

**ONTARIO COURT OF JUSTICE
(Newmarket)**

B E T W E E N:

**HER MAJESTY THE QUEEN
(Ministry of Natural Resources and Grey Bruce Health Unit)**

Appellants

- and -

MICHAEL SCHMIDT

Respondent

FACTUM OF THE RESPONDENT

PART 1 — SUMMARY OF THE FACTS

1. The respondent (hereinafter “Schmidt”) is a farmer who tends a herd of approximately 30 cows on a farm located at Lot 44, Concession 3, Glenelg Township, Grey County, Ontario.
2. Schmidt is not the owner of the cows; rather, he is the agister under contracts of agistment with the herd’s owners, a group of approximately 150 individuals, hereinafter referred to as “cowshare members”.
3. The cowshare members pay Schmidt for his services in tending the cows, including milking the cows, in accordance with the quantity of milk and milk products they obtain. (Hereafter, the word “milk” shall be used to include milk products.)
4. Cowshare members take possession of their milk in its original “raw” or unpasteurized condition.
5. Cowshare members are fully cognizant of the unpasteurized nature of the milk, and deliberately seek out the services of Schmidt specifically for that purpose.
6. Cowshare members believe, whether as a result of personal experience or as a result of research they have done, that unpasteurized milk provides them with health benefits that they cannot obtain from consuming pasteurized milk. In particular, raw milk advocate James McLaren feels extremely healthy when he

consumes raw milk as approximately 40 percent of his diet, but feels ill when he consumes pasteurized milk.

7. Pasteurization changes the nature of raw milk by destroying or inactivating various vitamins and enzymes.
8. Eric Bryant, one of the cowshare members, is an Essene Jew whose religious beliefs require that he consume all of his food in its raw state, and that he consume milk.
9. It is not illegal to consume unpasteurized milk in Ontario. It is illegal, however, to “sell, offer for sale, deliver or distribute” unpasteurized milk in Ontario. Consequently, the practical reality is that farmers are able to drink unpasteurized milk while non-farmers are not.
10. Both raw milk and pasteurized milk have from time to time been the source of food-borne illnesses in humans.
11. There are other measures besides pasteurization that can greatly decrease the likelihood of pathogens being present in raw milk.
12. Raw milk is sold legally in many other countries of the world, including some states of the United States, England, Wales, Germany, Finland, Sweden and New Zealand.
13. There is no known instance of any individual ever becoming ill as a result of consuming the raw milk produced by Schmidt.
14. Schmidt has devoted many years of his life to campaigns and activism promoting changes and challenges to the legislative and regulatory regime governing the pasteurization of milk in Ontario, to permit non-farmers who wish access to unpasteurized milk the right to obtain it legally.
15. Schmidt was charged with 19 offences under subsections 18(1) and 18(2) of the *Health Protection and Promotion Act*, R.S.O. 1990, chapter H.7 (“*HPPA*”) and subsections 15(1) and 15(2) of the *Milk Act*, R.S.O. 1990, chapter M.12 (“*MA*”). He was found not guilty at trial. The Crown is now appealing his acquittal.

PART 2 — RESPONSE TO APPELLANTS’ FACTUM

APPELLANTS’ ISSUE A: Did Justice Kowarsky err in law by deciding that the *HPPA* and *MA* offence provisions required a restrictive interpretation?

15. Justice Kowarsky was justified in considering that the terms of the *HPPA* and the *MA* were drafted in general terms and required the court to adopt a restrictive interpretation.

16. One of the charges against Schmidt was that of operating a plant without a licence. The definition of “plant” in the *Milk Act* is as follows:

“plant” means a cream transfer station, a milk transfer station or premises in which milk or cream or milk products are processed

17. The word “processed” is not defined in the Act, but its meaning can be derived from the definition of “processing” which is as follows:

“processing” means heating, pasteurizing, evaporating, drying, churning, freezing, packaging, packing, separating into component parts, combining with other substances by any process or otherwise treating milk or cream or milk products in the manufacture or preparation of milk products or fluid milk products;

18. This definition is so broad as to encompass every mother who heats store-bought milk for her baby’s bottle, and every homemaker who makes yogurt, ice cream or a latté at home in her small kitchen appliances. If the definitions of the *Milk Act* were applied literally, all of these individuals would be “processing” milk, and their kitchens would be “plants” for which they must obtain licences. The 4H club member who raises a single cow as a project would likewise have to have a licence for the “plant” in which she bottles or “packages” her pet’s milk.
19. It is apparent, therefore, that the legislature could not have intended the definition of “plant” in the *MA* to be taken literally. The statute must be given a restrictive interpretation, confined to public, commercial enterprises rather than private endeavours, in order to properly reflect the intentions of the legislature.
20. Likewise, if the word “distribute” in the *HPPA* were given a broad interpretation, this would outlaw some activities which the legislature could not reasonably have intended to outlaw. Suppose, for instance, that two brothers are co-owners of a dairy farm. Each brother individually is entitled to drink the milk raw. However, if one brother hands a glass of raw milk to his sibling, he could theoretically be said to have “distributed” raw milk—an illegal act. This would obviously be absurd. Or, suppose a hired farm-hand brings a bottle of milk into the farm kitchen at the request of the farm owners. He could theoretically be said to have “distributed” it, but again it would be ludicrous for such an act to be illegal when the owners could have simply brought the milk from the barn themselves without breaching the law.
21. Accordingly, it seems clear that there are instances of the word “distribute” which the legislature could not reasonably have intended to outlaw. A restrictive interpretation of the statute is therefore necessary.
22. The MNR argues that as public welfare statutes, the *HPPA* and *MA* should be interpreted in a manner consistent with their purpose and objective. The purpose clauses of the statutes themselves are set out in the Respondent’s Book of Authorities¹. Those purposes do **not** include a complete banning of raw milk. If

¹ *HPPA* section 2 and *MA* section 2, Respondent’s Authorities (hereinafter “RA”), Tabs 1 and 2

that had been the intention, the *HPPA* would have added “consume” to the list of things that could not legally be done, i.e. “sell, offer for sale, deliver, distribute *or consume* milk or cream that has not been pasteurized” [italicized words added].

23. One purpose of the *HPPA* is to promote and protect the health of the people of Ontario. According to the evidence of witnesses James McLaren and Eric Bryant, their health and the health of Kailee Bryant were all improved by consuming raw milk.² Consequently, interpreting the *HPPA* to outlaw these individuals’ ability to acquire raw milk via a cowshare would have the result of adversely affecting the health of at least *some* people in Ontario, and therefore would undermine, rather than promote, the purposes of the *HPPA*.
24. Justice of the Peace Kowarsky was therefore correct in determining that the statutes should be interpreted restrictively, and that so long as unsuspecting or unwary members of the public were not being put at risk, the cow-sharing or herd-sharing system used by Schmidt does not offend the legislation.

APPELLANTS’ ISSUE B: Is the Defendant’s Milk Distribution Scheme Legal?

25. The MNR argues, in essence, that the cow-sharing or herd-sharing plan used by Schmidt is a sham.
26. However, Canadian law is clear that “Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be.”³ The same philosophy applies to regulation. The default position in English common law is that people may do anything that isn’t explicitly forbidden. It is **not** that all actions are forbidden unless explicitly permitted.
27. In *Chambers v. Pennyfarthing Dev. Corp.*,⁴ the B.C. Court of Appeal said that “a contract can be disregarded as a sham only if there is an element of deceit in it and that no sham results where parties intend to create certain legal relationships and are successful in creating those legal relations, even though there is no business purpose other than the tax purpose.”
28. The evidence is uncontroverted that Schmidt’s cow-sharing arrangement is openly consented to by all parties. Indeed, the non-farm dwellers deliberately seek out the arrangement. There is no element of deceit. Schmidt has not contrived a scheme for bypassing the pasteurization regulations in order to fraudulently foist raw milk upon unsuspecting members of the public.

