COURT FILE No.: Central East - Newmarket 4911-999-07-0384-00
DATE: 2011·09·19

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under clause 116(2) (a) of the *Provincial Offences Act,* R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN
Appellant

— AND —

MICHAEL SCHMIDT
Respondent

Before Justice P.D. Tetley
Heard on April 13, 2011
Judgment released on September 28, 2011

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

Karen Selick, Canadian Constitution Foundation ..... for the Respondent

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

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TETLEY J.:

1. Background

[1] The Respondent, Michael Schmidt, is a farmer and a committed, vocal and highly visible advocate, for the facilitation of greater public access to what he refers to as "farm fresh" or unpasteurized "raw" milk. This is a Crown appeal from the Respondent's acquittal on nineteen charges relating to the production and distribution of raw milk and milk products under the *Provincial Offences Act*, R.S.O. 1990, cP.33 (hereinafter P.O.A.). The subject matter of this appeal involves the distribution and consumption of "raw" or unpasteurized milk in the Province of Ontario. It also entails a review of the parameters of the law that tacitly authorizes the consumption of raw milk by members of certain "farm families", a substance the Appellant categorizes as constituting a potential public health hazard, while effectively restricting consumption by other interested, non-farm based, consumers. The constitutional implications of certain statutory provisions to the Respondent's "cow-share" programme also forms part of the reasons in this appeal.

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

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

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

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

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

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

Section 18(3) references as authorized exception provides:

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

[5] Presumably, if a resident enjoys ownership of the means of production, a cow, that individual, together with members of their immediate family, can consume raw milk with impunity. This issue was considered in an earlier proceeding involving a 1994 regulatory review of a Public Health Inspector's Order directing that the Respondent

cease and desist from selling unpasteurized milk and milk products. In that review, the Health Protection Appeal Board, a specialized tribunal with jurisdiction to review the decisions of *H.P.P.A.* inspectors, defined the parameters of the legal entitlement to consume unpasteurized milk as follows:

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

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

justice erred in concluding that the defendant's "cow-share" programme complied with the applicable provisions of the *H.P.P.A.*

2. The Respondent's Cow-Share Programme

[7] The Respondent, who was unrepresented at trial, is the sole proprietor of Glencolton Farms located at 393889 Lot 44, Concession 3 EGR, Municipality of West Grey, near Durham, Ontario. The farm is described by the Respondent as a "biodynamic organic operation". It encompasses 100 acres of land and features a detached barn containing dairy equipment, refrigerated storage rooms, milking and processing areas, plus a blue bus used to transport milk and other farm products to the cow-share members in the GTA. At the time the charges in issue arose in late 2006, 24 dairy cows formed the resident herd on the premises. The farm also includes a detached farm store where various farm products were located including milk, cream, cheese and other products produced on the farm, such as eggs and meat.

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

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

[10] As an enthusiastic and longstanding proponent of the health benefits to be derived from the consumption of raw milk, the Respondent has personally endured significant personal stress and financial hardship as a consequence of his dedication to this issue. The legal costs associated with the defence of the 1994 prosecution lead to the eventual sale of five hundred acres of, his then, six hundred acre Glencolton farm and the sale of most of the dairy herd. Despite this setback, the Respondent was undeterred. Near bankruptcy, he reorganized and, in due course, instituted a "cow-share" programme. This arrangement was intended as a private "contractual" agreement between the Respondent, in his capacity as the sole proprietor of Glencolton Farms, and interested raw milk consumers, where cows are fractionally owned by the ultimate consumers of the raw milk they produce. In consideration of receipt of a capital sum, interested non-farmed based, consumers secure access to raw milk and raw milk products. The Respondent acts as the herdsman or "agister" and receives compensation in consideration of the capital cost of the dairy cow ($1200) and additional compensation for the costs of production and labour. The arrangement was designed with the intention that the cow-share members

would have a defined legal interest in a particular cow in the Glencolton Farms' herd. Individual shareholders pay increments of three hundred dollars to the Respondent in exchange for a one quarter interest in one of the dairy cattle at his farm. The arrangement includes the transport of the raw milk and raw milk food product to the GTA where the majority of the cow-share certificate holders reside. The trial record indicates this cow-share programme has been in operation since 1996. It initially involved ten members. There were one hundred and fifty cow-share members at the time the charges now under review were laid. Despite the fact this arrangement was purportedly known to the local public health authority and operated in an open and public manner, it did not attract official scrutiny and subsequent intervention from government authorities until the fall of 2006.

3. The 2006 Charges

[11] As noted, the trial justice dismissed all nineteen of the charges against the Respondent. Seventeen of the charges were laid by the Ministry of Natural Resources (M.N.R.) and allege infringement of s. 18(1) and s. 18(2) of the *H.P.P.A.* Fourteen of those charges arose from five distinct transactions involving an undercover investigator Susan Atherton, and the purchase of raw milk, or raw milk products, between August 22, 2006 and November 21, 2006. Three of the impugned transactions involved unpasteurized milk products on the aforementioned blue bus. The two others took place at the Respondent's farm. Each transaction involved a purported sale to the undercover operative, which is also alleged to constitute the offence of unlawful distribution of unpasteurized milk or milk products. The first two transactions (August 22, 2006 and

October 17, 2006) include the purchase or gratuitous receipt of cheese when the undercover operative was not yet a cow-share member. The other transactions occur after Ms. Atherton became a cow-share member. Each includes either a cash purchase or the uncompensated receipt of unpasteurized milk or milk product. The three remaining charges under the *H.P.P.A.* include failing to obey the 1994 "cease and desist" Order issued by the Public Health Inspector, on three separate dates, by storing and displaying unpasteurized milk and milk products contrary to s. 100(1) of the *Act*. Section 100(1) of the *H.P.P.A.* provides that, "any person who fails to obey an Order made under this *Act* is guilty of an offence."

