

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fraser Health Authority v. Jongerden*,
2010 BCSC 1713

Date: 20101202
Docket: S124618
Registry: New Westminster

Between:

Fraser Health Authority

Petitioner

And

**Alice Jongerden carrying on business as
Home on the Range, Jane Doe and
John Doe**

Respondents

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

G. McDannold

Counsel for the Respondent Alice
Jongerden:

J. Gratl

Place and Date of Trial/Hearing:

New Westminster, B.C.
October 14, 2010

Place and Date of Judgment:

New Westminster, B.C.
December 2, 2010

[1] The respondent Alice Jongerden was ordered by the court to stop packaging and distributing raw milk for human consumption. The Fraser Health Authority, which obtained that injunction, says Ms. Jongerden disobeyed it and asks that she be found in contempt of court.

[2] The Fraser Health Authority says that after the injunction was issued in March, 2010, Ms. Jongerden continued to distribute raw milk in the same manner and to the same recipients as before. Ms. Jongerden admits she continued to distribute raw milk, but says she complied with the court order by labelling the product “not for human consumption”.

[3] The distribution of raw, unpasteurized milk for human consumption is prohibited by the *Public Health Act*, S.B.C. 2008, c. 28 [“*Health Act*”] and regulations made under it. Section 15 of the *Health Act* says:

A person must not willingly cause a health hazard, or act in a manner that the person knows, or ought to know, will cause a health hazard.

[4] Section 111 of the *Health Act* provides for the making of regulations that define things or activities as health hazards and s. 7 of the *Public Health Act Transitional Regulations*, B.C. Reg. 51/2009 states:

Milk 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.

[5] The Fraser Health Authority has jurisdiction and responsibility for enforcing the *Health Act* and its accompanying regulations.

[6] Ms. Jongerden operates a dairy farm, carrying on business under the name of “Home on the Range”. She obviously disagrees with the public policy prohibiting the distribution of raw milk and believes consumers should have the right to choose it. On July 9, 2009, she was ordered by the Public Health Inspector to “cease and desist the distribution of raw milk for human consumption”. When that order was apparently not complied with, the Fraser Health Authority sought the injunction now in force.

[7] The matter came before Gropper J., who issued the injunction on March 18, 2010: *Fraser Health Authority v. Jongerden*, 2010 BCSC 355. In those proceedings, Ms. Jongerden said she had established a “cow share” in which registered members owned shares of the cows she cared for. Raw milk and raw milk products were available only to members of the cow share and not sold to the general public. A similar operation in Ontario had been found not to contravene the governing legislation in that province, but Gropper J. found that there was no similarity between the B.C. and Ontario legislation and the Ontario case had no application:

[26] The question of whether the milk or milk products are distributed to the public or to members of the cow share is of no relevance in British Columbia. Raw milk is deemed to be a health hazard by regulation, and s. 15 of the *Public Health Act* “prohibits a person from willingly causing a health hazard”.

[8] Madam Justice Gropper found Ms. Jongerden to have contravened the health inspector’s order and issued a permanent injunction “prohibiting the Respondents or anyone having notice of this Order from packaging and/or distributing raw milk and/or raw milk products for human consumption.”

[9] When the farm was inspected again on July 9, 2010, Ms. Jongerden admitted to the health inspectors that she was continuing to package raw milk for distribution to cow share members, who could either have the milk delivered or pick it up at the farm. However, each jar of raw milk now carried a sticker with the words “not for human consumption”. On the doors of the refrigerators in which the jars of milk were stored, Ms. Jongerden had posted a notice quoting the health regulation and stating:

I have received an injunction from Fraser Health to cease and desist packaging and distributing raw milk for human consumption. I will continue to honour my private agreement with each of you, making your dividends available as usual, to continue to do with as you please.

...

Your dividends are clearly labelled “not for human consumption”.

[Emphasis in the original.]