² Affidavit of James McLaren sworn May 12, 2010, at par. 8—17; affidavit of Eric Bryant sworn May 26, 2010 at par. 4—7 and 14—20 , and transcripts of cross-examinations of James McLaren and Eric Bryant.

³ *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 540, RA, Tab 7

⁴ *Chambers v. Pennyfarthing Dev. Corp.*, 1985 CanLII 498 (BC C.A.), at par. 160, RA, Tab 8

29. The concept of agistment has been known to English law for centuries. An agister provides care for cattle, horses, or other livestock owned by others, for remuneration. The owners of the livestock, not the agister, are entitled to the products of the animals, whether those products be foals, calves or milk. Contracts of agistment are structured with a wide variety of payment terms.
30. For instance, the case of *Macleod v. Brown*⁵ involved a lawsuit in which the owner of cattle sued the agister for allowing several cows to go missing. The agister was being paid for his services at a fixed rate per cow per month. By contrast, the case of *Langstock (Med. Hat) Ltd. V. Gyorfi*⁶ involved an agistment contract in which the agister was paid according to the number of pounds of weight gained by the cattle while under his care. The case of *Deeg v. Jacques*⁷ confirms that the cattle owners are entitled to the products of the animals; this was an agistment contract in which the agister was paid \$1.50 per head per day in winter and \$1.00 per head per day in summer.
31. The uncontradicted evidence is that Schmidt's cowshare members pay an invariable capital sum up front (\$300) in order to acquire their capital interest in the herd. They then become communal owners of an undivided interest in the cows. The payment of capital and the resulting ownership rights cannot be ignored. If the group owns the animals, then it follows under the law of agistment that the group owns the products of the animals, i.e. the milk.
32. The mere fact that cowshare owners pay for Schmidt's services according to the quantity of milk products they take possession of does not negate the fact that they already own the milk. There must be some mechanism to allocate the expenses of servicing the communally owned cows, and payment in proportion to the milk that each group member takes possession of has an obvious element of fairness to it.
33. Flexible co-ownership of assets is not uncommon in Canada. Neighbours may co-own riding lawn mowers or snow-blowers, items of significant capital expense which they do not need exclusive use of. Hunters frequently co-own hunting camps. Siblings or cousins frequently co-own cottages, often acquired by inheritance. Co-owners frequently make unequal use of the joint property, and the variety of arrangements for paying for the upkeep of the joint property are legion.
34. Accordingly, none of the evidence recited in paragraph 22 of the Appellants' Factum negates the fact that the cowshare owners already own the milk. In particular:
- (a) nothing is implied by Schmidt's use of the term "customers" since the cowshare owners are indeed the agister's customers for his animal care services;

⁵ *Macleod v. Brown*, [1947] A.J. No 4, [1947] 2 W.W.R. 364, Alberta Supreme Court, RA, Tab 9

⁶ *Langstock (Med. Hat) Ltd. v. Gorfi*, [2006] A.J. No. 1706, Alberta Court of Queen's Bench, RA, Tab 10

⁷ *Deeg v. Jacques*, 2008 SKQB 68, Saskatchewan Court of Queen's Bench, RA, Tab 11

(b) the reference to “buying” in the phrase “Customers—who buy a wide range of products including milk, bread, cheese, eggs, etc.” is necessary because bread and eggs do not come from cows and are not already owned by the cow-share owners, but must be purchased;

(c) the references to “sales” of milk, while admittedly imprecise language on Schmidt’s part, are simply shorthand method of communicating a concept that would otherwise require verbose circumlocutions, and do not negate the cowshare owners’ contractual rights;

(d) the fact that Susan Taylor was permitted to take possession of milk on the same day (October 20, 2006) as she acquired her cow-share membership is not indicative of a sham; Ms. Taylor had notified Schmidt three days earlier, on Tuesday, October 17, of her intention to join the cow-share on the upcoming Friday (i.e. October 20) and Schmidt was therefore able to produce “her” milk in advance, relying on her stated intention⁸. This is corroborated by the evidence of Crown witness Victor Miller.⁹

35. With respect to the two small quantities of cheese obtained by Susan Atherton prior to becoming a cow-share member, Schmidt’s evidence was that he gave her the cheese in order to ensure that she could digest it before she purchased her cow-share membership. He testified that he did not sell it to her.¹⁰ In this regard:

(a) Justice Kowarski’s finding that Schmidt’s evidence was highly credible and gave rise to reasonable doubt¹¹ should not be disturbed by an appellate court who did not have the advantage of hearing the two conflicting witnesses *viva voce*.

(b) A gift made to a single individual is not within the usual meaning of the word “distribute” which has connotations of multiple recipients.

(c) Even if Schmidt’s small gifts could be construed as “distributing” as opposed to “selling” the cheese, in light of the submissions above regarding the necessity of reading the statutes restrictively, these isolated incidents should not be considered the evils that the legislation was designed to prevent.

(d) In the alternative, any conviction of Schmidt in respect of these offences should be set aside due to the law of entrapment. Atherton deliberately set out to induce the commission of the offence. She and her colleague Miller lied to Schmidt, saying that she was facing imminent surgery and wanted to build up her immune system

⁸ Evidence of Susan Atherton, Transcript of Proceedings at Trial, Volume 2, pages 40-41

⁹ Evidence of Victor Miller, Transcript of Proceedings at Trial, Volume 2, page 89, lines 15-25.

¹⁰ Evidence of Michael Schmidt, Transcript of Proceedings at Trial, Volume 3, pages 127-128

¹¹ Decision of Justice of the Peace Kowarski, *R. v. Schmidt*, 2010 ONCJ 9, at paragraph 75.

beforehand.¹² They played upon Schmidt's innate inclination to assist his fellow man. Schmidt never sought Atherton out attempting to sell cheese to her and would not have done so if she had not plotted and connived to induce him. It would bring the administration of justice into disrepute if such tactics were permitted to result in a conviction.¹³

(d) In the further alternative, the maxim *de minimis non curat lex* should be applied. Each packet of cheese was worth \$3.20, for a total of \$6.40. This trifling act should never have triggered a prosecution costing hundreds of thousands of dollars.¹⁴

APPELLANTS' ISSUE C: Are the transactions between Schmidt and his customers sales of milk or sales of services?

36. The respondent submits that the legislation and cases cited by the Appellants on Issue C are so far removed factually from this case as to be of no assistance whatsoever in determining whether Schmidt was selling goods or services.
37. The Appellants cite the *Sale of Goods Act*, but the codification of the law of property transfers has no bearing on the issues under appeal.
38. The Appellants cite *Gee v. White Spot Ltd*, in which the plaintiffs sought a ruling that their purchase of food at the defendant's restaurant fell within the B.C. *Sale of Goods Act* in order to take advantage of the warranty of merchantability, after they contracted botulism. Nothing in the case suggests that the restaurant patrons had paid a capital sum in advance to the restaurateur so that they already owned the food and no sale occurred. The mere fact that some contracts might be hybrid sales of goods and services says nothing whatsoever about whether Mr. Schmidt sold milk to his agistment customers, or whether they in fact already owned the milk and were merely paying for his services. The *Gee* case is simply irrelevant.
39. Likewise, the Appellants cite *Preload of Canada v. Regina*, another case in which plaintiffs sought to characterize their contract as a sale of goods in order to take advantage of Saskatchewan's statutory warranties of merchantability. The goods in question were pre-stressed concrete pipes being manufactured by the defendant. There is no suggestion that the plaintiffs had already purchased the factory that made the pipes, and therefore owned the pipes throughout the manufacturing process. This is not at all comparable to Mr. Schmidt's case, in which both parties to the transaction (the agister and the cow-share member) agree that the only property which has ever changed title is the cow (i.e. the "milk manufacturing

¹² Evidence of Douglas Miller, Transcript of Proceedings at Trial, Volume 2, pages 101-102 and 105; Evidence of Michael Schmidt, Volume 3, pages 99 and 127

¹³ Cases on entrapment which the respondent relies upon are *R.v. Mack*, [1988] 2 S.C.R. 903 at RA, Tab 12 and *R.v. Townsend*, [1997] OJ No. 6516, at RA, Tab 13.

