IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reference re: Section 293 of the Criminal Code of Canada,* 2011 BCSC 1588

Date: 20111123
Docket: S097767
Registry: Vancouver

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

Before: The Honourable Chief Justice Bauman

Reasons for Judgment

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Place and Date of Judgment:	Vancouver, B.C. November 23, 2011

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I. INTRODUCTION

[1] By s. 293 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, (initially in 1890 and periodically since then in successive revisions to the *Code*), Parliament has prohibited the practice of polygamy. British Columbia asks this Court to declare whether this prohibition is consistent with the freedoms guaranteed to all Canadians by the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act*, *1982* (U.K.), 1982, c. 11 [*Charter*].

[2] Mr. Justice Binnie, in extra-judicial comments (Kirk Makin, "An Insider's Glimpse at a Court in Transition", *The Globe and Mail*, 24 September 2011), has suggested that the direction of any constitutional inquiry depends much upon how the good advocate, the good judge, the good appellate panel (and so on) characterizes the essential issue before the Court. Here, the Attorney General for British Columbia has said in opening that the case against polygamy is all about harm. Absent harm, that party accepted that s. 293 would not survive scrutiny under the *Charter*.

[3] The challengers, led by the *Amicus Curiae,* counter (primarily) that this case is about a wholly unacceptable intrusion by the State into the most basic of rights guaranteed by the *Charter* - the freedom to practice one's religion, and to associate in family units with those whom one chooses.

[4] Which characterization shoulders the burden of persuasion here? As Binnie J. said, the answer largely dictates the direction of the analysis.

[5] I have concluded that this case is essentially about harm; more specifically, Parliament's reasoned apprehension of harm arising out of the practice of polygamy. This includes harm to women, to children, to society and to the institution of monogamous marriage.

[6] Based on the most comprehensive judicial record on the subject ever produced, I have concluded that the Attorneys General and their allied Interested Persons have demonstrated a very strong basis for a reasoned apprehension of harm to many in our society inherent in the practice of polygamy as I have defined it in these reasons.

[7] I turn to some of the harms that are reasonably apprehended to arise.

[8] Women in polygamous relationships are at an elevated risk of physical and psychological harm. They face higher rates of domestic violence and abuse, including sexual abuse. Competition for material and emotional access to a shared husband can lead to fractious co-wife relationships. These factors contribute to the higher rates of depressive disorders and other mental health issues that women in polygamous relationships face. They have more children, are more likely to die in childbirth and live shorter lives than their monogamous counterparts. They tend to have less autonomy, and report higher rates of marital dissatisfaction and lower levels of self-esteem. They also fare worse economically, as resources may be inequitably divided or simply insufficient.

[9] Children in polygamous families face higher infant mortality, even controlling for economic status and other relevant variables. They tend to suffer more emotional, behavioural and physical problems, as well as lower educational achievement than children in monogamous families. These outcomes are likely the result of higher levels of conflict, emotional stress and tension in polygamous families. In particular, rivalry and jealousy among co-wives can cause significant emotional problems for their children. The inability of fathers to give sufficient affection and disciplinary attention to all of their children can further reduce children's emotional security. Children are also at enhanced risk of psychological and physical abuse and neglect.

[10] Early marriage for girls is common, frequently to significantly older men. The resultant early sexual activity, pregnancies and childbirth have negative health implications for girls, and also significantly limit their socio-economic development. Shortened inter-birth intervals pose a heightened risk of various problems for both mother and child.

[11] The sex ratio imbalance inherent in polygamy means that young men are forced out of polygamous communities to sustain the ability of senior men to accumulate more wives. These young men and boys often receive limited education as a result and must navigate their way outside their communities with few life skills and social support.

[12] Another significant harm to children is their exposure to, and potential internalization of, harmful gender stereotypes.

[13] Polygamy has negative impacts on society flowing from the high fertility rates, large family size and poverty associated with the practice. It generates a class of largely poor, unmarried men who are statistically predisposed to violence and other anti-social behaviour. Polygamy also institutionalizes gender inequality. Patriarchal hierarchy and authoritarian control are common features of polygamous communities. Individuals in polygynous societies tend to have fewer civil liberties than their counterparts in societies which prohibit the practice.

[14] Polygamy's harm to society includes the critical fact that a great many of its individual harms are not specific to any particular religious, cultural or regional context. They can be generalized and expected to occur wherever polygamy exists.

[15] I would answer the essential question before me: while s. 293 offends the freedom of religion of identifiable groups guaranteed by s. 2(a) of the *Charter* and the s. 7 liberty interests of children between 12 and 17 married into polygamy, the provision, save in its application to the latter group, is demonstrably justified in a free and democratic society. My reasons for that conclusion and the specific answers to the questions on the reference follow.

II. COURSE OF PROCEEDINGS

A. The Reference Questions

[16] By Order in Council dated 22 October 2009, the Lieutenant Governor in Council referred two questions to this Court for hearing and consideration pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, s. 1 [*CQA*]:

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?

[17] Section 293 provides:

293(1) Every one 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 of an indictable offence and liable to imprisonment for a term not exceeding five years.

(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 upon 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.

B. The Participants

[18] The three parties to this reference are the Attorney General of British Columbia [AGBC], the Attorney General of Canada [AG Canada], and the *Amicus Curiae* [*Amicus*]. As both Attorneys General take the position that s. 293 is constitutionally sound, the Court appointed the *Amicus*, who is publically funded, to advance the case in opposition.

[19] Section 5 of the *CQA* provides that the court may direct that interested persons be given notice of a reference hearing and that such persons are entitled to be heard. The AGBC was directed to provide notice under this section to the Attorneys General of each of the other provinces and territories. None participated in the reference.

[20] The AGBC, in consultation with the *Amicus*, was also directed to notify persons or groups whom he knew to be potentially interested in the reference, and to post information about participation in the reference on his website.

[21] Eleven such interested persons representing a range of different interests ultimately participated in these proceedings. They are:

a) Beyond Borders: Ensuring Global Justice for Children [Beyond Borders], a Canadian-based volunteer organization without religious or political affiliation that advances the rights of children to be free from abuse and exploitation;

b) the British Columbia Civil Liberties Association [Civil Liberties Association];

c) the British Columbia Teachers' Federation [BCTF];

d) the Canadian Association for Free Expression [CAFE];

e) the Canadian Coalition for the Rights of Children [CCRC] jointly with the David Asper Centre for Constitutional Rights [Asper Centre]. The CCRC is a non-profit organization formed for the purpose of informing the Canadian public about the *United Nations Convention on the Rights of the Child* and providing a forum for civil society participation in implementation of that convention. The Asper Centre is a centre within the University of Toronto's Faculty of Law devoted to realizing constitutional rights through advocacy, education and academic research;

f) the Canadian Polyamory Advocacy Association [Polyamory Advocacy Association];

g) the Christian Legal Fellowship, a national association of Christian legal professionals, law students and interested persons who advocate for justice with compassion and support the use of moral and religious underpinnings to address social, legal and political issues in Canada;

h) the Fundamentalist Church of Jesus Christ of Latter Day Saints [FLDS] and James Oler in his capacity as bishop of the FLDS;

i) REAL Women of Canada [REAL Women], a national non-profit organization dedicated to promoting equality for all women;

j) Stop Polygamy in Canada, an international group based in Alberta which provides information about polygamy in Canada; and

k) West Coast Legal Education and Action Fund [West Coast LEAF], an organization which promotes women's equality through equality rights litigation, law reform and public legal education.

[22] The Civil Liberties Association, CAFE, the Polyamory Advocacy Association and the FLDS argue against the constitutionality of s. 293. The remaining Interested Persons generally argue in support.

[23] Winston Blackmore is one of two leaders in the fundamentalist Mormon community of Bountiful. (Mr. Oler is the other.) Mr. Blackmore, on his own behalf and on behalf of his congregation, sought party status in the reference and an order for advance costs to allow him to retain and instruct counsel. Both applications were dismissed, and he was granted interested person status on the same terms as the others (indexed at 2010 BCSC 517). In the end, Mr. Blackmore opted not to take part in the reference.

[24] The participatory rights of the Interested Persons were more limited than those of the three parties, and were specified in a case management order. In sum, the Interested Persons were permitted to participate in the evidentiary phase of the reference and to make both oral and written submissions as determined by the Court. They were also required to ensure that neither their evidence nor submissions were unnecessarily duplicative of those of the parties or other Interested Persons.

[25] The Interested Persons were commendably responsible in all aspects of their participation in the proceedings. Some tendered evidence, and many submitted Brandeis Brief materials. All cooperated amongst themselves so that with respect to virtually all of the witnesses, at most, one or two of the Interested Persons engaged in brief and focused cross-examination. Their submissions similarly advanced their unique perspectives and were of assistance to the Court in considering the issues at hand.

C. The Evidence

[26] British Columbia is unusual in authorizing the Lieutenant Governor in Council to refer questions to the trial court. In most other provinces, the Court of Appeal alone can provide reference opinions. As far as I am aware, a reference of this significance in a trial court is a first.

[27] A reference in this forum enables the participants to create an evidentiary record impossible in the typical appellate reference. The participants in the present proceeding embraced that opportunity and compiled a record that is remarkable not only for its size, but also for the breadth and diversity of its contents. Indeed, it is no exaggeration to say that the record embodies the bulk of contemporary academic research into polygamy.

[28] Much of the evidence comprises affidavits and expert reports. Over 90 such are before me. In large measure, these were exchanged and filed with the Court in advance of the hearing according to a schedule directed by the Court. Approximately 22 of the affiants and experts were then examined and cross-examined during the hearing phase of the proceeding.

[29] The expert witnesses represent a broad range of disciplines including anthropology, psychology, sociology, law, economics, family demography, history and theology. The caliber and breadth of knowledge of these experts is impressive. Some undertook original research specifically for this reference. Others are clinical experts who offer case study observations from their practices. Yet others have studied aspects of polygamy relevant to their particular disciplines for years.

[30] The lay witnesses are largely individuals who have lived - and in some cases continue to live - in polygamous families in both Canada and the United States. Most have experience with polygamy in the context of fundamentalist Mormonism, and they spoke of those experiences, both positive and negative. Other witnesses described their involvement with polyamory.

[31] Unusually, most of the FLDS's lay witnesses gave their evidence, both written and *viva voce*, under cover of anonymity pursuant to an order I granted earlier in the proceeding (indexed at 2010 BCSC 1351). Also somewhat unusually, the AGBC tendered the evidence of many of his lay witnesses by video affidavits which were played in Court during the hearing.

[32] In addition to the affidavits and expert reports, the participants also filed and exchanged an extensive collection of Brandeis Brief materials. These comprise several hundred legal and social science articles, books and DVDs. An index of these materials is attached as Appendix A to these reasons.

D. Webcast of Final Submissions

[33] Citing the public interest in and importance of the questions before the Court, the Canadian Broadcasting Corporation [CBC] applied at the outset of the reference to televise the proceedings.

[34] The Practice Direction that governs applications to televise (Television Coverage of Court Proceedings, PD-23) requires the consent of the parties. The AG Canada did not consent to the CBC's application, and I dismissed it on that basis. I did, however, grant the CBC leave to revive the application with respect to the final submissions.

[35] The CBC (and another media organization) took up that offer and re-applied at the conclusion of the evidentiary phase to broadcast the closing submissions. This time, all of the parties and Interested Persons either supported or took no position on the application.

[36] After hearing submissions, I approved the application in principle, leaving it to the applicants and the Court Services Branch to work out an implementation plan for the Court's approval. I also indicated that I would elaborate on my reasoning to permit the application in my final reasons.

[37] There is no need for me to refer to the jurisprudence regarding the importance of open courts. The point is beyond debate. While balancing that principle with competing interests is frequently challenging, this proceeding has presented few of the usual tensions.

[38] Indeed, it has been characterized by an unusual degree of public access. Courtesy of the Polyamory Advocacy Association, virtually the entire court file - including the affidavits, written submissions and even transcripts of the *viva voce* evidence - has been accessible online through the Association's website. (The AGBC later assisted with this endeavour.) The evidence was also physically accessible to the public in a resource library located adjacent to the courtroom.

[39] To a large extent this level of openness has been facilitated by the nature of this proceeding as a reference, which attenuates the privacy concerns that normally exist in party-driven or criminal litigation. Witnesses did take the stand, some to offer very personal testimony. However, that evidence was not the subject of the application to televise.

[40] The application sought only to broadcast the closing submissions, which are similar in substance to appellate submissions. Much of the lively debate surrounding televised court proceedings centres upon its impact on witnesses and jurors. Clearly, none of the reservations that have been expressed by some in this regard apply to appellate litigation. The Supreme Court of Canada has been televising its proceedings for several years now. The Ontario Court of Appeal did so as well in *R. v. Truscott*, 2007 ONCA 575.

[41] The existence of the Practice Direction is a recognition that televising court proceedings is appropriate in some circumstances. In my view, this unique proceeding was one. The issues before the Court were of public interest, and the parties and Interested Persons either consented or took no position on the matter. In the context of this case, broadcast of the closing submissions neither raised privacy concerns nor in any other way impaired the fair and proper administration of justice.

[42] On this basis, I permitted the application. As I observed at the time, this is an exceptional proceeding and my ruling does not necessarily have precedential value for future cases.

[43] The media set up two web cameras in the courtroom which provided virtually live webcast of the entire closing submissions. I say "virtually" because it was a condition of my order that there be an approximate 10 minute delay in broadcast to permit recourse in the event of inadvertent reference to certain protected evidence. While I cannot speak for counsel, I did not find the cameras to be obtrusive or otherwise distracting. No concerns arising from the webcast have been brought to my attention.

[44] Another condition of my order was that the media measure, and report back to the Court, the viewership of the webcast. The statistics provided by the CBC indicate that approximately 2600 unique visitors watched at least part of the webcast on the first day of the closing submissions. That number decreased steadily over the course of the submissions to a modest 384 on the last day.

III. **EVIDENTIARY ISSUES**

[45] The diversity of the evidence together with the novelty of this proceeding require me to identify the rules of evidence that govern its admissibility and use.

A. Factors Justifying a Liberal Approach to Admissibility in a Trial Reference

[46] I have taken a liberal approach to admissibility in this proceeding, admitting all the evidence tendered. This approach accords with the Supreme Court of Canada's emphasis on the importance of a proper evidentiary foundation in *Charter* litigation. It also maximizes the trial reference's potential in terms of creating an evidentiary record.

1. The Importance of Evidence in *Charter* Litigation

[47] Since the earliest days of *Charter* jurisprudence, the Supreme Court of Canada has consistently emphasized the importance of evidence in *Charter* litigation.

[48] In the very first *Charter* case to reach the Court, *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, Mr. Justice Estey criticized the thinness of the evidentiary record, particularly noting the importance of evidence to the s. 1 analysis (at 384):

> May it only be said here, in the cause of being helpful to those who come forward in similar proceedings, that the record on the s. 1 issue was indeed minimal, and without more, would have made it difficult for a court to determine the issue as to whether a reasonable limit on a prescribed right had been demonstrably justified. Such are the problems of the pioneer and such is the clarity of hindsight.

[49] Chief Justice Dickson emphasized the importance of evidence to the s. 1 analysis in *R. v. Oakes*, [1986] 1 S.C.R. 103 (at 138):

> Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

[50] It is implicit in the analytical framework for s. 1 established in that decision that compelling evidence will generally be necessary, given that much of the analysis is focused on the effects of the legislation in question. Determining the actual salutary and deleterious effects of an infringement of a *Charter* right, for example, calls for more than a hypothetical or theoretical analysis.

[51] The importance of a proper evidentiary record in *Charter* litigation was further emphasized by Mr. Justice Cory in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, a constitutional challenge to Manitoba's election funding scheme (at 361-62):

> *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.
>
> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.
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> [Emphasis added.]

2. The Potential of a Trial Reference

[52] The danger of a "factual vacuum", and the need for evidence to counter that danger, is even more pronounced in a constitutional reference than in typical constitutional litigation. There are no parties in the usual sense, nor are there specific adjudicative facts underlying the controversy in question. Mr. Justice Strayer of the Federal Court of Canada Trial Division (as he then was), writing extrajudicially, described this as a principal disadvantage of references: "they may foster abstract jurisprudence because they require an opinion from the Court without the benefit of an adequate factual context" (The Honourable Barry L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3d ed. (Toronto: Butterworths, 1988) at 323).

[53] As a remedy for this problem, Strayer J. advocated "adequate fact-introduction" (at 329). However, the options for introducing facts are limited in an appellate reference. Generally, the factual materials upon which the participants wish to rely are simply included in the factums or affidavits filed with the court. This limits the ability of participants to rigorously challenge their reliability. Courts have addressed this problem in a limited fashion by allowing participants to file rebuttal evidence.

[54] In *Reference re British North America Act, 1867 (U.K.), s. 91*, [1939] S.C.R. 104, a reference concerning whether the term "Indians" in s. 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, included "Eskimo" inhabitants of Quebec, the Supreme Court of Canada used a novel procedure to develop the factual context of the case. This procedure was described by Strayer J. (at 297):

> Another technique available in the Supreme Court of Canada is the appointment of the registrar to hear evidence in advance of the argument of the reference. This device has apparently been used only once and a great deal of evidence both oral and written was thereby taken for insertion into the "case" subject to the ultimate decision of the court as to its admissibility. This method has the advantage of allowing a full right of challenge and rebuttal in a more typical adversary process of fact-introduction.

[55] The hearing before the registrar in that proceeding appears to be the closest facsimile to a trial reference that has been conducted in Canada. A trial reference, however, has the further advantage of integrating evidence and argument before the same adjudicator.

[56] A trial reference also allows evidence to be presented through expert witnesses, which the Supreme Court of Canada considers the preferred method. Justice Binnie expressed this preference in *R. v. Spence*, 2005 SCC 71 (at para. 68):

> I would add this comment: in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, ... a majority of our Court expressed a preference for social science evidence to be presented through an expert witness who could be cross-examined as to the value and weight to be given to such studies and reports. This is the approach that had been taken by the litigants in *Sharpe, Little Sisters, Malmo-Levine* itself and subsequently in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 ... We said in *Malmo-Levine* that
>
> > courts should nevertheless proceed cautiously to take judicial notice even as "legislative facts" of matters ... are reasonably open to dispute, particularly where they relate to an issue that could be dispositive... [para. 28]
>
> The suggestion that even legislative and social "facts" should be established by expert testimony rather than reliance on judicial notice was also made in cases as different from one another as *Find, Moysa, Danson*, at p. 1101, *Symes v. Canada*, [1993] 4 S.C.R. 695, *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, at pp. 472-73, *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at pp. 549-50, *R. v. Penno*, [1990] 2 S.C.R. 865, at pp. 881-82, and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357. Litigants who disregard the suggestion proceed at some risk.
>
> [Emphasis added.]

[57] In deciding to submit its reference questions to this Court rather than the Court of Appeal, the Lieutenant Governor in Council was apparently conscious of the desirability of developing a full evidentiary record. Former Attorney General, Michael de Jong, explained the rationale for selecting this forum in a press release (Ministry of Attorney General, Statement 2009AG0012-000518, "Province to Seek Supreme Court Opinion on Polygamy" (22 October 2009)):

> Pursuing a reference through B.C. Supreme Court gives us the option to introduce evidence and witnesses, which will put a human face on polygamy in contrast to the more abstract nature of a reference to B.C. Court of Appeal.

[58] While even a trial reference is by nature abstract, the evidentiary record it permits facilitates an informed consideration of the questions posed.

B. Legislative Facts and Judicial Notice

[59] The nature of the evidence on this reference as legislative fact further allows an expansive approach to admissibility.

1. Legislative and Adjudicative Facts

[60] The admissibility requirements for evidence in constitutional litigation are partially determined by whether the evidence in question is legislative fact or adjudicative fact. The difference between these two categories was explained by Mr. Justice Sopinka in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (at 1099):

> It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para. 15.03, p. 353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis's words, "who did what, where, when, how and with what motive or intent ...." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements: see e.g., *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, *per* Laskin C.J., at p. 391; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, *per* Dickson J. (as he then was), at p. 723; and *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, *per* McIntyre J., at p. 318.

[61] There are no "immediate parties" in a constitutional reference, which means there are no adjudicative facts; that is, there is no specific "who" that did "what, where, when, how and with what motive or intent".

[62] As such, all the evidence on this reference is properly categorized as legislative fact. This is no less the case for the witnesses who described their experiences with polygamy, notwithstanding the intensely personal nature of some of this evidence. These legislative facts assist in developing "the social, economic and cultural context" of s. 293. The less stringent admissibility requirements for legislative facts described in *Danson* have allowed me to receive much of the evidence on this reference.

2. Judicial Notice

[63] Judicial notice is one vehicle through which the less stringent admissibility requirements for legislative facts are put into effect.

[64] Chief Justice McLachlin summarized the process of judicial notice in *R. v. Find*, 2001 SCC 32 (at para. 48):

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

[65] Judicial notice is an exception to the usual requirement of proof by evidence given under oath, which accounts for the strict approach taken by McLachlin C.J.C. in *Find*.

[66] This definition of judicial notice, and the circumstances in which it may be applied, is based on the work of Professor E.M. Morgan in "Judicial Notice" (1943-1944), 57 Harv. L. Rev. 269. Professor Morgan argued that a strict formulation of judicial notice was necessary as he considered any fact properly subjected to judicial notice irrebuttable (at 273). Any broader formulation of judicial notice would allow the court to make too much use of unreliable out-of-court information.

[67] In *Spence*, Binnie J. explained how the approach to judicial notice differs for adjudicative and legislative facts. He referred to the Morgan criteria adopted by McLachlin C.J.C. in *Find* as

the "gold standard" for judicial notice (at para. 61) and summarized their application to adjudicative facts (at para. 62):

> If the Morgan criteria are *not* satisfied, and the fact is "adjudicative" in nature, the fact will *not* be judicially recognized, and that too is the end of the matter.

[68] For legislative facts, the Morgan criteria are the starting point of the court's analysis, but how strictly they are applied will depend on the nature of the facts presented and whether the information may be dispositive of a case. Justice Binnie explained (at para. 63):

> It is when dealing with social facts and legislative facts that the Morgan criteria, while relevant, are not necessarily conclusive. There are levels of notoriety and indisputability. Some legislative "facts" are necessarily laced with supposition, prediction, presumption, perception and wishful thinking. Outside the realm of adjudicative fact, the limits of judicial notice are inevitably somewhat elastic. Still, the Morgan criteria will have great weight when the legislative fact or social fact approaches the dispositive issue.

Therefore, judicial notice will more easily be taken of legislative facts than adjudicative facts, especially where the evidence does not border on dispositive.

[69] Although the participants in this proceeding have been able to present much of their evidence under oath and many of the witnesses were cross-examined, a significant portion of the materials before me has not been subjected to these protections. In particular, all of the materials in the Brandeis Brief are unproven in the traditional sense.

[70] This will require a consideration not only of the basis upon which such materials are admitted, but also of the weight they may be given and the uses to which they may be put.

C. Expert Evidence

[71] The basic test for the admissibility of expert opinion evidence was established in *R. v. Mohan,* [1994] 2 S.C.R. 9 (at para. 17). To be admissible, expert evidence must satisfy each of these four familiar criteria:

(a) relevance;

(b) necessity in assisting the trier of fact;

(c) the absence of any exclusionary rule; and

(d) a properly qualified expert.

[72] This test applies to constitutional cases as it does in other areas. The burden of proof lies with the party tendering the proposed expert.

[73] Mr. Justice Doherty of the Ontario Court of Appeal recently suggested a helpful approach to assessing the admissibility of expert evidence in *R. v. Abbey*, 2009 ONCA 624, leave to appeal refused [2010] S.C.C.A. No. 125. This approach does not purport to alter the principles expressed in *Mohan*, but, as Doherty J.A. explained it, the approach seeks to "facilitate the admissibility analysis and the application of the *Mohan* criteria" (at para. 77).

[74] Justice Doherty's innovation in *Abbey* was to divide the admissibility inquiry into a two-step process, as he described at para. 76:

> Using these criteria, I suggest a two-step process for determining admissibility. First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is qualified to give the relevant opinion. Second, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence. This "gatekeeper" component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence.

[75] He explained his rationale for doing so at paras. 78 - 79:

> It is helpful to distinguish between what I describe as the preconditions to admissibility of expert opinion evidence and the performance of the "gatekeeper" function because the two are very different. The inquiry into compliance with the preconditions to admissibility is a rules-based analysis that will yield "yes" or "no" answers. Evidence that does not meet all of the preconditions to admissibility must be excluded and the trial judge need not address the more difficult and subtle considerations that arise in the "gatekeeper" phase of the admissibility inquiry.
>
> The "gatekeeper" inquiry does not involve the application of bright line rules, but instead requires an exercise of judicial discretion. The trial judge must identify and weigh competing considerations to decide whether on balance those considerations favour the admissibility of the evidence. This cost-benefit analysis is case-specific and, unlike the first phase of the admissibility inquiry, often does not admit of a straightforward "yes" or "no" answer. Different trial judges, properly applying the relevant principles in the exercise of their discretion, could in some situations come to different conclusions on admissibility.

[76] This analytical approach is particularly helpful in the present case since separating the rules-based preconditions from the discretionary "gatekeeper" inquiry makes it easier to factor the unique context of a reference into the admissibility analysis.

1. Angela Campbell

[77] The only sustained challenge to the admissibility of an expert's evidence was made on the first day of the evidentiary phase. Both Attorneys General and Stop Polygamy in Canada objected to the evidence of Angela Campbell, a key witness for the *Amicus*. Professor Campbell is the director of the Institute of Comparative Law at McGill University's Faculty of Law.

[78] I ruled Professor Campbell's evidence admissible and qualified her in the terms proffered by the *Amicus*: as a legal scholar and qualitative researcher, addressing the interface between the practice of polygamy and the legal prohibition against polygamy, with emphasis on the polygamous community in Bountiful, BC. I indicated at the time that I would articulate my reasons in my final judgment. I do so here.

[79] The challenges to Professor Campbell's evidence focused largely on her qualifications and methodology. I will, however, apply the *Mohan* analysis in the manner followed in *Abbey* in some detail since it is the approach that would have governed the admissibility of any other expert evidence had it been contested.

a) Preconditions to Admissibility

[80] Justice Doherty described the criteria, or preconditions, that are considered at the first step of his suggested approach in *Abbey* (at para. 80):

- the proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;
- the witness must be qualified to give the opinion;
- the proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and
- the proposed opinion must be logically relevant to a material issue.

[81] I am satisfied that Professor Campbell's evidence satisfies these four preconditions to admissibility.

[82] The *Amicus* characterized Professor Campbell's opinion as addressing "the interface between the practice of polygamy and the legal prohibition against polygamy, with emphasis on the polygamous community in Bountiful, BC". I see no reason to hold that such matters are not properly the subject of opinion evidence. Much of the evidence in this reference could be described in similar terms.

[83] Professor Campbell is also qualified as a legal scholar and qualitative researcher to give this opinion.

[84] The AG Canada objected to the descriptor "legal scholar", submitting that the term lacked the requisite specificity to establish expertise in a defined field. While admittedly broad, this description reflects the reality that Professor Campbell's research (and that of many other experts in this reference) is somewhat interdisciplinary in nature. In my view, this proceeding would not benefit from an attempt to restrict expert witnesses to watertight compartments of academic expertise.

[85] The AG Canada also argued that Professor Campbell lacked formal academic qualifications in qualitative research. However, the threshold to qualify an expert is not particularly onerous, and formal academic credentials are not required: *R. v. Marquard*, [1993] 4 S.C.R. 223 at 243.

[86] While Professor Campbell does not have formal training in qualitative research, she has developed some expertise in the field through practical experience, an extensive study of academic sources on qualitative methods in advance of her research, and consultation with persons with backgrounds in qualitative research.

[87] With respect to the third criterion, those objecting to Professor Campbell's evidence have not pointed to any particular exclusionary rule that would serve to exclude it.

[88] Finally, Professor Campbell's evidence, dealing as it does with the Bountiful community, is logically relevant to the questions before the Court.

b) Cost-Benefit Analysis

[89] I now turn to the second step in the analysis suggested in *Abbey*. Here I must act as a "gatekeeper" in determining whether the benefits of Professor Campbell's evidence to the proceeding outweigh any potential costs that may flow from its admission.

[90] The nature of a reference is of singular importance to this assessment. The court is not called upon to perform an adjudicative function, nor is it engaged in a disposition of rights. In this context, expert evidence establishes only legislative facts.

[91] At para. 87 of *Abbey*, Doherty J.A. explained that:

> The "benefit" side of the cost-benefit evaluation requires a consideration of the probative potential of the evidence and the significance of the issue to which the evidence is directed. When one looks to potential probative value, one must consider the reliability of the evidence. Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert's expertise and the extent to which the expert is shown to be impartial and objective.

[92] There can be no question but that relevant expert evidence will ground any meaningful analysis of the reference questions. The Supreme Court of Canada has commented extensively on the dangers of deciding constitutional cases in a factual vacuum and on its preference for legislative facts to be adduced through expert evidence. The benefits of a trial reference in enabling the creation of this evidentiary foundation would be lost by the application of an unnecessarily restrictive approach to the admissibility of expert evidence.

[93] The reliability concerns Doherty J.A. mentions in the above passage touch upon the bulk of the objections raised with respect to Professor Campbell's evidence: methodology, expertise, and impartiality.

[94] Professor Campbell's methodology and expertise were heavily criticized, especially by Stop Polygamy in Canada. It contrasted her qualifications and methodology at length with those of the expert at issue in *Abbey*, Dr. Totten, a sociologist who had conducted qualitative research into gang culture and symbology. His evidence was excluded at trial but held by Doherty J.A. to be admissible.

[95] Dr. Totten, for example, used the technique of triangulation to verify his research findings. Professor Campbell admitted in cross-examination that she had not taken any such steps.

[96] The cost-benefit analysis is necessarily case-specific, and the extent to which Professor Campbell's research may not measure up to Dr. Totten's must be considered in the context of this particular case. The circumstances of *Abbey* required a very high degree of reliability, given the potential impact of Dr. Totten's evidence on the ultimate issue in a criminal prosecution. Professor Campbell's evidence does not have as significant an impact in this proceeding.

[97] Furthermore, the methodology Professor Campbell used for her Bountiful research has been subjected to peer review. To receive funding from the Social Sciences and Humanities Research Council, she was required to explain her methodology, which was subjected to peer review. Her research was also approved by McGill's Research Ethics Board. Finally, her two articles on her research in Bountiful have both been published in peer-reviewed journals.

[98] Another challenge levelled at Professor Campbell was that she has acted as an advocate in her report. The AG Canada pointed to many of her previous writings, both in law review articles and in opinion pieces in newspapers, calling for the decriminalization of polygamy. He also seized upon Professor Campbell's comment in her law review article "Bountiful Voices" (2009) 47 Osgoode Hall L.J. 183 at 186, that her intention was to provide "a counter-narrative to [the] popular depiction of the FLDS wife" as an example of her bias.

[99] Professor Campbell is by no means alone among the experts in having strong opinions regarding polygamy. Many passionately expressed their views, in person and in writing, on both sides of the debate before the Court. I note, however, that notwithstanding their prior out-of-court positions, most of the experts referred to and acknowledged Rule 11-2 of the new *Supreme Court Civil Rules*, B.C. Reg. 168/2009:

> Duty of expert witness
>
> (1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.
>
> Advice and certification

(2) If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she

(a) is aware of the duty referred to in subrule (1),

(b) has made the report in conformity with that duty, and

(c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

[100] In any event, the risk that firmly held opinions might impair the ability of an expert to provide objective evidence to the court is attenuated in the context of a reference for the reasons already discussed. The court is not acting in an adjudicative capacity, and the expert evidence stands only as legislative fact. Any residual concerns regarding impartiality can be taken into account when assessing weight.

[101] Importantly, Professor Campbell has been explicit in stating that her research is intended, in part, to give voice to a particular perspective, that of the women she interviewed in Bountiful. In considering her evidence, that perspective can be taken into account and explored in cross-examination.

[102] In the context of this proceeding, there are no significant costs to admitting Professor Campbell's evidence.

[103] Her evidence is admissible.

D. Lay Witnesses

[104] In addition to the expert witnesses, the participants tendered the evidence of a number of lay witnesses by way of affidavit, both written and video, and *viva voce* testimony. Some of these witnesses provided intensely personal evidence regarding their experiences with polygamy. Others provided statistics and documents relating to the community in Bountiful, as well as the FLDS more generally.

[105] In both cases, these witnesses provided legislative fact evidence only.

E. The Brandeis Brief

[106] Much of the evidence in this reference has been presented in the form of "Brandeis Brief" materials. The Brandeis Brief is named after Louis D. Brandeis (later Brandeis J. of the Supreme

Court of the United States) who, as counsel for the state of Oregon in *Muller v. Oregon* (1908), 208 U.S. 412, filed a brief that included a range of social science materials which supported the constitutionality of a restriction on the weekly hours of female labour. These materials were not presented through a witness at trial, but were merely attached to the written brief filed with the Supreme Court.

[107] The participants in this reference have submitted a wide range of Brandeis Brief materials, as reflected in Appendix A to these reasons. The materials have not been sworn to under oath by their creators, and may therefore only be received as legislative facts through judicial notice.

[108] None of the participants objected to the admissibility of any of the Brandeis Brief materials.

1. Canadian Use of Brandeis Brief Materials

[109] The use of unsworn evidence in a brief is relatively common in American constitutional litigation but developed much later in this country. Until the 1970s, extrinsic evidence of the surrounding social context that led to the enactment of legislation or the effects of its implementation was generally inadmissible in constitutional cases. The analysis in such cases tended to take an abstract and strictly legalistic form that focused predominantly on the text of the legislation.

[110] The Supreme Court of Canada began to develop a more liberal approach to the use of extrinsic evidence in *Reference re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, and *Reference re: Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714.

[111] In *Reference re: Anti-Inflation Act*, the parties included a variety of extrinsic materials, including the federal government's White Paper on inflation, a Statistics Canada bulletin, a study by an economics professor, a critique of that study, and the transcript of a speech from the Governor of the Bank of Canada. In each of the three judgments issued in the reference this evidence was accepted. In his concurring judgment Chief Justice Laskin ruled that (at 391):

> The present case is likewise one in which federal legislation is challenged as involving unconstitutional regulation, and I am of the opinion that extrinsic material, bearing on the circumstances in which the legislation was passed, may be considered by the Court in

> determining whether the legislation rests on a valid constitutional base. … As will appear from what follows, the arguments of the proponents and the opponents of the *Anti-Inflation Act* turn substantially on whether the social and economic circumstances upon which Parliament can be said to have proceeded in passing the *Act* were such as to provide support for the *Act* in the power of Parliament to legislate for the peace, order and good government of Canada. The extrinsic material proffered in this case was directed to this question and may, hence, be properly considered thereon.

[112] Justice Dickson (as he then was) took a similar approach to the admissibility of extrinsic evidence in *Reference re: Residential Tenancies Act*, where he held that the Court (at 722-23):

> should be loathe, it seems to me, to enunciate any inflexible rule governing the admissibility of extrinsic materials in constitutional references. The effect of such a rule might well be to exclude logically relevant and highly probative evidence. It is preferable, I think, to follow the practice adopted in the *Anti-Inflation Reference* and give timely directions establishing the evidence or extraneous materials to be admitted to serve the ends of the Court in the particular reference.

[113] In justifying the admissibility of such materials, Dickson J. made reference to the "living tree" doctrine of progressive constitutional interpretation (at 723):

> A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution, viewed as a "living tree", in the expressive words of Lord Sankey in *Edwards and Others v. Attorney-General for Canada and Others.* Material relevant to the issues before the court, and not inherently unreliable or offending against public policy should be admissible …

[114] The threshold of "not inherently unreliable or offending against public policy" obviously allows for a liberal approach to admissibility.

[115] With the enactment of the *Charter* in 1982, the use of extrinsic evidence transformed from something that was allowed to something that was desirable and, in some cases, practically required, as was shown in *MacKay*.

[116] The high water mark for admissibility of extrinsic evidence in *Charter* cases likely came in *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] 1 S.C.R. 460 [*RWDSU*], where in his concurring judgment Dickson C.J.C. found admissible several newspaper articles that had been attached to an affidavit, but not proved in any other way (at 478-79):

> I am unable to see why the newspaper articles should be held to be inadmissible or unhelpful in the peculiar circumstances of this case. The newspaper reports were, I reiterate, filed on behalf of the respondents, undoubtedly with a view to providing the factual context for the *Charter* argument. The appellants were apparently satisfied that the newspaper reports provided an adequate factual foundation for its s. 1 justification: in any event, the Government of Saskatchewan adduced no further evidence. There is nothing on the record to indicate that either party disputed the admissibility of the articles before the Chambers judge. Except to the extent that there exists conflicting material in the newspaper reports, the reports constitute an evidentiary foundation accepted by both parties. It is unnecessary in this appeal to consider whether newspaper articles tendered into evidence by one party and objected to by the other would generally be admissible for the purposes of s. 1.

[117] *RWDSU* set out a very broad approach to admissibility of extrinsic evidence in *Charter* cases. However, as here, that outcome was driven by the apparent acceptability of the inclusion of such materials in the record to all parties.

[118] After *RWDSU*, there were signs that the Supreme Court of Canada was moving to somewhat more stringent admissibility requirements for the admission of legislative facts. This was seen in two chambers decisions of Binnie J. in *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [1999] 3 S.C.R. 845, and *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44.

[119] More recently, however, a majority of the Court found in *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 [*Malmo-Levine*], that the trial judge had erred in refusing to admit expert evidence of legislative facts relevant to Mr. Malmo-Levine's challenge to the constitutionality of the marijuana prohibition.

[120] The judgment of Binnie J. in *Spence* is the Supreme Court's last word on this topic. Justice Binnie explained the proper approach to legislative facts that are not dispositive (at para. 65):

> When asked to take judicial notice of matters falling between the high end already discussed where the Morgan criteria will be insisted upon, and the low end of background facts where the court will likely proceed (consciously or unconsciously) on the basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used*, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.

[121] None of the materials in the Brandeis Brief are dispositive of any points in issue. Accordingly, a less stringent approach to judicial notice is appropriate, consistent with Binnie J.'s comments in *Spence*.

2. Use of Materials in the Brandeis Brief

[122] Although I have admitted the Brandeis Brief materials in their entirety, their use requires further comment.

[123] The academic materials are essentially a collection of the bulk of contemporary research into polygamy. The table of contents to the main Brandeis Brief of the defenders closely resembles the bibliographies attached to the reports of several expert witnesses. For example, most of the expert reports made reference to at least one of the sixteen articles of Dr. Alean Al-Krenawi included in the Brandeis Brief.

[124] The inclusion of these articles and books has allowed the participants, and, to a lesser extent, the Court to consult the original sources and verify that the experts have relied on them appropriately for their conclusions.

[125] Some expert witnesses attached materials they relied on as exhibits to their affidavits. These materials are on the same footing as materials otherwise included as Brandeis Brief materials, except where the witness has attached his or her own writings. It is a mere matter of form that some experts chose to attach their references and some did not. Several such articles have been included both in the Brandeis Brief and as an exhibit to an expert's affidavit.

[126] I have drawn a substantial amount of the historical evidence regarding polygamy in 19th century United States and Canada from books and articles in the Brandeis Brief. I do not understand this history to be seriously in dispute.

[127] I have used the non-academic books and articles, such as journalistic and autobiographical descriptions of polygamy, for limited purposes. In many cases, there is a significant overlap between these materials and the testimony of personal witnesses. Several of the journalistic books recount the life stories of witnesses who appeared before me. Two of the personal witnesses have also written books that were attached as exhibits to their affidavits.

Where sworn and unsworn evidence overlapped in this manner, I have relied upon the sworn evidence.

IV. POSITIONS OF THE PARTIES

[128] The Attorneys General and allied Interested Persons submit that the objective of s. 293 is, and always has been, the prevention of harm.

[129] Parliament is entitled to criminalize conduct where there is a reasoned apprehension that it poses a risk of harm. The evidence on the reference demonstrates that polygamy is associated with significant and substantial harms to individuals, particularly women and children, and to society at large. These harms have been consistently recognized throughout history and across the globe.

[130] The Attorneys General say that s. 293 is consistent with the *Charter*. It does not infringe any of the fundamental freedoms as alleged by the challengers of the law. Alternatively, to the extent that it does, any such infringements are demonstrably justified in a free and democratic society.

[131] The *Amicus* and his associated Interested Persons submit that s. 293 is the product of anti-Mormon sentiment and is also intended to mandate a marital norm - monogamy - that has historically been inextricably bound up with mainstream Christianity.

[132] The challengers urge caution in approaching the evidence with respect to harm. They say that what are cast as harms of polygamy are frequently contingent on other factors specific to a particular relationship or community. Care must thus be taken not to attribute consequences to the practice that over-reach the evidence. Polygamy, they say, is not *per se* harmful.

[133] The challengers collectively contend that s. 293 trenches upon freedom of religion, expression, association, and equality as protected by the *Charter*. It is also inconsistent with the principles of fundamental justice guaranteed by s. 7. These infringements, they say, cannot be justified under s. 1.

V. THE EVIDENCE

[134] A brief discussion of some terminology is in order before I embark upon a review of the evidence.

A. Terminology

[135] "Polygamy" is an umbrella term that refers to the state of having more than one spouse at the same time. It includes both polygyny and polyandry. Polygyny is the practice of a male having multiple female spouses. Polyandry is the converse, a female with multiple male spouses.

[136] Over the course of human history, polygyny has been the only form of polygamy practiced on a significant basis. Polyandry has been exceedingly rare and has tended to be a temporary adaptation to environmental stresses or other ecological factors.

[137] Virtually all of the witnesses used "polygamy" to mean "polygyny". However, I think it clearer if I use the precise terms in these reasons and I will endeavour to do so. Nevertheless, when I review the evidence of witnesses, I will use the terminology the particular witness used.

[138] Polyamory is subject to varied definitions but refers generally to consensual relationships in which participants have more than one partner. The Polyamory Advocacy Association described it in these terms in its Opening Statement:

> "Polyamory" is the practice of having emotionally intimate, sexual relationships within groups of three or more people, where at least one person in the group has more than one emotionally intimate, sexual relationship at a time and where all members of the group formally or informally adopt these principles:
>
> a. men and women have equal rights in establishing the configurations of the groups; no gender has privileges with respect to intimate relationships that the other gender lacks;
>
> b. no sexual orientation is regarded as superior to any other.

[139] Bigamy is the act of entering into a marriage when one of the spouses is already married. It is criminalized by s. 290 of the *Criminal Code*:

> 290. (1) Every one commits bigamy who
>
> (*a*) in Canada,
>
> (i) being married, goes through a form of marriage with another person,

(ii) knowing that another person is married, goes through a form of marriage with that person, or

(iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or

(*b*) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (*a*)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

[140] "Form of marriage" is defined in s. 214:

> "form of marriage" includes a ceremony of marriage that is recognized as valid
>
> (a) by the law of the place where it was celebrated, or
>
> (b) by the law of the place where an accused is tried, notwithstanding that it is not recognized as valid by the law of the place where it was celebrated;

[141] Bigamy is an indictable offence, and offenders are liable to imprisonment for a term not exceeding five years (s. 291).

[142] The offence of bigamy focuses on attempts to enter into multiple marriages by means of the civil marriage process. Its commission involves perpetuating a fraud against the state in that the state's marriage requirements are employed for a marriage that is a nullity. As the Law Reform Commission of Canada observed in *Bigamy*, Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985) at 11:

> This is why the prohibition of bigamy seems justified, since by assuming all the ritual and official characteristics of marriage, such conduct destroys the meaning of the institution itself. Aside from its duplicity, a bigamous marriage is a valid marriage in all respects: this is what makes it a real threat to the institution.

[143] Bigamy frequently also involves a deception against one of the individuals involved.

[144] In Canada, bigamy is distinguished from polygamy by the requirement of multiple state sanctioned marriages. Individuals who enter into multiple marriages but do not attempt to do so through the civil marriage process are not captured by the bigamy offence.

[145] In many jurisdictions, polygamy is dealt with as an aspect of the bigamy offence. England is an example in this regard: *Offences Against the Person Act, 1861* (U.K.), 24 & 25 Vict., c. 100, s. 57.

B. The Historical Context

[146] I begin my review of the evidence by situating polygamy and monogamy into historical context.

1. The Emergence of Modern Monogamy

[147] Dr. Walter Scheidel is Chair of the Classics Department at Stanford University. Among his areas of expertise is the emergence of monogamy in Western societies. Dr. Scheidel prepared an expert report for the AGBC addressing the origins, development and consequences of socially imposed universal monogamy. The following evidence derives from that report. (Dr. Scheidel means "polygyny" when he refers to "polygamy".)

[148] Polygamy has been the norm for most of human history, strict monogamy the exception.

[149] Nevertheless, while most documented societies condoned polygamy, actual bonding and mating arrangements were largely monogamous due to resource constraints that limited the ability of men to support multiple wives.

[150] The earliest unequivocal evidence of what Dr. Scheidel calls socially imposed universal monogamy, or SIUM, appears in ancient Greece and Rome.

[151] Socially imposed monogamy is the normative prohibition of polygamous relationships regardless of resources; even wealthy and high-status men are prohibited from engaging in the practice. Dr. Scheidel uses the term "socially imposed universal monogamy" in his work to emphasize that "no one, not even state rulers, are formally exempt from this rule" (at 3).

[152] Evidence from the seventh century b.c.e. (before common era) suggests that SIUM was by then firmly established in the Greek world. Polygamy was regarded as a "barbarian" custom and a mark of tyranny. As Athenian playwright Euripides declared with reference to the foreign Thracians, "We count it as shame that over two wives one man holds wedlock's reins" (at 6-7). By implication, SIUM was considered a Greek custom and associated with notions of freedom.

[153] From the historically documented period beginning in approximately the third century b.c.e., SIUM also prevailed in Roman society.

[154] While its causes are empirically unknown, Dr. Scheidel posits that Greek monogamy is best understood as the outcome of a gradual process involving the building of civic institutions and the development of ideas of normative egalitarianism. By way of example, constitutional and legal reforms in Athens in the early sixth century b.c.e. defined the monogamous family as the sole legitimate family form by barring legitimate procreation outside of marriage. Since the men most likely to father illegitimate children were those with sufficient wealth to support multiple women and children, these reforms inhibited a source of aristocratic power and prestige.

[155] Dr. Scheidel observes that Greek and Roman SIUM is consistent with the notion that universally imposed monogamy mitigates sexual competition among men, thereby also diminishing the intensity and divisiveness of other forms of male competition. In this regard, it bears noting that Greek and Roman city-states were characterized by high levels of popular, especially military, mobilization. They were also republics, a political system that was very rare in pre-modern world history.

[156] Dr. Scheidel writes (at 18):

> Among documented ancient societies around the globe, the specific congruence of SIUM, republicanism, citizenship rights, and high levels of collective action in the military and political spheres can only be observed in the case of Greece and Rome. The same is true of SIUM as such. This suggests that the association of SIUM with these other features was probably not coincidental. Given our ignorance of the origins of SIUM in these two societies, however, we are unable to determine whether SIUM contributed to these other features or whether it was a neutral element. The observation that in Greece, SIUM was gradually strengthened over time … speaks in favor of a dialectical process in which monogamous norms and practices and other civic features co-evolved and mutually reinforced one another over time.

[157] With the expansion of the Roman Empire, SIUM came to be common practice across parts of Europe, the Middle East and North Africa, though polygamy continued to survive in some areas. This norm was embraced by the Christian Church as it expanded across the Roman Empire in the first five centuries c.e.

[158] Early Christianity developed largely within the context of Greco-Roman SIUM. As a result, Christian and secular principles of monogamy were closely intertwined; while Christian authorities advocated SIUM with explicit reference to religious (Old Testament) scripture, SIUM as a Roman custom had already been dominant when Christianity arrived on the scene. As Dr.

Scheidel explains, this convergence of Christian and more general societal norms throughout much of the Roman world makes it difficult to define Christian insistence on SIUM as a specifically religious norm, even though it can be defined as such with respect to its origin in religious scripture.

[159] The subsequent collapse of the Roman Empire coincided with an expansion of polygamous societies. Arab conquests in the Middle East, North Africa and Spain spread Islam, a belief system that accepted polygamy. Polygamy was also practiced by certain post-Roman Germanic peoples. For these groups, SIUM was not an established practice in the same way it had been for the ancient Greeks and Romans. As a consequence, insistence on SIUM and the rejection of polygamy became more specifically associated with Christian doctrine.

[160] SIUM was predominantly maintained by the Christian Church in the centuries following the decline of the Roman Empire. As Christianity spread during the Middle Ages, SIUM once again came to be seen as both a religious and a European (or Western) custom. The re-consolidation and eventual dominance of SIUM in medieval and modern Europe reflected not only a continuous practice from the Roman to the post-Roman periods, but was also, at least in part, the result of Church efforts to impose SIUM as a universal norm and practice.

[161] European colonization and immigration, together with Christian missionary activities, gradually elevated SIUM to the globally dominant norm. This remains the case today, with the exception of the Middle East and sub-Saharan Africa.

[162] Dr. Scheidel writes (at 9) that:

> There is direct continuity between the Greek and Roman practice of SIUM that was common in the mature Roman Empire (third century BCE to fifth century CE), enshrined in Roman Law, and adopted by Christianity ... and the subsequent western tradition of SIUM, in medieval and modern Europe, in European colonies, and eventually in regions under European influence. Because of this it is appropriate to define the development of SIUM in post-ancient world history as the maintenance and expansion of Greek and Roman practice. No other documented cultural traditions in other parts of the world exhibit a comparable continuity of SIUM in ideal and practice.

[163] It is intriguing to consider whether SIUM has been a significant contributor to the creation of the modern democratic and economically developed state. According to Dr. Scheidel,

it is impossible to answer this question since "the causes for the 'rise of the West' continue to be hotly debated in the academic literature and no consensus appears to be within reach" (at 15).

[164] Nevertheless, Dr. Scheidel opines that it is plausible, though likely unprovable, that SIUM has been a contributing factor to the relative pace of western development. Empirical tests of the correlation between polygamy and various indicators of development have produced conflicting results concerning the relationship between polygamy and political development but generally tend to reveal a negative relationship between polygamy and socio-economic development.

[165] On this point, I briefly mention the evidence of Dr. Joseph Henrich, Associate Professor in the Psychology and Economics Departments at the University of British Columbia. I will have much to say about his evidence later.

[166] Early in his expert report entitled "Polygyny in Cross-Cultural Perspective: Theory and Implications", Dr. Henrich discusses the emergence of modern monogamy and canvasses some of the same historical ground as Dr. Scheidel; in fact, one of his sources was an article by Dr. Scheidel, "A Peculiar Institution? Greco-Roman Monogamy in Global Context" (2009) 14 History of the Family 280. As I will later discuss, Dr. Henrich goes on to test associations between polygamy and various social outcomes predicted by evolutionary biology.

[167] In his introductory summary setting out what his report will address, Dr. Henrich writes (at 6):

> Finally, I speculate that the spread of monogamous marriage, which represents a kind of sexual egalitarianism, may have created the conditions for the emergence of democracy and political equality, including women's equality. Within the anthropological record there is a strong statistical linkage between democratic institutions and monogamy, though monogamy precedes the development of democracy and notions of female equality in Europe. Monogamy may foster the emergence of democratic governance and female equality by:
>
> - Imposing the same rules on the king and peasant (each can only have one wife), which established a first foothold on the principles of equality among men.
> - Reducing the competition for females, which decreases the tendency for males to tightly control their wives and daughters - that is, imposing monogamy (on males and females) reduces patriarchal motivations in males by reducing competition for females, which may in turn permit more egalitarianism in the household.

- Dissipating the pool of unmarried males that were previously harnessed by rulers in wars of aggression.

> In this sense, the anthropologically peculiar institution of imposed monogamous marriage may be one of the foundations of Western civilization, and may explain why democratic ideals and notions of human rights first emerged as a Western phenomenon.

2. Philosophical Dimensions of Western Monogamy

[168] The AG Canada put forth the evidence of Dr. John Witte, Jr., a professor and Director of the Center for the Study of Law and Religion at Emory University. Dr. Witte is an expert in legal history, marriage and historical family law, and religious freedom. His evidence chronicles Western teachings regarding both monogamy and polygamy through the watershed periods of Western history, beginning in ancient Greece and Rome.

[169] Dr. Witte means "polygyny" when he says "polygamy".

a) Classical Foundations

[170] The classical civilizations of Greece and Rome are the source of many core Western values; liberty, democracy and the rule of law among them. Monogamous marriage is another institution that finds its roots in this ancient world.

[171] Throughout the classical period, spanning 1200 years from the sixth century b.c.e. to the sixth century c.e., marriage was understood as a union between a man and a woman presumptively for life. A set of duties attached to this status which survived dissolution of the marriage or death, including duties to the other spouse and to the children of the union. As Dr. Witte explained:

> The form of marriage is consistent throughout this 1,200 year period. Marriage is defined as a union between a man and woman presumptively for life. That union is formed in a two-step process. First by an engagement contract, and then by a marriage contract. The marital contract is usually celebrated in a wedding or in some kind of public ceremony in which the public is involved, including the families of the respective parties.
>
> In some instances, between the engagement and the wedding there are elaborate economic negotiations. There's an exchange of property between the parties. That once a party is married a set of duties attach to that marital status, a set of duties of the spouses to each other, and a set of duties of the parents to their children and eventually the children to their parents. Those duties survive the marriage institution ... Even after divorce and even after death, a party still remains responsible to his dependent or her dependent spouse and dependent children, and provision must be made for post-marital support and provision is presumptively make in testamentary relationships with the deceased.

> That understanding of the form of marriage, as a consensual institution depending especially on the consent of the man and the woman and their respective families as a private and public institution in which the community participates with a set of default rules that attach to the performance of the parties and an expectation that the dissolution of that union has to involve further public ceremony or involvement of third parties, is part of the tradition's teachings on marriage that you can find in these earliest sources.
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> [Transcript, 10 January 2011, p. 20, l. 17 - p. 21, l. 6]

[172] The function of marriage as described by classical philosophers - including Plato, Aristotle, Cicero, Musonius, Hierocles and Plutarch - was as a source of private goods for men, women and children, and of public goods for rulers, citizens and society.

[173] Privately, marriage offered mutual love, companionship and support to each spouse, as well as protection from sexual temptation. It was also the principal vehicle for the production of legitimate children who would serve as heirs to the family property, name, and lineage.

[174] Marriage was viewed, as well, as a critical source of public good. The mutuality inherent in the dyadic structure habituated children to notions of equality and other important norms of citizenship. As Dr. Witte elaborated:

> That notion [of mutuality] is considered to be critical for the state because it creates balance, it creates structure, it creates ballast for the polity, and with that balance produces children who are habituated as the Stoics say, especially Ulpian, habituated to the norms of citizenship. Are capable of seeing how authority and liberty can properly be balanced, how equality and charity can properly be balanced. Recognizing how a healthy polity can work. The thought is that this is the first school of justice, as Aristotle calls it, and therefore the household in this structure is a source of goods for the state.
>
> [Transcript, 10 January 2011, p. 23, ll. 31-43]

[175] These philosophical views about monogamous marriage entered into Roman law and were given enduring form by Imperial legislation. Many of the basic legal concepts and institutions of marriage in modern civil and common law derive from classical Roman law.

[176] Well before the Christianization of the Roman Empire in the fourth century c.e., Roman law defined lawful marriage as "the union of a man and a woman, a partnership for life involving divine as well as human law". The law restricted marriage to men and women who were of the age, fitness and capacity to marry. No other sexual relationship had the status of marriage at Roman law, and no other institution could produce legitimate children.

[177] So strong was the assumption of monogamy that classical Roman law simply ignored the possibility of polygamy as a valid form of marriage and imposed no specific penalties on it. That changed in 258 c.e., when Roman emperors became explicit in prohibiting and punishing the practice. An Imperial rescript from this period provided (at 22):

> It is in general obvious that no one who is under the authority of the Roman name can have two wives, since also in the Praetor's Edict men of this sort were branded with legal infamy (*infamia*). The appropriate judge, when he learns of this matter, will not allow it to go unpunished.

An *infamia* was a legal black mark that precluded an individual from exercising certain private and public rights, such as holding public office or appearing in court.

[178] Polygamy was eventually placed alongside adultery and incest as "abominable", "wicked", "unnatural" and "execrable" sexual offences that went against the laws of God, nature and the state. These offences were viewed as eroding the institution of marriage and undercutting the private and public goods it provided.

[179] Following Christianization of the Empire, Roman emperors repeated and extended the prohibitions against polygamy. The penalties became increasingly sharp, such that by the ninth century, Byzantine emperors had decreed polygamy a capital offence.

b) Biblical Foundations of Monogamy

[180] The Bible provides the Western tradition with a second important foundation in support of monogamous marriage and against polygamy.

[181] Genesis 1 and 2 (promulgated in sixth century b.c.e.) recount God's creation of the first man and the first woman with the instruction that the "two shall become one flesh". This notion of two - not three or four - becoming one flesh became an organizing idiom of biblical teachings regarding marriage thereafter.

[182] The Mosaic law, or Torah, similarly used the running metaphor of marriage as a covenant modelled on the special relationship between God and his one chosen people of Israel, again, exclusively dyadic in its formulation.

[183] The New Testament repeated and embellished these teachings of the Hebrew Bible. The three most famous New Testament passages on marriage - Matthew 19, Corinthians 7 and Ephesians 5 - echo and amplify both the creation narrative and the covenant ethic of monogamous marriage.

[184] While the Bible strongly commended monogamy and sexual purity, it did not prohibit polygamy outright.

[185] The Hebrew Bible chronicles a number of Israel's leading patriarchs as having multiple wives and concubines, among them Abraham, Jacob, Gideon, David and Solomon. Their polygamous households, however, were rife with discord and violence, and later Church fathers and theologians took these accounts as fair warning that polygamy was inherently dangerous and to be avoided.

[186] The truth of these accounts is less important than their normative import for the Western tradition, which concluded that even among the titans of the faith, polygamy was the cause and consequence of many harms.

[187] Dr. Witte testified that the preference for monogamy in the Western tradition is pre-Christian in its origin. Although the Bible came to provide a set of religious teachings about monogamous marriage that was consistent with and complemented the core Greco-Roman sources, there is no strong evidence that the formulations in the Hebrew Bible had any influence on the Greek philosophical traditions or vice versa. Rather, the two ancient cultures approached the same questions of human nature and sexuality, and arrived at comparable teachings.

c) Early Christian Teachings

[188] Theologians and philosophers during the early Christian era opposed polygamy as a form of adultery that violated the Biblical command that two join together in "one flesh". They did not offer an elaborate theory of the wrongs of polygamy, simply viewing it as an obvious breach of the natural structure of marriage. The tribulations of the ancient Biblical patriarchs who dared to engage in the practice served as proof that this was so.

