



No. S-111196  
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

**RESPONSE TO CIVIL CLAIM**

**Filed by:** Her Majesty the Queen in right of the Province of British Columbia (the "defendant").

**Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS**

**Division 1 – Defendant's Response to Facts**

1. The facts alleged in paragraph 2 of Part 1 of the notice of civil claim are admitted.
2. The facts alleged in paragraphs 1, 3, 4, 5, 6, 9, 10, 11, 12, and 13 of Part 1 of the notice of civil claim are denied.
3. The facts alleged in paragraphs 7 and 8 of Part 1 of the notice of civil claim are outside the knowledge of the defendant.

## **Division 2 – Defendant’s Version of Facts**

1. In response to paragraph 1 of the notice of civil claim: The structure of Home on the Range Raw Milk Dairy as a “cowshare” was a scheme to evade the laws of the Province relating to unpasteurized milk for human consumption. The essential nature of the plaintiff’s business, as the operating mind of Home on the Range, was the commercial sale and supply of unpasteurized milk from cattle (hereinafter “unpasteurized milk”), to persons who did not have personal care or control of the cattle from which the milk was produced, and who, to the plaintiff’s knowledge, intended to consume the milk unpasteurized.
2. In response to paragraph 3 and subsequent paragraphs of the notice of civil claim in which the plaintiff refers to unpasteurized milk as “Fresh Milk”: The adjective “fresh” is not synonymous with or equivalent to “unpasteurized”, and is inaccurate in this context.
3. In response to the allegation in paragraph 4 of the notice of civil claim that Madam Justice Gropper issued the March 18, 2010 order based “solely” on section 15 of the *Public Health Act*, S.B.C. 2008, c. 28 and section 7 of the *Public Health Act Transitional Regulation*, B.C. Reg. 51/2009:
  - a. On July 9, 2008, a public health inspector, as defined in section 1 of the *Health Act*, R.S.B.C. 1996, c. 179, ordered the plaintiff to “cease and desist the distribution of raw milk for human consumption”, pursuant to section 63 of the *Health Act*. The *Health Act* was the predecessor statute to the *Public Health Act*, in effect prior to March 31, 2009.
  - b. The plaintiff did not appeal from the July 9, 2008 *Health Act* order to the Supreme Court, although she had the right to do so under section 102 of the *Health Act*.
  - c. The March 18, 2010 order of Madam Justice Gropper included a declaration that the plaintiff “has contravened the July 9, 2008 *Health Act* Order ordering her to cease and desist the distribution of raw milk for human consumption.”

4. In response to paragraph 5 of the notice of civil claim:
  - a. Section 15 of the *Public Health Act* imposes an obligation. Subsection 99(3)(a) of the *Public Health Act* provides that a person who contravenes section 15 commits an offence. The provisions of the *Offence Act*, R.S.B.C. 1996, c. 338, sections 4 and 5 excepted, govern the prosecution of offences under the *Public Health Act*.
  - b. Section 111 of the *Public Health Act* empowers the Lieutenant Governor in Council to make regulations in respect of certain matters, including, under subsection 111(1)(b), “respecting conditions, things, activities or standards for the purposes of the definition of ‘health hazard’”. Section 111 does not specify penalties for offences under the *Public Health Act*.
  - c. Subsection 108(1)(c) of the *Public Health Act* provides that a person who commits an offence under subsection 99(3) is liable on conviction to a fine not exceeding \$3,000,000 or to imprisonment for a term not exceeding 36 months, or to both.
  - d. Section 7 of the *Public Health Act Transitional Regulation* provides that “[m]ilk for human consumption that has not been pasteurized at a licensed dairy plant in accordance with the *Milk Industry Act* is prescribed as a health hazard.”
  - e. Section 1 of the *Public Health Act* defines the term “health hazard”. The term “public health hazard” is not defined in the *Public Health Act*, and does not appear in the *Public Health Act* or in any subordinate legislation made under it.
5. In response to paragraph 6 of the notice of civil claim: In his December 2, 2010 judgment, indexed as 2010 BCSC 1713, Mr. Justice N. Smith found that the plaintiff “willfully” disobeyed the terms of the March 18, 2010 order, that is, knowing and intending that the persons to whom she had continued to distribute unpasteurized milk would consume the milk unpasteurized.

6. In response to paragraphs 9, 10, and 12 of the notice of civil claim:
  - a. There is little or no scientific basis for the claim that unpasteurized milk has nutritional value superior to that of pasteurized milk or that it has special health-promoting effects that pasteurized milk and other foods do not.
  - b. There is little or no scientific basis for the claim that pasteurized milk has deleterious effects that unpasteurized milk does not.
  - c. The health risks of consuming unpasteurized milk outweigh any special nutritional value or health-promoting effects that unpasteurized milk may have.
7. In response to paragraphs 11 and 13 of the notice of civil claim:
  - a. In jurisdictions where the distribution of unpasteurized milk for human consumption is legal, outbreaks of milkborne illness are more frequent than in jurisdictions where the distribution of unpasteurized milk for human consumption is illegal.
  - b. Good agricultural practices do not eliminate, or reduce to a safe level, the risk of contamination of unpasteurized milk with pathogens.
  - c. Testing for specific pathogens is not a practical or reliable procedure to ensure that unpasteurized milk is safe for human consumption.
  - d. Providing consumers with information about the health risks of consuming unpasteurized milk does not ensure the informed consent of everyone who may be affected by the activity, in particular, persons vulnerable to contracting milkborne illnesses through secondary transmission, and children.