¹⁴ Cases on the *de minimis* rule which the respondent relies upon are *R. v. Chapman*, 2008 ONCJ 552 and *R. v. K. (D.)*, 2007 ONCJ 116 at RA Tabs 14 and 15

plant”), not the milk itself. It is only the government who seeks to characterize the Schmidt agistment contracts differently. The *Preload* case is irrelevant here.

40. The respondent relies upon his arguments at paragraphs 31 to 34 above. The mere fact that this instance of co-ownership may have flexible or vaguely-defined terms does not negate the essence of the arrangement as one of co-ownership.

APPELLANTS’ ISSUE D: Did the Respondent violate the Order of the Health Inspector by storing and displaying raw milk and its products?

41. The order of Inspector McLeod dated February 17, 1994 is addressed to “Schmidt, Michael and Schmidt, Micheal [sic] operating as Glencolton Farms Lot 38, 39 and 40, con 2 EGR Glenelg Township, Grey County, Ontario”. The order then states: “NOTICE This order is directed to you *in your capacity as operator of the premises referred to in the Order.*” [underlining in the original, italics added for emphasis]
42. Schmidt’s uncontradicted evidence was that he had been operating at Lots 38, 39 and 40 of the said concession in 1994, but that he lost ownership of those lots shortly thereafter. His current operation is conducted in premises not referred to in the Order, namely at Lot 44. Schmidt believes that he had complied with the order by ceasing to perform the forbidden activities at the specified location.¹⁵
44. It was submitted by the Crown at trial¹⁶, and accepted by Justice Kowarsky¹⁷, that violation of the 1994 order would be a strict liability offence. Therefore, the defences available to the accused are: (i) an honest but mistaken belief in facts which, if true, would render his acts innocent or (ii) proof that he exercised all reasonable care to avoid committing the offences.
45. Schmidt had an honest belief that the order applied only to the premises specified in it, as the order itself states. This court may determine that his belief was factually correct, or factually incorrect. Either way, there is no evidence to refute Mr. Schmidt’s assertion of his honest belief. If his belief was honest but mistaken, he is still entitled to assert that defence as rendering his acts innocent.
46. Furthermore, Schmidt’s conduct indicates that he exercised all reasonable care to avoid breaching the order. The order as amended on appeal forbade him from “offering for sale, distribution, storage and display, sale, offering for sale and distribution”. His method of operation prior to the order had been cow-leasing. After the order, he developed the cow-sharing program, for the purpose of avoiding any inference that he was selling, offering for sale, or distributing.¹⁸

¹⁵ Evidence of Michael Schmidt, Transcript of Proceedings at Trial, Volume 3, pages 130, 131 and 137. Also, submissions of defendant, Transcript Volume 4, page 13.

¹⁶ Submissions of Mr. Middlebro, Transcript of Proceedings at Trial, Volume 4, page 17.

¹⁷ Decision of Justice of the Peace Kowarski, *R. v. Schmidt*, 2010 ONCJ 9, at paragraphs 17-24

¹⁸ Evidence of Michael Schmidt, Transcript of Proceedings at Trial, Volume 3, pages 95-98

47. With regard to “displaying”, the evidence of the two Crown witnesses was inconsistent. Susan Atherton testified that milk in the blue bus was in wooden crates in a section of the bus that was “sectioned off”¹⁹. This bears no resemblance to anything ordinarily thought of as a “display”. Atherton then testified that the milk in the farm store coolers was visible to people through glass doors bearing signs marked “Members only.”²⁰ However, her colleague Victor Miller and Michael Schmidt both testified that the coolers had solid, stainless steel doors, making the milk not visible until the doors were opened.²¹ Schmidt, as the owner of the coolers, can certainly be expected to be accurate about their appearance, and there is no reason to doubt his veracity on this point. Where there is reasonable doubt, the benefit of the doubt must be given to the accused. It would appear that Susan Atherton was mistaken (which also raises some doubts about the accuracy of her other evidence). Milk placed behind steel doors can hardly be said to be “displayed” under any reasonable interpretation of that term. Again, Schmidt demonstrated reasonable care to avoid violating the order.
48. Taken literally, the order banning “storage” would have terminated Schmidt’s ability to engage in dairy farming permanently, even if he had purchased milk quota and tried to conform with the government’s desired conduct. Even quota-holding farmers who send milk for pasteurization must *store* it unpasteurized between truck pick-ups. Literal compliance with the no-storage portion of the order would have meant that Schmidt could not use his own cows’ milk to feed livestock, nor could he have put it in his own refrigerator for later consumption—neither of which is illegal under the *HPPA* or the *MA*. In short, the order of February 17, 1994, insofar as it purported to ban Schmidt from the *storage* of raw milk, was beyond the power of the inspector to give, and beyond the power of the Health Protection Appeal Board to uphold in its decision of September 1, 1994. Indeed, the Board declined the Crown’s request to add “transportation” to the list of forbidden activities precisely because it would render the order overbroad and preclude Schmidt from transporting raw milk for pasteurization.²² For precisely the same reason, the Board should have removed “storage” from the list of forbidden activities but it apparently overlooked this anomaly.
49. The general rule against collateral attack of a court order can be set aside when no harm will be done to the rule of law or the repute of the justice system.²³ The respondent submits that this is just such a case.

¹⁹ Evidence of Susan Atherton, Transcript of Proceedings at Trial, Volume 2, page 36

²⁰ *Ibid.*, page 45

²¹ Evidence of Victor Miller, Transcript of Proceedings at Trial, Volume 2, pages 88 and 103; evidence of Michael Schmidt, Volume 3, pages 100-101

²² Exhibit 4 (Health Unit’s Book of Exhibits), Tab C thereof, Decision of the Health Protection Appeal Board, page 27

²³ *R. v. Litchfield*, [1993] 4 S.C.R. 333, RA Tab 16

50. Schmidt testified that he in fact instructed his lawyer to appeal the decision of the Board but that his lawyer failed to do so, being pre-occupied himself with getting paid for his prior work on Schmidt's behalf by taking possession of his farm.²⁴ Schmidt further testified that he was prevented from appealing the order further by approaching bankruptcy.²⁵
51. In light of these circumstances, it would harm the reputation of the justice system to convict Schmidt of violating an order which was clearly overbroad, should never have been made, and might well have been appropriately re-worded on appeal.
52. The charges laid by the Grey Bruce Health Unit cited only "storing and displaying" as being the acts that violated the 1994 order. Schmidt is not alleged to have violated the order by selling or offering for sale, which the order also forbade. If the order was overbroad in banning "storing", and if "displaying" has not been proven beyond a reasonable doubt, then Schmidt should be acquitted on these three charges.