[189] Increasingly, however, they became expansive in their discussions of monogamous marriage. The strongest arguments against polygamy were those extolling the benefits of monogamy. The most enduring of these were offered by Augustine of Hippo, later St. Augustine (354 - 430 c.e.).

[190] St. Augustine repeated the many private and public goods of marriage recited by the Greeks and Romans and illustrated in the Bible. Dr. Witte summarized some of his writings as follows (at para. 21):

> Summarizing both classical and Christian commonplaces of his day, Augustine regarded dyadic marriage as a God-given "natural society" created for the procreation of children and the protection of parties from sexual sin and governed by "a secret law of nature". He called marriage the most "intimate and sincere" form of "human fellowship", "an order of charity", "a faithful friendship", "a friendly and true union", "a fellowship of faith", a "bond of love" that fostered "domestic peace" and "household bliss" if properly nurtured and maintained. He insisted that married couples continue to "remain permanently joined" in body, mind, and property, abstain from sexual intercourse only by mutual consent "for the sake of the Lord", avoid unnecessary separation from bed and board for fear of temptation, and forgo the right to easy no-fault divorce available at Mosaic and Roman law. Like Aristotle, the Stoics, and the Roman jurists, Augustine called marriage "the first natural bond of human society", "the first step in the organization of men", the "first school" of justice, virtue, and order - a veritable "seedbed of the republic". When marriage is properly formed by "a publicly attested contract", Augustine wrote, it provides a disciplined and "orderly lifestyle" that anticipates and "ministers to the ordered agreement concerning command and agreement among citizens".

[191] St. Augustine distilled the earlier classical teachings into a famous theory that marriage had three goods: *fides*, the fidelity, trust and support that husband and wife offered each other; *proles*, the children who provided the couple with joy, contentment and succession, and who, in turn, received essential nurture, care and education; and *sacramentum*, an enduring covenant bond between the couple but also a stable institution for the church, state and society.

[192] For the first four centuries of the common era, the Church's teachings on monogamy and against polygamy paralleled those of Greek philosophy and Roman law. However, the Christian Church and the Roman state maintained separate normative systems.

[193] Following Christianization of the Roman Empire in the fourth and fifth centuries c.e., these normative systems slowly converged and strengthened each other. Christian theology provided a more elaborate theory of monogamous marriage than prevailed in Greco-Roman

philosophy. Roman law provided a more comprehensive law against polygamy than prevailing church canons had offered. By the fifth century, Western theology and law were united in prescribing monogamy and proscribing polygamy.

d) The Medieval Views on Monogamy and Polygamy

[194] The Catholic Church had exclusive jurisdiction over marriage from the 12th to 16th centuries. Drawing in various measure from Greek philosophers, early Church fathers and Roman law, the Church developed a systematic canon law and theology of marriage. In this latter respect, the work of Catholic philosopher, Thomas Aquinas (1225 - 1274), was of particularly enduring importance.

[195] Foreshadowing the insights of modern evolutionary scientists, Aquinas highlighted three unique qualities that distinguish human beings from other animals: (1) human beings produce fragile offspring that are dependent upon their parents for many years; (2) human beings do not have a mating season and are constantly desirous of love and its expressions in sexual form; and, (3) human males have to be induced to care for their offspring. While a mother is bonded to her child naturally through a long pregnancy and nursing, a father bonds to his child only if he is assured of his paternity.

[196] Aquinas reasoned that given these characteristics, nature inclined human beings toward monogamy as a means of ensuring paternal certainty and life-long investment in children by both parents. This argument in favour of monogamy served concurrently as a powerful argument against polygamy.

[197] Aquinas overlaid such natural law arguments in favour of monogamous marriage with moral arguments from natural justice based on appeals to the dignity and the inherent worth of persons.

[198] Aquinas rejected polyandry as unjust to children. A woman who had sex with several husbands removed the likelihood that her children clearly belong to any one husband. This undermined paternal certainty and the consequent paternal investment in the children's care. The children would suffer from neglect, as the wife would be overburdened in simultaneously trying to care for them and tend to her multiple husbands.

[199] Aquinas also rejected polygyny as unjust to wives and children. Polygyny went against the moral requirement of mutuality and equality between husband and wife. Instead, wives were reduced to slaves and set in perennial competition with each other for resources and access to their shared husband. Children were denied their father's full resources and attention, as both were dissipated over a series of children born to a series of wives.

[200] Aquinas supplemented these arguments based on natural law and natural justice with theological arguments about marriage. These elaborated and expanded upon Augustinian notions of fidelity, children and sacrament as the goods attending monogamous marriage.

[201] Upon this conceptual foundation the medieval Catholic Church built a comprehensive canon law governing matters of sex, marriage and family life that was enforced by a hierarchy of church courts and officials. The canon law of marriage repeated many of the basic terms of the classical Roman law of marriage but supplemented and reformed them in light of the Christian theology of marriage as an enduring sacramental bond.

[202] At medieval canon law, marriage was a heterosexual monogamous union for life formed by the mutual consent of a man and a woman who had the fitness and capacity to marry and who were not too closely related by blood, family or other ties. Echoing Roman laws and earlier church canons, medieval canon law included polygamy in the rolls of forbidden sexual unions. Offenders could be excommunicated and were also turned over to secular authorities for criminal punishment.

e) Protestant Views of Monogamy and Polygamy

[203] The Protestant Reformation brought sweeping changes to the Western law and theology of marriage, including a shift in marital jurisdiction from the church to the state.

[204] Nevertheless, Protestant theologians and jurists remained wholeheartedly committed to the traditional classical and Christian ideas of monogamy as the natural form of marriage. They regarded monogamous marriage as a natural and essential institution that served the private goods of marital love and fidelity, mutual protection of adults from sexual sin, and parental participation in the nurture and education of children. They also regarded monogamous marriage

as the natural foundation of civil society and political authority, and an indispensable agent of social order and communal cohesion of the state.

[205] Polygamy was a serious offence in most Protestant states in the 16th century and following. It was viewed as betraying the natural and biblical ideal of marriage as a dyadic union, and depriving society of the goods of monogamous marriage. Even worse, polygamy was seen as the cause, consequence and corollary of a host of harms, among them inequality, crime and exploitation. Offenders faced severe criminal sanction, including execution.

[206] These European Christian models of marriage were transmitted to America during the waves of colonization and immigration in the 16th to 19th centuries.

f) The Enlightenment

[207] With the Enlightenment in England, Scotland and America in the 17th and 18th centuries, arguments in favour of monogamy and against polygamy became increasingly cast in non-biblical and rational terms. Enlightenment philosophers echoed and elaborated the traditional arguments but now presented them on grounds of fairness and utility rather than Christian theology.

[208] The Enlightenment natural law argument in favour of monogamy and against polygamy continued a line of argument about the natural foundations of sex and marriage that went back more than two millennia in the West, and was especially well-developed by Aquinas and the medieval canonists.

[209] The heart of that argument was that exclusive and enduring monogamous marriage was the best way to ensure paternal certainty and joint parental investment in children who are born vulnerable and dependent over the long term on their parents' mutual care. Moreover, exclusive and enduring monogamous marriage best ensured that men and women were treated with equal dignity and respect, and that husbands and wives, and parents and children provided each other with mutual support, protection and edification throughout their lifetimes.

[210] One of the many Enlightenment thinkers who expounded upon polygamy was Henry Home, Lord Kames (1696-1782), a philosopher and leading justice of Scotland's High Court. His views were typical of those that prevailed during this period.

[211] Home defended monogamous marriage as a "necessity of nature" and denounced polygamy as a "vice against human nature". He reasoned that "matrimony is instituted by nature" to overcome human beings' greatest handicap to effective procreation and preservation as a species: their perpetual desire for sex, especially among the young, at precisely the time when they are most fertile. If human beings were permitted to engage in random sex, men would make perennial and promiscuous use of women and not commit themselves to their care or that of their children. Marriage was thus nature's safeguard against such proclivities. Polygamy, however, violated this natural design and strategy.

[212] Monogamy, Home argued, was better suited to the roughly equal numbers of men and women in the world; had God and nature intended to condone polygamy, there would be many more women than men.

[213] Monogamy was also better for children, as the diminished resources and parental attention inherent in a polygamous household led to impoverished, malnourished and undereducated children.

[214] Moreover, monogamy was better for women, as it was naturally designed to respect gender equality. Polygamy, in contrast, was a "patriarchal fraud" that reduced each wife to a servant and a "mere instrument of pleasure and propagation" for her husband. It also put each wife in competition with her fellow wives, and put their children into competition with each other. Inevitably, one wife and her children would be singled out for special affection, leading to further rivalry and violence in the household.

[215] Finally, monogamy was better designed to promote fidelity and chastity, as it induced spouses to remain faithful to each other. Polygamy, on the other hand, was a forum and catalyst for adultery and lust. Given the opportunity to take a second wife, a man would inevitably covet a third and a fourth. The wives who became neglected in the process would be bound to retaliate.

[216] Enlightenment philosophers were, by design, seeking to create new paradigms of thought and they deliberately eschewed theological foundations for monogamy and against polygamy. While they brought a different methodology to bear, they nevertheless arrived at the same result: polygamy was a dangerous institution that was the cause and consequence of harms to women, children, men and society.

[217] As Dr. Witte concluded:

> And what this underscores, at least to me, is that the prohibitions against polygamy are pre-Christian and post-Christian in their formulation in the West. Pre-Christian in that we have these formulations already in Greek philosophical texts and especially in pre-Christian Roman law, and post-Christian in that the architects of modern liberalism and the very formulation of what goes into a just liberal society are making clear that if we want to respect rights, if we want to respect dignity, if we want to respect the needs of all individuals in society and their inalienable and alienable rights, it is critical to maintain an institution of monogamy and prohibit and criminalize the institution of polygamy.
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> [Transcript, 10 January 2011, p. 41, ll. 4 - 19]

g) The Common Law Inheritance

[218] Polygamy had been an offence in the Western legal tradition by the third century. These anti-polygamy laws came to England in the later seventh century when the Anglo-Saxons similarly criminalized polygamy.

[219] The Normans maintained these laws in the 11th century, adding Frankish and Roman law precedents in support.

[220] From the 12th to 16th centuries, the Catholic Church assumed jurisdiction over the crime of polygamy as part of its canon law regulation of marriage and family life. English church courts imposed spiritual discipline and annulled polygamous marriages, and sent offenders to secular courts for criminal punishment where there was evidence of *mens rea*.

[221] In 1604, the English Parliament reclaimed jurisdiction over polygamy and declared it a capital offence punishable by secular courts alone. In 1828, Parliament declared polygamy to be a non-capital felony, though it remained a serious offence punishable by transportation or imprisonment.

[222] The American colonies and states in the 17th and 18th centuries followed similar patterns of criminalizing polygamy and annulling double marriages. Following the American Revolution in 1776, the 13 states and all those that subsequently joined the union passed their own statutes prohibiting bigamy or polygamy as both a criminal and civil offence.

[223] Criminalization of polygamy was not restricted to the individual states. As will be reviewed in more detail below, Congress criminalized the practice in the territories in 1862 in response to the Mormon Church.

[224] With respect to the form and function of marriage, common law thinkers of the 18th to 20th centuries endorsed the rational and utilitarian arguments from the Enlightenment that pair bonding and domestic stability were the best ways to protect the natural rights of men and women, and parents and children. As Dr. Witte explains, they also embraced the Enlightenment argument that a stable monogamous household was foundational to a democratic state.

[225] These were ancient insights of the Western tradition that Enlightenment philosophers and common law lawyers recaptured in the common law notion of monogamous marriage as a special status in society.

[226] Marriage as status harkened back to the formulations at Roman law of marriage as a union between a man and a woman presumptively for life which vested each of them with rights and duties which survived death or dissolution of the union.

[227] Marriage as status also reflected the notion that the institution had both private and public dimensions. Marriage was rooted in the consent of the parties and to this extent was private. Its goods, however, enured not only to the benefit of the couple and their children but to the broader community as well. It was this public dimension in particular that made marriage foundational to society and necessitated state involvement in the institution. I quote at some length from Dr. Witte's testimony in this regard:

> But marriage is also public in the sense that marriage is there to discharge essential goods for the human species and essential goods for human society. It is the means of transmission of wealth. It is the means of procreation of children. It is the means of co-insurance and welfare in a pre-social welfare, pre-New Deal society. That's important. It is the means of creating nurture and education in preparation for civil life for the child. In that sense marriage is public, and as Joseph Story and James Schuler and others say, in

which the state and society are deeply interested. That's why its terms themselves can't be renegotiated, and that's why the set of natural and rights and duties that are built into that institution themselves cannot be ignored with impunity.

And we celebrate that in a number of ways. We celebrate that through public engagements. Engagements are broadcast to the community, and nowadays we do that by having a nice picture in the newspaper, but historically the idea of having an engagement that's announced in the community was a way for the community to weigh in on the propriety of this union, to identify impediments that need to be articulated, to participate with the couple in the preparation for their life together. To bring essential property and commodities and gifts so that they can form their life, especially if their dower or dowries are inadequate. And as a warning to all others that these parties are now off limits for those that may have sexual proclivities with respect to them.

And the wedding is public. The registration is a public record. And the thought is that society participates in this institution that way, demonstrating its understanding that we are invested in this. And that just reflects a classic idea that marriage itself involves a number of different parties, the husband and the wife, the parents of the past generation who participate with them, the leading political authorities of the day that register them, that give them the certificates that recognize their household, and oftentimes in many communities still today religious communities that bless and consecrate the union and on behalf of the state validate that union. The thought is that is how the public recognizes the public dimensions of this institution.

And likewise divorce. Dissolution of marriage. One cannot simply walk away from a marital household with impunity. You cannot simply declare yourself divorced or have your own marriage on your own *ipse dixit*. These are - it's now a public institution and it's now - it has to be a public judgment that the marriage itself is dissolved and the duties that you assumed on achieving that status of being married are now eradicated or conditioned in a particular way in a post-divorce context.

[Transcript, 10 January 2011, p. 46, l. 9 - p. 47, l. 22]

h) Polygamy Linked to Harms

[228] As Dr. Witte summarized, for over 2500 years the Western legal tradition has defined marriage as the union of one man and one woman who have the fitness, capacity and freedom to marry each other. While it has never been seriously claimed that monogamous marriage is a uniformly positive experience for everyone, in general and in most cases, monogamous marriage is said to bring essential private goods to the couple and their children, and important public goods to society and the state.

[229] As Dr. Witte further summarized, for more than 1750 years the Western legal tradition has also declared polygamy to be an offence. The denunciation of the practice has been based on natural, philosophical, political, sociological, psychological and scientific arguments. Polygamy,

it has consistently been argued, is associated with harm: harm against women, against children, against men and against society. Dr. Witte reviewed some of these harms, as follows.

[230] The harms against women include: exploitation; commodification; social isolation; the inevitable favouritism of some women and deprecation of others within the household; discrimination; and, impoverishment.

[231] The harms against children include: the negative impacts on their development caused by discord, violence and exploitation in the marital home; competition between mothers and siblings for the limited attention of the father; diminishment of the democratic citizenship capabilities of children as a result of being raised by mothers deprived of their basic rights; impoverishment; and, violation of their fundamental dignity.

[232] The harms against men include: the unequal distribution of spouses and related ostracism of younger men forced to compete for a scarcer supply of women; the creation of a false appetite for patriarchy; inflammation of male lust; and deprivation of the essential bond of mutuality that is unique to the marital institution.

[233] Finally, the harms to society that flow from polygamy include: threats to the social order and a greater need for social supports as women lacking education and opportunity to enhance themselves, as well as their children, find themselves impoverished upon divorce or the death of their husbands; harms to good citizenship; threats to political stability; and the undermining of human dignity and equality.

C. Polygamy Globally

[234] A majority of countries today prohibit polygamy. Through criminal prohibitions of either polygamy or bigamy, the practice is prohibited throughout the Americas, Europe, Australia and Oceania, and large parts of Asia, including China and Japan.

[235] The main exceptions to this global trend are in sub-Saharan Africa, the Middle East and certain regions in Asia where polygamy remains legal. Islam provides a religious grounding for the practice in many of these areas. In parts of Africa, it may also be permitted under customary law. In what is called the “polygyny belt” extending from Senegal in the west to Tanzania in the

east, it is estimated that 20-30% of married men are in polygynous unions: H.G. Jacoby, "The Economics of Polygamy in Sub-Saharan Africa: Female Productivity and the Demand for Wives in Cote d'Ivoire" (1995) 103 Journal of Political Economy 938 at 939 (cited by both Dr. Scheidel and Professor Jonathan Turley).

[236] Although illegal in North America, polygamy is nevertheless practiced in isolated fundamentalist Mormon communities in both the United States and Canada. The evidence suggests that a small number of North American Muslims may also engage in the practice. Multi-partner unions additionally manifest as polyamory.

[237] In the sections that follow, I canvass some of the evidence with respect to Islam and fundamentalist Mormonism since these faiths ground a substantial preponderance of polygamy worldwide. I also review the evidence regarding polygamy in Canada, both contemporary and historical. I spend considerable time on the historical treatment of the practice, as this evidence informs my later discussion of the interpretation and scope of s. 293.

1. Islam

[238] Polygyny has been practiced by Muslims since the days of the faith's foundation by the Prophet Muhammad, and was, in fact, practiced by Muhammad himself. It is expressly permitted by the Qur'an, albeit with certain limitations. It is not an obligatory element of Islam, however, and the actual incidence of polygyny varies across cultures and countries.

[239] Polygyny in Islam received much less attention during this proceeding than polygyny in Mormonism. I did not hear oral evidence from any experts on Islam, nor did any participants in Muslim polygyny testify. There is, however, affidavit evidence from two expert witnesses with respect to the role of polygyny in the faith.

[240] Dr. Mohammad Fadel is an Assistant Professor and the Canada Research Chair in the Law and Economics of Islamic Law at the University of Toronto's Faculty of Law. He provided an expert report for the AGBC in which he explains Muslim jurisprudence and the place of polygyny within it.

[241] The *Amicus* submitted an expert report prepared by Dr. Anver Emon, an Associate Professor at the University of Toronto's Faculty of Law. Dr. Emon's report discusses his views on the place of polygamy in Islamic law and in a contemporary Islamic context.

a) Polygyny in the Qur'an

[242] The primary Islamic legal basis for permitting polygyny is found in the Qur'an 4:3. It reads in relevant part: "If you fear that you will not be just to the orphans, then marry women of your choosing, either a second, third, or fourth. But if you fear you cannot be just, then [only] one" (Dr. Emon's report at para. 6).

[243] This passage has been interpreted as providing men with a license to marry up to four wives as long as they treat those wives justly. The reference to "orphans" is somewhat ambiguous, as it may refer to female orphans or the mothers of orphans; however, it has essentially been read out.

[244] The qualification that men must treat their wives justly has been subject to different interpretations. It was generally understood by pre-modern jurists to entail treating the co-wives equally; however, this leads to the question of what equality of treatment requires. This may be limited to a fair division of goods, a separate residence for each wife, or an equal distribution of intimacy and affection.

[245] The practice of polygyny may be conditioned by Qur'an 4:129, which states in part: "You will never be able to be just among women even if you tried" (Dr. Emon's report at para. 12).

[246] Scholars disagree as to the exact relationship between these two provisions.

[247] Dr. Fadel deposes that by reading Qur'an 4:3 and 4:129 together, "Muslim jurists concluded that the simultaneous marriage of a male to more than one female is religiously disfavoured with respect to the man" (at para. 37).

[248] Dr. Emon does not believe this can be stated so conclusively. The two passages are separated by a considerable space in the text and are of a different nature, with verse 4:3 being legislative and verse 4:129 expressing a more general principle. Ultimately, Dr. Emon concludes, the Qur'anic text is likely open to multiple interpretations, both in terms of whether verse 4:129

is a gloss on verse 4:3, and in terms of how much the requirement to treat wives justly narrows the license granted in verse 4:3.

[249] Although there may be subtle variations between the different Islamic legal schools, certain conclusions may be reached. The Qur'an does allow for polygyny under certain conditions, namely, that a man take no more than four wives and that he treat those wives equally. Polygyny is neither obligatory nor promises any sort of spiritual reward in the afterlife. There is some controversy as to whether or not polygyny is generally viewed with disfavour in the Qur'an.

b) Muslim State Practice

[250] Contemporary states with significant Muslim populations take a variety of approaches to the legal regulation of polygyny. These approaches range from tacit encouragement to outright prohibition.

[251] Tunisia and Turkey are two examples of predominantly Muslim states that have prohibited polygyny outright.

[252] Many other Muslim states regulate polygyny without prohibiting it. Pakistan, for instance, has a review procedure whereby men who wish to take additional wives must appear before a board of inquiry to demonstrate their capacity to provide for their wives equally, and the consent of their existing wives. Egypt employs a more minimal type of regulation through a notice requirement mandating that a notary public notify the existing wife or wives by registered mail. An Egyptian woman who did not consent to her husband's polygynous marriage is entitled to apply for a divorce within one year if she has suffered a moral or material injury from the new marriage.

[253] In several states where a substantial Muslim community lives alongside communities that are not polygynous, parallel legal systems recognize polygynous marriages for Muslims but not other groups. The Philippines is one example. Muslim men are permitted to take multiple wives in exceptional circumstances, provided they are able to deal with them equally and justly. An arbitration procedure is required if any of the existing wives object to the marriage.

[254] Such parallel legal systems raise the possibility of men converting to Islam in order to enter a polygynous union. In one such case in India, a court found that due to the first wife's objections, the polygynous marriage of a Hindu man who converted to Islam was invalid.

[255] Finally, there are countries with very few restrictions on polygyny beyond those contained in the Qur'an. Some of these countries may actually encourage polygyny. Polygyny is treated relatively favourably in Saudi Arabia, with a state-run charity encouraging women to accept polygamous marriages. The supreme law of Saudi Arabia is the Qur'an and the *sunna* (the practices of the Prophet Muhammad), both of which permit polygyny. The strict restrictions on contact between men and women in Saudi Arabia also contribute to the incidence of polygyny. For example, a husband and wife may choose not to divorce so that the husband is able to see his children without any danger of being accused of immoral behaviour with his ex-wife. There are also tremendous financial disincentives for leaving a polygamous marriage, as a wife loses all financial benefits, including maintenance and right to live in a home, unless it is registered in her name.

2. Mormonism

[256] A number of witnesses gave evidence that bears upon Mormon polygamy, including:

a) Dr. Witte;

b) Professor Campbell;

c) Dr. William John Walsh, an expert in religious studies with an emphasis on Mormonism. His evidence was tendered by the FLDS;

d) Martha Ertman, a professor of law at the University of Maryland. Among her areas of focus is the legal regulation of 19th century Mormon polygamy. Her evidence was tendered by the *Amicus* and addresses the history of anti-polygamy legislation in the United States;

e) Marci Hamilton, a professor of law and the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law at Yeshiva University in New York City. She has researched and published extensively in the area of constitutional law,

particularly with respect to religious freedom. Her evidence, tendered by Stop Polygamy in Canada, examines the relationship between polygamy and constitutional rights in the United States, both in the 19th century and at present; and

f) Jonathan Turley, the Shapiro Chair of Public Interest law at George Washington University Law School in Washington D.C. His specialities include constitutional and international law. His evidence was tendered by the *Amicus*, and addresses American and international perspectives on the criminalization of plural unions.

[257] The Brandeis Brief also contains a number of books and a great many articles about Mormon polygamy. The two from which I have principally drawn are Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002) [Gordon*, The Mormon Question*], and Martha Bailey & Amy J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara: Praeger, 2010).

a) Brief History of the Mormon Church

[258] On 6 April 1830, Joseph Smith founded the religious movement that became the Church of Jesus Christ of Latter Day Saints, more commonly known as Mormonism. His followers believed he had translated another holy testament of the Christian God, the Book of Mormon, from golden plates revealed to him by an angel.

[259] Tensions with non-Mormons existed from the Church's inception. Mormons' intense evangelism and unquestioning deference to their leader, together with doctrines under which members ceded control of their daily lives and property to the Church, made them a large and ever-expanding religious community in the towns where they lived. Mormons were politically, economically and socially insular. They conducted business exclusively with other Mormons, engaged in bloc voting and created their own private militia.

[260] Anti-Mormon sentiment drove Mormons from several states in which they had established communities in the 1830s and 1840s, including Ohio, Missouri and Illinois. In 1844, Joseph Smith was killed by an armed mob.

[261] Joseph Smith's successor, Brigham Young, led his followers to Utah which was then a largely uninhabited territory. There, it was hoped, Mormons would be able to self-govern in accordance with the tenets of their faith.

[262] The Church exerted considerable influence and control over all three branches of government in the Territory. Church President Brigham Young presided as Governor, and other political offices were held by high-ranking members of the Church. The Mormon-controlled legislature tailored legislation to conform to Mormon doctrine. It also established probate courts with jurisdiction in civil and criminal matters but then constrained them by forbidding them to cite legal precedent, apply the common law or enforce the collection of lawyers' fees. These courts were frequently staffed by the same Mormon bishops who presided in the ecclesiastical courts set up to hear disputes among Mormons.

[263] Not surprisingly, Mormon theocratic governance in the Utah Territory was regarded as controversial by much of the rest of the nation, which believed in the separation of church and state. This again escalated tensions between Mormons and other Americans, as did their practice of plural marriage.

i. Plural Marriage

[264] As Professor Campbell explains, marriage is the central social and religious institution within Mormonism. It is viewed as essential to realizing the promise of resurrection after death, and of exaltation, or becoming close to, or like, God.

[265] Mormon theology posits that after life on earth, there are three levels of glory or exaltation, each bearing a closer proximity to God. Only the most virtuous will attain the highest level - celestial exaltation - where the spirit becomes a God itself.

[266] Plural marriage, also known as "The New and Everlasting Covenant of Marriage" or "celestial marriage", was first divinely revealed through Joseph Smith in 1831. It was not until 1843 that the revelation was recorded in *The Doctrine and Covenants of The Church of Jesus Christ of Latter-Day Saints* ("*Doctrine and Covenants*"), which forms part of the canon of the Mormon Church and contains early revelations of the Church's founders. It appears, however, that Joseph Smith discreetly engaged in the practice in the interim.

[267] Section 132 of the *Doctrine and Covenants* begins by referencing Joseph Smith's inquiry as to why numerous Biblical patriarchs were polygynous. It then warns that what is to follow is a new and an everlasting covenant, and "if ye abide not that covenant, then are ye damned; for no one can reject this covenant and be permitted to enter into my glory" (at verse 4).

[268] Section 132 later commands (at verses 61 - 63):

> And again, as pertaining to the law of the priesthood - if any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then he is justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else.
>
> And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him; therefore he is justified.
>
> But if one or either of the ten virgins, after she is espoused, shall be with another man, she has committed adultery, and shall be destroyed; for they are given unto him to multiply and replenish the earth, according to my commandment, and to fulfil the promise which was given by my Father before the foundation of the world, and for their exaltation in the eternal worlds, that they may bear the souls of men; for herein is the work of my Father continued, that he may be glorified.

[269] According to Professor Campbell, original Mormon theology rationalized polygamy not only through adherence to scripture but also through pragmatic and spiritual concerns.

[270] For example, while plural marriage was deemed essential to celestial exaltation, only a minority of men were seen as sufficiently righteous to enter into the celestial kingdom. Women were encouraged to marry them, even polygamously, so that they, too, could achieve exaltation. The practice was therefore understood as bestowing reproductive privilege on men considered especially deserving.

[271] A practice that rewarded only the most virtuous men with expansive families was consistent with the Mormon theological belief that Mormons are the restored Israel and the descendants of the Biblical patriarchs. Joseph Smith looked to the patriarchs of ancient Israel as justificatory sources for the practice of plural marriage and for the creation of patriarchal family structures.

[272] Professor Campbell states that this aspect of Mormon theology can also be understood as part of an effort to resist an understanding of marriage as rooted in romance. Such an approach to

marriage emerged in the Victorian period and coincided with the development of Mormon thought in the 19th century.

[273] The practice of polygamy within early Mormon theology is also anchored in the Mormon value of large families, headed by the community's most saintly men. According to Professor Campbell, fostering opportunities for such men to father many children was seen as a way to affirm their leadership and as a social mechanism for creating and raising "spirit children" who would grow to serve and develop the spiritual community. (It is Mormon belief that spirits pre-exist human bodies and that men and women have a duty to have as many children as possible to create physical bodies for these spirits who can then descend to earth.) Polygamy was thus viewed as instrumental to fulfilling this end.

[274] Joseph Smith's revelation remained closely held until 1852 when the Mormon Church publicly announced and advocated plural marriage as religious ordinance.

[275] The practice generated fierce opposition outside of Utah. Dr. Witte describes the reaction (at para. 320):

> When word of this Mormon policy of polygamy reached Congress, it prompted instant denunciation and a political crusade against the Mormon Church. Not only was their polygamy considered to be a flagrant violation of long cherished norms of American and Western civilization. But word of this exotic new practice came just as the nation was becoming deeply embroiled in bitter battles to abolish slavery and to secure women's rights. It was very easy to castigate polygamy as yet another species of slavery, patriarchy, abuse, and barbarism that needed to be vanquished. A staggering number of speeches, sermons, pamphlets, articles, and books poured forth after the 1850s denouncing polygamy - gradually adducing many of the same arguments about the harms of polygamy that we have sampled from the ancient Roman law and early Church Fathers to the latest Enlightenment philosophers. Polygamy and slavery were considered to be among the "twin relics of barbarism", the main political argument went, and Congress has "the right and the duty to prohibit" this "odious institution".

[276] Asked during his testimony about some of the sober arguments levelled against polygamy during this period of heated rhetoric, Dr. Witte responded:

> Well, the sober arguments were the arguments with respect to the concern about polygamy being a cause and consequence of harm. You see some of that reflected in the Supreme Court opinions. You see some of that reflected in Congress's - the record of legislative history of Congress's action in this area.
>
> And the concern was the exploitation and enslavement of women, the concern about creating rivalry and violence in the household. The concern was the privileging of the

> rich who participate in marriage at the cost of fit men who did not have the capacity to enter marriage because they didn't have the capital. There was concern of the exploitation of women in the household itself, the favouring of some and the diminishment of others. There was concern also about children, children being raised in those households being subject to the discord, to the violence, to the favouritism, the incapacity of those children to learn the habits of citizenship that they needed. The concern especially of coercion of young, of vulnerable children, especially girls, into relationships. All that rhetoric which is consistent with the rhetoric of the tradition indeed going back to the 3rd and 4th century church fathers' writings repeated ... by various Enlightenment philosophers and common law jurists. That kind of language is at the disposal of Congress and used by Congress, amongst other language, to describe why it was thought expedient to pass new laws on this subject.
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> [Transcript, 10 January 2011, p. 55, l. 24 to p. 56, l. 9.]

[277] Mormons defended polygamy as a positive religious command that, while requiring emotional sacrifice, offered great spiritual reward. Polygamy also enabled all women to fulfil their highest aspirations of becoming wives and mothers. As Orson Pratt, a Church elder, stated in 1869, "since old pagan Rome and Greece, - worshippers of idols, - passed a law confining a man to one wife, there has been a great surplus of females, who have had no possible chance of getting married" (Gordon, *The Mormon Question* at 99). Polygamy, in contrast, gave all women the opportunity to be married to, and bear the children of, a righteous man. Mormons also contended that polygamy, not monogamy, was the biological norm, as it reflected the differences in male and female sexuality.

ii. Criminalization of Polygamy

[278] Between 1862 and 1887, Congress enacted four statutes criminalizing polygamy in the territories. (The federal government had authority to pass laws regulating marriage, family and sexuality in these areas which fell within the territorial boundaries of the United States but were not states.)

[279] Criminalization began in 1862 with *An Act to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places, and disapproving and annulling certain Acts of the Legislative Assembly of the Territory of Utah*, 1862, (Sess. II) c. 126 [*Morrill Act*], which prohibited bigamy in all territories over which the United States had jurisdiction. The offence was defined as follows (at s. 1):

> That every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which

> the United States have exclusive jurisdiction, shall ... be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years.

[280] The *Act* also disincorporated the Mormon Church and prohibited religious organizations from owning property in excess of $50,000.

[281] The *Morill Act* ultimately proved difficult to enforce for reasons that included failure to prosecute by local authorities and jury nullification. To address this internal resistance, Congress passed *An act in relation to courts and judicial officers in the Territory of* Utah, 1874, (Sess. I) c. 469 [*Poland Act*], which sought to facilitate enforcement of the *Morill Act* by reducing Church control over the justice system in Utah. Among its provisions, it reduced the jurisdiction of the Territory's probate judges and required that jury pools be selected by the United States Marshall.

[282] That same year, the Mormon Church decided to bring a test case to challenge the constitutionality of the *Morrill Act*. The defendant was Brigham Young's secretary, George Reynolds, who had been charged with bigamy under the *Act*. Reynolds was convicted and appealed his conviction up to the United States Supreme Court. He contended, *inter alia*, that the First Amendment's free exercise clause protected the practice of polygamy so long as it was religiously motivated.

[283] In a landmark judgment that set the framework for much of the free exercise of religion jurisprudence to follow, the United States Supreme Court upheld the constitutionality of the *Morill Act* in *Reynolds v. United States*, 98 U.S. 145 (1878). The Court framed the question as, "whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land" (at 162). The Court concluded it could not, holding that the free exercise of religion provided for the absolute protection of belief but permitted the regulation of conduct.

[284] In its reasons, the Court wrote (at 164):

> Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be

> the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.
>
> By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or poligamy be punishable by the laws of this Commonwealth." 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com. 81, note (e). An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.
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> [Emphasis added]

[285] While the first sentence in this passage has, not surprisingly, been the subject of much subsequent comment, the Court's observations about the role of marriage in a democratic society and the history of the polygamy prohibition are also worthy of note.

[286] Despite the *Reynolds* decision, few indictments were laid for bigamy in Utah in the period that followed. As Gordon explains, Utah did not have official marriage registration requirements, the Mormon Church purportedly did not keep records of marriages, and the population remained recalcitrant (*The Mormon Question* at 147). Together, this made it difficult for prosecutors to prove the fact of multiple marriages.

[287] Around this time, the anti-polygamy movement came to broaden its targets to include Mormon women. Initially cast as victims and objects of pity, Mormon women were increasingly seen as collaborators in aiding their husbands to resist the anti-polygamy laws.

[288] Congress responded by enacting *An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the Unites States, in reference to bigamy, and for other purposes*, 1882, (Sess. I) c. 47 [*Edmunds Act*]. The legislation amended the offence of bigamy to provide (at s. 1):

> Every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years;

[289] It also created the new offence of unlawful cohabitation (at s. 3):

> That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanour, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

[290] The *Edmunds Act* excluded as jurors persons convicted of polygamy and even those who only believed that polygamy was acceptable. Men who engaged in polygamy or unlawful cohabitation were disenfranchised and barred from holding office. Women living in polygamous households were also disenfranchised.

[291] Many polygamous Mormons went into hiding. Men who refused to abandon their wives and children were arrested under the *Edmunds Act*. The new statute was much easier to enforce, and Gordon reports that there were more than 1400 indictments between 1882 and 1896 (*The Mormon Question* at 157). This high number was a result of the broad definition of unlawful cohabitation, which only required proof that the man and woman lived together, not that they had gone through a form of marriage.

[292] Five years later, Congress enacted a fourth round of legislation, *An act to amend an act entitled "An act to amend section Fifty-three hundred and fifty-two of the Revised Statements of the United States, in reference to bigamy and for other purposes,"* 1887, (Sess. II) c. 397

[*Edmunds-Tucker Act*], which went even further in countering Mormon resistance to the federal law. Among its provisions, it required all marriage ceremonies to be registered, thus enabling the certificates to be used as evidence in court proceedings. Men who wished to vote, hold public office or act as jurors were required to swear an oath to uphold the Constitution and laws of the United States, in particular, the law prohibiting polygamy. Anyone convicted of or engaged in polygamy was precluded from exercising any of these civic rights. The authority of the probate courts was curbed. New inheritance laws erected barriers to inheritance by plural wives. The charter of the Mormon Church was revoked, and Church property in excess of that prescribed by the *Morrill Act* was forfeited to the United States government for the use and benefit of public schools in the Territory. Adultery and fornication were criminalized. As well, suffrage for all women in Utah was repealed.

[293] Women's suffrage in Utah had been granted in 1870, well before most of the rest of the nation. Anti-polygamy activists had anticipated that Mormon women would use their right to vote to rally against polygamy. To the contrary, however, they used their voting rights to reinforce Mormon political power in the Territory. By the mid-1880s, it was widely agreed that women's suffrage had failed to emancipate Mormon women and calls had been increasingly made for their disenfranchisement.

[294] The Mormon Church went to court to challenge the right of Congress to dissolve its corporation and to use the proceeds to fund public schools in the Territory. In *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890), a majority of the United States Supreme Court upheld both the dissolution of the church corporation and the forfeiture of its assets.

[295] There is a divergence in the evidence on the reference as to Congress' motivation in enacting these successively harsh anti-polygamy statutes.

[296] Professor Ertman contends that the statutes' vast breadth reveals that Congress' target was much broader than plural marriage. In particular, she says the civil disabilities imposed by the *Edmunds Act* and the *Edmunds-Tucker Act* were intended to demote Mormons from full civic membership to punish them for committing two types of treason: political treason and social, or race, treason.

[297] With respect to political treason, Professor Ertman asserts that many Americans viewed as traitorous the establishment of a Mormon separatist theocracy in Utah, independent of American law, culture and social norms. In the pre-Civil War 1850s, this secessionist threat would have resonated powerfully. Legislators at both state and federal levels spoke of polygamy as a crime against the political institutions of the country, and political cartoons of the era similarly reflected this view.

[298] Professor Ertman states that 19th century Americans also regarded the Mormons as traitorous for committing a second betrayal, which she refers to as "race treason". She explains that according to this view, polygamy was natural for people of colour but unnatural for white Americans. Government officials, medical and political experts, novelists, and political cartoonists decried Mormon polygamy's tendency to produce a "peculiar race" that threatened to undermine white supremacy. Professor Ertman includes in her affidavit a number of political cartoons from the era as evidence of this "racial othering" of Mormons.

[299] Accordingly, in establishing a separatist theocracy, Mormons were regarded as equivalent to "backward African and Asian races." This despotic government was primitive, as was their practice of polygamy, thus rendering Mormons unfit to participate in civilized society and politics. Accordingly, the federal statutes in question not only criminalized polygamy, but excluded Mormons from voting, sitting on juries and exercising other democratic rights.

[300] Professor Ertman states that the jurisprudence from the Supreme Court echoed these claims of political and race treason. Professor Turley similarly refers to this jurisprudence as "rife with sectarian and religious bias" and displaying "open hostility for Mormons".

[301] Professor Hamilton disputes the assertion that the federal polygamy laws were solely a product of animus against the Mormons. She stresses, as does Dr. Witte, that well before the federal government considered whether to prohibit polygamy in the Territories, the practice was illegal at common law and in the states. It was Mormon defiance in the face of the long-standing Anglo-American prohibition that spurred Congress to enact successively stringent statutes with respect to polygamy in the Territories.

[302] Professor Hamilton contends that far from having as their sole purpose the targeting of Mormons, the federal laws merely reinforced the idea that polygamy in all its forms was anathema to the Christian settlers and missionaries that came from Europe to the Americas. Early Americans had similarly viewed polygamy among Native Americans with disapprobation. Thus, she writes, the criminalization of polygamy was neither novel nor crafted to apply solely to Mormons.

[303] In 1890 after many arrests and court battles, the Mormon Church bowed to the pressure and officially disavowed polygamy as a Mormon practice. Four months after the Supreme Court's decision in *Late Corporation of the Church of Jesus Christ of Latter-day Saints*, Church President Wilford Woodruff issued a proclamation known as the "Manifesto" in which he instructed members to henceforth "refrain from contracting any marriage forbidden by the law of the land". (He later stated that he had received a revelation from God that the Church should cease the practice of plural marriage.)

[304] In 1896, Utah achieved statehood with a constitution proclaiming, in part, "polygamous or plural unions are forever prohibited".

[305] It bears noting that polygamy was never the only or even the predominant form of marriage within early Mormonism. Plural marriage was practiced primarily by leaders of the Church who had not only the financial means to support large families, but the necessary dedication and sacrifice to practice it.

b) Mormon Fundamentalism

[306] Despite the 1890 Manifesto disavowing plural marriage, a number of Mormons, including leading members of the Church, continued to secretly engage in the practice in the decades that followed.

[307] During the early 20th century, disagreement persisted among Church leaders as to how to handle the polygamy question. Not until 1911 with the excommunication of Apostle John W. Taylor, a polygamy proponent, was there a consensus among Church authorities to truly discontinue the practice. Even then, the Church did not aggressively excommunicate polygamists until the 1920s and 1930s when it began to pursue a more mainstream image.

[308] These excommunications led to a schism within the faith that set in motion the development of a movement commonly referred to as "Mormon fundamentalism". Believing the Church's repudiation of plural marriage to have been driven by political expediency, fundamentalists hold the view that the religious justification for the practice stands valid.

[309] Dr. Walsh testified that although the mainstream Mormon Church has abandoned the practice of plural marriage, it remains a crucial part of the Mormon theological worldview even today. He described two major groups within the mainstream Church: one which seeks a return to polygamy, believing it to be a holy principle that should be eternally practiced, and another which views polygamy as an archaic practice that ought not to be revived.

[310] Wary of legal prohibitions against polygamy, Mormon fundamentalists tend to live covertly in isolated communities, making it difficult to ascertain their numbers. According to Dr. Walsh, some scholars estimate that as many as 50,000 Mormon fundamentalists live in contemporary North America, predominantly in the western United States.

[311] Of this number, approximately 10,000 are members of the FLDS. Other notable groups include the Apostolic United Brethren (the Allred group), the Latter-day Church of Christ (the Kingstons), the Centennial Park Group, and the Church of the Firstborn in the Fullness of Time (the LeBarons).

[312] There is no central authority for Mormon fundamentalists, and the specific beliefs and practices of these groups vary.

[313] Many former and current members of the FLDS gave evidence about their experiences living in FLDS communities. So, too, did one former member of the Apostolic United Brethren and another from the Latter-day Church of Christ.

[314] There are also independent fundamentalist Mormons who believe in the early doctrines of the Mormon Church but who are not associated with an organized community or group. They usually live in cities and their lives are integrated with the larger community.

[315] Alina Darger, Mary Batchelor, Anne Wilde and Marianne Watson are independent fundamentalist Mormons living in the United States. Each gave evidence in this proceeding.

i. The FLDS

[316] The FLDS is the largest and most well-known group of Mormon fundamentalists. As noted, Dr. Walsh puts their number at approximately 10,000.

[317] Initially known as "The Priesthood Work" or "The Work", the movement eventually organized itself as the FLDS. Its members are concentrated in the twin towns of Hildale, Utah and Colorado City, Arizona, as well as in the community of Bountiful in British Columbia. FLDS prophets have included John Barlow, Leroy Johnson, Rulon Jeffs and, most recently and controversially, Warren Jeffs.

[318] FLDS members believe Joseph Smith's teachings on plural marriage to be unalterable and accept it as their solemn responsibility before God to continue the practice so that they may qualify for the highest degree of glory in heaven. As Dr. Walsh states (at para. 14):

> Celestial marriage is an essential FLDS religious principle and not simply a domestic concern. It is viewed as God's commandment. Unless the faithful participate in it, they cannot enter into the fullness of glory in the kingdom of heaven in the afterlife. Thus, for believers in the principle, plural marriage is essential to personal and family salvation.

[319] The FLDS draws a distinction between civil and celestial marriage. It regards civil marriage as a contractual relationship formalized by the state to define legal and earthly interests. A celestial marriage, on the other hand, is a covenantal relationship that expresses how the heavenly family is organized by God for participation in the afterlife.

[320] The extent of FLDS members' participation in polygamy is not determined solely by the members themselves but also by church leaders. God, speaking through revelations to the leaders, determines who each person will marry. Referred to as placement marriage, this practice is unique to the FLDS.

[321] Dr. Walsh testified that placement marriage began in the early to mid-1950s as part of an effort to retrench to basic values:

> As part of one of these efforts the leaders at the time started implementing this placement system, feeling that this was a way to make marriage more spiritual, if people were trying to find out that God wanted them to marry instead of just choosing for themselves based on whatever personal preference system they had.
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> [Transcript, 5 January 2011, p. 38, ll. 39 - 46].

[322] Benjamin Bistline offers this explanation about placement marriage (at paras. 19-20):

> At the time that I married [mid-1950s], men were permitted to court their future wives, however they had to go to someone on the Priesthood Council to ask permission to court and marry a girl of his choice. As I explain in my book at page 120:
>
> > By the mid-1950s this policy had become a major concern to the Priesthood Council. It created two problems. Any girl after reaching about 13 years-old would have a great number of suitors coming to her, all having claimed to have a revelation that she was to marry him, greatly confusing her young and tender mind. The other (and no doubt greater problem) was that the girls would invariably choose the younger man, making it almost impossible for the older Brethren to get new wives. The people were taught that only a member of the Priesthood Council could get a revelation of who a girl "belonged to" (should marry).
>
> The doctrine of placement was first preached to the people in the late 1950s. It began to be practiced at about the same time. Under the doctrine of placement the Priesthood Council members (and later the President/prophet) would have a revelation about who should marry who. Neither the girls nor the men had a choice in the matter, although the men in particular might be able to influence the choice depending on their status with the Priesthood Council.

Mr. Bistline, whose evidence was tendered by the AGBC, grew up in Short Creek during the 1940s and 1950s. He authored a book entitled *The Polygamists: A History of Colorado City, Arizona* (USA: Agreka, 2004), which he attached to his affidavit.

[323] Nothing in FLDS theology prescribes a specific age for marriage.

[324] Dr. Walsh explains that Mormonism espouses a concept of human agency that derives from the belief that God is not an omnipotent, transcendent other being, but a finite being who lacks the capability to compromise humanity's agency. As agency is an inherent part of the human soul which cannot be taken away either by God or his priesthood representatives, it would be contrary to Mormon theology to force a person into a polygamous relationship. Indeed, it would be an abuse of power and a devaluation of normative standards were that to occur.

[325] Another area in which the FLDS differs from mainstream and other fundamentalist Mormons is communal ownership of property. Members donate to the church under an arrangement known as the United Effort Plan, a trust which owns most property and businesses in FLDS communities.

[326] The FLDS has been the target of major state intervention over the years.

[327] In 1953, Arizona police raided Short Creek (now Colorado City), arrested virtually the entire adult population, and took the children into protective custody. Through a plea bargain, many of the men were given suspended sentences, including a condition that they not practice polygamy. A majority of the children were returned to their parents' care following lengthy court battles.

[328] Many in the FLDS regard the raid as a formative event that brought the community together against outsiders.

[329] In 2008, Texas Child Protective Services and law enforcement officers entered the Yearning for Zion Ranch [YFZ Ranch], an FLDS satellite in Eldorado, after receiving an anonymous call from a young woman claiming to have been physically and sexually abused. (It is now widely believed that the phone call was a hoax.)

[330] Authorities removed all of the children into the temporary custody of the State, though they were eventually returned to their parents. Twelve girls were determined to have been victims of sexual abuse and neglect because they had been married between the ages of 12 and 15. Two hundred and sixty two other children were determined to have been neglected on the basis that their parents had failed to remove them from situations in which they would be exposed to sexual abuse against another child within their households.

[331] The raid resulted in legal action against a number of men, including Warren Jeffs. Grand jury indictments were issued against 12 in respect of offences including sexual assault of a child, failure to report child abuse, aggravated sexual assault, bigamy, and conducting a ceremony prohibited by law. As of July 2010, six men had either pleaded guilty or been convicted of the offences charged against them. The remaining proceedings were outstanding as of that date.

[332] In June 2009, the FLDS released a public statement clarifying its policy toward marriage. It read, in part:

> The church's policies regarding marriage have been widely misrepresented and misunderstood. Indeed, much of the misinformation circulating on this subject seems designed intentionally to fuel the flames of prejudice against the church.
>
> The church's practices in this regard continue a long tradition of marriage in this country that would have been found to have been unremarkable in 19th century America. In the

> FLDS Church all marriages are consensual. The church insists on appropriate consent, including that of the woman and the man in all circumstances.
>
> Nevertheless the church is clarifying its policy toward marriage. Therefore, in the future, the church commits that it will not preside over the marriage of any woman under age of legal consent in the jurisdiction in which the marriage takes place. The church will counsel families that they neither request nor consent to any underage marriages. This policy will apply churchwide.
>
> [Utah Attorney General's Office & Arizona Attorney General's Office, *The Primer: A Guidebook for Law Enforcement and Human Services Agencies who offer Assistance to Fundamentalist Mormon Families* (updated August 2009) at 19-20].

[333] At present, bigamy laws in Utah and Arizona are not generally enforced against consenting adults. Law enforcement efforts with respect to the polygamous communities focus instead on offences such as child abuse, domestic violence and fraud (*The Primer* at 4).

c) Polygamy in American Constitutional Law

[334] Professor Hamilton, whose evidence regarding the federal anti-polygamy statutes was referred to earlier, also reviewed American jurisprudence with respect to polygamy. In sum, the United States Supreme Court, federal courts and state appellate courts have been uniform in upholding the constitutional validity of polygamy prohibitions, whether challenged on free exercise, due process or equal protection grounds.

[335] Professor Turley contends that compelling arguments for the decriminalization of polygamy can be made on free exercise, equal protection and due process bases. While American courts have consistently ruled against those who practice polygamy, recent authorities strongly suggest a need to revisit earlier precedents due to their inconsistency with governing constitutional principles.

[336] Given the divergence in American and Canadian constitutional law, I will not delve further into the evidence on this topic.

D. Polygamy in Canada

1. The History of Polygamy in Canada

[337] The evidence regarding the history of polygamy in Canada derives substantially from the following sources included in the Brandeis Brief.

[338] The first is Sarah Carter's *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008) [Carter, *Importance of Being Monogamous*], endorsed by witness Lori Beaman as a well-respected account of early polygamy in Canada and the movement to prohibit it. The thrust of Carter's argument is that the Christian, monogamous and heterosexual model of marriage was not a long-standing norm in Western Canada in the 19th and early 20th centuries, and that its ascendency was the result of calculated and concerted efforts on the part of government and religious authorities to reshape the diverse marital landscape of the region. The two primary groups upon which she focuses are First Nations and Mormons.

[339] I also draw from chapter excerpts from *Brigham Y. Card, et. al*, eds., *The Mormon Presence in Canada* (Edmonton: The University of Alberta Press, 1990) [*Mormon Presence in Canada*]. The authors of these chapters are noted historians of Mormonism. As well, I rely upon Robert J. McCue's article, "Anthony Maitland Stenhouse, Bachelor "Polygamist"' (1990) 23:1 Dialogue: A Journal of Mormon Thought 108 [McCue, "Anthony Maitland Stenhouse"].

[340] The affidavit of John Nelson appends historical documents, primarily correspondence, from both Library and Archives Canada and the British Columbia Archives on the topic of polygamy, and is a rich source of historical information.

a) First Nations Polygamy

[341] Aboriginal societies in 19th century western Canada had diverse marriage customs and laws. As Carter discusses in detail, not all shared the monogamous ideal of marriage, and conjugal relationships came in a variety of forms.

[342] Marriage was central to the kinship systems of Aboriginal societies and was generally arranged by elders. Nevertheless, individuals could not be forced to marry, as the ease with which divorce could be acquired precluded coercion. Marriages could be monogamous or polygamous. They could also be same-sex.

[343] Polygamous marriages were considered desirable domestic arrangements. They ensured marital options for women who were divorced or widowed, a fairly common occurrence in the more militaristic of the First Nations. Further, since only men of wealth and prestige could

maintain these large households, parents sought such unions for their daughters. Subsequent wives were generally brought into a family after consultation with the first wife and with her approval. Polygamous marriages provided assistance, companionship and enhanced status for the senior wife.

[344] As an 1838 Hudson's Bay Company census suggests, monogamy was the predominant form of union, though polygamy was certainly practiced, particularly by the Aboriginal peoples of the plains (Carter, *Importance of Being Monogamous* at 121-2):

> ... At Fort Resolution in the Athabasca district, for example, eight of eighty-two men had two wives. One man (François Beaulieu, described as a "half breed") had five wives. At Fort Chipewyan, fifteen of 129 had two wives, two had three wives, and one had four wives. At Île à la Crosse, twenty-four of 109 had two wives, two had three wives, and one had four wives. The more southerly locations, which would have included the Plains Cree and Ojibway (Saulteaux), were Fort Pelly, where fourteen of eighty-three had two wives, and two had three wives; Fort Ellice, where sixty of 308 had two wives, twenty had three wives, and one had five wives; at Lower Fort Garry none of fifty-eight had more than one wife. The census does not include any statistics on the Blackfoot, who had limited contact with the HBC at that time. David Thompson [HBC explorer] wrote with regard to the Cree, "each man may have as many wives as he can maintain, but few indulge themselves in this liberty, yet some have even three."

[345] Missionaries and government authorities strongly condemned the practice. Again quoting from Carter at 129:

> It was seen as deviant and morally depraved. Polygamy became a towering example of the shortcomings of Aboriginal societies that were understood to subordinate women, in contrast to the ideal of monogamous marriage, which was cherished as an institution that elevated women. Polygamy was viewed as a system that exploited and degraded women, depriving them of respect and influence. It was thought that jealousy and friction among the wives was inevitable. The husbands in polygamous marriages were seen as idle, debauched, and tyrannical. The sexual desires of the husband were seen as a main motivation for polygamy. As John Moore has noted, this notion probably tells us more about the sexual fantasies of European male observers than about the culture and values of Aboriginal people.

[346] Nevertheless, until the 1890s, the Department of Indian Affairs took few steps to address the persistence of polygamy in Aboriginal communities, hoping instead that it would disappear under missionary influence and the realities of life on the newly established reserves. This lax approach changed with the arrival of Mormons in Canada in the late 1880s.

b) Mormon Polygamy

[347] Fleeing anti-polygamy laws in the United States, Mormons from Utah first began settling in southern Alberta under the leadership of Charles Ora Card.

[348] Card was an important community and church leader. He had been arrested in the United States for practising polygamy but escaped custody and went underground. Soon after his escape, Card was directed by the president of the Mormon Church to go north and find a site for Mormon settlement in Canada.

[349] With a small group of followers that included his third wife, a daughter of Brigham Young, Card settled at Lee's Creek, Alberta in 1887. They quickly established themselves as skilled farmers and built a community that would later become Cardston.

[350] Most of the Mormon leadership in Alberta at the time were married to more than one wife. However, historians agree that their practice was to bring only one wife to Canada, leaving the other or others in the United States in what has been described as "*de facto* monogamy" (Jessie L. Emery, "Two Legal Wives: Mormon Polygamy in Canada, the United States and Mexico" in *The Mormon Presence in Canada* at 178).

[351] The arrival of Mormons attracted widespread censure in Canada where attitudes had already been shaped to a large extent by events in the United States. The ongoing conflict between Mormons and the American government had received coverage in the Canadian press, and American publications critical of polygamy had crossed over the border.

[352] Polygamy was condemned in the Canadian media. It was also written about unfavourably in the women's literature available at the time, as Carter describes (*Importance of Being Monogamous* at 83-84):

> Polygamy was also discussed with disgust in advice literature for Canadian women, indicating that it was perceived as a very real threat. In *The Physical Life of Woman: Advice to the Maiden, Wife and Mother* readers were informed that "such practices lead to physical degradation. The woman who acknowledges more than one husband is generally sterile; the man who has several wives has usually a weakly offspring, principally males ... The Mormons of Utah would soon sink into a state of Asiatic effeminacy were they left to themselves." ... A surgeon for the US army who visited Salt Lake City wrote in 1863 in an article published in *Canada Lancet* that "Under the Polygamic system, the feeble virility of the male, and the precocity of the female, become notorious. The natural equilibrium of the sexes being disturbed, mischief of this kind

> must ensue; as a consequence, more than two-thirds of the births are females, while the offspring, though numerous, are not long lived, the mortality in infantine life being very much greater than in monogamous society."

[353] As had been the case in the United States, Mormonism was viewed with suspicion as a potentially treasonous organization that encouraged followers to obey the church before the state. The *Edmonton Bulletin* of 8 October 1887 declared that Mormons are "an utter abomination which no effort should be spared to rid the nation of", and that "no country, much less a young and sparsely peopled country, can afford to allow treason to flourish and social abominations to spread merely because the iniquities are performed under the name of religion" (Carter, *Importance of Being Monogamous* at 46).

[354] Mormons also had supporters in Canada, so long as they agreed to give up polygamy, as they were seen as industrious and capable farmers.

[355] Correspondence from the Lieutenant Governor of the Northwest Territories, J. Royal, to Sir John A. Macdonald in February 1889 captures some of these mixed reactions:

> I have just come back from a visit to the South West of the Territories, and I am glad to inform you that everywhere I have received the most cordial welcome. During my stay at Fort McLeod and Calgary I had and sought occasion to converse with as large a number of people as possible, and among other subjects discussed that of the Mormon Settlement at Lee's Creek came up repeatedly. While giving the Mormons due credit for their industry and productive qualities, most of the citizens are fearful of the social and political evil consequences that will necessar[ily] follow their settlement in Canada. History repeats itself under similar circumstances, and if the Mormons have ever since their existence been a constant source of trouble to the American Government; if they have not been able to live under the laws of the United States, it is reasonable to expect that their settlement in our country will be attended with the same results.
>
> They are at present only a small colony of 300 in one of the most beautiful parts of Alberta: they may be 5,000 in six months. "Principis obsta, seri medecina paratur."
>
> Would it not be well to amend the law so as to make it impossible for a Mormon to effect an entry for Dominion lands? I know that this matter has already attracted your attention: it is a question full of threats for the future: we do not want a Mormon question: the establishment of that self supporting, self governing and self satisfying sect is a danger and a shame to every Christian people. I am informed that the American Mormons are about to negotiate a large purchase of lands from the Galt Company: cannot this be prevented by special legislation? The Mormons will not and cannot assimilate with Canadian institutions.
>
> As Lieut. Governor of the N.W. Territories, I believe it to be for me a sacred duty to raise my voice on such an occasion and to echo the note of alarm that has already been sounded, and I do so fully impressed with the vast political importance of the question.

