

FEB 23 2011

S-111196
No.
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ALICE JONGERDEN doing business as HOME ON THE RANGE

PLAINTIFF

AND:

HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

(a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

Claim of the Plaintiff

Part 1: STATEMENT OF FACTS

THE PARTIES

1. The plaintiff, Alice Jongerden, is a resident of Chilliwack, British Columbia, and operated a cowshare known as Home on the Range that produced and distributed unpasteurized and unhomogenized milk (“Fresh Milk”) to the members of the cowshare. Ms. Jongerden was a member of the cowshare and produced Fresh Milk for her own consumption and for her family.
2. The defendant, Her Majesty the Queen in Right of the Province of British Columbia (the “Province”) is designated by the *Crown Proceedings Act* [RSBC 1996] c.89 as the respondent to claims against the government of the Province of British Columbia.

MATERIAL FACTS

3. From 2006 to September 15, 2010, the plaintiff operated a cowshare known as Home on the Range that produced and distributed Fresh Milk for human consumption. Home on the Range had approximately 400 members. Fresh Milk is unprocessed, unpasteurized and non-homogenized. Fresh Milk is occasionally referred to as raw milk.

4. On March 18, 2010, Madam Justice Gropper of the British Columbia Supreme Court issued an Order prohibiting the applicant from packaging or distributing raw milk for human consumption. The order was issued solely on the basis of s.15 of the *Public Health Act*, [SBC 2008], c.28, and s.7 of the *Public Health Act Transitional Regulation*, B.C. Reg.51/2009 (the “*Transitional Regulation*”), which was effective March 31, 2009.
5. Section 15 of the *Public Health Act* enacts the offence of creating a public health hazard, punishable under s.111(1)(b) of the *Public Health Act* by a fine of up to \$3,000,000.00 and a term of imprisonment not exceeding 36 months. Section 7 of the *Transitional Regulation* provides that “milk for human consumption that has not been pasteurized at a licenced dairy plant in accordance with the *Milk Industry Act* is prescribed as a public health hazard”. Section 7 of the *Transitional Regulation* deems Fresh Milk to be a public health hazard.
6. From March 18, 2010 until September 14, 2010, the plaintiff continued to distribute Fresh Milk but clearly labeled the Fresh Milk as “not for human consumption”, on the basis of her understanding that such labeling brought her into compliance with the March 18, 2010 order. On December 2, 2010, the plaintiff was cited for contempt of the March 18, 2010 order, although no penalty was imposed and she was taken to have purged her contempt.
7. The March 18, 2010 order and Section 7 of the *Transitional Regulation* prevent the plaintiff from producing and distributing Fresh Milk and they prevent the plaintiff from herself obtaining and consuming Fresh Milk from a lawful source.
8. If s.7 of the *Public Health Act Transitional Regulation* is repealed or declared to be of no force and effect, the plaintiff intends immediately to resume her work producing and distributing Fresh Milk as an agister for the Home on the Range cowshare.

NUTRITIONAL FACTS

9. Fresh Milk has high nutritional value. Fresh Milk contains vitamins, minerals, nutrients, beneficial enzymes, natural immune system boosters, and healthy fats and proteins. Fresh Milk also has beneficial health effects that have yet to be fully understood by scientists.
10. Processing milk by pasteurization and homogenization significantly reduces the nutritional

value of milk. Pasteurization decreases the number, concentration and bio-availability of vitamins, minerals, nutrients, beneficial enzymes, immune system boosters, and health fats and proteins. Milk that has been pasteurized and homogenized (“Processed Milk”) is significantly less nutritious than Fresh Milk. The consumption of Processed Milk also has deleterious effects on human health that consumption of Fresh Milk does not have, including higher incidents of asthma, allergies, and symptoms arising from so-called lactose intolerance, such as indigestion, nausea and other digestive ailments.

11. Fresh Milk is available for retail or farm sale to consumers in at least twenty states in the United States of America, and in all European Union countries with the exception of Scotland. Fresh Milk production and distribution in the US and EU is regulated by ensuring that milk cows are healthy and tested for diseases, that the milking facilities are sanitary, and that the milk is tested for virulent pathogens. The number and types of virulent pathogens are reduced by grass-feeding cows rather than by giving less expensive grain-based feeds to the cows. The regulation of Fresh Milk works by keeping the risk to consumers low by ensuring that virulent pathogens do not enter the Fresh Milk in the first instance.
12. Regulation of Processed Milk relies on a heating process known as pasteurization to kill pathogens after they have entered the production stream. Pasteurization has a deleterious effect on the nutritional value of Processed Milk. Processed Milk also involves homogenization, which is an industrial process by means of which milk fats are broken down. Homogenization results in cream being slower to separate, creating a more uniform and consistent product appearance for Processed Milk. Homogenization also has a deleterious effect on the nutritional value of Processed Milk.
13. As is the case with Processed Milk, risks associated with Fresh Milk can demonstrably be managed with appropriate regulation and provision of information to consumers. An outright prohibition is unnecessary.

Part 2: RELIEF SOUGHT

14. The plaintiff claims for the following relief:

- a. An order declaring s.7 of the *Public Health Act Transitional Regulation* to contravene s.7 of the *Charter of Rights and Freedoms*, as it deprives the plaintiff, contrary to the principles of fundamental justice, of the right to security of the person and the right to liberty.
- b. An order pursuant to s.52 of the *Constitution Act* declaring s.7 of the *Public Health Act Transitional Regulation* to be of no force and effect.
- c. An order declaring s.7 of the *Public Health Act Transitional Regulation* to be *ultra vires* and of no force and effect.
- d. An order for interim costs, should the plaintiff prove unable to bear the financial burden of this litigation.
- e. An order for costs payable by the defendant.