APPELLANTS' ISSUE E: If the appeal succeeds, should the court enter convictions or order a new trial?

53. With respect, the Appellants' arguments at paragraphs 33 through 38 of their factum do not seem connected to their subtitle of Issue E. In the event that this court proposes to overturn Schmidt's acquittal on some or all of the charges, the respondent asks that he be permitted to make submissions after that time on the issue of whether a new trial should be ordered, since the question will undoubtedly be affected by the court's rationale for the making the reversal.

PART 3 — SUPPLEMENTARY DEFENCES (NON-CONSTITUTIONAL)

54. In addition to having responded above to the Crown's arguments, the respondent submits the following further reasons to support the decision of Justice Kowarsky.

(a) The Legislature Did Not Intend to Outlaw Schmidt's Arrangements

55. Justice Kowarsky found via contextual analysis that the *MA* was intended to apply to commercial marketing, not to "a small group of people who come together by private agreement."²⁶
56. It would certainly have been within the legislature's power to outlaw cow-sharing via explicit language, had it chosen to do so. Indeed, it is instructive to observe how the legislature chose to outlaw "meat-sharing" in the *Food Safety and Quality Act*.²⁷

²⁴ Evidence of Michael Schmidt, Transcript of Proceedings at Trial, Volume 3, pages 133-134

²⁵ *Ibid.*, pages 94-95

²⁶ Decision of Justice of the Peace Kowarski, *R. v. Schmidt*, 2010 ONCJ 9, at paragraph 119

²⁷ Excerpts from *Food Safety and Quality Act*, S.O. 2001, c. 20, and Regulation 31/05, RA Tab 5

The regulations therein prohibit the sale, transporting, delivering or distributing of meat carcasses or meat products unless the animal was slaughtered in a licenced plant and inspected by an inspector. However, the legislature recognized that there may be individuals who slaughter their own animals. Those individuals would not be violating the law if they consumed their own home-slaughtered animals because they would not be selling, transporting, delivering or distributing the meat. Nevertheless, to ensure that such individuals do not engage in “meat-sharing”, explicit regulations were enacted providing that such meat carcasses not be removed from the premises where they were slaughtered and not be consumed by anyone other than the producer and his immediate family, on the producer’s premises.²⁸

57. The legislature could have imposed similar restrictions on raw milk, allowing only Schmidt and his immediate family to consume the milk he produces, and to do so only on the farm where it is produced. No such regulations were enacted.
58. Applying the rule of statutory construction *inclusio unius est exclusio alterius*, it may be concluded that the legislature did not intend to constrain raw milk producers in the same manner as uninspected meat producers are constrained.

(b) No Violation of s. 15(2) of MA because no proof of Grade A milk production

59. The Crown has advised that it will be abandoning its appeal on the charge that Schmidt violated ss. 15(2) of the *Milk Act*, the section that prohibits being a “distributor” without a licence. Nevertheless, the respondent wishes to point out that no evidence was ever produced at trial that he met the definition of “distributor” pursuant to the following chain of definitions²⁹:
 - (a) “distributor” means a person engaged in selling or distributing fluid milk products directly or indirectly to consumers; (*Milk Act*, section 1)
 - (b) “fluid milk products” means the classes of milk and milk products processed from Grade A milk and designated as fluid milk products in the regulations; (*Milk Act*, section 1)
 - (c) “Grade A milk” means milk designated as Grade A milk in the regulations; (*Milk Act*, section 1)
 - (d) “Milk that complies with and is produced and stored in compliance with Regulation 761 of the Revised Regulations of Ontario, 1990 is designated as Grade A milk.” R.R.O. 1990, Reg. 753, s. 2 (1).
60. In order to prove that Schmidt violated ss. 15(2), it would have to be shown that he distributed Grade A milk. Among other things, it would have to be shown that Schmidt had complied with requirements that his milk house have a “milk hose

²⁸ O. Reg. 31/05, *Food Safety & Quality Act*, RA Tab 5

²⁹ *Milk Act* and Regulations, excerpts at Respondent’s Authorities, Tabs 2, 3 and 4

transfer port” for the convenience of Dairy Farmers of Ontario (DFO) in picking up milk (subsection 12(3)(o) of O. Reg. 761) and that his milk house be “equipped with a properly grounded electrical outlet providing a service of 220 volts and having a capacity of 15 amperes to operate the tank-truck pump”, also for the convenience of the DFO.³⁰

61. No evidence was ever entered at trial that Schmidt complied with the regulations. Accordingly, the respondent submits that the *actus reus* was never proven and he was rightly acquitted on the charge of being a distributor without a licence.

(c) “Distribute” and “distributor” Should Be Read Consistently Between Statutes

62. The respondent submits that the word “distribute” in the *HPPA* should be read consistently with the definition of “distributor” in the *MA*, since both statutes deal with the same subject: milk. Since he is not a “distributor” under the *MA*, he should also be found not to have “distributed” milk or milk products to Susan Atherton. This would result in acquittals on the charges numbered 5, 7, 9, 11, 13, 15 and 17 in the list set out at pages 1 through 4 of Justice Kowarsky’s decision, all of which require a finding that Schmidt did “distribute” milk or milk products to Atherton.

PART 4 — CONSTITUTIONAL CHALLENGE

ISSUE F: Consumers’ Rights to Security of the Person Under S. 7 of the Charter

63. The respondent is entitled to raise the rights of consumers and would-be consumers of raw milk in this appeal under section 7 of the Charter even though the rights in question are not the respondent’s own rights, because he meets the criteria set out by the Supreme Court of Canada in the case *Hy and Zel’s Inc. v. Ontario*, namely:
- (a) a serious issue has been raised as to the validity of the *HPPA* and *MA*;
 - (b) the respondent is directly affected by the statutes in question; and
 - (c) no other reasonable or effective way exists to bring the validity of those statutes before the court.³¹
64. Consumers of raw milk, as exemplified by the witnesses James McLaren and Eric Bryant, have spent considerable time and effort researching the risks and benefits of raw milk. Both witnesses have gone to great pains to re-structure their dietary habits for their own well-being. Both have personally experienced health improvements from consuming raw milk. Their decision to consume raw milk is

³⁰ *Ibid.*, at AR Tab 4.

³¹ *Hy and Zel’s Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at par. 13, RA, Tab 17

part of a conscious, deliberate lifestyle choice intended to promote their physical health, longevity, and psychological wellness.³²

65. Canadian courts have held on numerous occasions that the right to security of the person includes the right of individuals to make decisions pertaining to their own bodies and their own health. For instance, McLachlin J. (as she then was) said, in the Rodriguez case:

It is established that s. 7 of the *Charter* protects the right of each person to make decisions concerning his or her body: *Morgentaler, supra*. This flows from the fact that decisions about one's body involve "security of the person" which s. 7 safeguards against state interference which is not in accordance with the principles of fundamental justice. Security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body. This is in accordance with the fact, alluded to by McEachern C.J.B.C. below, that "s. 7 was enacted for the purpose of ensuring human dignity and individual control, so long as it harms no one else": 1993 CanLII 1191 (BC C.A.), (1993), 76 B.C.L.R. (2d) 145, at p. 164.³³

66. Although McLachlin J. was dissenting in Rodriguez, her comments on this point were echoed in the majority decision of La Forest J., who said:

In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), supra*, Lamer J. also expressed this view, stating at p. 1177 that "[s]ection 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.³⁴

67. At common law, even leaving aside the issue of the Charter, there was already a right to bodily integrity and personal autonomy. Even where the state disagrees with the medical treatment chosen by an individual, and even when the treatment is generally regarded as foolhardy, the principles of self-determination and individual autonomy override the state's interest in the preservation of life and health. For instance, members of the Jehovah's Witness faith have been held to be entitled to reject blood transfusions notwithstanding the doctor's belief that the decision was contrary to the patient's best interests.³⁵

³² Affidavit of James McLaren sworn May 12, 2010, at par. 8—17; affidavit of Eric Bryant sworn May 26, 2010 at par. 4—7 and 14—20, and transcripts of cross-examinations of James McLaren and Eric Bryant.