[J. Royal to Sir John A. Macdonald (7 February 1889), Ottawa, Library and Archives Canada (RG17, Privy Council Office, Ottawa, Referring Ltr. From Hon. J. Royal on the Settlement of Mormons in Canada)]

[356] Fears regarding Mormon polygamy increased in November 1888 when Card led a delegation to Ottawa to petition the Canadian government to permit his followers to bring their plural wives to Canada. They were told they were welcome to come to Canada but were not permitted to engage in polygamy here. Sir John A. Macdonald would later recount the episode, and explained the government's position, as follows:

> Mr. Card and some others came to Ottawa. Some they are British subjects by birth, one or two are Canadians by birth, and others were born in the United States. They said they wished to settle in Canada. They were informed what our law was, and they were told explicitly and distinctly that we were aware that the great cause of the antipathy towards them in the United States was the practice of polygamy, and they must understand that the people of Canada would be as firmly opposed to that practice as the people of the United States were. They said they were aware of that, but they wanted shelter from what they considered oppression. They were told - told by myself - that in any case where the practice was proved they would be prosecuted and punished with the utmost rigor of the law. They said they were quite willing to submit to the law. They attempted, of course, to argue their case, and they discussed the doctrines of Mormonism generally with me. I said to them: You must understand that there must be no mistake about it; there will be no leniency, there will be no looking over this practice, but as regards your general belief, that is a matter between yourselves and your conscience. We are glad to have you in this country so long as you obey the laws, we are glad to have respectable people. Her Majesty has a good many British subjects who are Mohammedans, and if they came here we would be obliged to receive them; but whether they are Mohammedans or Mormons, when they come here they must obey the laws of Canada. I told them this, and they professed a sincere desire - I have no reasons to doubt their sincerity - to submit themselves to the laws of Canada for the sake of the rest and equity that they thought they would get, instead of being surrounded by a turbulent crowd who were oppressing them in every way.
>
> [*House of Commons Debates*, 6th Parl., 4th Sess. No. 24 (10 April 1890) at 3180].

c) Criminalization of Polygamy

[357] The first criminal prohibition against polygamy was enacted in 1890 when *An Act further to amend the Criminal Law,* S.C. 1890, c. 37, s. 11 came into force, thereby adding the offence to the *Act respecting Offences relating to the Law of Marriage*, R.S.C. 1886, c. 161 as follows:

> 5. Every one who practises, 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 any other 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 -

(a) Any form of polygamy; or

(b) Any kind of conjugal union with more than one person at the same time; or

(c) What among the persons commonly called Mormons is known as spiritual or plural marriage; or

(d) 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; and

2. Every one who, -

(a) Celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in sub-section one of this section; or

(b) Procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any such form, rule or custom which so purports; or

(c) Procures, enforces, enables, is a party to, or assists in the execution of any such form of contract which so purports, or the giving of any such consent which so purports, -

Is guilty of a misdemeanor, and liable to imprisonment for five years and to a fine of five hundred dollars.

3. In any charge or indictment for any offence mentioned in sub-section two of this section it shall be sufficient to describe the offence in the language of that sub-section applicable thereto; and no averment or proof of the method in which the sexual relationship charged was entered into, agreed to, or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the parties implicated.

[358] With some minor rewording, the provision was included as ss. 278 and 706 in the *Criminal Code, 1892*, S.C. 1892, c. 29, Canada's first comprehensive criminal code. These provisions were renumbered and underwent minor tinkering in the years following but remained substantially the same until 1954 when the *Criminal Code* was overhauled.

[359] I will review the legislative history of s. 293 in much more detail later.

d) First Nations and Mormon Polygamy After Criminalization

[360] As noted earlier, the Department of Indian Affairs took few steps to address the persistence of polygamy in Aboriginal communities until the 1890s.

[361] Among the factors prompting it to finally confront the issue was the arrival of Mormons at Lee's Creek, situated near a Reserve where polygamy was relatively common. This proximity

raised concerns that Mormon missionary activities would further encourage the practice among First Nations. It raised, as well, concerns that Mormons would see Aboriginal polygamy as evidence that that the practice was accepted in Canada, despite having been told that it would not be tolerated.

[362] Carter puts forth additional factors as motivating a firmer stance at this time. One was financial cost. Under the government's treaty obligations, multiple wives created extra annuity entitlements for the male head of a family.

[363] Another was the apparent fact that some parents were marrying their children at young ages, sometimes polygamously, to keep them out of residential and industrial schools, as marriage rendered them ineligible to attend. Carter quotes Reverend J.S. Tims complaining of his "extreme difficulty in obtaining girls [for the schools] from the fact that they are allowed to marry from 10 years of age upwards and to become the second or third wife of grown up and middle aged Indians, a custom which I think it is time the Department should take steps to discourage." (*Importance of Being Monogamous* at 201).

[364] Initial government measures to suppress polygamy among the Aboriginal population consisted primarily of warnings to transgressors, conveyed by the Northwest Mounted Police, that prosecutions would be imminent if they did not desist. This approach was not universally successful, as the Commissioner of Indian Affairs for the Northwest Territories described to his superior in 1892:

> I have the honor to state for the information of the Department that in spite of every effort, short of criminal prosecution, to suppress polygamy among our Indians, cases still continue to occur, and the question arises whether some more stringent measures that heretofore resorted to should not now be adopted. I think myself that the Indians of many portions of Manitoba and of some parts of the Territories are far enough advanced in civilization to be compelled to submit to the law in such an important matter.
>
> [Commissioner of Indian Affairs, North-West Territories to Deputy of the Superintendent General of Indian Affairs (6 September 1892), Ottawa, Library and Archives Canada (RG10, Manitoba-Polygamy Among the Indians, 91189)]

(At the time, the Northwest Territories covered a vast territory that included virtually all of what are now the provinces of Alberta, Saskatchewan and Manitoba.)

[365] The Commissioner reiterated his concerns regarding the persistence of the practice in subsequent correspondence. He also queried whether "an Indian [was] liable to criminal prosecution, if, in accordance with the customs of his Band, he lives with more than one wife?"

[366] The Department of Justice offered the following opinion in response:

> If such an Indian is validly married to one of the women with whom he lives and has gone through a form of marriage with the other or others which would make her or them his wife or wives but for the fact that he was already married, there can be no question that he is guilty of bigamy and liable to the Penalties for that crime. (Criminal Code, Sec. 276). Even if there has been no valid marriage, but the Indian intended by complying with the customs of the band relating to marriage to make both or all the women his wives, or if, even without such intention, he has complied in the case of two or more of the women with the requirements of the tribal customs, I am inclined to think that he may be successfully prosecuted under section 278 of the Criminal Code, [polygamy] the maximum Penalty under which is imprisonment for five years, and a fine of five hundred dollars.
>
> [Deputy Minister of Justice to Deputy Superintendent General of Indian Affairs (4 January 1895) Ottawa, Library Archives Canada (RG10, Manitoba-Polygamy Among the Indians, 122830)]

[367] Despite warnings that transgressors would be prosecuted, new cases of polygamy continued to emerge. Department of Indian Affairs officials responded by various means including the withholding of rations and the placement of second wives in residential schools under new compulsory attendance legislation.

[368] By the late 1890s, it was clear these measures were not having the desired effect.

[369] In 1898, the agent for the Blood Indian Agency reported to the Department of Indian Affairs that despite his best efforts to prevent the members of his reserve from engaging in polygamy, six or seven new cases of men taking second wives had arisen over the previous year. The agent sought instructions, expressing concern they were setting poor examples and that others might follow suit.

[370] The agent was directed to meet with the Chiefs, fully advise them of the law and give notice that no prosecutions would be instituted if they abandoned the practice within a month. If such notice was disregarded, he could institute criminal proceedings.

[371] In subsequent correspondence, the agent advised the Commissioner that he had had repeated meetings in an effort to persuade the offenders to give up their plural marriages. He had

also withheld annuity payments from the wives who were living "immorally" with the men. This had had the desired effect upon a number of the women, as they agreed to give up polygamy. Others, however, persisted.

[372] Legal proceedings were eventually taken against one of the young men. On 10 March 1899, Bear's Shin Bone was brought to trial on a charge of polygamy. The agent described the matter in a letter to the Commissioner:

> The case was laid before the Judge by the Crown Prosecutor and the Indian was defended by Mr. M. McKenzie. After proof the Judge convicted Bears Shin Bone holding that the law applied to Indians as well as whites, but that as Mr. Conybeare had said his instructions were not prosecute for the sake of punishing the Indian but merely to make the prisoner and others obey the law, he would not sentence him that day but allow him out and suspend sentence on the understanding that he gives up his second wife, but with the knowledge that if he does not he will be brought up before him at any time for sentence.
>
> I shall endeavour to do all I can to persuade him to do so and will also see the other two or three Indians who are waiting on his decision and ask them quietly to allow their second wife to return to their own houses.
>
> I think as this case was more of a test than anything of how the law applied to Indians - there being good grounds for the defence put in by Mr. McKenzie that the Legislature never intended this section of the Criminal Code to apply to Indians - the Department ought to provide a defence and as Mr. McKenzie attended as defending barrister I would ask your authority to issue a voucher to cover his fees. ...
>
> [Indian Agent to the Indian Commissioner, Winnipeg (13 March 1899), Ottawa, Library and Archives Canada (RG10, Blood Agency-Polygamy-Indian Commissioner for Manitoba and Northwest Territories 1848-1899)]

[373] This was one of only two successful prosecutions under the polygamy prohibition over its 120 year history. (The other, *R. v. Harris* (1906), 11 C.C.C. 254, was with respect to a man who had been living with a married woman "in open continuous adultery to the scandal of the public".)

[374] The conviction of Bear's Shin Bone did not have the effect the authorities had hoped for, as polygamy was not immediately abandoned by First Nations communities. The 1901 census for the Blood Indian Reserve, for instance, revealed that there were still over 30 polygamous families.

[375] Carter comments on the irony that in all the correspondence regarding the suppression of polygamy, supposedly for the benefit of the wives and children of polygamous unions, officials

expressed almost no concern about the devastating consequences that would be visited upon them by the dissolution of those unions. As she writes, "[a] central rationale for eradicating polygamy was that women were to be saved from unhappy lives, yet if the initiatives were successful, the 'semi-widows' or 'supernumerary wives' and children were to be abandoned" (*Importance of Being Monogamous* at 210).

[376] Turning to the Mormons, the criminalization of polygamy in Canada coincided with the Church's 1890 Manifesto disavowing plural marriage. The North West Mounted Police nevertheless maintained close surveillance on their communities to ensure they had abandoned the practice.

[377] It was well known to police that some Mormon men had one wife in Canada and one or more in the United States, but most were thought to be abiding by Canadian law. A November 1895 report from an officer in Lee's Creek to his commanding officer reads:

> I have the honour to report that I have lately been making inquiries with a view to ascertaining if there is any such thing as Polygamy being secretly carried on amongst the Mormons of this sub-district.
>
> After making my own observations and making minute inquiries amongst both Police who have been serving for a very considerable time in this portion of the command, and among non Mormon settlers, who are living among the Mormons, and who having no love or admiration for them, would I am sure be very glad if they could give me any such information. I am perfectly convinced that no such thing as Polygamy is being practised, nor has been since the Act was passed; and I feel that I am justified in reporting such to be the case. Of course you will understand that I am now merely referring to what they are doing in Canada.
>
> I think that they now stand in too wholesome an awe of Canadian Laws, and of the Mounted Police, to attempt any such serious offence; and another very strong deterrent is the fact that very few amongst them are in a position, financially, to support more than one wife and family.
>
> Doubtless some of the older men amongst them practised Polygamy in the United States before coming to Canada, and as I can hardly suppose that they have made away with the surplus wives, they must still exist, at least many of them, in Utah. The Mormons are a very secretive people, and it is impossible to obtain any direct information.
>
> I attach hereto a list of those members of the settlement who I have reason to believe, from what I can gather, have wives in Canada, and also in the United States, although I have no proof, beyond hearsay, that such is the case.
>
> [Hugh J.A. Davidson, Inspector in Charge of District, to Officer Commanding N.W.M. Police, Macleod District (5 November 1895), Ottawa, Library and Archives Canada(RG18-A-1, Mormons in Macleod District - Report on alleged Polygamy practised among, 1895)]

[378] He attached a list of nine names, one of which was Charles Ora Card.

[379] Other correspondence in the archival evidence reveals that the police had gathered information in 1899 regarding Charles McCarty, a prominent individual in the community, who had been living in one room with two women, apparently sisters. No action appears to have been taken against him, given the difficulty in obtaining evidence of a marriage ceremony in Canada, and because "[t]hese two women being sisters and passing under different names, have in the ordinary course a reasonable excuse for living in the one house, and further, no Mormon would give evidence in a case of this kind unless cornered very tightly." (E.H. Bolderson, Corpl. in charge of Detachment to Officer Commanding, N.W.M. Police, Macleod (10 February 1899), Ottawa, Library and Archives Canada).

[380] No charges for polygamy under s. 293 were laid against Mormons in Canada until 2009.

2. Bountiful

[381] Located in the southeast corner of British Columbia adjacent to the border with the United States, the community known as Bountiful is virtually synonymous with polygamy in Canada.

[382] The origins of Bountiful lie with Harold Blackmore, who settled in the area in the mid-1940s. The evidence of two of his daughters, Lorna Blackmore and Brenda Jensen, cast light on the community's early days, as does *The Secret Lives of Saints: Child Brides and Lost Boys in Canada's Polygamous Mormon Sect* by Daphne Bramham (Toronto: Vintage Canada, 2008) [Bramham, *Secret Lives of Saints*].

[383] Harold Blackmore was a devout Mormon who, following intense religious study and attendance at cottage meetings where he was exposed to talk of plural marriage, made a decision to return to what he believed to be the fundamental teachings of the faith, which included plural marriage.

[384] Aware that he would not be able to practice polygamy openly in Rosemary, Alberta, Harold relocated with his wife Gwen and their eight children to Lister, the geographical area that comprises Bountiful, in 1946. According to one account, he was drawn to Lister after having

seen it in a dream. Ms. Jensen offered a more prosaic explanation, which is that the location was chosen because of its isolation and ready access to the border. She described a rum runners' trail at the back of the property that was used to cross to and from the United States.

[385] Harold's wife Gwen was adamant that the only person she would contemplate joining them in plural marriage was her sister Florence. After much persuading, Florence eventually agreed to join the family.

[386] Harold married Florence in the United States around the time he relocated to Lister. Florence did not join the family in Lister until later and lived separately from them when she did. For a number of years, Gwen's children were not told that Florence was also their father's wife or that her children were their half-siblings.

[387] Within a few years of Harold's arrival in the community, other like-minded families joined them, including Eldon Palmer, Dalmon Oler and Raymond Blackmore. Raymond was Harold's uncle, though they were only months apart in age. Fiercely loyal to the FLDS Prophet Leroy Johnson, Raymond would eventually supplant Harold as leader of the community. Raymond's son, Winston, would become bishop in 1984 and name the community Bountiful.

[388] In 1964, Harold, his two wives and their younger children left Bountiful for Colorado City/Hildale where Harold had been encouraged to assist with construction in the rapidly expanding community. Without his consent, his property in Lister was incorporated into the United Effort Plan trust and administered by Raymond.

[389] Harold Blackmore was a devout man sincere in his religious beliefs. He became increasingly disillusioned with the discrepancies between his dreams of a utopian community and the reality he saw around him, fuelled in no small measure by the progressively autocratic rule of LeRoy Johnson. He left the FLDS with his family in 1968.

[390] Expanding rapidly since Harold's arrival in 1946, Bountiful today numbers approximately 1000 people. Its residents ally themselves with one of two leaders following a rift in church leadership in 2002. Roughly half the community follows Winston Blackmore; the other half follows James Oler, who is loyal to Warren Jeffs, the FLDS leader in the United States.

[391] Bountiful residents continue to have fairly limited contact with the outside. Businesses owned by Bountiful leaders - for example, J. R. Blackmore & Sons and Oler Brothers - employ many residents. Children attend one of the community's two independent schools, Bountiful Elementary Secondary School ("BESS") and Mormon Hills Elementary Secondary School ("MHESS").

[392] Bountiful remains closely affiliated with the twin cities of Hildale and Colorado City in the United States, with members inter-marrying, conducting business and, at least among Oler's followers, taking religious counsel from the FLDS leadership.

a) Police Investigations Relating to Bountiful

[393] Over the years, the police have received numerous reports regarding individuals in the community. Some investigations led to charges; most have not.

[394] The record indicates the following police investigations and convictions between 1986 and 1991:

a) In 1986, a 20-year old woman in Bountiful reported that she had been sexually assaulted by a 16-year old male two years earlier. Charges were proposed but not approved.

b) In 1989, a woman in Bountiful reported widespread physical and sexual abuse at the Bountiful school. The RCMP investigated jointly with Family and Child Services but obtained no disclosures of sexual abuse. They determined that inappropriate discipline had been used in the school but that this was of an historic nature.

   Allegations were made during the investigation that an official at the school had molested female students in the past but no charges were laid in this connection.

c) In 1989, the RCMP investigated a report that a man in Bountiful had sexually molested a woman in the community. No charges were laid.

d) In 1990, a man in Bountiful pleaded guilty to indecent assault with respect to the younger sister of his wife. The offences had occurred when the victim was between the ages of 8 and 14.

   In his statement to the police, the offender also admitted to having sexually assaulted another of his wife's sisters when she was a teenager. The sister confirmed the abuse but no charges were proposed since she had forgiven the man and had no animosity towards him.

e) In 1990, a woman who had grown up in Bountiful reported that when she was 15, she had been religiously married to a 55-year old man against her will and forced to accompany him to his home in Cardston, Alberta. The RCMP investigated the incident as unlawful confinement. The outcome of this investigation in unknown.

f) In 1991, an 18-year old son in a polygamous family in Bountiful pleaded guilty to sexual assault with respect to three of his half-sisters. The offences had occurred when he was 16 and the victims were 10, 5 and 4.

g) In 1991, the RCMP investigated a complaint by the woman referred to in subpara. (e) that a 41-year old man in Bountiful had committed sexual assault 23 or 30 years earlier. The outcome of the investigation is unknown.

h) In 1991, a man in Bountiful was convicted of sexual assault with respect to the third of his three wives. He was acquitted of five additional counts of sexual assault in relation to his first wife and three of his children.

[395] The first criminal investigation into polygamy in the community occurred in 1990-1991. Creston RCMP investigated and proposed that polygamy charges be laid against two men in Bountiful: a 57-year old man alleged to have one legal wife and four celestial wives, and a 35-year old man also alleged to have one legal wife and four celestial wives.

[396] Given the obvious constitutional dimension, the Criminal Justice Branch sought opinions as to the constitutional validity of s. 293 of the *Criminal Code* from both within and outside the Branch. Among those providing opinions was a retired justice of the British Columbia Court of

Appeal, Richard Anderson, QC. The opinions were unanimous that s. 293 was inconsistent with the *Charter's* religious freedom guarantee.

[397] As the charge approval standard of a substantial likelihood of conviction was not met, no charges were laid against the two men.

[398] Between 1992 and 1993, the Deputy Attorney General of British Columbia solicited the view of his federal counterpart as to the constitutional validity of s. 293 and urged consideration of amendments to the provision.

[399] The Federal Deputy Minister of Justice responded that he did not consider s. 293 to involve a clear breach of the *Charter* and expressed his view that there was a reasonably good chance that the provision would be upheld in a constitutional challenge.

[400] In light of this opinion, the Criminal Justice Branch sought a supplementary opinion from Mr. Anderson, QC. He again advised that it was his opinion that s. 293 likely offended the *Charter* and could not be saved under s. 1.

[401] Between 1993 and 2001, the following police and legal action took place:

a) In 1993, a 16-year old youth from Bountiful pleaded guilty to sexual assault with respect to his 6-year old half sister. Both the young offender and the complainant had left the community with their mother five years earlier and had been living elsewhere when the offence was committed. According to a newspaper article reporting on the youth court proceeding, his counsel linked his behaviour with the mores of the Bountiful community.

b) In 2000, a woman in Colorado City, Arizona reported to the RCMP that her 17-year old daughter had been taken out of school, smuggled into Canada and married to a 38-year old man in Bountiful. The RCMP investigated but subsequently advised the woman that they did not consider there to be a basis to proceed further.

[402] In September 2001, the Criminal Justice Branch sought the opinion of the former Chief Justice of British Columbia, Allan McEachern, QC as to the constitutionality of s. 293. Mr.

McEachern provided his opinion that it was likely that s. 293 unjustifiably infringed s. 2(a) of the *Charter*.

[403] In March 2002, the Attorney General of British Columbia wrote to the federal Minister of Justice urging him to review s. 293 and to undertake such legislative reform as necessary to ensure constitutionally sound provisions that would better respond to issues arising in Bountiful.

[404] The federal Minister of Justice promptly responded, declining to undertake a review of s. 293 and advising that repeal of the provision might violate the equality rights of women in Canada and affect Canada's international commitments.

[405] In 2005, the RCMP commenced an 18-month investigation into sexual exploitation in Bountiful. The investigation culminated with the recommendation of 11 charges under s. 153 against a 50-year old man in the community and one charge under the same section against a 42-year old man.

[406] The 50-year old man was the younger of the two men the RCMP had investigated for polygamy between 1990 and 1991. At that earlier time, the police had determined that he had one wife and four celestial wives but by September 2006, they believed on the basis of their investigation that he had acquired an additional 21 celestial wives for a total of 25.

[407] The proposed charges against this individual were based on the allegation that he had impregnated six of his 25 celestial wives while each was under the age of 18 and had had sex with a seventh just prior to her 18th birthday, all while he was in a position of authority in the community.

[408] The proposed charge against the 42-year old man was based on the allegation that he had impregnated one of his five wives approximately one month before she turned 18, while he was in a position of authority in the community.

[409] None of the eight celestial wives identified by the RCMP as "victims" were willing complainants. However, the RCMP had gathered evidence in the form of birth registration and medical records indicating the mothers' ages, the dates of birth of certain of their children, and the approximate dates of conception of these children.

[410] A series of four senior Crown counsel reviewed the file between 2006 and 2007. They concluded that charges under s. 153 should not be laid because there was not a substantial likelihood of conviction on the available evidence and it was not in the public interest to prosecute.

[411] In May 2007, then BC Attorney General Wally Oppal directed the Criminal Justice Branch to conduct an additional charge assessment review with consideration to be given to any and all potential criminal or quasi-criminal charges including, but not limited to, polygamy and any other offences of a sexual nature. Richard Peck, QC was appointed to undertake this task.

[412] Mr. Peck ultimately concluded that no charges should be approved in connection with the Bountiful investigation in question. He agreed with the conclusion of Crown counsel that there was not a substantial likelihood of conviction with respect to the sexual exploitation charges proposed by the RCMP. He also determined that a range of other sexual and marriage-related offences were not applicable, among them s. 170 (parent or guardian procuring sexual activity), s. 279.01 (trafficking in persons), s. 290 (bigamy), s. 292 (procuring feigned marriage), s. 294 (pretending to solemnize marriage) and s. 295 (marriage contrary to law).

[413] In his report, however, Mr. Peck expressed the view that "polygamy itself is at the root of the problem", and that contrary to the opinions the Ministry of the Attorney General had relied upon over the preceding years, there was "a good case for upholding s. 293 as compliant with the *Charter*". He recommended testing s. 293 by means of a reference to the British Columbia Court of Appeal as opposed to a prosecution.

[414] Attorney General Oppal then directed the Assistant Attorney General to retain Leonard Doust, QC to review Mr. Peck's analysis.

[415] In April 2008, the Criminal Justice Branch announced that Mr. Doust had confirmed Mr. Peck's findings and recommendation for a reference. Mr. Doust agreed with Mr. Peck's conclusions that polygamy was the root cause of the misconduct in Bountiful and the proper focus of any prosecution. He further agreed that while s. 293 infringed s. 2(a) of the *Charter*, it would likely be upheld as a reasonable limit under s. 1.

[416] In May 2008, Attorney General Oppal directed the Criminal Justice Branch to retain Terrence Robertson, QC to conduct a further charge assessment of the most recent police investigation into polygamy in Bountiful.

[417] In November 2008, the RCMP submitted a supplemental report to Crown counsel regarding allegations of polygamy and possible sexual exploitation by the two Bountiful men in question. This report was based on a further three-month investigation during which the RCMP interviewed additional witnesses and obtained FLDS marriage records, seized from the YFZ Ranch, for two celestial wives of the younger of the two men.

[418] In January 2009, the Ministry of the Attorney General announced that Mr. Robertson had approved polygamy charges against Winston Blackmore and James Oler, and that the two men had been arrested on the charges.

[419] However, the Supreme Court of British Columbia subsequently quashed the appointment of Mr. Robertson as special prosecutor and his decision to approve polygamy charges against Mr. Blackmore and Mr. Oler. In *Blackmore v. British Columbia (Attorney General)*, 2009 BCSC 1299, Madam Justice Stromberg-Stein concluded that the appointment of Mr. Robertson on essentially the same mandate as Mr. Peck was contrary to the *Crown Counsel Act*, R.S.B.C. 1996, c. 87, as Mr. Peck's decision, within the scope of his mandate, was final.

[420] The Attorney General responded by initiating the present reference.

[421] The final police investigation disclosed in the evidence began in 2007 when a woman in her late-50s who had been raised in a polygamous family in Bountiful reported to police that one of her older half-brothers had repeatedly assaulted her sexually when she was between the ages of 4 and 11, and that two other half-brothers had each sexually assaulted her twice the year she turned 10. The woman's family had moved from Bountiful to the United States when she was 14, and she had since remained in the United States.

[422] The RCMP investigated her allegations. Crown counsel considered historical charges of sexual intercourse with a female under 14, indecent assault and incest. In 2009, Crown counsel decided not to approve charges on the view that there was no substantial likelihood of conviction.

3. Muslim Community

[423] The only direct evidence of Muslim polygyny in Canada comes from the affidavit of Alia Hogben. In her role as Executive Director of the Canadian Council of Muslim Women, she has frequent contact with Muslim women who are seeking advice or information about problems they are facing. Several of these telephone conversations have been with women in polygynous marriages. She does not specify exactly how many such women she has spoken to, but it does not appear to be a particularly large number.

[424] Ms. Hogben describes two specific polygynous marriages where the woman neither knew about nor consented to polygyny. In the first case a woman's husband married a second wife without her knowledge or consent. In the second case, a woman did not learn until after she had two sons with her husband that he was already married to another woman he had sponsored to immigrate to Canada.

[425] Both women declined to take any action, reporting concerns about the potential loss of financial support for themselves and their children, loss of their homes, shame, and damage to their children's relationship with their fathers.

[426] Dr. Mohammed Fadel deposes, on the basis of his own personal knowledge as a Muslim living in Canada, that "polygyny exists to a limited extent among Muslims in Canada" (at para. 66). He believes that it is generally taboo, not only because of its legal status in Canada, but also because it is considered shameful. These factors make it difficult to determine the extent to which polygyny is practiced among Muslims in North America.

[427] Dr. Anver Emon attests in his affidavit to the limited reliable empirical data on the occurrence of polygyny among Muslims in the West. He refers to case studies supporting the proposition that polygyny occurs, but these do not address questions about its frequency. He also refers to media reports of polygynous marriages in Canada.

[428] Professor Nicholas Bala, an expert witness for the AGBC, briefly refers to Muslim polygamy in his affidavit. He deposes that the number of polygamous Muslim families in Canada is likely not large since immigration by polygamous families to Canada is not legally

permitted. He refers to media reports that some Muslim Imams may be performing polygamous marriages in Canada.

[429] On the limited evidence before me, it appears there are some Muslims in Canada participating in polygynous marriages. In most cases, Muslim polygamists in Canada do not publicize the fact of their multiple marriages. In the absence of any empirical data it is not possible to determine the level of polygyny among Muslims in Canada. However, there is no evidence that it is a widespread or mainstream phenomenon.

4. Polyamory

[430] Given the sheer diversity of its potential forms, a precise definition of polyamory is elusive. As Maura Strassberg explains in "The Challenge of Post-Modern Polygamy: Considering Polyamory" (2003) 31 Capital University L.R. 439 (at 439-441):

> Contemporary practitioners have coined the names "polyamory" and "polyfidelity" to describe a wide range of partner arrangements that vary as to the number of people involved, the sexes of those involved, the sexualities of those involved, the level of commitment of those involved, and the kinds of relationships pursued.
>
> Imaged as a form of commitment which is flexible and responsive to the needs and interests of the individuals involved, rather than a rigid institution imposed in cookie cutter fashion on everyone, this new polygamy reflects postmodern critiques of patriarchy, gender, heterosexuality and genetic parenthood. Such a 'postmodern polygamy' might occasionally look like traditional patriarchal polygamy, but it differs in important ways. For example, it could as easily encompass one woman with several male partners as it could one man with multiple female partners. It also includes the expanded possibilities created by same-sex or bi-sexual relationships, neither of which in contemplated by traditional polygamy.

[431] Polyamory is not casual group sex. Rather, its fundamental value lies in the relationships at its core.

[432] Important tenets of the polyamory movement are that it is sex positive and all relationships are consensual.

[433] Sex positive means that the movement puts a high value on sexual relations, some even viewing sex as sacred. This positive view of sex extends to both male and female sexuality.

[434] Another foundational element to the practice is that each party must know of and consent to both the possibility and reality of other relationships within the group. This need for openness

and consent at all times necessitates considerable self-awareness, communication, conflict resolution and emotional processing on the part of all members.

[435] Other than their relationship structure, polyamorists live mainstream lives fully integrated with their communities.

[436] The word "polyamory" first emerged in general use in both popular culture and legal scholarship in the 1990s. The practice is not insignificant and has attracted considerable academic attention; one example is Strassberg's article quoted above. A compendium of legal articles, Meg Barker & Darren Langdridge, eds., *Understanding Non-Monogamies* (New York: Routledge, 2010), was also filed in this proceeding.

[437] Polyamory has also been the subject of popular literature. Three titles for a popular audience published since 2008 are in the Brandeis Brief. They are Deborah Anapol, *Polyamory in the Twenty-First Century: Love and Intimacy with Multiple Partners* (Lanham, Maryland: Rowman & Littlefield Publishers, 2010); Dossie Easton & Janet W. Hardy, *The Ethical Slut: A Practical Guide to Polyamory, Open Relationships and Other Adventures*, 2nd ed. (Berkley: Celestial Arts, 2009); and Tristan Taormino, *Opening Up: A Guide to Creating and Sustaining Open Relationships* (San Francisco: Cleis Press, 2008).

[438] There are many community organizations and groups for polyamorists in the United States, Canada and internationally. There are annual conferences for those engaged in the practice in Canada and the United States, as well as academic conferences on the subject.

[439] There is limited data with respect to the number of people who engage in polyamory. In 2009, *Newsweek* did a profile on the practice: Jessica Bennett, Only You. And You. And You." (29 July 2009). It notes that an online polyamory magazine called *Loving More* has 15,000 regular readers. The article further notes that some researchers estimate that openly polyamorous families in the United States number more than half a million.

[440] In *Polyamory in the Twenty-First Century*, Deborah Anapol refers (at 44) to data collected by *Loving More* and, extrapolating from that data, estimates that one out of every 500 adults in the United States is polyamorous. She says that others have speculated that a number in

the range of 3.5% of the adult population prefer polyamorous relationships, which would put the figure at about 10 million people.

[441] The Polyamory Advocacy Association sought to collect data on the number of Canadian polyamorists living conjugally with two or more other people. Finding an absence of statistical data despite an exhaustive search of academic and popular literature, the Association created a web-based survey which ran from 7 April to 7 May, 2010.

[442] The survey had this introduction:

> The Canadian Polyamory Advocacy Association (CPAA) is doing a short survey on polyamorous households in Canada where 3 OR MORE ADULTS ARE LIVING OR HAVE LIVED in a single "conjugal union" or multiple, overlapping "conjugal unions".

[443] Conjugal union, in turn, was defined as follows:

> In this survey, a "CONJUGAL UNION" means a marriage, common law marriage, intimate partnership, handfasting, or any other marriage-like relationship.
>
> Example: in a three person situation, people living in such a Conjugal Union could be in a "GROUP" (persons A, B, and C are in a Conjugal Union with each other) or in an "OTHER" arrangement (persons A and B are in a Conjugal Union and persons B and C are in a separate Conjugal Union, sometimes in the same household and sometimes in separate households).

[444] The survey required respondents to confirm their belief in gender equality, thus ensuring that individuals in patriarchal polygamous households did not respond.

[445] 188 individuals responded that they had previously been or were currently living in a "conjugal union" of three or more people.

[446] Carol Jean Cosco, a volunteer with the Polyamory Advocacy Association, deposes that this number under-represents the number of polyamorous conjugal households for several reasons: the survey was of short duration and published in English only; some people who are polyamorous are not familiar with the term; others who are polyamorous are not involved in online or polyamorous communities so are less likely to have been aware of the survey; and, many polyamorists are not "out" about their relationships and may have been concerned about responding to surveys.

[447] Some of the key survey results include the following:

a) There are at least 112 polyamorous conjugal households in Canada which are based on each gender having equal rights in their intimate relationships;

b) 76 respondents said they had lived in a polyamorous conjugal household in the past;

c) The total number of women in such households was 167; the total number of men was 158. Another 40 self-identified as "other", which includes transsexuals, androgynous and gender queer;

d) 99 respondents did not have any minors (under the age of 19) living in their households. 53 had one or two minors, 17 had 3 - 6 minors, and 2 had 7 or more minors in the household;

e) 16 conjugal unions of 3 - 5 persons were sanctioned by a rite, ceremony, contract or consent other than a legal marriage. 30 were marked by a personal or written commitment to each other;

f) 45 respondents reported that their conjugal unions had involved witnesses who celebrated, assisted them or were a party to the rite, ceremony or contract that sanctioned the relationship; and

g) 74 respondents reported that they believed they were limited in being able to express or practice their religious beliefs or to live in keeping with their conscience as a result of s. 293. Another 33 thought s. 293 "may" limit them in this way.

[448] Five polyamorous witnesses filed affidavit evidence regarding their personal relationships and philosophies.

[449] John Bashinski is in what he describes as a conjugal relationship with two other adults, Ms. Joyce and Mr. Baird. Ms. Joyce and Mr. Baird had been in a conjugal relationship with each other for approximately 12 years before being joined by Mr. Bashinski in 2007. No rite or ceremony was conducted to celebrate or confirm the formation of the triad, nor do the members have a fixed plan to conduct such a rite or ceremony in the future.

[450] The triad reside in the same house. They are raising a daughter, who is the legal and biological child of Ms. Joyce and Mr. Baird. Mr. Bashinski and Mr. Baird each have an ongoing sexual and romantic relationship with Ms. Joyce. There is no significant sexual relationship between the two men.

[451] Mr. Bashinski discusses the self-image and commitment of the triad as follows (at paras. 43 - 44):

> Each member of our triad sees each of the others as a lasting and committed conjugal partner. Among ourselves and with others, we refer to each other using the words "husband", "wife" and "partner".
>
> Although we do not see any relationship as absolutely indissoluble, our understandings and agreements include
>
> a. an intent to stay together indefinitely;
>
> b. an accord to work through even major relationship problems rather than to dissolve the triad;
>
> c. an understanding that our relationship will persist regardless of circumstantial changes, such as changes of health, changes of financial circumstances, and changes of work;
>
> d. an obligation of affirmative concern, in all our actions, for the stability of the family and for the desires, concerns, feelings, and well-being of all family members; and
>
> e. an obligation of continuing financial support for an appropriate period of times should the triad be dissolved.

[452] Karen Ann Detillieux is married to Mr. Detillieux. They are the biological parents of two children. Since 2007, Ms. Detillieux has been in a second conjugal relationship with Mr. Mahaffy. There is no sexual relationship between the two men. The three, together with the children, which include Mr. Mahaffy's two children, live together and consider themselves a family unit.

[453] With respect to ceremony, Ms. Detillieux deposes (at para. 38):

> Mr. Detillieux and myself were legally married in a religious ceremony in 1995. There has been no rite or ceremony to mark the relationship between Mr. Mahaffy and myself, although we wear matching rings to reflect our commitment. We often speak of a ceremony and have the desire to act on this idea.

[454] Zoe Duff has been in a common law relationship with Mr. Hawksworth since 2006. She is the biological and legal parent of six children between 15 - 26 years of age. Ms. Duff has had

an intimate and conjugal relationship with Mr. Weeds since 2009. Ms. Duff, Mr. Hawksworth, and Mr. Weeds, together with Ms. Duff's two youngest children, live together and consider themselves a family unit. Sexuality within the triad is heterosexual.

[455] No rite or ceremony was held to celebrate or confirm the formation of the triad, and the members have no fixed plan to have one in the future. Ms. Duff adds (at para. 52):

> 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.

[456] Ms. Duff and Mr. Hawksworth regularly celebrate the anniversary of their common law relationship with friends and family with a party. They privately celebrated the first anniversary of their triad and plan to have a more public celebration next year.

[457] Forrest Maridas has been in a committed relationship with Mr. Osborne since 2005. They are the biological and legal parents of two young children. Ms. Maridas has also been in an intimate and conjugal relationship with Mr. Thompson for two years. Mr. Thompson has another partner, Ms. Furness. The relationship between Mr. Osborne and Ms. Furness, between Ms. Maridas and Ms. Furness, and between Mr. Osborne and Mr. Thompson are as roommates and friends, not intimate conjugal partners. The four adults and the children live together and consider themselves a family unit.

[458] Ms. Maridas deposes (at para. 15):

> Our family believes a non-monogamous lifestyle choice facilitates us all to grow to more complete, supported and aware selves. We encourage one another to pursue additional safe and healthy relationships that may have a romantic or sexual aspect to them. We hope our non-monogamous choices lead to life improvement. Time cannot be expanded upon, but simultaneous activities increase nurturing of multiple goals at a time. Having more people in our family who care about our children, who support one another in multiple ways is influenced by multicultural family constructs; more communal and long practiced. I have heard a First Nation's elder speak about family, with more broad definitions, like our own. My grandmother spoke about all the women in her neighbourhood helping to care for children (1950s) as they travelled between yards. I believe our present family has incorporated many of the benefits of widening the concept of nuclear family.

[459] Ms. Maridas and Mr. Osborne had a one year anniversary party to which they invited his family and their shared friends to publicly declare their relationship and commitment. Ms. Maridas and Mr. Thompson have discussed symbols of commitment and relationship steps. They have verbally made commitment agreements to one another, and Ms. Maridas states that "[h]aving social support for this joy would be wonderful" (at para. 33).

[460] Sarah White is engaged to Mr. Macintyre with a wedding planned for May 2011. She also has an intimate and conjugal relationship with Mr. Patterson. There is no plan for a second joining ceremony involving Mr. Patterson. As there is no intimate physical relationship between the two men, the three refer to themselves as a closed polyamorous "V". They live together and consider themselves a family unit.

5. Wicca

[461] The *Amicus* tendered the evidence of Samuel Wagar, a Pagan and a Wiccan Priest. Mr. Wagar is licensed by the Province as a religious representative authorized to perform marriages under the *Marriage Act*, R.S.B.C. 1996, c. 282. He has been licensed through the Congregationalist Wiccan Association of British Columbia.

[462] Mr. Wagar explains that Wicca is a modern and feminist-influenced religion based on occultist ideas that was founded in the United Kingdom in the mid-1940s. Wicca comprises the largest fraction of the Pagan religious movement in the United States and Canada. According to Mr. Wagar, Paganism had 21,085 adherents in Canada in 2001.

[463] Wicca is not centred on a charismatic leader but is focused on ritual and experiences derived from ritual. A Priestess, usually assisted by a Priest whom she chooses, leads the rituals.

[464] As set out in its constitution, one of the founding statements of belief of the Association is, "All acts of love and pleasure are acts of praise of the Goddess. This specifically includes all non-coercive sexual orientations." Mr. Wagar explains that in specific terms, this means all forms of sexuality between consenting adults, however expressed, are sacred.

[465] Another founding statement and belief of the Association is, "An ye harm none, do what ye will."

[466] These principles taken together allow that all forms of consensual sexual and emotional ties into which adults freely enter are sacred or, at a minimum, potential routes to an encounter with the sacred. This includes relationships involving more than two adults. Mr. Wagar deposes that the Wiccan community, and the broader Pagan community of which it is a part, contain a higher proportion of persons with minority sexual tastes than the population at large.

[467] Mr. Wagar deposes that since he is prohibited from performing a marriage ceremony that involves more than two adults, he is unable to act freely in accordance with his religious beliefs when approached by people involved in polygamous or polyamorous relationships.

E. Changing Family Demographics in Canada

[468] The foregoing evidence about multi-partner unions in Canada reflects, in part, a broader trend away from monogamous marriage as the sole legitimate form of family structure.

[469] Dr. Zheng Wu is Chair of the Department of Sociology at the University of Victoria and Director of the University's Population Research Group. His field of expertise is family demography, the study of family composition and related family events such as births, marriage, cohabitation and divorce. His evidence was tendered by the *Amicus*.

[470] Relying primarily on Statistics Canada data, Dr. Wu paints a demographic profile of "Changing Patterns of Conjugal Life in Canada", the title of his report. What he concludes is that while marriage remains the core social institution establishing and structuring Canadian families, it has weakened over time.

[471] Dr. Wu compiled a table setting out Canadian family structure between 1981 and 2006:

Family Type	**1981**	**1986**	**1991**	**1996**	**2001**	**2006**
Total couple families	88.7%	87.3%	87.0%	85.5%	84.3%	84.1%
Married couples	93.7	91.8	88.8	86.3	83.6	81.6
Common-law couples	6.3	8.2	11.2	13.7	16.4	18.4
Total lone parent couples	11.3	12.7	13.0	14.5	15.7	15.9
Female parent	82.6	82.2	82.7	83.1	81.3	80.1
Male parent	17.4	17.8	17.3	16.9	18.7	19.9
Total	100%	100%	100%	100%	100%	100%

Source: Canadian Censuses, 1981-2006.

[472] Several points are apparent:

a) Couple households, both married and unmarried, account for a high proportion of all Canadian households. While that proportion has declined slightly over the period, most Canadians clearly prefer living in conjugal households, however formed.

b) Although still predominant, the proportion of married households has progressively declined.

c) The proportion of common law households has increased dramatically.

(Although Dr. Wu uses the terms "common-law marriage" and "conjugal union" in his report, he clarified in cross-examination that by these he means unmarried cohabitation.)

[473] Dr. Wu refers to the gradual decline of marriage as a "barometer" of the diversification of conjugal life. This decline embodies two interrelated trends: the decline of marriage rates and the postponement of marriage to later in life. Canadians are currently getting married in the fewest numbers and at the oldest ages since 1940. Another factor is the high level of marital instability, reflected in the frequency of divorce. While Canadians have a strong commitment to marriage, most believe it is a dissolvable contract and that personal fulfillment is a reasonable basis for marriage dissolution.

[474] Above all, Dr. Wu states, the decline of marriage can be explained by the spread of non-married cohabitation.

[475] Unlike marriage, which has a specific legal definition, cohabitation represents a diverse set of relationships which include short-term arrangements, long-term arrangements, trial marriages and permanent variants of marriage. A growing proportion of such relationships are not dissimilar from legal marriage in terms of social function (such as the raising of children) and the level of relationship quality. Dr. Wu adds (at 4):

> In addition, the literature suggests that legal marriage is not imperative for the construction and maintenance of marriage-like commitments (Reczek, Eliot, & Umberson, 2009). For example, among individuals for whom legal marriage is not

> possible (e.g., same-sex marriages) or preferred, relationships can become durable unions through non-traditional modes of commitment, i.e., without the sanction and symbolism of legal marriage. The lesson here is that it is wrong to assume that the act of commitment is not possible outside legal marriage. The commitment-making act is multifarious and occurs through non-institutionalized processes. Throughout Canada (and especially Quebec), common-law marriage has transformed from an uncommon experience into a normative behaviour for millions of people (Wu, 2000). The growth of common-law marriage and other non-traditional households should caution us against defining conjugal unions and families in an inflexible manner.

[476] The extent to which common law families account for a significant proportion of all Canadian families is demonstrated by the following data:

Region	**Number**	**Percent**
Newfoundland and Labrador	16,935	10.9
Prince Edward Island	4,085	10.4
Nova Scotia	34,705	13.0
New Brunswick	30,995	14.2
Quebec	611,855	28.8
Ontario	351,040	10.3
Manitoba	33,720	10.8
Saskatchewan	28,850	10.8
Alberta	115,685	12.8
British Columbia	141,830	12.2
Yukon	1,965	23.6
Northwest Territories	2,990	27.5
Nunavut	2,205	31.3
Canada	1,376,870	15.5

Source: Canadian Censuses, 2006.

[477] Dr. Wu explains that the regional variations reflect differences in the meaning of marriage and social acceptance of unmarried unions. The high level of cohabitation in Quebec, for instance, is attributable to the rejection of the oppressive power of the Catholic Church over conjugal life prior to the Quiet Revolution.

[478] This rise in cohabitation is not limited to Canada but can also be seen elsewhere. Rates of cohabitation are particularly high in Scandinavia where it accounts for between one-fifth and one-quarter of all couple households.

[479] Other reflections of the increasing diversity of conjugal life in Canada are living apart together (LAT) relationships (individuals in a committed relationship but not sharing a household on a full-time basis), and same-sex unions.

[480] Dr. Wu explains that throughout Western societies, the purposes and benefits of marriage have been redefined with the rise of women in the labour force and the reduction in state and institutional control over people's private lives. The acceptance of non-marital relationships (and marital dissolution) reflects a recognition that individual rights and preferences are important aspects of conjugal life.

[481] Dr. Wu concludes (at 21 - 22):

> The meaning of conjugality is embedded in social norms or prevailing value-orientations. The introduction of no-fault divorce legislation, for instance, demonstrates Canada's commitment to individual rights, and is a tacit acknowledgement of the impermanence of marriage. Our value-orientation no longer requires that people begin conjugal life with legal marriage or expects that these marriages will last forever. What is occurring in socio-demographic terms, then, corresponds to a maturation of liberal-democratic principles, such as an emphasis on individual rights, egalitarianism, tolerance, and a rejection of institutional control of private relationships (Thornton & Young-Demarco, 2001). The collapse of traditional prohibitions against cohabitation, divorce and same-sex marriage indicates that current kinship norms cannot be evaluated against legal marriage. The relevance of legal marriage has been declining since the mid-1970s. To be sure, marriage continues to be a valued social institution, but it no longer embodies the unequivocal definition of conjugal life.

F. Alleged Harms of Polygamy

[482] We have traced the evidence of Dr. Scheidel and Dr. Witte with respect to the historical treatment of polygamy from Greco-Roman times. We have discussed the emergence of socially imposed universal monogamy in Western cultures.

[483] The *Amicus* and his allies submit that anti-polygamy laws are nothing but an attempt by western governments to impose the Christian belief in monogamy on their populations.

[484] To the contrary, I have noted the evidence that clearly demonstrates that anti-polygamy sentiment pre-dates the advent of Christianity.

[485] It remains to be seen, however, whether laws against polygamy address conduct that gives rise to harm. Is polygamy inherently harmful?

[486] As noted above, the practice of polyandry is exceedingly rare. The evidence on this reference virtually universally addresses the issue of harm in the context of polygyny, and that is my focus here. When I discuss the scope of s. 293, I will return to the issue of polyandry and whether it comes within the reach of the criminal prohibition, properly interpreted, and whether it can be seen to give rise to any of the harms alleged in respect of polygyny.

[487] I begin my review of the evidence of harm at the macro level of evolutionary psychology (simplistically, understanding current human behaviour by appreciating our evolutionary past). The expert evidence posits that based on human mating psychology, certain harms are a predictable consequence of polygyny.

[488] I then narrow the focus and turn to the social science literature regarding polygyny and its effects. This body of literature is drawn from diverse disciplines and the many authors employ different methodologies, including statistical analyses and field studies. My task is made much easier by the reviews provided by several of the expert witnesses summarizing the prominent literature on this subject.

[489] As I will discuss, these literature reviews reveal a consistent set of harms associated with polygyny. However, much of the data that grounds the studies referred to in the literature relates to particular countries or groups, overwhelmingly in the Middle East and Africa.

[490] To determine whether the correlations between polygyny and the harms identified in the literature can be generalized cross-culturally, one of the AG Canada's witnesses undertook a statistical analysis regarding polygyny and its relationship to a number of variables using data from 172 countries. I discuss her results in some detail.

[491] Finally, I narrow the focus yet further by reviewing some of the evidence regarding polygyny and its effects in contemporary North America. This evidence includes personal accounts from individuals who were raised or live in polygynous households, as well as the evidence of clinical experts who have treated patients from polygynous backgrounds.

[492] The AGBC referred on a number of occasions to the remarkable convergence of the evidence on the question of harm, from high level predictions based on human evolutionary psychology, to the recurring harms identified in intra-cultural and cross-cultural studies, to the

"on the ground" evidence of polygyny in contemporary North America. As I proceed through the evidence, this convergence becomes increasingly striking.

1. Evolutionary Psychology

[493] Two eminent academics in the field of evolutionary psychology gave evidence in this proceeding.

[494] Evolutionary psychology, as described by one of these experts, is the study of the features of the mind with specific reference to our ancestral past as a way of trying to understanding how and why we behave in the present.

[495] As his principal witness in the reference, the AGBC called Dr. Joseph Henrich, an Associate Professor in the Psychology and Economics Departments at the University of British Columbia. He also holds a prestigious Tier 1 Canada Research Chair in Culture, Cognition and Evolution. Dr. Henrich was qualified as an expert in psychology, particularly evolutionary psychology, in economics and in anthropology, as well as in the interdisciplinary field of culture, cognition and co-evolution.

[496] Dr. Henrich, over the course of four months, conducted an extensive review of the academic literature on polygyny in the sciences and social sciences. The resulting report is entitled "Polygyny in Cross-Cultural Perspective: Theory and Implications."

[497] The *Amicus*, in turn, called Dr. Todd Shackelford, Chair of the Department of Psychology at Oakland University (Rochester, Michigan). Dr. Shackelford enjoys an international reputation in his field and was qualified as an expert in evolutionary psychology and in conflict between men and women in monogamous relationships.

a) Dr. Henrich

[498] In some respects, Dr. Henrich's report is similar to the literature reviews conducted by several of the other experts. However, while those reviews are largely limited to cataloguing the consequences of polygyny found in the literature, Dr. Henrich develops a theoretical model that explains why our evolved psychology favours polygyny and how the consequential effects of

polygyny are the necessary by-products of a polygynous social structure. He then uses a wide range of evidence to test his theory.

[499] What this evidence ultimately leads Dr. Henrich to conclude (at 2) is that:

- A non-trivial increase in the incidence of polygyny, which is quite plausible if polygyny were legalized given what we know about both male and female mating preferences, would result in increased crime and antisocial behaviour by the pool of unmarried males it would create.
- Greater degrees of polygyny drive down the age of first marriage for (all) females on average, and increase the age gap between husbands and wives. This generally leads to females marrying before age 18, or being "promised" in marriage prior to age 18.
- Greater degrees of polygyny are associated with increased inequality between the sexes, and the relationship may be causal as men seek more control over women when women become scarce.
- Polygynous men invest less in their offspring both because they have more offspring and because they continue to invest in seeking additional wives. This implies that, on average, children in a more polygynous society will receive less parental investment.
- Greater degrees of polygynous marriage may reduce national wealth (GDP) per capita both because of the manner in which male efforts are shifted to obtaining more wives and because of the increase in female fertility.

[500] Two theoretical concepts from evolutionary biology underpin the evidence that Dr. Henrich presents. The first is that human mating psychology tilts humans towards a polygynous mating system. While the mating psychologies of both men and women incline towards polygyny, they do so for different reasons (at 3):

> First, like other animals, human males and females have different mating strategies rooted in the nature of primate sexual reproduction. Females are limited in their direct reproduction to the number offspring they can rear to maturity in their lifetimes, and are necessarily committed to high levels of investment, at least in the form of providing the egg, gestation and lactation. In contrast, with little investment (sperm and a small effort), males can potentially have thousands of offspring that they can decide to invest in, or not, based on the costs of obtaining mates vs. the impact of additional investment in their offspring. Because human offspring benefit from the investment of both parents (at least in ancestral human societies) females seek to form pair-bonds with those males who are best able to invest in their offspring (males possessing high social status, wealth and valued skills). A female does not generally benefit from establishing simultaneous pair-bonds with multiple males because (1) she can only have one pregnancy at a time (so lots of sex with different males does not increase her reproductive success), (2) this brings males into conflict (sexual jealousy) and (3) this creates confusion regarding male paternity (and greater paternity confidence increases paternal investment). In contrast, males benefit both from pursuing additional pair-bonds with different females at the same time, and from additional extra-pair copulations (short-term sexual relationships).

[501] Through polygyny, both men and women can effectively follow their evolved mating strategies. Polygyny allows males to form multiple simultaneous pair-bonds, while it also allows more females access to high-status males, as they are not monopolized by a single male.

[502] The second concept from evolutionary biology is that while these evolved mating strategies influence human mating patterns, humans also acquire and enforce (formally and informally) culturally-transmitted social norms that motivate and regulate social behaviour. Marriage systems represent collections of these social norms, which include rules about the number and arrangement of partners. These marriage norms do not entirely replace or subvert mating psychology, but they can strongly influence behavioural patterns, both because compliance with these norms is intrinsically rewarding and because third parties are willing to punish norm violators.

[503] Marriage systems and the actual mating patterns of human societies never match up exactly. Despite a marriage norm specifying that each man and woman shall marry once in their lifetime to only one person, the rates of infidelity, divorce, and prostitution make clear that this norm is often disregarded. Nevertheless, marriage systems do significantly shape and influence mating patterns.

[504] After describing the history of these marriage systems through to the development of modern monogamy, the remainder of Dr. Henrich's report addresses the expected consequences of the practice of polygyny on a large scale in a given society.

[505] These consequences largely derive from the mathematical realities of polygyny: when some men are able to have multiple wives simultaneously, other men will be unable to find wives. Dr. Henrich created a simplified model of a polygynous society to illustrate this point (at 21):

> This illustration reveals the underlying arithmetic that can result in a pool of low-status unmarried men. Imagine a society of 40 adults, 20 males and 20 females … Suppose those 20 males vary from the unemployed high-school drop outs to CEOs, or billionaires … Let's assume that the twelve men with the highest status marry 12 of the 20 women in monogamous marriages. Then, the top five men (25% of the population) all take a second wife, and the top two (10%) take a third wife. Finally, the top guy takes a fourth wife. This means that of all marriages, 58% are monogamous. Only men in the to 10% of status or wealth married more than two women. The most wives anyone has is four.

> The degree of polygynous marriage is not extreme in cross-cultural perspective … but it creates a pool of unmarried men equal to 40% of the male population who are incentivized to take substantial risks so they can eventually participate in the mating and marriage market. This pattern is consistent with what we would expect from an evolutionary approach to humans, and with what is known empirically about male strategies. The evidence outlined below shows that the creation of this pool will likely have a number of outcomes.

[506] The mathematical inevitability of this pool of unmarried men plays a key factor in triggering many of the consequences of polygyny that Dr. Henrich goes on to discuss.

i. Polygyny's Creation of a Pool of Unmarried Low-Status Men

[507] The first of these expected consequences is an increase in crime that would arise from the creation of a pool of unmarried low-status men. Since these men would find it difficult to acquire a wife, they would be "incentivized to take substantial risks so they [could] eventually participate in the mating and marriage market"; one aspect of these "substantial risks" appears to include criminal activity.

[508] In his report, Dr. Henrich presents evidence that monogamous marriage decreases crime rates for individual men and that unmarried men commit more, and more serious, crimes than married men. He then examines three different approaches to see whether these individual effects aggregate to create societal level impacts on crime rates where the number of unmarried men increases, as it must where polygyny is practiced on a wide scale.

[509] Dr. Henrich begins with an ample body of research that shows marriage makes men much less likely to commit crimes such as murder, robbery and rape. One such study showed that marriage reduced a man's likelihood of committing a crime by 35%. This study was particularly compelling as it did not simply compare the criminality of married and unmarried men, but used longitudinal data to track boys from a reform school from age 17 to 70. In this study, crime rates not only decreased when those men were married, but increased when they divorced or were widowed. Other studies are consistent in showing the association between monogamous marriage and decreased male criminality.

[510] Having established the proposition that monogamous marriage suppresses men's criminality, Dr. Henrich proceeds to analyze the aggregate effect that widespread polygyny may

have on crime rates in general using three different approaches: (a) examining the relationship between the degree of polygyny and crime across countries; (b) using the percentage of unmarried males as a proxy in cross-cultural analyses; and (c) using sex ratio as a proxy to look within countries (as this avoids the statistical issues that arise when comparing countries).

[511] The first prong of this research, the cross-country comparison, indicates that greater polygyny is associated with higher rates of murder and rape to a statistically significant degree. These results occur even where GDP per capita and "being an African country" are controlled for.

[512] The same researchers who conducted the cross-country comparison repeated the exercise with the percentage of unmarried men age 15 and up in each country substituted for polygyny, the second of Dr. Henrich's approaches. The analysis shows a positive association between the percentage of unmarried men and rates of murder, rape and robbery, again, to a statistically significant degree.

[513] Finally, Dr. Henrich relies on a number of studies regarding the linkage between a male-biased sex ratio (which implies a pool of unmarried men), and crime to serve as a proxy for polygyny. These studies cover a broad range of societies including Medieval Europe, the 19th century American West, and modern China and India. Dr. Henrich finds the cases of India and China to be particularly informative, as the quality of the data allows for detailed analysis.

[514] In China, sex ratios rose markedly between 1988 and 2004 as a consequence of the gradual implementation of China's one-child policy and paternal preference for male children. During the same period, crime rates doubled. While other variables make it impossible to state that the sex ratio was causative of this increase, the implementation of the one-child policy at different times in different Chinese provinces allowed the variable of sex ratio to be somewhat isolated.

[515] This research showed, after controlling for certain demographic and economic variables, that a 0.01 increase in sex ratio was associated with a 3% increase in property and violent crimes. To further challenge their hypothesis, the authors substituted the year of implementation of the one-child policy for sex ratio and found equivalent results. However, when white-collar crimes more likely to be committed by high-status men, such as corruption, were substituted, the sex

ratio did not appear to affect those rates as it did rates for property and violent crimes. Increases in rape also did not appear to be a major component of the increase in violent crime (the impact of the sex ratio here may have been offset by a massive increase in prostitution in China in this period).

[516] Murder rates in India showed similar results. Districts with more males had much higher murder rates than could be predicted purely by an increase in the number of "average males." For example, the murder rate in a Uttar Pradesh, which has a male to female ratio of 0.97, was half that of Kerala, which has a male-to-female ratio of 1.12.

[517] Dr. Henrich acknowledges the existence of one cross-national study that showed a negative correlation between male-biased sex ratio and crime rates, but is not concerned by its conclusions as the study was not thoroughly controlled and covered societies with extreme sex ratio differences that were likely driven by migration or death of males due to organized violence such as war. Dr. Henrich does note, however, that this study showed an association between polygyny and increased rates of assault (and marginally more murders) that was independent of sex ratio.

ii. Polygyny's Effects on Male Parental Investment

[518] Another major predicted consequence of widespread polygyny is decreased male parental investment. The underlying theory is that since married men would remain perennially in the marriage market, high-status men could choose to invest their resources in acquiring more wives rather than investing in their children. Similarly, the pool of unmarried men would be forced to invest their resources in attempting to improve their status so as to improve their chances of finding a bride.

