CITATION: Affleck v. The Attorney General of Ontario, 2021 ONSC 1108
COURT FILE NO.: CV-18-591774
DATE: 20210211

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
James Lansing Affleck, John Baak, Eric Bryant, Carol Celenza, Sanda Draga, Werner Fabian, Karen Fliess, Merle Gould, Maria Helms, Allyson McMullen, Lilian Miculescu, Paul Noble, Era Novak, Mascha Perrone, Jerry Puchyr, Maria-Thersia Roemmelt, Amy Stein, Fran Van Den Berg, Elisa Vander Hout, Beverly Viljakainen and Eleanor Zalecc Applicants	*J. Nehmettallah, and I. Blue, Q.C.* for the Applicants
– and –	
The Attorney General of Ontario and The Attorney General of Canada Respondents	*P. Ryan,* for the Respondent, The Attorney General of Ontario *J. Cheng and A. Gilani,* for the Respondent, The Attorney General of Canada
– and –	
Regional Municipality of York, Regional Municipality of Peel, Simcoe Muskoka District Health Unit, Dairy Farmers of Ontario and Dairy Farmers of Canada Interveners	*D. Wilson and D. Taylor*, for the Interveners, Dairy Farmers of Ontario, Dairy Farmers of Canada *D. Smith and L. Mangano*, for the Interveners, Regional Municipality of York, Regional Municipality of Peel, Simcoe Muskoka District Health Unit **HEARD:** November 16, 17, 18, 19, 20, 2020

O'BRIEN, J.

REASONS FOR DECISION

Overview

[1] The Applicants are producers and consumers of raw milk. In this Application, they claim that they should be allowed to purchase raw milk as a matter of freedom of conscience because it

has substantiated health benefits not found in pasteurized milk. They submit that the federal regulation and provincial statute prohibiting the sale and distribution of unpasteurized milk violate their freedom of conscience, protected by s. 2(a) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

[2] In addition, one of the Applicants, Eric Bryant, claims a violation of his right to freedom of religion protected by s. 2(a) of the *Charter*, given that any milk he consumes must be raw pursuant to the tenets of the Essene religion. Another Applicant, Amy Stein, claims a violation of her right to equal treatment protected by s. 15(1) of the *Charter* on the basis of disability.

[3] The Applicants submit that none of these violations can be saved under s. 1 of the *Charter*. Broadly, their argument under s. 1 of the *Charter* is that the risk of raw milk is not sufficiently serious to justify a complete ban on its sale and distribution.

[4] For the reasons that follow, I conclude that none of the Applicants' *Charter* rights have been violated. Their belief in the health benefits of raw milk does not rise to the level of a belief with profound moral dimensions, as required for protection of freedom of conscience under s. 2(a) of the *Charter*. I find that Mr. Bryant has not established an interference with his ability to act in accordance with his beliefs in a manner that is more than trivial and insubstantial. Further, Ms. Stein has not provided a sufficient evidentiary basis to establish a violation of s. 15(1). Even if I am wrong in these conclusions, any violation would be justified under s. 1 of the *Charter* given the extensive evidence about the safety concerns of consuming raw milk, particularly for vulnerable populations.

Parties

[5] Two of the Applicants are milk producers. The Applicant, Elisa Vander Hout owns and operates Glencolton Farms, together with her spouse Michael Schmidt. Mr. Schmidt has been previously involved in numerous legal proceedings seeking to assert the right to sell and distribute raw milk, as further discussed below. The Applicant, Paul Noble owns and operates Elbon Shady Haven Farm. Both farms produce raw milk intended for direct human consumption. The remainder of the Applicants are raw milk consumers, each of whom has purchased raw milk, consumed it, and provided it to their families. The Applicants believe in the health benefits of raw milk. They believe "as a matter of conscience" that they and their families need to consume raw milk because doing so protects their health.

[6] In addition, two individual Applicants claim violations of other *Charter* rights. The Applicant, Eric Bryant claims religious reasons for consuming raw milk. He is an Essene who "lives in accordance with the health prescriptions of the Essene Gospel of Peace." According to Mr. Bryant, the Essene Gospel of Peace requires adherents to eat only uncooked foods, and to eat only "living food," including raw milk.

[7] The Applicant, Amy Stein alleges that her right to equality pursuant to s. 15 of the *Charter* has been infringed. She states that she is physically unable to milk a cow due to an upper limb birth defect. As a result, she claims to not receive the same benefit as others pursuant to what has been referred to as the "family farm" exemption, discussed further below, which flows from the fact that raw milk may be possessed and consumed, but not sold or distributed.

[8] The Application is defended by the Attorney General of Canada ("AGC") and the Attorney General of Ontario ("AGO"). In addition, the Dairy Farmers of Ontario ("DFO") and the Dairy Farmers of Canada ("DFC") were granted full intervener status. The DFO plays a role in regulating milk in Ontario. It holds delegated authority from various federal and provincial sources, which allows it to issue production licences and establish licence conditions, including with respect to raw milk quality and on-farm requirements. It also is responsible for, among other things, raw milk testing, the inspection of dairy farms, and milk transportation. The DFO is a member of the DFC, which represents licensed dairy farmers across Canada. The DFC establishes production standards, which are incorporated by the DFO into provincial producer licensing requirements.

[9] The Regional Municipality of York, the Regional Municipality of Peel and Simcoe Muskoka District Health Unit (the "Municipalities") were granted status as *amicus curiae* in this proceeding. As municipal entities, they are mandated and authorized, in their capacity as municipal boards of health under the *Health Protection and Promotion Act*, R.S.O. 1990, c. H. 7 (the "*HPPA*"), to enforce s. 18 of the *HPPA*, which prohibits the sale and distribution of unpasteurized milk, as discussed below.

Regulatory Framework

[10] Canada and Ontario both have a longstanding history of prohibiting the sale and distribution of unpasteurized milk[1] for health reasons. At the federal level, food is regulated primarily by the *Food and Drugs Act*, R.S.C. 1985, c. F-27 ("*FDA*") and its associated regulations. Section B.08.002.2 of the Food and Drug Regulations, C.R.C., c. 870 (the "Regulations") was originally promulgated in 1991 in response to a number of outbreaks of disease related to the consumption of raw milk. Although some provinces, including Ontario, already prohibited the sale and distribution of raw milk, others had no prohibition on raw milk sales or had varying restrictions. The Regulations expressly prohibit the sale of unpasteurized dairy products in s. B.08.0002.2 as follows:

> (1) Subject to subsection (2), no person shall sell the normal lacteal secretion obtained from the mammary gland of the cow, genus Bos, or of any other animal, or sell a dairy product made with any such secretion, unless the secretion or dairy product has been pasteurized by being held at a temperature and for a period of time that ensure the reduction of the alkaline phosphatase activity so as to meet the tolerances specified in official method MFO-3, Determination of Phosphatase Activity in Dairy Products, dated November 30, 1981.
>
> (2) Subsection (1) does not apply to
>
> (a) cheese; or
>
> (b) any food that is sold for further manufacturing or processing in order to pasteurize it in a manner described in subsection (1).