³³ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at par. 200, RA, Tab 18

³⁴ *Ibid.*, at par. 136

³⁵ *Malette v. Shulman*, [1990] O.J. No 450 (Ont. C.A.); 72 O.R. (2d) 417, RA, Tab 19

68. According to the Ontario Court of Appeal in *Fleming v. Reid*, the common-law right to control what happens to one's body is co-extensive with the Charter right to security of the person:

The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s. 7. Indeed, in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.³⁶

69. The Ontario Court of Appeal has also held in *R. v. Parker* that the right to use marijuana for medicinal reasons is protected as part of security of the person, despite the general illegality of marijuana.³⁷ Conscientious raw milk consumers such as Michael Schmidt's cowshare members should have similar protection. They should not need to wait to become ill before their right to take preventive measures to enhance their health becomes operative.
70. At Michael Schmidt's trial, the Attorney General argued that raw milk consumers might impose harm on others, since asymptomatic carriers of bacteria can transmit germs by person-to-person contact to non-drinkers of raw milk, thereby putting them at risk. However, if that were a genuine concern, then logically the province would have taken the precaution of outlawing the drinking of raw milk by farmers. It has not done so.
71. The cross-examination of the Attorney General's expert witness Dr. Mansel Griffiths was particularly revealing on the issue of person-to-person transmission. Dr. Griffiths acknowledged having shaken Mr. Schmidt's hand three times, knowing that Mr. Schmidt was a raw milk drinker. Yet when asked whether he feared having contracted an illness via this skin contact, Dr. Griffiths stated: "I wash my hands regularly so I have no concern."³⁸ If hand-washing is all that is necessary to eliminate risk, the concerns expressed by the Attorney General appear grossly disproportionate to the actual level of risk.
72. There are tens of thousands of dairy farmers in Ontario who are legally permitted to drink raw milk. Farmers and their employees also routinely handle cattle, and walk upon cows' bedding materials and manure. To genuinely prevent the risk of person-to-person transmission of pathogens, the law would have to virtually quarantine all dairy farmers, their employees, and their families. The fact that this is not done indicates that the risk of person-to-person transmission is one which the province considers acceptable in ordinary day-to-day life.

³⁶ *Fleming v. Reid*, 1991 CanLII 2728 (ON C.A.); 4 O.R. (3d) 74; at par. 39, RA Tab 20

³⁷ *R. v. Parker*, [2000] O.J. No. 2787, 49 O.R. (3d) 481, RA, Tab 21

³⁸ Evidence of Mansel William Griffiths, Volume 5, pages 122-123.

73. While it might be argued that the health improvements experienced by witnesses James McLaren and Eric Bryant are subjective and unsubstantiated by medical evidence, the respondent submits that expert evidence is not necessary in order for a person to testify, “I felt ill then but I feel healthy now.” There is often no way for a medical expert to report on whether a person’s health has changed except by listening to the patient’s subjective report and reiterating it.
74. Furthermore, the very fact that raw milk has been illegal for sale within Canada has resulted in a lack of scientific evidence comparing its safety and benefits with pasteurized milk. When asked whether any studies had been done comparing raw milk and pasteurized milk in Canada, Dr. Griffiths replied, “No, because the studies haven’t been carried out.”³⁹
75. Unless cowshare arrangements are found to be legal, the *HPPA* and *MA* would together have the effect of violating the right to security of the person of raw milk consumers by denying them nutritional choice, i.e. the power to make decisions about what foods they will put into their bodies in order to best attain their physical health. This violation of rights is not in accordance with the principles of fundamental justice, since it is both arbitrary and overbroad.
76. In the *Chaoulli* case, the Supreme Court of Canada defined arbitrariness in these words:
- “In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts.”⁴⁰
77. The theoretical legislative goal of protecting the cowshare members of Michael Schmidt’s cowshare bears no real connection to the facts, since the evidence failed to establish a single case of anyone being made ill or harmed in any way by consuming raw milk from Schmidt’s farm.
78. Likewise, the theoretical legislative goal of protecting third parties (i.e. non-cowshare members) from person-to-person transmission of pathogens is also not borne out by the facts. The province has not seen fit to take the steps that would be necessary to advance this theoretical goal, namely: banning all consumption of raw milk, and quarantining farm families who might have had contact with the bodily secretions of cows. Unless the province diligently tackles the whole problem in a rigorous, systematic manner, its purported tackling of a tiny portion of the problem is simply arbitrary.

³⁹ Evidence of Dr. Mansel William Griffiths, Volume 5, page 121.

⁴⁰ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, at par. 131, RA, Tab 22

79. No food can be guaranteed to be free of pathogens, according to the Attorney General's own expert witnesses.⁴¹ For instance, salmonella bacteria can be found not only in raw milk, but also in raw eggs, raw poultry, and other raw meats, as admitted by Dr. Jeffrey Boyd Wilson.⁴² Many, if not most, Ontarians occasionally consume uncooked eggs in eggnog, or partially cooked eggs if they eat them poached, soft-boiled or fried. However, the province has not banned the sale of raw eggs or required them to be sold pasteurized, even though pasteurization of eggs is possible. The ban on the sale of raw milk is inconsistent with the province's other practices and is accordingly arbitrary.
80. Furthermore, the fact that other western democratic countries have not found it necessary to impose complete bans on the sale of raw milk demonstrates the absence of a factual connection between the legislative goal and the limitation imposed on life, liberty and security of the person. This reasoning parallels the conclusion of Justices McLachlin, Major and Bastarache in the *Chaoulli* case, which considered whether a complete ban on private health insurance was necessary to the goal of providing a high-quality public health care system. The judges said:

In summary, the evidence on the experience of other western democracies refutes the government's theoretical contention that a prohibition on private insurance is linked to maintaining quality public health care.

Binnie and LeBel JJ. suggest that the experience of other countries is of little assistance. With respect, we cannot agree. This evidence was properly placed before the trial judge and, unless discredited, stands as the best guide with respect to the question of whether a ban on private insurance is necessary and relevant to the goal of providing quality public health care. The task of the courts, on s. 7 issues as on others, is to evaluate the issue in the light, not just of common sense or theory, but of the evidence. This is supported by our jurisprudence, according to which the experience of other western democracies may be relevant in assessing alleged arbitrariness. In *Rodriguez*, the majority of this Court relied on evidence from other western democracies, concluding that the fact that assisted suicide was heavily regulated in other countries suggested that Canada's prohibition was not arbitrary: pp. 601-5.⁴³

81. The violation of consumers' section 7 rights also fails the test of being in accordance with the principles of fundamental justice because the violation is overbroad. In *R. v. Heywood*, the Supreme Court of Canada said:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the

⁴¹ Evidence of Dr. Jeffrey Boyd Wilson, Volume 6, page 64, lines 11-25 and evidence of Dr. Mansel William Griffiths, Volume 5, page 117, lines 6-24.

⁴² Affidavit of Dr. Jeffrey Boyd Wilson, sworn January 15, 2009, at paragraph 24.

