of the Provincial Offences Act of Ontario authorizes imprisonment in default of payment of a fine, and that *the unfettered discretion conferred by the Provincial Offences Act upon prosecutors which opens the possibility that the sentencing judge will impose a sentence which interferes with the liberty interest protected by Section 7 of the Charter, would be enough, in my opinion, to preclude the offence being classified as one of absolute liability.* It seems clear, therefore, that the possibility of imprisonment which arises only upon default and not upon conviction is sufficient to trigger the presumption in favour of strict liability.

22. I turn now to the case at bar, and refer to the guidelines established by the Supreme Court of Canada in **Sault St. Marie** when determining whether the offences before the court are ones of *mens rea,* strict liability or absolute liability. Those guidelines are:

(a) the over-all regulatory pattern adopted by the legislature;
(b) the subject matter of the legislation;
(c) the importance (or severity) of the penalty;
(d) the precise language used.

23. The descriptions of the offences with which the defendant is charged do not contain any language importing a positive state of mind such as intent, knowledge or recklessness. Consequently, I am satisfied that none of the offences is a *mens rea* offence.

24. The decisions of the Supreme Court of Canada in **Sault Ste. Marie** and **R. v. Chapin 1979 CanLII 33 (S.C.C.), [1979] 2 S.C.R. 121,** stand for the proposition that public welfare offences are *prima facie* offences of strict liability, and absolute liability offences will be exceptional and will only be recognized in the face of clear legislative direction. Taking account of the guidelines of the Supreme Court, I do not find anything before me which even suggests that the presumption in favour of categorizing these offences as strict liability offences has been rebutted. Accordingly, I am satisfied that all of the nineteen offences are strict liability offences.

G. Effect of the Strict Liability Ruling

25. Since all nineteen charges are strict liability offences, the Crown is required to prove the *actus reus* of each

offence beyond a reasonable doubt. If the Crown is able to do so, then in accordance with the direction of the Supreme Court of Canada in **Sault Ste. Marie** (*supra*), in order to escape conviction, the onus devolves upon the defendant to satisfy the court, on a balance of probabilities, either that he had an honest but mistaken belief in facts which, if true, would render the acts innocent, or that he exercised all reasonable care so as to avoid committing the offences.

26. In **Levis (City) v. Tetreault, [2006] S.C.J. No. 12,** the Supreme Court of Canada explained the **Sault Ste. Marie** decision with respect to the application of *due diligence* in the following words:

Under the approach adopted by the Court, the accused in fact has both the opportunity to prove due diligence and the burden of doing so. An objective standard is applied under which the conduct of the accused is assessed against that of a reasonable person in similar circumstances.

27. Alternatively, in order to avoid being convicted, the defendant must satisfy his burden, on a balance of probabilities, that an authorization, exception, exemption or qualification *prescribed by law* operates in his favour. In this regard, section 47(3) of the P.O.A., provides as follows:

The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

H. The Evidence

28. In the case at bar, there are four distinct components of the evidence, namely:

1) The Statement of Agreed Facts;
2) The Statement given by the defendant to Ministry of Natural Resources Officers at the time of the execution of the Search Warrant on November 21st 2006 ("the Search Warrant Statement");
3) The Evidence for the Prosecution; and
4) The Evidence for the Defence.

I. The Statement of Agreed Facts

29. A Statement of Agreed Facts, filed with the court, was signed on July 4th 2008 by the defendant as well as by the three Crown Counsel: John D. Middlebro, for Grey-Bruce Health Unit, Alan Ryan, for the Ministry of Natural Resources and Shannon Chace, for the Attorney General of Ontario, Constitutional Law Branch. The parties agreed to the following material facts:

1) The defendant is not a corporation;
2) Glencolton Farms is a sole proprietorship registered by the defendant under the Business Names Act of Ontario;
3) The business of Glencolton Farms includes, but is not limited to, the operation of a dairy farm;
4) There was no pasteurization nor sterilization of any of the dairy products at issue in this proceeding;
5) In 1994, Public Health Inspector Susie McLeod of the Bruce-Grey-Owen Sound Health Unit, as it then was, (now the Grey Bruce Health Unit) issued an Order under section 13 of the Health Protection and Promotion Act, R.S.O. 1990, H. 7, in writing, to the defendant and to Glencolton Farms, including the following terms:

I hereby require you to cease the manufacturing, processing, preparation, storage, handling, display [sale, offering for sale and distribution] of unpasteurized milk and milk products.

6) The Order of Susie McLeod was expanded by the Health Protection Appeal Board in its written decision dated 1, September 1994 to include the terms in parentheses.
7) On November 21, 2006, inspectors from the Ministry of Natural Resources and Public Health inspectors executed a search warrant at Glencolton Farms, and seized numerous items including dairy processing machinery and equipment, and 6 documents titled:

- *Changes to Glencolton Farms Policy (January 1, 2003);*
- *Notice to all milk share holders (December 31, 2002);*

- *Farm Store Price List (November 16, 2006);*
- *Blue Bus Price List (May 29, 2006);*
- *Contact List "Shares";*
- *Summary of "Tuesday Bus Sales" and "Friday Store Sales" (May 23 to November 7, 2006).*

8) *During the execution of the search warrant on November 21, 2006, large quantities of milk and cream were found and seized, which were neither pasteurized nor sterilized, as well as cheese and other dairy products made of milk that was neither pasteurized nor sterilized.*
9) *These agreed facts would be admissible at trial subject to the outcome of the defendant's Section 8 Charter Application, and that the parties would be entitled to call further relevant evidence to supplement these Agreed Facts.*

30. On January 26, 2009 I denied the defendant's Section 8 Charter Motion, and found *that the evidence obtained pursuant to the execution of the search warrant in this case is admissible in the trial proceedings.* See: **R. v. Schmidt, [2009] O.J. No. 605.**

J. The Search Warrant Statement

31. After a lengthy *Voir Dire* I made the following Ruling:

Notwithstanding the oppressive behaviour of the Ministry of Natural Resources' officers, I do not find that their actions affected the voluntariness of the defendant's statement having regard to all the circumstances. Accordingly, my Ruling is that the statement given by the defendant to Officer Herries on November 26, 2006 was given voluntarily. See: **R. v. Schmidt, [2009] O.J. No. 603.**

32. Consequently, the evidence obtained by the Prosecution pursuant to the execution of the search warrant on November 21, 2006 was admitted into evidence at the trial.

33. Prior to embarking on a detailed analysis of all the evidence, it is necessary to determine the issues which remain alive after considering the Statement of Agreed Facts and the Search Warrant Statement. This requires careful consideration of the essential elements of all the charges, the facts admitted in the Statement of Agreed Facts, and my findings of fact with respect to the Search Warrant Statement.

K. Analysis of the Charges

(a) The Charges under Section 18(1) of the HPPA

34. The 6 charges under section 18(1) of the HPPA are detailed in paragraph 7 (10), (11), (14), (15), (16) and (17). Section 18(1) of the HPPA provides as follows:

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.

(b) The Charges under Section 18(2) of the HPPA

35. The 8 charges under the Section 18(2) of the HPPA are detailed in paragraph 7 (4), (5), (6), (7), (8), (9), (12), and (13) above. Section 18(2) provides as follows:

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.

36. The prohibitions set out in sections 18(1) and (2) of the HPPA are identical save that section 18(1) relates to *milk* whereas section 18(2) relates to *milk products.*

Section 1 (1) of the HPPA defines "milk" as *milk from cows, goats or sheep.*

Section 18(4) of the HPPA defines "milk product" as *a product processed or derived in whole or mainly from milk.*

(c) The Grey-Bruce Charges

37. These 3 charges were laid under section 100(1) of the HPPA. In order to put these charges into context it is necessary to quote section 13(1) and (2) of the HPPA in accordance with which the Order by Susie McLeod was made in 1994.

38. Section 13(1) provides as follows:

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.

39. Section 13(2) provides as follows:

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 eliminate the health hazard.

40. Section 100(1) of the HPPA provides as follows:

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

L. The Essential Elements of the Charges

41. The essential elements of the charges under section 18(1) of the HPPA are that-

(a) A person

(b) Sells or offers for sale or delivers or distributes

(c) Milk or cream

(d) That has not been pasteurized or sterilized

(e) In a plant that is licenced under the Milk Act or in a plant outside Ontario that meets the standards for plants licenced under the Milk Act.

42. The essential elements of the charges under section 18(2) are identical save that section 18(2) relates to milk products as opposed to milk or cream.

43. The essential elements of the charge under section 15(1) of the Milk Act are that-

(a) A person

(b) Is operating a milk plant

(c) Without a licence from the Director (as defined in section 1) to do so.

The essential elements of the charge under section 15(2) of the Milk Act are that-

(a) A person

(b) Is carrying on business as a distributor of milk

(c) Without a licence to do so from the Director.

44. The essential elements of the Grey-Bruce charges are that-

a) Pursuant to section 13(1) and (2) of the HPPA an order was made by a Public Health inspector against the defendant;

b) The order was upheld and amended on appeal;

c) The defendant failed to obey the order, thereby committing an offence under section 100(1) of the HPPA.