[1] I refer to "unpasteurized" milk and "raw" milk interchangeably in these Reasons.

Although s. B.08.022.2 does not, on its face, prohibit distribution, the definition of "sell" in s. 2 of the *FDA* includes distribution.

[11] At the provincial level, the prohibition on the sale and distribution of raw milk has been in place since at least 1938, when legislation requiring pasteurization was introduced to combat tuberculosis and other diseases. Currently, s. 18(1) of the *HPPA* prohibits the sale and distribution of unpasteurized milk:

> 18(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*.

Pursuant to s. 100(3) and s. 101 of the *HPPA*, contravening s. 18 is an offence punishable by fine.

[12] However, possession and consumption of unpasteurized milk is not illegal in Ontario. Section 18 of the *HPPA* captures only the sale, offering for sale, delivery, and distribution of unpasteurized milk. Courts have interpreted this as providing for a "family farm exemption," which permits farmers and family members to consume unpasteurized milk from cows residing on the farm property: *Gavin Downing v. Agri-Cultural Renewal Co-operative Inc. O/A Glencolton Farms ("ARC") et al*, 2018 ONSC 128, at paras. 64, 98 ("*Downing*"). Ontario points out in these proceedings that there is no actual "exemption" to the legislation and, to that end, there is no provision that specifically states it is necessary to reside on a farm or be part of the family in order to consume raw milk.

[13] The production and sale of milk in Ontario is also regulated by the *Milk Act*, R.S.O. 1990, c. M. 12. The *Milk Act* does not directly require the pasteurization of milk. However, s. 15 of the *Milk Act* provides that no person shall operate a plant or carry on a business as a distributor without a license from the Director (who is appointed under that act). In addition, s. 100(1)(f) of R.R.O. 1990, Reg. 761 provides that the Director may refuse to issue or renew a licence where the applicant does not comply with the *HPPA* and its regulations.

[14] I agree with the position put forward by Ontario that the Applicants have not identified in their Notice of Application or Notice of Constitutional Question which provisions of the *Milk Act* or regulations they say are unconstitutional. Although in their factum they suggest they seek an order against the licensing requirement in the *Milk Act*, they have not explained how the licensing provisions are unconstitutional. The *Milk Act* has a list of criteria that may permit a Director to refuse a licence. If s. 18 of the *HPPA* were to be struck down, compliance with it would not be necessary for licensing purposes. I cannot see a basis to separately consider the constitutionality of the *Milk Act* and its regulations and will not do so below.

Prior Proceedings

[15] This Application is brought following many years of litigation, mostly involving the Applicant, Ms. Vander Hout's spouse, Mr. Schmidt, who co-owns Glencolton Farms. Ms. Vander Hout herself was also a Respondent in the most recent litigation, the *Downing* litigation cited above. As recounted by the Court in *Downing*, the first legal proceeding concerning

Glencolton Farms was commenced in 1994, when Mr. Schmidt was the subject of an *HPPA* order to cease processing raw milk. The most recent proceedings in Ontario are *R. v. Schmidt*, 2014 ONCA 188, and *Downing*. I discuss *R. v. Schmidt* below, as I find its analysis relevant in some parts to the current case, given that it involved a challenge under s. 7 of the *Charter* to the provisions of the *HPPA* at issue here.

[16] The 2018 *Downing* proceedings are relevant to this Application in that they are currently adjourned pending the outcome of this Application. There, Gavin Downing, the Director appointed under the *Milk Act*, sought an injunction restraining the operation of the milk plant at Glencolton Farms without a licence. In companion proceedings, the three Municipalities, who are interveners in the current proceeding, sought an injunction on the basis that the respondents, including Mr. Schmidt and Ms. Vander Hout, had contravened s. 18 of the *HPPA*. The Court found that the respondents were in violation of the *Milk Act* and the *HPPA*, that the "family farm exemption" did not apply to their activities, and that an injunction should be granted.

[17] The respondents appealed the decision and moved to stay the injunctive orders pending the determination of this Application. Nordheimer, J.A. did not grant the stay but did adjourn the appeal pending the determination of this Application.

Motion to Exclude Expert Evidence

[18] At the outset of the Application, the AGC, supported by the AGO and the DFO/DFC, brought a motion to exclude the evidence of three witnesses put forward by the Applicants as experts: Margaret Coleman, Peter Kennedy, and Dr. Nadine Ijaz. The expert evidence is primarily relevant to the s. 1 analysis in this case, although it also has some bearing in my analysis under s. 15(1) below. It relates to the alleged health benefits of raw milk and the public health risks of raw milk. For the reasons that follow, the motion is dismissed, and I find the evidence of these three experts to be admissible. However, I do have concerns about the weight to be attributed to this evidence. As will be evident through the course of my analysis, I accord it significantly less weight than the evidence of the experts retained by the Respondents.

[19] The moving parties submit that the evidence of Ms. Coleman and Dr. Ijaz falls outside the scope of their expertise and does not meet the requirement of impartiality. With respect to Mr. Kennedy, they submit only that his evidence does not meet the requirement of impartiality.

A. Test for admissibility of expert evidence

[20] Rule 4.1.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 requires that an expert witness provide evidence that is fair, objective, and non-partisan, and that the expert provides opinion evidence relating to matters only within the witness' area of expertise. See also *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 10 *("White* Burgess").

[21] The inquiry into the admissibility of proposed expert evidence is a two-stage process. At the first stage, the question is whether the four criteria from *R. v. Mohan*, [1994] 2 S.C.R. 9 ("*Mohan*") for admissibility are met: (i) relevance; (ii) necessity; (iii) absence of an exclusionary rule; and (iv) a properly qualified expert. If these criteria are met, the second stage requires consideration of whether the proposed evidence is sufficiently beneficial to the litigation to

warrant its admission despite the potential harm that may flow from it: *White Burgess*, at paras. 23-24. The question of a lack of impartiality is considered in determining whether the expert is properly qualified. However, if the evidence is admitted, the application judge also may consider any lack of impartiality or independence in the expert's evidence in determining the weight to accord to the evidence: *White Burgess*, at para. 45.

B. Ms. Coleman

[22] With respect to Ms. Coleman, the moving parties submit that she possesses neither the academic credentials nor the necessary experience through work or research to opine on the health risks or benefits of unpasteurized milk or food safety and its regulation. Ms. Coleman's most relevant experience is as a microbial risk assessor. The AGC emphasizes that Ms. Coleman does not hold any doctoral degrees and her master's degrees (in biology and biochemistry, and in medical microbiology) are not in areas directly related to the matters at issue; for example, she does not have training in either epidemiology or dairy science. Further, although Ms. Coleman worked as a risk assessor for a number of years at the United States Department of Agriculture ("USDA"), her only work there related to dairy products was a single listeriosis risk assessment in 2003 that included pasteurized and unpasteurized milk among a number of other foods.