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

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

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

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

4. Summary of the Trial Record

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

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

(A) Agreed Facts and the Respondent's Statement

[16] The trial featured an acknowledgment by the Appellant of a number of significant facts by way of an Agreed Statement of Fact, including the following: Michael Schmidt is the operator of Glencolton Farms. There was no pasteurization or sterilization of any dairy products produced, on display, stored or distributed by Glencolton Farms (Agreed Facts, para. 4, p. 47, January 26, 2009 Trial Transcript). Michael Schmidt is a dairy farmer who carries on a sole proprietorship under the name of Glencolton Farms, which was registered under the *Business Names Act*, R.S.O.: 1990, c B17 (p. 42, January 26, 2009 Trial Transcript). The Appellant set up a cow-share programme in which people pay for a six-year membership with $300 being charged for a quarter interest in a cow, $600 for half a cow and $1,200 for a full cow (pp. 49-50,

January 27, 2009 Trial Transcript).

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

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

The Respondent's Statement

[19] During the execution of a search warrant at Glencolton Farms on November 21, 2006 the Respondent provided a statement to an investigator with the M.N.R. The statement was ruled to be voluntary and was read into the trial record by M.N.R. Conservation Officer Dan Herries (pp. 74-78, January 28, 2009 Trial Transcript). In the statement the respondent acknowledged the following:

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

stopped by the police and M.N.R. officials.

- Cow-share members in Toronto pay $2.50/litre of milk, and members in the Durham area pay $2. The fee is not for the milk itself. The charge is for the Respondent's services and costs associated with milking, housing and feeding the cows and transportation costs.

(B) The Prosecution's Case at Trial

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

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

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

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

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

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

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

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

[28] The charges were largely based on Ms. Atherton's undercover investigation and

included the following:

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

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

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

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

(C) The Case for the Defence

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

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

- Previous involvement in facilitating the provision of raw milk to interested consumers in a "cow-lease" programme;
- The absence of any reported raw milk related illness as a consequence of the consumption of raw milk from Glencolton Farms;
- Subsequent prosecution, as a consequence of the programmes alleged non-compliance with the *H.P.P.A*. and *Milk Act*, a prosecution that concluded with the Respondent's guilty plea and the imposition of a $3500 fine;
- Acknowledged receipt of a 1994 "cease and desist" Order originally issued by a local health inspector and subsequently confirmed by the Health Protection Appeal Board;
- An assertion that the Order was of no continuing force and effect, as of 2006, as the Order referenced the previous geographical location of the Respondent's farm operation and not the address where the farm is presently situated;
- Representations regarding the cow-share programme and it's uneventful operation for a period of ten years (1996-2006) without regulatory intervention of any kind;
- The purported knowledge of local health officials, with regard to the programmes ongoing operation, as a result of the Respondent's high public visibility as a raw milk advocate;
- The Respondent's assertion that the Glencolton Farms dairy operation did not include a "plant", as that term is defined in the *Milk Act,* based, in part, on the fact the milk house was directly attached to the barn;
- An acknowledgment that the Respondent provided undercover operative Atherton with a small quantity of cheese, prior to her

enrolment in the cow-share programme, based on her false representation in relation to the deteriorating state of her health;

- An assertion that the farm store cooler door was solid stainless steel effectively preventing the display of raw milk and milk products as alleged;
- An outline of the steps taken to ensure the health of the Glencolton Farms dairy herd and the milk produced;
- An acknowledgement that the Respondent is not a cow-share programme member;
- An acknowledgement that raw milk and raw milk products were stored and displayed at Glencolton Farms on October 20, 2006 and at the farm and on the blue bus on November 21, 2006;
- The Respondent acknowledged that the member's handbook accurately outlined the details of the cow-share programme. No additional documentation, other than the handbook and membership card, reflected the "personal agreement" between Glencolton Farms and the cow-share membership;
- The Respondent acknowledged some uncertainty in the cow-share arrangement in regard to whether membership entitled the share-holder to a particular cow or access to a portion of the milk production; the Respondent stated "it could be both" with "the essential fact" being "that they (the cow-share members) actually have a cow".
- When confronted by the fact the name of a specific cow is not noted on the membership cards of any of the participants in the cow-share programme the Respondent advised of a "new" process where cow-share members are invited to the Respondent's barn in order to choose a cow;
- The Respondent testified that his responsibilities included the care and maintenance of the dairy herd and ensuring that they were properly fed and cleaned;
- The Respondent described himself as the "milkman" and agreed he performed different functions to facilitate the delivery of the raw milk to the cow-share members, including the bottling of the milk, the loading of the blue bus and the delivery of the milk and other farm products;
- The cow-share programme was indicated, by the Respondent, to be exempt from the prohibition against the sale of milk and milk products (s. 18(1) and 18(2) of the *H.P.P.A*) by creating a "private contract between two people to lawfully obtain a product not normally available to the public. The Respondent testified, "There are no regulations in place when you privately own your cow, which nobody can interfere with in the drinking of milk, as it comes from your cow".

