No. S097767
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1986, c. 68

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF S. 293 OF THE *CRIMINAL CODE OF CANADA,* R.S.C. 1985, c. C-46

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

CLOSING SUBMISSIONS

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I. INTRODUCTION AND OVERVIEW OF POSITION:

1. This Reference asks two questions:

(a) Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms?* If not, in what particular or particulars and to what extent?

(b) What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

2. The British Columbia Civil Liberties Association (the "BCCLA") was granted standing as an Interested Person to advance its interpretation of s. 293 of the *Criminal Code of Canada* (the "*Code*") and to argue that s. 293 of the *Code* offends fundamental freedoms protected by the *Charter of Rights and Freedoms* (the "*Charter*"). Briefly put, the BCCLA's argument is as follows.

3. Section 293 of the *Code* is a broadly-worded provision. It prohibits *all* multiparty marriages and marriage-like relationships, including polygyny, polyandry, and same-sex multi-party conjugal unions (collectively, "plural relationships"), and does so *despite* the consent of each person involved.

4. By intruding into an adult's decision about the form of conjugal relationship that best meets her personal needs and aspirations, s. 293 of the *Code* violates the individual's liberty and security of the person in a manner offensive to s. 7 of the *Charter*. It invites the state to inspect the bedrooms -- and kitchens and living rooms -- of those who find fulfilment in plural relationships, eroding the dignity of those involved in such relationships and denying them the privacy available to

couples and monogamous families. The evidence in the proceedings shows that the intrusive effect of the law causes serious psychological stress to those whose consenting relationships are criminalized by s. 293.

5. Section 293's violation of the rights to liberty and security of the person is grossly disproportionate to any interest the state has in preventing harm in family relationships. Harm may sometimes occur in plural relationships, as it does in monogamous ones. But the mountain of evidence before the Court simply does not establish that there are any harms specific to plural relationships.

6. Where harms do occur in plural relationships, they warrant treatment no different from the harms that occur in monogamous relationships. Suspected criminal activity should be investigated and, where warranted, prosecuted in accordance with the governing criminal law. Plural relationships should no more be an excuse for family abuse than family abuse should be an excuse for continuing to criminalize plural relationships in contemporary Canada.

II. THE ELEMENTS OF THE OFFENCE:

7. The two questions posed in the Reference are best answered in reverse order. The constitutionality of s. 293 of the *Code* can only be tested once the necessary elements of the offence have been ascertained. As McLachlin C.J. wrote in *R. v. Sharpe,* in relation to the *Code*'s provisions on the possession of child pornography:

> Until we know what the law catches, we cannot say whether it catches too much. . . . The interpretation of the section is a necessary precondition to the determination of constitutionality, although it is understood, of course, that courts in future cases may refine the analysis in light of the facts and considerations that emerge with expertise.[1]

[1] *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 **[*Sharpe*]** at para. 32.

8. Section 293 of the *Code* provides as follows:

> **Polygamy**
>
> 293. (1) Everyone who
>
> > (a) practises or enters into or in any manner agrees or consents to practise or enter into
> >
> > > (i) any form of polygamy, or
> >
> > > (ii) any kind of conjugal union with more than one person at the same time
> >
> > whether or not it is by law recognized as a binding form of marriage, or
> >
> > (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),
>
> is guilty to an indictable offence and liable to imprisonment for a term not exceeding five years.
>
> Evidence in case of polygamy
>
> (2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

A. <u>The Applicable Principles of Interpretation:</u>

9. The provision is to be interpreted in accordance with the modern rule of statutory interpretation: the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. If the ordinary

meaning of the words is consistent with the context in which the words are used and with the object of the statute, then that interpretation ought to govern.[2]

10. Further, if, applying the modern technique, a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted.[3] However, the preference for a constitutionally-compliant interpretation does not invite the Court to lay on the language of a constitutionally infirm provision a constitutionally compliant gloss. As Deschamps J., dissenting, remarked in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*:

> There does exist a general principle that if a legislative provision is capable of both a constitutional and an unconstitutional interpretation then the former should be preferred. . . However, the application of this interpretive aid is premised on there existing <u>two equally plausible</u> interpretations on the language of the statute . . . Where, as here, the text of the provision does not support a severely restricted scope of conduct that would avoid constitutional disfavour, the Court cannot read the section down to <u>create</u> a constitutionally valid provision. Such an approach would divest the *Charter* of its power to test the validity of statutes, deprive the legislatures of their ability to enact reasonable limits, and intermingle the purpose of statutory interpretation with the exercise of judicial review.[4]

B. <u>No unequal power relationship is required to make out the offence:</u>

11. It is apparent on the face of the statute that s. 293 does not require that the plural relationship in question involve a minor, or occur in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence. The language of the provision simply does not support the notion that any of the listed inequalities is a necessary part of the offence.

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[2] *R. v. Heywood*, [1994] 3 S.C.R. 761 **[*Heywood*]** at para. 31; *Sharpe* at para. 33.
[3] *Sharpe* at para. 33.
[4] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 at para. 215; all citations omitted; emphasis in the original.

12. Indeed, to posit the requirement of an unequal power relationship would be to ignore the language of the statute. It "would involve reading in a qualification that Parliament has not stated" and apparently did not intend.[5] Section 293 specifically prohibits *consent* to practise or enter into one of the prohibited forms of relationship. A significant inequality of position through dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence, will tend to undermine genuine consent, although it may produce acquiescence.

C. <u>The necessary elements of the offence:</u>

13. In brief, the Crown must prove that the accused either: (a) (i) practised, or (ii) entered into, or (iii) agreed or consented to practise or enter into "any form of polygamy" or "any kind of conjugal union with more than one person at the same time", or (b) (i) celebrated, (ii) assisted or (iii) was a party to a rite, ceremony, contract or consent that purports to sanction "any form of polygamy" or "any kind of conjugal union with more than one person at the same time". Subsections (a) and (b) are disjunctive, as are the elements of each of them. Thus, to prove the offence, the Crown must prove one of the actions covered by (a) or (b) plus the existence of a prohibited relationship.

14. The requirement that the accused "agree or consent to practise or enter into" or be a celebrant, assistant or party to a rite, ceremony, contract or consent to the prohibited relationship demonstrates that the accused need not be actively participating in the prohibited relationship to attract criminal liability. The bar to liability is set lower. It is sufficient that the accused has simply agreed or consented to engage in the prohibited relationship, or that she or he has partaken in, or assisted at, the celebration of the agreement or consent, whether by rite, ceremony, contract or other expression of consent. Any of these acts will

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[5] *Sharpe* at para. 65.

make out the offence, as will actually participating in the prohibited forms of relationship.

15. The next question is: what forms of plural relationships are caught by the section? In its Opening Statement, the Attorney General for British Columbia ("British Columbia") argued that s. 293 only captures polygynous marriage and *de facto* polygynous relationships, not polyandry or same-sex multi-partner unions.[6] In closing submissions, it would appear that British Columbia's argument has shifted somewhat, and it is now contemplated that s. 293 might capture all of these activities.[7]

16. The federal Attorney General ("Canada") argues that s. 293 captures polygamous marriages -- not just polygynous marriages -- that are valid according to the law of the place where they are celebrated, and conjugal unions that, though not legally recognized in any jurisdiction, are brought about by a marriage-like ceremony that purports to sanction the union and bind the participants together.[8]

17. Both interpretations are problematic and do not reflect legislative intent.

(a) "ANY FORM OF POLYGAMY"

18. The purpose and object of the original predecessor to s. 293 was simply described by the Government's representative in the House of Commons in February 1890: "to make more effectual provision for the suppression of polygamy".[9] Since its enactment, the prohibition on polygamy has prohibited "*any form* of polygamy". What does the phrase mean?

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[6] See Opening Statement of the Attorney General of British Columbia at paras. 61 – 63 and 66.
[7] See Closing Submissions of the Attorney General of British Columbia at paras. 100 and 120 - 131.
[8] See Opening Statement of the Attorney General of Canada at paras. 31 – 35, and Closing Submissions of the Attorney General of Canada at paras. 202 - 229, generally.
[9] House of Commons Debates 29 (7 February, 1890) at 342 (Sir John Thompson).

19. The ordinary meaning of the word “polygamy” is gender-neutral. The *Oxford English Reference Dictionary* and the *Concise Oxford Dictionary* both define "polygamous" as "**1** having more than one wife or husband at the same time. **2** having more than one mate."[10] The *Oxford Dictionary of Law* defines “polygamy” as “the practice of having more than one spouse”.[11] *Black’s Law Dictionary* defines “polygamy” as “the offence of having several wives or husbands at the same time, or more than one wife or husband at the same time . . .”[12]

20. British Columbia urges that “polygamy”, in its ordinary sense, means “polygyny” because this is how the phenomenon was commonly understood and practised in the late nineteenth century, and is generally understood and practised today.

21. The difficulty with British Columbia’s position is two-fold. First, that the modern approach to statutory interpretation directs the interpreter’s attention to the language of the statute. Language is to be interpreted in its entire context, in accordance with its ordinary and grammatical sense, harmoniously with the scheme of the Act, its object and the intention of Parliament, but *the language of the statute remains the focus*. Parliament does not speak in vain. The presumption is that it chooses its words carefully. Parliament spoke inclusively by making "polygamy" an offence, and there is meaning in that choice.