[23] I conclude that Ms. Coleman has sufficient expertise in the assessment of microbial risk in milk to be qualified as an expert. Although the AGC emphasizes that Ms. Coleman does not have a doctorate, it is not necessary to have a PhD to be qualified as an expert. Indeed, the Court of Appeal has emphasized that formal education is not necessarily required to establish expertise, stating in *R. v. Mills*, 2019 ONCA 940, at para. 52 ("*Mills*"), that expertise acquired through on-the-job experience may be valuable. Here, although Ms. Coleman did not work extensively at the USDA with milk, she did work extensively with risk assessments in food more generally. Since 2014, she has run her own consultancy business providing risk assessments. In that capacity, Ms. Coleman has testified in two other legal proceedings, one regarding raw cheese in Ireland and one regarding raw pet food in the United States.

[24] Although the AGC submits that Ms. Coleman does not have expertise in the alleged health benefits provided by raw milk, the risk assessment method which she uses, quantitative microbial risk assessment ("QMRA") requires a consideration of benefits of a particular food, as well as its risks. Ms. Coleman therefore is qualified as an expert to consider the benefits of raw milk within her analysis.

[25] At its core, the moving parties' real argument is that Ms. Coleman has significantly less expertise in raw milk than the experts put forward by the Respondents. The Respondents' experts have enormous educational expertise as well as research and practical experience specifically related to raw milk. As further discussed below, I agree that the Respondents' experts' evidence generally is entitled to more weight than the evidence of Ms. Coleman. However, Ms. Coleman has sufficient expertise in the matters opined upon for her evidence to be admissible. She has two master's degrees and work experience related to her expertise in microbial risk assessment.

[26] The moving parties also submit that Ms. Coleman is not a "properly qualified expert," as described in *Mohan*, because of a lack of impartiality. Ms. Coleman has been retained by or affiliated with several raw milk advocacy organizations, all with the mandate of advocating for the lifting of restrictions surrounding the sale and distribution of raw milk. In addition, Ms. Coleman has engaged in crowdfunding for research related to raw milk. In a promotional video prior to conducting the research, she describes only the purported benefits of raw milk, without describing the risks, and encourages prospective donors that a donation "can begin to shift outdated policies."

[27] Ms. Coleman's advocacy related to raw milk does not disqualify her as an expert. As set out in *White Burgess* at para. 49, the "threshold requirement is not particularly onerous." Exclusion at the threshold stage should occur "only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion but should be taken into account in the overall weighing of costs and benefits of receiving the evidence": *White Burgess*, at para. 49; see also *Mills*, at paras. 42, 45.

[28] I agree with the comments of Schabas, J. in *Black et al. v. City of Toronto*, 2020 ONSC 6398, at para. 31, in which he noted that prior advocacy is not only common but unsurprising in public interest litigation:

> In public interest litigation of this kind, it would be surprising not to have experts who have expressed points of view and advocated for particular outcomes. Often, because of their commitment to their field and the conclusions they have reached, experts become involved in advocacy. However, this does not disqualify experts; if it did it would risk denying courts important perspectives on many issues. Courts are not naïve and can, where necessary, discount or ignore testimony of experts if and when it becomes advocacy as opposed to evidence.

[29] It is important that Ms. Coleman has acknowledged and agreed to comply with r. 4.1.01(1) in this case. In addition, although Ms. Coleman has a pre-existing affiliation with the position in favour of raw milk, her evidence does not exhibit obvious bias or partiality. She provides extensive evidence by citing numerous studies she claims support her opinion. Her evidence does not present as argumentative or manifestly partial. Although the AGC emphasizes areas in which it says Ms. Coleman is plainly wrong, I can consider these substantive issues in weighing the evidence. Ms. Coleman's previous affiliations have not led her to provide manifestly partial evidence in this case.

C. Mr. Kennedy

[30] The same analysis with respect to partiality applies to Mr. Kennedy. The moving parties submit that Mr. Kennedy cannot be impartial given his raw milk advocacy and the nature of his employment. Mr. Kennedy is an attorney in the United States who currently works for the Weston A. Price Foundation, which he describes as the "leading advocacy organization for raw milk in North America." He describes himself as having been a raw milk advocate since 2004. He also was a founding member and President of the Farm-to-Consumer Legal Defense Fund, which assists dairy farmers subject to enforcement measures for selling or distributing raw milk

and otherwise pursues litigation to reduce restrictions on access to raw milk. Mr. Kennedy has made strong statements about the situation regarding raw milk in Canada, having written that Canada is a "quiet dictatorship" with a "fascist" system of governance when it comes to raw milk. He also has admitted that part of the strategy of the raw milk advocacy organizations in the United States is to get a foothold for access to raw milk in individual jurisdictions, including Canada, and then attempt to expand access with the goal of achieving universal access to unpasteurized milk.

[31] Although Mr. Kennedy clearly has been an advocate for access to raw milk, his affidavit evidence in this case is limited to setting out the regulation of raw milk in the United States. Mr. Kennedy's affidavit describes the federal ban in the United States prohibiting the transport of raw milk and raw milk products. He also outlines the details of states in the United States that have legalized the sale and distribution of raw milk. Mr. Kennedy's evidence did not strike me as overly controversial and was rarely referred to in argument in this case. He has demonstrated neither a clear inability nor unwillingness to provide fair, objective, and non-partisan evidence.

D. Dr. Ijaz

[32] The moving parties submit that Dr. Ijaz's experience and academic credentials do not qualify her to opine on the subjects covered in her affidavit evidence. Further, as with the other experts that were targeted on the motion, they submit that Dr. Ijaz is not an objective and impartial witness.

[33] I find Dr. Ijaz's evidence to be admissible. Dr. Ijaz's affidavit evidence is intended to provide a socio-cultural critique of policy and regulation regarding raw milk. To that end, the topics addressed in her affidavit are: (a) the Canadian context of raw milk consumption; (b) a risk ranking profile of raw milk in industrialized countries; (c) a discussion of risk management; (d) a discussion of risk communication; and (e) the rationale for raw milk consumption in industrialized countries.

[34] In my view, Dr. Ijaz has the expertise to opine on the issues outlined above. Her qualifications are not specific to the science of raw milk, but she does have an interdisciplinary background that allows her to engage in a socio-cultural critique of health policy. Specifically, she holds a Master of Science degree in herbal medicine and a PhD in traditional, complementary, and alternative medicine. In her work, she critically examines the intersections between science, sociological/cultural context, and policy. I am mindful that Dr. Ijaz's expertise with respect to raw milk science and epidemiology, including how risk is best assessed, does not compare to that of the Respondents' experts. She addresses these topics in order to place the regulation of raw milk in a comparative context, but she does not have near the knowledge or expertise of the Respondents' experts in these areas. However, this is a matter of weight and does not render her evidence inadmissible.

[35] With respect to their submission that Dr. Ijaz is a raw milk advocate, the moving parties say she is unable to comply with the requirement of impartiality on the basis of her past involvement with the raw milk movement. The moving parties mostly point to her activities in organizing and publicizing a raw milk rally in 2011. Dr. Ijaz also attended at the Ontario Legislative Assembly in 2015, where she was introduced as a "raw milk advocate," although she

prefers to describe the meeting as a discussion pertaining to the regulation of raw milk in Ontario.