M. The Evidence on the Essential Elements

Re: Section 18 of the HPPA and section 15 of the Milk Act

45. Paragraph 4 of the Statement of Agreed Facts states as follows:

There was no pasteurization nor sterilization of any of the dairy products at issue in this proceeding.

46. In paragraph 8 of the Statement of Agreed Facts the parties agree that during the execution of the search warrant large quantities of milk, cream, cheese and other dairy products which were made of milk that was neither pasteurized nor sterilized, were seized.

47. The defendant admitted in the Search Warrant Statement that he is not licenced by the Director to operate a plant or distribute milk or milk products from a milk plant.

48. With respect to all the charges under section 18 of the HPPA and section 15 of the Milk Act, it is useful to consider the following series of questions and answers set out in the Search Warrant Statement:

Q. Where do you sell or distribute your milk and milk products?

A. At the farm and in the Blue Bus, the famous Blue Bus.

Q. Where is the Blue Bus parked when you conduct your sales?

A. In a parking lot....I think it's called Richmond Hill.

Q. Do you sell your milk and milk products to the general public there?

A. I don't sell milk.

Q. What do you sell?

A. I don't sell anything except bread, meat, and cinnamon buns and brownies.

Q. Do you distribute milk and milk products to the public there?

A. I transport them to the cow share members.

Q. Who are the cow share members?

A. Cow share members are families who bought a quarter of a cow or half a cow.

Q. How much do members pay you for membership?

A. Three hundred dollars, the current average price of a cow is $1200.00 so that's what we base it on.

Q. Does a person have to be a cow share member in order to obtain milk and milk products from you?

A. Yes.

Q. What amount of money do they pay you for each litre of milk?

A. It depends where they are. In Toronto they pay $2.50. Here they pay $2.00. They pay a transport fee in Toronto.

Q. When you say 'here' do you mean sales from your store at the farm?

A. Yes. Can you correct that: it's not for sale; they pay me for the services, milking the cows, housing the cows, feeding the cows.

Q. Are the members aware that they are obtaining unpasteurized milk and milk products from you?

A. Yes, that's why they buy it or get the cow.

Q. How many members do you have?

A. I'm not sure; probably 150.

Q. Who can obtain milk and milk products from your store?

A. Members.

Q. Why do you have the cow share program?

A. So that people can obtain raw milk.

Q. Are you aware that it is illegal in Ontario to sell or distribute milk or milk

products that have not been pasteurized?

A. Oh yes totally aware.

Q. What is your understanding of how the cow share program would circumvent the milk laws?

A. It doesn't circumvent the laws; it gives the cow share holders the same right as a farmer to drink their own milk fresh from the cow they have a share in.

Q. Are you currently licenced to operate a milk plant by any level of government?

A. No.

Q. How long is a cow share member valid for?

A. Six years, which means the average milking lifetime of a cow.

49. Having no contradictory evidence nor any challenge or reason to doubt the veracity of the defendant's testimony in the Search Warrant Statement, I accept his answers therein as facts.

Section 100(1) of the HPPA

50. For ease of reference I repeat the facts set out in paragraphs 5 and 6 of the Statement of Agreed Facts:

> *5. In 1994, Public Health Inspector Susie McLeod of the Bruce-Grey-Owen Sound Health Unit, as it then was, (now the Grey Bruce Health Unit) issued an Order under section 13 of the Health Protection and Promotion Act, R.S.O. 1990, H. 7, in writing, to the defendant and to Glencolton Farms, including the following terms:*
>
> *I hereby require you to cease the manufacturing, processing, preparation, storage, handling, display [sale, offering for sale and distribution] of unpasteurized milk and milk products.*
>
> *6. The Order of Susie McLeod was expanded by the Health Protection Appeal Board in its written decision dated 1, September 1994 to include the terms in parentheses.*

51. It follows that the only live issue on these three charges is whether the defendant breached the Order as alleged, and is therefore *guilty of an offence.*

N. The *Viva Voce* Evidence for the Prosecution

52. In light of the factual admissions in the Statement of Agreed Facts and my findings of fact in relation to the Search Warrant Statement, I do not believe that it is necessary to elaborate unduly on the *viva voce* evidence of the Prosecution's witnesses.

53. Suffice it to say that there is sufficient compelling evidence before me that the Ministry of Natural Resources appointed two undercover inspectors to investigate the activities of the defendant with respect to information received that he was selling unpasteurized milk and milk products from his farm in Durham, Ontario, and from a bus in which he transported his products to the Greater Toronto Area.

54. Susan Atherton testified that at all material times in 2006 she was employed by the Ministry of Natural Resources as a conservation officer, and worked as an undercover agricultural investigator using the name "Susan Taylor". At that time Ms. Atherton was working together with Victor Miller who testified that he was then, and still is now, an investigator with the Intelligence Investigator Services Unit of the Ministry of Natural Resources. At all material times Mr. Miller was working in an undercover capacity using the name "Victor Douglas".

55. On several occasions during the periods under consideration the investigators attended both the bus and the farm store, where they purchased various items. Susan Atherton testified that *the intention was to buy milk and it wasn't until later that we found out that you had to be a member.* Ms. Atherton told the Court that although she attempted to purchase milk from the defendant, she was not permitted to do so until she became a member of his Cow Share Program for which she eventually paid $300.00.

56. During the course of the Prosecution's evidence, in an effort to curtail the proceedings by eliminating irrelevant, unnecessary and superfluous testimony, I addressed the defendant in the following words:

> *It seems to me, correct me if I am wrong, that there is no argument that you operate a farm in the area*

which has been described several times, [from which] you sell all kinds of fresh produce and baked and cooked [products] and what have you there, from a store.. amongst the buildings; that you also operate a blue bus in which you pack [your products] from time to time, and on Tuesdays or other days...you drive it to a certain location in the Greater Toronto Area, maybe Vaughan or Richmond Hill, whatever it is, and there you provide-you offer for sale all kinds of produce or what have you, except that milk and milk products are required to be provided for a fee only to people who are registered cow shareholders. Is that correct or am I wrong?

The defendant's reply was: *That's correct.*

57. Consequently, I am of the view that the only live issue before me with respect to the charges under section18 of the HPPA and section 15 of the Milk Act, is the following:

"Is the defendant guilty of the offences with which he is charged or does the fact that he sells his milk and milk products only to paid-up members of his Cow Share Program exculpate him"?

O. The *Viva Voce* Evidence for the Defence

Mr. Eric Bryant

58. Mr. Eric Bryant testified that he is a cow share member, who drives from his home in rural Ontario to the defendant's farm every two weeks to obtain a supply of milk and milk products. It is about a six-hour drive both ways.

59. Mr. Bryant told the court that *back about 12 years ago I was having some health issues with poor digestion...I have a B.Sc. in biology, so my natural reaction was to start researching about health and see why I was having indigestion...* He secured literature *on raw diet and the importance of enzymes, and it had a quote there about not cooking your food, and it attributed it to Jesus, and that caught my interest, and I followed up the reference...* He and his wife were influenced by the "Ascene Gospel of Peace" which they acquired; they became vegetarians, and after extensive enquiries, they became cow share members of Glencolton Farms, and have continued to obtain their milk products in that capacity for some 12 years.

60. Mr. Bryant further testified that he did his own research about the benefits and potential risks of raw milk, and that he is *an informed consumer.* He has a contract with the defendant in terms of which *I'm part-owner of a cow, and Michael looks after those cows. I come out and get milk from him, and I give him money to pay for the upkeep and maintenance of the cows.*

Mr. Michael Schmidt: Evidence-in-Chief

61. Mr. Michael Schmidt testified in his own defence, after being cautioned by the court that he had the right not to do so. In summary, his evidence is as follows:

a) He was born in Germany in 1954, grew up and worked on farms throughout his life.

b) In 1978 he received a Masters degree in Agriculture after completing his thesis in bio-dynamic farming, the earliest form of organic agriculture.

c) He immigrated to Canada in 1983, where he established a dairy farm, and worked within the quota system.

d) He continued to receive calls from people with food allergies, who were apparently unable to tolerate pasteurized milk.

e) As a result, he cancelled his contract with the Milk Marketing Board, and gradually developed the concept of establishing a form of joint ownership of his cows with those who were asking for unpasteurized milk products.

f) His "lease-a-cow" program enabled him to retain ownership of his cows, while they were leased to the people who wanted the unpasteurized milk and milk products.

g) During the two years that this program was in effect *there was no illness reported from the consumption of the raw milk provided.*

h) In February 1994, Susie McLeod, an inspector employed by the Grey-Bruce Health Unit issued

an order under the HPPA that he refrain from this practice because the milk was deemed to be a health hazard.

i) Also in 1994, his farm was raided by Ministry officials, who confiscated and destroyed hundreds of pounds of butter and cheese and hundreds of litres of milk in front of his five young children, who were being raised on those products.

j) *One of my workers was abducted and threatened by unknown people; our farm was broken into, milk equipment intentionally destroyed, and cows poisoned.*

k) In September 1994, the week before his trial, his farm insurance was cancelled without warning, which left him without any protection.

l) In all of those circumstances, on the advice of his lawyer, he pleaded guilty at trial. He paid the fine of $3,500.00 and was placed on probation for 2 years.

m) His appeal to the Health Protection Appeal Board was denied.