22. Parliament further reinforced its intention to forbid all manifestations of polygamy by proscribing “*any form of* polygamy”. These qualifiers to "polygamy" also have meaning that ought not to be ignored. The reference to “any form of" polygamy clearly signals intent to prohibit all relationships that fall within the

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[10] *Oxford English Reference Dictionary*, 2nd ed., *s.v.* "polygamous"; *Concise Oxford Dictionary*, 8th ed. *s.v.* "polygamous".
[11] *Oxford Dictionary of Law*, 6th ed. *s.v.* “polygamy”.
[12] *Black’s Law Dictionary*, 6th ed. *s.v.* “polygamy”.

category of polygamy, not just, as advocated by British Columbia, certain cultural traditions of polygamous marriage, such as those pejoratively described in the nineteenth century as “Mohammaden” and “Indian”, as well the Mormon tradition.[13]

23. Second, British Columbia’s proposed interpretation does not sit well with the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 10, which provides:

> The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

24. The “true spirit, intent and meaning” of s. 293 of the *Code* is to prohibit any form of polygamy. This is plain on the language of the statute. While in the 1890s – or even in the 1950s, when the provision was last revised – it may not have seemed plausible to legislators that a trio of spouses might consist of a wife and two husbands, these are circumstances that arise in contemporary society. Given the exhaustive expression in s. 293, "any form of polygamy", it is difficult to see how the section does other than speak to those situations, as well as the more prevalent and historically common phenomenon of polygyny.

25. The inclusive interpretation of “any form of polygamy” accords with the principle of interpretation that the words of a statute must be construed as they would have been the day after the statute was passed, commonly known as the original meaning rule.[14] As Dickson C. J. acknowledged in *Perka v. R.,* the principle that the words of an Act "will generally be understood in the sense which they bore when it was passed",

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[13] See *Trudeau v. R.*, [1935] 2 D.L.R. 786 (Que. K.B.) **[*Trudeau*]** at para. 52: ". . . the prevailing idea is to limit plural marriage and 301 [actually 310] was designed to cover everything of that class and nature". See also *Ali v. Canada (Minister of Citizenship and Immigration)*, [1998] 154 F.T.R. at paras. 12 - 13.

[14] See, e.g. *Perka v. R.*, [1984] 2 S.C.R. 232 at 264-265.

> . . . does not mean that all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted".[15]

26. It is consistent with the original meaning of the provision to acknowledge that, today, “any form of polygamy” encompasses both polygyny and polyandry.

(b) “ANY KIND OF CONJUGAL UNION WITH MORE THAN ONE PERSON AT THE SAME TIME”

27. Section 293 also prohibits “any kind of conjugal union with more than one person at the same time”. As Parliament is presumed not to speak in vain, "any kind of conjugal union" is properly understood as addressing behaviour that is distinct from "any form of polygamy". It is submitted that the distinction lies in two areas. First, "polygamy" will typically involve some form of marriage that is not legal in Canada, while a "conjugal union" will generally involve a marriage-*like* relationship of committed intimate partners. Second, if "polygamy" still connotes only opposite-sex relationships, then same-sex plural relationships are captured in the category of "any form of conjugal union".

(i) What is the content of a "conjugal union"?

28. The term "conjugal union" is not defined in the *Code*. The ordinary meaning of "conjugal union" is a committed marriage-like relationship. This is the meaning of "conjugal union" in s. 293.

29. The features of conjugality have not changed appreciably since the late Victorian age. In *Richardson v. Richardson*, the New Brunswick Court of Appeal accepted that a conjugal relationship is functionally equivalent to a married state. His Lordship cited *Tulk v. Tulk*, [1907] V.L.R. 64 for features of a conjugal relationship:

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[15] *Ibid.* at para. 80.

> . . . Marital intercourse, the dwelling under the same roof, social and protection, support, recognition in public and in private, correspondence during separation, making up as a whole the *consortium vitae*, which the old writers distinguish from the *divortium a mensa et thoro*, may be regarded separately as different elements, the presence or absence of which go to show more or less conclusively that the matrimonial relationship does or does not exist. The weight of each of these elements varies with the health, position in life, and all the other circumstances of[16] the parties.

30. In *M. v. H.*, [1999] 2 S.C.R. 3, the Supreme Court of Canada adopted the "generally accepted characteristics of a conjugal relationship" from *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist Ct.), and extended them to unmarried same-sex couples. The *Molodowich* indicators bear a striking resemblance to those set out in *Tulk v. Tulk,* in 1907: "shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple."[17]

31. In sum, a plural relationship bearing the hallmarks of conjugality is a "conjugal union" for the purposes of s. 293.

(ii) Is a ceremony or rite required?

32. No marriage ceremony or rite is required to form a conjugal union. A conjugal union is formed by agreement, which may result from conduct, i.e. by actions that demonstrate consent to live in a committed conjugal relationship.

33. The statute does not support the requirement for a ceremony or rite to create a conjugal union. Rather, s. 293(1)(a)(ii) of the *Code* makes it an offence for every one to "*in any manner*" agree or consent to practise or enter into any kind of conjugal union with more than one person at the same time. The

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[16] *Richardson v. Richardson* (1990), 70 D.L.R. (4th) 563 (N.B. C.A.) at paras. 10 - 11.
[17] *M. v. H.*, [1999] 2 S.C.R. 3 at para. 60.

language is clearly intended to capture all forms of agreement to exist in a conjugal union.

34. Interpreting s. 293(1)(a)(ii) as requiring a marriage ceremony or rite to form a "conjugal union" is inconsistent with the provisions of s. 293(2). Section 293(2) relieves the Crown of any burden to prove the method by which the alleged relationship was "entered into, agreed to or consented to". However, if Canada's proposal were adopted it would effectively require proof of the method by which the relationship was "entered into, agreed to or consented to", to show that the impugned relationship meets the proposed technical requirements of the "conjugal union" offence. This is not what Parliament intended.

35. Further, the interpretation of s. 293 proposed by Canada produces an absurd and arbitrary result. If the interpretation proposed by Canada were accepted, then two relationships, indistinguishable in all respects, except for the existence of a marriage-like ceremony or rite, would be treated differently by the criminal law. The union confirmed by rite or ceremony would be liable to criminal sanction, while the one not so confirmed would avoid prosecution. On any purposive interpretation of s. 293, this result is arbitrary. Such a result ought to be eschewed.

36. Moreover, if s. 293 is to "be applied to the circumstances as they arise", then it is necessary to consider how contemporary conjugal unions are formed. Dr. Zheng Wu's evidence is that:

> [I]t is wrong to assume that the act of commitment is not possible outside of legal marriage. The commitment-making act is multifarious and occurs through non-institutionalized processes. Throughout Canada (and especially in Québec), common-law marriage has transformed from an uncommon experience into a normative behaviour for millions of people [citation omitted]. The growth of common-law marriage and other non-traditional households should caution us against defining conjugal unions and families in an inflexible manner.[18]

[18] Affidavit #1 of Z. Wu at Exhibit "B" at p. 4; Exhibit 61 n the proceedings.

37. Dr. Wu further notes that "the proportion of common-law families has soared, rising from about 6 percent of all couple families to 18 percent in 2006."[19]

38. This evidence confirms that unions by consent are common in Canada; they are an important aspect of the contemporary Canadian experience of family formation.[20]

39. Finally, Canada's argument that "conjugal union" is a term of art that requires a form of marriage-like ceremony is also not justified by the jurisprudence.

40. The earliest case to interpret a forerunner provision to s. 293 of the *Code* is *Regina v. Labrie* (1891). The accused was charged under s. 5(d) of the *Act respecting Offences relating to the Law of Marriage*,[21] which rendered everyone who "lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union" liable to five years imprisonment and a fine on conviction. Defence counsel argued that the object of the statute was to "repress Mormonism" and that a form of marriage between the parties was required prior to cohabitation.[22] A guilty verdict was returned by the jury, but Labrie was acquitted by the Court on the grounds that "[i]t was apparent from the statute that there must be some form of *contract* between the parties, which they might suppose to be binding on them, but which the law was intended to prohibit".[23] The Court found that "the evidence adduced did not justify a verdict of unlawfully living and cohabiting in conjugal union with a

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[19] *Ibid.* at p. 5.

[20] It is notable that in some religious traditions, such as Islam, marriages do not depend on a ceremony but are purely a matter of contract based on consent and certain formal requirements. See Affidavit #1 of Mohamed Fadel at paras. 28 and 55 - 63; Exhibit 2 in the proceedings.

[21] *An Act respecting Offences relating to the Law of Marriage,* R.S.C. 1886, c. 161, as amended by *An Act further to amend the Criminal Law*, S.C. 1890, c. 37.

[22] *Regina v. Labrie* (1891), M.L.R. 7 211 (Q.B.) at 211.

[23] *Ibid.* at 213; emphasis added.

person already married to another person. . ."[24] The Court did not affirm any requirement for a marriage ceremony. [25]

41. In *The Queen v. "Bear's Shin Bone"* (1899), the Supreme Court of the Northwest Territories was concerned with the characterization of the relationship between Bear's Shin Bone and his two wives, and whether that relationship was a marriage caught by s. 278(a) of the *Code*. Bear's Shin Bone was charged under s. 278(a)(i) and (ii) of the *Code*. Section 278(a) provided, in material part:

> Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars, who --
>
> (a.) practices, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by another method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into
>
> (i) any form of polygamy;
> (ii) any kind of conjugal union with more than one person at the same time;
> (iii) what among the persons commonly called Mormons is known as spiritual or plural marriage; [or]
> (iv) who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union.