[519] As support for this proposition, Dr. Henrich relied on findings from 19th century census data from Mormon polygynous communities and from contemporary studies of African societies.

[520] The study of historical Mormon polygynous communities showed that the children of poorer men (from the bottom 16% of wealth in that community) had higher survival rates than those of the richest men in the community (from the top 2%). The poor men had an average of 6.9 children survive until age 15. For the rich men, despite having more total offspring than the

poor men and having over 10 times the wealth, only 5.5 children survived until age 15 on average. Dr. Henrich concludes that this data supports the idea "that in polygynous systems poor, but married, men will have no choice but to invest in their offspring while rich, high-status men will invest in getting more wives" (at 47).

[521] The patterns observed in recent studies of polygamous African societies are similar. The seven studies of this nature cited by Dr. Henrich reported that "children of polygynous families are at increased risk of diminished nutritional status, poor health outcomes, and mortality" (at 47). One study found that amongst the Dogon of Mali, even though per capita resources were equivalent between monogamous and polygamous households, children under age 10 in polygynous households were 7 to 11 times more likely to die.

[522] Although these studies all substantiate his theory, Dr. Henrich acknowledges that further research is needed to confirm the link between reduced paternal investment and child mortality (at 49).

iii. Polygyny, Age of marriage, the Age Gap and Gender Equality

[523] A third major consequence of polygyny identified by Dr. Henrich is the flipside to the creation of a pool of unmarried men: the increased demand for brides. This, he says, would lead to a decreased age of marriage for women, and an increased age disparity between husbands and wives (even in monogamous marriages). Unless a polygynous community were able to recruit from the outside, the extraordinary demand for wives could only be met by decreasing the age of marriage for women.

[524] There is evidence in this reference of women in polygynous unions marrying at very young ages. However, beyond this direct consequence for women, Dr. Henrich also proposes that this has implications for women's equality (at 30):

> Competition drives men to use whatever connections, advantages, and alliances they have in order to obtain wives, including striking financial and reciprocal bargains with the fathers of daughters (this is the very common practice of brideprice). Once girls and young women become wives, older husbands (and brothers) will strive to "protect" their young wives from other males (to guarantee paternity of any offspring), and in the process dampen women's freedoms and exacerbate inequality.

[525] The challenge in testing these implications is that most of the contemporary evidence comes from amongst the least developed nations in Africa, making it "difficult to tease apart the effects of polygyny vs. all the other variables that might influence Africa's situation" (at 30).

[526] To address this challenge, Dr. Henrich relies on three lines of evidence. Each ultimately supports his prediction that polygyny drives down the age of females' first marriage and increases the age gap between husbands and wives.

[527] First, Dr. Henrich describes a study that compared highly polygynous African countries (more than 10% of men are married polygynously) to less polygynous African countries, as well as comparable monogamous countries (which were developing countries outside Africa between 20 degrees north and south latitude). This study showed that the age of first marriage for women was lowest in the highly polygynous countries at 19.9. By comparison, the age of first marriage in less polygynous countries was 22.7 and in comparable monogamous countries it was 25.0. The age gap for marriage between a man and his first wife also increased from 2.7 years in the comparable monogamous countries to 3.9 years in the less polygynous countries to 6.4 years in the highly polygynous countries.

[528] Next, Dr. Henrich turns to four micro-level case studies which compare monogamously married people to polygynously married people in the same societies:

a) Bedouin Arabs living in Israel's Negev;

b) rural villagers in south-eastern Turkey;

c) the Arsi Oromo, agro-pastoralists from southern Ethiopia; and

d) Aboriginals from Arnhem Land, Australia.

[529] Since the individuals analyzed lived in the same social group, any observed differences could not be attributed to country-level differences.

[530] These case studies all consistently showed that polygyny drives down the age of first marriage for women and increases the age gap between husbands and wives, although in some cases the difference was slight. They also showed an effect specific to polygynous marriages, in

that men marrying polygynously seemed to select younger girls as wives compared to monogamists, both in absolute and relative terms.

[531] Finally, Dr. Henrich uses sex ratios as a proxy to determine the effects of polygyny on women. This work is based on the assumption that sex ratios favouring males will mirror the effects of polygyny by similarly increasing the competition among men for wives.

[532] The empirical evidence bears out the prediction of increased control over women. As women become scarce they tend to be viewed as commodities. This is shown by increases in fertility rates and reductions in divorce rates, both of which reflect male control. One study showed that rich families in China acquired infant girls to assure their sons would have wives in the future. Another showed that in some regions of India more than half of females were married before age 15.

[533] Furthermore, these patterns are also evident in highly developed countries. In one study where the sample was biased towards more developed countries (as they are more likely to report the needed data), higher sex ratios predicted lower participation of women in the labour force, lower illegitimacy rates, and lower divorce rates (all illustrating male control). When the sample was limited to more developed countries, sex ratio had a greater effect in all indicators other than participation in the labour force. Overall, according to this study, higher sex ratios predict a lower age at first marriage for women, as well as higher fertility rates and lower literacy.

iv. More Speculative Predictions

[534] Dr. Henrich also predicted additional consequences of polygyny that he acknowledged were more speculative and could not be as thoroughly supported by empirical evidence.

[535] One such prediction is that imposing monogamy may have the effect of increasing per capita GDP. Studies applying a theoretical economic model to the data from highly polygynous states showed that when monogamy is imposed "the fertility rate goes down, the age gap goes down, saving rates go up, bride prices disappear, and GDP per capita goes way up" (at 32). This model was based on the assumptions that men and women care about both having children and "consuming", that men are capable of reproducing during much more of their life than women, and that men tend to prefer younger women. In this model, when a ban on polygyny prevents

men from investing in obtaining further wives, they instead save and invest in production and consumption.

[536] As noted earlier in the historical review of monogamy and polygamy, Dr. Henrich also speculates that the spread of monogamy may have helped create the conditions for the emergence of democracy and political equality. Anthropological research demonstrates a strong statistical linkage between democratic institutions and monogamy. The theory is that imposed monogamy may eventually lead to democracy by dissipating the pool of unmarried men that rulers harness in wars of aggression, and by imposing a basic principle of equality among men; the king and the peasant become alike in only being able to have one wife.

[537] In his Closing Submissions, the *Amicus* urged the Court to discount the evidence of Dr. Henrich on the ground that he has not written on the subject of polygamy before and that he began his work with instructions to study the question of polygamy and its purported harms suggesting, as I took the submission, some sort of pre-disposition that tainted his work.

[538] I find neither criticism to mute the force of Dr. Henrich's evidence. He applied his unquestioned academic rigor to a subject which he has lectured on in the past. It is Dr. Henrich's acknowledged expertise in evolutionary psychology which he has applied to the question of polygamy that gives me comfort with his conclusions. While he is new to writing in this area, that expertise and his methodology ensure, in my mind, reliable evidence on this subject. His instructions from the AGBC and the focus of his research reflect, not a pre-disposition to a particular result, but the positing of an hypothesis which Dr. Henrich has tested in a scientifically neutral manner.

[539] In his cross-examination of Dr. Henrich and his examination of Dr. Shackelford, the *Amicus* also explored whether causation can be proved by correlational relationships. I am alive to this issue. However, Dr. Henrich's work and the studies upon which he relied are based on sound methodology, and causation need not be proved to a level of scientific proof. I will comment further on the issue of causation and correlation later when discussing the evidence of Dr. Rose McDermott.

b) Dr. Shackelford

[540] Dr. Shackelford's affidavit is largely a response to Dr. Henrich's report.

[541] While he allowed that Dr. Henrich has "ably summarized various negative correlates and apparent consequences associated with polygamous (more specifically, polygynous) relationships documented in the scholarly literature" (at para. 5), Dr. Shackelford notes that negative correlates and apparent consequences can be seen in any kind of mating or marriage relationship, including monogamous ones.

[542] Much of Dr. Shackelford's research has focussed on the correlates and consequences of male sexual jealousy directed towards women in monogamous relationships. His research documents that "male sexual jealousy is a leading cause of female partner-directed psychological abuse, physical abuse, and sexual abuse and rape, as well as a predictor of homicide of women by their monogamous male partner" (at para. 6).

[543] Another negative correlate or consequence that Dr. Shackelford identifies arises when women with children fathered by a previous partner remarry, which is an arrangement overwhelmingly associated with monogamy. Residence with a stepfather or male parent substitute is one of the best predictors of child neglect, abuse and filicide; the majority of such harms are inflicted by the stepfather. The rates of these harms for children who live with one stepparent relative to children who live with two genetic parents can be as high as 40 to 100 times greater.

[544] It seems to be obviously true, to an extent, that incidents of abuse arise in monogamous relationships. However, that does not really assist me here as I am considering the law that Parliament has directed against polygamy. I am concerned with the alleged harms arising out of this practice and whether a reasoned apprehension of harm has motivated Parliament to enact the provision. That harm may arise out of other human relationships, that is, monogamous ones, seems beside the point.

[545] That said, the underlying principles of evolutionary psychology upon which Dr. Shackelford relies in his report do have application to the issues before me, as Dr. Henrich sought to demonstrate.

[546] Dr. Henrich extracted two key observations from Dr. Shackelford's report that could be relevant to a comparative analysis of polygyny:

a) monogamous households experience violence within the family (including homicide and child abuse) preferentially among unrelated pairs, including spouses and adult-child pairs (often step relations); and

b) much of the violence among spouses is driven by male sexual jealousy.

[547] Dr. Henrich then considered how these observations would apply in polygynous households.

[548] A polygynous household should prove more violent since, as Dr. Henrich points out, non-sororal polygynous households will have more unrelated members. In such a household where there are two wives, each with two children, there are seven un-related pairings (three unrelated adults pairs + four wives-to-other-wife's-children). In a monogamous family of seven there would only be one such pair: the spouses. The number of unrelated pairs in a monogamous household would remain constant as the number of children increased, while in a polygynous household it would increase exponentially as the number of children increased.

[549] Given Dr. Shackelford's evidence that living in the same household with genetically unrelated adults is the single biggest risk factor for abuse, neglect and homicide of children, Dr. Henrich believes the implication is that children will be at greater risk in polygynous households. Although the effect of genetic unrelatedness is stronger for men than women, Dr. Shackelford's data suggests that three unrelated mothers equal one unrelated father in terms of mortal danger for the children.

[550] The other major hypothesis that Dr. Henrich extracts from Dr. Shackelford's report is that violence among spouses is largely driven by male sexual jealousy. Dr. Henrich states that there are three reasons to believe that male sexual jealousy, and the resulting violence, should be worse in polygynous societies:

a) Polygyny drives down the age of first marriage for women and expands the age gap between husbands and wives. Dr. Shackelford's own research shows the larger the age gap between husband and wife, the more likely violence is to occur;

b) Given that polygynous husbands may circulate among their different wives on different nights, they may have little idea what their other wives are doing. This could lead to greater paternity uncertainty and the potential for violence used as a form of social control; and

c) The greater competition in the mating and marriage markets in a polygynous society will cause men to shift to more violent and suppressive measures to sustain paternity certainty.

[551] Dr. Henrich concludes in his reply report (at 10):

> [B]oth evolutionary theory and some empirical evidence are consistent with the view that intra-familial violence, abuse, child mortality, neglect, stress levels, and sexual jealousy will be at least as bad, and probably worse, in polygamous families and societies as contrasted with their monogamously marrying families and societies. Neither evolutionary theory, as developed by Dr. Shackelford, nor the available data - limited as it is - are consistent with the opposite view.

[552] The *Amicus* put these propositions from Dr. Henrich's reply report to Dr. Shackelford in direct examination. Dr. Shackelford was not willing to accept Dr. Henrich's extrapolations from his data, expressing concerns that neither expert had any data regarding polygyny to support those extrapolations and that Dr. Henrich could not account for possible cultural and contextual differences in polygynous relationships.

[553] While Dr. Henrich's extrapolations from Dr. Shackelford's data are somewhat speculative and unproven, I find that they tend to be supported to some extent by other evidence in this reference.

c) Will Polygamy Spread in Canada?

[554] One issue that the evolutionary psychology evidence raises is the extent to which we can expect the incidence of polygyny to increase in Canada absent criminalization. The harms Dr. Henrich predicts are predicated on a non-trivial increase.

[555] Dr. Henrich's opinion is that a "non-trivial increase in the incidence of polygyny … is quite plausible if polygyny is legalized given what we know about male and female mating preferences" (at 2). He expanded upon this proposition in his testimony, which I quote at length:

> Q - the ways in which things can be applied cross-culturally, so what do you say to that, that it couldn't happen here?
>
> A Well, I mean that's really a tough question; right? Do we have say - have gender norms, for example, gone far enough that it's just going to form a kind of shield or wall against the spreading of polygamy. And, I mean, so one general caution there is that, you know, society changes quickly, so, you know, if you had told someone in the 1950s that the United States would have a black president and that most new doctors would be women, they probably would be surprised. So social changes can occur quickly.
>
> In this context we have good reason to believe that polygyny is a kind of ready response of our evolved psychology, that it's easy for this to happen for both males and females. So even though women may have acquired gender norms, they're still going to be inclined to marry up, so to speak.
>
> The other thing here - I'm just checking my notes - is that even if we put aside whether Canadians who have acquired sort of the general cultural values that maybe they are immune, but there's still going to be migration issues in the sense that I would expect that if polygamy did become legal in Canada, that there would be - you see different numbers for this, between 50 and 100,000 polygamous living families in the United States, certainly they'd want - many of them would be inclined to move north because they could live without the threat of the law in the United States. So that would be one thing. There would also be - I would think that Canada would be a destination for polygynous families from Africa and the Middle East. Canada would be the western destination for any immigrants who were polygynous because no other western democracy has legalized it. And then there is also underground polygyny both in the US and France. Presumably they would want to move here as well.
>
> The other thing to keep in mind is that if immigrant communities become stable and become like polygynous communities in other countries that have legalized polygyny, the fertility is always higher in polygynous communities. It's just robust. So these communities are going to grow faster and merely by population demographics there will be more polygynous - communities will expand faster than monogamous communities.
>
> And also I still think it's possible that because of our evolved psychology, that the idea of polygynous marriage will just spread - it's possible that it will spread amongst the majoritarian population. Of course I'm only speculating here. But in some of my research in the past six months, I have learned that India has had to legislate against Hindus because Hindu men have tried to convert to Islam so that they can be

> able to marry. In fact, there's a famous Hindu actor who converted to Islam so that he could marry additional women.
>
> That's actually - so one of the things I study is how when high status people do things it's likely to transmit and spread through the social fabric. So I can see this and I can imagine this starting by actors and people of very high social status adopting - taking a second wife or whatever, and then it would become legitimized and could potentially spread. And I learned recently that - on actually a story on NPR, so my source is a news site, that there is - that among African American Muslims in Philadelphia, polygyny is spreading in south Philly as well. I'm from Philly, not south Philly. So it seems to me plausible that this stuff could spread.
>
> One final point is that the idea of serial monogamy has come up a lot and I see serial monogamy amongst high status males as showing us that the psychology of polygyny is really there; right? So these are high status men who divorce the older wife in order to marry a younger wife, and in a polygynous society they would just add a younger wife. It's a lot more convenient; you can still live with your children. So you could see where this thing might begin to ebb into mainstream culture.
>
> Finally, I will mention - so I teach evolutionary psychology and as a consequence, I teach - sort of a longer version of what you guys saw today, and there's always this question at the end of it. Well, given everything you just said, we should be a polygynous society; why aren't we? And one of the ways I introduce that issue is I use clickers, so students can respond in real time to questions. And I put women only, right, so that only the women are going to click on this one. And I give them a choice: You're in love with two men. One is a billionaire, he already has one wife and he wants you to be his second wife. You'll be a billionairess; you will have your own island. Make it look pretty good. And then compare him - just a regular guy, identical in every way, but you will just be his first wife. And then the question to the women is what is the probability - I give them five choices - that you would be willing to go with the billionaire, and I was surprised that 70 percent of my female UBC undergraduates said they either would go with the billionaire, with a 75 percent or a hundred percent chance they'd marry the billionaire. And I said you're in love with both guys and they look the same and all that kind of stuff. So that makes me think that it's not as crazy as some people think. I used to think.
>
> [Transcript, 11 December 2010, p. 73, ll. 20 - p. 75, l. 39]

[556] Dr. Shackelford was asked his view as to the likely transmission of polygamy through mainstream North American society should the practice be permitted. He expressed some reticence about doing so since he was not an expert in polygyny. His response was considerably more ambivalent than that of Dr. Henrich:

Q … I do have one final question by way of synthesis perhaps, Doctor. The question that I … half asked that I would bring your attention back to was this question of from an evolutionary biology perspective whether we could expect polygamy to spread in North American society. And you had mentioned at different points in your testimony some factors that might impact on that and I just wanted to preface my question with a review of those.

One of them, of course, we've seen your survey results and also the anecdote from Professor Henrich that suggests that perhaps even well-educated university students are receptive to the idea in the present. You remember us discussing that?

A Yes.

Q And your observation that accorded with Professor Henrich's, that serial monogamy as we experience it is in part an expression of repressed polygynous behaviour, if I can put it that way?

A I suppose.

Q That would factor into the consideration of whether it would spread?

A I'm sorry, I don't understand.

Q I'm obviously not being clear. You have observed the phenomenon of serial monogamy?

A Sure.

Q As a form I think I called it de facto polygamy and you called it effective polygyny?

A Yes.

Q And I suggested to you that that was a manifestation of an otherwise repressed will to polygyny, if I can call it that, or an inclination to polygyny.

A Okay, yes.

Q And the third thing was your qualification that quite often behaviours spread through society based on imitation of high status people, and so weighing against these factors would be that at present there aren't any high status practitioners of polygamy that people might imitate. Do you remember us talking about that?

A Yes.

Q And you'd said that that was a means by which an idea or a behaviour could spread particularly quickly through society?

A Well, I think you said particularly quickly. Now, I'm not sure - I guess it would depend on what the reference was. I mean, it could. Certainly there's evidence that high status individuals, their behaviour can be imitated more quickly, for example, than someone who is of moderate -

Q Right. And so your observation was that the present practitioners of polygamy seem to be generally low status people in society generally, and that would militate against the other factors -

A Yes.

Q - in its immediate spread?

A Yes.

Q So let me ask you, taking all of those things into consideration, with the depth of your background in evolutionary psychology would you agree with me that it is - with this characterization: That it's plausible that polygamy would spread as a behaviour in North America if it were permitted, but how fast or how big it would be is speculative?

A It's plausible. I mean as opposed to impossible, it's plausible, yeah.

Q Well, you seem -

A It seems terribly, terribly unlikely. But is it plausible? Yes, it's plausible.

[Emphasis added]

[Transcript, 15 December 2010, p. 53, l. 24 - p. 55, l. 2]

[557] The question posed to Dr. Shackelford and his response focused on the likely spread of polygamy in North American society having regard to principles of evolutionary psychology. Dr. Henrich's opinion that a non-trivial increase in polygyny is quite plausible was based on a broader range of considerations. An important one, in my view, is immigration.

[558] Polygyny is practiced in many countries from which Canada draws immigrants. This includes states in the Middle East and Africa. It also includes the United States, where as many as 50,000 fundamentalist Mormons reside.

[559] On this point, I also note the evidence of Dr. Walsh that a sizeable contingent within the mainstream Mormon Church might be inclined toward the practice if permitted:

A The LDS did not renounce the principle of polygamy [in 1890]. What they did is they've made a practical realization that they would not be able to continue as a community under the pressure they were receiving from the American federal government. And therefore they decided that they would cease the practice of polygamy due to this pressure but at that time they maintained that they still believed in the principle of polygamy.

Q And has that - from a theological standpoint has that position changed or evolved over time within the LDS church?

A It officially has never changed. Informally you would say that probably within the LDS church today there are two major groups. I couldn't put an exact number, whether it's 50/50 or 60/40, but they are both substantial groups. One group would like the return of polygamy, and believe that's a holy principle that should be eternally practised. Another large group, possibly each larger than the first group, would like to see polygamy not returned. They believe it's an archaic practice and so they would like it not to return.

> So officially the church has never altered its position on polygamy, but informally the millions of members of the LDS church are kind of divided into those two camps.
>
> [Transcript, 5 January 2011, p. 32, l. 28 - p. 33, l. 7]

[560] It requires no leap of imagination to see how immigrants from these countries might view Canada as an especially desirable destination were polygamy not prohibited. Dr. Henrich's comments regarding the population demographics of polygynous communities suggest that in the event these immigrant communities were to become stable, their populations would expand comparatively rapidly.

[561] France's experience with immigration-based polygyny is instructive. I take the following evidence from the report of Dr. Rebecca Cook, Chair of International Human Rights Law at the University of Toronto Law School.

[562] During the period following World War II, liberal French immigration policies permitted the immigration of polygynous families, provided the marriages were valid in the original jurisdiction. While polygamous marriages could not be lawfully performed in France, the immigration scheme was motivated by the demand for immigrant labour. The immigrants who took advantage of the policy were primarily from West Africa and, to a lesser extent, Algeria and Morocco.

[563] By the 1990s, more than 200,000 people were living in polygynous families in France. They were largely concentrated in enclaves and the poorer suburbs of Paris.

[564] Concerns came to be raised with respect to the poor living conditions of polygynous wives. These concerns included co-wife competition, spousal neglect and coercion into marriage at a young age. Privacy harms were aggravated because living costs meant that separate living arrangements were not economically feasible for most polygynous families. In addition, second and third wives at times had difficulty accessing public health care and social security benefits despite having the necessary documentation.

[565] As a result of these cumulative harms, some African women's advocacy groups began lobbying the government to discourage the practice by reforming its immigration policy.

[566] The legislative response was the *Loi Pasqua*, passed in 1993. It altered the immigration regime so that only one spouse per immigrant would be issued a visa. The law applied not only prospectively to future immigrants but also retroactively to polygynous families already living in France. This had negative consequences for the latter group, as it required multiple spouses to divorce one another and physically separate their households or else face deportation. Most of these people could not afford to do so.

[567] What happened in France is acutely relevant because it belies any suggestion that the social or economic conditions that may make polygyny attractive elsewhere in the world simply do not exist here, and that the practice would therefore not take hold.

[568] Dr. Shoshana Grossbard, an expert in economics about whom I will say more later, made this point very clear. It was suggested to her in cross-examination that polygamy is less likely the more industrialized and commercialized a society because the pressures for greater numbers of wives and children to contribute to household labour are diminished. She responded:

> Yeah, all this is true, but if you want to use that to get me to say that polygamy is not likely to spread much in the United States or Canada if it's legalized I would not agree with that because it is a fact that you also find polygamous families in France. You know, with the limited amount of time that they are allowed, the immigration of African polygamous households 200,000 people are estimated to be in those households in France. So - and France is at least as commercial a country as we are or the US or Canada, so I think there is a definite danger that if a country makes it possible for polygamous immigrants to come that there might very well be very large numbers of immigrants aspiring to a life with more freedom and a higher standard of living even though they are polygamists and polygamy might have been better adapted to their rural background.
>
> [Transcript, 7 December 2010, p. 28, ll. 13-31]

[569] I interject to note that Dr. Henrich and Dr. Grossbard both refer to legalizing polygamy as opposed to decriminalizing it. Neither is a legal expert and it may very well be that they did not appreciate the distinction. What I see as relevant, however, is that in the absence of a criminal prohibition, those interested in polygamy would consider that a significant obstacle to its practice had been removed.

[570] I also draw from the French experience the fact that polygynous families were concentrated in enclaves and certain suburbs of Paris. It is reasonable to expect a similar

outcome here, in which case the incidence of polygyny, at least within those communities, would likely attain non-trivial levels with the attendant consequences Dr. Henrich predicts.

[571] I recognize that Canada does not depend on criminalization to restrict the immigration of polygamous families to Canada. In addition to barring admission on the grounds of criminality, the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, also imposes restrictions on family class immigration. Section 117(9)(c) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, effectively prohibits multiple spouses from being recognized within the family class, and provides that only the first marriage may potentially be recognized for immigration purposes.

[572] I also recognize that it would be within Parliament's constitutional authority to make polygamy a distinct ground of inadmissibility even if it were not subject to criminal sanction.

[573] Nevertheless, I am not satisfied that this completely takes away from the possibility of an increase in immigration-based polygamy.

[574] Moreover, and importantly, it does not address the possibility of an increase in the incidence of polygamy among those who are here.

[575] There are undoubtedly people from cultures and faiths which practice polygyny who are already resident in Canada who might take it up were it not prohibited. Here, I refer to the same groups I mentioned earlier in the immigration context. Within the population at large, the evolutionary psychology evidence supports the notion that over time, human beings will have a tendency to adopt the practice when the environment permits.

[576] On the whole, I find that the possibility of increased immigration by polygamous families, and the take up of polygamy by those already in Canada make the case for a reasoned apprehension that polygamy would increase non-trivially if it were not prohibited.

2. Literature Review

[577] A number of the expert witnesses provided the Court with summaries of the existing academic literature regarding polygyny. These articles are found in learned journals published in various fields such as anthropology, psychology, economics and political science.

[578] Overwhelmingly, the literature on polygyny and its effects arises in the context of studies and data from Sub-Saharan Africa and the Middle East. The *Amicus* and others submit that great care must be taken in extrapolating their findings to a radically different socio-economic culture in North America. I will return to this criticism below.

[579] Another observation I make at the outset is that there is considerable overlap between the literature reviews since many of the same articles are frequently cited by the experts.

[580] Dr. Rose McDermott is a Professor of Political Science at Brown University. She also holds an M.A. in Experimental Social Psychology from Stanford University. She was called by the AG Canada. She was a most impressive witness and she gave very important evidence on the reference.

[581] Dr. McDermott has studied polygyny for the past ten years. In her report, she describes the methodology of her literature review. It appears to be a common approach among the experts I refer to in this section. Dr. McDermott explains (at para. 23):

> All the citations contained here are drawn from peer reviewed articles. The peer review process requires authors to go through a rigorous process whereby their work is sent by journal editors to other experts in the field, typically in a blinded fashion, in order to obtain their opinion, criticism and suggestions. Only the best work survives this critique and goes on to be published in well known journals. This is the work which conforms to the highest scholastic standard. This work is the research readers can be most confident represents an accurate portrayal of the conditions and analysis described. The authors of the pieces described below are considered experts in their area. While it would be impossible to describe every article or book written on polygyny, the literature described below constitutes a fair, comprehensive and representative sample of the extant work in the field. As an expert who has conservatively read several hundred articles or books on this topic over the last decade, I consider the research described below to provide representative coverage of the major findings concerning polygyny.

[582] Her statement that all her citations were drawn from peer reviewed articles was qualified in cross-examination, as the *Amicus* showed that some were personal accounts by people who had left polygamous communities.

[583] Dr. McDermott summarizes the literature demonstrating the effects of the practice of polygyny on women, children and men, and concludes that many negative consequences touch upon each of the groups.

[584] Women in polygynous relationships are at increased risk of mental health problems as a result of higher rates of domestic violence, including sexual abuse, and co-wife conflict. They also tend to fare worse financially.

[585] Children of polygynous unions have worse outcomes than their monogamously born counterparts, as measured in a variety of ways. They face a higher risk of mortality. Young girls are often married to much older men and engage in early sexual behaviour, which has repercussions for their life expectancy and physical well-being. Where girls give birth frequently, shortened inter-birth intervals pose a heightened risk for various problems which can affect both the mother and the child.

[586] As for effects on men, Dr. McDermott notes that polygyny causes the proportion of young unmarried men to be high, up to a ratio of 150 men to 100 women. This leads to a need for a polygynist community (at least a closed one) to excise at least half of the junior boys, the so-called "Lost Boys". "Junior boys who are thrown out of such societies at much greater rates in order to make a sexually asymmetrical system viable, often receive less education and achieve lower levels of employment, as they are forced onto a society with few skills and no social support" (at para. 33).

[587] Junior males who are unable to find wives represent "a class of largely poor, young, unmarried men who are statistically predisposed to violence" (at para. 34).

[588] The Christian Legal Fellowship led the evidence of Dr. Shoshana Grossbard (mentioned earlier), a Professor of Economics at San Diego State University. She was retained to explain the economic effects of polygamy, which, for the purposes of her evidence, refers to polygyny.

[589] Dr. Grossbard has studied the economic effects of polygamy for the past three decades. She began her work in the area believing polygamy to be a neutral factor in the economic wellbeing of women. However, her views evolved over her many years of study, and it is now her opinion that the practice has a negative impact in this regard.

[590] While not strictly a literature review, I discuss Dr. Grossbard's evidence in this section since her economic analysis draws upon data collected by others in a similar fashion.

[591] Dr. Grossbard states that while polygamy increases male competition over women and, thus, increases the value of women in the marriage market, women in polygamous societies do not necessarily capture this added value. Instead, men manipulate social institutions in ways that facilitate their control of women and prevent women from capturing what would otherwise be their value in the marriage market.

[592] Among the social institutions associated with marriage that reduce women's wellbeing are:

a) Early marriage;

b) Arranged marriage;

c) Brideprice, which is the payment by the groom for the costs of obtaining a bride. Grooms pay part of the expected value of a woman's work in household production upfront to the woman's relatives instead of women experiencing the benefit of their high value after marriage;

d) Divorce;

e) Female circumcision;

f) Purdah, the seclusion of women. This limits women's freedom of movement and typically means that they do not participate in the labour force;

g) Low emphasis on the emotional side of marriage;

h) Jealously; and

i) Psychological health problems.

[593] Dr. Grossbard cautions that it is not known whether polygamy causes these institutions or whether causality runs the other way. Nevertheless, it is revealing, she states, that cross-culturally polygamy is associated with a large number of undesirable features.

[594] Dr. Grossbard also refers to a number of other negative consequences of polygamy, which include widowhood, since husbands are frequently considerably older than their wives; lower investment in children's human capital, as men tend to invest their resources in having more children as opposed to fewer children with higher levels of investment; and, greater health problems in children.

[595] Dr. Grossbard offers this concluding assessment (at 5-6):

> G. Concluding assessment
>
> a. In the cultures and societies worldwide that have embraced it, polygamy is associated with undesirable economic, societal, physical, and emotional factors related to women's wellbeing. The natural economic consequence of polygamy is increased market value for women, though the women themselves do not realize the economic benefit of their greater value. Rather, women tend to be treated more like commodities in polygamous societies, and their freedom to manage their own economic circumstance and destiny is reduced. This loss of control by women in polygamous civilizations is seen in the early and arranged marriages, which are so prevalent, along with the practice of paying a brideprice. Easy exits from marriage by the way of simple divorce proceedings add to women's undesirable circumstances observed in polygamous societies. The physical and emotional distress associated with the polygamy way of life is no less devastating. ...
>
> ...
>
> d. It has not been proven scientifically that the association observed between polygamy and any of the undesirable individual social features mentioned above is caused by the institution of polygamy. Nevertheless, the list of undesirable social features is so long that it is hard to escape the conclusion that some of these results are caused by the institution of polygamy. If only part of the undesirable results mentioned above will follow from the legalization of polygamy in Canada, it is sufficient reason to strongly oppose a legalized polygamy that may cause significant harm to women, children, and the men who love them. Furthermore, men may suffer undesirable consequences as increased competition for women may increase the number of involuntarily unmarried men.

[596] The *Amicus* called Professor Campbell. Her evidence, and in particular, her qualifications, were controversial at the hearing, particularly in the context of her conclusions arising out of her interviews of 22 women who live, or have lived, at Bountiful. However, Professor Campbell also provides the results of her literature review and that is what interests me here.

[597] Professor Campbell notes that "[c]ompetition and jealousy among sister wives is commonly observed within plural marriage communities" (Affidavit #2 at para. 147). Reasons include economic stressors and differential treatment by husbands.

[598] Professor Campbell suggests that criminalized polygamy gives rise to insularity, and that women in such communities may be more vulnerable to abuse. She notes literature disclosing that women in such communities may lose the perspective and ability needed to make informed autonomous life choices.

[599] Professor Campbell refers to extensive literature addressing whether patriarchal polygyny is inherently discriminatory, and states that "concerns about polygamy's implications for gender equality are plain" (Affidavit #2 at para. 171).

[600] She also discusses outcomes for children living in polygamous families or societies. In particular, she notes the "Lost Boys" phenomenon discussed above. She observes (Affidavit #2 at para. 191) that:

> Various studies confirm that children from polygamous families are at an enhanced risk of psychological and physical abuse or neglect. While not entirely conclusive, research indicates that children can be adversely affected by rivalry between sister wives, and by the fact that more children in the family may mean less time with, and attention and supervision from parents, especially their fathers. Moreover, a polygamous family structure might diminish the economic resources available to children and adolescents which in turn might limit their access to books and activities that would foster learning skills.

[601] In fairness to Professor Campbell, she did leaven each of these concerns with her observations of life in Bountiful through the eyes of her interviewees, who paint a much more positive picture of polygamous life. I will deal with the reliability of Professor Campbell's evidence before I conclude this section of my reasons.

[602] Dr. Rebecca Cook undertook a literature review of the harms of polygyny, particularly as viewed through the perspective of international human rights law. She writes (at para. 20):

> Based on my review of various international instruments, case law, relevant literature, and case studies, the weight of authority leads to the conclusion that polygyny has detrimental effects on women, and on society more generally. Polygyny structures the marital relationship unequally on the basis of sex. A core right - the right to take additional spouses - is extended to one spouse (the husband), but not the other (the wife). This asymmetry is premised on sex and sex role stereotypes that ascribe to men and women different attributes and characteristics that ostensibly warrant an unequal distribution of rights and obligations in marriage. In addition to these inherent wrongs of discrimination against women, polygyny is often associated with a number of material and health harms, though these harms vary within and across different social and legal contexts.

[603] Dr. Cook reviews in detail these various associated harms, repeatedly cautioning that their incidence varies with social and legal context:

a) Competition for material and emotional access to a husband can lead to fractious co-wife relationships. Jealousy, tension, strain and competitiveness are common among co-wives;

b) Women in polygynous families face increased family stress, depressive disorders, low self-esteem, feelings of disempowerment, and risks of physical and mental violence;

c) Women and girls may face greater exposure to sexually transmitted diseases, particularly in areas with high HIV/AIDS prevalence rates;

d) Polygyny often results in economic deprivation for women when resources are inequitably divided or simply insufficient;

e) The primary harm to children raised in polygynous families is their exposure to, and potential internalization of, harmful gender stereotypes. As well, when practiced in a closed or semi-closed community, the demographic pressure to maintain an unequal sex ratio leads to an ongoing need to prepare adolescent girls for entry into plural unions and boys for their potential expulsion. Early marriage and pregnancy have negative health implications for girls, and also significantly limit their socio-economic development.

f) Adolescents from polygynous families have lower levels of socio-economic status, reduced academic achievement and self-esteem, and higher levels of reported family dysfunction and drug use than their counterparts in monogamous families. One explanation for these differences is the higher levels of jealousy, conflict, tension and emotional stress in polygynous families. In particular, rivalry and jealousy among co-wives can cause significant emotional problems for children. The inability of fathers to give sufficient affectionate and disciplinary attention to all of their children can further reduce children's emotional security.

[604] Professor Nicholas Bala, of the Faculty of Law at Queens University, offers expert evidence through a report filed by Stop Polygamy in Canada. He was not cross-examined at the hearing. His review of the social science literature notes similar concerns about the impacts of polygyny as summarized above. He provides the following summary (at para. 56):

> While some of the quantitative studies have small samples or suffer from methodological limitations, there is a fairly high degree of consistency to the results. All of the reported studies find that women have worse social, psychological or economic outcomes in polygamous marriages than women in monogamous marriages in the same society, though of course not all women in polygamous marriages suffer ill effects from this form of marriage. Most studies also indicate that being raised in a polygamous family has negative effects on children, including higher levels of mortality and emotional problems, and lower education attainment. While a few studies from the Middle East suggest that being raised in a polygamous family may not, in itself, have negative effects on children, even these studies reveal that, to the extent that polygamy is associated with higher levels of poverty (as it invariably is), there are negative consequences for children. There is also some research to suggest that high rates of polygamy have negative economic effects for a country as a whole. The only research that suggests that there might be some benefits to polygyny relates to positive psychological effects on men, and even this research is not consistent, as some research has found negative outcomes for men in polygamous marriages as well.

[605] Professor Bala also notes the limits of the empirical research on the effects of polygyny. He states (at para. 68):

> All of the empirical social science research comparing outcomes for polygamous and monogamous families is based on populations in Africa and the Middle East, where polygamy is relatively common and legal. Thus, there is a lack of empirically sound research to irrefutably establish the harmful effects of polygamy in Canada; this reflects the difficulty of doing research with polygamous families, who tend to be highly secretive. However, the research literature from Africa and Asia establishes that polygamy is generally harmful for women and children, which is broadly consistent with the first person, media and ethnographic reports about polygamy in Canada.

[606] The AGBC tendered the evidence of Dr. Dena Hassouneh, an Associate Professor with the Oregon Health & Sciences University School of Nursing. Her research and practice has focused mainly on the mental health impacts of trauma on women from marginalized populations. As part of this work she has conducted a study into the impact of abuse on American Muslim women.

[607] Part of Dr. Hassouneh's report entails a review of literature on polygamy in Muslim families. Among the patterns and key concepts she identifies are:

a) A consistent pattern of emotional distress and disabling psychiatric symptoms among women in polygamous marriages, particularly among senior wives;

b) Poorer marital satisfaction, self-esteem and life satisfaction, and greater vulnerability to domestic violence;

c) Higher likelihood of contracting sexually transmitted diseases;

d) Poorer psychiatric, social and academic outcomes in children;

e) Decreased access to paternal time and resources by children; and

f) Jealousy and competition between co-wives.

[608] Finally, Dr. Susan Stickevers is a medical doctor who, in her pain medicine practice, treated several Muslim women who were in polygamous relationships. Her affidavit, tendered by Stop Polygamy in Canada, includes the results of a literature review she conducted (at para. 7):

> I am currently the administrator for an internet study group in the effect of polygyny on women and the family. As part of my involvement in this study group, I have conducted an extensive review of literature on polygyny and its effects. As a result of my literature review, I have found that polygamy is associated with the effects listed below.
>
> - Higher rates of depression in senior wives in polygamous marriages
> - Higher rates of anxiety in senior wives in polygamous marriages
> - Higher rates of psychiatric hospitalization and outpatient psychiatric treatment for polygamous wives
> - Higher rates of marital dissatisfaction for polygamous wives
> - Lower levels of self esteem observed in wives in polygamous marriages
> - Higher levels of somatization observed in wives in polygamous marriages
> - Lower levels of academic achievement and more difficulty with mental health and social adjustment in the children of polygamous families.

3. Statistical Analysis

[609] I have described the results of various literature reviews conducted by a number of experts concerning polygamy and its impacts. It is vaguely unsettling to base a potential conclusion (here, that polygamy causes harm) on an expert's review of what other alleged experts have written on the subject. That is why the original work undertaken for the reference by the AG Canada's witness, Dr. McDermott, serves such a valuable purpose in this inquiry.

[610] Dr. McDermott was asked by the AG Canada to present her opinion on:

(1) The impact of polygamist relationships on women's equality;

(2) The impact of polygamist relationships on children, including child brides, and the children of polygamist unions; and

(3) The impact of polygamist relationships on the nation state.

[611] Dr. McDermott performed her task by undertaking the literature review to which I have already referred. But she also undertook a statistical analysis of the effects of polygyny.

[612] She analyzed systematic data regarding polygyny and its relationship to dependent variables of interest regarding women, children and the nation state.

[613] The data came from two principal sources. Data with respect to women and children came from the WomanStats Project Database http://www.womanstats.org which represents ten years of data collection regarding women and children in over 172 countries. This constitutes every country in the world with a population greater than 200,000. Dr. McDermott is one of the co-creators of the databank. Without false modesty, she called it "the best data to date in the world".

[614] Dr. McDermott describes the WomanStats Project as follows (at para. 45):

> The WomanStats project constitutes a unique data set which provides extensive information about women's issues around the world, manifested in over two hundred variables measured across the arc of as many as 171 different countries. No other dataset on women's issues in the world ranks its equal, whether in terms of the breadth and depth of its coverage, the degree of its reliability checks, or the time spent in its creation. It literally is the best of its kind, and permits a comprehensive, comparative statistical analysis unlike any other.

[615] The data on the nation state came from two well-respected international organizations: the Stockholm International Peace Research Institute and Freedom House.

[616] Dr. McDermott chose certain dependent variables of interest in relation to polygyny. These variables are:

a) discrepancy between law and practice with respect to women's equality - this variable relates to whether a state's laws accord with the United Nations Convention on the Elimination of Discrimination Against Women, and whether the country enforces these laws;

b) birth rate;

c) rates of primary and secondary education for male and female children;

d) difference in HIV infection rates between men and women;

e) age of marriage;

f) maternal mortality, which refers to the number of women who die in childbirth;

g) life expectancy;

h) sex trafficking, including state compliance with relevant legislation;

i) female genital mutilation;

j) domestic violence, an omnibus measure incorporating domestic violence, rape, marital rape, and honour killings, as well as the extent and strength of the enforcement of the laws prohibiting these crimes in any given state;

k) inequality of treatment of men and women before the law. At the low end are countries where the legal age of marriage is 18 or higher, women may choose their spouse, divorce is possible and both partners are treated equitably by law, abortion is permitted, and women may inherit property;

l) defense expenditures; and

m) political rights and civil liberties.

[617] These variables were chosen because they (para. 50):

> constitute the group of outcomes theoretically hypothesized to be most likely to be affected by polygyny. In other words, given how polygyny affects factors such as sex ratio imbalance as discussed in the following section, and given its inherent incentives and demands, it was possible to generate hypotheses about which factors related to women, children and the nation state might be affected by polygyny. The process of deriving testable hypotheses from existing theoretical models represents the standard way in which science progresses.

[618] Of course, Dr. McDermott recognized the need to control for variables that might directly cause the outcomes she examined. She controlled for the effects of gross domestic product [GDP] on the relationship between polygyny and the other variables she examined. Dr. McDermott called GDP the "monster variable":

> If you can find a variable that still emerges significant controlling for GDP, that really means you have something...
>
> [Transcript, 16 December 2010, p. 3, ll. 10-13]

[619] For the purpose of the statistical analysis, each of the 172 countries considered in the WomanStats Project Database was placed in one of five categories based on both the legality and prevalence of polygyny:

a) "0" - polygyny is illegal and extremely rare. Multiple simultaneous cohabitations are also rare. Monogamy is dominant in practice, whether or not the couples have been formally married;

b) "1" - polygyny is illegal and the law is enforced but multiple simultaneous cohabitations, especially outside the bounds of formal marriage, are not uncommon. Canada was given a rating of "1" in Dr. McDermott's analysis;

c) "2" - Polygyny is generally illegal and the law is enforced. However, it is explicitly deemed legal for certain minority ethnic or religious enclaves. Typically less than 5% of women are in such marriages. The United States was categorized as "2" in Dr. McDermott's analysis;

d) "3" - Polygyny is legal under customary/religious law, though it may or may not be illegal under national law. If it is illegal, the government does not enforce the law. Less than 25% of women are in such unions;

e) "4" - The same as category "3" except that more than 25% of women are in such unions.

[620] Dr. McDermott relied on two methods of statistical analysis: least squares regression and ordered logistic regression.

[621] Her analysis produced the following results with respect to the dependent variables:

a) As polygyny in a society increases, the discrepancy between law and practice concerning women's equality also increases;

b) Women in polygynous states have more children on average than women in less polygynous states. This trend holds true for girls/women between the ages of 15 and 19;

c) Polygyny exerts an effect on children's welfare. Girls and boys are both less likely to receive primary or secondary education as polygyny becomes more frequent. The effect is most pronounced for both genders with respect to secondary education;

d) Increased polygyny heightens the difference in the occurrence of HIV infection between women and men; women become more likely relative to men to suffer from HIV as polygyny becomes more common;

e) As polygyny increases, the average age at which women marry declines substantially;

f) Maternal mortality increases dramatically as the degree of polygyny increases;

g) Women in states with greater polygyny die at a younger age on average. This is likely, at least in part, because they are more likely to die in childbirth, as noted;

h) As polygyny becomes more frequent, sex trafficking becomes more prevalent;

i) As polygyny becomes more frequent, female genital mutilation increases;

j) Women sustain greater domestic violence in polygynous societies;

k) Differential legal treatment of women relative to men increases, to the detriment of women, in more polygynous societies;

l) States with higher levels of polygyny spend more money per capita on defence, particularly on arms expenditures; and

m) States with higher levels of polygyny display fewer political rights and civil liberties for both men and women than those with less polygyny.

[622] Dr. McDermott offers this summary of her report (at para. 14):

> Based on the best data available to date in the world, including the majority of countries across the globe, I find that in polygynous societies, women sustain more physical and sexual abuse. They have more children, are more likely to die in childbirth, and live shorter lives than their counterparts in more monogamous societies. In polygynous societies, women are more subject to sex trafficking and female genital mutilation while receiving less equal treatment than men, and encountering more discrimination under the law. In addition, girls are less likely to be educated, restricting a key component allowing for upward mobility and economic independence. In societies with high rates of polygyny, up to half of the boys are ejected from their primary communities, with incalculable effects on them. Moreover, the average individual in a polygynous society has fewer liberties than the average individual in a state which prohibits polygyny. A polygynous state spends more on average on defense, leaving fewer resources available for building domestic infrastructure, including projects devoted to health and education. This is quite a diverse set of effects, confirming the wide-ranging consequences of polygyny in societies in which women live as enforced second class citizens, and the states of which they are a part.

[623] Dr. McDermott ends her report by alluding to anecdotal evidence of benefits arising out of polygamous unions (at para. 158):

> More generally, while some individuals certainly claim to benefit from being in a polygynous union, there has been no statistical demonstration that polygyny benefits most men or women, boys or girls or society considered as a whole. Nor are any such effects manifest in the vast majority of the peer-reviewed literature examining a smaller number of cases than would be permitted by statistical analysis. Perhaps such a defence of polygyny, unlikely though it may be, could be made and supported with data meeting the standards which we advocate - verifiable, comprehensive, valid, and reliable. But for now it is fair to state that while polygyny's negative effects are wide-ranging, statistically demonstrated, and independently verified using alternative analytical tools, its beneficial consequences are circumscribed and at odds with the welfare of most.

[624] Dr. McDermott's analysis demonstrates that statistically, the harms of polygyny do not depend upon a particular regional, religious or cultural context. They can be generalized, and they can be expected to occur wherever polygyny exists.

[625] I advance to consider the *Amicus*' submissions in the face of this powerful evidence as to the inherent or structural harms of polygyny.

[626] The *Amicus* adopts what he intimates is a "common sense" approach to testing the validity of Dr. McDermott's conclusions. This approach, however, tends to both overstate Dr. McDermott's conclusions and obscure the basis of her methodology.

[627] The *Amicus* attempts to undercut the basis of Dr. McDermott's conclusions by critiquing the classification of 172 countries in her study according to levels of polygamy. He states (at paras. 411 and 412):

> It was pointed out to the Professor that the "0" countries, where there is no polygyny, included such places as East Timor, Ecuador, Mauritius, Mongolia, Brunei, Guyana, Sri Lanka, Burundi, Ivory Coast, Macedonia, El Salvador and North Korea. The relatively small number of "1" countries included the United Kingdom, Canada and Belgium. The "2" countries included Israel, Singapore, and the United States. Interestingly, the "4" countries included the Bahamas and Barbados. Referencing just these samples, when it was put to Professor McDermott in cross-examination that it is obvious that there is better primary and secondary education, for example, in the above-named "1" and "2" countries than in the above-named "0" countries, Professor McDermott readily agreed. In other words, she readily agreed that this data went against her theory and not for it. It meant that in at least these instances, the less polygyny, the worse the levels of primary and secondary education.
>
> The Amicus of course does not suggest that more polygyny fosters greater levels of primary and secondary education any more than he would suggest the opposite. The point is that Professor McDermott's own data, by her own admission, undermines her conclusions.

[628] This criticism misapprehends the nature of Dr. McDermott's research. The basis of her study was to provide a statistical analysis of polygyny that "contains enough statistical variance or power to discern clear and meaningful statistically significant relationships between variables of interest" (para. 39). By categorizing all 172 countries by level of polygyny, aggregating the data for those levels, and controlling for GDP, Dr. McDermott was able to provide systematic cross-country comparisons. It may very well be the case that *some* of these level "4" countries do have better educational systems than *some* of the level "0" or "1" countries. However, this does nothing to discredit the aggregate effect of Dr. McDermott's study. In fact, these outliers only underline how strong the effect must be amongst the other countries at those levels.

[629] The *Amicus* is similarly dismissive of Dr. McDermott's finding that states with higher rates of polygyny spend more money per capita on defence and the correlation between the two facts. The *Amicus* calls this a "departure from anything reasonable" and characterizes her analysis as "abracadabra".

[630] Certainly, Dr. McDermott's conclusion that there is a statistically significant relationship between the level of polygyny in a country and that country's per capita defence spending initially seems surprising. However, the fact that it was arrived at by the same methods as she used for her other seventeen dependent variables does not, as the *Amicus* put it at para. 416, reveal "the frailty of her entire report." Rather, the consistency of her methodology bolsters her results with regard to national defence spending.

[631] The challenge to the national defence spending variable is an example of the manner in which the *Amicus* tends to overstate Dr. McDermott's conclusions. At para. 405 of his Final Submissions, the *Amicus* states that "[e]vils around the planet were attributed by her to one man marrying more than one wife." This is a mischaracterization of Dr. McDermott's research in two ways.

[632] First, her report does not at any point say that the levels of her dependent variables are attributable entirely to polygamy, as the *Amicus* seems to suggest. Polygamy is merely one factor that contributes to an increase in the negative outcomes with regard to these variables.

[633] Second, Dr. McDermott's report does not concern "one man marrying more than one wife". Her study considers the aggregate effect of widespread polygamy in a society.

[634] The *Amicus* stresses that Dr. McDermott admitted in cross-examination that she could not "prove anything". The most she could do was "create a correlation between the incidence of polygyny and the incidence of something bad" (para. 415). But creating such a correlation is the purpose of the statistical analysis.

[635] Dr. McDermott did explain in her testimony the difficulties of proving causation through this type of statistical analysis.

> So the - with any of the qualitative literature or any of the quantitative statistical literature you can never prove causation. The only method that proves causation is experimentation. But you can't really do experiments with polygamy because it's unethical to force people to have randomly, you know, manipulated forms of marital structure. So what you do is you work with the information you have and you can examine statistically the variance in relationship between polygamy and these dependent variables.
>
> [Transcript, 15 December 2010, p. 80, l. 41 - p. 81, l. 5]

[636] When Dr. McDermott refers to proof here, she is referring to a scientific concept of proof, not the legal concept of proof on the balance of probabilities that applies in a civil case. To reject Dr. McDermott's analysis in its entirety on the basis that she admits she cannot "prove" causation would effectively negate the use of wide swaths of social science evidence in our courts and, particularly, this reference.

[637] At para. 415 of his Final Submissions, however, the *Amicus* concludes from Dr. McDermott's acknowledgement of the limitations of statistical research that "in all probability the incidence of polygyny was wholly irrelevant to virtually every evil she purported to link it with". To support this conclusion, he ascribes great weight to comments made by Dr. Shackelford in direct examination about the limitations of correlational research. In particular:

> Yes, there's what is known as the third variable problem. It actually goes by that particular label in statistics, and this is in correlational research you may find that there is a relationship between two variables but it is always possible that there is a third variable that you haven't measured or that you're not aware of that, in fact, is causing both of the variables that you happen to be assessing.
>
> [Transcript, 15 December 2010, p. 7, l. 47 - p. 8, l.3]

[638] The difficulty in attributing Dr. McDermott's findings to a "third variable problem" is that she found correlations between her independent variable, level of polygyny, and eighteen different dependent variables. Given that the negative outcome related to each of these eighteen dependent variables increased as the level of polygamy increased, I find it difficult to write off these correlations as attributable to an unnamed "third variable".

[639] I find that Dr. McDermott's report was conducted on the basis of well-proven methodology and utilized data of unparalleled scope and quality. Her scientific method and the results it produced cannot be dismissed on the basis of what can only be characterized as a lay person's appeal to so-called common sense. Dr. McDermott's analysis does prove "something". As she says in the conclusion to her report (at para. 158) "polygyny's negative effects are wide-ranging, statistically demonstrated and independently verified using alternative analytical tools".

[640] I find Dr. McDermott's evidence to be compelling.

4. Polygamy in Contemporary North America

[641] Earlier I noted the fact that many of the empirical studies of polygamy center on cultures far removed from North America. Caution is urged in extrapolating findings in these studies to our situation here.

[642] These concerns are met in large measure, I find, by the statistical analysis of Dr. McDermott. As I have related, her data spans 172 countries and her analysis controlled for the "monster variable" - GDP.

[643] What is striking is the congruity we find in the dangers of polygamy found in the African and Middle Eastern based empirical studies (many undertaken by the prolific Dr. Al-Krenawi), those predicted by Dr. McDermott's work, and those found "on the ground" and anecdotally in North America. In this section I will explore the evidence as it pertains to the United States and Canada (there is a fundamentalist Mormon community in northern Mexico but not much of the evidence touched on it).

[644] I begin with the evidence regarding polygamy in the United States.

a) Polygamy in The United States

i. Fundamentalist Mormons

[645] The AGBC led the evidence of Andrea Moore-Emmett, a journalist who has studied polygamy in the United States. Ms. Moore-Emmett is an advisor to an anti-polygamy group known as Tapestry Against Polygamy. A number of principals in that group also gave evidence in the reference.

[646] Among other publications, Ms. Moore-Emmett is the author of *God's Brothel: The Extortion of Sex for Salvation in Contemporary Mormon and Christian Fundamentalist Polygamy and the Stories of 18 Women Who Escaped*, (San Francisco: Pince-Nez Press, 2004). That title leaves no question as to Ms. Moore-Emmett's position in the polygamy debate. As I have already discussed, I am alive to her advocacy, as well as that of many of the witnesses who passionately expressed their views.

[647] When Ms. Moore-Emmett speaks of "polygamy", she is referring to "polygyny".

[648] In writing her book, Ms. Moore-Emmett interviewed people from the following Mormon-based polygamous groups (affidavit at para. 8):

i) the Apostolic United Brethren (AUB) which is centered in Bluffdale, Utah, but also has settlements in Montana, Nevada and Mexico;

ii) The Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS) which has settlements in the twin cities of Hildale, Utah, Colorado City, Arizona, British Columbia and Mexico. The FLDS also has splinter groups such as the Second Ward which formed a group not far from Colorado City in a community that became known as Centennial Park;

iii) The True and Living Church of Jesus Christ of Saints of the Last Days (TLC) of Mormon town of Manti, Utah led by Jim Harmston;

iv) The Church of the First Born of the Fullness of Times headquartered in Colonia LeBaron in Chihuahua, Mexico led by Joel LeBaron;

v) The Church of the Lamb of God led by Fred Collier with members in Hanna, Utah, and Mexico;

vi) The Latter-day Church of Christ, also known as the Kingston Group, led by Paul Kingston based in Salt Lake City, Utah, with members in Utah, Idaho and Nevada;

vii) The Church of Jesus Christ of the United Order led by Luis Gonzales with members in Sacramento, California and in a community in Jackson County, Missouri under the leadership of Floren LeBaron;

viii) The Righteous Branch led by Gerald Peterson Jr. in Paiquin, Utah;

ix) The Church of Jesus Christ led by Roger Billings in Jackson County, Missouri; and

x) The Patriarchal Hierarchy led by Tom Green at Green Haven, row of trailers on Utah's West Desert.

[649] In her affidavit, Ms. Moore-Emmett summarizes "common traits" she has observed in her study of religious groups, whether highly organized like the FLDS or more loosely affiliated groups of polygamous families. In this regard, I reproduce the substantive portion of para. 11 of her affidavit. It is useful to do so because Ms. Moore-Emmett conveniently summarizes much of the evidence of the individuals who related their personal experiences with polygamy in the video affidavits before the Court. The traits Ms. Moore-Emmett identifies include:

- Systems of indoctrination, formal and informal, are used to prepare young girls and women for polygamous marriage, including marriage to much older men.
- The family structures are intensely patriarchal and inherently unequal between the men and women. There is an extraordinarily high degree of control exerted by men both within the families (by the father/husband) and the community generally (by men in leadership positions).

- Polygamous wives find it very difficult to leave their marriages. This is so for a number of reasons. They often have a large number of children, having been told by their husbands and religious leaders that they must have as many children as possible. People growing up in polygamist communities are taught not to trust the outside world. A woman who leaves the community becomes part of the outside community that is evil and cannot be trusted. Some women are forced to leave their children behind. If a woman is able to leave she, in many cases, must give up all ties with her family. Once she leaves she is not welcome back in the community to visit family. The woman is "dead" to her family. In some cases the women must give up all that they have ever known and experienced in life. Often the religious indoctrination and religious authority has made it impossible for the women to exercise true choice. These women often have no job skills, no education and no preparation for independent living. The blood atonement belief (one must pay for one's sin with death) held by many polygamist groups means that some women live in hiding in fear of death.
- Boys and young men are frequently forced from the communities in a variety of ways, apparently to reduce competition for girls and women among the group's men. The boys often have little education and find it difficult to cope in the outside world. They often become involved in drugs, alcohol or prostitution.
- Girls are 'married' at unusually young ages, sometimes between 14 and 16 years old, and usually become pregnant shortly after marriage.
- The trading of girls for marriage purposes between families and communities. This occurs over state and national boundaries.
- There is often a significant age gap of many years, even decades, between the men and women in polygamous marriages.
- In some polygamist groups girls are forced to marry a close relative (incest) sometimes causing genetic disease and birth defects.

[650] To the same effect is the evidence of Laura Chapman, a social worker practicing in Colorado. She was formerly a counsellor with Tapestry Against Polygamy. She was raised in an FLDS community.

[651] Ms. Chapman grew up in a family with one father, four mothers and 31 siblings. She witnessed her 17 year-old sister enter an arranged marriage with the FLDS Prophet Leroy Johnson; he was 70 years old at the time. She, too, entered marriage to a male who was essentially a stranger to her.