n) As a result of the costs of those proceedings, he lost 500 acres of his 600 acre farm, almost all of his machinery and almost all of his cows. He was on the verge of bankruptcy.

o) He then made written proposals to the Milk Marketing Board as well as to the Ministry of Natural Resources and the Ministry of Agriculture and Farming in an effort to develop a system for providing raw milk and milk products to those members of the community who wanted and/or needed them. All proposals were unsuccessful.

p) Consequently, in order to meet the needs of those who wanted the raw milk products, *I developed the cow share program...This time the cows were owned by the cow share people. I also looked at the definition of a 'milk plant', and developed the new system in a way that we would not fall under the definition of a plant according to the Milk Act. We simply had an expanded milk house directly attached to the barn.*

q) *My concern was not to circumvent the law. My concern was simply to work within the parameters of the statutes and Acts, as they were applying to farms under contract with the DFO, or farms which sold products to the public. None of that was happening in our case. We had a private contractual agreement with our cow share owners. We did not advertise.*

r) He talked openly about the concept of the cow share program, and gave lectures at universities and to chefs about the importance of the connection between the farmer and the consumer.

s) He thought that he had finally found a way to provide the raw milk products within the law.

t) After many years of hard work and fund raising, he was virtually able to recover from the losses which he had encountered in 1994.

u) Since 1996 –

- He has been bringing his milk products to the cow share owners in the Greater Toronto Area;
- His cow share owners have increased from 10 to 150;
- He publishes regular newsletters to keep the cow share members informed;
- Every cow share member has a membership card, and is fully aware *that they receive their milk raw;*
- *No one can receive milk or milk products unless they are members;*
- If someone wishes to become a member, he tries to establish that the person is serious, and gives him/her *something to try* in advance;
- He does not sell raw milk to the public;
- He provides a service for the members; this includes feeding, cleaning and housing the cows, bottling, cooling, milk separating and cheese making;
- The members have access to the cows' health records and milk test results;
- He retains 2 milk samples from every production for 4 weeks for *back-up testing;*

- An independent dairy inspector inspects his entire operation annually;
- His licenced veterinarian frequently tests his herd as well as the cow manure for pathogens; monthly *baseline testing* of the milk is conducted;
- No human pathogens have ever been found in any of his milk products;
- He has never received any reported illness due to the consumption of any of his milk products;
- He maintains an up-to-date record of all cow share members together with their contact information.
- On the fridge where the milk is stored at the farm store, there is a sign stating: **"Members Only"** and this was confirmed by Susan Atherton in her testimony.

62. At the conclusion of his evidence-in-chief, Mr. Schmidt asked whether I would permit him to submit a large number of affidavits from numerous cow share members. The Crowns objected. I indicated that without the Crown's ability to cross-examine the affiants, the evidence would be hearsay and inadmissible. However, on consent, I ruled that the affidavits would not be admitted into evidence, but that I would note that the defendant was in possession of those affidavits, and that they were all supportive of his case.

Cross examination of Michael Schmidt by Mr. Ryan

63. When questioned about the cow share members' handbook, the defendant testified that the contractual arrangement between him and the members was governed by the handbook, the membership card and a personal, verbal agreement between him and them.

64. When asked how the cow share program constituted an exemption to his obligation to comply with the relevant legislation, he replied as follows:

There's no exemption. It is simply a concept of a private contract between two people to attain rightfully a product which is not available normally to the public.

65. Both Mr. Ryan and the defendant were in agreement that there is no law which prohibits anyone from consuming raw milk and milk products, and I am not aware of any such legislation in the Province of Ontario.

66. Under cross-examination with respect to the charge of selling cheese to the undercover officer, Susan Atherton (Taylor), he told the court that *...she explained to me why she needed the raw dairy. She said that she had to have surgery and she wanted to build up her immune system before the surgery.* He explained the details of the cow share contractual agreement, and told her that she would have to go to his farm in order to become a member. He told one of his farm employees, Beverley Viljakainen, that Susan Atherton would be coming to the farm for that purpose. Mr. Schmidt testified that she had only been given a sample of his cheese to *try out if the milk products agree with her,* and she was *never asked for money specifically for the reason that she was not a member yet,* and this was consistent with his usual practise. He conceded that Susan Atherton may have also acquired a small quantity of cheese at the farm on another occasion when she went to become a member, but he was emphatic that she was not actually charged for the cheese.

67. The defendant testified that in order to ensure that every prospective member understood that consumption of the defendant's dairy products is a private, personal, conscious decision which he/she makes, the front cover of the cow share handbook contains the following statement:

This booklet is intended solely for informational purposes. You consume raw dairy products at your own risk.

Cross examination by Mr. Middlebro

68. Mr. Schmidt acknowledged that on October 20th, 27th and November 21st 2006 raw milk and milk products were stored and displayed on his farm and on the blue bus.

69. He again acknowledged the validity of both the February 17th 1994 Order by Health Inspector Susie McLeod and the Order dated September 1st 1994 by the Health Protection Appeal Board as he had done in the Statement of Agreed Facts.

70. When asked why he thought he was exempt from complying with the Orders, Mr. Schmidt replied that he was not exempt; *it doesn't apply to me; as simple as that.* In response to Mr. Middlebro's question, he said: *I comply with the order[s], yes.*

Credibility Issue

71. There is conflicting evidence with respect to the acquisition by Susan Atherton (Taylor) of a small package of cheese marked $3.20 on two separate occasions before she became a cow share member. Her evidence is that on each such occasion, although she was not permitted to purchase milk, she did purchase a small package of cheese while she was not yet a cow share member.

72. Under cross-examination by Crown Counsel Ryan, the defendant testified that in accordance with his usual practice, he had given Ms. Atherton the cheese *to try out if the milk products agree with her* and that *she was never asked for money specifically for the reason that she was not a member yet.*

73. In Susan Atherton's testimony she told the Court that when she first went to purchase raw milk at the Blue Bus -

There was a little book on the shelf beside the cheese and I picked it up, and I was looking at it, and I set it down on the counter when I purchased my cheese and it was called: "Cow Share Members Handbook" *and after I paid for my cheese, Mr. Schmidt gave me the book.*

74. Their respective testimony is consistent insofar as his having given her the handbook at that time, and telling her that she would have to attend the farm store and apply for membership there. The issue is whether she paid for the cheese before becoming a member or whether the defendant or his employee gave the cheese to her to try after she had told the defendant that she wanted to buy the raw milk because she was going to have surgery.

75. With respect to the resolution of this issue, I rely on the third element of the test for determining credibility as set out by the Supreme Court of Canada in **R. v. W.D., 1991 CanLII 93 (S.C.C.), [1991] 1 S.C.R. 742 (S.C.C.).** After hearing all the evidence in relation to this issue, I am left with a reasonable doubt as to whether the defendant sold the cheese or gave it to Susan Atherton. Accordingly, I resolve the issue in favour of the defendant, and find that he did not sell the cheese to Susan Atherton, but gave it to her for the reasons which he supplied to the Court.
In my view, it strains common sense that the defendant would sabotage his entire cow share program by selling small quantities of cheese for a total of $6.40 to someone who was not a member.

76. In the decision of the Health Protection Appeal Board of 1st September 1994, it is noteworthy that although the Appeal Board ruled against him, the Board made the following comments with respect to Mr. Schmidt at page 15:

The Board accepted Mr. Schmidt as an expert witness qualified to express opinions in relation to farming and food

production. The Board furthermore found Mr. Schmidt to be a candid, honest and knowledgeable witness, and attached great weight to his testimony throughout the hearing.

77. Save that I did not qualify the defendant as an expert witness in the proceedings before me, I am in complete agreement with the above statement of the Appeal Board, and apply it *mutatis mutandis* to his testimony in the proceedings before this Court.

P. The Issues

78. Having regard to the Statement of Agreed Facts and my findings of fact with respect to the Search Warrant Statement, it is my view that the ultimate issues to be determined by the court are as follows:

a) In relation to the charges under section 100(1) of the HPPA, did the actions of the defendant constitute breaches of the Order, thereby committing the offences as alleged?

b) In relation to the charges under section 18(1) and (2) of the HPPA, did the actions of the defendant constitute selling, offering for sale, delivering or distributing milk and milk products within the contextual meaning of the legislation, thereby committing the offences?

c) In relation to the charges under section 15(1) and (2) of the Milk Act, did the actions of the defendant amount to operating a plant and carrying on business as a distributor of milk and milk products within the contextual meaning of the legislation, thereby committing the offences?

Q. Statutory Interpretation

79. To resolve the issues which I have described requires an in-depth investigative examination of the complexities of statutory interpretation. In a nutshell, the Prosecution argues that the prohibitions in the legislation govern all members of the public. The defendant, on the other hand, proffers that such prohibitive legislation does not apply to a specific group of people who are members of a select program, namely the Cow Share Program created by the defendant.

80. My opinion is that the issues do not seem to involve an attack on the legislation *per se*, but rather a difference of opinion as to the extent of the applicability of the legislation to the defendant as he now operates his dairy product business, so that the resolution of the issues is fact specific.