42. The Court decided that the relationship was a marriage caught by the section, on the grounds that the custom of marriage by consent recognized by the Blood Indian Tribe produced a valid form of binding contract.[26]

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[24] *Ibid.*

[25] An unreported 1893 decision, *The Queen v. Liston*, is apparently to similar effect. The Chief Justice at the Toronto Assizes held that s. 278 of the *Code* was intended to apply only to Mormons. The accused, who was apparently in an adulterous relationship, was acquitted. See Affidavit No. 1 of Susan Drummond, Exhibit "B" at para. 58; Exhibit 65 in the proceedings.

[26] [1899] 3 C.C.C. 329 (N.W.T. S.C.) **["*Bear's Shin Bone*"]** at 330.

43. In coming to its conclusion on liability, the Court in *"Bear's Shin Bone"* relied on *The Queen v. Nan-E-Quis-A-Ka* (1889), a case that pre-dates the enactment of the criminal prohibition against polygamy and multi-party conjugal unions. The issue in *Nan-E-Quis-A-Ka* was whether the first wife of the accused was incompetent and not compellable to give evidence against her husband. The accused had married his first wife by an expression of mutual consent to live as husband and wife. The accused later married his second wife in the same fashion. The Court, sitting *en banc*, confirmed that an Aboriginal accused was married because he had consented to live together with a spouse, according to the tradition of his community. The Court held, "Wherever marriage is governed by no statute consent constitutes marriage itself and that consent is shown by living together".[27]

44. In *The King v. John Harris* (1906), the accused, was charged with having "by an illegal form of contract, and by mutual consent, lived and cohabited in a conjugal union" with a married woman.[28] The accused was convicted under s. 278(b) of the *Code* (the same provision formerly numbered s. 278(a)(iv)). The Court held that if the prohibition meant "anything at all . . . [it was] meant to apply to just such a case as this, where the parties are living together in open continuous adultery to the scandal of the public."[29]

45. In *Rex v. Eastman* (1932), the accused was convicted by a Magistrate of endangering the morals of her child or rendering that child's home unfit because she was cohabiting with a man not her husband. The Magistrate relied peripherally on s. 310(b) of the 1927 *Code* (which was the renumbered s. 278(b) of the 1906 *Code*) in reaching his decision, using it to bolster the conclusion that

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[27] *The Queen v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211 (N.W.T.S.C.) **[*Nen-E-Quis-A*-Ka]** at 214. The Court did not, however, recognize as valid "any law or custom authorizing polygamy". See *ibid.* at 213. In 1895, the Deputy Minister of Justice and Solicitor of Indian Affairs opined that Aboriginal men married by "tribal customs . . . may be successfully prosecuted under Section 278 of the Criminal Code". See Affidavit No. 1 of Susan Drummond, Exhibit "B" at para. 76; Exhibit 65 in the proceedings.

[28] *The King v. John Harris* (1906), 11 C.C.C. 254.

[29] *Ibid.* at 255.

the adulterous living situation exposed the child to inappropriate sexuality. The Court of Appeal overturned the conviction and said, in *obiter*, "I only remark here that the section seems to apply only in the case of some sort of *contract* to live together, and not to a living together of one person with a married person of the opposite sex without any such contract."[30]

46. In *Dionne v. Pepin* (1934), the accused was also charged with endangering the morals of her children by cohabiting with a man to whom she was not married. The Court relied on *Labrie* for the proposition that mere cohabitation was not a criminal offence. It did not find that the morals of the accused's children were endangered.

47. In *Trudeau* (1935), the accused was convicted by a local magistrate under the s. 310(b) "conjugal union" provision. The conviction was based on the premise that the woman with whom the accused had lived and cohabited and agreed and consented to live with in a form of conjugal union, Geralda Plouffe, was already married. The conviction was overturned by the Quebec Court of King's Bench, sitting *en banc*, on the grounds that the Crown had not proved that Ms. Plouffe's former husband, who had disappeared 15 years prior to Plouffe's cohabitation with Trudeau, was alive and that Plouffe was, therefore, still married.

48. In concurring reasons to the principal judgments, Mr. Justice Walsh opined, in *obiter*, that the "outstanding feature" of the offence in s. 310 overall "is the principle of conjugal unions. They are criminal."[31] Justice Walsh further noted that the "polygamy", "conjugal union" and "Mormonism" provisions of s. 310 of the *Code* (the last still included in the 1927 version of the *Code*) were "very broad", the practices being considered criminal "when undertaken 'by any other method whatsoever', and *even 'by mere mutual consent'*."[32]

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[30] *Rex v. Eastman*, [1932] O.R. 407 (C.A.) at para. 19; emphasis added.
[31] *Trudeau* at para. 43.
[32] *Ibid.* at para. 48; emphasis added.

49. In the last case prosecuted under the predecessor provisions to s. 293, *Rex v. Tolhurst, Rex v. Wright* (1937), the Ontario Court of Appeal was again concerned with adultery. Tolhurst and Wright lived together but were married to other people. They were charged under s. 310(b) of the *Code*. The question before the Court was limited. It was ". . . purely one of law, namely, whether s. 310(b) of the Code covers an offence commonly known as adultery or the living in adultery of two married people."[33] The Court of Appeal answered the question in the negative. It held that the words "any kind of conjugal union" in the s. 310(b) of the *Code* "predicate some form of union under the guise of marriage, and that Parliament had no intention in this section of the Code of dealing with the question of adultery."[34] The Court did not explain what it meant by a "form of union under the guise of marriage", whether this necessitated some form of marriage ceremony, or whether a contract brought about by other means would suffice.

50. From a review of the case law, it is evident that the cases present no consistent line of authority as to what is required to prove that the parties are in a "form of conjugal union". Certainly, the majority of the cases call for an agreement or contract between the parties, but they do not specify any requirement for a marriage ceremony or rite to solemnize that agreement.[35]

51. The inconclusive nature of the cases, the broad and inclusive language of the statute and currently prevailing social reality in Canada do not support the federal Attorney General's suggested reading in of a requirement for a marriage ceremony or rite in s. 293(1)(a)(ii).

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[33] *Rex v. Tolhurst, Rex v. Wright,* [1937] 68 C.C.C. 319 (Ont. C.A.) at 320.

[34] *Ibid.*

[35] *"Bear's Shin Bone"* and *Nan-E-Quis-A-Ka* are not authority for the legal requirements of "any form of conjugal union", as the cases were decided on the basis that there were marriages between the spouses. *"Bear's Shin Bone"* was thus brought within the "polygamy" provisions of the offence, even though the accused was charged under both the polygamy and conjugal union provisions of the *Code*.

D. Section summary:

52. In summary, s. 293 requires the Crown to prove that the accused either: (a) (i) practised, or (ii) entered into, or (iii) agreed or consented to practise or enter into "any form of polygamy" or "any kind of conjugal union with more than one person at the same time", or (b) (i) celebrated, (ii) assisted or (iii) was a party to a rite, ceremony, contract or consent that purports to sanction "any form of polygamy" or "any kind of conjugal union with more than one person at the same time".

53. "Polygamy" includes polygyny and polyandry, while "any kind of conjugal union with more than one person at the same time" includes any form of plural relationship in which the participants agree or contract to co-exist conjugally. No marriage-like ceremony or rite is required. "Conjugal" takes its ordinary meaning of "marriage-like".

54. Section 293 captures all plural relationships, regardless of whether they cause harm to those directly involved, or not.

III. THE EVIDENCE BEFORE THE COURT:

55. British Columbia and Canada argue that the blanket ban on all forms of plural relationships is necessary. British Columbia says that the necessity arises from harms that purportedly occur "at large" from plural relationships, including "marketplace harms" from plural relationships and a purportedly increased risk of harm to the participants and children "inherent in the family form".[36] Similarly, Canada says that polygamy is "always risky" and that "all polygamous marriages expose the participants, their children, families and their communities, up to and

[36] Attorney General of British Columbia, Closing Submissions, at para. 317.

including the state level, to the risk of significant harm".[37] It is necessary to evaluate these claims.

A. The Nature of the Evidence:

56. By way of introductory comment, the BCCLA notes that the Governments rely heavily on two types of evidence to claim that polygamy has structural harms.

57. First, the Governments rely on cross-cultural and international qualitative and quantitative research correlating polygamy to various adverse outcomes for women, children and societies in countries other than Canada. A limitation of this evidence is that it is drawn from places and cultures that are far removed from the Canadian experience. The evidence of Dr. Shoshana Grossbard is instructive in this regard:

> Q. And can you say anything about the nations that would be primarily the host to polygamist communities?
>
> A. Yes there are many African countries. There are also Arab countries. Many of the countries where you find polygamy you find it just in certain parts of that country because it's a cultural phenomenon, and for example it could be limited to certain tribes or certain ethnic groups within a population and sometimes it's also associated with religion. . . .[38]

58. There are significant limitations to the cross-cultural and international evidence because this proceeding is called on to evaluate the constitutionality of the ban on plural relationships in Canada, given *its* prevailing conditions.

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[37] Attorney General of Canada, Closing Submissions, at para. 326.

[38] Evidence of Dr. Shoshana Grossbard, December 7, 2010 at p. 6, line 46 to p. 7 line 9. Later in her testimony, Dr. Grossbard also notes that the societies where polygyny is found "also have pretty low levels of investment of capital for all children because they typically have very high fertility and they spend their resources on quantity of children rather than quality of children"; see p. 15, lines 40 - 45. This distinguishes such countries from Canada: see Evidence of Dr. Joseph Henrich, December 9, 2010, p. 103, lines 39 – 45.