[652] Ms. Chapman notes the inter-relationships that have developed amongst what she estimates are approximately 20 polygamous sects throughout North America. She relates (at para. 16):

> Young women are often sent away from their childhood communities or convinced to marry within other polygamist communities. For this reason, I have relatives in almost all of the above-mentioned groups. For example, two of my former sister-in-laws were married to Warren Jeffs, my great-uncle Rulon Allred (once leader of the Allred group) was murdered by Ervil LeBaron a polygamist leader in Mexico (who later died awaiting trial for a number of murders). My Aunt Charlotte married Ervil LeBaron's brother Verlan LeBaron. Verlan's life as well as my grandmother's life, was threatened by Ervil LeBaron. Tom Green, an independent polygamist was charged with child rape and bigamy in the States. Tom Green's child bride, Linda Kunz, is my first cousin. The Kingston sect's mid-wife delivered my children in home births. My niece Samantha, is the third-wife of Gerald Palmer, a man in Bountiful, British Columbia.

[653] Ms. Chapman's evidence identifies these common traits in her experience with fundamentalist Mormon communities:

a) An average age of marriage for girls between 15 and 18;

b) Often a significant age discrepancy between men and women in marriage;

c) Regular, virtually annual, pregnancies in marriage;

d) Little choice for girls and women entering arranged marriages;

e) Girls unable to look to local law enforcement officers for protection in these closed polygamous communities;

f) Children refused medical care;

g) Children receiving limited education and almost no exposure to the outside world;

h) Young boys (13 to 17) abandoned by their parents and forced from the community;

i) Poverty, few resources for large families, and reliance on government aid;

j) Incest: "As an example, in my ex-husband's family, one uncle married his niece, two brothers and a sister married their first cousins, and three sisters married second cousins" (para. 34); and

k) Significant challenges faced by women leaving polygamous relationships.

[654] Stephen Kent is a sociologist specializing in religion at the University of Alberta. His evidence was tendered by Stop Polygamy in Canada. He has published articles on fundamentalist Mormon polygamy. His affidavit speaks to many of the harms discussed by the American commentators summarized above.

[655] Timothy Dunfield is currently pursuing a PhD at the University of Alberta on the effects of polygamy on boys and young men in FLDS communities. His evidence was tendered by the Christian Legal Fellowship and discusses the Lost Boys phenomenon in some detail. In short (at 5):

> The "mathematics" needed to ensure the survival and continuation of polygamy often means that polygamist communities must get rid of excess boys in order to ensure a proportionately higher number of young girls will be eligible for marriage.
>
> As I have shown, the boys who leave polygamous communities face unique survival challenges once outside the community. Their indoctrination at the hands of FLDS leaders, teachers, and parents severely limits their socialization into society and may impair their ability to make wise decisions. Ultimately they face a difficult and dangerous road as they attempt to raise themselves and survive in a world they are ill-equipped to face. The Lost Boys face these and other challenges as the direct result of polygamy's influence on them, their parents, and all who adhere to this practice, especially in settings where entire communities employ its practice.

[656] Dr. Lawrence Beall is a clinical psychologist practising in Salt Lake City. Dr. Beall's practice includes a number of patients (30 some in total) who have left polygamous communities, primarily the FLDS. He was qualified to give opinion evidence on the psychological, emotional and social impacts of the practice of polygamy on individuals from FLDS communities.

[657] Dr. Beall was retained by the State of Texas in cases arising out of the raids on the FLDS community at the YFZ Ranch. His evidence dealt with the psychological impacts on adolescent girls of marrying older men.

[658] The psychological effects of polygyny that Dr. Beall has observed in his practice are akin to those found in cases of domestic violence, assault and child abuse. Women with children leaving polygamous communities tend to have a combination of past traumatic experiences and ongoing, often elevated stress. Post-traumatic stress disorder [PTSD] was common in Dr. Beall's patients.

[659] In cross-examination, Dr. Beall acknowledged that each of the six women from the FLDS he treated had suffered abuse, whether sexual assault, physical assault or other spousal abuse. Eleven of the 16 men he had diagnosed with PTSD had a history of physical abuse.

[660] Young men and women tended to present with different symptoms. Dr. Beall deposes (at para. 15):

> In comparing the young men's diagnosis to that of the girls there are several key differences. The boys usually shared the PTSD diagnosis. However, girls tend to internalize symptoms and have higher levels of anxiety and depression. Boys externalize symptoms and have behavioral problems. Many of these young men described acting out in destructive ways. They were also more angry than the girls and tended to be more aggressive.

[661] While acknowledging that his opinions cannot be generalized to the FLDS community as a whole, Dr. Beall expressed his view that the 22 former FLDS members he treated are representative of those outside the privileged "inner circle".

[662] Dr. Beall also opines on the impacts of polygamy on adolescent development. He begins by noting that the basic structure of polygamy (that is, polygyny), is authoritarian (at para. 24):

> The basic structure of polygamy is authoritarian. The men who practice it generally believe they have the authority to govern and control their wives and children in the family relationship. Although it is not a new theme, what is unique to the FLDS culture and polygamy generally, is that this male domination is the rule not the exception. It is an institutionalized power imbalance between males and females.

[663] Dr. Beall outlines central tenets of fundamentalist Mormon polygamous communities, which include a controlling central figure, a lack of independent thinking and education, isolation from mainstream society, and reliance on violence. He then considers how these tenets impact upon adolescent mental and emotional health, social development, sexual grooming and ability to give informed consent.

[664] Dr. Beall reaches this general conclusion (at paras. 63-64):

> Young women and young men with their lives before them are impressionable, vulnerable, and willing. A course of life determined for them in their adolescence quickly becomes "set" and determines who they will become. There is strong evidence that the conditions faced by members of polygamous communities prevent the natural unfolding of their minds and personalities, and lock them in to a life that is beneath their potential.

> What is the prognosis for women and young men who leave the polygamous community? Prognosis is favorable if these individuals receive psychological treatment that is specific to their needs. Counselors need to consider the reality of their backgrounds, including high levels of stress, conditioning, trauma, the loss of family, friends, and the familiar, together with their corresponding symptoms and problems. The lack of socialization in the outside world and deficits in coping skills need to be considered.

[665] A considerable body of evidence led on the reference concerns the FLDS communities in the United States. This is appropriate because the Canadian FLDS community at Bountiful is closely aligned with its American counterparts in Hildale, Utah, and Colorado City, Arizona (twin cities, physically connected).

[666] Some of this evidence was given through witnesses who related their life experiences being raised in polygamous communities. (A number of these witnesses had spent time in both the United States and Bountiful.) Their evidence was highly personal and very moving. The *Amicus* and allied Interested Persons wisely chose not to cross-examine the vast majority of these witnesses tendered by the AGBC.

[667] Once again, they gave voice to many of the themes we have seen emerging in the evidence. Specifically, within the respective FLDS communities in the United States, we find:

a) Extremely large family units with the resultant lack of parental attention;
    i. Sarah Hammon (her father had 19 wives and 75 children. Sarah was raised in a household with 30 siblings):

> Q What was your relationship with your father like?
>
> A I didn't have a relationship with my dad. He didn't know my name or who my mother was or even that I was his child unless I was in the house with him. And that was for 13 years that I lived with him.
>
> ...
>
> Q ... I wonder if you could speak to again ... the difficulty of maintaining close relationships in - or developing close relationships in a family as large as the kind of family you grew up with?
>
> A Yeah, when you have that many people primary relationship around you all the time - in an average nuclear family there is a mother, the father, and, you know, maybe two or three siblings, and that's a good sized family. And then you know if you've got step-siblings and stuff that's sort of on the fringe, but you've got your nuclear family. When you've got 30 people, 30 siblings and then 11 mothers in one home it's enough to make your brain explode. You cannot develop close bonded relationships with that many people. I have so few, you know, real memories of my full

siblings because there's so many distractions, so many other people, so much other stuff going on around me that I never really formed a bond. And today I have trouble developing close relationships with people because I just - it's like I have my bubble. If anyone threatens to pop it I just roll away.

Q And did that also impact how you felt in terms of your value as a child?

A Absolutely. Yeah. I felt very lost in the family. Like a number more than, you know, a valuable member of it.

[Transcript, 8 December 2010, p. 67, ll. 5 - 11; p. 83, 1.33 - p. 84, l. 14 (video affidavit)]

ii. Mary Mackert:

Q What about your sons and their relationship with their father? Did they have a relationship with their dad?

A Part of why I left is because my husband had 35 children. There aren't enough hours in the day for him to father those children. And I had trained my children well. They didn't have a lot of problems. They didn't get into a lot of trouble. And so that meant they didn't spend any time with their dad because he was always putting out fires, going where the problems were. I pretty much took care of me and mine. That's why I was the favourite wife, I wasn't a problem to him. But that created a problem for my children. And they began to escalate their mischief to get an audience with their father. And for children, whether it's - if they can't get positive attention, they will get negative attention rather than be ignored, and they felt they were being ignored.

[Transcript, 11 January 2011, p. 17, ll. 12 - 34 (video affidavit)]

iii. Brent Jeffs (his father had three wives and 20 children):

Q And what was it like living in that house?

A For me it was nothing but chaos and yelling and screaming and everyone fighting for attention and never getting it. And - there was a few good times obviously when it was good. My family - my dad always taught early on to - to be yourself and never fall short of that, so we were a little bit different than most families but still there was a lot of chaos and it was extremely hard to try and get any attention from your parents because there were so many of you. And then also you had to deal with the other moms and their jealousy toward the - you know, the other wives, and a lot of the times there was - even for me growing up there was a lot of abuse from the other moms, because they resented me because, you know, I was my mom's kid. So that was extremely tough to deal with in growing up and having the other moms beat me all the time because of who I was.

[Transcript, 5 January 2011, p. 65, ll. 17 - 40 (video affidavit)]

b) Arranged, or placement, marriage for young women, often with little or no notice of the event and often to significantly older men;

i. Susie Barlow:

> Warren Jeffs assigned me to enter into a "spiritual marriage" with my cousin when I was 16 years old. ... My Husband, Leonard Barlow Senior, was 51-years old, having been born in 1950. I became his second wife on December 21, 2001. That day was supposed to be the shortest day in the year, but it was the longest for me.
>
> [Affidavit at para. 12]

ii. Carolyn Jessop:

> A My father and mother were very concerned that I may run and they decided to wake me up at 2:00 in the morning and tell me about the marriage and then not let me out of their sight until the marriage had happened.
>
> ...
>
> Q Now, you've told us that you were assigned to marry Merril Jessop. How was - how old was he at the time of your wedding?
>
> A He was 50. He was 32 years older than me.
>
> Q And so you were 18?
>
> A I was 18. He was 50.
>
> ...
>
> Q Did you have any thoughts about who was selected for you to marry?
>
> A Yes, I did. When I went to high school I went to high school with around ten of his teenage daughters and I guess what you would classify as a clique. We ran in different cliques. ... There was a lot of friction there. And so I was running in a taboo group to his daughters and all of a sudden one day I become their mother.
>
> [Transcript, 12 January 2011, p. 17, ll. 14 - 18, p. 18, ll. 3 - 8, 15 - 20, 24 - 27]

iii. Rowena Mackert:

> Q Can you tell us about your marriage, how it came about and how you found out about it?
>
> A Okay. My father's fourth wife he married when I was 13 and she had a son that was 16. John and I hated each other. It was very clear. Everyone knew. At 3 o'clock in the morning on a Saturday morning - Sunday morning, actually. Saturday night was priesthood meeting for the men. And father got home from it and hours later my mother and he came to my bedroom, woke me up and told me that Uncle Leroy - Leroy Johnson had had a revelation and that I was getting married. I sat there stunned. I didn't want to get married. I just wanted out.

Q How old were you?

A I was 17. My father - my mother asked don't you want to know who you're supposed to marry, or who you're marrying, and I kind of looked in disbelief, you know, I really didn't want to know. Told me John, and John who, and I'm running down the list of all the Johns that I know and my father said Swaney and it was like a knife was stabbed through my heart. There was no love lost between the two of us. I was really headstrong and he was too.

I didn't get any sleep that night. The next day everyone went to church and I stayed home with John's mother and she rummaged through material to find something to make a wedding dress, and she and I spent Sunday afternoon and Monday morning making my wedding dress. ... John got home from church probably about 5 o'clock in the afternoon, so I had been up for about 14 hours. And father called everyone down to the living room and told them that we were getting married. We got married the next afternoon.

[Transcript, 8 December 2010, p. 7, ll. 8 - 44, p. 8, ll. 4 - 10 (video affidavit)]

c) Co-wife conflict, including abuse of other wives' children;

i. Mary Mackert:

Q Did you have a relationship with your father's other wives?

A I did. Very strange one with the two women who'd married him before my mother, much like the relationship my mother had with them. That kind of trickled down. My mother was my dad's favourite wife, and being the favourite wife is a curse. You don't want it. Because the other women are envious of it and everybody is vying for it, and so you're put down and tore down and ostracized in a lot of ways. Some women, I'll hear them talk about this great camaraderie they have with their sister wives, and I say not true, because every day of your life is competition for his resources, and they are limited and there's not enough of him to go around.

[Transcript, 11 January 2011, p. 6, ll. 6 - 24 (video affidavit)]

ii. Teressa Wall:

A I grew up - in my household when I grew up for most of my childhood I had two moms. My dad had a wife prior to my mom. She had eight children. My mom had 14. Later on down the road he had another wife, and you know, it was, now I look at it, it is a pretty crazy childhood now that I know what normal is. You know, we - the first wife was very abusive to my mom and her children. So were her children. She was kind of favoured in the family so her and her children, really they didn't have to do any work or anything. You know, my mom and us growing up we pretty much did all the meals, cleaned the house, did all the canning. My early, early childhood we used to live in the basement of our house. We weren't allowed to go upstairs. That's where the first wife and her children lived. We weren't allowed to go up there. There was a lot of my

early childhood I really don't remember. I don't know if my mind just blocked it out or - but so, you know, we had - all the children we stuck together pretty well, you know. We kind of had to band together and protect each other and...

Q And when you say all the children you mean all of -

A My mom's children. Sadly enough it was almost like a battle, one side against another. It really was. Unfortunately, because - but, you know, and then there was some very rare odd times when we all got along together for a brief hour or so, but for the most part it was - it was side against side.

[Transcript, 8 December 2010, p. 21, l. 28 - p. 22, l. 19 (video affidavit)]

iii. Rowena Mackert:

Q What was your relationship like with your father and mother now?

A Very strained. The two - mentioned Donna - we had children - my father had children kind of in threes, you know, so some of the children we referred to them as triplets and there would be three boys and then there would be three girls, and there were a lot of jealousies between the mothers about the children. Who had the cutest child. I remember that mother Donna severely punished one of my sisters and said something to the effect to my mother, you know, that she beat her darling little name with the hairbrush. I guess that some of the mothers would use the most horrific discipline on the other wives' children.

It was - to try and get along with the other mothers you had to morph yourself to them. And that's what I had a problem trying to get to. You have to become this creature that can morph to whatever is needed of you. Donna expected, when we go to her house and help her, she expected things to be done a certain way and she had a different way of reacting and a different way of punishing. Midge had a different way of teaching and punishing and reacting, and mother had her way. So it was like you never knew which part of this big salad mix you were going to get and you constantly had to change yourself to fit in with what was going on with the mother that you were with, with the children that you were around.

[Transcript, 8 December 2010, p. 15, l. 18 - p. 16, l. 7 (video affidavit)]

iv. Paula Barrett:

Q And what about your other children, what was their relationship like with their dad?

A Same as my oldest son, they all hated their father, because they didn't like - because when they seen me crying they'd put their hands on my back and I'd practically jump out of my skin. That's when they knew that their father and his first wife were beating on me.

Q Like physically beating you?

A Physically and mentally.

Q And you were saying that before you got married you'd been told that the plural marriage would create a team and it would be happy for you.

A Exactly.

Q And when you were actually living with Dallas and his first wife, did it ever work as a team for you?

A Never. We never did anything together. We never cooked dinner together, we never - it was pure - my children and me were like Cinderella doing all the housework and staying up late at night. Going to bed late, and early the next morning and then have to get up again at 6 o'clock.

[Transcript, 7 January 2011, p. 42, ll. 15 - 41 (video affidavit)]

d) Incidents of intra-family sexual abuse;

e) Mental health issues;

i. Carolyn Jessop:

My mother was incredibly unhappy. Very depressed. I can honestly say thinking back on my life there's few days I didn't remember her talking about killing herself. She wasn't very happy with her life. Very - very emotional about a lot of things. And then when Rosy married my dad of course the burdens of having children and raising a lot of children increased, because Rosy worked as a nurse and was gone a lot, so then my mother ended up with the responsibilities of about nine preschoolers between her children and Rosy's children.

[Transcript, 12 January 2011, p. 7, ll. 6 - 18]

ii. Sarah Hammon:

A lot of polygamist women have had nervous breakdowns. I think that it's more of an issue in polygamous communities than it is in mainstream society. I have talked to some of my friends here in - there's mainstream and there's Colorado City in my brain. And they don't know anyone who has had a nervous breakdown. None of the women my age that I talk to, no people, women, have had nervous breakdowns. And yet I can count 14 or 15 off the top of my head out there that have had nervous breakdowns. And I think again it just comes back to having so little personal power over your life and your destiny and being so degraded in your own home, you know, as a mother, as a wife, you're being one of rather than the mother, the wife. You're one of. And you're expendable in your home.

[Transcript, 8 December 2010, p. 82, l. 46 - p. 83, l. 19 (video affidavit)]

f) Extreme secrecy when interacting with outsiders;

i. Teressa Wall:

A ...

We did not really have anything to do with our neighbours. And - I don't know, I never really had to explain that. We never really had anything to do with anybody outside of the FLDS. So there was no - nobody asking how come you have three moms. We weren't allowed to even play with the neighbour kids, like that was considered you know a big no-no. And for the most part growing up we were terrified that if we spoke to anybody outside of the group that we could get taken away or that our father could get arrested and taken away.

Q Why were you terrified? Who was -

A In school, in church, Sunday school, teachings from your parents, you know, you're always taught to be very careful and secretive about your family and how many wives your father might have or.

Q What were you told about people outside?

A That they were gentiles they call them, and I'm sure you've heard several of us talk about them being gentiles and that they were wicked and evil and that they will - all of them will try and hurt you in some way or another. So naturally you know many people have asked me since I've left why do people stay there. Why - like, why do they continue to stay there when they could leave, and it's they're scared.

[Transcript, 8 December 2010, p.50, l. 22 - p. 51, l. 6 (video affidavit)]

ii. Brent Jeffs:

A No exposure to the outside world. They didn't want any exposure because having exposure to the outside world meant that you might form a different opinion of the church. You might have any inkling of curiosity that you might want to you know find out what is really out there. So they kept us extremely secluded within those walls to keep our minds narrow and not being able to wander out and figure out what is out there.

[Transcript, 5 January 2011, p. 72, ll. 2 - 13 (video affidavit)]

g) The "Lost Boys" phenomenon;

i. Sarah Hammon:

A Any time you have a closed society living in polygamy you're going to go through these phases of lost boys and child brides. It's going to have to happen in order to maintain polygamy. You either go towards monogamy or you go through these phases, and I don't see it how it goes any other way. Because if one man has three wives there's two men who have none, and that's just what is going to happen. And, you know, girls and boys of the age that they start developing normal healthy relationships at 15, 16, 17 years old and start learning to relate to each other, the boys you know they can't - it's hands off because this girl

might belong - potentially belong to a 50-year-old man, and the girls the same thing. I can't be friends with him because I might get placed with somebody else and that is just going to break my heart. They never - not only are they told not to do it but they just - they never can anyway because it's just impossible to develop those relationships because they know they're a dead end.

Q And what happens with the boys, the ones that - that can't get wives?

A They end up - you know, I have a theory that even before they know - even before they become a lost boy as a group, lost boys as a group, that they have this sense already there is not going to be a partner for me. There will be no partner for me. This guy has five wives, this guy has seven, this guy has eleven.

Q And can they exist in your community without a partner?

A What normal man would want to? No, there's not an excess of single men in the community. They have to leave, and how devastating. And that's another thing that so many people think the women are the victims, but there's victims everywhere. There's a mesh of victims of this because the men have been taught since they were little boys that in order to go to heaven they have to have three wives. So here is a man that is damned just because of bad math.

Q Right. Right.

A How heartbreaking. How heartbreaking for these guys, you know, they have done nothing wrong except for believe this thing that their parents, the people that they trust most, have taught them. And they're going to hell because of bad math. It's wrong.

[Transcript, 8 December 2010, p. 80, l. 13 - p. 81, l. 23 (video affidavit)]

ii. Richard Ream:

Q And you were 19, is that right, Rich, when you left?

A I was 19 and a half, I was almost 20.

Q And you described to us some of the conflict you'd been having with Warren [Jeffs] right before you left. Is that really what triggered the decision to walk away entirely?

A No. Nothing ever triggers that. And that is a life changing decision believe it or not. When you're getting ready to slam the door on everything that is familiar to you, I mean, think about it, that's going to cause some upset up in here. It might make you question your own sanity a little bit down the road too. But there were a few contributing factors, not the least of which is that I felt like I was in a dead-end life, one, because of my previous sins, shortcomings, weaknesses. I was all but told point blank by Warren Jeffs that I was not eligible and would not be eligible for marriage in the FLDS because I had committed fornication. So there's a dead give-away right there, that you ain't going nowhere, you've pretty much climbed as high as you're gonna climb in this society,

which wasn't appealing to me. I wanted the wife and the children and all of that what have you.

[Transcript, 7 January 2011, p. 25, ll. 7 - 37 (video affidavit)]

iii. Carolyn Jessop:

My oldest son, Arthur, his best friend was a second cousin Sam. Sam Jessop. Sam was put out of the community at 15. He had been taken out of school when he was 10. His brothers that had also been put out of the community took him in, but they were dealing with a lot of their own issues trying to stabilize their own lives. They were not in a very stable place themselves. They tried to put Sam in high school to help him get an education. Sam was failing. He went to his counsellor. He said, I just don't get it. I don't get how to do this. He was failing in all his classes, so his brothers pulled him out of school and he ended up in the trenches and that was going to be his life. He and Arthur had a huge argument. Arthur went to Oregon for a year, to college at Eugene, and when he got back Sam and him had a falling out and a fight and they didn't talk for months. And I think it was just Sam could see Arthur was educating his way out of the trenches. Arthur wasn't going to be in the trenches the rest of his life and Sam felt trapped. Sam would build these beautiful retaining walls, but he didn't want to do it the rest of his life. He'd been working hard labour as far back as he could remember and so he told his brothers that after he built a wall he would never built another wall. He started trying to get an education. He spent a weekend studying for his GED, and then he hung himself.

My concern is that Sam is just one of hundreds of these kids that are just fighting to make sense of something that you can't make sense of, and the people in his life that he cared the most about, being his parents, didn't want to see him. And it's hard to make sense of being - your parents taking you out and throwing you out with the garbage. And a lot of these boys are finding their way through it and maybe not in the most positive of ways, but I think Sam is just more of an awareness that they're not going to all make it. They're not all going to find their way through it.

[Transcript, 12 January 2011, p. 56, l. 32 - p. 57, l. 27]

h) Training of children for obedience and a general culture of subservience;

i. Susie Barlow:

I do not remember a time in my life when I was not told that my role in life as a good priesthood child was to grow up and enter plural marriage. I was taught by my parents, Father, my school, and my church that as a girl I was to be completely obedient to Father, the male Priesthood leaders above him, and, when married, my husband. I was told that if I was good - which meant giving complete obedience without question - I would be saved when the end of the world arrived.

[Affidavit at para. 19]

ii. Brent Jeffs:

Q And what are the main teachings of the church?

A Following perfect obedience and perfect faith and basically doing everything that they ask no matter what without question without any opinion, nothing. You just follow their leadership and you have nothing more than - no opinions or anything. And so if they ask you to do anything it's because God told them and that you should just follow that with perfect obedience and faith.

[Transcript, 5 January 2011, p. 70, ll. 27 - 38 (video affidavit)]

iii. Howard Mackert:

And so decisiveness, personal, you know, just the ability to make a decision and stick with and see it through is just really void in that community. I see it in the young boys all the time, the ones that I've met.

I had a nephew that came up and lived with us for a year before we got him out on his own, and the guy couldn't make up his mind. There's tremendous indecision because he had been taught to just be this obedient servant and never have a thought of his own.

[Transcript, 16 December 2011, p. 75, ll. 18 - 30 (video affidavit)]

i) Girls raised to believe their duty and life's purpose is to have children;

i. Don Fischer:

They pretty much get married off and they're, you know - whenever - they don't go out and work. Guys go out and work. Girls get married off. So yeah, they pretty much all got married. I knew - I knew a few - I know a lot of them have left Colorado City, that community, but the rest of them are married. There's pretty much not a girl that's not married out there. They all marry them. The entire purpose of a female is to have kids. That's just how they treat them. Your whole purpose. Everything they teach you growing up is you - your whole purpose here, you're growing up, you're getting married to somebody, having as many babies as you can as fast as you can until you can't have babies anymore.

Their whole reason for existing is to produce kids for God, for the kingdom of heaven. For some reason they think they got to have a lot of people to do that. So that that's pretty much - the guy's whole purpose is to be this great man of God and have lots of wives and be a God when he goes to heaven; the woman's job is to make babies. They're not really treated as anything but cattle.

[Transcript, 13 January 2011, p. 25, ll. 7 -36 (video affidavit)]

ii. Teressa Wall:

A ...

Did we have kids before I wanted to? Definitely. I was - definitely I wanted - I didn't want to have children yet. I wanted to, you know, kind of do some things, but, you know, he -

basically that's your - that's your mission there is to get married and have kids.

Q And who tells you that?

A Oh, you know, just from classes in school they - in school in the Alpha Academy they used to have a class called child development and they would have all the girls go in there and talk about their duties as a wife, their duties as a mother. Their greatest mission here on this earth is to multiply and replenish the earth. Their priesthood head is God to them. You obey your priesthood head no matter what. It just - I don't know, it's just something that is taught very early on.

Q So as a woman could you choose not to have children?

A No. That is - you don't have a choice. That is your mission, unless you physically cannot have children, unless there's something wrong with you and you cannot have children, then no, you - that is absolutely not. And really they very much shun anybody that has even an idea of maybe not wanting to have children.

[Transcript, 8 December 2010, p. 29, l. 39 - p. 30, l. 25 (video affidavit)]

iii. Jorjina Broadbent:

A It seals into - the prophet goes into you're sealed for time and all eternity and you're to go and replenish, multiply and replenish the earth.

Q And that means go and have lots of babies?

A Have as many children as you can. My husband always said that it's not quality we're looking for, it's quantity, how many children we can have before this life is up. And I'm, okay ...

Q And how many children did you have?

A I had 12.

[Transcript, 7 January 2011, p. 55, l. 46 - p. 56, l. 10 (video affidavit)]

j) Trafficking of girls across the border for the purpose of marriage;

i. Truman Oler:

A lot of the people from Canada would go down to there. There was also a lot of families, girls from Canada getting married to - or getting - going to the States the guys down there and vice versa. Girls from the States being placed with guys in Canada. And there was lots of travel for people going down to visit family members that were down or the other way around.

[Transcript, 18 January 2011, p. 9, ll. 34 - 42]

ii. Ruth Lane:

Q And were you in Colorado City at that time?

A Yes.

Q Where was Winston?

A He was in Canada.

Q Was he the bishop at the time?

A Yes, the bishop.

Q And where did you marry him and what were the circumstances of the marriage?

A Crazy. Crazy. My parents were mad that I asked for him. And he had married two sisters the week before, which I didn't know that when I asked for him. I probably still would have asked for him, though. So I ended up driving back to Canada with him. We stopped in Salt Lake and got married on our way to Canada and headed on up to Canada.

[Transcript, 5 January 2011, p. 87, ll. 1 - 18 (video affidavit)]

k) Children sent to Canada to "cure" their rebelliousness;

i. Truman Oler:

A And also, I don't know if I mentioned, there was a fair amount of people coming up to work in Canada. They worked with - some of them came up to work with us. And as I have said too, a few times some people went down there just to work with different people, as I did for a few months. And a lot of those, when the people came to Canada to work, some of those were kind of like a reform mission. I don't know if I really talked about that. But that was a lot - that was a lot - or not a lot but some of the reason that they came to work. It was majority of the guys I guess that would have come to work. You know no girls or whatever. Yeah, that was some of the travels back and forth.

Q And so the reform measure that you just talked about, that was boys down in the States who would be sent up to Canada because they were being rebellious or acting up?

A Yes. Yes. They would come and work with and they would usually be placed with people who were - they would work with people who they thought were a strong person to guide them and basically watch over them constantly and make sure they're doing the so-called right thing.

[Transcript, 18 January 2011, p. 9, l. 43 - p. 10, l. 20]

ii. Teressa Wall:

And so after that happened my parents were very disappointed. I was banned from the property. I could never come back to the property again. I was a huge disgrace and they sent me back to Canada. And that is when I was sent to Sundre, Alberta to work in the post mill. And so from - pretty much from 11, 12 years old on I really didn't have a whole lot of contact with my family. Eventually my other siblings were sent to Canada, some of my younger brothers were sent to Canada as well to reform.

[Transcript, 8 December 2010, p. 25, ll. 30 - 42 (video affidavit)]

iii. Don Fischer:

Pretty much the people that were in Canada, that lived in Canada, they went to school in their homes - in their private school up there, but the boys who were shipped up there it was kind of a work camp, reform camp, keep them busy doing nothing but working night and day so they can't go off and be bad. So we didn't go to school, we just went and worked.

[Transcript, 13 January 2011, p. 15, ll. 29 - 38 (video affidavit)]

l) Devaluing of education;

i. Susie Barlow:

After marrying Leonard I was unable to complete the ninth grade. It was important for me to finish high school, but I found that impossible as a young wife, expected to obediently take care of a FLDS household. My experience was very typical for an FLDS child. In fact I know very few FLDS boys who were able to go beyond eighth grade because they had to go to work to earn money for their families and the Prophet. Most girls don't go much past ninth grade, and some don't make it that far if they get married.

[Affidavit at para. 18]

ii. Carolyn Jessop:

Q Now, you mentioned you were originally pulled out of school at 8th grade. Was that typical for the girls in your community?

A Oh, very typical. Some of them got pulled out at 12, 7th grade. I mean, education is not really a necessity for a woman. The thing that was really important is understanding how to become a mother, how to raise children, how to raise obedient children, and to make sure that your heart's in the proper place and where it needs to be. Those are the things that really matter. And sometimes fighting for an education is seen as absolute selfishness. It's also viewed as - or can be viewed as contamination, because if you go out into the world to get a college education what - that to me was always referred to as you just walked through a barnyard and you came back into the house with manure all over your feet. And everybody knows it. Everybody knows you've been contaminated in those areas.

[Transcript, 12 January 2011, p. 8, ll. 10 - 29]

iii. Richard Ream:

Q And how far did you get to in school in Colorado City?

A I finished 6th grade. When I wanted to enroll for 7th, that wasn't permitted. My dad didn't allow me to do that, because he was concerned about me having contact with the opposite sex, which is strictly forbidden.

Q So he wanted you to get out of an environment where there was that temptation?

A Where there were girls, yes.

Q And what did he have you do then instead of going to school?

A Work.

[Transcript, 7 January 2011, p. 7, ll. 25 - 39 (video affidavit)]

m) Lack of reproductive control;

i. Carolyn Jessop:

But my concern after that pregnancy and especially with the other four where I got so sick with each pregnancy and I was terrified during that pregnancy I wasn't going to live through it, and so I went to Merril, because in the FLDS a woman doesn't have a right to choose whether she can have children. That is up to a man and he is inspired by God if there's a spirit that is supposed to be born to that woman. And if he sees you as worthy to be a mother in Zion and you refuse, it is considered a sin unto death. So it wasn't my place to choose to not have more children because I was having difficult pregnancies. That was - that was a choice that my husband would have to make and he held within his power. He could make that decision.

[Transcript, 12 January 2011, p. 27, l. 34 - p. 28, l. 2]

ii. Brenda Jensen:

A They felt like at the time [16 years of age] - in my experience they felt like the girl was mature enough to start raising a family, that she would have the length and time of her birthing span so she could produce more children, and all of this is for the glory of God. And it was very important that she start as soon as possible.

Q Now, just to follow up on what you've just said there about expanding the birthing time, were you taught that a woman could say no to having more children? Or to having children?

A Into having more children?

Q Or having children period.

A No, it was your duty. You were to - it was a duty. For some reason that you wouldn't be able to conceive you - that's where the caste system came in heavy because you were unworthy for some reason. God saw you as an unworthy person. You had no choice. You were to have children as fast as the good Lord saw fit.

[Transcript, 17 January 2011, p. 11, l. 30 - p. 12, l. 2]

n) Inequality of women;

i. Carolyn Jessop:

Q Where do woman fall on the equality scale?

A In the community I grew up with as women we didn't really have a lot of rights. I mean, I grew up feeling like I was a commodity and I felt like that once I would be married, I would be a possession.

[Transcript, 12 January 2011, p. 55, ll. 39 - 44]

ii. Jorjina Broadbent:

Q And what about the role of women within the FLDS? What are you taught as part of the role women are to take?

A We are to be submissive and obedient and give ourselves to our husband. And we have no opinion, we're not supposed to have a choice in anything, we're just supposed to do what our husbands ask us to do to get to the celestial kingdom.

[Transcript, 7 January 2011, p. 54, ll. 17 - 25 (video affidavit)]

o) Rigorous segregation of boys and girls;

i. Brent Jeffs:

Q And were girls in your classroom too? Were the boys and girls together?

A In the beginning of school, yes. There was boys and girls in the same class. And so, you know, that was - that seemed okay. As the years went on I think it started around 4th grade is when they started separating the classes from boys to girls. They noticed as in natural human thing for boys' curiosity towards girls or girls' curiosity towards boys, so they started separating the classes and then started teaching things like girls are snakes, treat them as snakes, you know, don't talk to them. Don't affiliate yourself with them at all. And that you are supposed to wait until you're married and that's the only time you can basically -

Q Even talk to them.

A M'mm-hmm. We weren't even allowed to talk to them in school.

Q And what happened if you did?

A We got into trouble and sent up to the principal's office. From 3rd grade on for me I was constantly up in his office because I liked girls and that didn't stop me. So I wrote love letters and still talked to them and the consequences of going up to his office meant nothing to me after awhile because it was all just a blur.

[Transcript, 5 January 2011, p. 72, ll. 14 - 45 (video affidavit)]

ii. Jorjina Broadbent:

Q What was wrong with talking with boys?

A Boys are like snakes, they'll bite you and they're poison, and they will take a girl's virginity and shoot it all to hell.

Q So the girls are taught and the boys are taught that they're not to interact with each other?

A No, they're not supposed to talk to each other. I mean, if they're in school and they have to hand a paper to somebody, that's different. But no interaction at all. You're not even supposed to have eye contact or even wave at them. They were just told that boys are snakes and girls are snakes, you're just supposed to leave them alone.

Q And if a boy was seen waving at a girl or vice versa, what would happen?

A Usually the boys were kicked out, or they were told that their father was supposed to watch them really closely and if they did it again they were kicked out. It just depends on the circumstances, whether they had been going out at night and sneaking out and dad didn't know about it or anything. And that's what my boys were doing. I didn't even know they were sneaking out at nights and going and watching videos and movies and all this stuff, until I've been out now and I'm like, "You sneaky little guys. Here I got in trouble for not knowing where you guys were and there you were."

[Transcript, 7 January 2011, p. 64, l. 15 - p. 65, l. 1 (video affidavit)]

[668] The evidence of witnesses from fundamentalist Mormon groups other than the FLDS is to similar effect.

[669] Rowena Erickson was raised as a member of the Kingston group. She described the isolation - social, religious and emotional - of living in the community. The spiritual and physical aspects of members' lives were controlled by the leadership. Complete obedience was required. Members were forbidden to interact with people outside the community. Girls were generally pulled from school by age 14. While boys were often allowed to finish high school, the leader chose their career paths.

[670] Ms. Erickson was taught from the time of her first memories that she was to prepare herself to marry whomever the Lord wished her to marry, and that it was only through obedience to this and other directives that she would get to Heaven. Her sister married a man she loved. Seven years later, Ms. Erickson was married to the same man. She had eight children with him; her sister had six.

[671] Ms. Erickson left the group in 1992.

[672] John Llewellyn joined the Apostolic United Brethren, which he considered the most open and intellectual of the fundamentalist Mormon groups, as a married adult. He came to have three wives but in fairly short order became disenchanted with Mormon fundamentalism.

[673] In his affidavit, Mr. Llewellyn speaks of the challenges he faced in maintaining a household with his three wives, whom he describes as "intelligent, outspoken women". He goes on to state (at paras. 15 - 16):

> I understood that I could exert priesthood power over my wives, but did not. Candidly, power and the idea that more than one woman would like to be one's wife tends to inflate one's ego, with some, more than others. In my experience, I observed many of my peers enjoying rebuking or ordering their wives around in the presence of others. I refused to be like the others.
>
> During my time as a polygamist, I found that, almost without exception, each polygamous husband had a "favourite wife", who was dominant, and secondary wives. The wives were not equal, and were not treated equally. Over the 20 years in which I was associated with the AUB, I was not aware of a single family, including the families of key priesthood members, that did not have serious problems. Many women had serious emotional problems. There were also constant rumors of child molestation in the community.

[674] Like members of the other fundamentalist Mormon groups referred to so far, Mr. Llewellyn also speaks of the requirement for absolute obedience to the leadership, and to the physical and intellectual isolation of the community for the purposes of control.

[675] Mr. Llewellyn's disillusionment with the AUB eventually led to the dissolution of his family.

[676] Against the evidence of these witnesses who related extremely negative experiences with polygamy is that of positive adherents. Two who testified in these proceedings are Mary Bachelor and Alina Darger.

[677] Ms. Batchelor is an independent fundamentalist Mormon who resides in a suburb of Salt Lake City. She entered into a plural marriage as a second wife a few days before her 21st birthday. Of her relationship with her sister wife, she explained there were positive bonding moments, as well as challenging times. After three years, the first wife left the marriage. Ms. Batchelor and her husband then married civilly.

[678] Ms. Batchelor described herself as an "involuntary monogamist", and spoke of her aspiration to live in a plural marriage again. She said of the practice:

> Plural marriage is a very vital and intricate part of my belief system, and I do not believe that I can achieve the fullness of my potential as a woman and as well as a daughter of God without it. It's a very meaningful part of my belief system.
>
> [Transcript, 20 January 2011, p. 5, ll. 41 - 45]

[679] Ms. Batchelor does not accept placement marriage, believing choice and consent in marriage to be important. In her case, she chose her marriage and the individuals involved.

[680] Ms. Batchelor has seven children. The eldest attend community college, while the others are at various grades in the public school system.

[681] Ms. Darger is an independent fundamentalist Mormon who was raised in a family that practiced plural marriage. Her father had two wives and 32 children. The family initially lived together but split into two separate households next door to each other in Salt Lake City as their numbers grew.

[682] Ms. Darger graduated from the local public high school. She has since been employed in a number of different capacities, including as a mortgage loan processor and working for a medical supply company. She currently runs a residential and commercial cleaning business with a sister wife.

[683] Ms. Darger practices plural marriage; her husband has three wives. Asked how she came to the decision to enter into a plural marriage, she explained:

> It was more of a process, because growing up, of course, I - you know, I lived in a plural family and I loved that experience and I thought it was really amazing, and I always felt like I had somebody close and to care for me.
>
> And then as I got older, I would talk about it with my siblings and say, what do you think? Will you - do you want to do it or do you not want to live this way? And I always felt I wanted to do that. And in talking with them, I did realize that there are a lot of sacrifices to make, and even watching my parents, and that it would be a harder road than if I had just chose a monogamous marriage, but I felt like, you know, growing up, what was so rewarding to me and what was so special to me, I wanted to have that in my family and continue on with that.
>
> [Transcript, 19 January 2011, p. 57, l. 47 - p. 58, l. 16]

[684] Ms. Darger was 20 when she married her husband, who was also 20 at the time. His other two wives are biological sisters. Like Ms. Batchelor, Ms. Darger does not believe in placement marriage.

[685] Ms. Darger explained that the four adults in the family endeavour to make important decisions affecting the household through discussion and mutual agreement. When the issue concerns the children, each has input but the ultimate decision is made by the father and the biological mother.

[686] There are 24 children in the household. Seven are Ms. Darger's. One of her children is presently in college, one is being home schooled and the rest attend public school. Despite the large number of children, Ms. Darger testified that her husband makes a point of taking time to know each of his children individually.

[687] Anne Wilde is another independent fundamentalist Mormon who gave evidence in this proceeding. She is the media and communications director of Principle Voices, a non-profit agency whose mission is "to (1) educate others about polygamous families and their culture; to (2) encourage empowerment of individuals and families from the polygamous culture; and to (3) provide crisis referrals and responses to those in the culture" (at para. 1).

[688] Ms. Wilde was raised in the mainstream Mormon Church. She married her husband of over three decades as his second wife at the age of 33. (An earlier marriage had ended after nine years.) Over a period of several years, her husband married a number of other women with her consent. Although they chose to live in separate houses, primarily because of the secrecy of their lifestyle, she says they "got along just fine". Ms. Wilde states that she has never regretted her decision to be a plural wife: "My husband and I had an extremely happy, successful and productive life together for 33 years" (at para. 11).

[689] Ms. Wilde's husband was a prolific writer of books with respect to Mormon Church history and doctrine. Ms. Wilde herself has been actively involved in educating about polygamy. She, along with Ms. Batchelor and Marianne Watson, published *Voices in Harmony: Contemporary Women Celebrate Plural Marriage* (Cedar Fort, 2000), which contains anonymous personal accounts by 100 plural wives. A few years later Ms. Wilde became co-

founder of Principle Voices. She was also managing editor of *Mormon Focus* magazine. She is an advocate for the rights and safety of women and children in plural marriages, and has worked with the Utah Attorney General's office in this capacity.

[690] Drawing upon this background, Ms. Wilde offers the following summary of her opinion in her affidavit (at para. 5):

> The following is a summary of my true opinion on the issues addressed herein.
>
> a. Plural wives are diverse, independent and balanced individuals who find meaning and fulfillment in their chosen lifestyle.
>
> b. Plural marriage is not for everyone; it is a difficult, challenging lifestyle, but one that can be richly rewarding in proportion to the difficulties.
>
> c. Plural marriage is a matter of personal choice, both getting married and leaving the marriage.
>
> d. Those who participate in plural marriage from the LDS [Latter Day Saints] tradition do so as a matter of deeply held religious belief, rooted in eternal principle, and with eternal significance.
>
> e. Besides the eternal blessings believed to flow from the righteous living of this principle, there are earthly blessings for the women involved:
>
> i. Selflessness, organization, communication, thrift, humility and charity
>
> ii. Individual responsibility of faithful wife, growing closer to Heavenly Father, instead of always focusing on her husband, waiting for him to make her happy
>
> iii. Rich relationships among sister wives
>
> iv. Greater autonomy for the women who participate
>
> v. Expanded support networks.
>
> f. The people within this culture are afraid to report crimes and come forward because criminalization of the practices drives people underground.
>
> g. If the goal is to ensure that women and children are safe and empowered, that goal is not furthered by demonizing and criminalizing people.

[691] Numerous other witnesses gave positive accounts of their experiences either being raised or living in polygamous families. Some of the themes that run through this evidence include:

a) Growing up in a polygamous household was a positive experience;

i. Witness No. 8:

> I grew up in a large plural family. I have many mothers, a myriad of brothers and sisters, and one father. And while it would be years before I would hear terms like "traditional family" and the "nuclear family", I grew up in what I would term the "perfect family". Is that to say we were perfect? No, just that together we had something, that as a child, I instinctively knew was special - a camaraderie and bond, a richness of people, an "unloneliness" that when I became an adult and made forays into the broader society I saw was missing in so many of the lives of those I got to know (at para. 7).

b) Polygamous families are victims of inaccurate stereotypes;

i. Christine Wayman:

> Growing up in a polygamous family did not make me a deprived person, like some people have thought it does. I have parties, play volleyball, soccer and basketball, go to ball games, watch television and have a computer. I received an education and am like any other American citizen (at para. 18).

c) Women have freedom and autonomy;

i. Jennifer Zitting:

> In addition, while living in a polygamist community, I met women who had the freedom to pursue high powered careers. Many women in the community held masters degrees in teaching and special education. Quite a few women had nursing degrees, the nurse practitioner who ran the clinic was a woman, and there was even a female lawyer. Even the women who stayed home accomplished feats that would amaze the average woman. I know one who raised 24 children, and did it well. I have noticed that these women have freedom that monogamous wives don't have because they are not 100% responsible for the care and feeding of their husbands. Some of the women don't take advantage of that freedom, but others of them take that opportunity and run with it (at para. 6).

d) Abuse is the exception rather than the rule;

i. Witness No. 12:

> I have never seen an FLDS male abuse a woman; I've only seen love and kindness. Perhaps I've been guarded from it. If I ever felt myself or one of my children were being abused, I would turn immediately to the bishop, to get help for the situation. But, the police could be an option. I am aware of one situation where an FLDS woman has been unhappy, has sought help, and received it. One of my sister wife's daughters went to the bishop for such an issue and the daughter, along with her children, is now living with me and my sister wives. The bishop is now dealing with the situation, but this daughter is welcome to live with us as long as she wants (at para. 17).

ii. Muslim Community

[692] There is not a great deal of evidence regarding the harms of polygamy in the Muslim community in the United States in this reference. However, what evidence exists is generally consistent with the evidence from other contexts.

[693] Two expert witnesses submitted affidavits providing evidence of these harms. The AGBC tendered the affidavit of Dr. Dena Hassouneh. Stop Polygamy in Canada tendered the affidavit of Dr. Susan Stickevers. Neither of these affiants was called upon to testify in person.

[694] Dr. Hassouneh, as mentioned previously, is an Associate Professor with the Oregon Health & Sciences University School of Nursing. Her research and practice has focused mainly on the mental health impacts of trauma on women from marginalized populations. As part of this work she has conducted a study into the impact of abuse on American Muslim women. The AGBC requested that she provide a report explaining, based on her research, the impacts of polygamy on Muslim women who have experienced abuse in polygamous relationships, as compared to women who have experienced abuse in monogamous relationships.

[695] I have already referred to the results of Professor Hassouneh's literature review. In her report, Dr. Hassouneh considers the applicability of the themes that arise in the literature to examples from her clinical practice. She sets out three brief case studies and summarizes that symptoms including depression, anxiety, hostility, anger and betrayal were reported by the women. Problems with marital satisfaction, paternal investment and relationship quality were also apparent. While acknowledging that the extent to which these patterns generalize to Muslim women living in North America is unknown, Dr. Hassouneh speculates that many of the patterns observed in the literature may also commonly occur in North America.

[696] Dr. Hassouneh also conducted a qualitative study into American Muslim women's lived experiences with abuse, which formed the basis of an article entitled "Polygamy and Wife Abuse: A Qualitative Study of Muslim Women in America" (2001) 22 Health Care for Women International 735. Her study sample included 17 Muslim women from diverse ethnic backgrounds who had either experienced abuse personally or had knowledge of the abuse experiences of other American Muslim women. Common themes relating to polygamy which emerged include husbands marrying another wife without informing the other wife or wives;

emotional suffering and distress; unjust treatment; favouritism; abuse by co-wives; abuse by husbands; and polygamy's detrimental effect on children.

[697] Dr. Stickevers is Chief of Physical Medicine & Rehabilitation Service at the Department of Veteran Affairs Medical Center in Northport, New York, and also the Residency Program Director & Assistant Clinical Professor of Physical Medicine & Rehabilitation at the State University of New York at Stony Brook. In her medical practice in New York City in the 1990s, she treated 18 Muslim women who had been in polygamous relationships. These women were all immigrants from Pakistan or various parts of Africa.

[698] Only one of these eighteen women had given her consent to being a polygamous wife. In many cases, the husbands went on vacation to Pakistan or Africa and announced they had married another woman upon their return.

[699] As part of her pain medicine assessment of patients, Dr. Stickevers obtains psychometric testing. The testing of her patients in polygamous marriages revealed higher rates of depression, anxiety, somatization and lower self-esteem than women in monogamous relationships. Seventeen of her 18 polygamous female patients scored high for levels of depression, somatization, and anxiety. Dr. Stickevers observed that this is significantly higher than the prevalence of these conditions in her monogamously married female patients.

[700] The harms of polygamy reported by Dr. Hassouneh and Dr. Stickevers are consistent with those identified in other contexts. Particularly noteworthy are women's negative experiences generally, conflict with co-wives, and harm to children.

[701] I note, however, that Dr. Hassouneh and Dr. Stickevers based their conclusions on interactions with relatively small numbers of women (17 and 18 respectively). Perhaps more importantly, the participants in their studies were not selected from a general population of women in polygamous relationships, but from a population of women who had endured some sort of harm.

b) Polygamy in Canada

i. Bountiful

[702] I now turn to the Canadian experience with polygamy and it is overwhelmingly centered in the community of Bountiful.

[703] Speaking to the positive aspects of life in Bountiful, we heard evidence from a number of witnesses from the community who took advantage of the anonymity order I made earlier in these proceedings. Witnesses Nos. 2, 3, and 4, in particular, took the stand. They spoke to their early marriages (16 and 17 respectively in the case of No. 2 and No. 4, 15 in the case of No. 2's daughter); their desire for education, which they say is encouraged; and generally their satisfaction with life in Bountiful and the institution of plural marriage.

[704] Witness No. 1 described the benefits of having sister wives (at para. 8):

> I had five sister wives and I loved and still love all of them. Of course there were many children, and some of the ladies had to work outside of the home to help support our growing family. I was one of the working wives, and I will say that I appreciated more than I ever can express when my sister wife or wives would tend my toddlers, do my washing, and have a clean home and a delicious supper waiting when I returned from work. Just not having to wake my littlest children before I went to work was a great blessing. When I returned I would often take the oldest children and do some of the outside chores or yard and garden work while the home mother would oversee the inside jobs of cleaning up and getting ready for bed. Of course our children helped us, but we were so well organized that in a pinch we could clean every corner inside and out in an hour. If some of the ladies worked a later shift, those at home would try to get the children ready for bed and have story time. It was a good life, especially since each of us had things we liked to do. One mother loved to swim and would take all of the children every good day while another could sew or concoct her favourite stew or salad.

[705] Witness No. 2, who is the second of her husband's two wives, described her relationship with her sister wife:

> A. My sister wife and I have lived - have lived at times in the same home. We've lived in different homes. We are now living again in the same home. I feel that we are both very committed in having a good relationship with each other, and conflict arises, yes, but I feel like that we can deal with it in a reasonable manner.
>
> Q. Well, since you've raised the subject.
>
> A. Yes.
>
> Q. How are conflicts dealt with in your family?
>
> A. Well, with discussion and negotiation and conciliation.

[Transcript, 25 January 2011, p. 6, ll. 23-34]

[706] There is a certain disconnect between their positivism and some aspects of these witnesses' realities. Witness No. 2 confirmed that no one from the community has graduated to become employed in any of a multitude of professional careers. Witness No. 3 is now attending summer sessions at Southern Utah University. She values education highly but admitted that because Grades 11 and 12 at BESS are not certified, she did not receive her Dogwood diploma. Witness No. 4, with a calm that startled, related that she was born and raised in the FLDS in the United States and received an "assignment" by the Prophet to marry a Canadian stranger on a half-hour's notice. She was taken by car on an 18-hour drive north across the border with a false note from her parents listing the purpose of entry as visiting an aunt. The whole process was repeated with a girl who became her 15 year-old junior wife some six months later.

[707] One theme that resonates in the evidence of the anonymous Bountiful witnesses is the stigma that attaches to their criminalized lifestyle and the insularity this breeds. As Witness No. 1 states (at paras. 11 - 12):

> I feel that the criminal prohibition against polygamy is totally unfair. We have been told many times that it isn't having multiple relationships with women that we are being prosecuted for, it is making a commitment to care of one another and any resulting children. We are being singled out and ridiculed for having children instead of aborting them, and taking care of them once we have them. We see instances around us in the greater community where 12 and 13 year old girls become pregnant and no media even considers it newsworthy, but let an FLDS girl have a baby at 16 and we have a whole inquiry upon us. It is hard to teach our children in school that Canada does not believe in discrimination and that all Canadians are free to believe whatever they wish when we are attacked for our beliefs. We are intelligent beings and even our little children know that there is no justice for us because we are those terrible FLDS people. We ladies cringe if one of our children has an accident. Woe betide the polygamist child who breaks his leg. Do we dare take him to the hospital? Will the cry of abuse be raised? What if we wait several hours hoping against hope that the leg is not broken and then take him in? Will the cry of neglect be cast at us?
>
> We are all affected by the stigma that is cast upon polygamists or at least upon FLDS polygamists. We hesitate to associate among the community at large unless of necessity. We are all weary of being everywhere misrepresented. We are all poorer; we have to pay so very much for lawyers. Perhaps we could send more children to university if all our money was not spent in legal fights. And there is always the very real fear in my mind that children could be taken away from their parents and that their father and maybe even their mother could end up in jail.

[708] Witness No. 6 is a man in his 40s who left the Bountiful community in the late 1980s. He offers this evidence about his experience (at paras. 6 - 13):

> I was born into a family with a father and many mothers in Bountiful. I grew up in a large home with 35 brothers and sisters, of whom 9 were my full biological siblings.
>
> The household was organized with everyone having a place and a role in the family. These roles were not only identified with the adults but the children had important positions within the household.
>
> I attended the Bountiful school. In 1988, I decided to leave the community and strike out on my own. There were many reasons that I left the community but one of the main reasons was that I sought a less rigid lifestyle. I do not like to follow others. I prefer to make my own decisions and I did not want to follow the strict rules of the church.
>
> After leaving the Bountiful community I have kept in regular contact with many of my siblings still living in Bountiful. I also maintain a close relationship with my mother and I see her fairly regularly.
>
> I do respect the privacy of my family and I know that there are some of my brothers and sisters who do not agree with my lifestyle and choices. I respect their views and I do not impose myself on any of them who may be uncomfortable in my presence.
>
> Since leaving the community of Bountiful, my views about polygamy have not changed. I was taught that the marriage covenant was sacred and everlasting. I still believe that to be true.
>
> The FLDS is not my choice but I believe that religion is a personal choice. I believe that the only people who have the right to chose what goes on in Bountiful are the individuals who live there.
>
> I chose to leave the community on my own volition and to lead my own life. I have never seen or heard of boys being driven from the Bountiful community. In my observation boys, myself included, leave the community because they do not wish to abide by the strict rules of behaviour imposed by the church on all its members.

[709] I will now concentrate on several aspects of the evidence led with respect to harm in connection with the community: teen pregnancy, the movement of young girls between the United States (largely Hildale/Colorado City) and Bountiful, and educational outcomes.

- **Young Mothers**

[710] Among the most serious harms arguably associated with polygamy are the early sexualization of girls, early and frequent pregnancies, and marriage to older men. I have reviewed some of the expert evidence on these issues above. Does the evidence from Bountiful tend to confirm this to be the case?

[711] In early 2005, the British Columbia Vital Statistics Agency [BCVSA] conducted a review of teen pregnancy in Creston, the local health area incorporating Bountiful. As related in the affidavit of Dr. Perry Kendall, the Provincial Health Officer for British Columbia, that review indicated a higher than expected number of births to mothers between the ages of 14 and 18. The BCVSA then attempted to isolate the percentage of teenage births from Bountiful by identifying five family names closely associated with the community and searching for birth records featuring those names.

[712] What that analysis revealed was that while Bountiful likely accounted for 8 - 24% of the Creston area population, the five identified Bountiful families alone accounted for 38% of the area's teen pregnancies. It also revealed a significant age gap between the mother and father in these pregnancies, with 28% of the declared fathers being more than 10 years senior and roughly half being five years senior.

[713] In Dr. Kendall's opinion, more information was necessary before precise conclusions could be drawn from these results. In particular, he would have liked information regarding the number of girls aged 14 - 18 in Bountiful, as an over-representation of teenage girls in the community could account for, or at least offset, the higher number of pregnancies. In the end, he was only able to conclude that the statistics regarding teen pregnancies showed that the rate in Creston was higher than the provincial average, likely as a result of a higher rate in Bountiful.

[714] Over the objections of the *Amicus* and others, I admitted the evidence of Bruce Klette, the Director of Information Technology Services at the BCVSA. While this evidence was tendered by the AGBC well after the Court-imposed deadline for evidence, Mr. Klette explained the difficulties he faced in producing his analysis, in particular, the need for him to create new search functions specifically for the project. As well, the evidence speaks to issues raised in the evidence of Dr. Kendall concerning teen pregnancy in Bountiful. That evidence was filed within time and there is no doubt that Mr. Klette's analysis adds to that work and improves upon it.

[715] While there are issues with Mr. Klette's methodology (the AGBC frankly so concedes), these are inevitable given the novelty of his work and these weaknesses go to the weight of the evidence. In that regard, I do not treat Mr. Klette's evidence as definitive on the points he makes.

I view it rather as confirming the trends on these issues in Bountiful and the general expert view of what one might expect to see in a polygamous community.

[716] In brief, I have admitted the evidence because it is probative of facts in issue and I can conceive of no real prejudice to those who oppose its admission.

[717] It is to be stressed that Mr. Klette, like Dr. Kendall, has not been able to address the issue of the teen pregnancy rate in Bountiful because of the difficulty in obtaining reliable denominator population data for the community.

[718] That said, Mr. Klette and his staff aggregated electronic birth registration data for three cohorts: Cohort 1 - All British Columbia Births; Cohort 2 - Creston and Cranbrook LHA births (the local health area that includes Bountiful); and Cohort 3 - Bountiful Births.

[719] The cohorts cover births from 1986 through 2009.

[720] It was in constructing Cohort 3 - Bountiful Births that Mr. Klette had to resort to his imaginative approach. That Cohort consists of 833 births which were identified as being within Bountiful through a process of deduction from a number of sources of information, including fathers' surnames and mothers' usual places of residence characteristic of the Bountiful community, and distinct family names arising out of a review of records from the two Bountiful schools.