81. If the interpretation of legislation was such a simple task, why have so many books been written on the subject? In Canada, the leading textbook on Statutory Interpretation is **"Driedger on the Construction of Statutes"** of which there were three editions. The fourth edition is entitled: **"Sullivan and Driedger on the Construction of Statutes"**, Butterworths Canada Ltd., 2002 ("4th Edition"), and in 2008, the fifth edition was published, entitled **"Sullivan on the Construction of Statutes"**, LexisNexis Canada Inc., 2008 ("5th Edition").

82. In her Foreword to the 4th Edition, Professor Sullivan writes as follows:

The third edition of 'Driedger on the Construction of Statutes' was not just a revision of Driedger's work but a new book in many respects. First, the focus shifted from British precedent to the current practice of Canada's appellate courts, and from an intentionalist to a pragmatic approach. Second, issues not dealt with or given only a cursory treatment in the early editions received a full analysis in the third.

83. *The modern principle of interpretation of statutes is the culmination of centuries of interpretation by common law courts.* (4th Edition at page 4). It is apparent, therefore, that statutory interpretation is an evolutionary process. The methods of interpretation change with the shifts in jurisprudence so that, as time goes on, statutory interpretation requires reliance on new and ever-changing circumstances, ideas and methods concomitant with societal and technological development, discoveries and inventions. Even the initial purpose of the legislators may change to meet the new challenges of a different generation.

84. *In examining social context, the courts look both to the context in which the impugned legislation was originally enacted and, in dynamic legislation at least, to the context in which it operates.* (5th Edition at page 562).

85. *By social context Driedger meant the general and fluctuating circumstances of society; by intellectual context he meant the individual knowledge that each of us acquires through education and experience. In short 'all facts that are needed to understand the subject matter of a statute may be considered by a court'.* (5th Edition at page 562).

86. Indeed, the Interpretation Act of Canada states in section 10:

The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning. R.S., c. I-23, s. 10.

87. Furthermore, in section 12 of the Interpretation Act Parliament directed that-

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. R.S.C. 1985, c. I-2, s. 12

88. In addition, section 64(1) of the Ontario Legislation Act, which replaced the Ontario Interpretation Act, mirrors the Federal Act as follows:

An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Schedule F, s. 64 (1).

89. In Black's Law Dictionary, Seventh Edition, the word "remedial" in relation to a remedial statute is defined as "intended to correct, remove, or lessen a wrong, fault, or defect".

90. In **R. v, Jacob, [2009] O.J. No. 303,** a judgment released on January 27th 2009, the Ontario Court of Appeal was considering the interpretation of legislation prohibiting hunting at night in a certain area. The Appellant was appealing his conviction for discharging a firearm across a road in a First Nations area. At paragraph 35, the Court of Appeal said:

The well established approach to statutory interpretation is set out by the Supreme Court of Canada in **Bell Express** *Vu Limited Partnership v. Rex, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559,* at paragraph 26, as follows:

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

91. And at paragraph 36 of **Jacob,** the Court noted-

This approach to statutory interpretation- sometimes referred to as the textual, contextual and purposive approach-requires an examination of the three factors: The language of the provision, the context in which the language is used, and the purpose of the legislation or the statutory scheme in which the language is found.

92. The Court of Appeal found that since one of the purposes of the legislation in question was public safety, *the context and more importantly its purpose point strongly to a broader interpretation...*

93. According to Professor Sullivan, section 12 of the Interpretation Act *was introduced at a time when legislation was normally drafted in precise and very detailed terms. For such legislation, it makes sense for interpretation to be both purposeful and liberal. However, 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.* (5th Edition at page 469).

94. My view is that the sections in issue under the HPPA and the Milk Act constitute legislation which is drafted in general terms so that the court must adopt a *restrictive interpretation-one in which the scope of the general language is narrowed so as to exclude applications that are outside the purpose* [whether actually intended or more appropriate in the circumstances]. Such an interpretation takes into account not only the context in which the legislation was originally enacted, but also the context in which it currently operates.

95. The question before me may be simply expressed as follows: "If the purpose of the HPPA and the Milk Act is primarily public safety, does the legislation apply to a structured group of private people, such as the members of the defendant's cow-share program, who may wish to become involved in activity which in itself is not unlawful, so that

public protection of such people is not required, and therefore the legislation concerned is not applicable to them?"

96. If 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. However, I believe that in all the circumstances, including the history of this case and the defendant's many years of involvement with the justice system in relation to his dairy products, a thorough contextual analysis would be in keeping with the proper administration of justice. *Today, as the modern principle indicates, intention, textual meaning, and acceptability of consequences are all legitimate concerns of interpreters; each has a role to play in every interpretive effort.* (4th Edition at page 7).

97. When the Court considers the overall objective of the Legislature in enacting both the HPPA and the Milk Act, what is essentially in contention in this case is the breadth of the specific objectives of the Legislature.

98. In the 4th Edition at page 20, the learned authors state: *As understood and applied by modern courts the ordinary meaning rule consists of the following propositions:*

1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.

2. Even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation: they must consider the entire context.

3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.

99. And at pages 2 and 3, the learned authors explain the concept in subparagraph 3 above in the following manner:

In an easy case textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague or obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern principle has weakness, it is its failure to acknowledge and address the dilemma created by hard cases.

100. I am of the view that the case at bar is indeed one of those hard cases contemplated by Driedger and Sutherland, so that the court must adopt a dynamic approach to interpreting the legislation in question, interpretation which may necessarily modify or depart from the ordinary meaning. *In practice, at least in hard cases, courts are required to balance a number of competing considerations in accordance with their sense of what is appropriate in the circumstances.* (4th Edition at page 7).The court is required to *look both to the context in which the impugned legislation was originally enacted and, in dynamic legislation at least, to the context in which it operates."*(5th Edition at page 562).

101. In the 5th Edition at page 573, Professor Sullivan makes the following comment on the issue of broad interpretation:

In modern interpretative practice, courts have become accustomed to reading legislative texts in a broad context. Increasingly, this context includes extrinsic aids that formerly were considered inadmissible- legislative evolution and legislative history are relied on as both direct and indirect evidence of legislative intent. In the words of Sullivan and Driedger, 4th edition at page 20: *Interpreters [of legislation] are obliged to consider the total context of the words in every case, no matter how plain those words may seem on initial reading".* (Underlining for emphasis).

102. *Statutory interpretation is founded on the assumption that legislatures are rational agents. They enact legislation to achieve a particular mix of purposes, and each provision in the Act or regulation contributes to realizing those purposes in a specific way.* (4th Edition at pages 243-244).

103. *Reading down should be used as an interpretative technique when the evidence shows on balance that narrowing the scope of the text is the best way to give effect to the apparent intentions of the legislature.* (Sullivan 5th Edition at page 466).

104. In **Blue Star Trailer Rentals Inc. v. 407 ETR Concession Co., [2008] O.J. No.409 (O.S.C.)** the court was considering the application of certain provisions of the Ontario 407 Act to trailers. In narrowing the scope of the 407

Act to exclude its applicability to attached trailers, the court held that the Ontario Legislature passed the 407 Act *as a component part of the much broader statutory scheme enacted under the Highway Traffic Act to govern the use, management and administration of highways and vehicles using highways in Ontario.*

R. The Validity of the Ontario Milk Legislation

105. In **Allan v. Ontario (Attorney General), [2005] O.J. No. 3083 (O.S.C.)** the Ontario Divisional Court was dealing with a case involving the validity of the Ontario provincial milk producing and marketing legislation in relation to the export of Ontario milk from the province. The court held that the applicants could not avoid the application of the provincial marketing legislation by exporting their product. The court found that regardless of the ultimate destination of the milk they produced, they were subject to the valid provincial regulatory scheme.

106. In **Allan,** after a detailed examination of the legislation, the court held that Ontario's milk marketing program was validly enacted. In order to properly understand the context in which the charges before this court were laid, it is beneficial to quote the relevant passages of the court in **Allan.**

> 11. *The objectives of the provincial Act are carried out by the Ontario Farm Products Marketing Commission ("OFPMC") and the Dairy Farmers of Ontario. The OFPMC is a body appointed by the Lieutenant-Governor in Council, which is empowered to make regulations with respect to the production and marketing of milk in Ontario (s. 7(1) of the Milk Act). It is also authorized to delegate its power to make regulations to a marketing board like DFO, including regulations requiring that milk be marketed by, from or through the marketing board (ss. 7(8) and 7(1)[35])). The provincial Act also permits the OFPMC to authorize a marketing board to exercise certain powers, including the power to require that milk be marketed on a quota basis (s. 7(1)[14]). Where the marketing board is authorized to exercise such powers, it may make regulations, orders, policies and decisions or issue directions (s. 7(9)).*
>
> 12. *DFO has been delegated the power to make regulations with respect to the production and marketing of milk within Ontario, and to exempt any persons from the requirements set out in those regulations (s. 5 of O. Reg. 354/95, Milk and Farm-Separated Cream - Marketing; see also s. 7(1) of the provincial Milk Act, particularly subsections 7(1) [11] and 7(1)[35-37]). The application of the regulation is set out in s. 2:*
> *This Regulation provides for the control and regulation in any or all respects of the producing or marketing within Ontario of milk and farm-separated cream, including the prohibition of that producing or marketing in whole or in part.*
>
> *DFO has been authorized to require that milk be marketed on a quota basis and to regulate the fixing and allotment of quota (s. 6 of O. Reg. 354/95, and s. 7(1) of the provincial Milk Act, particularly s. 7(1)[14-16]).*
>
> 13. *DFO has made the regulation in issue in this case, DFO Milk General Regulation 11/04 pursuant to the powers granted to it. Again, s. 2 deals with the application of the regulation:*
>
> *This Regulation provides for the control and regulation in any or all respects of*
>
> (a) *the producing and marketing within Ontario of milk, including the prohibition of that producing or marketing in whole or in part, and*
> (b) *the quality of milk in Ontario.*
>
> *The regulation requires that all milk producers be licensed by it, and that all milk produced meet Grade A standards. DFO also requires that all milk be marketed to it (s. 3) and that all milk be marketed on a quota basis (s. 7). Appointed transfer agents of DFO receive milk from the bulk milk tanks of licensed producers and arrange for its transportation as part of the fungible milk supply to milk processors. Licensed milk producers are allotted a marketing quota calculated on a kilogram of butterfat basis. Quota represents the right to sell milk, whether it is ultimately to be used intraprovincially or for interprovincial or export trade, to the provincial marketing board. DFO sells the raw milk to dairy processors for further processing, either for consumer use in liquid form ("fluid milk") or for use in dairy products like cheese or ice cream ("industrial milk").*