5. The Grounds of Appeal

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

(A) Misapprehension and Misapplication of Evidence

[34] At the outset of his decision, the presiding justice indicated that he would not elaborate on the *viva voce* evidence offered by the Crown witnesses in light of the acknowledgments referred to in the Agreed Statement of Fact and the content of the defendant's statement to the investigators (para. 52). This concern is the basis for the detailed review of the entirety of the trial record in Appendix "A" of this judgment. The Appellant argues that the justice failed to give meaningful consideration to the evidence of the Crown witnesses', particularly the testimony of Ms. Atherton, where it conflicted

with the Respondent's testimony.

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

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

consideration of the acknowledged statutory violations and the convictions that would necessarily have followed as a consequence.

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

[38] The Crown also objects to the adoption of the credibility assessment of the Respondent arising from the 1994 Health Protection Appeal Board hearing. The Appellant submits that the justice of the peace erred in applying the positive findings the Appeal Board made about the Respondent's credibility some 15 years earlier to buttress the credibility of the Respondent's trial testimony (paras. 76-77, January 21, 2010 Trial

Transcript). The Appellant submits that the justice attached undue weight to the reliability of the Respondent's assertions as to whether milk and milk products were being sold based, in part, on a credibility assessment made by unknown others, in an unrelated proceeding, held some 12 years earlier. The Appellant further contends that it is well-established that such determinations must be made on a case-by-case basis based on consideration of the actual record before the court: see e.g. *R. v. Ghorvei*, [1999] O.J. No. 3241 (C.A.).

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

testimony in relation to these transactions.

(B) Misapplication of the Burden of Proof

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

[41] At trial, the Respondent offered no statutory or common law authority tending to show that he was not subject to the statutory requirements of the *H.P.P.A.* and *Milk Act*. No governing legislation or jurisprudence is viewed by the Appellant as an authorization, exception or exemption "prescribed by law" so as to exempt the Respondent from storing, distributing, delivering, or arguably, selling unpasteurized milk and milk products (para. 64, January 21, 2010 Trial Transcript). Moreover, no exemption is contended to exist in law to allow persons to contract out of the terms or provisions of either *Act* (See: *Kennedy v. Leeds, Grenville and Lanark District Health* [2009] O.J. No. 3957 (C.A.)*; Universal Game Farm Inc. et al v. Her Majesty the Queen in Right of Ontario* 86 O.R. (3d) 752 (S.C.J.). Given the regulatory purpose of the *H.P.P.A.* and

Milk Act this prohibition is submitted as being consistent with the expressed purpose or intent of the *Act* from a policy perspective. By analogy, the Appellant notes there are any number of reported circumstances where a private agreement or privately conveyed consent has not acted as an impediment to prosecution: e.g. see *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Labaye*, [2005] 3 S.C.R. 728.

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

[43] The trial justice's consideration of the consequences of the conviction under the *H.P.P.A.* and *Milk Act* arising from the fact that the Respondent was concluded to have operated a "legitimate" enterprise is seen, by the Appellant, as reflecting a misunderstanding of the constituent elements of the offences in dispute. In any prosecution, the issue is whether the Crown has met the burden of proof of the charge

beyond a reasonable doubt. The fact that members of the cow-share programme voluntarily assumed any health risks associated with the consumption of unpasteurized milk does not and cannot operate as a defence or exempt Mr. Schmidt's distribution arrangement from the restrictions inherent in the *H.P.P.A.* and *Milk Act*.

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

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

[46] Public Health Inspectors, Andrew Barton and Christopher Munn, testified that raw milk and raw milk products are deemed a health hazard pursuant to government

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

(C) Issues of Procedural Fairness and Natural Justice

[47] The Appellant contends the court committed reversible error in this respect. Specifically, the trial justice cited "Sullivan and Driedger on the Construction of Statutes" Butterworths Canada Ltd., 2002 (4th Edition) and "Sullivan on the Construction of Statutes", Lexis Nexis Canada Inc., 2008 (5th Edition) as authority to justify the fact he conducted his own research in concluding "similar cow-share programmes are functioning lawfully in large parts of the world, including many states in the United States of America and Australia [...] British Columbia, Nova Scotia and even in Ontario [...] some countries, such as Great Britain, Germany, Finland, Sweden and New Zealand [permit farmers] to sell their raw milk directly from the farm to the consumers" (paras. 168-169, January 21, 2010 Trial Transcript). From this, the justice surmised, without identifying the source of the information he was relying on, that the proponents of these arrangements "stress that any food whatsoever can be contaminated so that food safety in general boils down to how it was produced, handled and packaged." The Appellant

submits that this inappropriate independent research likely contributed to the formulation of the justice's conclusion that the Respondent's raw milk enterprise did not violate either s. 18(1) or 18 (2) of the *H.P.P.A.*

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

[49] At paragraph 71 of the *Hamilton* decision, the Court of Appeal held that the manner that the proceedings were conducted and the approach of the trial judge created

three overarching problems that may be viewed as having application in the instant case:

(1) by assuming the multi-faceted role of advocate, witness and judge, the trial judge put the appearance of impartiality at risk, if not actually comprising that appearance;

(2) it produced a fundamental disconnect between the case presented by counsel and the case constructed by the trial judge; and

(3) it created a real risk of inaccurate fact-finding by introducing raw statistical information and forms of opinion on a wide variety of topics. None of this material was analyzed or tested in any way.