[721] I have reproduced the totals for each Cohort broken down into ten columns with descriptive headings:

Cohort 1—British Columbia Births

1	2	3	4	5	6	7	8	9	10
year	all births	teen births	% teen births	mother residence outside Canada	% mother residence outside Canada	mother born outside Canada	% mother born outside Canada	all births: average age difference b/t parents	teen births: average age difference b/t parents
1986	42154	1363	3.2	8	0.0	9352	22.2	*	*
1987	41948	1322	3.2	143	0.3	9396	22.4	*	*
1988	43207	1467	3.4	129	0.3	10023	23.2	*	*
1989	43921	1531	3.5	149	0.3	9941	22.6	*	*

1990	45734	1535	3.4	193	0.4	10736	23.5	*	*
1991	45726	1598	3.5	171	0.4	10904	23.8	*	*
1992	46309	1597	3.4	131	0.3	11821	25.5	*	*
1993	46216	1492	3.2	145	0.3	12390	26.8	4.0	4.9
1994	47130	1513	3.2	146	0.3	13301	28.2	4.0	4.5
1995	46959	1548	3.3	134	0.3	14037	29.9	3.9	4.3
1996	46202	1359	2.9	141	0.3	14142	30.6	3.9	4.3
1997	44618	1317	3.0	94	0.2	13884	31.1	4.0	4.4
1998	43059	1229	2.9	65	0.2	13547	31.5	4.8	4.1
1999	41973	1182	2.8	88	0.2	13419	32.0	4.4	4.1
2000	40692	1069	2.6	72	0.2	13602	33.4	4.6	12.7
2001	40554	1031	2.5	58	0.1	13286	32.8	3.9	4.2
2002	40116	933	2.3	75	0.2	13404	33.4	4.4	4.3
2003	40512	783	1.9	86	0.2	13274	32.8	4.0	4.2
2004	40531	801	2.0	74	0.2	13496	33.3	4.0	4.3
2005	40835	742	1.8	55	0.1	13535	33.1	3.9	4.1
2006	41763	806	1.9	50	0.1	13665	32.7	3.9	4.1
2007	43684	858	2.0	53	0.1	14379	32.9	3.9	4.2
2008	44362	814	1.8	59	0.1	14306	32.2	3.9	4.1
2009	45123	850	1.9	67	0.1	14891	33.0	3.8	3.8
Total	**1043328**	**28740**	**2.7**	**2386**	**0.2**	**304731**	**29.3**	**4.6**	**6.6**

Cohort 2—Cranbrook / Creston LHA Births

1	2	3	4	5	6	7	8	9	10
year	all births	teen births	% teen births	mother residence outside Canada	% mother residence outside Canada	mother born outside Canada	% mother born outside Canada	all births: average age difference b/t parents	teen births: average age difference b/t parents
1986	565	23	4.1	0	0.0	49	8.7		*
1987	511	21	4.1	6	1.2	55	10.8	*	*
1988	515	28	5.4	6	1.2	51	9.9	*	*
1989	489	18	3.7	3	0.6	53	10.8	*	*
1990	453	19	4.2	2	0.4	44	9.7	*	*
1991	519	25	4.8	3	0.6	43	8.3	*	*
1992	455	20	4.4	7	1.5	52	11.4	*	*
1993	479	18	3.8	9	1.9	56	11.7	4.4	5.3
1994	478	27	5.6	2	0.4	51	10.7	4.1	5.5
1995	437	24	5.5	2	0.5	47	10.8	3.9	5.7

1996	428	17	4.0	3	0.7	39	9.1	4.1	3.8
1997	465	29	6.2	6	1.3	44	9.5	3.9	3.7
1998	437	21	4.8	5	1.1	38	8.7	4.2	5.3
1999	478	32	6.7	11	2.3	50	10.5	4.7	4.2
2000	386	26	6.7	5	1.3	41	10.6	3.7	6.2
2001	417	41	9.8	8	1.9	56	13.4	4.5	4.5
2002	439	20	4.6	16	3.6	55	12.5	4.4	8.5
2003	457	23	5.0	9	2.0	54	11.8	4.0	4.9
2004	436	21	4.8	5	1.1	51	11.7	4.2	4.9
2005	469	11	2.3	3	0.6	64	13.6	4.5	3.3
2006	491	17	3.5	5	1.0	53	10.8	4.3	4.2
2007	540	22	4.1	4	0.7	48	8.9	4.2	3.7
2008	559	27	4.8	2	0.4	65	11.6	4.0	3.3
2009	587	27	4.6	4	0.7	58	9.9	4.1	3.8
Total	**11490**	**557**	**4.9**	**126**	**1.1**	**1217**	**10.6**	**4.2**	**4.7**

Cohort 3—Bountiful Births

1	2	3	4	5	6	7	8	9	10
year	all births	teen births	% teen births	mother residence outside Canada	% mother residence outside Canada	mother born outside Canada	% mother born outside Canada	all births: average age difference b/t parents	teen births: average age difference b/t parents
1986	15	2	0	0	0	5	33.3	*	
1987	14	0	0	0	0	4	28.6	*	
1988	24	1	4.2	0	0	7	29.2	*	
1989	12	1	8.3	0	0	3	25	*	
1990	16	1	6.3	0	0	6	37.5	*	
1991	25	4	16	0	0	6	24	*	
1992	16	0	0	0	0	9	56.3	*	
1993	28	1	3.6	0	0	6	21.4	4.5	1
1994	30	2	6.7	0	0	8	26.7	5	3.
1995	28	2	7.1	1	3.6	11	39.3	7	20.
1996	27	0	0	2	7.4	9	33.3	7.6	
1997	37	3	8.1	2	5.4	14	37.8	7.1	
1998	28	2	7.1	3	10.7	10	35.7	9.1	11.
1999	52	8	15.4	7	13.5	26	50	8.7	5.
2000	58	16	27.6	7	12.1	28	48.3	8.4	9.
2001	61	16	26.2	6	9.8	34	55.7	7.8	
2002	60	10	16.7	12	20	31	51.7	9.1	12.

2003	56	7	12.5	6	10.7	22	39.3	9.6	
2004	48	3	6.3	3	6.3	28	58.3	8.1	
2005	49	3	6.1	1	2	27	55.1	9.4	4.
2006	41	2	4.9	2	4.9	21	51.2	8.5	
2007	40	1	2.5	3	7.5	23	57.5	9.5	
2008	34	0	0	2	5.9	16	47.1	9.5	
2009	34	0	0	1	2.9	19	55.9	9.2	
Total	**833**	**85**	**10.2**	**58**	**7**	**373**	**44.8**	**8.1**	**8.**

*For the majority of birth events that occurred prior to 1993, the electronic registry does not capture the father's age or birth date, reducing the accuracy of this measure in those years. Thus, Mr. Klette did not include any value.

[722] I note these trends as they pertain to Bountiful: the percentage of teen births is significantly higher than in the other Cohorts; the percentage of mothers resident/born outside Canada is significantly higher; and, the average age difference between parents is significantly higher.

[723] The *Amicus* effectively demonstrated that other isolated communities in British Columbia evidence significant teen births. But what is telling in the evidence here is the comparison of Bountiful to Cohort 2, its neighbours.

[724] As well, the prominence of mothers in Bountiful born outside British Columbia is startling. 126 of the 215 recorded mothers reported places of birth outside the province. Of these, 73 listed their place of birth as Hildale and two as Colorado City. Thirty seven of the 126 had teen births; 32 of those 37 were from Utah, and one was from Arizona. The fact that a large number of girls and women are moving from the FLDS communities in Utah/Arizona to Bountiful is starkly demonstrated.

[725] FLDS records seized during the raid on the YFZ Ranch in April 2008 also graphically demonstrate the movement of girls and women across the border and the youth of some of the girls involved. The AGBC tendered a number of marriage records for the period 1990 - 2004 through Nick Hanna, a Texas Ranger involved in the execution of search warrants at the compound. When these records are correlated with British Columbia birth registration records, we see:

- Child A - Born in the Bountiful community; married in 2004 at age 13 in Colorado City, Arizona;
- Child B - Born in the Bountiful community; married in 2005 at age 12 at the YFZ Ranch, Texas;
- Child C - Born in the Bountiful community; married in 2005 at age 12 at the YFZ Ranch, Texas;
- Child D - Born in the Bountiful community; married in 2004 at age 18 in Colorado City, Arizona;
- Child E - Born in the Bountiful community; married in 2004 at age 18 in Colorado City, Arizona;
- Child F - Born in Hildale; married in 2004 at age 16 in Colorado City, Arizona; gave birth to a child in Lister, British Columbia at age 17;
- Child G - Born in the Bountiful community; married in 2006 at age 17 in Denver, Colorado;
- Child H - Born in the Bountiful community; married in 2006 at age 18 in Denver, Colorado;
- Child I - Born in the Bountiful community; married in 2006 at age 17 in Denver, Colorado;
- Child J - Born in the Bountiful community; married in 2004 at age 17 in Mesquite, Nevada;
- Child K - Born in Hildale, Utah; married in 2004 at age 15 in Mesquite, Nevada; gave birth to a child in Canyon, British Columbia at age 17;
- Child L - Born in the Bountiful community; married in 2004 at age 16 in Mesquite, Nevada;
- Child M - Born in Hildale, Utah; married in 2003 at age 17 in Hildale, Utah; gave birth to a child in Creston, British Columbia at age 18;
- Child N - Born in Hildale, Utah; married in 2003 at age 17 in Hildale, Utah; gave birth to a child in Creston, British Columbia at age 18;
- Child O - Born in the Bountiful community; married in 1990 at age 17 in Spokane, Washington; gave birth to a child in Creston, British Columbia at age 18;
- Child P - Born in the Bountiful community; married in 1996 at age 17 in Lister, British Columbia;

- Child Q - Born in Hildale, Utah; married in 1998 at age 16 in Hildale, Utah; gave birth to a child in Lister, British Columbia at age 18;

- Child R - Born in the Bountiful community; married in 1998 at age 17 in Sandy, Utah;

- Child S - Born in Hildale; married in 1999 at age 15 in Salt Lake City, Utah; gave birth to children in Creston, British Columbia at ages 16 and 18;

- Child T - Born in the Bountiful community; married in 1999 at age 17 in Salt Lake City, Utah; gave birth to a child in Creston, British Columbia at age 18;

- Child U - Born in the Bountiful community; married in 1999 at age 15 in Sandy, Utah; gave birth to a child in Creston, British Columbia at age 17 and in Lister, British Columbia at age 18;

- Child V - Born in the Bountiful community; married in 1999 at age 17 in Hildale, Utah;

- Child W - Born in the Bountiful community; married in 1999 at age 17 in Hildale, Utah;

- Child X - Born in Hildale, Utah; married in 1999 at age 15 in Colorado City, Arizona; gave birth to children in Lister, British Columbia at ages 16, 17, and 18;

- Child Y - Born in Salt Lake City, Utah; married in 1999 at age 16; gave birth to a child in Cranbrook, British Columbia at age 18;

- Child Z - Born in the Bountiful community; married in 1999 at age 15 in Hildale, Utah;

- Child AA - Born in Cardston, Alberta; married in 2000 at age 16 in Colorado City, Arizona; gave birth to a child in Lister, British Columbia at age 18;

- Child BB - Born in the Bountiful community; married in 2000 at age 15 in British Columbia; gave birth to a child in Creston, British Columbia at age 16;

- Child CC - Born in the Bountiful community; married in 2000 at age 16 in Lister, British Columbia; gave birth to a child in Lister, British Columbia at age 18;

- Child DD - Born in Hildale, Utah; married in 2003 at age 15 in Hildale, Utah; gave birth to a child in Canyon, British Columbia at age 19;

- Child EE - Born in St. George, Utah; married in 2004 at age 16 in Hildale, Utah; gave birth to a child in Creston, British Columbia at age 19.

- **Educational Outcomes**

[726] The AGBC tendered evidence from two witnesses from the British Columbia Ministry of Education regarding educational outcomes in Bountiful. This evidence shows that:

a) many students who begin Grade 8 at BESS or MHESS are not attending any school in British Columbia by what should be their Grade 12 year;

b) the graduation rates for students at both schools are well below the provincial average; and

c) few Bountiful students attend post-secondary institutions, particularly universities.

[727] Brent Munro, a Manager in the Information Department of the British Columbia Ministry of Education, gave evidence on aspects of school attendance and graduation at BESS and MHESS, as well as the rates of participation at public post-secondary institutions in British Columbia.

[728] Edward Vanderboom, the Inspector of Independent Schools, explained the system of classification and certification for independent schools in British Columbia, and the historical and current status of both BESS and MHESS within that system.

[729] Mr. Munro and Mr. Vanderboom were able to track the progress of individual students through both the secondary and post-secondary school systems in British Columbia through the use of the Personal Education Number [PEN], a unique code which follows a student from kindergarten to Grade 12 and on into public post-secondary education in British Columbia.

[730] The Ministry of Education issues both the British Columbia Certificate of Graduation [Dogwood Certificate], which is awarded to students after they have completed all the necessary requirements for high school graduation, and the British Columbia Adult Graduation Diploma [Adult Graduation Diploma], which is awarded to adults who return to high school and complete all the necessary requirements for graduation.

[731] The enrollment statistics presented by Mr. Munro demonstrate a distinct downward trend in the levels of enrollment for students from both BESS and MHESS over the course of their high school careers. They show that only 23% of students who began Grade 8 at BESS or MHESS were still enrolled in a school in British Columbia by what should be their Grade 12 year. They also show a much more significant drop-off for males in what should be their Grade 10 year, with enrollment dropping to 51%, compared to 76% for females. Of course, these

statistics do not account for the possibility of children moving out of British Columbia, which is not insignificant, considering the evidence of two-way traffic between Bountiful and FLDS communities in the United States.

[732] In keeping with the steadily decreasing enrollment figures, Mr. Munro's affidavit also reports very low graduation rates for students at BESS and MHESS.

[733] To provide effective comparisons for the Bountiful schools, Mr. Munro provided equivalent data for the Province as a whole, for Aboriginal students, and for three other comparable schools, Bowen Island Community School [Bowen Island], Alert Bay Elementary [Alert Bay] and Canyon/Lister Elementary [Canyon].

[734] Mr. Munro summarizes the results of his research (at para. 16):

> Attached to my affidavit and marked as Exhibit "E" is copy of a spreadsheet entitled "Number of students who were in Grade 7 for the first time between 1994/1995 and 2003/2004 who have been awarded a Dogwood or BC Adult Graduation Diploma". This spreadsheet shows that, for this cohort of students, 7% of female students and 6% of male students who attended BESS were issued either a Dogwood or Adult Diploma. With respect to Mormon Hills, 43% of the females, and 33% of the males were issued either a Dogwood or Adult Diploma. The data shows that for same cohort of students examined on a provincial basis, 78% of females, and 72% of males received a Dogwood or Adult Diploma, and 41% of the Aboriginal students received a Dogwood or Adult Graduation Diploma. With respect to the schools use for comparison the data is as follows:
>
> - Bowen Island - 81% of the females and 85% of the males have been issued a Dogwood or Adult Graduation Diploma;
> - Alert Bay - 55% of the females and 47% of the males have been issued a Dogwood or Adult Graduation Diploma; and
> - Canyon - 84% of the females and 86% of the males have been issued a Dogwood or Adult Diploma.

[735] These low graduation rates are explained not only by the enrollment rates, but also by the historical inability of both BESS and MHESS to award the Dogwood Certificate, as Mr. Vanderboom explained in his evidence.

[736] The *Independent School Act*, R.S.B.C. 1996, c. 216, creates a scheme whereby the Inspector of Independent Schools may issue a certificate classifying an independent school into one of four groups. Group 1 schools must meet the education requirements established by the Minister of Education and employ British Columbia certified teachers. Group 3 schools (the

certification for BESS groups for Grades 11 and 12 since 2004) do not. A school may be classified in different groups for different grade levels.

[737] Mr. Vanderboom testified that BESS has not held Group 1 status since 1995 and, as such, has not had an approved graduation program since 1995. Without an approved graduation program, BESS students have been unable to attain a Dogwood Certificate through courses taken at BESS. To receive a Dogwood Certificate, they must do so under the auspices of another institution.

[738] BESS applied for group 1 classification for grades 11 and 12 in 2007, but its application was rejected by Mr. Vanderboom when he was Deputy Inspector for Independent Schools on the basis that its program for Grades 11 and 12 did not meet the educational requirements prescribed by the Minister.

[739] Since its inception in 2003, MHESS had not held group 1 status for grades 11 and 12. In October 2010, however, MHESS was granted group 1 certification and beginning with the 2010-2011 school year, will be able to award Dogwood Certificates.

[740] Mr. Munro was also able to use the PEN to track the enrolment of BESS and MHESS students in public post-secondary institutions in British Columbia. Of these students, only one has ever enrolled at a university in British Columbia (Thompson Rivers University). All of the other students were enrolled in a public college or institute. The fields in which credentials were issued included: carpentry, heavy duty mechanics, primary care paramedic, practical nursing, electrical, culinary arts, business administration, and resident care/home support. These fields of study are overwhelmingly practical in nature and provide skills that are needed in the Bountiful community.

[741] Late in the hearing of the reference, the Fraser Institute released its *Report Card on British Columbia's Elementary Schools 2011*, in which, perhaps surprisingly given the tenor of the AGBC's evidence regarding education outcomes in Bountiful, BESS was ranked tied for first place in the report, with a perfect score. Entirely unsurprisingly, that report made its way into evidence, by way of exhibit marked for identification, the next day.

[742] As this report was not tendered by an expert who could verify its conclusions and methodology I cannot rely on it to any great extent. However, in any event, this report does not, in fact, contradict the evidence of the AGBC regarding educational outcomes in Bountiful. This report is based on the results of the Foundation Skills Assessment, a standardized test that is administered to Grade 4 and Grade 7 students province-wide. The Foundation Skills Assessment measures individual students' performance in reading comprehension, writing, and numeracy.

[743] The AGBC has not alleged that the education students receive in Bountiful schools is deficient in these basic aspects. The effects of polygyny are seen at the secondary grades, where enrolment rates decline precipitously and few students graduate.

[744] While, as the *Amicus* points out, there may be a number of reasons why students are not attending secondary school, not completing their Grade 12 graduation within expected timeframes and not attending post-secondary institutions in the province, the evidence supports the view that educational outcomes suffer within close-knit semi-isolated polygamous communities like Bountiful.

ii. Muslim Community

[745] I have already referred to the evidence of Ms. Hogben, Executive Director of the Canadian Council of Muslim Women. Her evidence is not only hearsay but also entirely anecdotal and limited to those women that contact her organization seeking help with domestic problems. It does not inform me of the level of polygamy among Muslims in Canada or the degree of harm caused by it.

5. Stereotyping Adherents of Minority Religious Groups

[746] The *Amicus* led the evidence of Professor Campbell, to which I referred briefly above, and that of Dr. Lori Beaman. Dr. Beaman is a Professor of Religious Studies in the Department of Classics and Religious Studies at the University of Ottawa, and the Canada Research Chair in the Contextualization of Religion in a Diverse Canada.

[747] Both Professor Campbell and Dr. Beaman properly caution against the acceptance at face value of what may be stereotypical portrayals of life in polygamous communities. As they rightly

point out, construing unfamiliar practices as harmful without careful examination can result in the perpetuation of stereotypes and an unjustified curtailing of fundamental freedoms.

[748] Professor Campbell, in her evidence, contrasts many of the predicted harms with the actual life experiences related to her by the 22 women whom she interviewed at Bountiful. They paint a more positive state of affairs than the evidence of the so-called "polygamy survivors" would suggest.

[749] Similarly, Dr. Beaman said in examination by the *Amicus*:

> Q And are you aware of any research that's been undertaken fitting within that model in North America?
>
> A Specifically in North America there are three - there are three pieces of research with which I am a bit more familiar. One would be - one person who has done a number of bits of things would be Janet Bennion from the United States. Altman and Ginat is a sort of classic study that's often cited. And in Canada we have Angela Campbell who has done research on - all on polygynous groups. Not all on Fundamentalist Latter-day Saints. Some are - Bennion's work is on the Allreds, and so - but all looking at polygamy amongst Fundamentalist Latter-day Saints.
>
> Q You mentioned the Allreds. Is that another polygamous group?
>
> A. Yes.
>
> Q. And do you draw anything from the studies?
>
> A What I draw from the studies is essentially that the results are mixed. Altman and Ginat are really quite clear that while there are some unique or unusual problems that can arise within the context of polygamous relationships, that some people live quite contentedly within the context of polygyny. Campbell's research has found the same thing and Bennion's research has also found the same thing. So while all of them identify problems, all of them also stress that polygyny for many people is a satisfying family arrangement.
>
> [Transcript, 13 December 2010, p. 18, ll. 16-46]

[750] And further:

> A I suppose the other thing that I think is important to consider in these discussions is if we think about stories as representative of the people who are telling them one of the comparisons that I make is thinking about going to a transition house and interviewing all of the women in a transition house, and the stories we would hear would not be pleasant I'm sure. To take those stories and then think that they're reflective of monogamous relationships would be wrong-headed, I think. We can't extrapolate from horror stories, and they truly are horrible, to generalizations of about how relationships might look in general. And again I make the comparison with doing those sorts of interviews and thinking about monogamy in general, and then thinking about people who have had negative

experiences in polygynous groups, and there are some, and then saying, well, this is how polygynous relationships should be characterized.

...

A The concern that some of these scholars raised is simply that people who leave sometimes overlay those feelings, those emotions, back onto their entire experience. Not to deny that there are abusive relations, not to deny that there are really horrible experiences, but simply that we need to be careful when reading accounts to not generalize to the group as a whole.

[Transcript, 13 December 2010, p. 19, ll. 22 - 41; p. 20, ll. 13 - 20]

[751] Finally, I note this portion of Dr. Beaman's testimony:

A One of the concerns that I have heard expressed from women who are in conservative religious groups is that outsiders perceive them as somehow duped. One of the phrases that I heard quite frequently from evangelical Christian women was we're not door mats. And so the idea that somehow they exercise less agency, they don't participate in decision-making processes and so on and so forth, they're quite aware of that and they're quite aware of those criticisms. Any they insist in turn that they do engage in those decision-making processes. And so, for example, in my research on submission and headship one of the findings was, in fact, there was a great deal of mutuality in those relationships.

[Transcript, 13 December 2010, p. 26, ll. 24 - 38]

[752] I found the evidence of these two witnesses sincere, but frankly somewhat naive in the context of the great weight of the evidence.

[753] Dr. Beaman, for example, referred to the 2008 raid on the YFZ Ranch in Texas and then stated in her report:

> [T]he allegations of abuse were largely unfounded. Atrocity narratives and stereotypes played a role in preventing State authorities from more carefully examining allegations against those living in these communities.

[754] Yet, Dr. Beaman had no knowledge, when she stated this, of the detailed report of the Texas Department of Family and Protective Services dated 22 December 2008 (included in the Brandeis Brief). That report documented that in a population of approximately 700 to 800 persons (including some 400 children), 12 girls were victims of sexual abuse with the knowledge of their parents, having been married at ages ranging from 12 to 15.

[755] The investigation found that these girls, and 262 other children, were subjected to neglect under Texas law (failure to remove children from exposure to sexual abuse of other children and

neglectful supervision). There were 124 designated perpetrators as a result of this investigation, who included "men who engaged in underage marriages; parents who failed to take reasonable steps to prevent an underage daughter from marrying an older adult male; and parents who placed their child in, or refused to remove their child from, a situation in which the child would be exposed to sexual abuse committed against another child" (at 14).

[756] In the face of this report, Dr. Beaman's conclusion that allegations of abuse were "largely unfounded" simply cannot be given credit, and the entire exchange between her and counsel on cross-examination leads one to be wary of those who would downplay the apparent dangers to children in FLDS communities.

[757] Similarly, Professor Campbell's evidence suffers from the fact that we do not know who her 22 interviewees were and to whom they were married (indeed, one witness agreed that it could have been to the same man). Professor Campbell accepted the evidence of these individuals at face value. Her evidence also suffers from the fact that Professor Campbell has only spent a limited time in Bountiful on two occasions (in total 12 days including travel time from Montreal).

[758] Professor Campbell accepted, again at face value, that teen marriages in Bountiful have long been discouraged. Late in the evidentiary phase of this hearing we learned, from a more complete review of documents seized during the raid of the YFZ Ranch in Texas, that this may well not be the case. (I make no findings of fact as this involves criminal conduct and the evidence proffered is simply documents found at the YFZ Ranch.) I recognize that Professor Campbell's interviewees were predominantly from the Blackmore side of the community and that it may be that teen marriages are a thing of the past within that group. Nevertheless, the YFZ documents suggest that this is not the case with respect to the Bountiful community as a whole.

6. Position of the Challengers

[759] I have already discussed some of the principal evidence relied upon by the *Amicus* and his allied Interested Persons in opposing the notion that polygamy (as opposed to some of its individual adherents) causes harm and some of his ripostes to points made by the Attorneys General through their witnesses.

[760] But to be fair to the *Amicus*, he has, in the best tradition of his retainer, questioned every aspect of the Attorneys' case for harm in his final submissions. He has offered a counterpoint on each of the major sources of alleged harm, that is, whether polygamy:

- causes inequality or indignity;
- causes forced marriage;
- causes women to have too many children;
- causes physical or sexual abuse;
- causes mental distress;
- causes "Lost Boys" and, if it does, whether they commit crimes;
- causes the early sexualization of girls;
- undermines democracy; and
- is associated with welfare fraud.

[761] I offer just a few further examples of the *Amicus*' position on the alleged harms.

[762] With respect to Dr. Henrich, the *Amicus* seeks to undercut the force of his evidence by aligning him with the controversial views of Robert Wright, the author of *The Moral Animal: Why We Are the Way We Are: The New Science of Evolutionary Psychology* (New York: Vintage, 1994).

[763] In referring to what he calls the "marauding unmarried men analysis", the *Amicus* writes (at paras. 390 - 391):

> To read Mr. Wright's expression of the theory is, it is respectfully submitted, to know why its adoption would be an incredible departure from the values that this Court should further.
>
> Mr. Wright is not what would be considered a feminist scholar: Mr. Wright is described, "[t]rue to a long tradition of feminist bashing", as "a popular apologist for evolutionary psychology" who "compares feminism to communism and other 'ideologies that rested on patently false beliefs about human nature.' Like the communist dinosaur, feminists refuse, he suggest, to acknowledge the scientific truth about human nature".

[764] As the AGBC effectively suggested in reply, however, Dr. Henrich was not called upon to defend the *Amicus'* spirited challenge of Mr. Wright's work, in particular, his theory that monogamy is a compromise among men, not between the sexes.

[765] With respect to the allegation of the abuse of young girls within the Bountiful community, the *Amicus* refers, at para. 480, to evidence from various government and law enforcement officials who suggest that in their experience with Bountiful, there had been few, if any, reported incidents of abuse. To the contrary, however, we have the evidence filed by the AGBC relating to the marriages of girls and young teens from Bountiful in the United States between 2004 and 2006.

[766] The *Amicus*, as well, relies on the dissenting opinion of Chief Justice Durham in *State of Utah v. Holm*, 2006 UT 31, who decried the allegedly infirm basis for the "crime within polygamy" argument (para. 480(f)):

> In her dissent in *State v. Holm*, Chief Justice Durham explained that the earlier comments of her Court that certain crimes were "not unusually attendant to the practice of polygamy" (in the *Green* case, which is cited by the AGBC at para. 404 of his argument and is relied on by Professor Witte at paras. 328-331 of his report as including "a textbook example of an argument that goes back for nearly two thousand years") was based largely on a Student Note that, on closer scrutiny, she found unconvincing. Chief Justice Durham wrote:
>
> > Because the federal First Amendment analysis required only rational basis scrutiny, the court was content to reply on assertions in a student law review piece that polygamy was frequently related to other criminal conduct, together with two local cases, including the case of Green himself. *Id.* P 40 & n.14. However, reviewing this assessment in light of the heightened scrutiny I believe is called for here, I cannot conclude that the restriction that the bigamy law places on the religious freedom of all those who, for religious reasons, live with more than one woman is necessary to further the state's interest in this [***156] regard. Upon closer review, the Student Note is unconvincing. The State has provided no evidence of a causal relationship or even a strong correlation between the practice of polygamy, whether religiously motivated or not, and the offenses of "incest, sexual assault, statutory rape, and failure to pay child support," cited in *Green, id.* P. 40. [emphasis added]
>
> Indeed, Chief Justice Durham commented that, in any event, "[t]he Note itself predicts that "it is unlikely that a flat-out ban on polygamy would meet the 'least restrictive means' required of" a traditional strict scrutiny analysis".

[767] Finally, by way of further example, I note the *Amicus*' position on the issue of educational outcomes (at para. 492):

> Further, whatever the situation with the FLDS (in the event it does have a pattern of early school-leaving, a pattern in common with, for example, the Amish), this could not be attributed to polygamists in North America as a whole. As noted in the Primer issued by the Offices of the Attorneys General of Utah and Arizona, "[a]pproaches to education vary widely" even "among fundamentalist groups and families". The Primer notes that

> "[s]ome communities build and staff their own private or charter schools with the goal of providing high quality education for their children", some fundamentalists require homeschooling (although "with some using correspondence curricula such as the American School program"), and "some parents encourage their teens to graduate from high school early and to begin college before their graduating class" (p. 37). The Apostolic United Brethren, one polygamous group, is identified with "strongly encourag[ing] education", with most children attending public school although a number of private schools also being sponsored by the group. It also encourages a college education for members desiring one, and "sponsors a limited scholarship program which helps to defray the costs of higher education for some students". Indeed, in the 1800s, half of the first enrollees in the University of Deseret (now the University of Utah) were women.

[768] In a somewhat similar vein, the FLDS points out that much of the evidence said to demonstrate the harms of polygamy relates to the FLDS community in the United States and in Bountiful. It says with respect to these harms that the independent variable is not polygamy but, rather, several other practices and features unique to the FLDS which, taken together, distinguish it from most other fundamentalist Mormon communities. These are: (1) a belief in a prophet who receives revelation from God; (2) as a corollary, the belief that the prophet has the right and duty to assign believers in marriage; and, (3) closed and isolated communities which do not tolerate doctrinal dissent or violations of its strict codes of behaviour, the penalty for which ultimately is expulsion from the community.

[769] The FLDS says these are the independent variables which, if abused, explain virtually all of the evidence of harms alleged by the defenders. They are not harms of polygamy.

[770] The negative experiences of some within the FLDS, or fundamentalist Mormon polygamy generally, are not the experiences of all. More fundamentally, the differences in their experiences are not based on their family structure, that is to say, polygamy, but on the behaviour of individuals within the community and within relationships.

[771] This debate on the issue of polygamy and harm leads to this critical question: to what extent need the Court resolve the many conflicts in the massive evidentiary record before it on these matters? The answer lies in the jurisprudence of the Supreme Court of Canada.

[772] To justify criminalizing an activity, the government must demonstrate a reasoned apprehension of harm. In *Malmo-Levine*, a case testing Canada's marijuana prohibition, the Supreme Court explained (at paras. 78 and 133):

> The use of marihuana is therefore a proper subject matter for the exercise of the criminal law power. *Butler* held, at p. 504, that if there is a reasoned apprehension of harm Parliament is entitled to act, and in our view Parliament is also entitled to act on reasoned apprehension of harm even if on some points "the jury is still out". In light of the concurrent findings of "harm" in the courts below, we therefore confirm that the NCA in general, and the scheduling of marihuana in particular, properly fall within Parliament's legislative competence under s. 91(27) of the *Constitution Act, 1867*.
>
> ...
>
> We do not agree with Prowse J.A. that harm must be shown to the court's satisfaction to be "serious" and "substantial" before Parliament can impose a prohibition. Once it is demonstrated, as it has been here, that the harm is not *de minimis*, or in the words of Braidwood J.A., the harm is "not [in]significant or trivial", the precise weighing and calculation of the nature and extent of the harm is Parliament's job. Members of Parliament are elected to make these sorts of decisions, and have access to a broader range of information, more points of view, and a more flexible investigative process than courts do. A "serious and substantial" standard of review would involve the courts in micromanagement of Parliament's agenda. The relevant constitutional control is not micromanagement but the general principle that the parliamentary response must not be grossly disproportionate to the state interest sought to be protected, as will be discussed.

[773] The reasoned apprehension of harm is also relevant to the justification analysis under s. 1 of the *Charter*. Here, the court looks at the legitimacy of the government's objective and whether the means chosen to achieve that objective are proportionate to the infringement of the claimant's *Charter* rights.

[774] Once it has been established that there is a reasoned apprehension of harm with respect to certain conduct so as to justify its criminalization, there is necessarily a pressing and substantial objective: the prevention of that harm.

[775] The issue when considering rational connection is whether there is a causal connection between the infringing measure and the government's objective. Again, once it has been established that there is a reasoned apprehension of harm with respect to certain conduct, measures aimed at preventing that harm will almost always be rationally connected to the legislative objective.

[776] In *Sharpe*, the Supreme Court characterized the objective of s. 163.1(4) of the *Criminal Code* prohibiting the possession of child pornography as, "criminaliz[ing] possession of child pornography that poses a reasoned risk of harm to children" (at para. 82). Obviously, this objective was found to be pressing and substantial.

[777] As for rational connection, the Court resolved the ambiguities in the social science literature regarding the causal links between pornography and harm to children by holding that the constitutionality of the legislation did not require proof of a causative link but a reasoned apprehension of harm. The Court said this (at para. 85):

> This raises a question pivotal to this appeal: what standard of proof must the Crown achieve in demonstrating harm - scientific proof based on concrete evidence or a reasoned apprehension of harm? The trial judge insisted on scientific proof based on concrete evidence. With respect, this sets the bar too high. In *Butler*, *supra*, considering the obscenity prohibition of the *Criminal Code*, this Court rejected the need for concrete evidence and held that a "reasoned apprehension of harm" sufficed (p. 504). A similar standard must be employed in this case.

[778] In light of that measure of the burden of proof, it is clear that I need not test the Attorneys' case on harm against the balance of probabilities standard. I will set out my conclusions on this issue when I develop the *Charter* analysis below. But this conclusion does obviate the need here to exhaustively review the entire record on the question of harm.

7. Summary of Apprehended Harms

[779] Drawing on principles of evolutionary biology tested against evidence from psychology, anthropology, economics and other disciplines, Dr. Henrich posits that polygyny has a number of predictable effects:

a) It creates a pool of unmarried men with the attendant increase in crime and anti-social behaviour;

b) The increased competition for women creates pressure to recruit increasingly younger brides into the marriage market;

c) This competition causes men (as fathers, husbands and brothers) to seek to exercise more control over the choices of women, increasing gender inequality and undermining female autonomy and rights. This is exacerbated by larger age disparities between husbands and wives in *both* polygynous and monogamous relationships; and

d) Men reduce investment in wives and offspring as they spread their resources more thinly across larger families and increasingly channel those resources into obtaining more wives.

[780] Male control features prominently in Dr. Grossbard's economic analysis of polygyny. That analysis reveals that while polygyny increases the value of women in the marriage market, women do not realize the added value since men manipulate social institutions in ways that facilitate their control of women. These institutions include early and arranged marriages, the payment of brideprice, easy divorce and the devaluing of romantic love. Among the costs are depressed mental health for women and poorer outcomes for their children.

[781] These and other harms recur consistently in the social science literature.

[782] Women in polygynous relationships are at an elevated risk of physical and psychological harm. They face higher rates of domestic violence and abuse, including sexual abuse. Competition for material and emotional access to a shared husband can lead to fractious co-wife relationships. These factors contribute to the higher rates of depressive disorders and other mental health issues that women in polygynous relationships face. They have more children, are more likely to die in childbirth and live shorter lives than their monogamous counterparts. They lack reproductive autonomy, and report high rates of marital dissatisfaction and low levels of self-esteem. They also fare worse economically, as resources may be inequitably divided or simply insufficient.

[783] Children in polygynous families face higher infant mortality, even controlling for economic status and other relevant variables. They tend to suffer more emotional, behavioural and physical problems, as well as lower educational achievement. These outcomes are likely the result of higher levels of conflict, emotional stress and tension in polygynous families. In particular, rivalry and jealousy among co-wives can cause significant emotional problems for their children. The inability of fathers to give sufficient affection and disciplinary attention to all of their children can further reduce children's emotional security. Children are also at enhanced risk of psychological and physical abuse and neglect.

[784] Early marriage for girls is common, frequently to significantly older men. The resultant early sexual activity, pregnancies and childbirth have negative health implications for girls and also significantly limit their socio-economic development. Shortened inter-birth intervals pose a heightened risk of problems for both mother and child.

[785] The sex ratio imbalance inherent in polygyny means that young men are forced out of polygamous communities to sustain the ability of senior men to accumulate more wives. These young men and boys often receive limited education as a result, and must navigate their way outside their communities with few life skills and little social support.

[786] Another significant harm to children is their exposure to, and potential internalization of, harmful gender stereotypes.

[787] Polygyny has negative impacts on society flowing from the high fertility rates, large family size and poverty associated with the practice. It generates a class of largely poor, unmarried men who are statistically predisposed to violence and other anti-social behaviour. Polygyny also institutionalizes gender inequality. Patriarchal hierarchy and authoritarian control are common features of polygynous communities.

[788] A great many of the foregoing effects are not limited to particular cultures or geographic locations; they are universal. Dr. McDermott's statistical analysis of polygyny reveals that throughout the world, women in polygynous societies sustain more physical and sexual abuse. They have more children, are more likely to die in childbirth and live shorter lives than their monogamous counterparts. They are more likely to be subject to sex trafficking and genital mutilation. They receive less equal treatment than men and encounter more discrimination under the law.

[789] Girls are less likely to be educated, restricting a key factor allowing for upward mobility and economic independence. Up to half of the boys in highly polygynous societies are ejected from their communities with incalculable negative effects.

[790] Individuals in polygynous societies tend to have fewer civil liberties than their counterparts in societies which prohibit the practice. Polygynous states spend more on defence

on average, leaving fewer resources for domestic infrastructure and projects geared toward health and education.

[791] Moving closer to home, these harms are consistent with what clinical experts in North America have observed in their patients from polygynous backgrounds. Dr. Beall spoke of PTSD and other mental health conditions in his patients from fundamentalist Mormon communities. Dr. Stickevers' Muslim patients in polygynous relationships had higher rates of depression and anxiety and lower levels of self-esteem than her monogamously married patients. Dr. Hassouneh's Muslim patients had similar symptoms.

[792] The evidence of the witnesses who recounted their personal experiences living in polygynous families put a human face on many of the harms identified by the experts and in the social science literature. To be fair, some of these witnesses related positive experiences with polygyny. However, their accounts stand against the overwhelming weight of the evidence that polygyny has harmful consequences for both the individuals involved and the societies of which they are a part.

[793] Finally, the evidence relating to Bountiful reveals higher rates of teen pregnancy, the movement of young girls between the community and the United States for the purpose of marriage, and poorer educational outcomes.

G. Canada's International Obligations

[794] The AG Canada and several of his allied Interested Persons (primarily the CCRC/Asper Centre and West Coast LEAF) argue that Canada's obligations under international treaties and customary international law support the prohibition on polygamy.

[795] These participants also argue, as a matter of comparative law, that a review of state practice demonstrates a growing trend to prohibit polygamy worldwide, which supports the continued criminalization of the practice through s. 293.

[796] These principles of international human rights law and comparative law arise primarily in the s. 1 analysis to support arguments that any infringement of *Charter* rights by s. 293 is reasonably justified.

[797] Two expert witnesses gave evidence on Canada's obligations regarding polygamy under international human rights law.

[798] The AG Canada tendered the evidence of Dr. Rebecca Cook, Chair of International Human Rights Law at the University of Toronto Law School. Dr. Cook was qualified as an expert in international human rights law with a particular focus on women's rights and states' obligations.

[799] Professor Turley, of whom mention has already been made, responded to some aspects of Dr. Cook's evidence in his affidavit.

1. Canada's Obligations under International Treaties

[800] Several participants submit that Canada is obligated by conventional international law to take "all available measures" to eliminate polygamy.

[801] The AG Canada has identified the following four treaties to which Canada is a state party as relevant to polygamy:

- the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Can T.S. 1976 No. 47, 6 I.L.M. 368 [*ICCPR*];
- the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3; GA Res. 2200 (XXI), 21 UN GAOR Supp. (No. 16) at 52; UN Doc. A/6316 [*ICESCR*];
- the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 [*CRC*]; and
- the *Convention on the Elimination of All Forms of Discrimination against Women* 18 December 1979, 1249 U.N.T.S. 13; 34 UN GAOR Suppl. (No. 21) (A/34/46) at 193; UN Doc. A/Res/34/180 [*CEDAW*].

[802] As the *Amicus* points out, none of these treaties includes the words "polygamy" or "polygyny" in their text. Accordingly, any obligation Canada may have to prohibit polygamy as a state party arises only through interpretations of their more general provisions.

[803] Each treaty has its own treaty body that monitors state compliance. These bodies review the periodic reports produced by states parties and issue concluding observations that provide an

assessment of the state parties' efforts to fulfill their treaty obligations. They also issue their own general comments or recommendations which are intended to provide guidance to states parties in interpreting the treaties and complying with their obligations.

a) Statements by International Treaty Bodies

[804] Dr. Cook's basic conclusion is that Canada has obligations under each of these treaties, as interpreted by each respective treaty body, to take "all appropriate measures" to eliminate polygyny.

[805] These treaty bodies conceptualize the harms of polygyny on two different levels. Dr. Cook refers to these as the "inherent wrongs" and "associated harms."

[806] On one level, all of these treaty bodies consider systems of polygamy, inevitably polygynous, as constituting an "inherent wrong" that offends each respective treaty's principle of equality. In her testimony, Dr. Cook summarized the conclusions of these treaty bodies with regard to the inherent wrong of polygyny:

> Well, the Human Rights Committee sees the inherent wrong of polygamy of the structuring of the marital relationship in asymmetrical ways, that is one man taking many wives, as inherently wrong and offensive to women's dignity and equality.
>
> The Women's Committee thinks about the inherent wrong not only because of the unequal structuring of the marriage relationship, but also because that unequal structuring of the marriage relationship can lead to very negative stereotypes about women that diminish their perceptions of themselves, diminish what they think they can do within the family and in the community. So there's variations on the theme between those two committees.
>
> [Transcript, 6 January 2011, p. 19, l. 34 - p. 20, l. 1]

[807] On another level, these treaty bodies recognize the harms that are the consequence of the practice of polygamy; particularly where they refer to polygamy as a "traditional harmful practice".

[808] As the *Amicus* observes, none of these treaty bodies has examined the issue of polygamy in a focused and comprehensive way as in this reference. However, their findings of harm are essentially consonant with the evidence of harm before this Court.

[809] These treaties provide a measure of flexibility to states in terms of how they address polygamy and its consequential harms. Dr. Cook describes the obligation as being to take "all appropriate measures" to eliminate polygamy (para. 134). She describes the significance of such terminology at paras. 142-43 of her report:

> The use of the term "all" available measures, rather than "any" such measures requires states to be comprehensive in their approach. State practice indicates that, in order for measures to eliminate polygyny to be effective, states feel obligated to use a mix of legal, educational, and social measures. The legal measures include constitutional, civil, and criminal prohibitions.
>
> The challenge is to identify what measures are "appropriate" in what contexts and why. To achieve effectiveness, the nature, types and mix of measures will vary according to context. Where polygyny is deeply entrenched, it might be that criminal law measures are needed to demonstrate the inherent wrongs of polygyny, to punish parties officiating in, facilitating and participating in polygynous unions, and to deter future such practices. Where polygyny is prohibited in law, but persists in practice, positive measures might also be required, such as educational measures, judicial training programs and public awareness campaigns, particularly to eliminate traditions and stereotypes of women that facilitate polygyny.

[810] Crucially, however, this discretion has limits. These measures must be appropriate and effective. In the context of *CEDAW*, "the ultimate arbiter is the Women's Committee itself on whether a particular measure is appropriate" (Transcript, 6 January 2011, p. 32, ll. 37-39).

[811] Another key attribute of these treaty bodies is that they impose positive obligations on the state to not only prevent treaty violations through state conduct, but also through the conduct of private actors. This is a different manner of rights protection than that provided by the *Charter*, which applies only to state action.

[812] As Dr. Cook notes, each of these treaty bodies emphasizes slightly different aspects of polygyny related to their respective treaties. I will review some of the aspects of each.

i. CEDAW

[813] Dr. Cook referred most extensively in her report to the provisions of *CEDAW* and the conclusions of the *CEDAW* Committee. The text of *CEDAW* itself does not explicitly mention polygyny, but the *CEDAW* Committee has strongly and consistently stated that polygyny violates a number of treaty provisions.

[814] The articles of *CEDAW* that Dr. Cook stated were implicated by polygyny include:

- article 1 - discrimination;
- article 2(f) - state obligations to eliminate discriminatory laws and practices;
- article 5(a) - sex role stereotyping and prejudice;
- article 14 - rural women; and
- article 16 - marriage and family life.

[815] The *CEDAW* Committee strongly condemned polygamy in its *General Recommendation No. 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13th Sess., (1994), U.N. Doc. A/49/38 (at para. 14):

> States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches provisions of article 5(a) of the Convention.

This passage leaves no doubt that the *CEDAW* Committee considers the practice of polygamy a violation of the treaty.

[816] The conclusion in *General Recommendation No. 21* is reinforced by the *CEDAW* Committee's concluding observations. The Committee has consistently called upon state parties to implement measures aimed at eliminating polygamy.

ii. ICCPR

[817] The Human Rights Committee, which monitors compliance with this treaty, has also strongly expressed its disapproval of polygamy.

[818] In *General Comment No. 28: Equality of rights between men and women (article 3)*, UN HRCOR, 68th Sess., (2000), U.N. Doc. CCPR/C/21/Rev.1/Add.10, the HRC criticized polygamy (at para. 24):

> It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of

> women. It is an inadmissible discrimination against women. Consequently, it should be abolished wherever it continues to exist.

[819] The HRC has also commented on polygamy in its concluding observations. The provisions of the treaty that have been held to be violated by the practice are article 3, which requires state parties to undertake to ensure that women and men enjoy all rights under the Covenant equally, and article 26, which prohibits discrimination on the basis of sex, as well as several other grounds.

[820] Article 23(4) of the *ICCPR*, which requires state parties to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage" is also infringed by any martial system that allows polygyny.

iii. CRC

[821] In addition to the references in Dr. Cook's report, the submissions of the BCTF and the CCRC/Asper Centre also refer to the *CRC*.

[822] According to these submissions, the following provisions of the *CRC* are implicated by the practice of polygamy:

a) article 4 - protection of rights;

b) article 19(1) - protection from all forms of violence;

c) article 24(3) - health and health services;

d) article 28 - right to education;

e) article 29(b) and (d) - goals of education;

f) article 34 - sexual exploitation; and

g) article 36 - other forms of exploitation.

[823] The Committee on the Rights of the Child has not apparently mentioned polygamy in its General Comments. Dr. Cook argues that comments on the importance of preventing teen pregnancy in *General Comment No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child*, UN CRCOR 33rd Sess., (2003), U.N.Doc. CRC/GC/2003/4, indicate that polygamy falls under the ambit of article 24(3) of the *CRC*, which

requires states parties to "take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."

[824] Moreover, the Children's Committee has referred to polygamy in its concluding observations. In *Concluding Observations of the Committee on the Rights of the Child*: *Burkina Faso*, UN CRCOR, 53rd Sess., (2010), U.N. Doc. CRC/C/BFA/CO/3-4 at paras. 44-45, for example, the Committee identified polygamy as a discriminatory custom and tradition:

> The Committee urges the State party to ensure effective implementation of its National Gender Policy and to strengthen its National Policy on Education to Family Life and set up educational specific programmes for parents and children that challenge discriminatory customs and traditions and stereotypic attitudes regarding the roles and responsibilities of women and girls in the family and promote equal sharing of parental responsibility. The Committee also urges the State party to discourage polygamy by applying legal and administrative measures and conducting awareness-raising campaigns on its adverse effects on children. The Committee further urges the State party to take all the necessary measures to combat domestic violence. [Emphasis added.]

[825] As with the other treaties, Canada has positive obligations to prevent violations of the *CRC*. These positive obligations are heightened with regard to the *CRC* as children are, of course, inherently less able to advocate on their own behalf.

[826] The negative impacts of polygyny on education, that have been documented elsewhere, also raise issues under articles 28 and 29 of the *CRC*, which protect the right of the child to education.

iv. ICESCR

[827] The Committee on Economic, Social and Cultural Rights [CESCR] has commented on polygamy less extensively than the other treaty bodies. It has not discussed polygamy in its general comments, but has mentioned it briefly in several concluding observations.

[828] In *General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of All Economic, Social, and Cultural Rights (Art. 3 of the Covenant*), UN ESCOR 34th Sess., (2005), U.N. Doc. E/C.12/2005/4, the CESCR emphasized the crucial importance of equality provisions by referring to article 3 of the *ICESCR*.

[829] There have been some comments in the CESCR's concluding observations that confirm the committee's interpretation that polygamy falls under the ambit of article 3.

[830] Dr. Cook also argues that articles 12 and 13 of *ICESCR* are implicated by the practice of polygamy. Article 12 recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The CESCR has not apparently specifically identified polygamy as violating this provision, however, its *General Comment 14, Article 12: The Right to the Highest Attainable Standard of Health*, UN ESCOR, 22nd Sess., (2000), U.N. Doc. E/C.12/2000/4, suggests it does (at para. 21):

> It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.

[831] It would be consistent with the findings of other treaty bodies to conclude that for the purposes of article 12 of *ICESCR*, polygamy is a "harmful traditional cultural practice" and that, therefore, article 12 would impose an obligation on Canada to prevent it. This is particularly so given the reports that indicate the practice of polygamy increases the danger a woman will be exposed to HIV.

[832] Article 13 of *ICESCR* recognizes "the right of everyone to education." In this sense, the concerns regarding the impact of polygamy on children's education overlap with the issues discussed above under the *CRC*.

b) Arguable Limitations on a State's Ability to Criminalize Polygamy

[833] These treaties contain several provisions that are similar to those sections of the *Charter*, such as freedom of religion, which the challengers allege are violated by s. 293. One might therefore expect to find statements from these treaty bodies that suggest criminalization (or other means of regulation of polygamy) violates these treaties in some way.

[834] However, I have been presented with no authority from any of these international treaty bodies that suggests polygamy may be a practice that is protected by any of their respective treaties.

[835] In his report, Professor Turley refers to several of these provisions and argues, largely by analogy to issues such as homosexuality, that the criminalization of polygamy conflicts with modern understandings of human rights (at para. 229):

> The clear trend of human rights in the last century has been to protect the right of individuals to make such choices absent a clear showing of harm to others or society - beyond injury to majoritarian moral tenets.

[836] As I have set out in some detail earlier in these reasons, there is considerable evidence that polygamy causes a range of harms to its participants and to society more generally. Furthermore, while it can be said that there is a trend toward protecting individual rights, it is also the case that international human rights law demonstrates a particular concern for the protection of vulnerable persons.

[837] In her report, Dr. Cook argues that, properly interpreted, rights under these treaties such as the right to privacy and family life (*ICCPR*, article 17), the right to freedom of religion (*ICCPR*, article 18), and the right to enjoy one's culture (ICESCR, article 15) do not limit the state's ability to criminalize polygamy.

[838] Although the criminalization of polygamy may superficially seem to conflict with some provisions of these treaties, it does not appear that any of the relevant treaty bodies have found the practice of polygamy to be protected. This is not surprising, giving their strong condemnation of polygamy.

[839] I am satisfied that the consensus of these international treaty bodies is that the practice of polygamy violates various provisions of the treaties that Canada has ratified. As a state party, Canada has obligations to take all appropriate measures to eliminate polygamy. This includes an obligation to prevent violations of these treaties by private actors through their practice of polygyny.

[840] While it is true, as the *Amicus* contends, that the obligation to take all appropriate measures does not necessarily require criminalization given the flexibility that state parties are accorded in selecting the means of compliance, criminalization is, nevertheless, one available measure by which state parties can endeavour to eliminate polygamy.

2. Customary International Law

[841] Dr. Cook suggests there is evidence of an emerging customary rule against sex discrimination. At para. 73 of her report, she further links this customary law rule to "the dominant trend in international state practice … to restrict and in some cases prohibit the practice of polygamy".

[842] Determining whether Canada has an obligation to prohibit polygamy due to a binding norm of customary international law is a far murkier process than determining Canada's treaty obligations. Customary obligations are created by consistent and uniform state practice that is based on an understanding that the practice is required by law (*opinio juris*). Although the state practice must be "uniform", this does not require that every state follow the practice.

[843] Polygamy is still permitted in many countries worldwide, particularly in Africa and the Middle East. I note that in her categorization of countries according to the level of polygyny, Professor McDermott indicates that in at least 47 of 171 countries, more than five per cent of women are in polygynous marriages. In such circumstances, it simply cannot be said that state practice with regard to polygamy is consistent and uniform, let alone that states conduct themselves in a manner that suggests an understanding that they are required by law to prohibit polygamy.

3. Comparative Law

[844] The evidence of state practice prohibiting polygamy, though falling well short of the standard to establish a rule of customary international law, may still be relevant as a matter of comparative law. In *United States v. Burns*, 2001 SCC 7, for example, the Supreme Court of Canada considered evidence of international trends in the context of the death penalty.

[845] The AG Canada submits that a majority of states in the world prohibit polygamy and there is a growing trend in that direction. This submission is based primarily on the evidence of Dr. Cook, who states that a majority of states in the world prohibit polygyny, though she does not provide any exact figures. She does note that polygyny is prohibited throughout the Americas, Western and Eastern Europe and large parts of Asia.

[846] The *Amicus* disputes the AG Canada's assertion, arguing that s. 293 has no equivalent in most foreign legal systems, which simply have bigamy provisions akin to s. 290. On that basis, he claims that the AG Canada wrongfully conflates a failure to provide legal recognition to polygyny with a criminal prohibition.

[847] In its Final Submissions, West Coast LEAF provides a summary of efforts in recent years to prohibit exploitative polygyny (at para. 29):

> (a) In Benin, the Constitutional Court determined that polygyny was outlawed on the basis that such a prohibition was consistent with its constitution and in particular, its constitutional guarantee of equality of men and women.
>
> (b) The Australia Law Reform Commission refused to recommend the recognition of the legal status of polygyny in 1992 because it offended women's rights.
>
> (c) Polygyny has been outlawed in France, Turkey, and Tunisia (amongst other states).
>
> (d) In Mauritius, the decision of *Bhewa v. the Government of Mauritius* upheld the prohibition on polygamy, applying the *ICCPR*.
>
> (e) In Indonesia, the decision of *M. Insa, S.H.*, Decision Number 12/PUU-V/2007, (The Constitutional Court of the Republic of Indonesia) (2007) held that the judicial and spousal permission requirements for polygyny were reasonable and constitutional limits on freedom of religion.
>
> (f) In the United States, several decisions deal with related matters:
>
> (i) In *State of Utah v. Green*, a bigamy conviction was upheld despite a freedom of religion claim;
>
> (ii) In *Bronson v. Swenson*, the refusal to grant a marriage license was permitted, despite a free exercise of religion claim;
>
> (iii) In *State of Utah v. Holm* a bigamy conviction was upheld against a free exercise of religion claim.

[848] Several of the items on this list do not necessarily support this proposition. It cannot really be said that the prohibitions on polygamy enacted in Turkey (1926) and Tunisia (1956) are recent. The recommendation against recognition of polygamous unions in Australia merely reinforced the *status quo*, as did the American decisions from Utah.

[849] The strongest examples of recent prohibitions on polygamy are those from France and Benin. However, the French government did not prohibit polygamy in 1993 as such, but, abandoning an earlier family reunification program, merely changed immigration laws so that, with retroactive effect, only one spouse would be recognized for each immigrant. As discussed

earlier, under the former family reunification program the number of polygynous families in France had grown significantly, leading to serious social difficulties.

[850] There is not sufficient evidence for me to conclude that there is a distinct trend in state practice towards prohibiting polygamy. While there are some relevant examples of states taking steps to restrict polygamy, they are insufficient to constitute a trend.

[851] Although a collective trend towards restricting polygamy has not been demonstrated, the existing practices of individual comparable jurisdictions are still relevant to this reference in some respects. This is particularly so with respect to the United States, whose own trials and tribulations with polygamy influenced the drafting of s. 293, and France, which has recent experience with the difficulties that arise with a significant level of polygamy.

VI. PURPOSE AND INTERPRETATION OF SECTION 293

[852] I repeat s. 293 for convenience:

> (1) Every one 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 subparagrah (a)(i) or (ii),
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
>
> (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 upon 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.

[853] As Parliament's objective in enacting this provision informs both its interpretation and the *Charter* discussion, I turn next to this issue.

A. Purpose of Section 293

1. Legislative History of Section 293

[854] In 1886, the year before the arrival of Charles Ora Card and his Mormon followers in Canada, Parliament enacted *An Act respecting Offences relating to the Law of Marriage*, R.S.C. 1886, c. 161. The Act contained four offences: unlawfully solemnizing or procuring unlawful solemnization of marriage (s. 1); procuring a feigned marriage (s. 2); solemnizing marriage in violation of provincial law (s. 3); and, bigamy (s. 4).

[855] Virtually identical to England's bigamy prohibition, s. 4 read, in material part:

> Every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada, or elsewhere, is guilty of felony, and liable to seven years' imprisonment:

[856] There remained a question, however, whether this provision was sufficient to capture Mormon plural marriage or, for that matter, Aboriginal or "Mohammedan" polygamy. The concern was that a conviction for bigamy required an attempt to enter into two or more legal marriages, and that Mormon "spiritual" marriages conducted in private ceremonies might be technically exempt from the prohibition: see B. Carmon Hardy, "Mormon Polygamy in Mexico and Canada: A Legal and Historiographical Review" in Brigham Y. Card et al., eds., *The Mormon Presence in Canada* (University of Edmonton: Alberta Press 1990) 186 [Hardy, *Mormon Polygamy in Mexico and Canada*] at 196.

[857] Another potential loophole in the bigamy provision was identified by Anthony Maitland Stenhouse, the former Member for Comox in the British Columbia Legislative Assembly. In 1888, he resigned his seat, announced his conversion to Mormonism and became an ardent and vocal defender of polygamy, though, ironically, he remained a lifelong bachelor.

[858] In a letter to the *Lethbridge News* dated 20 November 1889, Stenhouse noted the bigamy offence's requirement for sequential marriage and proposed that it did not apply to a simultaneous plural marriage. As he pointed out (McCue, "Anthony Maitland Stenhouse" at 120):

> There is one case of polygamy ... whose bearing on the law ... has [not] yet been ascertained. The case of the bridegroom with two brides is not an impossibility. Nor is it inconceivable that he might, as a bachelor, be duly wedded to both ladies at the same

> moment, neither of the wives preceding the other. In view of such a case the question arises, ... would the parties be liable to criminal prosecution.
>
> ... As an undergraduate in matrimony, I propose to test the law as soon as I have found the ladies.

[859] Legislation which was to follow removed all doubt in both respects.

