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Thursday, February 11, 2010 - Issue 194

Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

* The British Columbia Supreme Court has ruled that sections of the British Columbia Farm Practices Protection (Right to Farm) Act which protect fish farms from liability in nuisance and injunction applications ARE invalid insofar as they relate to aquaculture. British Columbia Courts had previously held that the province's legislation with respect to the regulation and licensing of fish farms was ultra vires. The Court concluded that the "right to farm" protection under the Farm Practices Protection (Right to Farm) Act was part of the province's ultra vires regulatory scheme. (Morton v. British Columbia (Minister of Agriculture and Lands), CALN/2010-003, [2010] B.C.J. No. 124, British Columbia Supreme Court)

* An Ontario Court has dismissed charges of processing, distributing and selling milk products that were not pasteurized or sterilized, and charges of operating a plant or distributing fluid milk products without a license, against an unlicensed Ontario milk producer who sold raw milk to "members" only who, by acquiring membership, allegedly acquired an interest in his cattle. The Court found that the farmer was not distributing to the public and was not therefore required to be licensed. (R. v. Schmidt, CALN/2010-004, [2010] O.J. No. 223, Ontario Court of Justice)

**** NEW CASE LAW ****

Morton v. British Columbia (Minister of Agriculture and Lands); CALN/2010-003, Full text: [2010] B.C.J. No. 124; British Columbia Supreme Court, C.E. Hinkson J., January 26, 2010.

Constitutional Law -- Federal/Provincial Jurisdiction -- Aquaculture.

Right to Farm Legislation -- British Columbia -- Aquaculture.

The British Columbia Minister of Lands (the "Province") had licensed Marine Harvest Canada Inc. ("Marine Harvest") to operate a 20 acre fish farm holding up to 600,000 Atlantic salmon in the Broughton Archipelago at the southern extremity of the Queen Charlotte Strait on the south central coast of British Columbia.

Alexandra Morton, the Pacific Coast Wild Salmon Society, Wilderness Tourism Association, and others (collectively "Morton") sought Court orders prohibiting the Province from renewing Marine Harvest's licenses on the grounds that the exclusive jurisdiction to regulate the management and protection of fisheries in Canada is vested in Parliament, and that the Province's legislation regulating fish farms was ultra vires.

On February 9, 2009, Hinkson, J. declared a number of sections of the British Columbia Fisheries Act, R.S.B.C. 1996, c. 149, the Farm Practices (Right to Farm) Act, R.S.B.C. 1996, c. 131, and the Aquaculture Regulation, ultra vires the Provincial Crown with respect to finfish (not cultivation of marine plants). The Finfish Aquaculture Waste Control Regulation was held ultra vires in its entirety: Morton v. British Columbia (Agriculture and Lands), [2009] B.C.J. No. 193, (2009) BCSC 136; [2009] 7 W.W.R. 690; 92 B.C.L.R. (4th) 314.

Hinkson, J. ordered that the Provincial Regulatory scheme with respect to finfish farming continue for a further 12 months in order to permit the Parliament of Canada to promulgate regulations for finfish farming.

The Province of British Columbia did not appeal. Marine Harvest did appeal to the British Columbia Court of Appeal, but on the narrow ground that fish farms are private fisheries and the fish in them are private property, that sections 1(h) and 2(1) of the Farm Practices Protection (Right to Farm) Act relate solely to property and civil rights in the Province, and are essentially "tort law" which can be upheld independent of the aquaculture regulatory scheme. The Court of Appeal directed that the argument be remitted to the Chambers Justice for consideration: Morton v. British Columbia (Agriculture and Lands), [2009] B.C.J. No. 2156, 2009 BCCA 481.

Sections 1(h) and 2(1) of the Farm Practices Protection (Right to Farm) Act provide:

> 1(h) aquaculture as defined in the Fisheries Act if carried on by a person licensed, under Part 3 of that Act, to carry on the business of aquaculture;
>
> ...
>
> 2(1) If each of the requirements of subsection (2) is fulfilled in relation to a farm operation conducted as part of a farm business,
>
> (a) the farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm

operation, and

(b) the farmer must not be prevented by injunction or other order of a court from conducting the farm operation.

Hinkson, J. reconsidered this issue on December 21 and 23, 2009. An application by the Attorney General for Canada to extend the operation of invalidity was also considered at this application.

Decision: Hinkson, J. granted a further 12 month extension of the suspension of the provincial regulatory scheme, but permitted the Provincial Government to grant new licenses for existing fish farms only [at para. 30 to 35.]. Hinkson, J. confirmed his previous decision that sections 1(h) and 2(1) of the Farm Practices (Right to Farm) Act was ultra vires the Province with respect to fish farming only. His decision did not apply to the cultivation of marine plants [at para. 66].