(D) The Primary Issue

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

6. The Cow-Share Programme

[51] A review of the trial record, the Statement of Agreed Facts and the trial exhibits confirms the Respondent's intention to create a share arrangement where interested whole milk consumers could gain a legal interest in a portion of the milk products generated by the Glencolton Farm dairy cattle. Although some uncertainty exists in the trial record as to whether the price paid by the consumer was for a specific cow within the herd or access to a portion of the milk production of a particular cow, the fact there were 150 cow-share members and only 24 cows suggests the agreement permitted access

to the milk itself. This conclusion is confirmed at page nine of the publication "The Glencolton Farm Cow-Share Members' Handbook" which every cow-share member received along with a milk share certificate. The price to purchase a single share was three hundred dollars or approximately one quarter of the price of a dairy cow. No formal contract of purchase and sale was executed by either vendor or purchaser. No corporate structure was created allowing the interested consumer to receive an actual share certificate as an equity owner in the corporation that included the herd as one of its assets. It appears that legal title to the cows remained with the Respondent as the owner of Glencolton Farm. Although the trial record serves to confirm that the Respondent viewed the dairy herd as being owned by the various cow-share certificate holders, in reality, the cow-share arrangement approximates membership in a "big box" store that requires a fee to be paid in order to gain access to the products located therein. There is no evidence the cow-share holders were involved in the purchase of the cows in the herd, their subsequent sale or replacement, or that they had any say in the management of the herd or the distribution of the resultant milk product. The membership handbook indicates that the cow-share members fund the services of the Respondent and his wife to tend the cows and look after the milk production. The members are directed to pick up the milk at the farm or from the blue bus with one cow-share indicated as entitling the share holder to a yearly total of approximately 750 litres of unpasteurized milk, cheese, cream or other dairy products.

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

[52] On behalf of the Ministry of Natural Resources, Mr. Ryan submits the

following factors constitute legal deficiencies in what the Appellant views as an illegal distribution scheme within the context of the applicable provisions of the *H.P.P.A.*:

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

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

offence would continue to remain viable.

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

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

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

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

> Those findings support the existence of a valid private agreement between the defendant and cow-share members in terms of which he is responsible

> for the upkeep of the cows and the provision of milk for membership. The responsibility of the members is to pay a fee for the upkeep of the cows, the production of the dairy products and their delivery.

[57] At paragraph 158 the following considerations are referenced:

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

[58] After conducting his own independent research the justice noted similar cow-share programmes function lawfully in various jurisdictions throughout North America. Reference was made to the fact raw milk can be sold directly to consumers, by the farmer who produces it, in a number of countries such as Germany, Finland, Sweden and New Zealand. Based, at least in part, on consideration of these factors the Justice of the Peace concluded the Respondent's "raw milk enterprise" was not in violation of either s. 18(1) or 18(2) of the *H.P.P.A.*

[59] On concluding the cow-share programme constitutes a "sharing of ownership of the cows amongst the members" no violation of the Public Health Inspector's 1994 "cease and desist" Order was found to have occurred, on the three dates alleged, as a consequence of the Respondent's role in storing or displaying unpasteurized milk and milk products. While the restraining Order was acknowledged to be valid, the distribution arrangement through the cow-share membership was concluded <u>not</u> to

constitute a violation of the prohibited activities referenced in the Order itself "with respect to the public at large." (para. 175, January 21, 2010 Trial Transcript).

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

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

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

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

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

and the *Milk Act* was considered "general" and requiring restrictive interpretation. No common law authority on point was referenced.

[63] Also critical to the trial justice's analysis and his ultimate determination that the offence provisions do not apply to the Respondent's operation was his conclusion that the complexity of the proceeding made it a "hard case" where legislative intent was unclear and ambiguous. Consequently, he found that "departure from according the ordinary meaning" of the statutes provisions was warranted (paras. 98 and 100, January 21, 2010 Trial Transcript). The rationale for concluding why the purpose of the *H.P.P.A.* and *Milk Act* was unclear or uncertain was not addressed in the judgement.

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

[65] Furthermore, the Appellant asserts the justice erred in considering the Respondent's history with the justice system and the fact he would face "astronomical

fines" if convicted on all counts as relevant factors in concluding that the offence provisions did not apply to the Respondent's "private" distribution scheme. No factual analysis or cited legal authority is relied upon in support of the proposition that, in the face of legislative provisions to the contrary, it was not the Legislature's intent to penalize where culpability is established to exist.