⁴³ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, at par.149—150, RA, Tab 22

principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.⁴⁴

82. As already argued in paragraphs 22 and 23 above in this factum, the mechanism of the legislation is overbroad to accomplish its stated objectives, namely the protection and promotion of the health of Ontarians. The evidence of James McLaren and Eric Bryant indicates that their health would be undermined, rather than promoted, if they were prevented from obtaining raw milk.
83. Furthermore, evidence was presented at trial that a substantial study of approximately 15,000 European children showed evidence that raw milk consumption appears to offer protection against asthma and allergy.⁴⁵ If this kind of benefit is available, the complete ban on sales of raw milk—with the attendant result of making further scientific study in Canada virtually impossible—is grossly disproportional to the purported purpose of the statutes and again undermines, rather than promotes the purpose.

83.1 Overbreadth is also dealt with at paragraph 122 of this factum, below.

ISSUE G: Respondent's Rights to Life, Liberty & Security of the Person under Section 7 of the Charter

84. Schmidt's liberty and security of the person interests are engaged in the following ways:
- (a) if convicted of violations of the *HPPA* or the *Milk Act*, section 72 of the *Provincial Offences Act*⁴⁶ exposes him to probation, which is a restraint on his freedom of movement;
 - (b) if Schmidt is convicted and fails to pay any fines imposed, he may be subject to imprisonment under ss. 69(14) of the *Provincial Offences Act*⁴⁷;
 - (c) the penalties imposed by the *HPPA* and the *Milk Act*⁴⁸ are potentially so large as to financially ruin any individual exposed to them; by confiscating an individual's life's savings, the legislation retroactively deprives him of the portion of his life spent accumulating those savings, and effectively deprives him of significant ability to exercise the normal

⁴⁴ *R. v. Heywood*, [1994] 3 S.C.R. 761, at par. 49, RA, Tab 23

⁴⁵ Exhibit 13, paper entitled "Inverse Association of Farm Milk Consumption with Asthma and Allergy in the Rural and Suburban Population Across Europe in Clinical and Experimental Allergy", introduced in evidence of Mansel William Griffiths, volume 5, pages 101—104 and 137—139.

⁴⁶ *Provincial Offences Act*, section 72, Respondent's Authorities, Tab 6

⁴⁷ *Provincial Offences Act*, section 69(14), Respondent's Authorities, Tab 6

⁴⁸ *HPPA* section 101, Respondent's Authorities, Tab 1 and *Milk Act*, section 21, RA, Tab 2

liberties of a subject or to enjoy financial and psychological security in the future;

- (d) the large financial penalties imposed by the *HPPA* and the *Milk Act* may in fact have a more severe, longer-lasting impact on a convicted individual than imprisonment would; therefore, it would be illogical to conclude in a formulaic manner that the possibility of imprisonment clearly engages liberty interests while the possibility of financial ruin does not;
- (e) the respondent's long-standing efforts to make unpasteurized milk available to non-farmers have been an important and fundamental life choice, having profound psychological, economic, social and ethical consequences for him; and
- (f) "liberty" in its normal meaning includes the right to contract with other individuals having legal capacity, a right which is explicitly recognized in Ontario's statutes and should therefore be considered a protected liberty notwithstanding that it may encompass an element of so-called "economic rights".

85. Among the earliest jurisprudence pertaining to the Charter was the holding in the reference *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 that being exposed to the possibility of a probation order engages an individual's section 7 right to liberty⁴⁹.
86. Although it has become almost a mantra for legal commentators and lower courts to write that section 7 of the Charter does not include economic or business-related liberty, the Supreme Court of Canada has always been careful not to close the door to interpretations of section 7 which might include economic components. See, for instance, the *Irwin Toy* case, where the "mantra" seems to have first originated. Chief Justice Dickson, writing for the majority, said:

This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property -- contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.⁵⁰

⁴⁹ *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at par. 76 and 79, RA, Tab 23

⁵⁰ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at par. 95, RA, Tab 25

87. The jurisprudence on the scope of section 7 continues to evolve, and there continues to be disagreement among the justices of the Supreme Court as to what is encompassed by the rights to liberty and security of the person. In the 2002 *Gosselin* case for instance, Chief Justice McLachlin said that “the meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration.”⁵¹
88. Two dissenting justices in *Gosselin* went on to argue that “economic rights fundamental to human life or survival” definitely should not be treated in the same manner as corporate-commercial economic rights.⁵²
89. While Michael Schmidt’s case bears little resemblance on its facts to the *Gosselin* case, the point is that the evolution of “economic rights” as part of security of the person must begin somewhere, and it might as well be with Mr. Schmidt. Not only do the penalties he faces threaten to destroy him financially, but the inability to continue in the occupation he has followed since childhood would undoubtedly be a matter of fundamental personal importance to him. Decisions of fundamental personal importance have been held by the Supreme Court of Canada in the *Morgentaler* case to be critical components of the right to liberty.⁵³
90. In fact, the respondent believes that this case presents a golden opportunity for the courts to start the reconsideration of an illogical and detrimental chain of reasoning on the subject of section 7 liberty which began in 1985. While it cannot be expected that this court will either ignore or overrule decisions of the Supreme Court, if the respondent’s argument makes sense, this court should at least comment on it and provide the opportunity for appellate courts further up the line to help the law evolve in a more logical direction.
91. According to a wide variety of dictionaries, two of the most important definitions of the word “liberty” revolve around the notions of (i) freedom of choice, and (ii) the absence of external constraints.⁵⁴
92. The definition of “liberty” was unencumbered by judicial interpretation when the *Charter* became part of Canada’s constitution in 1982. The courts have virtually eviscerated it since then. The earliest instance of this curtailment of the scope of “liberty” occurred in 1985, when Justice Bertha Wilson wrote:

Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the *Charter* to sweep all those offences

⁵¹ *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at par. 79, RA, Tab 26

⁵² *Ibid.*, at par. 311

⁵³ *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Respondent’s Authorities, Tab 27

⁵⁴ See, for instance, the definitions from five dictionaries at Respondent’s Authorities, Tab 35

into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1.⁵⁵ [emphasis added]

93. In other words, Wilson J. deliberately chose to curtail the plain, broad meaning of the word “liberty”. Instead of applying the test contained in section 1 of the Charter to determine when legislative violations of liberty were justified in a free and democratic society, she simply defined away a vast portion of the word “liberty”. Subsequent courts have followed this example, reluctant to engage in section 1 analysis (perhaps out of fear of being accused of usurping the role of the legislature).
94. As a result, Canadian courts have ruled that a wide variety of activities which would certainly fall within the dictionary definition of “liberty” do not fall within the concept of “liberty” for the purposes of section 7. For instance, liberty in section 7 of the Charter “is not synonymous with unconstrained freedom” does not include “an unconstrained right to transact business whenever one wishes,” according to the court in *R. v. Edwards Books and Art Ltd.*⁵⁶ But by any standard dictionary, that is precisely what liberty does include: an absence of external restraint, and freedom of choice.⁵⁷
95. Likewise, the courts have held that “liberty” does not include the right to smoke marijuana for recreational purposes in the privacy of one’s own home (*Malmö-Levine*)⁵⁸, or even the right for a doctor to practice his profession. (*Mussani*)⁵⁹ With all due respect, it would have made much more sense, and would have accorded far better with the plain use of language, for the courts to have acknowledged that the laws restraining business hours, drug use, and medical licensing were indeed restrictions on liberty but were justified under section 1 of the *Charter*.
96. The respondent submits that by tightly circumscribing the scope of section 7, what the courts have effectively accomplished is not the trivialization of the *Charter* so feared by Wilson J. in 1985 but the far worse trivialization of Canadians’ liberty.
97. What, indeed, remains within section 7 liberty after the courts have finished emptying it out? Not much. By the time of the *Morgentaler* decision in 1988, liberty had been boiled down to the highly subjective catch-phrase, “decisions of fundamental personal importance.”