[36] Like the other witnesses, I am not persuaded that Dr. Ijaz's evidence meets the high threshold of clear unwillingness or inability to provide fair, unbiased, and impartial evidence. Most of the evidence related to Dr. Ijaz's advocacy dates back several years, prior to when she earned her master's degree and PhD. She now has provided affidavit evidence in which she refers to a multitude of studies and in which she has acknowledged some of the weaknesses in her position. For example, Dr. Ijaz has acknowledged that Canada's stance that raw milk consumption poses a greater risk of foodborne illness to the individual consumer than pasteurized milk consumption "is consistent with the stance taken by other industrialized world nations, and is a point upon which most scientific experts will also agree." Elsewhere in her affidavit, she states that there "remains general scientific consensus that, from the vantage point of foodborne risk, there is a sound basis for government public health recommendations to preferentially choose pasteurized over raw milk." In other words, although Dr. Ijaz has a history of raw milk advocacy, her evidence in this case does not suggest an inability to provide fair, unbiased, and objective evidence.

[37] In my view, none of the evidence discussed above is inadmissible at either the first or second stages of the *Mohan* analysis. The experts are properly qualified, and I do not consider the concerns about their evidence to rise to a level such that the harm of admitting the evidence outweighs its benefits. Therefore, my concerns regarding their evidence will be considered in the weight I attribute to it rather than to its admissibility.

Do the impugned provisions violate s. 2(a) of the *Charter*?

A. Section 2(a) freedom of conscience

[38] Turning to the *Charter* analysis, I find that the impugned provisions do not violate the Applicants' freedom of conscience protected by s. 2(a) of the *Charter*. The Applicants' beliefs in raw milk are sincere, but they are akin to a belief in a lifestyle choice. They are not the type of profound and fundamental beliefs that are entitled to *Charter* protection.

[39] Section 2(a) of the *Charter* protects freedom of conscience and religion. It reads:

> 2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion…

[40] Most of the analysis to date under s. 2(a) has been undertaken with respect to freedom of religion, although the Supreme Court of Canada and other courts also have provided some guidance with respect to freedom of conscience. The analysis under s. 2(a) requires claimants to show that (1) they sincerely believe in a belief or practice that has a nexus with religion, or, in this case, conscience; and that (2) the challenged law interferes, in a manner that is more than trivial or insubstantial, with their ability to act in accordance with their beliefs: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paras 56-59 ("*Amselem*"); *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 63 ("*Trinity Western*).

[41] I do not doubt that the Applicants have a sincere belief in the health benefits of raw milk. They also sincerely believe in their right to choose what they consume. However, these are not the types of beliefs protected by the *Charter*.

[42] The Supreme Court of Canada has consistently described s. 2(a) in a manner that emphasizes the profound and fundamental nature of the thoughts and actions protected. As stated in *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713, at p. 759:

> The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being.

See also *Amselem*, at para. 41.

[43] In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 179, Wilson, J. addressed freedom of conscience in particular, noting that, while not to be treated as indistinguishable from freedom of religion, the concepts are related. Her discussion of freedom of conscience referenced the connection to a "secular morality" as follows:

> It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.

[44] In *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)* (1994), 113 D.L.R. (4th) 67, at p. 82, Linden, J.A. distinguished between freedom of conscience and freedom of religion, while still emphasizing the seriousness of matters of conscience that would receive protection:

> It seems, therefore, that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles. These are serious matters of conscience.

[45] In this case, the Applicants' sincere belief in the importance of consuming raw milk simply does not have a profound moral dimension. Each of the 19 consumer Applicants has included often only a single paragraph in his or her affidavit articulating the conscience claim. The paragraphs are almost identical, reading typically as follows: "I hold, as a matter of conscience, that I should have the right to obtain raw milk from a farm in Ontario for the health benefits that I truly believe, and as studies have demonstrated, raw milk provides to me and my family." While all the Applicants emphasize the importance of the health benefits of raw milk, some elaborate on this position by emphasizing the Applicants' commitment to raw milk as an unprocessed food. For example, the Applicant, Allyson McMullen states that she believes raw milk provides her family "with nourishment as a living, whole and complete food" and emphasizes that she wishes to choose her family's "food, its source and natural state of being."

[46] There is no moral dimension to the Applicants' beliefs. The Applicants maintain that raw milk is good for their health, but they have not articulated any moral or other profound belief system that they say governs their position. Indeed, with the emphasis they place on health benefits, I agree with the submission of the AGC and other Respondents that, at its core, the Applicants' case is more properly a claim under s. 7 of the *Charter*, now shoehorned into s. 2(a) as a result of the failure of the s. 7 claim in *R. v. Schmidt*.

[47] In *R. v. Schmidt*, Sharpe, J.A. directly considered the same arguments now put forward in this Application. Mr. Schmidt argued that the provisions of the *HPPA* and the *Milk Act* violated s. 7 of the *Charter*. In addressing whether the impugned provisions violated Mr. Schmidt's right to liberty, Sharpe, J.A. at para. 40 dismissed the suggestion that the *Charter* could protect a lifestyle choice:

> I also agree with the respondent that preventing an individual from drinking unpasteurized milk does not fall within the "irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference." In my view, the appellant's argument to the contrary cannot be accepted in the face of the holding in *R. v. Malmo-Levine*, that "the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle." Lifestyle choices as to food or substances to be consumed do not attract *Charter* protection as "a society that extended constitutional protection to any and all such lifestyles would be ungovernable." Such choices, held the court, citing *Godbout*, are not "basic choices going to the core of what it means to enjoy individual dignity and independence." [Citations omitted.]

[48] The Supreme Court of Canada made a similar point in *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, [2017] 2 S.C.R. 456. There, lawyers for the Department of Justice asserted that a policy requiring them to be available on a standby basis on evenings and weekends violated their s. 7 *Charter* rights. In dismissing the s. 7 claim, the Court noted at para. 50 that the incursion into the private lives of lawyers did not "implicate the type of fundamental personal choices that are protected within the scope of s. 7," citing examples from *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 that "a taste for fatty foods, an obsessive interest in golf and a gambling addiction are not afforded constitutional protection."

[49] While there certainly are cases in which a *Charter* claim may satisfy the test for one *Charter* right and not another, that is not the case here, where the Applicants' focus on health and choice places it more comfortably within the scope of s. 7 than s. 2(a).

[50] In any event, it would be equally ungovernable to extend *Charter* protection to all lifestyle choices under s. 2(a). In *Bennett v. Canada (Attorney General)*, 2011 FC 1310, the Federal Court dismissed such a claim. There, the applicant submitted that the prohibition on the possession of marijuana in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, violated his rights under s. 2(a), given that his smoking of cannabis was religious pursuant to the tenets of the Church of the Universe. The Court concluded at para. 10 that "lifestyle choices such as these are not protected by the right to freedom of religion under paragraph 2(a) of the *Charter*."