Conclusion

[66] The foregoing analysis confirms reversible errors exist in law in the rationale relied on by the justice of the peace in acquitting the Respondent of the ss. 18(1) and s. 18(2) *H.P.P.A.* charges and the sole remaining charge (operating a milk plant without a licence) under s. 15(1) of the *Milk Act*. The applicable legislation was not given the broad interpretation it required as public welfare legislation. Appropriate consideration was also not afforded to the restrictions inherent in the *Act* according to their plain meaning. The interpretation of the reviewed legislative provisions consistent with the language of the sections in issue, the context in which the language is used and the expressed purpose of the legislation itself was required: See *Blue Star Trailer Rentals Inc*., and *407 E.T.R. Concession Co*. (2008), 91 O.R. (3rd) (C.A.) at para. 23. An interpretation consistent with the legislative aim of both the *Milk Act* and *H.P.P.A*. should have been adopted and not, as here, interpretations "that defeat or undermine legislative purpose": See *Her Majesty the Queen in Right of Ontario (Ministry of Labour) v. United Independent Operators*, 20411 104 O.R. (3d), (C.A.) per Gillese J.A. at paragraphs 31 and 32. Had the applicable legislation been more broadly interpreted in the instant case, as required by law, the Respondent would necessarily have been found guilty of each of

the offences alleged with the possible exception of two s.18 (2) sale allegations (August 22, 2006 and October 17, 2006) on the basis of the evidence presented at trial. Only those two acquittals and the acquittals relating to the *H.P.P.A*. s. 100 (1) offences regarding breaches of the 1994 public health inspector's cease and desist" Order are concluded as sustainable.

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

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

mistaken belief in relation to the three s. 100(1) charges with that belief being supported by the prosecutorial inertia in even alerting the Respondent to the regulatory authorities concerns. The acquittals on these three charges are therefore affirmed.

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

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

share programme involving the distribution of raw milk and raw milk products over an extended period of time, and in the face of the inherent ambiguity in the Order itself, persuades me that the acquittal on the three s. 100(1) charges ought to be affirmed, albeit for different reasons than those enunciated by the trial Justice. It cannot be concluded in these circumstances that the Order was sufficiently clear and unequivocal, or the breach deliberate or intentional, in view of the apparent tacit acceptance of its existence by all interested government agencies over such a long period of time (See *Laroche* (1964), 43 C.R. 228 (S.C.C.); (1963), 40 C.R. 144 (Ont. C.A.) and *R. v. Roche* (1985), 46 C.R. (3d) 160, (Ont. C.A.) (1984), 40 C.R. (3d) 138 Co. Ct.*); Prescott - Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686 (C.A.)

8. Entrapment

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

[71] Entrapment occurs when the authorities provide a person with an opportunity to

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

9. The Charter Issues

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

health and religious practice involving the consumption of raw milk and raw milk products.

[73] By application, the Respondent challenges the prohibition on the sale and distribution of raw milk as referenced in both the *H.P.P.A.* and the *Milk Act*. *Charter* issues were advanced under ss. 7 of the *Canadian Charter of Rights and Freedoms*, which embodies the right not to be deprived of life, liberty or security of person except in accordance with the principles of fundamental justice, ss. 2(a), which enshrines the lawful entitlement to freedom of religion and s. 15, the right to equality.

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

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

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

at the University of Guelph, Dr. Beals, a pathologist and Dr. Ronald Hull, a dairy microbiologist.

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

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

[78] The defence experts, Dr. Beals and Dr. Hull, noted the history of the commercialization of the milk distribution system in the early part of the 1900's as people moved from the country to the city and the subsequent development of large-scale

dairy farms. The advent of pasteurization as an aspect of the commercialization of milk and milk products was also discussed by Dr. Beals. He asserted the process reduces the enzyme count in milk and effectively eliminates the presence of beneficial bacteria in the milk. Dr. Beals also drew a distinction between the relative health safety, of what the Respondent refers to as "farm fresh milk", or raw milk produced for the purpose of human consumption, as opposed to raw milk produced for commercial purposes and destined to be pasteurized. Dr. Beals testified that there is scientific support for the contention that good animal husbandry practices, farm cleanliness, appropriate pasturing and diet, and safe milk handling procedures can reduce the health related risks associated with the consumption of unpasteurized milk to a safe level.

(B) Section 7 – Security of Person

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

[80] In order to advance the s. 7 *Charter* challenge the law requires that the applicant establish that the state has deprived him or her of life, liberty or security of person (*R. v. Beare*, [1988] 2 S.C.R. 387 at para. 28; *Blencoe v. British Columbia (Human Rights*

Commission), [2000] 2 S.C.R. 307 at para. 47 and *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486 at para. 30.

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

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

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

concluded that the penalty provisions of the *Provincial Offences Act*, applicable here, act to potentially deprive the Respondent of life, liberty or security of person.

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

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

[85] It is acknowledged that in general terms an individual has the right to make

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

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

[87] This particular legislation may also fairly be viewed as internally inconsistent from the perspective of its response to the serious public health concerns expressed by the expert witnesses who testified on behalf of the Crown during the course of the

constitutional argument. The conclusions they reached largely reflect those found in the 1994 report of the Ministry of Health's – Health Services Review Board. In that report a Board qualified expert, Dr. Styliardis, concluded, in an opinion that the Board accepted, "that unpasteurized milk and milk products constitute a health hazard as defined by the *H.P.P.A.* because they are vehicles for the transmission of a number of different harmful bacteria including bovine tuberculosis, brucellosis, staphylococcus, bacilli, shigella, chloroforms, and E-coli."

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

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

[90] On consideration of the totality of the evidence presented at the Respondent's trial it is difficult to contend that a "reasonable apprehension of harm" to public health,

arising from the serious potential health consequences of consuming raw milk, has not been established. While issue may be taken, depending on one's perspective, to the underwhelming or, alternatively, over-reaching, response by the legislature to this issue, it is clear that the courts must accord deference to those who have been elected to enact such rules and regulations.