S. **Penalty Considerations**

107. In my opinion, when considering the meaning in relation to the ultimate objectives of all the legislation under which the defendant has been charged, it is prudent also to take into account the penal consequences of conviction.

This task requires a consideration of whether the consequences of conviction are acceptable, and therefore, legitimate. Mr. Schmidt is facing 17 charges under the HPPA. Section 101(1) of that Act provides as follows:

Every person who is guilty of an offence under this Act is liable on conviction to a fine of not more than $5000.00 for every day or part of a day on which the offence occurs or continues.

108. He is also facing two charges under the Milk Act. Section 21 provides as follows:

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.

109. Because there is no definition of "subsequent offence" in the Milk Act, I accept that the ordinary meaning of the term is what is intended. Therefore, I understand the term "subsequent offence" to mean any conviction of a similar offence to the ones of which a defendant was previously convicted. On September 13th 1994 Mr. Schmidt was convicted, *inter alia*, of offences under section 15(1) and (2) of the Milk Act. It follows that upon conviction of the two current charges under the Milk Act, he would be liable to a fine not exceeding $10,000.00 for each conviction times the number of days that each offence is held to have continued.

110. I do not intend to do the math. However, it is clear that the totality of the potential fines would be astronomical. As such, when I consider these penal consequences in conjunction with the remainder of my findings herein, I cannot accept that the Legislature ever intended that a person who is not putting the general public at risk, and who is functioning to all intents and purposes within the parameters of the law, should face such enormous punishment.

T.The Purpose of the Milk Act

111. The purpose of the Milk Act as set out in section 2 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.

112. An analysis of the overall purpose of the Milk Act is necessary in order to understand the purpose of the Act as well as the scheme established by the Act for achieving that purpose.

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

113. Adopting the ordinary meaning of the words in section 2, the overall purpose of the Act is to stimulate and improve, to control and to regulate the production and quality of milk and milk products in Ontario. In order to give effect to such purpose, the Act provides, *inter alia:*

- Administration and Enforcement procedures;
- For the establishment of a Commission called the *"Ontario Farm Products Marketing Commission"* with powers to inspect and in numerous ways to regulate the producers and the production of such products;
- For the construction and control of production plants;
- For the licensing with respect to such plants;
- A description of offences under the Act;
- Procedures for compliance enforcement; and
- Punishment for those found guilty of committing defined offences under the Act.

114. Succinctly put, the scheme of the Act essentially embodies a process for the control of the production and marketing of milk and milk products in the Province of Ontario. In relation to the prosecution of people who are alleged to have contravened any of the provisions of the Act, I refer to section 25 of the Milk Act, which states under the heading "Rebuttable Presumption" as follows:

> *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". (Underlining for emphasis).

115. I find that the presumption in section 25 clearly places the onus on the defendant in this case to rebut that presumption by proving to the court, on a balance of probabilities, that the cow share program as it was established and is being run by him, does not constitute "marketing within Ontario" as set out in section 25.

116. Section 1 of the Milk Act defines "marketing" as follows:

"Marketing" *includes advertising, assembling, buying, distributing, financing, offering for sale, packing, processing, selling, shipping, storing and transporting and 'market' and marketed' have corresponding meanings; (commercialisation", "commercialiser", "commercialisé").*

117. Professor Sullivan (5th Edition at page 45) says the following in regard to the ordinary meaning rule:

> *The presumption in favour of ordinary meaning is rebutted by evidence that another meaning was intended or is more appropriate in the circumstances.* (Underlining for emphasis).

118. And at page 227, the learned author writes:

Ideally, interpreters should offer an explanation of how they moved from the words of the text and their context to a conclusion about what the text means.

119. I find that the defendant has indeed rebutted the presumption set out in section 25 of the Milk Act for the following reasons:

a) The stated purposes of the Act envisage the control of milk production for marketing and commercial purposes in Ontario, but *Purpose is not inherently more important than other contextual factors, and cannot be relied on to justify adopting an implausible interpretation;* (4th Edition at page 261)

b) The specific inclusion at the end of the definition of "marketing" of "commercialisation", "commercialiser", "commercialisé" makes it plain and obvious that commercial marketing in its broadest sense is what is meant by the term "marketing";

c) Utilizing the Latin interpretive guide: *inclusio unius est exclusio alterius* it seems apparent that the specific inclusion of those terms in the definition was to clarify that the term "marketing" as used by the Legislature means commercial marketing within the general public, and excludes a small group of people who have come together by private agreement, such as the cow share program established by the defendant, for the purpose of obtaining raw milk products from him, by buying shared ownership in his cows for the duration of the milking life of the cows;

d) Marketing implies advertising and offering products for sale to the general public, who are required simply to pay the requested price for the products; the undisputed evidence of the defendant is that there is no advertising or selling of his products to the general public whatsoever, and that in both the farm store and the blue bus where his milk is stored, there are clearly visible signs indicating: **"Members Only".**

e) The definitions of the words "distributor" and "plant" in section 1 of the Act are:

> "Distributor" *means a person engaged in selling or distributing fluid milk products directly or indirectly to consumers.*
>
> "Plant" *means a cream transfer station or milk transfer station or premises in which milk or cream or milk products are processed.*

120. As indicated earlier, I found that the defendant did not sell cheese to Susan Atherton prior to her becoming a member of the cow share program. My conclusion with respect to the actions of the defendant in relation to the two charges under the Milk Act is that the broad, general meaning of the legislation must be adopted, and that this requires a remedial interpretation of the legislation as mandated under section 12 of the Interpretation Act of Canada and section 64(1) of the Ontario Legislation Act.

121. Thus my interpretation is that the legislation refers to the public at large, and does not include the defendant's dairy operation as it is currently being conducted, where sales of the defendant's dairy products are absolutely restricted to members of his cow share program. In my view, such a remedial interpretation gives effect to the legislative meaning in accord with the overall contextual purpose of the Milk Act, and accordingly, "best ensures the attainment of its objects" (R.S.C., 1985, c. I-2, s. 12) and "effect is given to the enactment according to its true spirit, intent and meaning" (R.S., c. I-23, s. 10).

122. Furthermore, notwithstanding the broad definitions of "plant" and "distributor", I find that in all the circumstances, taking into account the structuring and conduct of his entire dairy operation, the defendant did not require a licence from the Director to operate his dairy product enterprise as he does, nor did he by so doing, carry on business as a distributor of fluid milk products without a licence. Consequently, I am not persuaded that the Crown has proven the *actus reus* of these two charges under sections 15(1) and (2) of the Milk Act beyond a reasonable doubt. Accordingly, I find the defendant not guilty.

U. The Purpose of the HPPA

The Charges under section 18(1) and (2) of the HPPA

123. An analysis of the overall purpose of the HPPA is necessary in order to understand the purpose of the Act as well as the scheme established by the Act for achieving that purpose. The legislation creating the prohibition against the sale of unpasteurized milk first came into force in the year 1938 in section 100(1) of The Public Health Act R.S.O. 1938 c. 30. Section 18(1) and (2) as well as section 13(1) and (2) of the current Act are located under Part III of the HPPA which is headed "Community Health Protection".

124. The purpose of the HPPA is set out in section 2 as follows:

> *a. to provide for the organization and delivery of public health programs and services,*
> *b. the prevention of the spread of disease, and*
>
> *c. the promotion and protection of the health of the people of Ontario.*

125. Adopting the ordinary meaning of the words in section 2, my understanding of the overall purpose of the Act is that it is essentially related to the provision of *public health programs and services* so as to *prevent the spread of disease* amongst the people of Ontario, and to promote and protect *the health of the people of Ontario.*

126. Of particular significance are the terms: "public" and "people of Ontario". These terms must surely be understood contextually as relating to the public at large, so that the intrinsic aim of this legislation is the protection of the public at large. Supportive of this view is that section 18 is under Part III of the Act which is titled: "Community Health Protection". Does this legislation then also govern those members of the public who do not believe that they require such protection? Did the defendant break the law by doing what he did?