[51] Finally, the Applicants' reliance on *Maurice v. Canada (Attorney General)*, 2002 FCT 69, 210 D.L.R. (4th) 186, does not assist their case. In *Maurice*, the applicant, an inmate at a federal correctional institution, had been refused a vegetarian diet. The Court found at para. 9 that the applicant's s. 2(a) freedom of conscience had been violated on the basis that vegetarianism is "founded in a belief that consumption of animal products is morally wrong." It is here that we see the core of the distinction from the current case: there is no moral basis for the Applicants' commitment to raw milk. The Applicants have affirmed repeatedly that they believe in the health benefits of raw milk. This is no different than a lifestyle choice and is not tied to a larger belief system of right and wrong. I find that the Applicants do not sincerely believe in a practice that has a nexus with conscience, as required by the first step of the s. 2(a) test.

[52] Given this finding, I do not need to consider the second step of the s. 2(a) test and it would not be appropriate to do so. The AGO submits that the second step of the s. 2(a) test should be applied differently in a conscience claim than it would be in a claim asserting freedom of religion. The Municipalities take a similar position. Since I do not consider the Applicants' conscience to be engaged, the facts of this case are not well-suited to exploring the contours of the second step of the s. 2(a) test. Accordingly, I decline to do so. I find that the Applicants' beliefs do not have a nexus with conscience and their freedom of conscience has not been infringed.

B. Section 2(a) freedom of religion

[53] For different reasons, I find that Mr. Bryant's freedom of religion, protected by s. 2(a), is not violated by the impugned provisions.

[54] The Respondents do not take a position on the sincerity of Mr. Bryant's belief, as set out in the first part of the s. 2(a) test, although the AGO draws attention to Mr. Bryant's evidence that there is no organized church for his faith in Canada and that he engages in solitary worship. I accept that Mr. Bryant has met the first part of the test, in that he has shown he has a sincere belief in the practice of consuming uncooked food and that this practice has a nexus to his religion.

[55] Mr. Bryant is an Essene and follows the teachings of the Essene Gospel of Peace. This includes the dietary laws set out in Book One of the Gospel. According to Mr. Bryant, pursuant to Book One, the Essene faith requires that its adherents eat only uncooked foods. This includes raw milk; pasteurization is unavailable to Essenes because the Gospel of Peace forbids heating food above the temperature of the "fire of life," which is body temperature.

[56] Mr. Bryant further believes that according to his Essene faith, having better health, which he believes can be achieved through the consumption of raw milk, enables a person to better communicate with God.

[57] Mr. Bryant is not required to produce expert evidence regarding the tenets of the Essene faith and is only required to show that he sincerely believes that having better health engenders a personal, subjective connection to the divine: *Amselem*, at para. 69. I accept that Mr. Bryant meets the first part of the s. 2(a) test.

[58] However, I am not satisfied that Mr. Bryant meets the second step of the test, that the impugned provisions interfere in a manner, that is more than trivial or insubstantial, with his ability to practice his belief. The onus is on Mr. Bryant to demonstrate that the interference is more than trivial or insubstantial. This part of the test requires an objective analysis of the interference caused by the impugned state action. It looks at the impact on the claimant rather than on the impact of the implicated practice or belief on others: *Trinity Western University*, at para 74; *Ktunaxa Nation v. British Columbia (Forest Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 70.

[59] Although Mr. Bryant has demonstrated a sincere belief that the Essene religion does not permit him to consume food cooked beyond body temperature, he has not demonstrated that being unable to purchase raw milk causes him more than a trivial interference with this belief. In the Applicants' factum, the discussion of Mr. Bryant's entire freedom of religion claim is limited to three sentences, which do not provide any indication of an interference of any significance. The factum states only as follows: "…the Applicant Bryant is an Essene. Under the Essene Gospel of Peace, anything that he and his family eat must be in its original state. Therefore, if Bryant wishes to consume milk it must be raw in order to remain faithful to his religion."

[60] On cross-examination, Mr. Bryant acknowledged that his religion does not require him to consume a minimum amount of milk. The quantity and type of raw milk is left to his discretion. He currently consumes it approximately once per year. Although the limitation on the sale and distribution of raw milk no doubt make consumption difficult for Mr. Bryant, the evidence does not suggest he is overly disturbed or disrupted by the low amounts he consumes. He thinks he should be consuming raw milk more than he is, but there is no evidence of needing a particular amount to support the practice of his religion. Moreover, the impugned provisions do not prohibit Mr. Bryant from consuming raw milk in any amount, although admittedly they make it much more challenging.

[61] Further, I note that Mr. Bryant's evidence interweaves his discussion of the divine with what appears to be a subjective belief in the health benefits of raw milk, separate from his religious faith. He states, for example, that it is important to him and his family (who are not Essenes) to continue to acquire raw milk. He believes that forbidding him to acquire raw milk, in addition to denying his right to practice his religious faith, would be a violation of his "right" to "optimize [his] health." Mr. Bryant's belief that better health improves his connection with the divine is extremely broad. It could be relied upon to justify almost any healthy lifestyle choice, which, as set out above, is not the sphere of personal belief the *Charter* is designed to protect. By interweaving his comments about his right to optimize his health with his comments about religion, Mr. Bryant has failed to demonstrate that the inaccessibility of raw milk specifically impacts his religious freedom in a manner that is more than trivial or insubstantial.

Do the impugned provisions violate s. 15 of the *Charter*?

[62] I also find that Ms. Stein has not established that the impugned provisions violate her right to equality protected by s. 15(1) of the *Charter* on the ground of disability.

[63] Subsection 15(1) of the *Charter* protects every individual's right to equality as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[64] The analysis under s. 15(1) requires a claimant to demonstrate that (1) the law creates a distinction based on an enumerated or analogous ground; and (2) the distinction is discriminatory in that the law perpetuates, reinforces or exacerbates disadvantage: *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 50 ("*Fraser*"). These requirements are the same in adverse effects cases, where it will be necessary to examine the impact of the law since the impugned law will not, on its face, include any distinctions based on prohibited grounds: *Fraser*, at para 50.

[65] Ms. Stein's claim is based on the alleged adverse effects of the impugned provisions. She states that she has a physical disability that prevents her from milking cows. In her submissions, because of her disability, she is denied the same benefit of the law enjoyed by able-bodied persons who are able to milk their own cows.

[66] In *Fraser*, the Supreme Court of Canada's most recent discussion of s. 15(1), the Court provided detailed guidance regarding the treatment of adverse effects claims. The Court emphasized at paras. 35-36 the importance of recognizing adverse effects discrimination, which is "'much more prevalent'" than openly direct discrimination, stating that by "recognizing the exclusionary impact of such discrimination, courts can better address 'discrimination in its diverse forms…'" (citations omitted).

[67] The Court described two types of evidence that would be useful to a court in adverse effects discrimination cases, while also recognizing that both are not required in every case. First, courts benefit from evidence about the physical, social, cultural or other barriers which provide the "'full context of the claimant group's situation'": *Fraser*, at para. 57. Courts also benefit from examining the outcomes of the impugned law or policy in practice. Ideally, courts would be provided with both types of evidence, as "evidence about the claimant group's situation, on its own, may amount to merely a 'web of instinct' if too far removed from the situation in the actual workplace, community or institution subject to the discrimination claim": *Fraser*, at para. 60.