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

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

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

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

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

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

apprehension of harm to permit the legislation to act" (para. 29).

i) Law Not Grossly Disproportionate

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

[97] By analogy, Justice Sharpe's comments in *Cochrane v. Ontario (Attorney General)* resonate in this appeal. It is the "reasonable apprehension of harm" and not evidence of actual harm that must be considered in assessing the legislative response to the public health or safety issue the law was enacted to protect. As Ms. Selick rightly points out, there was no evidence presented at trial to suggest that the milk produced at Glencolton Farm was unhealthy to consume. There is no evidence, other than anecdotal speculation, that anyone ever became ill after drinking unpasteurized milk produced by the cows on the Respondent's farm. As the *H.P.P.A.* implicitly authorizes a "farm family" exemption to permit a relatively unfettered entitlement to the dairy producers of Ontario to drink the raw milk they produce, one might reasonably expect to see regular outbreaks of raw milk related illness if the product was as dangerous to one's health as the Appellant asserts. Further, assuming that the dairy farmers of Ontario and their families consume raw milk, and presumably many do, one might also expect to see

regular outbreaks of raw milk related illness in rural populations in which the dairy farms are located as a consequence of the fact the consumers of such milk may be asymptomatic carriers of milk based bacteria or pathogens that may cause infection in others. Consideration of these factors does not detract from the fact there is a scientific justification for the legislative response in issue.

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

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

that fact in itself does not necessarily render the law non-*Charter* compliant, particularly in relation to the Respondent who, as a dairy farmer, is not a member of the restricted group.

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

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

(C) Equality Rights s. 15

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

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

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

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

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

> "Two brief comments on this new analogous ground are warranted. First, reserve status should not be confused with residence. The ordinary "residence" decisions faced by the average Canadians should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible. The reality of their situation is unique and complex. Thus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground. Second, we note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its

> inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally interrelated form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.

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

Conclusion

[107] For the forgoing reasons I conclude as follows:

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

[108] The *Charter* Application is therefore dismissed.

(E) Disposition or Appeal

[109] The *Provincial Offences Act*, s. 121, defines the powers of the reviewing court on appeal against acquittal. It provides that the court may allow the appeal, set aside the finding, and order a new trial or enter a finding of guilt with respect to the offence(s)

which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted in law.

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

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

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

22 and October 17, 2006, s. 18(2), cheese sale allegations.

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

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

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

[115] I do not however accept the Respondent's submission that the gifts of the unpasteurized cheese do not constitute acts of prohibited "distribution". Given the public

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

The Deficient Information

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

[117] Generally an omission of the date of offence is viewed as an essential

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

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

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

Quantity of Product Conveyed

[120] The Respondent's counsel asserts the quantities of cheese conveyed in relation to the transactions noted above were so small as to amount to a trifling amount not warranting a finding of culpability. In legal terms, the Respondent contends these charges do not warrant a finding of guilt as the law does not concern itself with very

small or trifling matter, invoking the legal maxim "*De minimis non curat lex*".

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

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

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

Other Matters

[124] Counsel are requested to contact the Trial Co-ordinator, Ms. Maryann Knetsch, at the Ontario Court of Justice, Newmarket, telephone (905) 853-4817,or Email: Maryann.Knetsch@ontario.ca to schedule a date for the sentencing hearing. Once a convenient date has been secured counsel are requested to serve and file a brief outline of their respective sentencing positions and the authorities upon which they intend to rely

two weeks in advance of the scheduled hearing date.

Appendix "A"

The Trial Testimony of MNR Investigator Susan Atherton

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

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

[127] August 22, 2006, Ms. Atherton observed the blue bus at Waldorf School. She observed 12-14 "customers" when she arrived. She got on the bus. There were display shelves on the sides of the interior of the bus with pastries, honey, eggs, produce and cheese. She saw milk in jars at the back of the bus stored in crates. She observed transactions involving the exchange of the milk to people who were lined up in the bus. She observed individuals selecting items from display racks and paying the Respondent. He appeared to know most of the customers by name. Ms. Atherton bought soft cheese wrapped in cellophane for $3.10. He indicated to someone else that the cheese was "made Friday". The Respondent provided Ms. Atherton with a copy of the "Cow-Share Members Handbook" after she paid for the cheese. She discussed the six-year

membership for $300 with the Respondent. Later at trial, Ms. Atherton confirmed that she had in fact acquired the unpasteurized cheese in question as it had been seized and subsequently frozen in the lab. It was tested and found to be "unsafe for consumption as per Health Canada guidelines" (pp. 36-40, 75-76 and 81-83, January 27, 2009 Trial Transcript).

[128] On October 17, 2006, Ms. Atherton again observed customers lined up at the bus. Some customers were waiting to go into the bus and others were coming out with product. Ms. Atherton again bought cheese wrapped in cellophane for $3.20 directly from the Respondent. She also observed other people purchasing dairy products, including milk and cheese, from the Respondent. Ms. Atherton advised him that she wanted to become a cow-share member. He advised that if she went to the farm on Friday, she could register to become a member there and secure her milk at the farm itself. He advised her to attend between 3:00 p. m. and 6:30 p. m. to buy milk. Ms. Atherton did not see anyone produce a membership card and did not observe anyone being asked to establish proof of their membership before they made their purchases. The Respondent was observed to inform the customers as to the total cost of their purchases (pp. 40-42, January 27, 2009 Trial Transcript).