59. The Governments also rely heavily on evidence inspired by theories of evolutionary psychology. This evidence, it is maintained, demonstrates why polygamy has a structuring effect that must be avoided by a blanket ban on all plural relationships. The evidence of the evolutionary psychologists should be treated with great caution. As Dr. Todd Shackleford put it, evolutionary psychology is “an explanatory framework; a series of hypotheses” that some adopt with a view to trying to explain human behaviour.[39] Evolutionary psychology views humans as having a shared "evolved psychology" that informs mate-seeking behaviour across time, space and culture.[40] This view of human beings differs significantly from the conception of the individual entrenched in our constitutional law. In constitutional law, the person is viewed as a rights-bearing agent, imbued with dignity and autonomy to make profoundly personal decisions in accordance with her own sense of the right and the good. To the extent that there is cognitive dissonance between the models of the individual proposed by evolutionary psychology and by our constitutional law, it is respectfully submitted that the former must yield to the latter.

B. <u>The "at large" and "marketplace" harms alleged are specious</u>

60. There is no evidence to suggest that plural relationships are sufficiently numerous in Canada to generate any kind of "market pressure", positive or negative. Polygamy in Canada was described by the Law Reform Commission of Canada as "a marginal practice which corresponds to no meaningful legal or sociological reality in Canada".[41] The Womanstats database, on which Canada's expert, Dr. Rose McDermott relies for data, says:

> After reading through the EWC Cultural files on all of all of the major ethnic groups within the country, all available CEDAW reports, all of the UN Human Right's (*sic*.) treaties, Shadow reports, Measure DHS -

[39] Evidence of Dr. Todd Shackleford, December 12, 2010, p. 33, lines 15 – 18.
[40] Evidence of Dr. Joseph Henrich, December 9, 2010, p. 73, lines 31 - 37.
[41] See Law Reform Commission of Canada, Working Paper 42, "Bigamy" (1985) in Affidavit #2 of Brianna Luca at p. 884, Exhibit 151 in the proceedings.

> household survey reports and other available Journal articles and news sources *we have found no evidence that polygynous marriages are a national issue. They do not even appear to be a cultural or regional occurrence*. Other evidence may be found in the future but as of this comment the practice appears to be extremely minimal or non existent.[42]

61. Dr. McDermott also confirms that there is really no reliable data on polygynous marriage in Canada, and that her best estimate -- 10,000 marriages -- is drawn from a BBC news report.[43]

62. All of the witnesses who addressed the question agreed that there is no reliable data on the prevalence of polygyny among Muslims in Canada.[44] The Quebec *Conseil du statut de la femme* estimated in its recent report, "Opinion: Polygamy and the Rights of Women" that "a very small number of Canadian Muslims" practise polygamy.[45]

63. For their part, polyamorous relationships appear to be extremely unusual, the practice of a very small minority of Canadians.[46]

C. Lost Boys and Child Brides

64. This Governments raise the purported, and related, harms of the creation of a pool of unmarried low status males at risk for antisocial conduct (the "lost boys"), and depression of the age of marriage for females, through polygyny (the "child brides"). Given the near non-existence of polygyny in Canada, for these harms to be plausible on a national scale one must assume that polygyny would proliferate were it not criminalized by the state. The necessity of this assumption was confirmed in the evidence of Dr. Zheng Wu, a demographer, as follows:

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[42] See Evidence of Dr. Rose McDermott, December 16, 2010, p. 20, line 20 to p. 21, line17; emphasis added; see also Exhibit 119.
[43] *Ibid.* p. 21, line 42 to p. 22, line 26.
[44] Affidavit #1 of Anver Emon at para. 19; and Affidavit #1 of Alia Hogben at para. 17.
[45] See affidavit of Dany H. Gabay at Exhibit "A", p. 7; Exhibit 152 in the Proceedings. See also Evidence of Dr. Shoshana Grossbard, December 7, 2010, p. 24, lines 27 – 29.
[46] See Affidavit #1 of Carol Cosco, Exhibit 99 in the Proceedings.

Q. Now, I'm going to put Professor Henrich's -- a couple of his principal propositions to you.

He says that in a market with roughly equal men and women that the presence of polygyny, which allows some of the men to have more than one wife, creates a shortage of women for marriage and that this will force a depression or will create a pressure for the recruitment of increasingly younger women to increase the pool of available brides. Do you accept that as a proposition? Do you have any thoughts on that?

A. Well, in theory, because men tend to marry women of their own age or younger, and if a man marries more than one person, one woman, in theory you're going to look for women of your own age and going younger. . . . Yes, I would say in theory it would be possible.

Q. But it would be true also, sir, wouldn't it, of people in their first marriage because the available pool is smaller because the polygynists are taking some wives out of circulation as it were. So if you take a proportion, say, why don't we say 18 to 40-year-olds at the time, child bearing or marriage age. If those are taken disproportionately by a smaller number of men then a pressure is created for the recruitment of a larger pool of women and that can only come from younger and younger ages, and that would be true for monogamous men in the society and polygamous men in society. Would you agree with that?

A. In theory, yeah.

Q. The other flip side of this mathematical argument, if I can put it this way, the theory as you've referred to it, is that there is a creation of an increase in the pool of unmarried, unmarriageable young men that I think you've already told us are more likely to be lower socioeconomic status. So polygyny creates unmarriageable men to the extent that they can't satisfy themselves from younger brides or some other source of brides; is that fair?

A. Well, in theory, as I said, in probably a closed society, as demographers I'm thinking here are other issues involved, immigration, migration as well, and people going in and out of the system.

Q. Right.

A. But in a closed system in theory, yeah you would expect the number would increase in terms of men, yeah.

Q . Okay. And you've mentioned perhaps a third pressure that I can put in there. So we've got the pressure creating this pool of unmarried men, we've got a pressure creating child brides, and then there's perhaps a third pressure for the importation into whatever society it is of women?

A. There's possible, yes.

...

A. But can I qualify this?

Q. Please.

A. Yes. There's no easy yes-and-no answers for these kind of things; right?

Q. I understand.

A. Everything is going to be equal and holding this constant and that constant and so on. Certainly we are talking about in theory and there would be increase but how much the increase is always very important. Maybe 1 percent, 2 percent, but it is increase. In theory you would expect an increase. Just based on logic and mathematics it would be an increase. But how much is increase, how much -- you know, has to be taken into account as well.

Q. And the main factor would be, wouldn't it sir, the degree of polygyny? . . .

Q. . . . So it's ipso facto a pressure, but whether it's -- whether it's significant is going to depend largely on the extent to which the practice is taken up?

A. That's correct, yeah.[47]

65. The evidence in the proceeding does not support the suggestion that polygyny would increase with decriminalization. Dr. Joseph Henrich testified that he thought it "possible that because of our evolved psychology, that the idea of

[47] Evidence of Dr. Zheng Wu, December 7, 2010, p. 65, line 13 to p. 66, line 16.

polygynous marriage will . . . spread amongst the majoritarian population," but then also admitted, "Of course, I'm only speculating here"[48] -- a candid admission, since Dr. Henrich's belief appears to be based on a poll by "clicker" of female students in his evolutionary psychology class, the amorous goings-on of an Indian actor and a radio report on polygamy among African American Muslims in South Philadelphia.[49] Dr. Henrich also readily admitted on cross-examination that Canada is an essentially monogamous society, and that polygyny will be "absolutely exceptional" in Canada.[50] Dr. Todd Shackleford, an evolutionary psychologist who shares material assumptions with Dr. Henrich, considers it “terribly, terribly unlikely” that polygamy, if decriminalized, would spread in North America to any extent.[51]

66. Moreover, the twin purported inexorable harms of lost boys and child brides hinges on the premise that women must remain on the "marriage market" to satisfy mate-seeking males. If one follows the theory to its logical conclusion, *anything* that removes women from a pool of potential heterosexual spouses must be classified as a harm to be guarded against by law: for example, celibates, lesbian couples and, to a greater extent, lesbian triads would pose a social harm justifying state action. However, it is obvious that these "harms" would -- and should -- never be protected against by legislative action in a democratic state because such legislation would be extreme. The same holds true for s. 293 of the *Code.* It is an extreme measure.

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[48] Evidence of Dr. Joseph Henrich, December 9, 2010, p. 74 at lines 21 - 26; and p. 103, lines 6 - 24.
[49] Evidence of Dr. Joseph Henrich, December 9, 2010 at p. 74, lines 30 - 32, 41 - 47 and p. 75, lines 12 - 38.
[50] *Ibid*., p. 102, lines 44 - 47.
[51] Evidence of Dr. Todd Shackleford, December 12, 2010, p. 54, line 37 – p. 55, line 2.

D. There are no "inherent risks" to participants and their families

67. On a theoretical level, the suggestion that all plural relationships bear a risk of harm to their participants and children is based in part on an extrapolation from research by Dr. Todd Shackleford and others showing that there is an increased risk of violence in monogamous families when a step-parent is introduced into the family. The extrapolation is drawn by Dr. Henrich, although Dr. Henrich admits that it is "an inferential extension" that is unsupported by actual data.[52] In his oral evidence, Dr. Shackleford expressly warned against the extrapolation of the research "holus bolus" into the non-monogamous context.[53]

68. The Governments also rely on the evidence of lay witnesses who have left the fundamentalist Mormon community and on evidence from psychologist Dr. Lawrence Beall to establish the "inherent" harms of polygamy. Two observations are warranted about this evidence.