[860] The first iteration of a criminal prohibition against polygamy came in Bill F, *An Act to amend "An Act respecting Offences relating to the Law of Marriage"*, 4th Session, 6th Parl., 1890, which was introduced into the Senate on 4 February 1890. The Bill would have added polygamy to the offences contained in the *Act respecting Offences relating to the Law of Marriage* in the following terms:

> 5. Everyone who, whether in pursuance of, or under pretext of any religious belief, or otherwise, 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 other method whatsoever, but in a manner not recognized as a binding form of marriage by the law of the place in which the offence against this Act is committed, and whether such offence is committed in Canada or elsewhere;
>
> (a) Practises, agrees to practise, or consents to practise, any form of polygamy; or
>
> (b) Practices, agrees to practise, consents to practise, enters into, agrees to enter into or consents to enter into any kind of conjugal union with more than one person of the opposite sex at the same time; or
>
> (c) Practices, agrees to practise, consents to practise, enters into, agrees to enter into, or consents to enter into what among the sect called "The Church of Jesus Christ of Latter Day Saints," commonly known as Mormons, are known as spiritual or plural marriages; or
>
> (d) Lives, cohabits, agrees to live or cohabit, or consents to live or to cohabit, in any kind of conjugal union with a person who is married or with a person who lives or cohabits with another or others in any kind of conjugal union;
>
> 2. And every one who,
>
> (e) Celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraphs (a), (b) (c) and (d) of this section; or
>
> (f) Procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any such form, rule or custom which so purports; or

> (g) Procures, enforces, enables, is a party to, or assists in the execution of any such form of contract which so purports, or the giving of any such consent which so purports;
>
> Is guilty of a misdemeanor, and liable to imprisonment for two years, or to a fine of five hundred dollars, or to both such imprisonment and fine:
>
> 2. In any indictment for any offence mentioned in paragraphs (a) (b) (c) and (d) of the preceding sub-section, it shall be sufficient to describe the offence in the language of the paragraph applicable thereto; and no averment nor proof of the method in which the sexual relationship charged was entered into, agreed or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the parties implicated;
>
> 3. Upon any trial for any offence against this section, the wife or husband of the defendant shall be a competent witness for or against the defendant.
>
> 4. This section shall not apply to any Indian belonging to a tribe or band among whom polygamy is not contrary to law, nor to any person not a subject of Her Majesty and not resident in Canada.

[861] Bill F would have also disqualified anyone convicted of any offences in the *Act respecting Offences relating to the Law of Marriage* from running for or holding public office, voting or serving as a juror.

[862] When Bill F went to committee, one senator expressed concern about the provision which would have exempted from its ambit "any Indian belonging to a tribe or band among whom polygamy is not contrary to law, nor to any person not a subject of Her Majesty and not resident in Canada". He said: "I think that is a very dangerous exception to make, because it may have the effect of excepting the very class to whom the Bill is intended to apply" (*Debates in the Senate*, 6th Parl., 4th Sess., (25 February 1890), at 142 (Hon. Mr. Dickey)).

[863] Bill F was withdrawn one month later, as it was overtaken by a criminal law amendment bill introduced in the House of Commons by the Minister of Justice on 7 February 1890. Bill 65, *An Act further to amend the Criminal Law*, proposed the addition of a polygamy offence to the *Act respecting Offences relating to the Law of Marriage* in the following language:

> 5. Every one who practises, 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 any other 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 -

(a) Any form of polygamy; or

(b) Any kind of conjugal union with more than one person at the same time; or

(c) What among the persons commonly called Mormons is known as spiritual or plural marriage; or

(d) 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; and

2. Every one who, -

(a) Celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in sub-section one of this section; or

(b) Procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any such form, rule or custom which so purports; or

(c) Procures, enforces, enables, is a party to, or assists in the execution of any such form of contract which so purports, or the giving of any such consent which so purports, -

Is guilty of a misdemeanor, and liable to imprisonment for five years and to a fine of five hundred dollars.

3. In any charge or indictment for any offence mentioned in sub-section two of this section it shall be sufficient to describe the offence in the language of that sub-section applicable thereto; and no averment or proof of the method in which the sexual relationship charged was entered into, agreed to, or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the parties implicated.

[864] On second reading in the House of Commons, Sir John Thompson described the intent of this provision:

> Section 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.
>
> [*Debates of the House of Commons*, 6th Parl., 4th Sess., (10 April 1890), at 31644]

[865] Closing the loophole identified by Stenhouse, Bill 65 also substituted the bigamy provision with the following:

> Every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, and every male person who, in Canada, simultaneously, or on the same day, marries more than one woman, is guilty of felony, and liable to seven years' imprisonment.

[866] Bill 65 received royal assent and came into force on 16 May 1890.

[867] The *Criminal Code, 1892* was Canada's first comprehensive criminal code. It consolidated most of Canada's pre-existing criminal laws, including the *Act respecting Offences relating to the Law of Marriage*.

[868] With some rewording, the bigamy offence in s. 4 of the *Act* became s. 275 of the *Criminal Code, 1892*. S.C. 1892, c. 29. Section 5 of the *Act*, the polygamy prohibition, became ss. 278 and 706 of the *Criminal Code, 1892*.

[869] Included in Part XXII, which was entitled "Offences Against Conjugal and Parental Rights - Bigamy - Abduction", s. 278 read:

> 278. 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) practises, 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 any other 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;
>
> (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; or
>
> (b) celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (a) of this section; or
>
> (c) procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any such form, rule or custom which so purports; or

(d) procures, enforces, enables, is a party to, or assists in the execution of, any such form of contract which so purports, or the giving of any such consent which so purports.

[870] Section 706 set out separately the rule of proof formerly contained in ss. 5(3) of the *Act*:

> 706. In the case of any indictment under section two hundred and seventy-eight (b), (c) and (d), no averment or proof of the method in which the sexual relationships charged was entered into, agreed to, or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the persons implicated.

[871] Sections 278 and 706 were renumbered and underwent minor tinkering in the years following but the provisions remained largely as set out above until 1954 when the *Criminal Code* underwent a general overhaul.

[872] In 1951, the federal government appointed a Royal Commission on the Revision of the *Criminal Code* with terms of reference relating primarily to the updating and simplification of the *Code*.

[873] The Commission presented its final report and a draft bill to the government in February 1952. The final report made no comment on the polygamy provision. The draft bill proposed the following language:

> 243. (1) Every one 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 (i) or (ii) of paragraph (a),
>
> is guilty of an indictable offence and is liable to imprisonment for five years.
>
> (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 upon the trial of the accused, nor is it necessary upon the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

[874] The Commission's final report and draft bill were tabled in the House of Commons in April 1952. The draft bill was introduced into the Senate in May 1952 as Bill H-8. After second reading, Bill H-8 was referred to the Standing Committee on Banking and Commerce, which in turn referred it to a subcommittee. The subcommittee did not consider s. 243, as it was on its list of provisions "[c]hanged in form only". A Department of Justice briefing note regarding the bill indicated that the former polygamy provision, s. 310, "has been redrawn to simplify".

[875] The bill and its successors went to committee and subcommittee a further number of times. Each time, s. 243 was approved without amendment or comment. The final iteration of the bill, Bill 7, received assent and was proclaimed into force as of 1 April 1955.

[876] Some sources credit the advocacy of John Blackmore, Member of Parliament for Lethbridge and uncle of Winston Blackmore, for the removal of the reference to Mormon spiritual or plural marriage from the *Code* provision: see Bramham, *Secret Lives of Saints* at 49. Hardy attributes the change to efforts on the part of both John Blackmore and Solon Low, Member of Parliament for Peace River (*Mormon Polygamy in Mexico and Canada* at footnote 76).

[877] Since 1954, the polygamy prohibition has undergone renumbering but has otherwise remained unchanged.

2. Conclusion on Purpose of Section 293

[878] Parliament's purpose in enacting the prohibition against polygamy can only be meaningfully understood in its historical context.

[879] Dr. Witte told us of the "sober arguments" levelled against polygamy in the United States before and during the passage of the anti-polygamy laws in the latter half of the 19th century. I repeat a portion of that evidence:

> And the concern was the exploitation and enslavement of women, the concern about creating rivalry and violence in the household. The concern was the privileging of the rich who participate in marriage at the cost of fit men who did not have the capacity to enter marriage because they didn't have the capital. There was concern of the exploitation of women in the household itself, the favouring of some and the diminishment of others. There was concern also about children, children being raised in those households being subject to the discord, to the violence, to the favouritism, the incapacity of those children to learn the habits of citizenship that they needed. The concern especially of coercion of

> young, of vulnerable children, especially young girls, into relationships. All that rhetoric is consistent with the rhetoric of the tradition indeed going back to the 3rd and 4th century church fathers' writings repeated ... by various Enlightenment philosophers and common law jurists. That kind of language is at the disposal of Congress and used by Congress, amongst other language, to describe why it was thought expedient to pass new laws on this subject.
>
> [Transcript, 10 January 2011, p. 55, l. 31 to p. 56, l. 9]

[880] These "sober arguments" were being expressed at the time Parliament was considering the Canadian version of the polygamy prohibition. As Dr. Witte noted, these arguments reflected a long-standing recognition, in the Western legal and philosophical tradition, of the harms associated with polygamy. I conclude that these concerns were similarly held in Canada and can be seen to have prompted, in part, our legislation.

[881] I conclude that s. 293 was, and indeed still is, intended to address the harms viewed as arising from polygamy; harms to women, to children, to society and, importantly, to the institution of monogamous marriage.

[882] I would expand upon an important point with respect to the purpose of s. 293. In my view, it is directed in part at protecting the institution of monogamous marriage. At first blush, this characterization of its object seems to undercut the thesis that s. 293 is directed at addressing harm - the harm viewed as arising from the institution of polygamy.

[883] I say this in response: the harms said to be associated with polygamy directly threaten the benefits felt to be associated with the institution of monogamous marriage − felt to be so associated since the advent of socially imposed universal monogamy in Greco-Roman society.

[884] As I said above, the prevailing view through the millennia in the West has been that exclusive and enduring monogamous marriage is the best way to ensure paternal certainty and joint parental investment in children. It best ensures that men and women are treated with equal dignity and respect, and that husbands and wives (or same sex couples), and parents and children, provide each other with mutual support, protection and edification through their lifetimes.

[885] The negative and the positive aspects of the polygamy prohibition are two sides of the same coin. The prohibition abates the harms to individuals and society associated with

polygamy, and it protects and preserves monogamous marriage, the institution believed to advance the values threatened by polygamy.

[886] The Supreme Court of Canada revisited the nature and extent of Parliament's criminal law power in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

[887] Four of the nine Justices (LeBel, Deschamps, Abella and Rothstein JJ.) said this of the criminal law power (at para. 232):

> In our view, therefore, it is not enough to identify a public purpose that would have justified Parliament's action. Indeed, it might be hoped that Parliament does not act unless there is a public purpose that justifies its doing so. Where its action is grounded in the criminal law, the public purpose must involve suppressing an evil or safeguarding a threatened interest.

[888] In the case of s. 293, Parliament sought to suppress the evil reasonably apprehended to be associated with the practice of polygamy and in doing so it was, and is, safeguarding a threatened interest − the institution of monogamous marriage.

[889] This aspect of polygamy prohibition was discussed in the American context in Hardy, *Mormon Polygamy in Mexico and Canada* at 189-190:

> Something of a parallel existed in the United States. After anti-polygamy legislation was passed by the Congress, many Mormons were outraged at what they considered to be the hypocrisy, the double standard, of those who made and enforced such laws against them. To the Mormon, vast numbers of homeless children, widespread prostitution, adultery and sexual deceit constituted a standing rebuke of those who condemned the Mormon marriage system which, the Saints alleged, had largely eliminated such evils.
>
> What Mormons seemed unable to grasp fully, although it was explained on several occasions, was that it was not the sexual derelictions of individuals with which the law was concerned so much as with preserving the *form* of the monogamous home. The purpose of the laws, as explained by legislators and judges alike, was to expunge the "semblance" of a competing and threatening order of American home life. This is why, in the face of Mormon consternation, convictions for plural marriage were allowed even when no sexual relations between spouses existed. The intent was to obviate, in the words of the Utah Commission, "the assault made by the Mormon Church upon the most cherished institution of our civilization - the monogamic system.

[890] Hardy notes the Canadian congruence with this American view, as the polygamy prohibition in this country similarly made provision for convictions with or without evidence of sexual relations between the parties (at 197).

[891] We also see some reference to polygamy's threat to the institution of monogamous marriage in the American jurisprudence of the time.

[892] Recall the *Reynolds* decision, where the United States Supreme Court said (at 165):

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

[893] In *United States v. Musser*, 4 Utah 153, 7 P. 389 (1885), the Supreme Court of Utah considered the meaning of the then newly created offence of "unlawful cohabitation". After observing that the law was not aimed at adultery since it required cohabitation with more than one woman, the Court noted that "it appears plain that the intention was to protect the monogamous marriage by prohibiting all other marriage, either in form or in appearance only, whether evidenced by a ceremony, or by conduct and circumstances alone" (at 391).

[894] The Court added (at 391):

> We may assume that the authors of this law had in mind the institution of marriage, because they expressly declared that any man who, having a wife, marries another, is guilty of a crime; and that any male person who cohabits with more than one woman is guilty of unlawful cohabitation. They had in view the evil effects of such practices. <u>The end of the law was the protection of the monogamous marriage; and the suppression of polygamy and unlawful cohabitation were but means to that end</u>. [Emphasis added.]

[895] I conclude that similar sentiments were also at work in Canada in the lead up to the introduction of s. 293.

[896] While there is little doubt that the arrival of Mormons from the United States was a galvanizing influence on many of those who supported the introduction of the provision and its earlier iterations, it follows from what I have just said that I do not consider the legislation to have been the product of religious animus.

[897] It is true that Parliamentarians expressed their objections to polygamy during the House of Commons and Senate debates regarding Bill 65 with strong moral condemnation. However, overwhelmingly, it was directed towards the practice of polygamy, not Mormon religious belief.

[898] For example, the Hon. Mr. Power said in the Senate:

> I am glad that the Government have undertaken to deal with the practice of polygamy. It is understood that some Mormons have settled in our North-West Territories, and the probabilities are that if the Government and Parliament of Canada did not take some steps to indicate that they did not propose to allow those people to continue to indulge in their nefarious practice in this country, we might ere long have a wholesale exodus from the United States, where they are now being followed up energetically by the law into this country.
>
> [*Debates of the Senate*, 6th Parl., 4th Sess., (25 April 1890), at 584]

[899] The Hon. Mr. Macdonald said:

> Mormons who come into this country and continue to live as Mormons, and are convicted of the practice are punished accordingly.
>
> [*Debates of the Senate*, 6th Parl., 4th Sess., (25 April 1890), at 585]

[900] I also observe that while the debate surrounding the polygamy law focussed predominantly on Mormons, some Parliamentarians were careful to not to make that link exclusive. In the House of Commons, for example, the Hon. Mr. Mulock, in arguing for a more stringent penalty than was proposed, said:

> The present provision, which leaves it in the option of the judge to merely impose a nominal fine, is an illusory punishment and will develop the hope in the breasts of the Mormons or others who would seek to evade the law that they may escape with a fine; [Emphasis added.]
>
> [*Debates of the House of Common*, 6th Parl., 4th Sess., (10 April 1890), at 3177]

[901] In the Senate, the Hon. Mr. Abbott stated:

> 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.
>
> [*Debates of the Senate*, 6th Parl., 4th Sess., (25 April 1890), at 585]

[902] The introductory words of the original iteration of the law, s. 5 of the *Act respecting Offences relating to the Law of Marriage,* made this clear:

> Everyone who 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 any other method whatsoever, ... [Emphasis added.]

[903] Polygamy was not prohibited because it was a religious belief of the early Mormon settlers. It was the practice of polygamy and the harms with which it was associated that concerned Canadian lawmakers.

[904] I find that the prohibition was prompted by largely secular concerns with the perceived harms associated with the practice of polygamy to women, children, society and the institution of monogamous marriage. As I have discussed, socially imposed universal monogamy, while embraced by Christianity, had its roots in secular Greco-Roman society.

B. Interpretation of s. 293

1. Positions of the Parties

[905] Each party begins its submissions on the interpretation of s. 293 by citing the modern approach to statutory interpretation: the words of a statute must 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. From this point of consensus, however, they offer divergent interpretations of the provision.

[906] The *Amicus* puts forth the most expansive interpretation. His position, simply put, is that s. 293 criminalizes all conjugality other than monogamy, regardless of gender arrangement, the manner in which the union was formed or its benefit to the participants. Section 293 also criminalizes all participants in the union, alleged wrongdoers and victims alike.

[907] The *Amicus* submits that for the purposes of s. 293(1)(a)(i), "polygamy" encompasses polygyny, polyandry and same-sex polygamy.

[908] "Polygamy" is a gender neutral term and was so, according to dictionaries from the period, in 1890 when the prohibition was first enacted.

[909] Moreover, the *Oxford English Dictionary*, 3rd ed. [*OED*] indicates that the terms "polygyny" and "polyandry" were in usage by at least 1780, more than a century earlier. The *OED* defines both as forms of polygamy, significant given that the polygamy prohibition has

always made it an offence to enter into "any form of polygamy". The *Amicus* submits that Parliament must be taken to have known of the existence and definitions of these terms and to have chosen the one that best expressed its intended meaning. Of note, that choice was maintained in subsequent revisions of the provision.

[910] The *Amicus* draws further support for a gender neutral interpretation of polygamy from both the bigamy offence, which was amended in the same bill that first introduced the polygamy prohibition, and the conjugal union offence in s. 293(1)(a)(ii).

[911] The amended bigamy provision, which became s. 4 of *An Act respecting Offences relating to the Law of Marriage*, read as follows:

> Every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, and every male person who, in Canada, simultaneously, or on the same day, marries more than one woman, is guilty of felony, and liable to seven years' imprisonment. [Emphasis added.]

Plainly it was not Parliament's intention to restrict s. 293 to polygyny or else it would have drawn the distinction it drew here.

[912] The conjugal union offence, both in 1890 and currently, prohibits being in "any kind of conjugal union with more than one person at the same time". Again, the *Amicus* submits, the underlined words are explicitly gender neutral and reflect Parliament's intention to capture all forms of polygamous conjugality, regardless of gender arrangement.

[913] In arguing against an interpretation that would restrict polygamy to polygyny, the *Amicus* stresses the words "any form of", which he says clearly do not refer to particular religious or cultural traditions of polygamy as some other reference participants contend. This is evident, he says, from the breadth of the prohibition as originally enacted:

> 5. Every one who practises, 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 any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practice or enter into
>
> (a) Any form of polygamy; or -
>
> (b) Any kind of conjugal union with more than one person at the same time; or -

> (c) What among the persons commonly called Mormons is known as spiritual or plural marriage; or -
>
> (d) 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.

[914] As the underlined passage precedes "any form of", it would be redundant for the phrase to refer to different religious or cultural traditions of polygamy.

[915] The *Amicus* says that the presumption of statutory interpretation, codified in s. 10 of the *Interpretation Act*, R.S.C. 1985, c. I-21, that words are to be given their current, as opposed to historical, meaning further buttresses his interpretation. "Polygamy" should be interpreted in a manner consistent with current social realities, and be taken to encompass any form of committed, multi-partner relationship.

[916] With respect to s. 293(1)(a)(ii), the conjugal union offence, the *Amicus* submits (at paras. 140 - 141):

> In the Amicus' submission, "conjugal union" means a "marriage-like relationship" or a "conjugal relationship". It is a broad term, encompassing formal marriages but also including what are sometimes called "common law relationships". The word "conjugal" describes the *substance* of a relationship, rather than its legal form: it speaks to a relationship between persons that is committed, interdependent and of some permanence. Within the broad category of "conjugal unions" or "conjugal relationships", the law recognizes at least marriage and common law relationships; within the context of immigration, Canadian law also recognizes a third relationship between "conjugal partners".
>
> In the Amicus' submission, s. 293(1)(a)(ii) prohibits all such relationships when pursued by more than two people.

[917] He argues that whether a multi-partner relationship is conjugal for the purposes of s. 293(1)(a)(i) can be determined by reference to factors developed in family law. He proposes the test from *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), cited in *M. v. H.*, [1999] 2 S.C.R. 3 (at para. 59):

> *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal.

[918] In arguing for a broad interpretation of the conjugal union offence, the *Amicus* raises the following points.

[919] First, the ordinary meaning of "conjugal union" is "conjugal relationship", as reflected in the synonymous use of those terms by many courts, tribunals and commentators. A few examples follow:

a) The *Immigration and Refugee Protection Regulations*, SOR/2002-227, state in s. 2 that "'conjugal partner' means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year". In determining whether that test had been met in *Mbollo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1267, Boivin J. used "conjugal relationship" and "conjugal union" interchangeably:

> [24] An appeal before a panel is a hearing *de novo*. Accordingly, the applicant and his spouse had to provide sufficient reliable evidence showing that their conjugal relationship was genuine and that it was not entered into primarily for the purpose of acquiring a status under the Act (*Froment v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1002, 299 F.T.R. 70 at para. 19, citing *Sanichara* at para. 8; *Mohamed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 696, 296 F.T.R. 73 at para. 40; *Morris v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 369, 147 A.C.W.S. (3d) 489 at para. 5).
>
> [25] The consideration of conjugal partner status under section 2 of the Regulations is an integral part of interpreting section 4 of the Regulations. If it is not established on a balance of probabilities that a conjugal relationship exists, the relationship is not genuine, and it may be inferred that it was entered into primarily to obtain a status or privilege under the Act.
>
> [26] The panel based its analysis on the non-exhaustive factors for identifying a conjugal relationship as established in *M. v. H.*, [1999] 2 S.C.R. 3, 238 N.R. 179. The weight to be assigned to the different factors varies, and a flexible method must be adopted in determining whether a conjugal union exists (*Cai v. Canada (Minister of Citizenship and Immigration*), 2007 FC 816, 159 A.C.W.S. (3d) 428 at para. 12).
>
> [*Amicus'* emphasis.]

b) Statistics Canada often uses the term "conjugal union" synonymously with "conjugal relationship", encompassing both marriage and common law unions; for instance, in Nancy Zukewich and Melissa Cooke-Reynolds, "Days of our lives: time use and

transitions over the life courses" in *Transitions to Union Formation*, 1998, No. 2 (Statistics Canada: 2003) at 89:

> This study of union formation compares getting married with entering a common-law union. In an attempt to capture the respondent's first transition into a conjugal union, the population was restricted to those aged 20 to 34. This was based on average age at first marriage and the fact that people tend to enter their first common-law relationship at slightly younger ages than when they marry (Statistics Canada 2000). However, married people in this age range are somewhat more likely than cohabiting people to be in their first union.
>
> [*Amicus*' emphasis.]

[920] Second, the *Amicus* contends that the context of the phrase "conjugal union" in s. 293 supports his interpretation.

[921] The conjugal union offence speaks broadly of "any kind of conjugal union with more than one person at the same time", and appears aimed at capturing any kind of committed, permanent relationship between three or more people. For greater clarity, Parliament confirmed it was criminalizing every such relationship "whether or not ... by law recognized as a binding form of marriage".

[922] Further, the opening words of subsection (a) criminalize anyone who "practises or enters into or in any manner agrees or consents to practise or enter into" a conjugal union. Again, this language is exceedingly broad.

[923] The *Amicus* points out that "practices", which is distinguished from "enters into", relates to an ongoing state of affairs. It is therefore not a requirement that the union be formed in a particular way. "Agrees or consents" encompasses the casual manner in which many common law unions are formed; first by deciding to cohabit and then by each party consenting to that continuing state of affairs. In this regard, the evidence of Dr. Wu with respect to the present diversity of non-institutionalized acts of commitment warrants regard.

[924] Thus, the *Amicus* argues, it is the simple fact that an accused person is in such a relationship that matters, not the manner in which the relationship was formed.

[925] This point is put beyond doubt by s. 293(2), which provides that "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 upon the trial of the accused".

[926] The *Amicus* also turns to the legislative record in contending for a broad interpretation of conjugal union. He says that the first iteration of s. 293 (s. 5 of *An Act respecting Offences relating to the Law of Marriage*) evinces Parliament's intention to prohibit all conjugal relationships between more than two people, even if they were formed merely by cohabitation and consent. (That provision is set out at para. 863 above.) A number of points drive this submission:

a) The opening words of the section make clear that liability extends to anyone who "practices" any form of polygamy or multi-partner conjugal union. The significance of this was explained above.

b) The opening words of the section also refer to alternative methods of entering into a polygamous relationship or multi-party conjugal union, some of which are extremely broad: "... by any form of contract, or by mere mutual consent, or by any other method whatsoever".

c) Subsection (d) reveals Parliament's intention to criminalize multi-party cohabitation where the participants do so in a conjugal union: "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".

d) Subsection (2) refers to the relationships listed in subsection (1) as "sexual relationships". Parliament was thus focussing on the intimate nature of the relationships rather than any formalized social status.

[927] Although the polygamy provision was subsequently revised, as has been noted elsewhere, there is nothing in the legislative record to suggest that the changes were intended to be substantive.

[928] The French version of s. 293, which refers to "union conjugale", offers yet additional support for the *Amicus*' proposed interpretation. The *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), uses union conjugale where it uses "conjugal relationship" in English. Similarly, some French translations of judicial authorities use union conjugale where their English counterparts say conjugal relationship: see, for example, *M v. H*; *Bellavance v. Canada*, 2004 TCC 5.

[929] Many of the Interested Persons similarly advocate expansive interpretations of s. 293, including REAL Women, the Christian Legal Fellowship, the Civil Liberties Association and the Polyamory Advocacy Association.

[930] The two Attorneys General and certain Interested Persons propose more circumscribed interpretations of s. 293.

[931] The AG Canada submits that properly interpreted, s. 293 prohibits practicing or entering into multiple simultaneous marriages, whether sanctioned by civil, religious or other means. Under this interpretation, the offence is not directed to multi-party unmarried relationships or common law cohabitation; it is, however, directed to both polygyny and polyandry.

[932] The AG Canada submits that polygamy is, and always has been, an offence linked to marriage. The word, by definition and etymology, means multiple marriages. The offence was first introduced in Canada in a bill to amend *An Act respecting Offences relating to the Law of Marriage*. Section 293 is found in a part of the *Criminal Code* entitled "Offences Against Conjugal Rights"; all of the offences found in this part relate to marriage. The limited jurisprudence regarding s. 293 confirms its link to marriage: see, for example, *R. v. Labrie*, (1891), 7 M.L.R. 211 (Que. Q.B.), *R. v. Tolhurst,* [1937] O.R. 570 (C.A.), and *R. v. Wright* (1937), 3 D.L.R. 808.

[933] The AG Canada's interpretation finds support in s. 293(1)(b), which uses the language "celebrates, assists or is a party to a rite, ceremony, contract or consent". Each is a term of art associated with and having a distinct meaning within the context of marriage. Based on the historical and legislative context, subsection (b) must be understood as furthering Parliament's intention to discourage multiple marriages.

[934] Importantly, the AG Canada says, an interpretation linking polygamy to multiple marriages is consistent with the evidence that marriage is a foundational public institution with effects extending well beyond the immediate participants. It is consistent, as well, with the evidence of the harms associated with the practice.

[935] The AG Canada submits that s. 293(1)(a)(i) prohibits the practice of entering into multiple simultaneous marriages that are legally valid under the law where they were celebrated. Given that it is not legally possible to marry multiple people in Canada, this offence should be interpreted as referring to non-residents of Canada who marry their spouses in a foreign country in accordance with its laws and then come to Canada. Upon their arrival in Canada, they are practicing polygamy within the meaning of that subsection.

[936] The AG Canada describes s. 293(1)(a)(ii) as an anti-circumvention provision intended, in part, to prevent individuals from escaping criminal liability by having their multiple marriages sanctioned only by religious or other means. There are two important aspects to this offence: (a) it is aimed at marriage, not cohabitation; and (b) it captures all non-legally valid multiple marriages, including Mormon celestial marriage.

[937] The AG Canada argues that a conjugal union is a long-standing legal concept used to describe a marriage, whether valid under civil law, valid only in religious law or existing only in the view of the parties and the communities to which they belong.

[938] At the time of the first enactment of s. 293, "conjugal union" was commonly defined as "[o]f or pertaining to marriage or to husband and wife in their relation to each other, matrimonial": *OED*, 2d ed. Courts have similarly interpreted the conjugal union offence as relating to marriage and requiring more than simple cohabitation: *Labrie*; *Tolhurst*. Indeed, even the *Amicus*' own family law expert, Dr. Susan Drummond, gave evidence that "[c]ohabitation alone, without some form of intentional act that binds the parties contractually, does not meet the criteria of conjugal union set out in the polygamy section" (at para. 60).

[939] A conjugal union is legally distinct from a conjugal relationship. One of the key areas of distinction is that the former, like any marriage, is created in a moment by a marriage ceremony

or other sanctioning event. A conjugal relationship, in contrast, develops only over time and without a specific moment of creation.

[940] The AG Canada says it is of note that in 2000, Parliament reviewed all federal statutes that referred to marriage to determine whether they should be revised to include common law partners and relationships. As a result of this exercise, Parliament amended 68 statutes including the *Criminal Code*, adding a definition of common law partner to s. 2 of the *Code*:

> "common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year;

[941] Various provisions in the *Code* were also amended to reflect this change; for instance, s. 215 regarding the duty of persons to provide necessaries of life, was revised to apply to spouses and common-law partners. Section 293, however, remained unchanged, thus undercutting any submission that conjugal union refers to an unmarried relationship.

[942] As an offence related to marriage, s. 293(1)(a)(ii) includes two important elements. First, a conjugal union, like a marriage, comes into being through a marriage ceremony or other sanctioning event. Second, the participants in the conjugal union, like the participants in a marriage, are bound together in a marital structure or institution.

[943] The AG Canada emphasizes the importance of both elements. Although some form of sanctioning event is necessary to create a conjugal union, the harms associated with polygamy do not flow from the sanctioning event alone. As a foundational social structure, the institution of marriage wields extraordinary power in organizing relationships between individuals and between individuals and the state.

[944] The AG Canada takes the position that s. 293 applies to both polygyny and polyandry. Many of his submissions on this point mirror those of the *Amicus*. The AG Canada adds that it is also reasonable to assume that many of the same harms associated with polygyny will manifest in polyandrous marriages; for instance, divided parental investment in children or the increased likelihood of violence and neglect due to less genetic-relatedness among family members.

[945] Further, even though the prohibition of polygamy is most solidly founded on harm reduction, it can only achieve this purpose through the enforcement of a definable standard. The public has an interest in coherent and universal legal rules restricting individuals from engaging in all types of multiple marriages. To permit some members to engage in an activity that is prohibited for others may serve to weaken the moral standards that are addressed by the law.

[946] The AG Canada says that the bigamy and polygamy provisions in the *Criminal Code* are complementary, in that both target multiple marriages. The bigamy provision targets only multiple marriages entered into through the civil process. The polygamy provision targets marriages entered into in countries where polygamy is legal and the participants subsequently come to Canada; it also targets marriages where the parties have circumvented civil marriage requirements. Together, the two provisions ensure that all forms of multiple marriage are prohibited in Canada and that there are no loopholes which would permit individuals to circumvent Parliament's intention.

[947] The FLDS does not agree with some aspects of the AG Canada's position but proposes an interpretation that has similarities.

[948] The FLDS disputes the AG Canada's submission that the polygamy offence refers to polygamous marriages that are valid in a foreign jurisdiction. Such a scenario, it argues, is already prohibited by s. 290, the anti-bigamy provision. The FLDS also challenges the AG Canada's position that a conjugal union requires a sanctioning event.

[949] However, the FLDS says that the few authorities that have considered s. 293 have held that a conjugal union requires more than mere cohabitation between the parties, and have described the requisite nature of the relationship as being "under the guise of marriage" (*Tolhurst*) or as a "form of contract between the parties, which they might suppose to be binding on them" (*Labrie*).

[950] It follows, the FLDS thus submits, that the offence is made out upon the making of an agreement by more than two persons to treat themselves as bound together in a marriage-like relationship. The accused must have agreed to treat this agreement as binding upon his or her conscience for some period of time.

[951] Since criminal laws require precision in order that an accused may know the parameters of prohibited conduct, the offence created by s. 293 cannot be defined solely by reference to the indicia of a marriage-like relationship as described in the authorities. The FLDS would define the offence in this way (at paras. 33 - 34):

> It is the submission of the FLDS that the *actus reus* of the offence created in section 293 is the making of the agreement between more than two people to form or engage in a relationship having some or all of the indicia of marriage, excluding the fact or intent to engage in sexual relations, and to treat that relationship as binding on their conscience and enduring for some period of time. The *mens rea* is the specific intent to make the agreement. The question of whether this agreement is sanctioned by foreign law (polygamy, as defined by Canada) or undertaken in Canada without sanction of law (conjugal union) is irrelevant.
>
> Section 293 therefore creates, uniquely, a crime of status. It is not an offence to undertake individually or collectively any of the indicia of marriage such as living together, having sexual relations, bearing children, sharing expenses or supporting one another. The offence is only committed if persons performing some, or all of these indicia of marriage have also agreed to treat their relationship as binding on their conscience and enduring for some period of time. The sisters who live together and support one another in every way, having agreed to treat their relationship as enduring are captured by the prohibition in the same way that members of the FLDS, having entered a celestial marriage are captured.

[952] Also like the AG Canada, the FLDS submits that the offence is not limited to polygyny but applies to polygamy in all its forms.

[953] The AGBC proposes a different interpretation of s. 293. He contends that the provision targets multi-partner relationships with the trappings of duplicative marriage (at para. 100):

> Setting aside for the time being the question of whether "polygamy" or "conjugal union with more than one person" includes both polygyny and polyandry (discussed under "overbreadth" in the final section of this Part), it is apparent that a multi-partner relationship does not become criminal unless it has the trappings of duplicative marriage. What constitutes "duplicative marriage" need not be exhaustively defined in advance, but it means at least that multi-party conjugality would attract the criminal prohibition when it is or purports to be a marriage, including when it is or purports to be a pairing sanctioned by some authority and binding on its participants. In this formulation, "authority" would be some mechanism of influence, usually religious, legal, or cultural, that imposes some external consequences on decisions to enter into or remain in the relationship. This is the "core" polygamy that, on the evidence, is the overwhelmingly prevalent, and most harmful, kind.

[954] The AGBC takes this concept of duplicative marriage from *State of Utah v. Holm*, where the Supreme Court of Utah held that "the bigamy statute was intended to criminalize both

attempts to gain legal recognition of duplicative marital relationships and attempts to form duplicative marital relationships that are not legally recognized. This court has previously recognized that the legislative purpose of the bigamy statute was to prevent 'all the indicia of marriage repeated more than once'" (at para. 26).

[955] The AGBC says his focus on the core polygamy of duplicative marriage is consistent with the context of the section as a whole. Subsection 293(1)(b) refers to "a rite, ceremony, contract or consent", suggesting that Parliament's concern was with relationships with a certain degree of formality or commitment. Moreover, the phrase "whether or not it is by law recognized as a binding form of marriage" suggests that its main application was thought to be with respect to purportedly binding forms of marriage, whatever their legal status.

[956] The AGBC further submits (at paras. 105 - 106):

> The three original provisions of the [1890] prohibition addressed themselves to three types of criminal conjugality: Mormon plural marriage; "any form of polygamy", and a conjugal union among more than two persons (there was a fourth category of "cohabiting" in a conjugal union, which was removed in 1954 presumably because it was completely redundant with the now subsection 293((1)(a)(ii)).
>
> It seems clear from the history and context that the overlap among the provisions was deliberate. Subsection 293(1)(a)(ii), which has since 1890 forbidden a "conjugal union" with more than one person, is a reiteration and expansion of the principal prohibition that was designed and serves as an anti-circumvention measure. It refers to a polygamous marriage-like union even if it cannot be proven to have been formalized through recognized ceremony or celebration that would have made it either a "form of polygamy" under subsection 11(5)(a) [now subsection 293(1)(a)(i) or "what among the persons commonly called Mormons is known as spiritual or plural marriage" under then subsection 11(5)(c).

[957] Each of the forms of polygamy of concern to the government of the day (Mormon, Indian and Muslim) was a form of multiple marriage in the sense of being a relationship recognized as originating in some sort of purportedly binding authority. Further, the concerns apparent from the historical record are the protection of women and children and the preservation of the authority and cohesiveness of the state. These are concerns that relate to polygamy at the point that it becomes institutional in some measure.

[958] The AGBC takes the position that it is unnecessary for the Court to decide whether s. 293 applies to polyamory, polyandry and multi-partner same-sex unions. He submits (at para. 120):

> The Attorney's position is that the question of the inclusion of these non-polygynous polygamous relationships (which the Attorney refers to collectively as "polyandry" for convenience) need only be answered if this Court concludes, on present evidence, that polyandry is *prima facie* included in section 293, *and* that inclusion would render it unconstitutionally overbroad, *and* that the problem could not be resolved in a number of ways short of a finding of invalidity.

[959] The AGBC argues that each of these propositions may be doubted, and the question left for another day:

a) For a number of reasons, it is open to the Court to interpret "polygamy" as "polygyny":

   i. First, all indications from the legislative record and surrounding historical context are that "polygamy" was understood and discussed in 1890 purely with reference to polygyny. It is also generally understood and practiced that way today.

   ii. Second, the Court is not bound by the original definition of the term, as the interpretation of words in a statute can evolve over time as the norms and mores of society change; the evolving definition of marriage is an apt example. It would be in keeping with rules of statutory interpretation to read down "polygamy" in s. 293 to mean "polygyny", particularly if to do otherwise would render the section unconstitutional.

b) Even if polyandry and same-sex multi-partner conjugality were prohibited by s. 293, it is not certain this would render the provision unconstitutional. It would be open to this or another court to decide that polyandry also carries constitutionally significant harms; that broader inclusion confirms a defensible uniform moral stand; and, that there may be strong equality reasons to support the application of the polygamy ban regardless of the gender of the conjugal partners.

c) If an inclusive definition would nevertheless be problematic, the Court would be entitled to read in exceptions.

[960] In explaining why the need to address the matter may never arise, the AGBC offers some further insight into what conduct he considers s. 293 to capture (at para. 126):

> Indeed, it may be doubted that such a day may even come. The evidence indicates no significant religious, cultural or legal tradition, anywhere in the world, that includes among its tenets polyandrous or same-sex multi-partner unions. There are five affidavits from polyandrous polyamorists in Canada, but it may be doubted whether any of them is in a polygamous marriage or conjugal union within the *prima facie* scope of section 293 - none of the relationships has been of long-standing (it appears the longest has endured three years), none involves a sanctioning authority or external influence, and the parties appear to consider themselves bound only as long as they choose. [Emphasis added.]

[961] Yet another interpretation of s. 293 is proposed by West Coast LEAF and supported by the BCTF. It submits that s. 293 should be read down to apply to exploitative polygamy only. Read down in this way, the provision applies only to the exploiter, not the exploited. It also does not capture polyamory, as such relationships, at least as defined by the Polyamory Advocacy Association, are based on equality and self-realization.

[962] Reading down is a tool of constitutional interpretation that relies on the principle of constitutionality for its operation.

[963] The principle, or presumption, of constitutionality, in turn, is a rule of construction that applies to all constitutional analyses. It holds that where "legislation is amenable to two interpretations, a court should choose the interpretation that upholds the legislation as constitutional. Thus, courts must presume that Parliament intended to enact constitutional legislation and strive, where possible, to give effect to this intention": *R. v. Mills*, [1999] 3 S.C.R. 668 (at para. 56).

[964] Citing *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, West Coast LEAF submits that construing terms by reference to the evidence and submissions is a common and accepted function of courts in interpreting criminal law. In that case, for instance, McLachlin C.J.C. turned to the evidence in determining the meaning of "reasonable in the circumstances" in the context of s. 43 of the *Criminal Code*, which permits corrective measures when disciplining children.

[965] West Coast LEAF submits that in the present case, the record is replete with evidence regarding the harms associated with polygamy. Overwhelmingly, that evidence relates to exploitative polygyny.

[966] Accordingly, s. 293 is reasonably open to the interpretation that it applies to polygamy insofar as it exploits women and girls. This interpretation fulfils the equality rights of women and girls in exploitative polygamous relationships while limiting the potential infringement of the *Charter* rights of polygamists.

[967] West Coast LEAF says that the determination as to whether a particular polygamous relationship is exploitative depends on an assessment of the totality of the circumstances presented. While such an exercise may defy bright line distinctions, exploitation is a concept known to the criminal law and is an express element of a number of a offences, among them s. 153 (sexual exploitation) and s. 163 (obscenity).

[968] West Coast LEAF offers a non-exhaustive list of factors, the existence of one, some or all of which may tend to establish exploitative polygamy, including: (a) whether a community practices polygyny and not polyandry; (b) whether there is a power differential between a husband and wife based on a significant age differential; (c) whether the female is a "young person" as defined in the *Criminal Code*; and (d) whether the marriage structure in question concentrates household power in the central male figure in terms of decision-making, sexual control and economic control.

2. Conclusion on Interpretation of s. 293

[969] The modern rule of statutory interpretation bears repetition here: the words of a statute must 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 (*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27).

[970] To this common law rule I would add the following statutory directions from the federal *Interpretation Act*:

> 10. 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.
>
> ...
>
> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[971] Determining the scope of s. 293 is a threshold inquiry on this reference. As McLachlin C.J.C. said in *Sharpe* (at para. 32):

> Until we know what the law catches, we cannot say whether it catches too much.

[972] As summarized in detail above, the parties have addressed a number of alternative versions as to what this law "catches". Here, I will identify the spectrum of interpretations to assist the discussion. The alternatives move from the broadest to the narrowest interpretation.

[973] At the far end of inclusiveness is the interpretation advanced by the *Amicus*: s. 293 criminalizes all conjugality other than monogamy, regardless of gender arrangement and the manner in which the union was formed. It criminalizes all participants in the union.

[974] Moving closer to the center, the AG Canada submits that s. 293 prohibits practicing or entering into multiple, simultaneous marriages, whether sanctioned by civil, religious or other means. It is not directed at multi-party, unmarried relationships or to common law cohabitation. It captures both polygyny and polyandry.

[975] Next, we have the position advanced by the AGBC. The prohibition is directed against duplicative marriage in polygynous relationships. It is unnecessary to decide today whether s. 293 applies to polyamory, polyandry or multi-partner, same-sex unions.

[976] Finally, at the narrow extreme of the spectrum, West Coast LEAF would read down the section to apply to exploitative polygamy only. It applies to the exploiter, not the exploited. It does not capture polyamorous relationships, at least as defined by the Polyamory Advocacy Association.

[977] I have concluded that the AG Canada's submission, with some qualifications, is closest to the mark in this contest.

[978] Both the AGBC and West Coast LEAF (and the Interested Persons who advance their own interpretations building on these), in a pre-emptive effort to address concerns with overbreadth, invite the Court to read down or read in limitations to the scope of the section. It is the case, as McLachlin C.J.C. said in *Sharpe* (at paras. 32-33):

> While the Crown concedes that s. 163.1(4) limits freedom of expression, this does not eliminate the need to consider the nature and scope of the infringement in determining whether or not it is justified. Until we know what the law catches, we cannot say whether it catches too much. This Court has consistently approached claims of overbreadth on this basis. It is not enough to accept the allegations of the parties as to what the law prohibits. The law must be construed, and interpretations that may minimize the alleged overbreadth must be explored: see *Keegstra, supra, Butler, supra*, and *Mills, supra*. So we must begin by asking what s. 163.1(4) truly catches as distinguished from some of the broader interpretations alleged by the respondent and some of the interveners in support. The interpretation of the section is a necessary pre-condition 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 experience.
>
> Much has been written about the interpretation of legislation (see, e.g., R. Sullivan, *Statutory Interpretation* (1997); R. Sullivan*, Driedger on the Construction of Statutes* (3rd ed. 1994); P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000)). However, E. A. Driedger in *Construction of Statutes* (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be [page75] founded on the wording of the legislation alone. At p. 87, Driedger states: "Today there is only one principle or approach, namely, the words of an 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." Recent cases which have cited the above passage with approval include: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 144; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 30; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550, at para. 22; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 10. Supplementing this approach is the presumption that Parliament intended to enact legislation in conformity with the *Charter*: see *Sullivan, Driedger on the Construction of Statutes, supra*, at pp. 322-27. If 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: see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1010; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 66.

[979] In *Canadian Foundation for Children, Youth and the Law*, McLachlin C.J.C. did turn to the evidence in determining the meaning of “reasonable in the circumstances”. But there, the words were inherently ambiguous or lacking in content. They required a purposive construction to give them meaning.

[980] Here, the words used by Parliament, including “every one”, “any form of polygamy”, “any kind of conjugal union” are unambiguous in their effort to include “all”. As *Sharpe* itself points out, even with an eye to interpreting words in a *Charter*-compliant manner, the breadth of

some words cannot be ignored. In *Sharpe*, this was confirmed by the fact that even proceeding as the Court directed itself, in the result the proper interpretation of the child pornography provision captured two categories of material that raised little or no risk of harm to children.

[981] A number of further considerations prompt my conclusion that one must ascribe to the phrases I have highlighted their ordinary meaning.

[982] As I have concluded from the object of the *Act* and the intention of Parliament, s. 293 was intended to preserve monogamous marriage from the threat of polygamy and the harms believed to be associated with it. It is the case that the threat to that institution in 1890 (and indeed today) overwhelmingly takes the form of polygyny, but the focus was, and is, the preservation of monogamous marriage, and the protection of individuals and society from the harms associated with polygamy. The words chosen are intended to address the perceived threat in all of its forms.

[983] From the historical record, it is clear that at the time of the original legislation, there was a well-grounded fear in the United States and Canada that the law against polygamy would be difficult to enforce and easily circumvented by imaginative polygamists. Recall that the law in Canada was prompted in part by a concern that the bigamy prohibition was not sufficiently broad to capture Mormon plural marriage. And remember Stenhouse's ruminations in 1889 about the bachelor "...duly wedded to both ladies at the same moment, neither of the wives preceding the other" (McCue, "Anthony Maitland Stenhouse" at 120).

[984] Parliament was intent on leaving no loophole. In this regard, I underline the prohibition against "any kind of conjugal union with more than one person at the same time". I agree with the AG Canada that this was an anti-circumvention measure, a bit of a belt and suspenders approach to drafting the essential prohibition of any form of polygamy. This conclusion reflects my view, which I will develop below, that s. 293(1)(a)(ii) does not add much, if anything, to the prohibition in s. 293(1)(a)(i). In this regard, I disagree with the *Amicus'* submission that this subsection extends to conjugal relationships or common law cohabitation as those terms have been given modern meaning.

[985] Turning to the scheme of the *Act*, the *Amicus* convincingly argues that where Parliament intended to depart from a gender neutral wording, it did so expressly. This is evidenced by the

introduction of the amendments to the bigamy provision at the time of the introduction of the polygamy prohibition (see para. 911 above).

[986] The AG Canada's submission on the scope of s. 293 then proceeds to suggest that it is directed at prohibiting multiple, simultaneous marriages or in the AGBC's version "duplicative marriages". This position is to be contrasted with that of the *Amicus* and his allies that s. 293 captures all non-monogamous conjugal relationships.

[987] I agree with the AG Canada and the AGBC that the section does not; that its focus is multiple marriages, that is, pair-bonding relationships sanctioned by civil, religious or other means.

[988] Section 293 contains two principal prohibitions: one against all forms of "polygamy" and the other against any kind of "conjugal union" with more than one person at the same time.

[989] Both "polygamy" and "conjugal union" are concerned with marriage.

[990] The *OED*, 2nd ed., defines polygamy as involving multiple marriages:

> Marriage with several, or more than one, at once; plurality of spouses; the practice or custom according to which one man has several wives (distinctively called *polygyny*), or one woman several husbands (*polyandry*), at the same time. Most commonly used of the former.

[991] The etymology of the word, as also set out in the *OED*, indicates that the term has always had this meaning: "Gr. πολυγαμία, f. πολύγαμος often married, polygamous; f. πολυ, POLY + γαμος marriage".

[992] In my view, the concept of "conjugal union" in s. 293 is intended to capture a union which is a marriage. That is made plain by the closing words of ss. 1(a), "whether or not it is by law recognized as a binding form of marriage". It is also made plain by dictionary meanings of the two words.

[993] "Conjugal", according to the *OED*, means "of or relating to marriage, matrimonial". "Union", in turn, is defined as: "5. The joining of one person to another in matrimony; an instance or occasion of this, a marriage."

[994] *Black's Law Dictionary*, 9th ed., similarly defines "conjugal" as "of or belonging to marriage or the married state." The entry for "conjugal union" simply reads "See MARRIAGE (1)."

[995] That takes us to the concept of "marriage". It is not defined in the *Criminal Code*. It was famously defined by Lord Penzance in *Hyde v. Hyde* (1866) L.R. 1. P.&D. 130 at 133 as: "...the voluntary union for life of one man and one woman to the exclusion of all others."

[996] That definition has, of course, been overtaken by the recognition of same-sex marriage in Canada.

[997] Dr. Henrich, in his report (at 7, fn. 3), provides us with the anthropological meaning of "marriage". It is a description that I find to be quite comprehensive, though I do not suggest it provides a strictly legal definition:

> A marriage is a long-term pair-bond between two people that is recognized and sanctioned by the couple's community. Being married comes with economic, social, and sexual expectations, prescriptions and prohibitions (norms) for both parties, who are accordingly judged - formally or informally - by the community. Marriage may or may not be sanctioned by formal laws, and marriage certainly existed long before formal laws or even writing. Public rituals usually mark the commencement of a marriage. "Cohabitation", a term I use later and distinguish from marriage, does not carry the set of shared expectations, prohibitions, and prescriptions, as judged by *a community*, that marriage does. The key to understanding marriage is recognizing the role of a community in defining, sanctioning, and enforcing it."

[998] What I stress here is Dr. Henrich's view that "the key to understanding marriage is recognizing the role of a community in defining, sanctioning and enforcing it", and the fact that he distinguishes "marriage" from mere "cohabitation".

[999] Pursuing this point, I have regard to the scheme of the *Act*. Section 293, from its first iteration, has been viewed as creating an offence relating to the law of marriage. Today, it is in

the part of the *Criminal Code* dedicated to offences relating to marriage under the heading, "Offences Against Conjugal Rights".

[1000] A sanctioning of some formality is clearly contemplated by s. 293; perhaps less expressly in ss. (1)(a) with the language "practices or enters into or in any manner agrees or consents to practice or enter into", but expressly so in ss. (1)(b) which talks of "a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in sub-paragraph (a)(i) or (ii)".

[1001] Scant jurisprudence has been decided under this provision. The few cases include:

a) *R. v. Labrie* (1891), 7 M.L.R. 211 (Que. Q.B.)

b) *R. v. Liston* (1893, unreported), cited in W.E. Raney "Bigamy and Divorce" (1898) 34 Can L.J. 545

c) *R. v. Bear's Shin Bone* (1899), 3 C.C.C. 329, 4 Terr. L.R. 173

d) *R. v. Harris* (1906), 11 C.C.C. 254 (Que. C.S.P.)

e) *Dionne v. Pepin* (1934), 72 Que. S.C. 393

f) *R. v. Trudeau*, [1935] 2 D.L.R. 786 (B.R. Que.)

g) *R .v. Tolhurst*, [1937] O.R. 570 (Ont. C.A.)

[1002] However, a number of these authorities support this conclusion regarding marriage.

[1003] In *Labrie*, the Quebec Court of Appeal (*per* Dorion C.J.) quashed a conviction under the polygamy section, based on the Crown's submission that "the law applied to every and anybody who, then married, cohabited, or agreed or consented to do so, with another married person...". It was held that (at 213):

> It 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.

[1004] Moreover, the requirement for a marriage consistent with a First Nations custom was met in *Bear's Shin Bone*.

[1005] Finally, we have *Tolhurst*, a decision of the Ontario Court of Appeal. From the perspective of *stare decisis*, it may not be strictly binding on me but I am interpreting a federal statute and consistency across the provinces is to be preferred. The decision carries some persuasive authority. In *Tolhurst*, it was found that (at 320):

> James Tolhurst's wife and May Wright's husband were still living, and that James Tolhurst and May Wright were living together as man and wife, and had four children born to them who were registered in the register of vital statistics at Hamilton as their children.

[1006] The issue was characterized as whether adultery *simpliciter* of two married people was covered by what is now s. 293(1)(a)(ii). Chief Justice Rowell stated (at paras. 3-4):

> The Court is of opinion that this section does not cover adultery however much the conduct is to be condemned and however unfortunate the circumstances of this and other cases referred to in the learned Judge's judgment.
>
> We think the crucial words of s-s. (*b*) are "any kind of conjugal union"; these words predicate some form of union under the guise of marriage, and Parliament had no intention in this section of the Code of dealing with the question of adultery. The section is headed "Polygamy and Spiritual Marriages" and it was originally enacted as an amendment relating to An Act Respecting Offences Relating to The Law of Marriage by 53 Vict., ch. 37, sec. 11, and it is said to have followed the Edmunds Law in the United States, and was aimed at prohibition of polygamy under any guise.

[1007] Interpreting s. 293 to exclude common law relationships follows, as well, from the AG Canada's compelling submission based on the amendments in 2000 to multiple federal statutes dealing with marriage, with a view to revising many of them to include common law partnerships and relationships.

[1008] Section 2 of the *Code* was amended to add a definition of "common-law partner". As the AG Canada noted, various provisions in the *Code* were amended to reflect this recognition of common law conjugal relationships, but s. 293 was left unchanged - unchanged in the context of the decision in *Tolhurst* (and others) of which Parliament is deemed to have been cognizant when making the amendments flowing from the new definition. In my opinion, these observations answer the submissions of the *Amicus* based on the statutory use in French of the phrase "union conjugale" for the English "conjugal relationship".

[1009] The cases cited by the *Amicus* which use the two phrases apparently interchangeably are not authority, in my view, for equating the two concepts in s. 293. There, I conclude, "conjugal

union" is a term of art and the "union" arises only, as the Attorneys General argue, upon the occurrence of some form of sanctioning event as I have discussed.

[1010] Declining, for the purposes of s. 293, to equate "conjugal union" with "conjugal relationship" meets many of the void for vagueness concerns advanced, not expressly by the parties, but by Dr. Susan Drummond, who gave evidence for the *Amicus* and authored "Polygamy's Inscrutable Criminal Mischief" (2009) 47 Osgoode Hall L.J. 317. The thrust of her argument in that article is that the meaning of conjugality has become so fluid and open-ended that s. 293 fails to provide fair notice of what conduct falls within the scope of the offence.

[1011] The *Amicus*, as I have said, suggests that an exceedingly broad scope should be accorded the "conjugal union" prohibited in s. 293. He argues (at para. 140), as I have extracted above, that:

> ... "conjugal union" means a "marriage-like relationship" or a "conjugal relationship". It is a broad term, encompassing formal marriages but also including what are sometimes called "common law relationships" The word "conjugal" describes the *substance* of a relationship, rather than its legal form; it speaks to a relationship between persons that is committed, interdependent and of some permanence. Within the broad category of "conjugal unions" or "conjugal relationships", the law recognizes at least marriage and common law relationships; within the context of immigration, Canadian law also recognizes a third relationship between "conjugal partners".

[1012] The *Amicus* would look to cases like *Malodovich* to assist in defining a "conjugal union" for the purposes of s. 293. All this is in aid of the argument that s. 293, especially in subparagraph (1)(a)(ii), is hopelessly overbroad.

[1013] The *Amicus*, in urging a finding that the reference in s. 293 to "conjugal union" is synonymous with the latter day concept of a "conjugal relationship", notes the interchange of those phrases by various courts and tribunals discussing other legislative provisions.

[1014] In my view, such imprecision, if it is that in those contexts, is not a reason to make the same mistake in interpreting the phrase in s. 293. These submissions do not give appropriate force to the word "union" in the phrase.

[1015] The original polygamy prohibition was proposed in *An Act to Amend an Act Respecting Offences Relating to the Law of Marriage* - the law of marriage, not more casual, unformalized

relationships. As I have noted, it was followed by the enactment of s. 278 in the *Criminal Code 1892*, which was found in the part of the *Code* dealing with marriage offences, as s. 293 is today.

[1016] That "conjugal union" in s. 293 is premised on the occurrence of some form of sanctioning, again, is made clear by ss. (1)(b). And it is, as well, in ss. (1)(a) where the phrase is introduced. I abbreviate that provision:

> 293(1) Every one who
>
> (a) practises or enters into ...
>
> (ii) any kind of conjugal union...
>
> whether or not it is by law recognized as a binding form of marriage;

[1017] A "conjugal union" coming within the prohibition may not need be recognized as a "binding form of marriage", but the whole thrust of the section is that it must be a purported form of marriage.

[1018] The *Amicus* argues that for the purposes of s. 293, it is the simple fact that an accused person is in a conjugal relationship that matters, not the manner in which the relationship was formed. He points to s. 293(2) which provides that:

> No averment or proof of the method by which the alleged relationship was entered into, agreed or consented to is necessary in the indictment or upon the trial of the accused.

and submits that it puts the point beyond doubt.

[1019] I have already expressed my view that "conjugal union" in s. 293 is intended to capture a "marriage". What s. 293(2) does is obviate the need to prove the *method* by which that marriage was entered into. It does not, however, relieve of the need to prove its *existence*.

[1020] In my view, it is clear that the offence created in ss. 293(1)(a) is premised on some form of sanctioning event because the status prohibited by the section - "polygamy" and "any kind of conjugal union with more than one person at the same time" - both have at their core, as I have discussed, "marriage" (whether or not recognized as legally binding). And "marriage" has at its core the voluntary joining of two individuals with the requisite intent to "marry" and the recognition and sanction by the couple's community. I have previously noted that a sanctioning event of some formality is contemplated by s. 293.

[1021] That leaves ss. 293(2) to relieve, as I have indicated, from the need to prove the actual method by which the marriage was entered into. Of course, in many instances the existence of the marriage may well be established by proving the sanctioning event, but that is not absolutely necessary. The existence of the marriage, because of ss. 293(2), may be inferred from all of the circumstances before the Court.

[1022] I should be clear that in saying a sanctioning event is contemplated by the section, I am not saying that proof of the event is a constituent element of the offence. Section 293(2) says otherwise. What is an element of the offence is a "marriage" with more than one person at the same time, and an indicia of "marriage", as I have discussed, is some form of sanctioning event.

[1023] I am not definitively defining "marriage"; it is not my task on this reference to do so. While arguably vague, I am not satisfied that it is unconstitutionally so within the meaning of authorities such as *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, and *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031.

[1024] A law will only be found to be unconstitutionally vague when it is so unintelligible that it fails to provide an adequate basis for legal debate or is incapable of coherent judicial interpretation. As we have seen, however, various experts on this reference, as well as a number of courts, have defined and construed "marriage" and "conjugal union".

[1025] This leads to my substantive concerns with the position of the AG Canada. One is in respect of his view that ss. (1)(a)(i) should be interpreted as referring to non-residents of Canada who marry their spouses in a foreign country in accordance with its laws and who then emigrate to Canada. I respectfully disagree. That is a nuance that never found expression in the lead up to the legislation in Canada or in its scant judicial review since then. It is belied, in my view, again, by the closing words of ss. (1): "whether or not it is by law recognized as a binding form of marriage."