[68] Here, the evidence Ms. Stein has provided falls drastically short of what would be needed to prove discrimination. Ms. Stein has not set out the minimum factual foundation that would be required to establish that she suffered an adverse impact from the impugned provisions. The Supreme Court of Canada has recognized the importance of a factual foundation in deciding a *Charter* claim: "Where a person challenging a law's constitutionality fails to provide an adequate factual basis to decide the challenge, the challenge fails… 'the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position'": *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3, at para. 22.

[69] The only evidence Ms. Stein has provided in support of her s. 15(1) claim is a single paragraph in her affidavit, in which she states that "[a]lthough I own a farm and I know how to transform raw milk in my kitchen into cheese and other dairy products, I am physically unable to milk a cow due to an upper limb birth defect." With this scant evidence, Ms. Stein has not proven that the impugned provisions disadvantage her. While asserting that she is unable to milk a cow herself, she does not consider or explain accommodations she might have made or equipment she could use to assist in the process, nor does she discuss whether family members on the farm could milk a cow. She provides almost no information about the actual situation in which her allegations of discrimination arise. I agree with the submission of the AGO that when an applicant seeks to have a law of general application struck down as unconstitutional, some level of detail and thoroughness is required beyond the single paragraph provided here.

[70] Even assuming that Ms. Stein is not able to obtain raw milk for consumption on her farm, she has not, in any event, shown that being unable to consume raw milk is a disadvantage, as required at the second step of the s. 15(1) test. While she states her belief that raw milk provides health benefits, as further discussed below in the s. 1 analysis, I am not persuaded that those benefits are proven. At best, the evidence suggests that there is correlational evidence connecting raw milk to protecting against asthma and allergies in children. The evidence is not causal and, in any event, Ms. Stein has not provided any evidence that she suffers from asthma. Moreover, raw milk allegedly minimizes allergies specifically in children and so clearly does not apply to her.

[71] In short, Ms. Stein has made out neither a distinction nor a disadvantage and her s. 15(1) claim must fail.

If the Applicants' *Charter* rights have been violated, is the violation saved by s. 1?

[72] If I am wrong and any of the Applicants' *Charter* rights have been violated, I in any event would find that the violation is justified under s. 1 of the *Charter*.

A. Pressing and substantial objective

[73] At the first stage of the *Charter* analysis, it is clear that the impugned provisions have a pressing and substantial objective. This part of the analysis is not an evidentiary contest; a theoretical objective asserted as pressing and substantial will generally be sufficient: *Harper v. Canada*, 2004 SCC 33, [2004] 1 S.C.R. 827, at paras. 25-26. In this case, according to the Regulatory Impact Analysis Statement ("RIAS") with respect to s. B.08.002.2 of the Regulations, the introduction of the pasteurization requirement in 1991 was intended to create a regulatory safeguard against milk-borne illnesses by implementing uniform control measures across Canada. The impugned provisions of the *HPPA* are similarly aimed at protecting the public against the risks associated with consuming raw milk. Legislative provisions aimed at protecting public health easily meet the requirement of a pressing and substantial objective: *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1995] 3 S.C.R. 199, at para. 65 ("*RJR-MacDonald*"); *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 65.

B. Proportionality

[74] At the next step in the s. 1 analysis, the Court will consider whether the means by which the legislative goal is furthered are proportionate.

I. Rational Connection

[75] First, the Respondents must show that the prohibition on selling and distributing raw milk is rationally connected to protecting public health. The rational connection can be established by reason and logic. It is aimed at preventing limits being imposed on rights arbitrarily: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48 ("*Hutterian*").

[76] In *R. v. Schmidt*, the Court of Appeal found that, under the s. 7 analysis, s. 18 of the *HPPA* complied with the principles of fundamental justice and, specifically, was neither arbitrary nor overbroad. Sharpe, J.A. stated that the scientific evidence in that case "easily" reached the standard of sufficient evidence giving rise to a reasoned apprehension of harm permitting the legislature to act: *R. v. Schmidt*, at para. 46.

[77] Although the s. 7 analysis regarding arbitrariness and overbreadth is distinct from the s. 1 proportionality analysis, the two have some parallels: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 124. The Court of Appeal's finding that s. 18 of the *HPPA* was not arbitrary, is at a minimum a good starting point in finding a rational connection. In any event, I find that there is a rational connection between pasteurization and protecting public health.

[78] The parties have put an enormous volume of evidence before me regarding the risks and purported benefits of raw milk. I am persuaded that consuming raw milk has serious health risks, which are substantially mitigated by mandatory pasteurization.

[79] First, there is a scientific consensus that unpasteurized milk is more harmful than pasteurized milk. The Applicants' expert, Dr. Ijaz, acknowledges this, stating that "[t]here is a general scientific consensus that raw milk, as a whole, as produced and consumed in industrialized countries, poses a greater risk of foodborne illness per serving than does pasteurized milk." Further, as excerpted above, she acknowledges a scientific consensus that there is a "sound basis" for government public health recommendations to preferentially choose pasteurized over raw milk.

[80] The reason unpasteurized milk is more harmful is because it contains pathogens. These pathogens are difficult, if not impossible, to completely eliminate from raw milk because there are numerous possible sources of contamination during production, including from the cow itself, from the environment, and from milking and storage equipment.

[81] The potential harm caused by raw milk is not insignificant. Common symptoms of milk-borne infection include diarrhea, vomiting, nausea, fever, and abdominal cramps. However, infected individuals can go on to develop more serious symptoms including chronic diseases and, in some cases, death.

[82] Certain vulnerable populations are most at risk from consuming unpasteurized milk. The people at highest risk from infection are the very young, the elderly, pregnant women, those already suffering from an illness, and immune-compromised persons. Young children, who have no choice in what they consume, are the demographic most affected by raw milk outbreaks.

[83] In addition, people who drink raw milk can become asymptomatic carriers of disease and transmit illness by person-to-person contact to non-consumers of raw milk. In other words, permitting the sale and distribution of raw milk can result in disease in those who have never made the choice to consume it.

[84] Meanwhile, the process of pasteurization is highly effective for reducing harm. Pasteurization inactivates the virulent pathogens in milk. The pasteurization process is designed to use the lowest temperature and time to render the milk safe. Pasteurization also safely reduces pathogenic bacteria without any significant effect on milk's nutritive value. Indeed, the evidence before me shows that outbreaks from raw milk are rare in countries where pasteurization is mandatory. In Canada, outbreaks have decreased dramatically since mandatory pasteurization was implemented.

[85] Although countries around the world have adopted a range of regulatory measures to address the risks of raw milk, public health agencies consistently raise those risks. For example, in a 2015 report, the European Food Safety Authority states that there are clear links between drinking raw milk and human illness associated with microbiological hazards. In 2014, the Centre for Disease Control in the United States recommended in a letter to state regulators that, to protect public health, they should continue to support pasteurization. In a 2014 policy statement, the American Academy of Pediatrics emphasized its support for pasteurization as follows:

> … the AAP strongly supports the position of the FDA and other national and international associations in endorsing the consumption of only pasteurized milk and milk products for pregnant women, infants, and children. The AAP also endorses a ban on the sale of raw or unpasteurized milk and milk products throughout the United States, including the sale of certain raw milk cheeses… This recommendation is based on the multiplicity of data regarding the burden of illness associated with the consumption of raw and unpasteurized milk and milk products, especially among pregnant women, fetuses and newborn infants, and infants and young children, as well as the strong scientific evidence that pasteurization does not alter the nutritional value of milk.