69. First, the evidence of the lay witnesses reveals that some of them have experienced horrific abuse and family violence. Was this caused by polygamy, or by abusive individuals? Among those witnesses who provided video depositions, it is notable that four (three females and one male) were from the same family and all of the females reported abuse at the hands of the same father.[54] Also significant are the witnesses from independent Fundamentalist Mormon polygamous families who reported no abuse, and suggested that they would not tolerate it.[55] What the evidence of the lay witnesses confirms is that, unfortunately, abuse appears as liable to occur in polygamous families as it does

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[52] Evidence of Dr. Joseph Henrich, December 9, 2010, p. 65 at lines 24 - 42.
[53] Evidence of Dr. Todd Shackleford, December 15, 2010, p. 60, lines 30 - 38.
[54] See Affidavit #1 of Howard Mackert; Affidavit #1 of Kathleen Mackert; Affidavit #1 of Mary Mackert; and Affidavit #1 of Rena Mackert, Exhibits 34, 35, 36 and 37, respectively, in the proceedings.
[55] See evidence of Mary Batchelor, January 20, 2011, p. 20, lines 1 to 47; Evidence of Alina Darger, January 19, 2011, p. 57, lines 8 - 18; Affidavit #1 of Anne Wilde at para. 11, Exhibit 67in the proceedings; and Affidavit #1 of Marianne Watson at Exhibit "A", p. 12, Exhibit 68 in the proceedings.

in monogamous families. However, the evidence does not establish that abuse is more likely to occur.

70. Second, Dr. Beall, a psychologist and trauma specialist, who testified to counselling 30 "polygamy survivors,"[56] gave evidence that post-trauma symptoms and post-traumatic stress disorder ("PTSD") were common to his fundamentalist Mormon patients. Dr. Beall opined that his patients' experience of polygamy was causative of their psychological trauma.[57] However, as Dr. Beall explained, the unique feature of PTSD among psychological disorders is the existence of a stressor event that causes a sense of helplessness and terror, resulting in intrusive psychological experiences after the event is over.[58] On cross-examination, Dr. Beall admitted that of the 11 males he had treated and diagnosed with PTSD, all had a history of physical abuse;[59] that sexual assault and spousal abuse were common among the women he treated;[60] and that experiences of physical and sexual violence, domestic abuse, and threats of serious harm to the victim's own person and/or her children or other loved ones were common in his FLDS patient group as a whole.[61] The expert evidence thus confirmed what the evidence of the lay witnesses also suggested: abuse occurs in polygamy, but is not caused by it *per se*.

71. There is no evidence of abuse, whatsoever, from the witnesses in "polyamorous" plural relationships.

E. The FLDS and Bountiful as Exemplars of the Harms of Polygamy

72. Were it not for the phenomenon of Bountiful, its unlikely this Reference would ever have been brought to the Court. British Columbia and Canada hold

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56 Evidence of Dr. Lawrence Beall, December 2, 2010, p. 9, line 24.
57 *Ibid.* p. 18, lines 27 - 32.
58 *Ibid.* at p. 20, lines 6 - 8.
59 *Ibid.* p. 44, lines 43 - 47.
60 *Ibid.*, p. 45, lines 32 - 36.
61 *Ibid.*, p. 59, lines 40 - 46, p. 60, lines 1 - 6.

out the FLDS community of Bountiful and its southern sister cities of Hilldale, Utah and Colorado City, Arizona as demonstrating the harms they say flow inexorably from plural relationships. There is disturbing and compelling evidence of harmful activities in these communities, but caution must be exercised in assessing its causes.

73. The FLDS is an insular and dogmatic religious group that adheres to some severe precepts. Among them is the principle of placement, or assigned, marriage. The evidence suggests that this practice is unique to the group, and is not shared by other Fundamentalist Mormons, or others in Canada who engage in plural relationships.[62] Placement marriage raises substantial concerns with respect to consent to marriage. It is an issue that warrants attention, but it is an issue entirely distinct from the constitutionality of s. 293 of the *Code*.

74. The FLDS is also led by a charismatic leader, the "prophet", who exercises extraordinary power over members of the group. As Truman Oler, who made the difficult decision to leave Bountiful (and thus his family), put it in his evidence, ". . . I guess basically we were always taught that the duty of the man was to be ready and willing at any point in time to drop everything, drop everything and go to do the prophet's will. You had to be ready to do that at any point."[63]

75. Similarly, Carolyn Jessop, a former member of the FLDS in the United States, testified as to power of the prophet in matters of marriage:

> Q. Now, the person -- the particular person who assigns people into marriage in the FLDS is the prophet. You've testified about that?
>
> A. Yes.

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[62] See, e.g., Evidence of Mary Batchelor, January 20, 2011, p. 8, lines 10 - 13; and Evidence of Alina Darger, January 19, 2011, p. 54, line 47 to p. 55, line 6.

[63] Evidence of Truman Oler, January 18, 2011, p. 5, lines 35 - 40.

> Q. And he is a person who has tremendous power over everybody in the FLDS because he's believed by those who follow the religion to be a prophet from God; is that right?
>
> A. It's believed that he speaks to God through revelation.
>
> Q. Right. And because of that belief he wields a tremendous amount of power within the FLDS?
>
> A. In my experience, yes. To say no to him, you're saying no to God.[64]

76. There is evidence that the current "prophet", Warren Jeffs, has been responsible for arranging marriages of young girls and teens to adult men within the FLDS.[65] Where there is evidence of abuses against minors they should be investigated and, where the evidence discloses reason to charge, prosecuted under the governing laws. As with arranged marriage, however, the issue of the abuse of children is a distinct matter from the right of consenting adults to enter into plural relationships. It ought to be treated as such.

F. Criminalization of plural relationships promotes insularity

77. The evidence in the proceeding suggests that the criminal prohibition on plural relationships contributes to insularity in some communities, to the detriment of women and their families. For example, Angela Campbell notes that while most residents of Bountiful "have no hesitation about accessing what might be termed 'uncontroversial' services outside of their community . . . where required services might raise questions about a polygamous lifestyle, I perceived some apprehension, and this has resulted in some insularity for residents of this community".[66] Professor Campbell gives the examples of marriage and individual psychosocial counselling as services that women in Bountiful are

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[64] Evidence of Carolyn Jessop, January 12, 2011, p. 64, lines 34 - 47.
[65] See Affidavit #3 of Leah Greathead. Jeffs' private writings suggest that he personally engaged in acts of sexual abuse. See Affidavit #1 of Warren Hoole at p. 124.
[66] Affidavit #2 of Angela Campbell at para. 126, Exhibit 64 in the proceedings.

reluctant to engage for fear that the issues they need to address will be singularly attributed to polygamy.[67]

78. The evidence of insularity among Muslim communities is compelling. Professor of Nursing Dena Hassouneh notes in her affidavit that her personal observations of women in Arab-American and African-American Muslim communities suggests that the stigma of polygamy within and without Muslim communities is "isolating" and "detrimental to the health and safety of women generally and women in particular".[68] In the Canadian context, the Executive Director of the Canadian Council of Muslim Women, Alia Hogben, noted that, among Muslim immigrant women with whom she has spoken, there is evidence that the law impedes women's ability to leave polygamous relationships foisted upon them without their consent, or in which they are otherwise unhappy. Hogben says that some women who have contacted her, "are aware that polygamy is illegal in Canada, and they are afraid of facing legal consequences".[69] Many also report experiences of discrimination in the Canadian legal system, and feel distrustful of government, causing them to turn more to community leaders than to the state to resolve family law problems.[70]

G. <u>If polygamy is not criminal, the polygamists will come to Canada</u>

79. The Governments and some of the allied Interested Persons suggest that if polygamy ceases to be a criminal activity, Canada will see an increase in the number of polygamous families applying to immigrate to Canada. This speculation is analogous to the fear expressed in the mid-twentieth century that if homosexual activities were decriminalized, Canada would become a destination for gay immigrants. The argument was not compelling a half century ago, and it

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67 *Ibid*. at paras. 129 - 131.
68 Affidavit #1 of Dena Hassouneh at Exhibit "C", pp. 15 - 16 and 28, Exhibit 3 in the proceedings.
69 Affidavit #1 of Alia Hogben at para. 15, Exhibit 10 in the proceedings.
70 *Ibid.* at para. 17.

is not compelling now. The BCCLA adopts the submissions of the Amicus in response to this argument.

IV. SECTION 293 OF THE *CODE* BREACHES S. 7 OF THE *CHARTER*[71]

80. Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

81. The s. 7 analysis proceeds in two stages. First, the Court is called upon to determine whether there is a deprivation of life, liberty or security of the person. If so, the Court must determine whether that deprivation is in accordance with the principles of fundamental justice.[72]

82. Each of life, liberty and security of the person has a distinct role to play in the right protected by s. 7 of the *Charter*, and it is incumbent on the Court to give meaning to each.[73] Section 293 of the *Code* implicates the individual's right to protection of liberty and security of the person.

A. Liberty

83. Section 293 of the *Code* affects liberty in two ways. First, liberty is implicated because conduct found to offend s. 293 renders the individual liable to imprisonment. This is sufficient to trigger the s. 7 inquiry.[74]

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[71] In addition to advancing the argument that follows, the BCCLA supports and adopts the submission of the Amicus that s. 293 violates s. 7 of the *Charter* on the grounds that consent to an activity that is otherwise criminal is a principle of fundamental justice, and s. 293 deprives the liberty of the individual contrary to that principle of fundamental justice.