127. In other words, are the cow share members bound to accept the protection offered to the general public in the legislation or are they permitted to reject the protection offered, and assume any risks which may be involved? The starting point, I believe, is to understand the meaning of the word "public" and the term "people of Ontario" as they are used in the legislation, in an effort to interpret the wording of the sections within the context of their stated purpose.

128. It is noteworthy that the first definition of the word "public" in the "Concise Oxford Dictionary, 1990 is "of or concerning the people as a whole". (Underlining for emphasis)

129. Let me consider some of the pertinent jurisprudence with respect to the meaning of the word "public". In an old British case, **Sherwell v. Combined Incandescent Mantles Syndicate Ltd., (1907) 23 TLR 482 (United Kingdom Court)** the court was considering the meaning of the term "an offer of shares to the public." At page 483 the court said per Warrington J.: "It means, in my judgment, an offer of shares to anyone who should choose to come in".

130. In **Toronto (City) v. Original Playhouse Cafe Ltd., [2005] O.J. No. 1721 (O.C.J.),** His Worship R. Quon, was considering the meaning of the term "public" in relation to charges laid under the no-smoking by-law of the City of Toronto. At paragraph 76, the learned Justice of the Peace said the following:

...in broad terms, when an invitation is addressed or is aimed at the public in general, with no restriction as to who can attend, then all members of the public have that expressed or implied right of access. On the other hand, when invitations are limited or given to specific persons ...then those invitations would not be made to the public in general. Hence, depending on the context, the type of event, the type of premises, and where the public is not ordinarily invited or permitted access to an event, then the function is normally a private function and the premises are not a public place for the purposes of the no-smoking by-law

131. In **Kipling Avenue Social Club v. Toronto (City), [2005] O.J. No. 1323 (O.S.C.)** the Appellant applied for a declaration that it was a private club for the purposes of the Toronto Municipal Code which prohibited tobacco smoking in public places. The purpose of the application was to enable club members to smoke in the premises of the club. In dismissing the application, Echlin J. of the Ontario Superior Court held that the Appellant was not a private club, *inter alia,* because the business and membership cards and the website made no reference to the club whatsoever. At paragraph 17, the Court said the following:

To be a "private club" *under the Code, the Club must operate solely for the benefit and pleasure of its members and direct its publicity and advertisements to its members. In this regard, there was extensive evidence presented that publicity and advertisements were directed to the public at large, leading to the suggestion that the Club was not operating solely for the benefit of its members.*

132. In **R. v. 1100947 Ontario Inc. o/a Kilt and Clover, [2008] O.J. No. 783,** the Ontario Superior Court was considering the Crown's appeal in relation to the dismissal of charges under the Smoke-Free Ontario Act. The Appellant submitted that the main objectives of the Act are to limit public and workplace exposure to second-hand smoke. In determining the objectives of the legislation the court referred to the Hansard Report at the time that the legislation was introduced. The Honourable George Smitherman, Minister of Health, as he then was, stated as follows in the Legislature:

....This bill creating the Smoke-Free Ontario Act, would, if passed, protect all Ontarians from the deadly effects of cigarette smoke...no matter where they are.

133. The Minister then explained the ultimate purpose of the legislation in the following words:

In other words, unless Ontarians want to be exposed to cigarette smoke, they won't be. (Underlining for emphasis).

134. On September 28th 2009, the Ontario Court of Appeal released its judgment in **Kennedy v. Leeds, Grenville and Lanark District Health Unit, [2009] O.J. No. 3957.** The issue was whether the appellant's premises constituted an "enclosed public place" within the meaning of section 9(1) of the Smoke Free Ontario Act, S.O. 1994, c. 10. Armstrong J.A. introduced the judgment as follows:

The appellant leased premises...which had been operated as ...a Sports Bar. In order to avoid the provisions of the Smoke Free Ontario Act...the appellant purported to operate the sports bar as a private club for people who paid a token monthly membership fee of $4.00.

135. The Court of Appeal held that the appellant's premises did constitute an "enclosed public place" and confirmed the conviction. In distinguishing that case from the case at bar it is essential to consider the following findings in **Kennedy:**

- Membership was solicited by recruiters who approached members of the public who were smokers;
- Application forms were provided to interested people, and were also available at the door;
- Members were required to sign the form, agree to pay $4.00 per month, and undertake to comply with certain rules;
- There was an electric "OPEN" sign in the window;
- There were no signs prohibiting entry, although one sign advised patrons who were sensitive to second hand smoke not to enter.

136. At paragraph 45, the Court held: "Read as a whole, the Act is clearly designed to eliminate smoking in public places and thus protect members of the public from contact with second hand smoke."

137. The overall purpose of the Smoke Free Ontario Act is to protect vulnerable non-smoking members of the public from contacting serious illnesses by coming into contact with second hand smoke which permeates the air in enclosed places. As the Court held in **Kennedy** the attempt to convert premises which are generally open to the public into a private club in the manner adopted by the appellant, reveals an obvious intention to circumvent the

legislation, thus endangering the health of the public which the legislation was specifically designed to prevent.

138. **British Columbia (Attorney General) v. Pellikaan, [1986] B.C.J. No. 1709 (Supreme Court)** is a case which bears striking similarity to the case before me. The defendant was charged with selling raw milk contrary to the provincial Milk Industry Act and the Health by-law of the City of Vancouver. A public health inspector seized some of the milk, and tests revealed that the milk was unpasteurized, dirty, came from unhealthy cows, unsanitary and contaminated with excreta. The City obtained an interlocutory order restraining the defendant from selling his milk. The defendant subsequently incorporated a society called the "Canadian Theocratic Party", the stated purpose of which was to assist *those who required raw (unpasteurized) milk for religious or health reasons.* An Agricultural Officer telephoned the number provided in a newspaper advertisement, and asked: *Is this the place where I can buy raw milk?* The positive response, however, required him *to sign a paper* indicating that he was buying a share in a cow. The officer went to the farm, and bought the raw milk without having to say or sign anything in relation to purchasing a share in a cow. Similar incidents occurred on two subsequent occasions. Upon analysis, the milk was found to be badly contaminated and unfit for human consumption.
139. In **Wholesale Travel Group Inc., [1991] S.C.R. 154** at paragraph 122, the Supreme Court of Canada made the following instructive comment in relation to the development of regulatory legislation pertaining to food and drink:

> *While some regulatory legislation such as that pertaining to the content of food and drink dates back to the Middle Ages, the number and significance of regulatory offences increased greatly with the onset of the Industrial Revolution. Unfettered industrialization had led to abuses. Regulations were therefore enacted to protect the vulnerable -- particularly the children, men and women who laboured long hours in dangerous and unhealthy surroundings. Without these regulations many would have died. It later became necessary to regulate the manufactured products themselves and, still later, the discharge of effluent resulting from the manufacturing process. There is no doubt that regulatory offences were originally and still are designed to protect those who are unable to protect themselves.*

140. And at paragraph 128 the Supreme Court continued with this theme in the process of distinguishing between criminal and regulatory offences:

> *At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.*

141. In my view, these poignant statements from the Supreme Court beg the question: "If the ultimate purpose of regulatory legislation is to protect those who are unable to protect themselves, especially those who are particularly vulnerable, do those members of society who expressly waive the need for protection, still need the protection"? Relating this to the case at bar, if, in consuming raw milk *per se* the cow share members are not committing an unlawful act, and they wish to continue to do that within the parameters of the essentially private cow share program, why should they be forced to be bound by legislation which is intrinsically aimed at the vulnerable – those who need the protection?

142. At paragraph 131 of **Wholesale Travel** the Supreme Court cautions:

> *.... it is sufficient to bear in mind that those who breach regulations may inflict serious harm on large segments of society. Therefore, the characterization of an offence as regulatory should not be thought to make light of either the potential harm to the vulnerable or the responsibility of those subject to regulation to ensure that the proscribed harm does not occur. It should also be remembered that, as social values change, the degree of moral blameworthiness attaching to certain conduct may change as well.*

143. In distinguishing the case at bar from the decisions in **Kipling, Kennedy and Pellikaan,** I find that the defendant's cow share program is a legitimate private enterprise which does not constitute "marketing" within Ontario. There is the undisputed evidence of the defendant that he did not solicit members, nor did he advertise or promote the sale of his dairy products to the public; the cow share booklet and membership cards were furnished to paid-up members exclusively; the signs at both the farm store and the blue bus clearly stated that milk products could only be purchased by members. Access to milk products was clearly not open to the public. His periodic "Mooosletters" were provided only to members, thereby keeping the membership informed about the dairy products. The members paid membership fees, the amounts of which clearly established their part ownership in the cows for their milking life.

144. There is also further compelling evidence that those who willingly became members did so after the defendant had ensured that they were fully informed about his products and his methods of production. In addition, there was a warning on the front cover of each cow share booklet that people who became members were consuming the dairy products at their own risk. Furthermore, as opposed to the facts in **Pellikaan**, there is no evidence that the cows and dairy product operations of the defendant were anything but clean and hygienic. Moreover, as opposed to the facts

in **Kennedy**, there is no evidence whatsoever that members of the public were placed at risk by being in contact with or in the company of cow share members who were consuming raw milk products.

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

V. Legislative Harmonization

146. Because of the principle of harmony in enacting legislation, when different Acts are passed by the Legislature with essentially the same goal, the interpretation of both or all of such Acts should be harmonized so that they are in sync with one another.