[129] On October 20, 2006, Ms. Atherton was again working undercover with M.N.R. conservation officer Victor Miller, alias "Victor Douglas". Together they attended Glencolton Farms for the entire day. The lone employee in the farm store, Beverley Viljakainen, was taking money for customer purchases. The farm store appeared to be open to the general public. People were observed in the store. They were noted to make

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

[130] On October 27, 2006, continuing surveillance revealed the farm store to be very busy. The milk and cheese products were observed to be stored in the same location as on October 20. Ms. Atherton and Mr. Miller did not go directly into the farm store, as they assisted another member with loading milk from the milk house into a cow-share member's vehicle. They purchased three jars of milk and a package of soft cheese, hamburger and cider from Ms. Viljakainen. Ms. Atherton observed others making

purchases (pp. 55-57, January 27, 2009 Trial Transcript). After finishing in the store, they went into the barn and proceeded to the milking parlour and a storage area. The investigators were shown a cheese making area. They observed equipment, including milking stations and stanchions (a restraining device to prevent a cow's head from moving forward), where cattle were housed in that area. There was a milk storage area. Wooden boxes with jars full of milk were observed. She noted cheese curd in a separate area next to the milk station (pp. 57 and 63-66, January 27, 2009 Trial Transcript).

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

[132] On November 21, 2006, MNR investigators, accompanied by Public Health Inspectors, executed a search warrant on the farm. Collectively, these officials seized dairy production equipment, machinery and documentation, including correspondence with "all milk share holders" (Agreed Facts – Appendix C), a contract list of shares for "customers" (Agreed Facts – Appendix D) and the bus sales and farm sales for milk and milk products dated May 23, 2006 through to November 7, 2006 (Agreed Statement of Facts – Appendices E and F; pp. 49-51, January 26, 2009 Trial Transcript). They found large quantities of milk, cheese, cream and other dairy and non-dairy products displayed and stored in the farm store and blue bus. Laboratory testing revealed the milk products were neither pasteurized, nor sterilized (p. 51, January 26, 2009 Trial Transcript).

Ministry of Natural Resources Investigator Victor Miller

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

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

[135] While being cross-examined, Investigator Miller confirmed that the Respondent had advised him that "the membership card would be a mandatory requirement" in order

to be a part owner of a cow. He agreed that the notes of his interaction with the Respondent served to confirm public access to the milk produced at Glencolton Farms was restricted to cow-share members and not to the public generally (pp 102-103, January 27, 2009 Trial Transcript).

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

(B) <u>Lead MNR Investigator Brett Campbell</u>

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

[138] At the time of the execution of the search warrant Investigator Campbell

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

(C) Grey-Bruce Health Inspector Andrew Barton

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

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

[141] During the execution of the warrant the blue bus was searched. The seats had been removed in the bus and replaced by shelving. There were food products on the shelves, including bread, cinnamon buns, oats and vegetables. Underneath, in some

coolers and a chest freezer, meat products and some dairy products, including milk, quark and cheese were observed. The milk products were stacked and stored in plywood boxes. Mr. Barton estimated there were in excess of 32 boxes. There were one or two coolers underneath. Mr. Barton recalled there were six two-litre jars of milk in a box. The store fridges had meat and a small amount of dairy products. The jars of dairy products had screw tops. The milk was sent to a laboratory for testing. It was determined to be raw or unpasteurized (pp. 9-13, January 28, 2009 Trial Transcript).

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

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

(D) <u>Grey-Bruce Health Inspector Christopher Munn</u>

[144] Inspector Munn was contacted by Brett Campbell of the Ministry of Natural

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

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

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

Defence Witnesses Trial Testimony

(A) Cow-Share Member Eric Bryant

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

Trial Testimony of the Respondent

[148] The Respondent began his testimony by reading a18-page document as his verbatim evidence in chief (pp. 89-103, January 28, 2009 Trial Transcript).

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

previous farm operation at a different location. Based on the subsequent transfer of title of lots 38, 39 and 40, Concession 2, Durham, in Grey County Ontario, he believed that the 1994 Order was no longer of any force and effect (p. 95, January 28, 2009 Trial Transcript).

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

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

[152] Since 1996, he has provided a delivery service by bringing, cow-share owner's milk to the GTA. Members must have a card. Only cow-share members are eligible to receive milk or milk products. The Respondent is known to give potential members some raw milk product to try out before they commit to the programme (p. 99 January 28, 2009 Trial Transcript). His primary concern was to ensure a reliable supply of raw

milk for those who need the milk for health reasons. Accordingly, the Respondent admitted that he instructed Beverley Viljakainen to validate Ms. Atherton as a cow-share member based on her representations of a health-based need for raw milk. In retrospect, these representations were viewed by the Respondent as being a false pretence as they were untrue (p. 100, January 28, 2009 Trial Transcript). The Respondent noted that not all his members consume raw milk for health reasons. Many just express a preference for unpasteurized milk. Ms. Atherton was given a small quantity of cheese before she became a member in order to try it out. In the Respondent's own words, he "never asked for money for that reason that she was not a member yet [...] but as to her testimony, the price was written on the package. Therefore I can only assume that she believes she may have paid for it. By my clear recollection, "there was no sales transaction" (p. 100, January 28, 2009 Trial Transcript).