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the

⁵⁵ *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at par. 105, Respondent’s Authorities, Tab 24

⁵⁶ *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at par. 150, RA, Tab 28

⁵⁷ Again, see definitions of “liberty” at RA, Tab 35

⁵⁸ *R. v. Malmö-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 (2003) RA, Tab 29

⁵⁹ *Mussani v. College of Physicians and Surgeons of Ontario*, [2004] O.J. No. 5176, at par. 40, RA, Tab 30

state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.⁶⁰

98. This decision and those that follow from it seem to indicate that the Charter protects us from violations of our liberty regarding the big, important decisions in our lives—decisions that may perhaps come along once in a lifetime—yet does not protect us from the petty, day-to-day violations of our liberty that occur routinely, over and over. This reasoning is problematic in several respects:

(a) The dividing line between a “decision of fundamental importance” and one that is insignificant or trivial is highly subjective. Why does the legal permission to abort a fetus (as in *Morgentaler*) qualify as more important than the ability of a doctor to practice his profession (as in *Mussani*)? There is no scale, and no units, by which such things can be measured, and it is unlikely that any two people would ever rank the vast panoply of lifetime decisions in the same order of importance.

(b) It is absurd to think that minor violations of liberty, aggregated together, do not eventually add up to a full-blown case of totalitarianism. Suppose, for instance, that the state decided to prescribe what time we must rise in the morning, what colour clothing we must wear, how often we can visit the toilet, how many hours of television we can watch and how many times we must chew our food before we swallow. Each of these rules in itself might be described as a trivial regulation not worthy of constitutional protection. But could anyone honestly believe we would still be living in a free country? How many trivial violations of liberty can the state heap upon us before we are forced to admit that this is stifling authoritarianism and not freedom at all?

(c) It seems logically backwards to have liberal rules for decisions of fundamental importance, and restrictive rules for decisions of trivial importance. If citizens are so unintelligent or irresponsible that they cannot handle minor decisions without direction from the state, how can they ever be expected to acquire the wisdom and character to handle the big, momentous decisions that occasionally intrude into their lives?

(d) Who are the lawgivers with the wisdom and intelligence to decide all those little matters for us, when they themselves are citizens who likewise cannot be trusted to make little decisions for themselves? How does being elected to office suddenly elevate political candidates from the status of ignoramuses who cannot be trusted to make everyday decisions about their own lives, into sage lawmakers who can make such decisions not only for themselves but for everyone in the country?

⁶⁰ *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at par. 230, Respondent’s Authorities, Tab 27

ISSUE H: Freedom of Contract as an Aspect of Liberty

99. The province of Ontario recognizes the right to contract explicitly in section of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, which provides:

Contracts

3. Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability. [emphasis added]

100. Ontario's *Human Rights Code* is the only human rights legislation in the entire country which includes this explicit recognition of the right to contract. No other provincial code contains the same language, nor does the *Canadian Human Rights Act*.

101. While a minority of the Supreme Court of Canada in the *Chaoulli* case expressed doubt that “freedom of contract” is part of liberty under section 7 of the *Charter* (they called it a “novel” argument in Canada)⁶¹, it is important to remember that the *Chaoulli* case comes from Quebec, where there is no statute recognizing the importance of freedom of contract. The respondent has been unable to find any Ontario cases in which a court has considered the freedom of contract argument. The respondent submits that this “novel” argument is worthy of consideration by this court. The right to enter into contracts was important enough for the province of Ontario to recognize as a *human right* in its own special section of the law—a law which deals with other crucially important subjects such as employment, housing and services. This indicates the legislature’s view of the extreme importance of the right to contract to the well-being of Ontarians.

102. Section 18 of the *HPPA* is a clear violation of the right of Ontarians to contract with each other for the acquisition of raw milk, even when both parties are well-informed of the risks and consent to taking them.

103. If the court accepts the respondent’s argument that his section 7 liberty and security of the person interests are engaged, and are violated by the impugned sections of the *HPPA* and the *MA*, then the respondent submits that the abrogation of those rights has not complied with the principles of fundamental justice for the reasons already set out earlier in this factum: namely, the impugned statutes are arbitrary and overbroad.

ISSUE I: Eric Bryant’s Freedom of Religion under Charter ss. 2(a)

104. The respondent is entitled not to be convicted of an offence if the law is unconstitutional, even if the respondent himself is not the person whose charter

⁶¹ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, at par. 201, RA, Tab 22

rights are infringed.⁶²

105. Therefore, if the law infringes Eric Bryant's freedom of religion in a manner that is unconstitutional, the respondent is entitled to be acquitted.
106. Canadian courts have long articulated an expansive definition of freedom of religion under the *Charter*, revolving around the notion of personal choice and individual autonomy and freedom. Freedom of religion claimants do not need to prove the objective validity of their beliefs or even that all other members of their religion share those beliefs, so long as the beliefs are sincerely held and undertaken in order to have a connection with the divine.⁶³
107. Eric Bryant testified that his religious beliefs, as an Essene Jew, require him to consume milk, and require him to consume it raw. He further testified that if he were not able to obtain raw milk in his diet, he would not be able to attain optimal health and it would be more difficult or perhaps impossible for him to connect on a spiritual level with God.⁶⁴ Such claims are not marginal or trivial, but are of fundamental personal importance to Mr. Bryant.
108. In light of the expansive definition of religion which the courts have adopted and the difficulty in determining the validity of any individual's freedom of religion claim, there should be no obligation upon Michael Schmidt to be the arbiter of when his cowshare members have a valid freedom of religion exemption. The presumption should be in favour of including, not excluding, borderline freedom of religion claims. Mr. Schmidt should be entitled to provide raw milk to Mr. Bryant free from fear of penalty by the state.

ISSUE J: Equality Rights under S. 15 of the Charter

109. Section 15 of the *Charter* entitles every individual to the equal benefit of the law without discrimination on the basis of the grounds enumerated in that section (race, national or ethnic origin, etc.). It is well-established law that there are other analogous grounds that may also be raised in section 15 claims.
110. The discrimination that arises in this case is this: Mr. Schmidt, an individual who resides on a farm where cows also reside, is permitted by law to drink the milk from those cows without having it pasteurized. However, Eric Bryant and the other cowshare members, who are co-owners of the very same cows, are forbidden from drinking the milk unpasteurized merely because they do not reside on the farm where the cows reside. According to the prosecution, allowing Mr. Bryant et al. to take possession of their raw cow's milk constitutes "delivery"

⁶² *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at par. 37 to 44, RA, Tab 31

⁶³ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at paragraphs 40, 43 and 46, RA, Tab 32

⁶⁴ Affidavit of Eric Bryant sworn May 26, 2010, at paragraphs 16, 17 and 26.

or “distribution” of unpasteurized milk, which is forbidden by section 18 of the *Health Protection and Promotion Act (HPPA)*.