147. Moreover, the Interpretation Act of Canada, section 15 (2) (b) connotes the principle of harmonious legislative interpretation. It reads:

Where an enactment contains an interpretation section or provision, it shall be read and construed as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears. R.S., c. I-23, s. 14.

148. In **Point-Claire (City) v. Quebec (Labour Court), [1997] 1.S.C.R. 1015,** the Supreme Court expressed the principle in these terms:

There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among statutes should prevail over discordant ones ...

149. And later in **Bell Express Vu Limited Partnership v. Rex, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559,** the Supreme Court of Canada expressed this principle in the following language:

... where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in R. v. Ulybel Enterprises Ltd., 2001 SCC 56 (CanLII), [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as 'the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter'.

150. *Related legislation refers to legislation that deals with the same subject as the provision to be interpreted or a related subject.* (4th Edition at page 261).

151. In **Blue Star Trailer Rentals Inc. v. 407 ETR Concession Co.** *(supra)* the Ontario Superior Court was dealing with the issue of related legislation in the process of the interpretation of legislation under the Ontario 407 Act. At paragraph 33, the court said the following:

Related legislation forms part of the legal context of the statute to be interpreted and that context can be considered when interpreting the words in the statute.

152. In conformity with this concept of related legislation, the court found at paragraph 33 of **Blue Star Trailers:**

It is evident that the legislature passed the 407 Act *as a component part of the much broader statutory scheme enacted under the* HTA [Highway Traffic Act] *to govern the use, management and administration of highways and vehicles using highways in Ontario.*

153. The Smoke Free Ontario Act and the Ontario Health Protection and Promotion Act are prime examples of two separate pieces of legislation with identical purposes, namely protecting the health of the people of Ontario. As the Ontario Court of Appeal held in **Club Pro Adult Entertainment Inc. v. Ontario, [2008] O.J. No. 777:**

It was obvious that the pith and substance of the [Smoke Free Ontario] Act was to promote the health of Ontarians. It was valid provincial legislation pursuant to the provincial government's jurisdiction over health.

154. In the Smoke Free Ontario Act the government enacted legal restrictions relating to the sale of cigarettes and

other tobacco products to the public, and smoking in public places. I am of the view that in the case at bar, the defendant himself has established a self-imposed restriction on the sale of his dairy products so as to avoid the sale and consumption of his dairy products to and by the people of Ontario at large.

155. Related legislation *also includes other statutes that the court may consider helpful in interpretation. The courts determine on a case by case basis what significant relations may exist between the provision to be interpreted and the provisions of other statutes and what use may fairly be made of this material.* (4th edition at page 261).

156. In **R. v. Labaye, 2005 SCC 80 (CanLII), [2005] 3 S.C.R. 728,** the accused was charged under section 210(1) of the Criminal Code with keeping a common bawdy-house for the practice of acts of indecency. The accused operated a club in Montréal the purpose of which was to permit couples and single people to meet each other for group sex. Only members and their guests were admitted to the club. Prospective members were interviewed to ensure that they were aware of the nature of the activities of the club. Members paid an annual membership fee. A doorman manned the main door of the club, to ensure that only members and their guests entered. Entry to the club and participation in the sexual activities there was voluntary. The trial judge found that the premises constituted "a public place" within the meaning of section 197(1) of the Criminal Code, and convicted the accused. The Quebec Court of Appeal upheld the conviction. In a seven to two decision, the Supreme Court of Canada set aside the conviction and acquitted the accused.

157. In **Labaye** the Supreme Court was dealing with a criminal offence in relation to the public's standard of tolerance with respect to sexual activity. The issue was whether or not the activities of the accused were compatible with the proper functioning of Canadian Society. On the other hand, the case before me deals with regulatory offences in relation to public health. Nevertheless, as disconnected as the two cases may seem to be, for the reasons which follow, I find the reasoning of the majority in **Labaye** to be extremely helpful in interpreting the regulatory legislation concerned in the case at bar.

158. (a) There is compelling evidence before me that the people who are permitted to buy the raw milk products from the defendant -

- Are fully informed of the fact that the milk is not pasteurized, and are provided with a booklet explaining the farm practices and the respective responsibilities of the defendant and the cow share owners;
- Are given cow share membership cards in their own names;
- Purchase shares in the cows of their own free will;
- Pay an amount for the shares relative to the milking life of the cows;
- Consume the milk at their own risk;
- Are fully aware that the milk is not freely available to the public at large.

(b) In addition, it is essential to note that -

- There is no evidence that anyone ever became ill as a result of the consumption of the defendant's milk products; and
- The tests conducted by the Public Health Officials on the seized products revealed nothing more than that the milk had not been pasteurized, which in and of itself, is deemed to be a risk to public health by virtue of the provisions of the HPPA.

159. Similarly, in **Labaye**, the Supreme Court found that -

- On the evidence, only those already disposed to this sort of sexual activity were allowed to participate and watch;
- No one was pressured to have sex;
- The fact that the club is a commercial establishment does not in itself render the sexual activities taking place there commercial in nature;
- The membership fee buys access to a club where members can meet and engage in consensual activities with other individuals who have similar sexual interests;
- There was no evidence that the degree of possible health risks rose to the level of incompatibility with the proper functioning of society.

160. In **Labaye** the risk of contracting a sexually transmitted disease was discounted as a factor because the court found that "it is conceptually and causally unrelated to indecency". The court found that even if consideration were

to be given to the risk "there seems to be no evidence that the degree of alleged harm rose to the level of incompatibility with the proper functioning of society".

161. In their dissenting judgment, it is noteworthy that Bastarache and LeBell JJ. held (at paragraph 76) that the decision of the majority not only constitutes "an unwarranted break with the most important principles of our past decisions regarding indecency, but also replaces the community standard of tolerance with a harm-based test". (Underlining for emphasis).

162. My understanding of the central principle of the majority in **Labaye** is that the primary reason why the sexual activities in the club were not regarded as an affront to socially acceptable norms of decent behaviour, was that the people who were permitted to enter the club were paid-up members who were entering voluntarily, and were fully aware of the range of sexual activities occurring therein, removed from the glare of the public at large.

163. Likewise, in the case before me, I am satisfied that the distribution of unpasteurized dairy products is reserved solely for paid-up and fully informed members of the program, who purchase shares voluntarily. They are informed that the consumption of the products is completely at their own risk. In addition, if I were to adopt a harm-based test in this case, it is of paramount importance to note that there is no evidence before me whatsoever that any person ever became ill as a result of his/her consumption of any of those products. Moreover, there is a significant amount of undisputed, compelling evidence from the defendant regarding the health, control and precautionary measures which he has put in place to ensure that his products *per se* do not constitute a health hazard to any of his family or cow share members.

164. It is clear that the HPPA simply creates a presumption that all unpasteurized dairy products constitute a health hazard to the people of Ontario. Section 1 defines a "health hazard" as:

> *a) a condition of a premise,*
>
> *b) a substance, thing plant or animal other than man, or*
>
> *c) a solid, liquid, gas or combination of any of them,*
>
> *that has or that is likely to have an adverse effect on the health of any person.*

165. The peremptory prerequisite for issuing an order under section 13 is contained in section 11(1), which is also located in Part III ("Community Health Protection") under the sub-heading "Complaints re health hazard related to occupational or environmental health." Section 11(1) reads as follows:

> *Where a complaint is made to a board of health or a medical officer of health that a health hazard related to occupational or environmental health exists in the health unit served by the board of health or the medical officer of health, the medical officer of health shall notify the ministry of the Government of Ontario that has primary responsibility in the matter and, in consultation with the ministry, the medical officer of health shall investigate the complaint to determine whether the health hazard exists or does not exist. R.S.O. 1990, c. H.7, s. 11 (1).*

166. I am satisfied from the undisputed evidence of the defendant that there has never been a report that someone became ill as a result of consuming any of his dairy products. Of significance too, is that notwithstanding the testing that was done on those products both before and after the seizure pursuant to the execution of the search warrant, there is no evidence from the Prosecution that the test results revealed an actual health hazard to the public. The 1994 Order was made and these charges were laid, in my view, merely because unpasteurized milk and milk products *per se* are deemed to be a health hazard as defined.

167. When the defendant was asked by the inspector during the execution of the search warrant and by the Crown during cross examination why he believed that his cow share program was able to circumvent the legislation, his response was that the program did not circumvent the legislation, but rather enabled him to function within the parameters of the legislation, which is exactly what he was trying to do after his failed appeal to the Appeal Tribunal in 1994.

168. Recent case law reveals a consistent and multi-faceted trend toward the admissibility of extrinsic materials of all types. In proving external context with respect to legislative interpretation *judges may engage in private research.* The informal sources of *noticing legislative facts and 'social framework' facts are newspapers, radio, television and conversation with colleagues. No doubt the internet will increasingly be a source of both.* (4th Edition at pages 463 and 464).