Part 3: LEGAL BASIS

1. The plaintiff says that s.7 of the *Public Health Act Transitional Regulation* is *ultra vires* for the following reasons:
 - a. Section 7 of the *Transitional Regulation* lacks statutory foundation in the *Public Health Act* or elsewhere;
 - b. Section 7 of the *Transitional Regulation* is contrary to the legislative intention of the *Milk Industry Act*, which contemplates fair and equitable provision for the supply of Fresh Milk; and
 - c. The true purpose and effect of s.7 of the *Transitional Regulation* is to support and buttress the milk quota subsidy system, which is designed to increase the price paid by the public for milk by restricting its supply.
2. The government executive has enacted regulations without the authority of and contrary to the intention of the Legislature. Section 7 of the *Public Health Act Transitional Regulation* is *ultra vires* and should be struck down.
3. The prohibition against Fresh Milk infringes s.7 of the *Charter of Rights and Freedoms*. The

choice to drink Fresh Milk rather than Processed Milk is a nutritional choice. Nutritional choices are choices made by individuals that are intended to affect the long-term health of that individual. Nutritional choices are, in essence, choices about long-term health, and a person deprived of control over their long-term health does not enjoy individual dignity and independence.

4. Nutritional choices are an aspect of the right to security of the person. The right in question is the right to choose nutritious and nourishing foods, the consumption of which leads to a healthy body, greater physical fortitude, mental independence and a longer life. Otherwise stated, the Applicant claims the right to make preventative health choices. The Applicant says that she need not wait until she becomes sick to trigger her right to make healthy choices. Her right to choose foods that enhance her bodily integrity and increase her sense of well-being exist before, during and after any acute illness. The right to make health choices includes both treatment and prevention.
5. In the alternative, s.7 of the *Public Health Act Transitional Regulation* creates the threat of prosecution and imprisonment for up to 36 months for creating Fresh Milk. The threat of imprisonment is sufficient to trigger scrutiny under s.7 of the *Charter of Rights and Freedoms* to ensure that the potential deprivation of liberty accords with the principles of fundamental justice.
6. The deprivations of liberty and security of the person entailed by the *Transitional Regulation* does not accord with the principles of fundamental justice. The deprivation is both arbitrary and overbroad. Arbitrariness is demonstrated by the absence of a demonstrable public health risk posed by human consumption of Fresh Milk, and by the existence of effective and less restrictive regulatory limits in many other western democracies. Arbitrariness is also demonstrated by the fact that the *Milk Industry Act* provided for Fresh Milk production and distribution until 1996. Overbreadth is established by the fact that an outright prohibition is unnecessary to achieve reasonable protection of human health. Fresh Milk has a long and safe history in the Province of British Columbia.
7. The infringements of s.7 cannot be justified under s.1 of the *Charter of Rights and Freedoms*. If s.7 of the *Transitional Regulation* is found to be arbitrary or overbroad, then it will for the

same reasons lack a rational connection between means and objective and it will fail the test of minimal impairment.

Plaintiff's address for service:

Jason Gratl
Gratl & Company
Barristers and Solicitors
302-560 Beatty Street
Vancouver, BC V6B 2L3

Fax number address for service (if any): 604-608-1919

E-mail address for service (if any): jason@gratlandcompany.com

Place of trial: Vancouver, British Columbia

The address of the registry is:

800 Smithe Street
Vancouver, British Columbia

Date: February 22, 2011

.....
Signature of
[] plaintiff [X] lawyer for plaintiff

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

The claim is a challenge to the constitutional validity of the prohibition against Fresh Milk within the Province of British Columbia, as enacted by s.7 of the *Public Health Act Transitional Regulation*.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

[Check one box below for the case type that best describes this case.]

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters

- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[Check all boxes below that apply to this case]

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

The plaintiff relies on:

1. *Public Health Act*
2. *Milk Industry Act*
3. *Canadian Charter of Rights and Freedoms*

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ALICE JONGERDEN doing business as HOME ON THE RANGE

PLAINTIFF

AND:

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IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT

NOTICE OF CONSTITUTIONAL QUESTION
(*Constitutional Question Act*, s. 8(2))

TO: Attorney General of Canada
AND TO: Attorney General of British Columbia

TAKE NOTICE that the Plaintiff, Alice Jongerden, seeks a constitutional remedy within the meaning of s. 8(1) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68 in this proceeding.

1. The nature of the constitutional remedy sought by the Defendant is:
 - (a) An Order pursuant to ss.7 and 52 of the *Canadian Charter of Rights and Freedoms* declaring s.7 of the *Public Health Act Transitional Regulation* to be of no force and effect.
2. The rights or freedoms that the Defendant alleges to be infringed by the conduct of the Plaintiff in bringing and pursuing this action against him are:
 - (a) The right to liberty and security of the person, as guaranteed by s.7 of the *Canadian Charter of Rights and Freedoms*.

3. The date on which the application for the constitutional remedy will be argued is to be determined.

4. Particulars necessary to show the point to be argued are set out in the attached Notice of Civil Claim filed February 23, 2011.

Dated this 23rd of February, 2011



Jason Grati
Grati & Company
302-560 Beatty Street
Vancouver, B.C. V6B 2L3
Tel: 604-694-1919
Fax: 604-608-1919

This Notice was prepared by Grati & Company, Barristers & Solicitors, with an address for service at
302-560 Beatty Street, Vancouver, B.C. V6B 2L3 Tel: 604-694-1919 Fax: 604-608-1919