[10] On September 14, 2010, Ms. Jongerden obtained an adjournment of this application but, as a condition of that adjournment, Saunders J. prohibited all production and distribution of raw milk until a hearing of the application.

Ms. Jongerden says she has complied with that order.

[11] In her affidavit, Ms. Jongerden states that raw milk can be consumed by domestic and farm animals and can also be used by humans for cosmetic purposes. She adds that raw milk can also be made into glue and the fat in it is good for shining shoes and removing stains. She says:

11. ... However, the choice to ignore my warnings or to obtain raw milk elsewhere was a choice that members of the milkshare were specifically left by the terms of the Court Order to make.

12. It is possible that people for whom I packaged raw milk and raw milk products after March 18, 2010, consumed the raw milk themselves. I myself do not know for certain whether they intended to do so or did in fact do so.

[12] Contrary to Ms. Jongerden's stated belief, the *Health Act* and regulations do not merely require consumers to be warned of the health hazards associated with raw milk. The prohibition against the distribution of raw milk for human consumption is absolute. Ms. Jongerden may favour a system that permits the distribution of raw milk with appropriate health warnings, as is the case with certain other products deemed to be hazardous, but that is not what the present legislation provides.

[13] It is not for the court to consider the merits of the public policy or the science on which that legislation is based. No challenge to the legal validity of the legislation is before me and none was before Gropper J. As Gropper J. said, her only role was to determine if there had been a breach of the legislation. My only role is to determine if there has been a deliberate breach of Gropper J.'s order.

[14] I have no doubt that Ms. Jongerden's continued distribution of raw milk was a violation of the *Health Act* and regulations. She admits to being aware of the possibility that some of her cow share members may consume the raw milk. The notice she posted on her refrigerators in fact invites them to continue to use the product "as you please". Given that these are the same people to whom she was

formerly delivering the product for human consumption, her conduct must be found to be something she “knows, or ought to know, will cause a health hazard” within the meaning of s. 15 of the *Health Act*.

[15] However, the fact that she is in continued breach of the *Health Act* and regulations does not necessarily mean she is in contempt of court for breach of the injunction. A finding of contempt must be based on the language of the order, without reference to the underlying legislation. In *Jackson v. Honey*, 2009 BCCA 112, the Court of Appeal said:

[13] The facts in support of a finding of contempt must establish, beyond a reasonable doubt, that the contemnor wilfully disobeyed a court order that was clear and precise in its meaning. In *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316, 29 B.C.L.R. (4th) 214 Newbury J.A., for the Court, cited *Re Sheppard and Sheppard* (1976), 67 D.L.R. 592 where the Ontario Court of Appeal described the act of contempt as “the intentional doing of an act which is in fact prohibited by the order”: para. 12. Madam Justice Newbury went on to cite *Topgro Green houses Ltd. v. Houweling*, 2003 BCCA 355, 184 B.C.A.C. 118 where the Court described the act of contempt as “deliberate conduct that has the effect of contravening the order”: para. 14.

[16] The applicable law was also summarized by the Court of Appeal in *Gurtins v. Goyert*, 2008 BCCA 196:

[15] The rule of law requires that court orders be obeyed. Accordingly, it is of paramount importance that persons who are subject to court orders be able to readily determine their obligations and responsibilities. They do this by having regard to what is on the face of the formal order setting out what they are required to do, or refrain from doing. As stated in *Arlidge, Eady & Smith on Contempt* (London: Sweet & Maxwell, 2005) (at para. 12-55), “[a]n order should be clear in its terms and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation”. See also: *Northwest Territories Public Service Association v. Commissioner of the Northwest Territories* (1979), 107 D.L.R. (3d) 458 (N.W.T.C.A.) at 478, 479; *In re A Bankrupt; Rudkin-Jones v. The Trustee of the Property of the Bankrupt* (1965), 109 Sol. Jo. 334 (C.A.).