[72] *R. v. D.B.*, 2008 SCC 2, [2008] 2 S.C.R. 3 **[*D.B.*]** at para. 37.

[73] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 **[*Morgentaler*]** at 52.

[74] *D.B*. at para. 38.

84. However, s. 293 engages the liberty interest in a richer, and arguably more significant, way. The right to liberty is engaged "when the state steps in to prohibit . . . fundamental life choices that '[e]veryone' is otherwise free to pursue . . ."[75] This is because

> the liberty right within s. 7 is thought to touch the core of what it means to be an autonomous human being blessed with dignity and independence in "matters that can properly be characterized as fundamentally or inherently personal".[76]

85. One's choice of conjugal relationship is undoubtedly in the category of fundamental life choices that are basic to individual autonomy and dignity, and intensely private in nature. In choosing conjugal partners, we choose the people with whom we will be intimate (sexually and otherwise), with whom we will share significant life decisions, and likely our homes and our finances, and with whom we may raise, educate and socialize children. It is difficult to imagine a more intensely personal decision than the choice an individual makes about her conjugal relationship. The individual's choice of conjugal relationship is a basic manifestation of one's personal autonomy and sense of the good in private life.

86. Section 293 of the *Code* intends to prohibit the individual from entering a plural relationship. The provision thus triggers consideration of the right to liberty under s. 7, in the "rich" sense of the right.

B. <u>Security of the Person</u>

87. Section 293 of the *Code* also interferes with the security of the person of those who are, or desire to be, involved in a plural relationship.

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[75] *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 **[*A.C. v. Manitoba*]** at para. 217 per Binnie J., dissenting, but not on this point.

[76] *R. v. Clay*, 2003 SCC 7, [2003] 3 S.C.R. 735 at para. 31, citing *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 **[*Godbout*]**. See also *Morgentaler* at para. 289, per Wilson J; and *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 368; and *R. v. Malmo-Levine, R v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 **[*Malmo-Levine*]** at paras. 84 - 85.

88. The individual's right to security of the person encompasses the notions of dignity and the right to privacy, and has an element of personal autonomy.[77] Like the right to liberty, the right to security of the person protects the right of the individual to make fundamental life choices such as: having meaningful access to abortion;[78] having the right of a parent to nurture a child, care for its development and make decisions for it in fundamental matters such as medical care;[79] having access to responsive medical services;[80] and for sexual assault victims, having the ability to seek therapy without fear of their private records being disclosed.[81] As the Supreme Court acknowledged in *Blencoe v. British Columbia (Human Rights Commission)*, the decisions protected by the right to security of the person are "compelling", "basic to individual autonomy" and "basic to individual dignity".[82]

89. For the reasons described above, there can be no doubt that the choices an individual makes about her conjugal relationships fall within the category of life choices protected by the right to security of the person.

90. Security of the person affords everyone protection from serious state-imposed psychological stress and assaults to her emotional integrity by the criminal law.[83] For nearly a quarter century, the law has recognized that "serious state-imposed psychological stress, at least in the criminal law context, constitute[s] a breach of security of the person".[84]

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[77] *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519 **[*Rodriguez*]** at paras. 197 and 200 per McLachlin J., dissenting, but not on this point.
[78] See *Morgentaler.*
[79] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 370.
[80] *Chaouilli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 **[*PHS*]**.
[81] *R. v. Mills*, [1999] 3 S.C.R. 668.
[82] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 **[*Blencoe*]** at par. 86.
[83] *Rodriguez* at para. 136 per Lamer C.J., dissenting, but not on this point.
[84] *Morgentaler* at para. 25 per Dickson C.J.C. and at para. 281 per Wilson J. See also *Blencoe* at paras. 55 to 57.

91. A breach of security of the person can occur where there is a prohibition engaging the right; no prosecution is required: "the fact of exposure is enough to violate security of the person".[85]

92. The evidence discloses that s. 293 produces a constitutionally cognizable level of psychological stress for individuals living in plural relationships.

93. Among the witnesses living polygamously, the choice of the Canadian witnesses to give their evidence anonymously speaks for itself, in terms of the degree of psychological stress imposed by the criminalization of their relationships. The anonymous witnesses are sufficiently fearful of the consequences of identifying themselves as polygamists that they feel it necessary to conceal their identities.

94. Angela Campbell's research among women in Bountiful also reveals serious psychological stress among women who know that their plural relationships are criminalized. Professor Campbell notes that among the women she interviewed, "many expressed anxiety and regret over the prospect of being branded a 'criminal'".[86] She says, "the women with whom I have spoken in Bountiful feel marginalization, vulnerability and indignity from the state's efforts to foreclose the life and family choices that they wish to make, which they see as propelled by their faith, by personal choice, and by family and community norms."[87] The women expressed concern about whether their spouses will be charged and convicted under s. 293.[88] A "significant number" of women also expressed fear that if they or their husbands were charged, or even suspected of a criminal offence, their children would be apprehended by the state. Professor Campbell deposes to an interview subject making the following comment,

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85 *Morgentaler* at para. 281, per Wilson J. See also *Rodriguez* at para. 128.
86 Affidavit #2 of Angela Campbell at para. 120, Exhibit 64 in the proceedings.
87 *Ibid.* at para. 260.
88 *Ibid.* at para. 138.

> [W]hat happened in Texas, that would be the worst thing that's ever happened. Because in this situation, the children are everything. And you don't focus on the husband, or even the wives, as much as the children. They're your comfort and your job, your everything. Everything you do is for the children. So if you lose them it's like taking your life away.[89]

95. Independent Fundamentalist Mormon Mary Batchelor, who lived in a polygamous relationship for three years in Utah and aspires to do so again,[90] also describes criminalization of polygamy as having a serious adverse psychological effect on her. While not caused by s. 293, in particular, her psychological reaction to comparable American legislation is instructive:

> Q. Now you have said in your affidavit, Ms. Batchelor, that you knew when you entered plural marriage that it was against the Utah law?
>
> A. I -- I did know, yes.
>
> . . .
>
> Q. And what effect do you see the law against polygamy as having had in your experience?
>
> A. I felt it was very oppressive and frightening to me and also the people that I know. You know, we didn't feel like we could tell people things about our families. I mean, obviously, I wasn't raised in polygamy, so I didn't experience that same kind of fear, but I experienced it when I went into plural marriage. I wasn't able to tell people who my husband was really and live it openly like that. So it was very frightening.
>
> So I think secrecy is one of them. The feeling that you can't just live openly and be part of society for fear you're going to be prosecuted and your family is going to be torn apart.[91]

96. The feeling of the need to hide one's identity and conceal one's intimate relationships, and the feelings of fear and oppression expressed by the witnesses speak to the serious nature of the psychological impact of the criminal

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89 *Ibid.* at para. 124.
90 Evidence of Mary Batchelor, January 20, 2011 at p. 7 at lines 17 - 25.
91 *Ibid.* at p. 14 line 35 to p. 15 line 21; emphasis added.

prohibition on polygamy for those who find personal fulfilment in this form of domestic and family arrangement.

97. The witnesses in "polyamorous" plural relationships also give evidence of serious stress imposed by the prohibition in s. 293 of the *Code*.

98. Zoe Anne Elizabeth Duff, who lives in a triad relationship with two men, deposes as to the impact of s. 293 on her and her family as follows:

> The fact that Section 293 stands, regardless of anticipated enforcement or lack thereof, places us in a moral dilemma as parents who have raised children to be law abiding citizens. We live a life that is honest and open and yet must be careful as to whom we disclose our loving and supportive relationship. Our children have experienced difficult conversations with friends and parents of friends who become aware of our triad and react with inappropriate comments since the existence of the law has been raised in the media. We have a family of wonderful children who love and respect us as parents and know that our relationship is supportive and loving but have trouble explaining why our breaking that law is fine but such things as underage drinking and recreational drug use have never been tolerated in or around our home.
>
> Having been an active advocate for support and information in the polyamorous community both in Canada and the United States, my family is concerned that this puts me at risk for prosecution under the law. It causes me to consider carefully and hesitate greatly to participate and hampers my career choices as the publicity of my lifestyle increases.
>
> We are unable to entertain any thoughts of ceremonially recognizing our relationship. I have been informed by my Wiccan Priest who is able to perform legally binding weddings through a parent organization that he must decline performing non-legally binding polyamorous handfastings. The parent organization has recently advised that it could be charged and have all credentials revoked for performing a symbolic ceremony under this section of the criminal code.
>
> The lack of clarity in the wording of section 293 leaves us very vulnerable to enforcement of a law that can clearly be interpreted to include our family and community members.[92]

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[92] Affidavit of Zoe Anne Elizabeth Duff at paras. 50 - 53; Exhibit 96 in the proceedings.