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

[154] The Respondent stated that he does not sell raw milk to the public. Instead, he provides a boarding service for cow-share owners. Cow-share owners have access to the health records of their cows. He provides access to milk test results and keeps frozen milk samples from every production, for a period of four weeks, for backup testing. He

has never had anyone report that they have been made ill due to the milk he provided. An annual inspection of the entire operation is conducted by an independent dairy inspector, in addition to frequent tests of the cow manure, for pathogens, conducted by a licensed veterinarian. No pathogens harmful to human health have ever been found in Glencolton Farm's raw milk. Monthly tests are conducted by the Dairy Herd Improvement Organization to check for somatic cell counts and milk quality verification. These tests have yielded "great results". The herd is tested regularly under supervision of licensed veterinarian. The Respondent advised that he keeps an updated cow-share membership list (pp. 101-102, January 28, 2009 Trial Transcript).

The Cross-examination of Mr. Michael Schmidt

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

[156] He acknowledged receiving Ms. McLeod's "cease and desist" Order of February 1994, which was addressed to "Michael Schmidt operating as Glencolton Farms". The location of the farm specified in the 1994 Order (Lots 38, 39 and 40) was indicated as being a half an hour walk from Glencolton Farms' current location, lot 44. All of the lots are in Glenelg Township in Grey County (pp. 130-131, January 28, 2009 Trial Transcript). Following the issuance of the 1994 Order the Respondent launched an appeal of that Order. The Health Services Appeal and Review Board provided its decision in writing. The Review Board decision confirmed that raw milk was a health hazard. The Respondent believes they got it "totally wrong" but acknowledged the Order was never appealed or made subject to judicial review (pp. 132-133, January 28, 2009

Trial Transcript). The Respondent accepted that the Order was a determination of certain rights between himself and the Grey-Bruce Health Unit (p. 135, January 28, 2009 Trial Transcript). He also agreed that the Order directed him to stop the "manufacturing, processing, preparation, storage, handling, or display of unpasteurized milk and milk products" (p. 137, January 28, 2009 Trial Transcript). He stated that he believed the Order did not currently apply to him because he was no longer producing raw milk at the same location as referred to in the Order (pp. 139-140, January 28, 2009 Trial Transcript). He viewed the Order as being connected to the previous farm property (p. 141, January 28, 2009 Trial Transcript).

[157] The Respondent agreed that there was raw milk and raw milk products stored on Glencolton Farms on October 20, 2006. He could not recall if raw milk and milk products were stored and displayed on October 27, 2006 as he was on the bus on that date. On November 21, 2006, raw milk and milk products were also acknowledged as being located on the blue bus (p. 138, January 28, 2009 Trial Transcript).

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

Transcript).

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

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

[161] The cow-share members hire the Respondent to milk and feed the cows (p. 117, January 28, 2009 Trial Transcript). The Respondent acts as a mentor because of his knowledge. "I'm the milkman, but I just mean from a technical point of view, I'm asked to load the bus. Sometimes I'm asked to bottle the milk. Whatever is required? " The

Respondent is the one responsible for the production of milk. He handles the milk, stores the milk at the farm and transports it on the bus (for delivery to the cow-share membership) (p.136, January 28, 2009 Trial Transcript).

[162] Shareholder responsibilities do not include the care or maintenance of the cows (p. 118, January 28, 2009 Trial Transcript). The Respondent testified that members instruct him how to take care of their cow, in order to ensure it is healthy, properly fed and clean (p.118, January 28, 2009 Trial Transcript). While this information is not in the handbook, the Respondent states it was discussed with Ms. Atherton. The Respondent also stated that he would have discussed these matters with her on the blue bus based on his general practice and the sort of questions people usually ask about the conditions for becoming a cow-share member (p. 119, January 28, 2009 Trial Transcript). He was unaware if Ms. Atherton had the name of her cow on her card or if she was led by one of the members to the barn to see her cow. A review of the cow-share documents that were filed as exhibits at trial reveal that a specific cow was not named on her card or any of the other membership cards. The Respondent advised that a new process is developing where, once they are official members, the cow-share members come to the barn and choose their cow (p. 120, January 28, 2009 Trial Transcript).

[163] The Respondent testified that the private contract between the parties has nothing to do with public health. It involves a conscious decision of individuals to get a product that they think is good for them. It is viewed as empowering people who want to make a decision to drink raw milk. By entering into a private agreement, they have their own milk (p. 125, January 28, 2009 Trial Transcript). “What we do in our house, public

health has no right to go in…" (p. 125, January 28, 2009 Trial Transcript). The cow-share arrangement is purported to allow the milk products to be brought to the cow-share members without falling under the jurisdiction of the local health authority.

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

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

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

[166] He stated that the reason he did not give Ms. Atherton milk instead of the cheese is because the quantity of milk on hand at the blue bus was limited and just enough to meet the needs of the cow-share members who were there. Accordingly, Ms. Atherton was asked to attend at the farm if she wished to obtain some milk (p. 128,

January 28, 2009 Trial Transcript). He believed there was sufficient cheese on hand to permit her to sample that product.

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

Acknowledgement

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