### **Division 3 – Additional Facts**

1. Pasteurization is the process of heating milk for a predetermined time at a predetermined temperature to destroy pathogens. In British Columbia, the *Milk Industry Act*, R.S.B.C. 1996, c. 289 and the *Milk Industry Standards Regulation*, B.C. Reg. 464/81 set out the standards and procedures according to which milk from cattle is required to be pasteurized.
2. A variety of pathogens may be found in unpasteurized milk. The routes by which these pathogens may contaminate milk during production are many, varied, and as a practical matter impossible to eliminate.
3. Milkborne illnesses may have serious health consequences, including permanent disability or death.
4. Consumers of unpasteurized milk may transmit milkborne illnesses to non-consumers through person-to-person contact.
5. Pasteurization is an effective and efficient means of preventing milkborne illnesses.
6. A wide array of healthful foods are available to Canadian consumers. The availability of milk and milk products from cattle does not affect the ability of Canadian consumers to obtain sustenance.
7. A wide diversity of views exist as to what constitutes an optimally healthful human diet, including as regards the inclusion of milk and milk products from cattle in such a diet.
8. The plaintiff has never been charged with an offence under sections 15 and 99(3)(a) of the *Public Health Act*.

## **Part 2: RESPONSE TO RELIEF SOUGHT**

1. The defendant opposes all the relief sought by the plaintiff.

## **Part 3: LEGAL BASIS**

1. Section 7 of the *Public Health Act Transitional Regulation* is *intra vires* in the administrative law sense:
  - a. Section 7 of the *Public Health Act Transitional Regulation* is authorized by the provisions of its parent statute, specifically sections 1 (definition of “health hazard”) and 111(1)(b) of the *Public Health Act*.
  - b. The scheme of the *Milk Industry Act* does not support a restrictive interpretation of sections 1 and 111(1)(b) of the *Public Health Act* that would render section 7 of the *Public Health Act Transitional Regulation* *ultra vires*. The *Milk Industry Act* at one time provided for the approval of raw milk dairy farms and permitted the sale and supply of unpasteurized milk from such approved farms; however, the Legislature repealed these provisions. The plaintiff relies on the regulation-making power of the Lieutenant Governor in Council under subsection 40(3)(q) of the *Milk Industry Act* to make “just and equitable provision for the sale of milk from approved raw milk dairy farms in the milk pasteurization areas”, but this provision is a defunct vestige of the former scheme and imposes no duty or obligation on the Lieutenant Governor in Council to promulgate such regulations.
  - c. Like the *Public Health Act*, section 7 of the *Public Health Act Transitional Regulation* has a public health purpose. Section 7 was not prescribed for any colourable purpose relating to the system of market control and equalization among milk producers in British Columbia.

2. Section 7 of the *Public Health Act Transitional Regulation* does not infringe the rights of the plaintiff under section 7 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”):
  - a. The choice to consume unpasteurized milk is not an aspect of security of the person or any other interest protected by section 7 of the *Charter*.
  - b. If section 7 of the *Public Health Act Transitional Regulation* has the potential to cause a deprivation of the plaintiff’s liberty—or, in the alternative, which is expressly denied, a deprivation of her security of the person—that deprivation is in accordance with the principles of fundamental justice. Given the significant public health risks associated with unpasteurized milk for human consumption, section 7 of the *Public Health Act Transitional Regulation* is neither overbroad nor arbitrary.
  - c. In the alternative, section 7 of the *Public Health Act Transitional Regulation* may be interpreted, or read down, so as not to apply insofar as the plaintiff obtains and consumes unpasteurized milk from cattle under her personal care and control.
  - d. In specific response to paragraph 6 of Part 3 of the notice of civil claim: A failure to enact legislation cannot form the basis of a claim under section 7 of the *Charter*.
  - e. In further specific response to paragraph 6 of Part 3 of the notice of civil claim: The defendant denies that “the *Milk Industry Act* provided for [unpasteurized milk] production and distribution until 1996” or that “[unpasteurized milk] has a long and safe history in the Province of British Columbia.”

3. In the alternative, if section 7 of the *Public Health Act Transitional Regulation* limits the rights of the plaintiff under section 7 of the *Canadian Charter of Rights and Freedoms*, which is expressly denied, those limits are reasonable limits prescribed by law that are demonstrably justified in a free and democratic society, pursuant to section 1 of the *Charter*.

Defendant's address for service:

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Place of trial: Vancouver

The address of the registry is  
800 Smith Street  
Vancouver, British Columbia

Date: March 22, 2011

Signature of

  
[ ] defendant [X] lawyer for defendant  
E.W. (Heidi) Hughes and Sarah Bevan

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.