Hinkson, J. referred to section 2(2) of the Farm Practices Protection (Right to Farm) Act, which provides:

(2) The requirements referred to in subsection (1) are that the farm operation must

(a) be conducted in accordance with the normal farm practices,

(b) be conducted on, in or over land

(i) that is in an agricultural land reserve,

(ii) on which, under the Local Government Act, farm use is allowed,

(iii) as permitted by a valid and subsisting license, issued to that person under the Fisheries Act, for aquaculture, or

(iv) that is Crown land designated as a farm area under subsection (2.1), and

(c) not be conducted in contravention of the Public Health Act, Integrated Pest Management Act, Environmental Management Act, the regulations under those Acts or any land use regulation.

He concluded that these sections indicate that the Farm Practices Protection (Right to Farm) Act was doing more than to attempt to regulate tort law -- those sections were inextricably linked to the province's ultra vires regulatory regime stating [at para. 63 and 64]:

63 Subsection 2(2)(c) indicated that the impugned subsections of the Farm

> Practices Protection (Right to Farm) Act are more than an attempt to regulate tort law as it applies to the aquaculture industry -- they are about managing many aspects of the practice of that industry.
>
> 64 I find that the impugned subsections, when read within the larger statutory context of the Farm Practices Protection (Right to Farm) Act, are inextricably linked to the province's purported regulatory regime for aquaculture, which is directed at the identification of appropriate and allowable standards of activity in aquaculture. As a result, the pith and substance of these subsections is the protection of fisheries practices. The general regulation of the fisheries, including their management and control, are under the exclusive authority of Parliament, pursuant to s. 91(12) of the Constitution Act, 1867, as explained by Chief Justice McLachlin in Ward v. Canada (Attorney General), [2002] 1 S.C.R. 569 at para. 41.

R. v. Schmidt; CALN/2010-004, Full text: [2010] O.J. No. 223; Ontario Court of Justice, P. Kowarsky J.P., January 21, 2010.

Marketing Boards and Commissions -- Definition of Marketing and Distribution to the Public.

Michael Schmidt, an Ontario dairy farmer and "crusader" for the legalization of sale and distribution of raw milk, was charged with 14 counts of processing, distributing or selling milk products that were not pasteurized or sterilized; 2 counts of operating a plant or distributing fluid milk products without a license under the Ontario Milk Act; and 3 counts of failing to obey a Public Health Inspector's Order under the Health Protection and Promotion Act by storing and displaying unpasteurized milk and milk products.

In 1994, Schmidt's attempt to circumvent the Ontario Regulations through a "cow-lease" program was rejected by the Ontario Health Protection Appeal Board.

Schmidt then established a "cow share" program in which members of the public who wished to buy raw milk were required to buy a membership which gave them an ownership interest in his cows.

Decision: P. Kowarsky, J.P. dismissed all charges on the grounds that Schmidt was not selling to the public at large, only members [at para. 119 to 122]:

> ...I find that the defendant has indeed rebutted the presumption set out in section 25 of the Milk Act for the following reasons:
>
> (a) The stated purposes of the Act envisage the control of milk production for marketing and commercial purposes in Ontario, but Purpose is not inherently more important than other contextual factors, and cannot be relied on to justify adopting an implausible interpretation: (4th Edition at page 261)

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

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

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

"Members Only".

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

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

"Plant" means a cream transfer station or milk transfer station or premises in which milk or cream or milk products are processed.

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

121 Thus my interpretation is that the legislation refers to the public at large, and does not include the defendant's dairy operation as it is currently being conducted, where sales of the defendant's dairy products are

> absolutely restricted to members of his cow share program. In my view, such a remedial interpretation gives effect to the legislative meaning in accord with the overall contextual purpose of the Milk Act, and accordingly, "best ensures the attainment of its objects" (R.S.C., 1985, c. I-2, s. 12) and "effect is given to the enactment according to its true spirit, intent and meaning" (R.S.C, c. I-23, c. 10).
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> 122 Furthermore, notwithstanding the broad definitions of "plant" and "distributor", I find that in all the circumstances, taking into account the structuring and conduct of his entire diary operation, the defendant did not require a licence from the Director to operate his dairy product enterprise as he does, nor did he by so doing, carry on business as a distributor of fluid milk products without a licence. Consequently, I am not persuaded that the Crown has proven the actus reus of these two charges under sections 15(1) and (2) of the Milk Act beyond a reasonable doubt. Accordingly, I find the defendant not guilty.

[Editor's Note: This is a decision of the Provincial Offences Division of the Ontario Court of Justice. Similar schemes to circumvent marketing legislation have been restrained by injunction in other provinces. It will be interesting to see whether this decision is appealed.]

** CREDITS **

This NetLetter is prepared by Brian P. Kaliel, Q.C. of Miller Thomson LLP, Edmonton, Alberta.