[86] A 2009 report of the Food Safety Agency of Australia and New Zealand concluded that raw milk represents a food safety hazard even where it is produced under strict regimens and undergoes pathogen screening.

[87] The Applicants submit that the science in favour of pasteurization is outdated, but this position is not borne out in the evidence before me. Many of the studies in evidence, including most of the reports outlined above, are from the last few years. One of the most recent studies put before me was a 2019 study from England and Wales, which found that the risk of drinking raw milk had increased since 2014 and that almost a third of outbreak cases were children.

[88] Further, the Respondents' experts, who have greater and more relevant expertise than the experts put forward by the Applicants, are unanimous in raising concerns about the risks of raw milk. These experts are:

1. Dr. Shannon Majowicz, who holds a doctorate of epidemiology and is a tenured associate professor in the School of Public Health and Health Systems at the University of Waterloo, with specific expertise in the epidemiology of foodborne infections;

2. Dr. Michele Jay-Russell, who is a Doctor of Veterinary Medicine, holds a PhD in microbiology, and is a research microbiologist at the University of California, Davis. Dr. Jay-Russell's research focuses on food safety and veterinary public health, as well as the development of industry guidelines to curtail and contain foodborne disease outbreaks.

3. Dr. Mansel Griffiths, who is a dairy microbiologist and author of over 400 peer-reviewed articles on the subject of dairy microbiology and food safety. He has served as the Senior Industrial Research Chair in Dairy Microbiology in the Food Science Department at the University of Guelph from 1990-2014 and the Director of the Canadian Research Institute for Food Safety from 1999-2015.

4. Dr. John Lucey, who holds a Doctorate in Food Chemistry and is a full professor in the Food Science Department at the University of Wisconsin-Madison. He is also the Director of the Wisconsin Centre for Dairy Research. He has been in full time dairy research for 28 years. Dr. Lucey is an internationally recognized expert on milk chemistry and has published research on the risks and purported benefits of unpasteurized milk.

5. Dr. Keith Warriner, who holds a Doctorate of Food Science and teaches food microbiology and food safety management at the University of Guelph. Dr. Warriner researches and publishes in the area of food safety, including research on how interventions might reduce pathogen levels in unpasteurized milk.

[89] The Applicants rely heavily on a study published in 2018 by Joanne Whitehead and Bryony Lake (the "Whitehead and Lake study"). The Whitehead and Lake study was put into evidence by Ms. Coleman. According to Ms. Coleman, the study determined that legalizing access to raw milk in more states of the United States resulted in lower rates of outbreaks, particularly when controlling for population growth and consumption. Ms. Coleman described the study as "authoritative, based on the best available data."

[90] Although I determined above that Ms. Coleman's evidence was admissible, here, her evidence cannot be given weight in the face of the expertise of the Respondents' experts. Although Ms. Coleman described the Lake and Whitehead study as "authoritative," she admitted on cross-examination that she did not follow the journal in which it was published and that she does not "follow epidemiology," nor does she "follow outbreaks." These are the very things the study was about.

[91] Meanwhile, the Responding experts who commented on this study have specific expertise directly relevant to the study. Dr. Majowicz, who holds a doctorate in epidemiology, for example, states that the Lake and Whitehead study is "highly flawed."

[92] John Sheehan, retained by the AGC, is the Director of the Division of Dairy, Egg, and Meat Products within the Office of Food Safety, Center for Food Safety and Applied Nutrition, United States Food and Drug Administration ("FDA"). Mr. Sheehan explains that the FDA, together with the United States' Centers for Disease Control and Prevention ("CDC"), had serious concerns about the Whitehead and Lake Study. Specifically, on a close review of the study, the FDA and CDC identified significant concerns with the methods, quality, and statistical rigor of the article, which had used and analyzed data collected by the CDC itself. Because of their concerns, officials from both agencies issued a joint letter to the journal's editors, asking them to carefully consider whether the article should remain in publication. Mr. Sheehan's view is that the issuance of the letter by the FDA was "quite extraordinary," a step he had never seen the FDA previously take.

[93] The Applicants also submit that the impugned provisions are arbitrary given that those living on farms and owning cows can consume raw milk, while others cannot. The fact that the responding governments have allowed a measure of choice on a family's own farm does not negate the rational connection between prohibiting the sale and distribution of raw milk and protecting public health. Governments are not required to impose more restrictive measures in order to justify regulation for public health and safety.

[94] In short, the evidence on the record before me shows that consuming unpasteurized milk poses serious health risks, particularly to vulnerable populations, and that pasteurization is a highly effective step to significantly reduce that risk. There is a rational connection between the legislation prohibiting the sale or distribution of unpasteurized milk and the governments' public health objectives.

II. Minimal Impairment

[95] At the next stage of the proportionality analysis, the Respondents must demonstrate that the measure at issue impairs the right as little as reasonably possible in furthering the legislative objective. The measure must be "carefully tailored" to ensure that rights are impaired no more than is reasonably necessary. In making this assessment, the courts accord the legislature "a measure of deference." As set out in *RJR-MacDonald*, at para. 160: "If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement." See also *Frank v. Attorney General (Canada)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 66.

[96] Here, the requirement that milk be pasteurized for sale or distribution falls within a range of reasonable alternatives. The Applicants point to other countries in which pasteurization is not required, to say that less minimally impairing options are available. Specifically, for example, 43 states of the United States permit the sale of raw milk. In England, Wales and Northern Ireland, the sale and distribution of raw milk is legal. Germany has a sophisticated regulatory scheme called Vorzugsmilch, under which the sale of raw milk is permitted.

[97] On the other hand, other countries have taken an approach similar to Canada. For example, Scotland implemented a prohibition on the sale of raw milk in the 1970s following numerous outbreaks due to contaminated raw milk that resulted in thousands of illnesses and four reported deaths. In the United States, while some states permit the sale of raw milk, at the

federal level, the sale and distribution of raw milk is prohibited. In Victoria, Australia, the sale of raw milk is only permitted for cosmetic purposes. In 2014, a three-year-old boy in Australia died from consumption of organic bath raw milk labeled "not for human consumption." An additional four children became sick from drinking the same brand of bath milk. Following these illnesses and the death of the child, Victoria instituted a regulation requiring bath raw milk produced for cosmetic purposes to contain a bittering agent that gives it a bad taste to discourage human consumption.

[98] Further, the government is entitled to take the means necessary to meet the objective it has set to protect vulnerable members of the population such as children. Legislative action to protect vulnerable groups is not "necessarily restricted to the least common denominator of actions taken elsewhere." The legislature is not required, in the name of minimal impairment, to "choose the least ambitious means to protect vulnerable groups": *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 999; *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393, 147 O.R. (3d) 444, at para. 154.