169. I am completely aware that what is accepted as lawful by the government of another province or country has no bearing whatsoever on whether such activity is lawful in Ontario. However, let me say *obiter*, that from my own personal research, I have good reason to believe that similar cow share programs are functioning lawfully in large parts of the world, including many states in the United States of America and Australia, to name but two. In addition,

I understand that similar cow share programs have been established in parts of British Columbia, Nova Scotia and even in Ontario. In some countries, such as Great Britain, Germany, Finland, Sweden and New Zealand, farmers are permitted to sell their raw milk directly from the farm to consumers. The proponents of these arrangements stress that any food whatsoever can be contaminated so that food safety in general boils down to how it was produced, handled and packaged.

170. For all of these reasons I am not persuaded beyond a reasonable doubt that the defendant's raw milk enterprise, such as it is, constitutes a violation of any of the provisions of sections 18(1) or (2) of the HPPA, and there will be a finding of "not guilty" on all of those charges.

W. The Grey-Bruce Charges

171. These three charges were brought under section 100(1) of the HPPA.There is no need for me to repeat the charges which I have detailed in paragraph 6. In essence, on February 17th 1994 a Public Health Inspector made an order under section 13(1) of the HPPA prohibiting the defendant from distributing unpasteurized milk and milk products. The order was upheld on appeal with certain additional restrictions on the defendant's ability to sell, store or display his dairy products. He is alleged to have breached that order on three separate occasions in 2006 by storing and displaying unpasteurized milk and milk products.

172. Since the defendant did not launch a further appeal to such order, Crown Counsel Middlebro submits that the defendant is bound by the order, and that any attack on the validity of the order constitutes a collateral attack, which is prohibited in law. In support, the Crown provided the Court with several judgments including two decisions of the Supreme Court of Canada.

173. In **R. v. Consolidated Maybrun Mines Ltd., 1998 CanLII 820 (S.C.C.), [1998] 1 S.C.R. 706**, the issue was the validity of an Administrative Order made under the Environmental Protection Act R.S.O. 1980 c. 141 ss. 17, 146 (1a). The Supreme Court of Canada held as follows:

> *Persons charged with failing to comply with an order made under this legislation may not collaterally attack the validity of the order after failing to avail themselves of the appeal mechanisms provided by the Act.*

174. The principle underlying the rule against collateral attacks is that "the ultimate validity of an order does not give a person in contempt of the order a defence to the contempt. Such an order is never a nullity; however wrong or irregular, it still binds. It cannot be questioned collaterally, and has full force and effect until set aside or reversed on appeal". See Libman on Regulatory Offences in Canada, Earlscourt Legal Press Inc. at page 7-223, relying on **Human Rights Commission v. Taylor, 1990 CanLII 26 (S.C.C.), [1990] 3 S.C.R. 892.** See also: **R. v. Klippert Ltd., [1998] S.C.R. 737; R. v. 135837 Ontario Inc., [2007] O.J. No. 433 (O.P.C.); R. v. Hoy, [2008] O.J. No. 982 (O.C.J.); R. v. Ambrosi, [2008] B.C.J. No. 1286 (B.C.S.C.).**

175. It seems abundantly clear to me that all of these cases and numerous others which I have read during my own research, deal with the prohibition against collateral attacks which are attacks on the validity of the court or administrative orders *per se.* In contrast, I do not perceive Mr. Schmidt's defence to the Grey-Bruce charges as being an attack on the Order itself, but rather his defence appears to be that although the Order is valid, the way that he has structured his business in relation to dairy products amounts to full compliance with the Order in that he does not commit the acts alleged to be prohibited with respect to the public at large, which is his understanding of the Order and the purpose therefor under the HPPA.

176. In a judgment rendered some 10 months ago on March 12, 2009, the Ontario Court of Appeal considered the Collateral Attack Rule in the context of criminal proceedings in relation to a charge of breaching an Undertaking issued by a police officer. See **R. v. Oliveira, 2009 ONCA 219 (CanLII), 2009 ONCA 219.** In ruling that the defence to the charge did not amount to a collateral attack on the Undertaking, the Court of Appeal explained, at paragraphs 26 and 27, that –

> *The respondent does not challenge the validity of the undertaking or the propriety of any of its terms. He does not suggest that the order was improper when made or that he was not bound to comply with that order. The respondent argues that by virtue of subsequent events, the operative Criminal Code provisions, and jurisprudence from this court interpreting those provisions, the undertaking was not in force on the date of the alleged breach.... The respondent's defence does not collaterally attack the validity of any order, but takes issue with an essential component of the actus reus of the crime charged by the prosecution.*

177. Similarly, in the case at bar, the defendant acknowledges in the Statement of Agreed Facts that the order was properly made. However, the dispute arises only in relation to its current applicability to him. As in **Oliveira**, Mr. Schmidt's defence to the Grey-Bruce charges is that **"by virtue of subsequent events"** the Order no longer applied to him. I do not find that this defence amounts to a collateral attack on the validity of the order. My understanding is that during the 1994 proceedings, his defence of his *cow-lease* plan was rejected by the Appeal Board. In that case ownership of the cows remained vested in the defendant. In my view, the establishment of the **cow-share** program creates a sharing of ownership of the cows amongst the members, which is quite different from the leasing program.

Consequently, I find that the defendant did not breach the Order as alleged, and that the Prosecution has failed to prove the *actus reus* of the Grey-Bruce charges beyond a reasonable doubt, and there will be a finding of "not guilty".

X. The Law Is Always Speaking

178. In support of the interpretation which I have adopted with respect to the legislation in these proceedings, I could not do better than refer to the decision of the Chief Justice of the Supreme Court of Canada in **R. v. 974649 Ontario Inc., 2001 SCC 81 (CanLII), [2001] 3 S.C.R. 575.** Chief Justice McLachlin, expressing the evolutionary process of statutory interpretation, gave direction to the courts. At paragraph 38 the Chief Justice stated as follows:

*The intention of Parliament or the legislatures is not frozen for all time at the moment of a statute's enactment, such that a court interpreting the statute is forever confined to the meanings and circumstances that governed on that day. Such an approach risks frustrating the very purpose of the legislation by rendering it incapable of responding to the inevitability of changing circumstances. Instead, we recognize that the law speaks continually once adopted: **Tataryn v. Tataryn Estates, 1994 CanLII 51 (S.C.C.), [1994] 2 S.C.R. 807** at p. 814; see also Interpretation Act, R.S.O. 1990, c. 111, s.4. Preserving the original intention of Parliament or the legislatures frequently requires a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities. While the courts strive ultimately to give effect to legislative intention, the will of the legislature must be interpreted in light of prevailing, rather than historical circumstances.*

179. In the *dictum* which I just quoted, the Chief Justice made reference to the Supreme Court's earlier decision in the **Tataryn** case (*supra*) in which the court was dealing with the interpretation of the British Columbia Wills Variation Act, R.S.B.C. 1979, c. 435, section 2(1). At paragraph 15 the court held as follows:

> *Whatever the answers to the specific questions, this much seems clear. The language of the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking (Interpretation Act, R.S.B.C. 1979, c. 206, s. 7), means that the Act must be read in light of modern values and expectations. What was thought to be adequate, just and equitable in the 1920s may be quite different from what is considered adequate, just and equitable in the 1990s. This narrows the inquiry. Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice.*

180. The Prosecution argues that the entire cow share program is simply a scheme invented by the defendant to circumvent the legislation. However, the cow-share program as it has been developed and fine-tuned by the defendant, may also be seen as a legitimate attempt by the defendant to function within the confines of the legislation.

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

Y. Contempt Conviction

182. In his Reasons for Sentencing Mr. Schmidt for Contempt of Court on December 2, 2008, Boswell J. of the Ontario Superior Court, said at paragraph 9:

As I said in my Reasons for finding Mr. Schmidt in contempt, this is not a case about the merits of raw milk, nor for that matter, the bigger picture about the limits of acceptable governmental regulation over our lives. This is a case about the integrity of the administration of justice in our community and the importance of respect for court orders.

183. I am in complete agreement with the learned Judge. However, in the case before me, I have adopted a different interpretation of the legislation itself for all the reasons which I have given. In **(Prostitution Reference), 1990 CanLII 105 (S.C.C.), [1990] 1 S.C.R. 1123,** Lamer J. as he then was, explained that the meaning of any legislation must not be considered in isolation, but rather *in the context of possible judicial interpretation* and that *the fact that different courts have given different interpretations to the provision is not fatal.*

Z. Closing Remarks

184. Having found the defendant not guilty on all charges before this court, there is no need for me to rule on the defendant's constitutional challenge pursuant to section 7 of the Canadian Charter of Rights and Freedoms.

185. I wish to make it perfectly clear that my decision to acquit the defendant on all charges-

- in no way stands for the proposition that henceforth it is legal to market unpasteurized milk and milk products in the Province of Ontario;
- in no way purports to undermine or invalidate the milk marketing legislation in this Province, which has been held to be valid legislation by the Ontario Divisional Court in **Allan v. Ontario (Attorney General)** (*supra*);
- in no way supports either side of the debate on whether the consumption of unpasteurized milk or milk products is healthy or constitutes a health hazard;
- in no way condones the activity of any person who disobeys a valid order made by any court or government tribunal in this Province.

186. Indeed, the milk marketing legislation remains of full force and effect until such time as it is amended or revoked by the Legislature or held to be unconstitutional or otherwise invalid by a court of competent jurisdiction.

P.Kowarsky J.P.
Ontario Court of Justice
January 21st 2010