99. Karen Ann Detillieux, also involved in a triad relationship, deposes that she and her partners feel "marginalized by the law and fearful of discrimination".[93] She further deposes that while she and her partners do not fear prosecution under the law,

> the existence of Section 293 as it is written purports to criminalize my family and my conjugal relationships. From my perspective this law supports those few who have criticized and rejected my relationships and accused us of wrongdoing, or worse, or bringing harm to ourselves or our children. On the contrary, from our personal experience we know that the inability to freely express key parts of ourselves and our lives causes harmful and unnecessary stress.[94]

100. John Bashinki deposes to his fear that s. 293 may adversely affect the ability of he and his two partners (a woman and a man) to care for their two year old child, Kaia; that he and his partners may be prosecuted under the law; and that he may denied permanent residency or citizenship in Canada, due to the law:

> I fear, and I believe that the other members of our triad likewise fear, that Section 293 may adversely affect our ability to care and provide for Kaia.
>
> a. I fear that, should the issue be brought to the attention of child welfare authorities, those authorities might find our triad to be in violation of Section 293, and/or might find Section 293 to lend credence to the idea that multi-partner conjugal relationships are immoral, unhealthy, or contrary to the standards of Canadian society.
>
> b. I fear that, as a result of such a determination and should some occasion for evaluation arise, any of all of us might be deemed unfit parents or caretakers for Kaia, and/or our home might be deemed an unfit environment for her, resulting in some or all of us losing custody of Kaia, access to her, some or all control over her upbringing, and/or the right to live together as a family.
>
> c. I fear that, should there be any challenge to our arrangements providing for my custody of Kaia in the event of the death or

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93 Affidavit of Karen Ann Detillieux at para.56; Exhibit 95 in the proceedings.
94 *Ibid.* at para. 54.

> incapacity of both of the other members of our triad, Section 293 might weigh as a factor in denying me such custody.
>
> I fear, and believe that the other members of our triad likewise fear, that any or all of us could be subject to prosecution, conviction, and punishment under Section 293.
> . . .
>
> I fear, and believe that the other members of our triad likewise fear, that Section 293 may cause immigration authorities to deny me permanent residency or citizenship in Canada.
>
> a. It is my understand that violation of, or evidence intent to violate, any Canadian criminal law is grounds for and can be expected to result in exclusion from permanent residency or citizenship.
>
> b. Should I be denied permanent residency or citizenship, I would be harmed by losing the chance to live and fully contribute to the country I have chosen as most suitable to me.
>
> c. Although other members of our family are Canadian citizens, any decision denying me the right to reside in Canada would force them to choose between *de facto* exile from their native country and the loss of their freedom to live life with the mates of their choice in the fashion of their choice.
>
> d. I believe that the other members of our family would in fact leave Canada if I were denied the right to reside here. The United States is our family's chief alternative to Canada as a country of residence. However, there is no guarantee that the United States would admit the other members of our family as immigrants or would do so quickly, and indeed no guarantee that we would find ourselves welcome as a family in any country at all. Inability to find a place of residence could temporarily or permanently separate our family, resulting in enormous negative consequences for all family members.[95]

101. In short, the evidence establishes the breaches of the right to liberty and security of the person. The psychological stress of those affected by the prohibition on plural relationships in s. 293 of the *Code* describe is serious -- far

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[95] Affidavit of John Robert Bashinski at para.56; Exhibit 93 in the proceedings.

from life's ordinary stressors[96] -- and arises directly from the criminalization of their plural relationships. This being so, the question becomes whether that breaches are in accordance with the principles of fundamental justice. They are not. Section 293 is grossly disproportionate.

C. Gross disproportionality:

102. The test for disproportionality under s. 7 was set out in *Malmo-Levine* as follows:

> [A]fter it is determined that Parliament acted pursuant to a legitimate interest, the question can still be posed under s. 7 whether the government's legislative measures in response to the use of marihuana were, in the language of *Suresh* [*v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3], "so extreme that they are *per se* disproportionate to any legitimate government interest" . . . [T]he applicable standard is one of *gross* disproportionality, the proof of which rests on the claimant.[97]

103. The principle against gross disproportionality under s. 7 is not limited to consideration of the penalty attaching to a conviction. Thus, the Court held in *Malmo-Levine* that "if the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused by marijuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*."[98]

104. This test also applies where the claimant is not an accused, but a challenger to the law in civil proceedings.[99]

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[96] See *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 60: serious psychological effects "need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety".

[97] *Malmo-Levine* at para. 143; all emphasis in the original.

[98] *Ibid.* at para. 169.

[99] See *PHS,* and *Bedford v. Canada*, 2010 ONSC 4264 **[*Bedford*]**.

105. The first step in the disproportionality analysis is to identify whether the impugned law pursues a legitimate state interest. The second step to the analysis is to interrogate whether the effects of the law are so extreme that they are *per se* disproportionate to the state interest.

106. Section 293 of the *Code* does pursue a legitimate interest: the prevention of harm.[100] The problem in this case is that the criminal prohibition is so poorly calibrated to the underlying legislative purpose that it utterly tramples the rights of those consenting adults who, for reasons of personal conscience, family orientation or religious belief, find their conception of the good in a plural relationship.

107. The argument begins by considering Parliament's purpose in enacting offence.

(a) THE PURPOSE OF S. 293 OF THE *CODE*

108. The goal of the original amendment to the *Act respecting Offences relating to the Law of Marriage* was to "suppress polygamy".[101] However, it is not apparent from the legislative history exactly what particular mischief Parliament aimed to address by so doing, and whether Parliament was motivated by anything other than an inchoate and abstract sense that polygamy entailed some form(s) of harm and was simply immoral.

109. What can be gleaned from the legislative record is that the provision was enacted with a view to preventing polygamy, especially Mormon polygamy, from taking hold in Canada.[102]

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[100] See *Malmo-Levine* at para. 130.
[101] House of Commons Debates, 29 (7 February, 1890) at 342 (Sir John Thompson).
[102] Legislative history is admissible for the "general purpose of showing the mischief Parliament was attempting to remedy with the legislation": *Heywood* at para. 42.

110. Sir John Thompson, who moved second reading of Bill 65, "An Act further to amend the Criminal Law" in the House of Commons on April 10, 1890, commented, that the relevant section (s. 9),

> . . . deals with the practice of polygamy, which I am not aware yet exists in Canada, but which we are threatened with; and I think it will be much more prudent that legislation should be adopted at once in anticipation of the offence, if there is any probability of its introduction, rather than we should wait until it has become established in Canada.[103]

111. In committee in the House later the same day, Member of Parliament Blake spoke in support of the bill and referred to polygamy in the Mormon context as an "abominable practice",[104] while his colleague Mr. Mulock spoke in favour of increasing the punishment provision to prevent "a serious moral and national ulcer".[105] Member McMullen referred to Mormon polygamy as a "pernicious habit".[106] Member Mitchell "commend[ed] the Government for taking care to preserve the morals of this country" by using the criminal law to compel Mormon settlers in the West to "live as other people do in a Christian community".[107]

112. Senator John Abbott who moved second reading of the bill in the Senate on April 25, 1890, said,

> The third chapter is mainly devoted to the prevention of an evil which seems likely to encroach upon us, that of Mormon polygamy, and it is devoted largely to provisions against that practice.[108]

113. However, later in the debates, Senator Abbott commented,

> Of course the Bill is not directed against any particular religion or sect or Mormon more than anybody else; it is directed against polygamists. In so far as Mormons are polygamists of course it attaches to them.[109]

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[103] House of Commons Debates, 30 (10 April, 1890) at 3162-3163.
[104] *Ibid.* at 3175.
[105] *Ibid.* at 3177.
[106] *Ibid.* at 3178.
[107] *Ibid.* at 3170.
[108] Senate Debates (25 April, 1890) at p. 583.

114. Two years later, when the *Code* was under debate in the House of Commons, Sir John Thompson commented in relation to the "conjugal union" provision of s. 278 that is was not intended to address adultery, but Mormonism and plural marriage. He said,

> I may state the history of this section. It was inserted the first time three years ago, when an attempt was made to put down offences connected with Mormonism and plural marriage, and after considering the laws of every state in the United States which attempted to deal with that question, we found that that was the best way we could express it . . .[110]

115. After 1892, the prohibition on "any form of polygamy" and "any form of conjugal union" was simply perpetuated in the various reorganizations of the *Code*, and the provision was not further considered in Parliament in any substantive manner.

116. Despite the sometimes vitriolic expression of the purpose behind the suppression of polygamy in the legislative debates, it remains reasonable to conclude that the law was introduced to avoid harm from conduct believed to be anti-social and thus incompatible with the proper functioning of society.[111] The real question is whether the *effects* of the law today "fall within the broad latitude within which the Constitution permits legislative action."[112] This is the question of gross disproportionality.

(b) ARE THE EFFECTS OF THE LAW SO EXTREME AS TO BE GROSSLY DISPROPORTIONATE?

117. To begin, it is important to note that the interests at play in this Reference are of an entirely different order of magnitude of personal importance than those

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109 *Ibid.* at p. 585.
110 House of Commons Debates, 35 (3 June, 1892) at 3322.
111 See *R. v. Butler*, [1992] 1 S.C.R. 452 at para. 59.
112 *Malmo-Levine* at para. 175.

before the Court in *Malmo-Levine.* The gross disproportionality claim in that case was ultimately founded on what the Court characterised as a "lifestyle" choice – recreational pot smoking – that did not attract constitutional protection.[113] This proceeding, in contrast, grapples with the right to choose the conjugal relationship that best meets an individual's personal aspirations for her private life – a "basic choice going to the core of what it means to enjoy individual dignity and independence".[114] In this respect, it is more akin to *Morgentaler* and *Rodriguez* than to *Malmo-Levine.*

118. The *Charter* infringement for those who find fulfilment in plural relationships is deep. Through s. 293 of the *Code*, Parliament has criminalized plural relationships between consenting adults. This is not a mere restriction on "one's ability to do as one pleases," as British Columbia suggests.[115] It is an assault on the individual's autonomy in making profoundly personal decisions for herself. The evidence reveals the result: those affected live under the weight of bias, stigma, prejudice and fear arising from the criminalization of their conduct.