[99] The evidence is that jurisdictions without a prohibition on the sale of raw milk have experienced greater harm from the consumption of raw milk. In Canada, outbreaks from raw milk are now rare. In England and Wales, by contrast, within two years of the liberalization of their raw milk regulations, five outbreaks involving a total of 103 reported cases arose among milk consumers. In New Zealand, where raw milk sales are permitted, between 2009 and 2016 there were 46 outbreaks of illness linked to consuming raw milk, 70% of which involved children from one year to 16 years old.

[100] Further, Germany's situation is unique. The Voszugsmilch system is an expensive and complicated system involving elaborate on-farm testing and veterinary interventions. Only 14 producers in a country of more than 80 million people operate under this system. More importantly, the system requires a willingness to comply with stringent regulatory requirements, an attitude that has not been seen among raw milk producers in Ontario, who have been willing to contravene court orders. Specifically, the first legal proceeding concerning Glencolton Farms was commenced in 1994 when Ms. Vander Hout's spouse, Mr. Schmidt, was the subject of an *HPPA* order to cease processing raw milk. As stated by the AGO: "This marks more than a quarter century of litigation concerning many of the same people, the same farm, and the same legal issues." In spite of the injunctions granted in *Downing* in 2018, the evidence is that Glencolton Farm has continued to make their raw milk available to members of the public in the years since then.

[101] I do not accept the Applicants' submission that the dangers posed by the sale and distribution of raw milk are a *de minimis* public health issue. Illnesses reported as part of an outbreak are only the tip of the iceberg. Many people do not report or get tested for their illness. Dr. Majowicz estimates that only one in about 20-27 cases of infection are reported. Moreover, as set out above, in jurisdictions where the sale of raw milk is permitted, outbreaks can and do occur. Some of the Applicants have provided evidence on this Application that, if permitted, they would feed raw milk to their children. I do not consider the death of even one child to be a *de minimis* problem, particularly where it can be easily prevented through the straightforward, low-cost, and effective step of pasteurization.

[102] I also do not accept the Applicants' position that the risks of raw milk could be effectively mitigated by various improvements, such as testing the milk and farm management safety practices. Leaving aside the evidence of outbreaks from jurisdictions that do permit the sale of raw milk under strict conditions, the evidence before me is that it is difficult if not impossible to eliminate pathogens from pasteurized milk because of the numerous possible sources of pathogen contamination during production. Testing of unpasteurized milk also is an unreliable method to ensure food safety, as it only captures a snapshot of pathogen prevalence at a point in time and does not reflect and anticipate microbiological growth and distribution. For example, milk may have an organism at a level so low to be below detection but that subsequently grow to levels that are unacceptable after testing. In addition, contamination may not be evenly distributed in the milk.

[103] The Applicants also point to the fact that other foods with the risk of foodborne illnesses are sold raw, such as romaine lettuce and chicken. This argument does not convince me that the impugned provisions fail the minimal impairment step. First, vegetables do not have the same risk profile as raw milk, as they are not produced by animals, thereby carrying an intrinsic risk of disease. In addition, there is no easy, uniform, mechanism to control the risk for other foods, as there is with milk.

[104] In sum, given the effectiveness of pasteurization in addressing the serious health risks to vulnerable groups, especially in comparison with other alternatives, the prohibition on the sale and distribution of raw milk falls well within the range of reasonable alternatives open to the legislatures.

C. Final Balancing

[105] The final step of the proportionality analysis involves a consideration of whether the deleterious effects to an individual's *Charter* rights are out of proportion to the public good achieved by the infringing measure: *Hutterian*, at para. 78.

[106] It is evident from my s. 2(a) and s. 15 analyses that I do not consider the infringement of the Applicants' rights, if any exist, to have a particularly deleterious effect. The impugned provisions interfere with what I have found to be a lifestyle choice. With respect to Mr. Bryant, his evidence does not support a significant interference with his freedom of religion. This is to be measured against the important benefits of the impugned provisions in protecting the health of vulnerable groups.

[107] The Applicants assert that the deleterious effects include depriving them of the health benefits of raw milk. However, the evidence only establishes at best an association between raw milk and protecting children from allergies and asthma. It does not establish a causal connection to this or any other purported benefit.

[108] The Applicants specifically submit that unpasteurized milk is beneficial for three reasons: (1) raw milk helps protect children from allergies and asthma; (2) raw milk has protective probiotic and prebiotic effects on the human microbiome; and (3) if pregnant women drink raw milk, there is a protective effect on newborn infants. However, on this third point, even the

Applicants acknowledge there is limited and only "preliminary" evidence. None of the other experts find any evidence of this protective effect.

[109] With respect to the first two purported benefits, the Applicants rely on the evidence of Ms. Coleman and Dr. Ijaz. I have ruled their evidence to be admissible, but I give it less weight than the evidence of the Respondents' experts. The experience Ms. Coleman relies on as relevant to her opinion in this matter is her experience as a microbial risk assessor. Although I accept that in that role Ms. Coleman has some ability to consider the benefits of specific foods, her expertise in doing so is not comparable to that of the AGC's expert Dr. Lucey. As set out above, Dr. Lucey has been engaged in full-time research related to dairy for 28 years. He has published specifically in the area of the possible risks/benefits of raw milk. Similarly, while Dr. Ijaz's expertise permits her to engage in a socio-cultural critique of health policy, her expertise in the health benefits of raw milk pales in comparison to the expertise of Dr. Lucey.

[110] According to Dr. Lucey, whose evidence on the health benefits of raw milk is consistent with the evidence of Dr. Majowicz (who also has published in this area) and the evidence of Dr. Griffiths, "at least 6 comprehensive scientific reviews published over the past 17 years all conclude that there are no proven nutritional benefits associated with raw milk (over the consumption of pasteurized milk)."

[111] Dr. Lucey accepts that there is an association between the farm environment and reduced risk of farm children developing allergies and asthma. Some epidemiological studies have suggested that consumption of raw milk is one factor in this reduced risk. However, no component in raw milk has been isolated or demonstrated to have any "protective" effect. The bottom line, according to Dr. Lucey, is that the suggestion that raw milk provides protection against allergies "remains an unproven theory or hypothesis."

[112] Meanwhile, there is a clear proven connection between the consumption of raw milk and harm to health. Indeed, as explained by Dr. Griffiths, scientists now have direct evidence, through whole genome sequencing, of the causal connection between contaminated raw milk and illness, even for those who did not consume the raw milk but were exposed to illness through contact with others. In short, the hypothetical benefit of raw milk in protecting children from allergies is much less compelling than the clear causal connection between raw milk and what is in some cases serious illness causing hospitalization and even death.

[113] Overall, the benefits of the impugned provisions outweigh their deleterious effects. I find that the Respondents have satisfied the proportionality test. Any violation of the Applicants' *Charter* rights is saved by s. 1.

Disposition

[114] The Application is dismissed.

[115] I was advised at the conclusion of the hearing that the only responding party seeking costs is the AGO. If the parties are not able to reach an agreement on costs, the AGO has 21 days from the date of this decision to provide submissions of no more than 5 pages double-spaced, not including attachments. The Applicants will then have 14 days to provide responding submissions with the same limitation on length. The submissions may be sent to my judicial assistant, Anna Maria Tiberio.

Released: February 11, 2021