[16] A concise and most helpful summary of the principles applicable to the interpretation of an order in contempt proceedings is found in *R. (Mark Dean Harris) v. The Official Solicitor to the Supreme Court*, [2001] EWHC Admin 798 (Q.B.D.), wherein Mr. Justice Munby stated (at para. 68):

- (i) No order will be enforced by committal unless it is expressed in clear, certain and unambiguous language. So far as this is

possible, the person affected should know with complete precision what it is that he is required to do or to abstain from doing.

(ii) It is impossible to read implied terms into an injunction.

(iii) An order should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. Looking only at the order the party enjoined must be able to find out from the four walls of it exactly what it is that he must not do.

(iv) It follows from this that, as Jenkins J said in *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 LT 387 at p 390,

a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question.

[Emphasis in the original omitted.]

[17] Although a contempt application must be decided on the wording of the order, and the alleged contemnor must be given the benefit of any ambiguity, the surrounding circumstances known to the alleged contemnor—the “factual matrix” surrounding the making of the order—may be considered in determining the order’s meaning, as demonstrated in *Agricultural Land Commission v. Munro*, 2006 BCSC 1408:

[83] Looking at the factual matrix surrounding the making of the Consent Order is helpful in determining the proper interpretation of “farm use”. The Consent Order arose from the parties’ settlement of the ALC’s claim that the Munros were breaching s. 20 of the ALCA (using ALR land for an unauthorized non-farm use). As the matter involved the ALCA, I conclude that the term “farm use” was most likely intended to have the meaning attributed to it in the ALCA. However, I agree with the Munros that as they are facing contempt proceedings, the Consent Order should (at least for the issue of contempt) be interpreted in the manner most favourable to them: *Melville* at ¶13. Therefore, the term “farm use” can be given an even broader definition than that in the ALCA. This position is also supported by the dicta of *Brentwood Pioneer Holdings*, in which the Court found, though in the context of ALCA’s predecessor legislation, that the definition of “farm use” should be given a broad meaning and a large and liberal interpretation.

[18] The Order of March 18, 2010 clearly prohibits Ms. Jongerden from “packaging and/or distributing raw milk and/or raw milk products for human consumption.”

There is no dispute about the fact that packaging and distribution continued after the

Order was made and the issue is whether that packaging and distribution was for human consumption. The factual matrix in this case includes the fact that Ms. Jongerden was providing raw milk products to people who she previously understood and expected to consume the product and who she frankly admits may have chosen to ignore the label on the jar and the notice on the refrigerators.

[19] The injunction was not directed solely at distribution to people Ms. Jongerden knew would use it for human consumption. The distributor of a product will rarely have direct, first-hand knowledge of its use, but will have reasonable expectations arising from the nature of the product and the nature of the distribution business. The injunction in this case was issued to prevent conduct deemed a health hazard and was clearly intended to prevent the distribution of raw milk in circumstances where human consumption is known to be a real and substantial possibility.

[20] The notice that Ms. Jongerden posted on her refrigerator doors invited the cow share members to continue to use the product “as you please”, making the allotments “available as usual”. The people the notice was directed at are the same people to whom she was formerly delivering the product for human consumption. Ms. Jongerden must therefore have anticipated that cow share members would likely continue to use the raw milk for human consumption, as in the past. To authorise recipients of a product to continue to use it as they see fit when there is a history of that product being used in a certain (now prohibited) manner is equivalent to knowing and intending that usage will continue.

[21] In that context, I must conclude that Ms. Jongerden wilfully disobeyed the terms of the Order by continuing to distribute and make available raw milk to the same individuals to whom she previously provided it for human consumption. I must, therefore, find her in contempt of Gropper J.’s order.

[22] However, the Fraser Health Authority has not yet asked that any specific penalty be imposed for Ms. Jongerden’s contempt of court. I understand that Ms. Jongerden has, as a result of the interim order of Saunderson J., ceased all production and distribution of raw milk products. As long as that remains the case,

Ms. Jongerden will have purged her contempt and there should be no need for the matter to proceed to consideration of a penalty.

“N. Smith J.”