119. Weighed against the infringement of the individual's right to liberty and security of the person is the legislature's objective in s. 293 of the *Code*. This objective, the prevention of harm, is valid but abstract. In this case, the notion of the harm to be prevented is firmly rooted in Victorian conceptions of morality. These are out of step with Canada's contemporary legal culture and social reality. Yet, as the Supreme Court of Canada recognized in *R. v. Labaye*, "[i]t is important to evaluate the nature of the conduct in light of *contemporary* Canadian standards."[116]

120. In considering whether the state's general objective to prevent harm is compelling in the face of the s. 7 infringement, it behoves one to consider what

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113 *Malmo-Levine* at para. 86.
114 *Ibid.* citing *Godbout* .
115 Closing Submissions of the Attorney General of British Columbia at para. 332.
116 *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728 **[*Labaye*]** at para. 55; emphasis added.

the evidence reveals: that plural relationships in Canada today are not inherently harmful. Some, like some monogamous relationships, can be difficult or even abusive. Others, however, are happy and fulfilling for those who choose them.

121. The extent of the disproportionality in the criminalization of plural relationships is highlighted by comparing the state's extreme response to these relationships and the considerably more moderate response to criminal indecency, an offence traditionally justified by reference to the state's interest in protecting national morality. For conduct to be held indecent at law, it must be shown to be "conduct that can be objectively shown *beyond a reasonable doubt* to interfere with the proper functioning of society," meaning conduct that, "not only by its nature but also in degree, rises to the level of threatening the proper functioning of our society".[117]

122. In comparison to sexual acts, plural relationships in Canada are not judged on their merits. They are criminal merely by coming into existence. This is an extreme and grossly disproportionate response to the state's interest in preventing harm.

123. The criminal law's treatment of plural relationships cannot be governed by the views of the "moral majority". The state's interest lies not in promoting a particular view of morality, but in preventing actual harm[118] and creating and perpetuating "a free and democratic society". This means accommodating diversity. As Dickson J. (as he then was) commented in *R. v. Big M Drug Mart*,

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*.[119]

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117 *Labaye* at paras. 52 and 56; emphasis added.
118 *Ibid.* at para. 24.
119 *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 336.

The criminalization of plural relationships *per se* erodes, and does not serve, freedom. It overextends the reach of the criminal law in the individual's private life, intruding into her most private relationship.

124. For many monogamous Canadians, it may be difficult to understand how anyone, and particularly a woman, might consent to a plural relationship. Such psychological speculation is not a proper concern in defining the rights conferred by the *Charter*. As Binnie J., dissenting, held in *A.C. v. Manitoba,* "The *Charter* is not just about the freedom to make what most members of society would regard as the wise and correct choice. If that were the case, the *Charter* would be superfluous."[120]

125. Similarly, some Canadians fear that decriminalizing plural relationships will only open the door to abuse of the vulnerable. On this point, the comments of Lamer C.J., dissenting, in *Rodriguez* are apposite:

> The fear of a 'slippery slope' cannot, in my view, justify the over-inclusive reach of the Criminal Code to encompass not only people who may be vulnerable to the pressure of others but also persons with no evidence of vulnerability and, in case of the appellant, persons where there is positive evidence of freely determined consent.[121]

126. If, in Canada, we take seriously the right of the individual to self-determination and autonomy, then the right of consenting adults to decide for themselves the form of relationship that will support their flourishing warrants constitutional protection. If abuses occur within a relationship (whether plural or monogamous), state intervention through the criminal law or civil remedies may be appropriate. However, ours will be an impoverished version of a free society if our response to abuses in some plural relationships continues to be a blanket ban on all such relationships.

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[120] *A.C. v. Manitoba* at para. 163.
[121] *Rodriguez* at para. 92.

127. For more than 40 years, Canadians have recognized that the state does not belong in the bedrooms of the nation. It is now also time to recognize that the state has no role overseeing how many adults sleep in the bed, nor how many beds are in the room.

V. SECTION 1:

128. Violations of s. 7 will rarely be salvaged under s. 1 of the *Charter*.[122] Himel J. of the Ontario Superior Court of Justice summarized the applicable principles well in *Bedford v. Canada*:

> In *Re B.C. Motor Vehicle Act* [[1985] 2 S.C.R. 486], at p. 518 Lamer J. observed that "[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like." Wilson J., who concurred in the judgement, wrote at p. 531: "I cannot think that the guaranteed right in s. 7 which is to be subject *only* to limits which are reasonable and justifiable in a free and democratic society can be taken way by the violation of a principle considered fundamental to our justice system" (emphasis in original).[123]

129. Canada, and many Interested Persons, have noted the relevance of this country's international legal obligations and the practices of other democratic countries to the interpretation of *Charter* rights. Canada specifically argues that international law and practice are relevant at the s. 1 stage of analysis to highlight the pressing and substantial nature of Parliament's objective in prohibiting polygamy.[124] This is true so far as it goes. However, international law and the practices of other nations will not save s. 293 of the *Code* if it is grossly disproportionate in its effects. International human rights treaties, including the

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122 *D.B.* at para. 89.
123 *Bedford* at para. 440.
124 Closing Submissions of the Attorney General of Canada at paras. 418 – 419.

Convention on the Elimination of All Forms of Discrimination Against Women,[125] may require states parties to take "all *appropriate* measures" to eliminate discriminatory treatment, but Canada's treaty commitments do not require that it undertake any *particular* measure to comply with its international obligations. As Dr. Rebecca Cook acknowledged in her evidence, states parties have a great deal of flexibility in addressing discrimination under *CEDAW*.[126] Simply put, international law does not require that s. 293 of the *Code* be upheld.

130. In any event, as a matter of constitutional law, if it is correct that s. 293 of the *Code* is grossly disproportionate, then it cannot be proportionate under the *Oakes* test. The result is that the *Charter* violation is not saved under s. 1.

VI. REMEDY:

131. Section 2(1) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68 calls on the Court to give the Lieutenant Governor In Council "its opinion on the matter referred, with reasons, in the manner of a judgment in an ordinary action". The terms of the Reference suggest that the Court should consider the appropriate remedy if s. 293 of the *Code* is found unconstitutional, in whole or in part.

132. If the Court finds that s. 293 of the *Code* is globally unconstitutional, then the law has failed by operation of the *Constitution Act, 1982*, s. 52, and the law should be struck down.[127]

133. Even if the Court finds that the provision is only constitutionally infirm in part, it ought to strike down the law and leave to Parliament the decision as to legislative response. Striking down is appropriate for two reasons.

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[125] 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981, accession by Canada 10 December 1981) **[*CEDAW*]**.
[126] Evidence of Dr. Rebecca Cook, January 7, 2011, p. 70, lines 31 – 33.
[127] *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96 at para. 35.

134. First, s. 293 of the *Code* is a Victorian antique. Its origin and past application are tinged by biased attitudes and moral assumptions that do not reflect contemporary Canadian legal values. The links between the state's purpose in enacting the section and the modern Canadian constitutional state are tenuous, at best. In these circumstances, rehabilitation of s. 293 by the remedies of reading in, reading down or severance is not appropriate. The future of s. 293 should be considered and debated before Parliament.

135. Second, although seemingly more draconian than reading in or reading down, striking down the legislation actually respects the role of Parliament and least intrudes on its domain. As explained in *R. v. Ferguson*:

> Section 52(1) grants courts the jurisdiction to declare laws of no force and effect only "to the extent of the inconsistency" with the Constitution. It follows that if the constitutional defect of a law can be remedied without striking down the law as a whole, then a court must consider alternatives to striking down. Examples of alternative remedies under s. 52 include severance, reading in and reading down. . . .
>
> On the other hand, it has long been recognized that in applying alternative remedies such as severance and reading in, courts are at risk of making inappropriate intrusions into the legislative sphere. *An alternative to striking down that initially appears to be less intrusive on the legislative role may in fact represent an inappropriate intrusion on the legislature's role*. This Court has thus emphasized that in considering alternatives to striking down, courts must carefully consider whether the alternative being considered represents a lesser intrusion on Parliament's legislative role than striking down. Courts must thus be guided by respect for the role of Parliament, as well as respect for the purposes of the *Charter* [citations omitted]. . . .
>
> When a court opts for severance or reading in as an alternative to striking down a provision, it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations now being made by the court by means of severance or reading in. For instance, as this Court noted in *Schachter* [*v. Canada*, [1992] 2 S.C.R. 679], the test for severance "recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislative would have passed the constitutionally sound part of the

> scheme without the unsound part" (p. 697). If it is not clear that Parliament would have passed the scheme with the modifications being considered by the court -- or that it is probable that Parliament would *not* have passed the scheme with these modifications -- then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere. In such cases, the least intrusive remedy is to strike down the constitutionally defective legislation under s. 52. It is then left up to Parliament to decide what legislative response, if any is appropriate.[128]

136. In this case, it is most appropriate to allow the state to respond to the Court's legal reasons by considering the law in the political forum of the Parliament.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: 17 March, 2011

M. Pongracic-Speier

[128] *Ibid.,* at paras. 49 - 51; emphasis added. See also *PHS* at paras. 18 - 21.