111. The prosecutors can’t have it both ways: either Mr. Bryant and other cowshare owners should have the right to legally obtain possession of their raw milk without Mr. Schmidt being charged for “delivering” or “distributing” it to them, or else they are being discriminated against by the *HPPA* merely because they do not reside on the farm where their co-owned cows reside. Thus the dividing line for the discrimination is the individual’s place of residence, either “on-farm” or “off-farm”.
112. In the case of *Corbiere v. Canada*⁶⁵, it was held that place of residence can constitute an analogous ground of discrimination. In that case, Indians who resided off-reserve were found to have been discriminated against by the *Indian Act* as compared with Indians who resided on-reserve, since only the latter were permitted to vote in band elections. The court held that analogous grounds are personal characteristics that are either completely immutable (for instance, race) or those that are “changeable only at unacceptable cost to personal identity.” Although the court cautioned that it did not intend to make “residence” alone an analogous ground for “average Canadians” there is no persuasive explanation as to why on/off-reserve residence distinctions should be treated different from on/off-farm distinctions. Presumably there are lifestyle differences, not merely scenic differences, between living on- and off-reserve. The same is true of living on- and off-farm.
113. Cow-share owners may be city dwellers with little or no experience in farming. Most can be expected to have occupations and careers far removed from raising cattle. For them to move to a farm, with all the lifestyle changes that implies, simply to gain the legally withheld benefit of consuming raw milk, would be an unacceptable cost, just as moving to the native reserve would have been an unacceptable cost to the aboriginal plaintiffs in *Corbiere*.
114. Once it is established that the *HPPA* creates a distinction on an analogous ground, the test is whether the distinction is discriminatory: i.e. whether it creates a disadvantage by perpetuating prejudice or stereotype. Clearly, off-farm dwellers who desire raw milk for its health benefits would be at a disadvantage vis-à-vis on-farm dwellers if the *HPPA* effectively prevented them from consuming raw milk, since they would be unable to attain the health benefits available to on-farm dwellers. When the legislature enacted the *HPPA* making the sale, distribution or delivery of unpasteurized milk illegal, the only rational explanation for not simply outlawing the consumption of raw milk at the same time—which would have required only the addition of a single word, “consume”, in the list of actions prohibited by section 18—must be that the legislature considered off-farm

⁶⁵ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paragraphs 4, 5, 6, 13 and 15, Respondent’s Authorities, Tab 33

dwellers stereotypically less capable of making decisions for themselves about the health benefits of farm products than on-farm dwellers.

115. The word “prejudice”, according to a variety of dictionaries, includes among its meanings the notion of a “preconceived judgement or opinion.”⁶⁶
116. In outlawing the consumption of raw milk by off-farm dwellers, the legislature implemented its preconceived judgment or opinion that such persons were incapable of determining for themselves whether raw milk was detrimental or beneficial to them. In reality, witnesses James McLaren and Eric Bryant indicate that they have considered the risks and benefits and choose to consume raw milk.⁶⁷ Both of these individuals are therefore disadvantaged, as compared with an on-farm dweller, because of a prejudice of the legislature.

Issue J: Charter S. 1 Does Not Save the Legislation

117. If this court agrees that the impugned legislation violates any of sections 2(a), 7 or 15 of the Charter, the analysis then proceeds to the question of whether the legislative limits on those Charter rights can be “demonstrably justified in a free and democratic society” under section 1. The starting place according to the *Oakes* case is the presumption that individual rights are guaranteed, and that it would be exceptional, rather than routine, for a limitation (i.e. violation) of rights to be justified. Furthermore, the onus is on the litigant seeking to uphold the limitation of rights, i.e. in this case, the Attorney General of Ontario, to show why the limitation is justified.⁶⁸
118. The test set out in *Oakes* is as follows:
- (1) the legislative objective must relate to concerns which are pressing and substantial, and the standards must be high to warrant overriding a constitutionally protected right;
 - (2) the means chosen to achieve the objective must be reasonable and demonstrably justified, and must pass a proportionality test, which means that:
 - (a) they must be rationally connected to the objective and not arbitrary, unfair or based on irrational considerations;
 - (b) they must minimally impair the freedom in question; and
 - (c) there must be proportionality between the effects of the measures chosen and the legislative objective.⁶⁹

119. The respondent submits that the impugned sections of the *HPPA* and the *MA* fail

⁶⁶ See various dictionary definitions of “prejudice” at Respondent’s Authorities, Tab 36

⁶⁷ Affidavit of James McLaren sworn May 12, 2010, paragraph 12 and cross-examination of James McLaren, page 9. Also, affidavit of Eric Bryant sworn May 26, 2010, paragraphs 14 and 18

⁶⁸ *R. v. Oakes*, [1986] 1 S.C.R. 103, at par. 66, Respondent’s Authorities, Tab 34

⁶⁹ *Ibid.*, at par. 69 and 70.

the Oakes test on all branches.

120. While public safety is no doubt an important concern of the state, “important” is not the same as “pressing and substantial”. The evidence at trial failed to establish that there is anything remotely resembling an epidemic of illness due to unpasteurized milk in the 21st century. Illness was undoubtedly more prevalent when this legislation was first enacted some 70 years ago, but other technological advances besides pasteurization have resolved that problem. According to the Attorney General’s expert Dr. Mansel Griffiths, “In the middle of the 20th century, the main illnesses associated with the consumption of milk were brucellosis and tuberculosis. These have been eradicated as milk-borne illnesses in developed countries, mainly through herd certification programs, the installation of refrigerated bulk tanks for collection of milk on farms and the introduction of pasteurization.”⁷⁰ [emphasis added]
121. As already discussed at paragraphs 75 through 80 above, the legislation is arbitrary and therefore fails part 2(a) of the Oakes test.
122. The legislation does not minimally impair the freedom of the respondent or of raw milk consumers. Indeed, section 18 of the *HPPA*—which outlaws the sale and distribution of all raw milk, even if it is free of pathogens—is overkill, made completely redundant by the provisions of section 17 of the *HPPA* which says:

Sale of diseased food

17. No person shall sell or offer for sale any food that is unfit for human consumption by reason of disease, adulteration, impurity or other cause.

The respondent agrees that the law should not permit him to sell raw milk which is unfit for human consumption. There is no evidence that he has ever done so. However, the only law that is necessary to ensure that he does not do so, or that he will be punished if he does, is section 17 of the *HPPA*. Section 18, which outlaws both healthful and contaminated raw milk, is irrational and excessive in light of the other provisions in place to protect consumers.

123. Other foods are sold in Ontario either pasteurized or raw: honey, cranberry juice, and apple cider vinegar, for example. The unpasteurized versions of all of these foods can potentially contain pathogens, but the province relies upon section 17 of the *HPPA* to protect consumers. It has not enacted specific sections of the *HPPA* outlawing their sale. If section 17 is sufficient for these items, it should be sufficient for milk.
124. The measures chosen by the legislature to achieve the objective of public safety are disproportionate because they prevent Ontarians from obtaining the benefits of raw milk.

⁷⁰ Affidavit of Dr. Mansel Griffiths, affirmed January 14, 2009, at par. 98.

125. Furthermore, the penal provisions of the legislation are disproportionate. Despite the lack of evidence that milk produced by Michael Schmidt has ever harmed even a single person, he is exposed to a penalty of \$5,000 per day under the *HPPA* and \$10,000 per day under the *Milk Act*. Such penalties could be a far more severe punishment than imprisonment, considering the long-term ramifications on an individual's life.

PART 5 — ORDER REQUESTED

126. The respondent requests the dismissal of this appeal for the reasons set out in Part 2 of this factum (Response to Appellants' Factum).

127. In the alternative, if this court would otherwise find the respondent guilty of an offence, the respondent requests that the court either:

(a) read down the impugned legislation so as to not violate the constitutional rights of the respondent or members of the public who obtain raw milk via a cowshare; or

(b) strike down the impugned legislation,

as a consequence of which the respondent would be found not guilty on all charges.

All of which is respectfully submitted this 14th day of March, 2011.

COPY

Karen Selick
Solicitor for the Respondent