[1026] That said, it may well be asked what the "conjugal union" prohibition adds to that against "polygamy". The answer is little, if anything. Of course, Parliament is presumed not to waste words with superfluous legislative language (and hence, the argument proceeds, I should give some separate effect to "conjugal union"), but the fact is that the original polygamy provision

was replete with superfluous inclusions. Witness the original express inclusion of "What among the persons commonly called Mormons is known as spiritual or plural marriage", which was removed, presumably as entirely superfluous, in 1954.

[1027] The legislation was conceived in an atmosphere of concern for loopholes; the addition of the "conjugal union" prohibition can be seen as a symptom of that concern.

[1028] As I noted above, the AG Canada submits that properly interpreted, s. 293 prohibits practicing or entering into multiple simultaneous marriages, whether sanctioned by civil, religious or other means.

[1029] This formulation lacks some precision. It arguably would only capture a male in a polygynous relationship because he is the only one who has entered into multiple marriages. Each wife has only entered into one marriage with that male. Section 293 is intended to capture both parties. And by its terms, it refers to a polygamous relationship (and a conjugal union with more than one person) in the singular. This follows from the singular "union" and the singularity suggested by "whether or not it is by law recognized as a binding form of marriage". It also follows from the fact that a polygamous relationship is evidenced by a marriage with multiple spouses.

[1030] Of course, one enters the prohibited relationship of "polygamy" or a "conjugal union with more than one person" by a marriage between, in the case of polygyny, the man and each subsequent wife. Each marriage brings the participants into what I will call the capital "M" Marriage. It is that "Marriage" which is the ultimate target of s. 293(1)(a) and all participants in it are captured by the offence.

[1031] This view raises a number of potential concerns with the provision as a whole which I must confront directly. First, if s. 293(1)(a) is concerned with capital "M" Marriage and not the individual pair-bondings which lead to that result, what are we to make of the proviso "whether or not it is by law recognized as a binding form of marriage"? One might say that there is no form of polygamy (or conjugal union with more than one person) that has been legal in Canada so the "whether or not" proviso must be referring to the individual pair-bondings because the first of these might indeed be binding.

[1032] My response is two-fold. Quite arguably, the "whether or not" proviso is simply a way of underlining the intent that the fact of a non-binding second marriage is not a defence to the charge laid as a result of that event. But a more compelling point is this: that the possibility of a form of legally recognized polygamy was indeed in the minds of some Parliamentarians at the time of the initial legislation. As I noted above, when Bill F (the Senate's predecessor legislation to the Commons' Bill 65) went to Committee, one senator expressed concern that a provision in the proposed polygamy offence would have exempted from its ambit "any Indian belonging to a tribe or a band among whom polygamy is not contrary to law".

[1033] Section 5 of Bill F went even further; it expressly exempted legal polygamy, that is, by its terms it only included polygamy entered into "...in a manner not recognized as a binding form of marriage by the law of the place in which the offence against this Act is committed". So, in order to make clear that no such exemption was countenanced in the original of s. 293, the "whether or not" proviso can be seen to have been added.

[1034] One might then ask if that is all so and s. 293(1)(a) is directed at capital "M" Marriage, what is one to make of the offence under s. 293(1)(b)? Does it only capture celebrants of the capital "M" Marriage? Of course, there never would be such a person because, save in the oddest of cases (Stenhouse's example), there would not likely be a simultaneous marriage between all of the partners in the polygamous relationship. No, what s. 293(1)(b) captures is the celebrant of a pair-bonding which precipitates or exacerbates the polygamous capital "M" Marriage. He or she, by celebrating the precipitating or contributing small "m" marriage, can indeed be viewed as celebrating a "ceremony" (etc.) that purports to sanction the polygamous relationship, that is, to "approve" or "encourage" or "expressly permit" it.

[1035] It may fairly be said that in interpreting s. 293, I have had "a lot of explaining to do"; that its drafting has required the Court to tread a difficult route in an effort to clarify its meaning. But today's provision is the product of 1890's drafting which, as we have seen, created an offence with a number of redundant layers. Those layers, in turn, were stripped away slowly and surely until, in 1954, we were left with the compressed kernel of the offence we see today. I must say that the metaphor of the committee designing the horse comes to mind, but s. 293 is what the

Court is left to struggle with; to give effect to, if possible, in light of the rules which govern these matters.

[1036] From all of this, I conclude that properly interpreted, s. 293(1)(a) prohibits practicing or entering into a "marriage" with more than one person at the same time, whether sanctioned by civil, religious or other means, and whether or not it is by law recognized as a binding form of marriage.

[1037] The offence is not directed at multi-party, unmarried relationships or common law cohabitation, but is directed at both polygyny and polyandry. It is also directed at multi-party same sex marriages.

[1038] The emphasis on some form of sanctioning led to much concern in the submissions of the *Amicus* and a number of the Interested Persons.

[1039] These were based on the alleged absurdity of such a distinction - the possibility of avoiding prosecution by the simple expedient of not undergoing a sanctioning event.

[1040] It is the case that I have found Parliament engaging in "line drawing" here, but that is the stuff of many statutory prohibitions. Why .08 and not .07? Drinkers can carefully monitor their consumption to avoid the offence. So be it. At least it is a bright line. Why do we prohibit bigamy, but not adulterous relationships, polygamy but not so-called serial monogamy (marriage, divorce, marriage, divorce, and so on)? Because, absent a division of powers or a *Charter* argument, Parliament can draw such bright lines and, subject to those considerations, it is not for the Court to say that it cannot.

[1041] But more importantly, this line reflects, again, the pre-eminent place that the institution of monogamous marriage takes in Western culture and, as we have seen, Western heritage over the millennia. When all is said, I suggest that the prohibition in s. 293 is directed in part at protecting the institution of monogamous marriage. And let me here recognize that we have come, in this century and in this country, to accept same-sex marriage as part of that institution. That is so, in part, because committed same-sex relationships celebrate all of the values we seek to preserve and advance in monogamous marriage.

[1042] The alarmist view expressed by some that the recognition of the legitimacy of same-sex marriage will lead to the legitimization of polygamy misses the whole point. As Maura Strassberg, Professor of Law at Duke University Law School, points out in "Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage" (1997) North Carolina L.R. 1501 at 1594, the doctrinal underpinnings of monogamous same-sex marriage are indistinguishable from those of heterosexual marriage as revised to conform to modern norms of gender equality. This counters, as well, the argument advanced by many, that "in this day and age" when we have adopted expansive views of acceptable marriage units and common law living arrangements, the acceptance of polygamy, or at least the abandonment of its criminal prohibition, is the next logical step. This is said in the context of the sentiment often expressed that the "State has no business in the bedrooms of the Nation". Here, I say it does when in defence of what it views is a critical institution - monogamous marriage - from attack by an institution - polygamy - which is said to be inevitably associated with serious harms. That is the debate to which I now turn in the context of s. 293 and alleged breaches of the *Charter*.

VII. THE CHARTER

[1043] When I examined the alleged harms associated with polygamy, I discussed the burden on government to justify criminalizing an activity in an exercise of the criminal law power. Parliament must demonstrate a reasoned apprehension of harm, not scientific proof based on concrete evidence: *Sharpe*. It need only demonstrate that the harm is not *de minimus*, not insignificant or trivial. Absent gross disproportionality, the precise weighing and calculation of the nature and extent of the harm is Parliament's job: *Malmo-Levine*. As I also discussed, a reasoned apprehension of harm is relevant to the justification analysis under s. 1 of the *Charter*.

[1044] On the whole of the evidence here, I conclude that the Attorneys General have certainly demonstrated a reasoned apprehension of harm associated with polygyny. Indeed, they have cleared the higher bar: they have demonstrated "concrete evidence" of harm. I have detailed that evidence at length. I have discussed the varied nature of the harms associated with polygyny and highlighted their coincidence across nations, cultures and socio-economic units.

[1045] The evidence, in particular that of Drs. Heinrich and McDermott, supports the reasoned view that the harms associated with the practice are endemic; they are inherent. This conclusion

is critical because it supports the view that the harms found in polygynous societies are not simply the product of individual misconduct; they arise inevitably out of the practice. And many of these harms could arise in polyandrous or same sex polygamous relationships, rare as those appear to be. Here I mention, without limitation, harm to children (for example, from divided parental investment or as a result of less genetic-relatedness of family members), to the psychological health of the spouses, and to the institution of monogamous marriage.

[1046] So it is on the basis of this conclusion that I advance to the *Charter* discussion.

[1047] The challengers collectively allege that s. 293 offends the following rights and freedoms protected by the *Charter*:

a) s. 2(a) - freedom of religion;

b) s. 2(b) - freedom of expression;

c) s. 2(d) - freedom of association;

d) s. 7 - liberty and security of the person; and

e) s. 15 - equality.

A. Freedom of Religion

[1048] As there is considerable overlap in the submissions of the parties and Interested Persons with respect to the *Charter*, I will generally aggregate them and refer simply to the "challengers" and the "defenders".

1. Positions of the Parties

[1049] Section 2(a) of the *Charter* guarantees freedom of conscience and religion.

[1050] The *Amicus*, the FLDS and the Polyamory Advocacy Association contend that s. 293 infringes s. 2(a).

[1051] I focus here on the submissions of the *Amicus*, who contends that s. 293 does so in both purpose and effect.

a) Purpose

[1052] The *Amicus* submits that s. 293's improper purpose is twofold.

[1053] First, he says that s. 293 is the product of religious animus. That the prohibition targeted Mormons is well established on the evidence and cannot be seriously doubted given the specific reference in the original text to curtailing "[w]hat among the persons commonly called Mormons is known as spiritual or plural marriage". The prohibition also took aim at the Aboriginal cultural practice of polygamy as part of what Dr. Drummond describes as the state's "larger coercive colonial project intended to 'civilize' Aboriginal populations that included residential schools" (at para. 71).

[1054] The second aspect of s. 293's religious purpose was to mandate a practice - monogamy - that was intrinsically rooted in the dominant religion of the day, mainstream Christianity. In so doing, the state impermissibly involved itself in the establishment of a particular religious viewpoint.

[1055] The *Amicus* submits that to ascribe to s. 293 any other purpose, such as the prevention of harm, is to impermissibly shift its true purpose *ex post facto*: *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295.

[1056] The defenders argue that this characterization of s. 293's purpose is inconsistent with the evidence that the law was directed to the secular purpose of protecting women, children and society from the harms of polygamy. Far from being the product of religious animus directed at early Mormon settlers, s. 293 continued a prohibition that extended back over two millennia. The original text of the provision expressly prohibited polygamy whether "religious or secular", further evidence that Parliament's concern was with the practice of polygamy, not Mormon religious belief.

[1057] Citing *R. v. Edward Books and Art Ltd.*, [1986] 2 S.C.R. 713, the defenders additionally argue that laws which impact religious beliefs or practices should not necessarily be characterized as having a religious purpose. They also cite *R. v. M.S.*, [1996] B.C.J. No. 2302, regarding s. 155 of the *Criminal Code*, the prohibition against incest. As Mr. Justice Donald wrote (at para. 55):

> Section 155 seeks to prevent the harm to individuals and to the community caused by incest. The fact that the offence is rooted in a moral principle developed within a religious tradition cannot support a claim for interference with the freedom to believe or not to believe under the *Charter*.

[1058] Finally, the defenders say that while society's understanding of the harms associated with polygamy may have become more nuanced over the many years since the prohibition was enacted, the prohibition's core purpose has always been the protection of individuals and society from harm. That remains its purpose today, and, thus, it has not impermissibly shifted.

[1059] While early *Charter* jurisprudence, such as *Big M. Drug Mart*, required that a law's constitutionality be judged with reference to its original objective, the scope of the "shifting purpose doctrine" has been clarified in later decisions.

[1060] In *R. v. Butler*, [1992] 1 S.C.R. 452, the Supreme Court held that laws premised on notions of morality and social harm generally speaking could withstand scrutiny notwithstanding that the content of those notions had evolved over time (at 494 - 95):

> I do not agree that to identify the objective of the impugned legislation as the prevention of harm to society, one must resort to the "shifting purpose" doctrine. First, the notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society. Second, and more importantly, I am of the view that with the enactment of s. 163, Parliament explicitly sought to address the harms which are linked to certain types of obscene materials. The prohibition of such materials was based on a belief that they had a detrimental impact on individuals exposed to them and consequently on society as a whole. Our understanding of the harms caused by these materials has developed considerably since that time; however this does not detract from the fact that the purpose of this legislation remains, as it was in 1959, the protection of society from harms caused by the exposure to obscene materials.

See also: *R. v. Levkovic*, (2008), 235 C.C.C. (3d) 417 (Ont. S.C.), appeal allowed on other grounds, for more recent comment on the doctrine.

b) Effect

[1061] The test for a *prima facie* infringement of s. 2(a) was set out in *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (at paras. 56 and 59):

> Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of

> conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.
>
> ...
>
> It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.

[1062] Applying this test, the *Amicus* submits that s. 293 abridges religious liberty with respect to three different religious groups: fundamentalist Mormons, Muslims and Wiccans. The provision prohibits a practice that is, for some, tightly bound up in their religious beliefs and subjects them to penal sanction.

[1063] The *Amicus* also urges the Court to keep in mind the consciousness with which s. 293 criminalizes beliefs and practices. When originally enacted in 1890, the law prohibited everyone from entering into polygamy "by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular." Prior to 1954, the provision criminalized "[w]hat among the persons commonly called Mormons is known as spiritual or plural marriage". Section 293(1)(b) continues to criminalize everyone who "celebrates, assists or is a party to a rite, ceremony, contract or consent that purport to sanction a relationship mentioned in subparagraph (a)(i) or (ii)".

[1064] The FLDS advances the same position specifically with respect to fundamentalist Mormons, focussing on the evidence of those witnesses who said that plural marriage was an essential aspect of the fundamentalist Mormon faith. While acknowledging that freedom of religion is not absolute, the FLDS submits that polygamy in and of itself does not cause harm to, or interfere with, the rights of others. Fundamentalist Mormon doctrine does not espouse or justify the abuse of women or children. These are "the crimes of man, not of practice based on religious belief" (at para. 93).

[1065] The Polyamory Advocacy Association argues that s. 293 inhibits the ability of the polyamorous community to develop new forms of religious rights pertaining to polyamory.

[1066] While polyamory has been a largely secular phenomenon to date, the evidence indicates that some polyamorists do favour religious ceremonies. Criminalization of these ceremonies significantly impairs the ability of polyamorists to experiment and innovate in this regard. As such, s. 293, as interpreted by the Attorneys General, directly infringes the religious liberty of polyamorists.

[1067] The defenders respond, as the Supreme Court has repeatedly underscored, that no matter how sincerely held the belief, religiously motivated practices that harm or interfere with the rights and liberty of others do not come within the protective ambit of s. 2(a).

[1068] This principle can be traced back to *Big M. Drug Mart*, where Dickson C.J.C. clearly contemplated that the s. 2(a) guarantee would be subject to limitations (at 346):

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.

[1069] The Supreme Court has since reiterated and reapplied this holding in different contexts; see, for example, *Young v. Young*, [1993] 4 S.C.R. 3 (whether an access parent should be able to teach his children his religious views over the objection of the custodial parent); *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141 (similar fact scenario as *Young v. Young*) ; *Amselem* (Orthodox Jews erecting succahs on balconies of co-owned property); and *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 (whether teachers in public schools can hold discriminatory religious beliefs about homosexual persons).

[1070] In arguing that any reconciliation of rights must occur as part of the s. 1 justification analysis and not before, the *Amicus* cites *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, where the issue was the religious liberty of a student to wear a kirpan to school. The Court wrote (at para. 30):

> This Court has frequently stated, and rightly so, that freedom of religion is not absolute and that it can conflict with other constitutional rights. However, since the test governing limits on rights was developed in *Oakes*, the Court has never called into question the principle that rights are reconciled through the constitutional justification required by s. 1 of the *Canadian Charter*.

[1071] The CCRC/Asper Centre offer the most nuanced submissions on this particular question.

[1072] While acknowledging the apparent inconsistency in the Supreme Court jurisprudence, the CCRC/Asper Centre suggest that a careful review of the decisions discloses no binding authority which would require the Court to extend s. 2(a) protection to the practice of religious beliefs that infringe the security of the person (material interference with their physical or psychological integrity) of others.

[1073] In none of the cases was the Supreme Court faced with an asserted religious practice that was *per se* harmful. The balcony structures in *Amselem* were not themselves dangerous; in *Multani*, the Court proceeded on the basis that kirpans were not inherently dangerous. *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, was a decision regarding the right of Jehovah's Witnesses to deprive their children of medically necessary blood transfusions. Even there, the majority position, which was that the balancing in that case took place under s. 1, was premised on the view that the parents' religious freedom did not cause an immediate risk of harm.

[1074] In the context of polygamy, the assertion of religious freedom occasions at least a risk of harm, if not actual harm itself.

[1075] The CCRC/Asper Centre identify two practical implications of situating the reconciliation of competing rights at s. 2(a) as opposed to s. 1.

[1076] The first is the question of onus. To require the government and the court to embark upon a justificatory analysis where conduct is *per se* harmful would be a gross misuse of resources. Section 2(b) is a useful analogue in this regard. Despite the broad ambit of the right, the Supreme Court has held that physical violence is not protected expression. No. s. 1 analysis is therefore necessary.

[1077] The second is symbolic, but no less important for that reason. The *Charter* serves as a statement of the values Canadian society holds so fundamental as to be shielded from state interference. Consequently, there is substantive value in upholding a vision of the *Charter* in which conduct that occasions material, physical or psychological harm, or serious risks thereof, falls beyond the ambit of constitutional protection.

[1078] The CCRC/Asper Centre takes no position as to whether it may be necessary to proceed to s. 1 to justify s. 293 as it applies to other circumstances. However, they submit that children are entitled to have their fundamental rights upheld in the first instance. Where the conduct being limited infringes the *Charter* rights of children, the justification analysis is neither required nor appropriate.

[1079] The defenders say that the evidence is overwhelming that whether religiously motivated or otherwise, polygamy is inherently harmful to, and interferes with the *Charter* rights of, women and children.

[1080] The rights of women and children to be free from physical, psychological, economic, social and legal harms are enshrined in ss. 7, 15 and 28 of the *Charter*. Interpretations of numerous conventions and treaties to which Canada is a signatory have also recognized the right of women and children to be free from the kinds of harms that flow from polygamy. International human rights law additionally confirms that polygamy is not to be protected by religious freedom, as the practice tends to deprive women and children of their own fundamental rights.

[1081] The AGBC adds that the particular manifestation of religious liberty in this case is unique in a number of respects. The first he describes is this (at para. 277):

> This case may be unique in the section 2(a) jurisprudence in that, because polygamy's harms are most obvious where there is the presence of an external, supposedly binding authority sanctioning it, *the religiosity of the practice itself exacerbates the harm*. The evidence that has emerged from expert and lay witnesses alike indicates that, the greater the religious fervor with which polygamy is intertwined, the more harmful it can expect to be. This is not so with any other case asserting a religious right to do something prohibited.

[1082] Another is the "zero-sum" nature of polygamy. The mathematics of polygamy when practiced in an insular or isolated religious society dictate that the right can only be exercised by depriving others who share the same beliefs of the same right.

2. Conclusion

[1083] As I have related, the *Amicus*, in particular, submits that s. 293 breaches s. 2(a) of the *Charter* in both its purpose and its effects.

[1084] As to its purpose, the *Amicus* says that the provision was aimed at both prohibiting Mormon and Aboriginal practices of plural marriage and mandating Christian monogamy.

[1085] *Big M. Drug Mart* was one of the first cases to consider whether legislation had been enacted for an improper purpose under s. 2(a). Chief Justice Dickson (and four colleagues) concluded that the *Lord's Day Act* had been enacted for the religious purpose of compelling sabbatical observance, and that it simply had no secular purpose (at 331):

> A finding that the *Lord's Day Act* has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabattical observance, has been long-established and consistently maintained by the courts of this country. (para. 78)

[1086] The Chief Justice said this of freedom of religion (at 336):

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> ... Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".

[1087] Chief Justice Dickson (with Chouinard and Le Dain JJ.) revisited a similar issue in *Edwards Books and Art Ltd.*, which concerned the constitutionality of Ontario's Sunday closing legislation, the *Retail Business Holidays Act*, R.S.O. 1980, c. 453. In concluding that the legislation served a secular purpose, he said (at para. 62):

> I agree with Tarnopolsky J.A. that the *Retail Business Holidays Act* was enacted with the intent of providing uniform holidays to retail workers. I am unable to conclude that the Act was a surreptitious attempt to encourage religious worship. The title and text of the Act, the legislative debates and the Ontario Law Reform Commission's *Report on Sunday Observance Legislation* (1970), all point to the secular purposes underlying the Act.

[1088] There is little question that the arrival of Mormons from Utah was a galvanizing influence on many of those who supported the introduction of s. 293. However, I do not agree with the *Amicus* that this reflected religious animus on the part of Parliament. Polygamy was not

prohibited because it was a religious belief, or, to turn the coin, because Parliament wanted to impose a Christian religious belief in monogamous marriage. I find that the original prohibition was prompted by largely secular concerns with perceived harms associated with the practice to women, children and society. As I have discussed, socially imposed universal monogamy, while embraced by Christianity, had its roots in Greco-Roman society.

[1089] The polygamy prohibition enacted in 1890 reflected a historical aversion to the practice that was many centuries old. I agree with the defenders of s. 293 that its purpose has not impermissibly shifted over the time since its introduction. It has always been seen as addressing the risk of harm to women, children and society, although our understanding of the harms associated with polygamy has become more nuanced over time. Indeed our appreciation of those harms has become much more nuanced since the early 1990s when some of the legal opinions expressing the view that the prohibition could not withstand *Charter* scrutiny were first advanced.

[1090] This brings us to a consideration of the effects of the prohibition. As I have noted, the test for a *prima facie* infringement of s. 2(a) was set out in *Amselem*. The aggrieved individual must show that:

1. the claimant sincerely holds a belief or practice that has a nexus with religion; and
2. the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.

[1091] Applying this test in the context of the evidence touching fundamentalist Mormons, some Muslims and Wiccans, I agree that s. 293 triggers a breach of their religious liberty.

[1092] There is evidence that for at least some members of each of these faiths, plural marriage is a sincerely held religious belief:

a) There is extensive evidence that many fundamentalist Mormons hold a sincere belief that plural marriage is an essential aspect of their faith. Mary Batchelor, for example, testified that "plural marriage is a very vital and intricate part of my belief system, and I do not believe that I can achieve the fullness of my potential as a woman and as

well as a daughter of God without it" [Transcript, 20 January 2011, p. 5, ll. 41 - 44]. Witness No. 4 testified that "plural marriage - celestial and plural marriage is something that I have to enter and abide to gain my highest degree in the celestial kingdom" [Transcript, 26 January 2011, p. 1, l. 46 - p. 2, l. 1].

b) With respect to Muslims, Dr. Emon deposes that Muslims who engage in polygynous marriages in Canada may justify their acts by reference to the Qur'an and subsequent legal doctrines (at para. 22).

c) As for Wicca, Mr. Wagar gives evidence that within the faith, "all forms of consensual sexual and emotional ties that adults freely enter into are sacred, or at a minimum, are potentially routes to an encounter with the sacred" (at para. 8). This includes relationships that involve more than two people.

[1093] By criminalizing polygamy, s. 293 clearly interferes with the ability of individuals who sincerely hold these religious beliefs to act in accordance with them in a manner that that is more than trivial or insubstantial.

[1094] Assuming that any particular polyamorous relationship is captured by s. 293 as I have interpreted it, I do not agree that the provision infringes their s. 2(a) rights. What evidence I have that suggests that polyamorists are a discrete group sharing truly common principles is scant. Polyamory is, I conclude, a largely secular phenomenon, as varied in practice as the imagination of its practitioners. While some polyamorists who gave evidence suggested that they may wish in the future to formalize their arrangement with a religious or secular ceremony, I do not accept that this reflects a practice or belief meeting the *Amselem* test.

[1095] Before concluding this discussion, I must consider whether harm and competing rights are internal limits to s. 2(a), as the defenders argue, or matters to be weighed in the s. 1 analysis.

[1096] While I sympathize with the CCRC/Asper Centre's principled approach to defining the scope of s. 2(a) and, in particular, their view that there is real value in upholding a vision of the *Charter* in which conduct that occasions harm, or a serious risk thereof, falls outside the scope of constitutional protection, the better view, based on the jurisprudence to date, suggests that these issues should be addressed in the s. 1 analysis. I have noted (see para.1070) the *Amicus*' reliance

on *Multani* to support his submission that rights are reconciled through the constitutional justification required by s. 1 of the *Charter*.

[1097] While polygamy gives rise to harms, or at least the risk of significant harm, and thus this is a case where arguably there are limits on the religious freedom claimed by the challengers, this case is also about competing fundamental rights under the *Charter*. *Multani* holds that competing rights are best reconciled under s. 1 (at para. 27, quoting from *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825):

> In these circumstances, there can be no doubt that the detailed s. 1 analytical approach developed by this Court provides a more practical and comprehensive mechanism, involving review of a whole range of factors for the assessment of competing interests and the imposition of restrictions upon individual rights and freedoms.

[1098] Accordingly, I will here express my conclusion: I accept the *Amicus*' submissions that s. 293 violates the religious liberty of those persons I have described in a manner that is non-trivial and not insubstantial.

B. Freedom of Expression

1. Positions of the Parties

[1099] The claim that s. 293 offends freedom of expression is advanced by the Polyamory Advocacy Association.

[1100] The Association observes that s. 293, as interpreted by the Attorneys General, captures purely secular formalities and ceremonies. These celebrations take place, in part, to convey meaning to an audience. The public celebration of a polyamorous relationship affirms the value and legitimacy of the union. It is also an expression of love and commitment. By prohibiting such expression, s. 293 infringes s. 2(b).

[1101] The AGBC responds that Mr. Justice Pitfield dismissed a similar argument in *EGALE Canada Inc. v. Canada (Attorney General)* 2001 BCSC 1365 [*EGALE*] at para. 132, where he held that "the words 'freedom of expression' are not apt to describe the formalization of the legal relationship that is marriage".

[1102] He further submits that the essence of the s. 293 offence is the entering into or being in a particular type of sanctioned relationship. What is said about the relationship is only one part of the legal context. By way of example, entering into a fraudulent contract involves a communicative component but it is not one that attracts *Charter* protection. The same reasoning holds true for polygamy.

2. Conclusion

[1103] In my view, the right to expressive freedom does not capture the formalization of a polygamous marriage.

[1104] I observe that in *EGALE*, Pitfield J. said much the same thing with respect to monogamous marriage. While the Court of Appeal reversed that decision, it expressly declined to comment on the soundness of that particular aspect of it.

[1105] I will say no more on this particular breach.

C. Freedom of Association

1. Positions of the Parties

[1106] Section 2(d) of the *Charter* protects freedom of association.

[1107] The *Amicus*, the FLDS and the Polyamory Advocacy Association submit that s. 293 targets the associational aspects of polygamy contrary to this guarantee.

[1108] As the *Amicus* submits (at paras. 311 - 312):

> The heart of the s. 2(d) claim is that s. 293 prohibits more than two individuals from *associating* with one another in a conjugal union. As seen above, the criminal law does not prohibit a whole range of activities that can be characterized as polygamous, such as:
>
> (a) Serial monogamy, through divorce and remarriage (*de facto* polygyny, as it is sometimes called from an evolutionary psychology perspective);
>
> (b) Having sex or affairs with any number of partners while in a conjugal union with an unknowing and unconsenting partner (that is, adultery);
>
> (c) Having sex with many partners at the same time;
>
> (d) Having children with more than one partner, whether as a result of conjugal union, one night stands or even group sex; and

(e) Raising children by more than two adults, such as through blended families, including where one or more adults are unrelated to the children.

Yet, while the law is tolerant of these behaviours, s. 293 *criminalizes* three adults from agreeing to form a conjugal union together. Section 293 prohibits their *association* together as a conjugal union. While polygamous *activities* are not prohibited, s. 293 criminalizes polygamous *groupings*.

[1109] The FLDS expresses its position in this way (at paras. 102 - 103):

> The effect of section 293, therefore, is to prohibit the formation of polygamous relationships, and thus deprives members of the FLDS from associating with one another as a family and from association with one another in the pursuit of their religious beliefs. The activity or goal that the members of the FLDS are pursing commonly, through plural marriage, is to establish a family and thus being able to enter the highest level in the celestial kingdom.
>
> Section 293 also affects the rights of members of the FLDS to associate with family members, and this affects the way men and women live in the FLDS. In particular, the law prevents individuals from living together in a manner that each of them otherwise freely consents to live. The criminal law provision does not prohibit the behaviour of cohabiting with more than one person, or having sex with more than one person, or having children with more than one person or loving more than one person. For members of the FLDS the effect of section 293 is to prohibit their ability to contract with other individuals so as to settle upon the consequences that they agree should flow from such otherwise lawful behaviours.

[1110] The Attorneys General answer that s. 293 does not engage s. 2(d) of the *Charter*, as intimate personal and familial relationships are not a protected form of association.

[1111] The Court of Appeal made this point in *R. v. M.S.*, involving consensual incest between a father and adult daughter. Justice Donald agreed with the views of Mr. Justice Tarnopolsky in *Catholic Children's Aid Society of Metropolitan Toronto v. S.(T.)* (1989), 69 O.R. (2d) 189 (C.A.) [*Catholic Children's Aid Society*] that s. 2(d) only protected association with persons beyond the primary family unit (at 204):

> The freedoms of assembly and association are necessarily collective and so mostly public. Our constitutional concerns have not been with assemblies within families or associations between family members. Rather, the protections we have been concerned with are for those assemblies and associations that take us outside the intimate circle of our families. The family is a collective, but the desire of one family member to associate with another is not so much for the purpose of pursuing goals in common, nor even pursing activities in common.

[1112] Freedom of association was also raised by claimants in challenges to the exclusion of same-sex couples from the definition of marriage. The courts did not accept that s. 2(d) could be engaged by the inability to marry: see, for example, *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.) and *EGALE*.

[1113] The challengers say that this relatively brief line of authority is not dispositive, and they cite dicta favouring their view that familial relationships are protected by s. 2(d). The *Amicus* also draws upon American jurisprudence, which he says provides persuasive authority for including intimate or familial relationships within associational freedom.

[1114] In *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590 (Alta. C.A.), Mr. Justice Kerans wrote as follows regarding the scope of s. 2(d) (at 542 - 543):

> ... the special status given to the freedom of association in Canada reflects our tradition about the importance for a free and democratic society of non-governmental organization. In my view, the freedom includes the freedom to associate with others in exercise of *Charter*-protected rights and also those other rights which - in Canada - are thought so fundamental as not to need formal expression: to marry, for example, or to establish a home and family, pursue an education, or gain a livelihood.
>
> [Emphasis added.]

[1115] This passage was quoted with approval by Dickson C.J.C., dissenting with Madam Justice Wilson, in *Reference re: Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 [*Alberta Reference*]. Dickson C.J.C. would have interpreted s. 2(d) broadly and rejected a constitutive approach whereby freedom of association entailed only the freedom to belong to or form an association. He wrote (at 362):

> The essentially formal nature of a constitutive approach to freedom of association is equally apparent when one considers other types of associational activity in our society. While the constitutive approach might find a possible violation of s. 2(d) in a legislative enactment which prohibited marriage for certain classes of people, it would hold inoffensive an enactment which precluded the same people from engaging in the activities integral to a marriage, such as cohabiting and raising children together. If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.

[1116] These two decisions were subsequently cited in *EGALE*, where Pitfield J. addressed whether freedom of association was infringed by the then heterosexual definition of marriage. In concluding it was not, he wrote (at paras. 138-139):

> While it may be an overstatement to say that the fundamental freedom of association may never be relevant in the context of marriage, I conclude it is not relevant in the context of Parliament's ongoing recognition of marriage as an opposite-sex relationship.
>
> Permanent relationships between gays and lesbians are not prohibited by anything that Parliament or the provinces have, or have not, done with respect to the legal nature of marriage. Indeed, legislative progress in many provinces confirms that gay and lesbian relationships are a recognized and generally accepted aspect of today's society. The fact that such relationships do not have the approbation of the state so as to give rise to the rights and obligations that immediately result upon marriage does not amount to a denial of the fundamental freedom of association.

[1117] The challengers highlight the distinction that was drawn between the prohibition of an associational activity and state approbation giving rise to rights and obligations. The present case concerns the former.

[1118] Another way in which the challengers respond to the Attorneys General's submissions is with reference to the Supreme Court's expanded interpretation of s. 2(d) in recent years; beginning with *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 and continuing with *Health Services and Support - Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27 [*Health Services*]. While these decisions arose in a labour relations context, they nevertheless signal a shift to a contextual and purposive approach to s. 2(d) that allows for a broader range of associations within its protection.

[1119] In *Health Services*, for example, the Court held that s. 2(d) protections should be extended to collective bargaining, overturning the Labour Trilogy (which included *Alberta Reference*) in the process.

[1120] The *Amicus* observes that the courts in both *R. v. M.S.* and the *Catholic Children's Aid Society* relied on the majority judgment in the *Alberta Reference* to conclude that freedom of association did not extend to intimate or family relationships. He says that conclusion is now suspect.

[1121] In its contextual assessment as to whether freedom of association extended to the right to collective bargaining, the Supreme Court in *Health Services* first noted that "the language of s. 2(*d*) is cast in broad terms and devoid of limitations" (at para. 39). It then went on to consider the history of collective bargaining in Canada, collective bargaining in relation to freedom of

association in the larger international context, and whether *Charter* values favoured an interpretation of s. 2(d) that protected collective bargaining.

[1122] The *Amicus* submits that including intimate or family relationships within s. 2(d)'s protection would be consistent with the liberty values enshrined in s. 7, in that constitutionally protecting family relationships would enhance human dignity and respect for personal autonomy. It would also be consistent with Canada's obligations under international law.

[1123] With respect to these same contextual factors, the AGBC says that this Court has heard no evidence regarding the history of associational guarantees in the family setting so as to establish a historical case for inclusion. The consensus in international law is that polygamy should be prohibited. Finally, on the evidence in this case, a right to marry polygamously is inconsistent with and does not promote other *Charter* rights, freedoms and values.

2. Conclusion

[1124] I have outlined at some length the positions of the parties on the s. 2(d) argument. There is no doubt that the jurisprudence has given a more robust scope to the freedom to associate protected by s. 2(d) since the majority judgment in the *Alberta Reference*. But I note that neither *Dunmore* nor *Health Services* expressly considered or cast doubt on the decisions in *Catholic Children's Aid Society* or *R. v. M.S.*

[1125] In *Dunmore*, the majority reviewed the s. 2(d) jurisprudence and said (at para. 16):

> As these dicta illustrate, the purpose of s. 2(*d*) commands a single inquiry: Has the state precluded activity <u>because</u> of its associational nature, thereby discouraging the collective pursuit of common goals?

And Mr. Justice Bastarache for that majority concluded (at para. 18):

> In sum, a purposive approach to s. 2(d) demands that we "distinguish between the associational aspect of the activity and the activity itself", a process mandated by this Court in the *Alberta Reference* (see *Egg Marketing*, *supra*, *per* Iacobucci and Bastarache JJ., at para. 111). Such an approach begins with the existing framework established in that case, which enables a claimant to show that a group activity is permitted for individuals in order to establish that its regulation targets the association *per se* (see *Alberta Reference*, *supra*, *per* Dickson C.J., at p. 367). Where this burden cannot be met, however, it may still be open to a claimant to show, by direct evidence or inference, that the legislature has targeted associational conduct because of its concerted or associational nature.

[1126] In my view, it cannot be said in the case of s. 293 that Parliament "has targeted associational conduct because of its concerted or associational nature" [emphasis added]. It has targeted polygamy because of the physical, psychological and social harms perceived to be associated with the practice.

[1127] Section 293 does not infringe s. 2(d) of the *Charter*.

D. Liberty and Security of the Person

1. Positions of the Parties

[1128] Section 7 of the *Charter* guarantees everyone

> 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.

[1129] The s. 7 analysis proceeds in two stages. First, the court must identify whether there is a deprivation of life, liberty or security of the person. Second, the court must determine whether, if there is a deprivation, that deprivation is in accordance with the principles of fundamental justice.

a) Interests at Stake

i. Liberty

[1130] It is common ground that the potential for imprisonment under s. 293 sufficiently implicates the liberty interest to trigger a s. 7 inquiry.

[1131] However, the challengers assert that s. 293 also engages the liberty interest in a richer, more nuanced way. Not limited to physical restraint, they say that the right to liberty is also engaged "when the state steps in to prohibit ... fundamental life choices that '[e]veryone' is otherwise free to pursue": *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (at para. 217) per Binnie J., dissenting, but not on this point.

[1132] In *Malmo-Levine*, Binnie J. described how considerations of personal autonomy, short of imprisonment, are sufficient to trigger s. 7 liberty interests (at para. 85):

> In *Morgentaler, supra*, Wilson J. suggested that liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance", "without interference from the state" (p. 166). Liberty accordingly means more than freedom from

> physical restraint. It includes "the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference": *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80. This is true only to the extent that such matters "can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence": *Godbout, supra*, at para. 66. See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 54; *Buhlers v. British Columbia (Superintendent of Motor Vehicles)* (1999), 170 D.L.R. (4th) 344 (B.C.C.A.), at para. 109; *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 (C.A.).

[1133] The challengers submit that choice of family arrangement undoubtedly falls into the category of fundamental life choices basic to individual autonomy, dignity and self-identity. Indeed, they say, it is difficult to contemplate a more intensely personal and private decision.

[1134] The AGBC is prepared to accept that the s. 7 liberty interest is engaged with or without the threat of incarceration, but observes that the only consequence is that the Court must also weigh this second infringement of liberty in its fundamental justice analysis, particularly with respect to proportionality.

ii. Security of the Person

[1135] The Civil Liberties Association argues that s. 293 interferes not only with liberty but also with security of the person. It submits (at para. 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. 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; having the right of a parent to nurture a child, care for its development and made decisions for it in fundamental matters such as medical care; having access to responsive medical services; and for sexual assault victims, having the ability to seek therapy without fear of their private records being disclosed. 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".

[1136] The Civil Liberties Association says that an individual's choices about his or her conjugal relationship clearly fall within the category of life choices protected by the right to security of the person.

[1137] Security of the person affords protection from serious state-imposed psychological stress and assaults to emotional integrity by the criminal law: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

[1138] The evidence on this reference establishes that s. 293, by criminalizing plural relationships, produces a constitutionally cognizable level of psychological stress for individuals living in plural relationships. As but one example, the choice of certain of the witnesses to give their evidence anonymously speaks for itself in terms of the degree of psychological stress imposed by the criminalization of their relationships. Numerous witness, both fundamentalist Mormon and polyamorous, also gave evidence of the adverse psychological impacts of criminalization.

b) Principles of Fundamental Justice

[1139] The principles of fundamental justice s. 293 is alleged to offend are arbitrariness, overbreadth and gross disproportionality.

[1140] The *Amicus* adds a fourth, which is that consent is a defence to criminal liability.

[1141] The defenders say that none of these withstand scrutiny.

i. Overbreadth

[1142] A law must impair fundamental rights only to the extent necessary to achieve its purpose. A law that goes further is overbroad: *R. v. Heywood*, [1994] 3 S.C.R. 761

[1143] The challengers maintain that s. 293 is drastically overbroad if its objective is protection from harm:

a) It criminalizes all polygamous conjugal unions whatever their form and regardless of whether there is harm to any individual. Along with prohibiting polygamous unions formed as a result of emotional or cultural coercion, s. 293 prohibits those entered into by empowered and consenting adults.

b) It criminalizes all parties to a polygamous conjugal union, whether man or woman, consenting adult or exploited child, abuser or victim.

c) It is overbroad in the nature of the message of denunciation it sends to those it criminalizes. In this regard, the *Amicus* says (at paras. 610 - 611):

> Not only does s. 293 criminalize relationships that are not harmful and individuals who have not caused harm, it also denounces conduct that is not inherently harmful. Despite the Attorneys' strenuous protestations to the contrary, *polygamy is plainly not harmful in and of itself*. Polygamous unions can provide a context for a range of abuses (just as can any family form), but polygamous unions can also be beneficial to all participants, such that they grow as individuals and members of their society.
>
> The Attorneys might argue that s. 293 would not be employed except where there is actual harm to a woman or child. Leave aside that such selective enforcement of the law cannot save the law (particularly given the discrimination that criminalization engenders against polygamists) and just take the example of a woman or child actually being harmed in a polygamous relationship. A husband, who is determined to have caused the harm, is duly convicted for polygamy. What message does that send society? The prosecution was motivated because the man harmed another individual, and yet he was convicted of polygamy. Does the victim not deserve to know that the law denounces the *harm* the man inflicted? There is a fatal disconnect here. Section 293 does not concern *harm to individuals*, and a conviction for polygamy does not denounce the *infliction of harm upon individuals*.

[1144] The *Amicus* submits that beyond being overbroad, s. 293 is actually unnecessary, as a suite of laws exist to target harms of criminal magnitude that might arise in some polygamous relationships. These include:

a) *Criminal Code*, s. 153 - sexual exploitation;

b) *Criminal Code*, s. 266 - assault;

c) *Criminal Code*, s. 271 - sexual assault;

d) *Criminal Code*, s. 273.3 - removal of a child from Canada;

e) *Criminal Code*, s. 279(2) - forcible confinement;

f) *Criminal Code*, s. 279.01 - trafficking in persons;

g) *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, ss. 13 and 30 - removal of child in need of protection; and

h) *Immigration and Refugee Protection Act*, s. 118 - trafficking in persons.

Unlike s. 293, these offences only target conduct that is harmful.

[1145] The *Amicus* argues that the Attorneys General have not brought forward any convincing evidence that these more targeted laws cannot be effectively used to punish and deter harmful conduct in polygamous relationships. Any assertions that offences such as exploitation and trafficking are under-reported and difficult to prosecute can be said of most crimes, particularly those that arise in a family setting. Difficulty of prosecution in any other context would never be said to constitute grounds to violate the *Charter*.

[1146] Beginning with this last submission first, the Attorneys General answer that Parliament is not precluded from imposing complementary measures to address social harms, citing *Sharpe* and *Malmo-Levine*.

[1147] Moreover, say the Attorneys General, many of the alternative offences are both dramatically underreported and difficult to investigate, especially in the context of insular immigrant groups or closed religious communities where polygamy is most likely to thrive. An additional concern that became apparent during the testimony of some of the witnesses is that family members are not always able to identify harmful conduct in their midst. The evidence of one of the anonymous witnesses that she saw nothing wrong in a teenage girl being married to a much older man bears noting in this regard.

[1148] The Attorneys General further respond to the overbreadth challenge with the following submissions:

a) Regardless whether any particular polygamous relationship is harmful to the immediate participants, all polygamous marriages expose the participants to a heightened risk of harm. Further, many of the harms of the practice extend well beyond the immediate participants to their children, the broader community and the state. Where a law addresses behaviour that carries either the risk of harm or social harms, it is not necessary that the state prove harm in an individual case; the state is entitled to impose a single enforceable standard in the interests of proof and enforcement.

b) The challengers' "criminalization of victims" objection is based on the false premise that the sole legitimate objective of s. 293 is the protection of wives themselves.

While in many cases the wives will suffer harm, this harm is not the only justification for the prohibition. If the Court accepts that polygamy also engenders social harms, which is amply established on the evidence, then this argument necessarily collapses. Common sense and prosecutorial discretion will ensure that the blanket prohibition is not unreasonably applied.

c) As for polyamory, only vague definitions have been offered as to what the term means, and none is capable of supporting any practical distinction between harmful polygamy and supposedly benign polyamory. Moreover, given that polyamory necessarily entails an increase in the number of non-related cohabitants, there is no reason to expect that the predicted increase in associated harms would apply with any less rigour than in the context of religiously motivated polygamy. Finally, it appears that most of the relationships the Polyamory Advocacy Association describes as polyamorous would not be captured by s. 293, in any event.

ii. Arbitrariness

[1149] A law is arbitrary within the meaning of s. 7 if it lacks a real connection on the facts to the purpose the law is said to serve.

[1150] The challengers describe s. 293 as the epitome of an arbitrary law.

[1151] The objective of s. 293 is said to be the protection of women and children from harm or the reasonable apprehension of harm, yet, it criminalizes both women and children if they participate in a plural marriage.

[1152] The harms alleged to be suffered by children of polygamous unions are the same as those suffered by children of abusive monogamous parents, serially monogamous parents or single parents. Section 293 targets only polygamous unions. This is arbitrary.

[1153] Among the social harms the Attorneys General attribute to polygamy is a pool of unmarried men more prone to anti-social behaviour. Not only is this simply unconnected to the reality in Canada, but s. 293 does not criminalize the behaviour associated with multiple

simultaneous conjugal relationships, only the agreement of the participants to treat the relationship as enduring. This, again, is arbitrary.

[1154] The Attorneys General answer that in order to be found arbitrary, a law must bear no relation to, or be inconsistent with, the state's legitimate objective. The objective of s. 293 is to reduce polygamy and its attendant social harms. The provision thus clearly bears a relation to that objective.

[1155] They further respond that all of the challengers' arguments with respect to arbitrariness are essentially re-articulations of two assertions: first, that polygamy does not cause harm; and second, if it does cause harm, its criminal prohibition is ineffective at reducing polygamy.

[1156] As the evidence amply establishes that polygamy does cause harm, the only question is whether s. 293 is effective at deterring or reducing polygamy. However, effectiveness is not an appropriate consideration here; rather, it is a factor to consider when assessing rational connection under the *Oakes* analysis under s. 1.

iii. Gross Disproportionality

[1157] This principle of fundamental justice precludes legislative measures that are so extreme that they are *per se* disproportionate to any legitimate government interest.

[1158] The Civil Liberties Association offers the most detailed submissions amongst the challengers on this issue. It argues that s. 293 is so poorly calibrated to the prevention of harm, albeit a legitimate state interest, that it "utterly tramples the rights those consenting adults who, for reasons of personal conscience, family orientation or religious belief, find their conception of the good in a plural relationship" (at para. 106).

[1159] The Civil Liberties Association says it is reasonable to conclude that s. 293 was introduced to avoid harm from conduct believed to be anti-social and thus incompatible with the proper functioning of society. While valid, this objective is not only abstract but it is also firmly rooted in Victorian conceptions of morality, which are out of step with Canada's contemporary legal culture and social reality.

[1160] Weighed against this is the fact that Parliament has criminalized plural relationships between consenting adults. The infringement for those who find fulfillment in plural relationships is deep. The evidence establishes that plural relationships are not inherently harmful, though, much like monogamous relationships, some can be difficult or even abusive. The evidence also establishes that those affected live under the weight of bias, stigma, prejudice and fear arising from criminalization of their conduct.

[1161] The Civil Liberties Association argues that the extent of the disproportionality is apparent when one compares Parliament's response to polygamy to that of criminal indecency, an offence traditionally justified by reference to the state's interest in protecting national morality.

[1162] In *R. v. Labaye*, 2005 SCC 80, the Supreme Court held that for conduct to be held indecent at law, it must be demonstrated 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" (at paras. 52 and 56).

[1163] In contrast, plural relationships are not judged on their merits but are criminal simply by coming into existence.

[1164] The FLDS agrees that the imposition of criminal sanctions, including imprisonment, upon members who have not committed any offence other than being in a polygamous marriage is not only grossly disproportionate to the state objectives of protecting women, children and social harmony, but is directly contrary to those objectives. Section 293 ensures insularity and fear of authority, thereby reducing the ability of those within the community to report legitimate abuses of women or children. It also has the effect of marginalising FLDS members in the wider community.

[1165] The Attorneys General contend otherwise. Parliament's use of a criminal prohibition that includes the possibility of incarceration but has no mandatory minimum sentence is not a legislative response so extreme as to be disproportionate to its legitimate interest in preventing the harms associated with polygamy:

a) It is sufficient that there exist cases in which incarceration would be a fit sentence for a breach of s. 293. Because the provision does not impose any mandatory minimum sentence, any question of unconstitutional disproportionality must be addressed through *Charter*-compliant sentencing in a given case.

b) The fact that Parliament has addressed some of the harms associated with polygamy through the enactment of other criminal prohibitions does not foreclose its ability to prohibit the practice itself. This is especially the case where a narrower prohibition would be ineffective in responding to the harms caused by the practice.

c) The challengers' argument regarding the consequential impacts of criminalization (*i.e.*, marginalization of polygamous communities) is not a consideration that belongs in the gross disproportionality analysis; rather, it is a consideration more properly reserved for s. 1: *Malmo-Levine* (at para. 181).

iv. Consent

[1166] For the purposes of s. 7, a principle of fundamental justice is a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate. The principle must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person: *Malmo-Levine* (at para. 113).

[1167] The *Amicus* submits that there is support in both judicial authorities and academic commentary for the inclusion of consent, as a defence to criminal liability, as a principle of fundamental justice.

[1168] Though not a *Charter* decision, the Supreme Court undertook a thorough analysis of the principle of consent in *R. v. Jobidon*, [1991] 2 S.C.R. 714, where the issue was whether a consensual fist-right resulting in the death of one of its participants constituted assault.

[1169] Consent was subsequently applied as a principle of fundamental justice in *R. v. C.M.* (1992), 75 C.C.C. (3d) 556 (Ont. CJ. (Gen. Div.), where the court considered whether the prohibition of anal intercourse except by consenting adults over the age of 18 was consistent

with s. 7. Justice Corbett concluded that denying the defence of consent of complainants between 14 and 18 in those circumstances infringed the accused's right to liberty in violation of the principles of fundamental justice.

[1170] Section 293 stands in marked contrast to this principle. The *Amicus* submits that like the prohibition against anal intercourse, the prohibition against polygamy criminalizes private activity which is not inherently harmful and to which the parties have consented. Not only does s. 293 fail to recognize consent as a defence, but the act of consenting is impliedly made an element of the offence.

[1171] The Attorneys General disagree.

[1172] They respond that the *Amicus* falls far short of establishing a significant societal consensus as required, particularly when the Supreme Court in *Malmo-Levine* rejected the harm principle as a principle of fundamental justice for the purposes of s. 7. The Court observed that there are activities that are legitimately prohibited even though undertaken by consenting adults, citing duels, fist fights and incest.

[1173] The Attorneys General further say that to the extent it is a legal principle at all, consent can have no application to offences that have broader social harms. Incest and obscenity are analogous examples. The consent of the participants to criminal activity is irrelevant, and their interests in making autonomous decisions about the number of people to marry must give way to the plethora of compelling societal interests, including those of any children within the family who are unable to "consent" to their situation.

v. Vagueness

[1174] Although none of the challengers specifically raise vagueness, the AG Canada addresses it in his submissions. In short, he says that s. 293 is not unconstitutionally vague.

[1175] The threshold for finding a law vague is exceedingly high. A law will only be found to be vague where it is so unintelligible that it fails to provide an adequate basis for legal debate. As the Supreme Court explained in *Nova Scotia Pharmaceutical Society*, in making that determination the court must interpret the law, not in the abstract, but within a larger interpretive

context developed through an analysis of considerations such as purpose, subject-matter and nature of the impugned provision, societal values, related legislative provisions and prior judicial interpretations.

[1176] The AG Canada submits that s. 293, properly interpreted, prohibits multiple marriages. It has also proven itself capable of judicial interpretation; for example, by the Ontario Court of Appeal in *Tolhurst*.

2. Conclusion

[1177] The analysis begins with identifying the s. 7 interest properly at stake. The Court then considers whether there has been a deprivation of that protected interest, and whether that deprivation is in accordance with the principles of fundamental justice.

[1178] There is no doubt that s. 7 is triggered here in light of the potential for imprisonment under s. 293. I also accept the challengers' submissions, based on the Supreme Court of Canada's decision in *Malmo-Levine* (and the authorities summarized at para. 85 of the judgment), that liberty interests are engaged because the choice of family arrangement in this context is within that "irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference".

[1179] The Civil Liberties Association submits that security of the person is also engaged because s. 293, by criminalizing plural marriage, produces a constitutionally cognizable level of psychological stress for individuals living in plural relationships. As I later discuss, it is my view that the reasoning in *Malmo-Levine* disposes of this submission and I do not accept it.

[1180] That takes us to the second stage of the analysis. The challengers point to these principles of fundamental justice offended by s. 293: arbitrariness, overbreadth and gross disproportionality. The *Amicus* also raises consent as a relevant principle.

[1181] Much of the force of the challengers' arguments with respect to s. 7 rests on two related premises: first, that, as the *Amicus* states at para. 610 of his Final Submissions, "polygamy is plainly not harmful in and of itself"; and, second, that consensual and harmless adult polygamous unions exist.

[1182] But I have concluded quite the contrary. The Attorneys General have demonstrated a reasoned basis for the apprehension that polygamy (especially polygyny) is inherently harmful to the participants, to their offspring and to society generally.

[1183] This conclusion undercuts many of the challengers' submissions with respect to s. 7.

[1184] It is not necessary for me to decide whether consent as a defence to criminal liability rises to the level of a principle of fundamental justice, a proposition the Attorneys General dispute. Even if it did, the principle could only apply where the "victim" of the offence consented. In the case of polygamy, the risks of harm associated with the practice extend beyond the immediate participants to those who are not in a position to give their consent. The children of a polygamous union, as just one example, cannot consent to their situation, which includes exposure to the increased risk of harms that flow from their parents' marital relationship.

[1185] Thus, even if a principle of fundamental justice, consent would have no application here.

[1186] I turn next to overbreadth.

[1187] The Supreme Court of Canada explained overbreadth in *Heywood* (at 792-793):

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

[1188] I have addressed Parliament's objective in enacting s. 293 at length already. Very simply stated, it is to prevent the many harms associated with polygamy. The question, then, is whether the blanket prohibition of polygamy imposed by s. 293 is broader than necessary to accomplish this legitimate objective.

[1189] Given the breadth of polygamy's perceived harms, it is my view that it is not, with one exception that I will address shortly.

[1190] The challengers point to the criminalization of all polygamous unions irrespective of harm as indicative of overbreadth. My conclusion that there is a reasoned apprehension that

polygamy is inherently harmful to the participants, to their offspring and to society answers this submission.

[1191] Next, the challengers say that criminal laws that specifically target the harms that arise in some plural unions already exist and obviate the need for s. 293.

[1192] The fact that Parliament can (and has) addressed some of the discrete harms that have been found to arise in some polygamous relationships, for example, through laws against sexual exploitation and sexual assault, does not prevent Parliament from promulgating the criminal prohibition against polygamy itself.

[1193] An analogous argument was advanced in *Sharpe* with respect to possession of child pornography. The claimant argued that to the extent the exploitation of children in the manufacture of child pornography was the concern, it was addressed through laws targeting that activity and that the law against possession was unnecessary. Chief Justice McLachlin disagreed (at para. 93):

> [A]n effective measure should not be discounted simply because Parliament already has other measures in place. It may provide additional protection or reinforce existing protections. Parliament may combat an evil by enacting a number of different and complementary measures directed to different aspects of the targeted problem: see, e.g., *R. v. Whyte*, [1988] 2 S.C.R. 3. Here the evidence amply establishes that criminalizing the possession of child pornography not only provides additional protection against child exploitation - exploitation associated with the production of child pornography for the market generated by possession and the availability of material for arousal, attitudinal change and grooming - but also reinforces the laws criminalizing the production and distribution of child pornography.

See also *Malmo-Levine* (at para. 137).

[1194] Further, the other discrete offences do not "occupy the field" of harms associated with polygamy as an institution.

[1195] Finally, and importantly, it is legitimate for Parliament to act proactively to prevent the occurrence of harm. The structure of polygamy creates conditions that increase the risk that the other offences identified by the challengers may occur. Parliament is entitled to take preventative measures and is not limited to reacting once harm occurs.

[1196] The challengers also urge that s. 293's overbreadth is starkly demonstrated by the fact that it criminalizes all participants in the illegal union, including the "victims" (overwhelmingly, the multiple women).

[1197] I question whether the capable consenting spouse is a "victim". To the contrary, she can be seen to be facilitating an arrangement which Parliament views as harmful to society generally.

[1198] It is, in any event, constitutionally permissible for the state to attempt to deter vulnerable people from self-harm by criminalizing the harmful conduct. As the majority explained in *Malmo-Levine* (at para. 124):

> We do not accept the proposition that there is a general prohibition against the criminalization of harm to self. Canada continues to have paternalistic laws. Requirements that people wear seatbelts and motorcycle helmets are designed to "save people from themselves". There is no consensus that this sort of legislation offends our societal notions of justice. Whether a jail sentence is an appropriate penalty for such an offence is another question. However, the objection in that aspect goes to the validity of an assigned punishment - it does not go to the validity of prohibiting the underlying conduct. [Emphasis added.]

[1199] There is one limited respect in which I find that s. 293 goes further than necessary in pursuit of the legislative objective, and that is in exposing young persons under the age of 18 who are parties to illegal unions to criminal prosecution.

[1200] "Every one" in s. 293 brooks no exception and includes such individuals within its purview. As the evidence on this reference demonstrates, however, these young person are victims in the true sense of the word. Indeed, I have found protecting children from the harms of polygamy to be one of the objectives of s. 293. To subject them to criminal sanction is contrary to that objective.

[1201] While tempting, it is no answer to this infirmity to say that we can rely on prosecutorial discretion and common sense to ensure that these victims will not be prosecuted. As Cory J. observed in *R. v. Bain*, [1992] 1 S.C.R. 91 (at 104), albeit in a slightly different context, "[t]he protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control".

[1202] My concern is with the application of s. 293 to young persons. By that I mean persons between the ages of 12 and 17. The *Criminal Code* does not apply to a child under 12 by operation of s. 13. The *Code* applies with full force and without the accommodations of the *Youth Criminal Justice Act* at 18. The latter statute reflects the principle of fundamental justice that young persons are entitled to a presumption of diminished moral blameworthiness (*R. v. D.B.*, 2008 SCC 25 (at para. 68)), a proposition supported by art. 40(1) of the *Convention on the Rights of the Child*. Article 1 of the *Convention* defines a child as below the age of 18 unless under the law applicable to the child, majority is attained earlier.

[1203] To be clear, s. 293 is not overbroad in its application to persons 18 years of age or older at the time of the laying of the Information in respect of conduct that occurred at or after 18 years of age.

[1204] The Supreme Court recognized in *Heywood* that "[t]he effect of overbreadth is that in some applications the law is arbitrary or disproportionate" (at 793). That is the case here. The effect of s. 293's overbreadth is that it is arbitrary in its application to young persons who are parties to an illegal union.

[1205] I emphasize that the arbitrariness of s. 293 in this limited respect is a function of its overbreadth. I do not consider the provision to be arbitrary in the sense described in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, and more recently in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [*PHS Community Services*].

[1206] In this latter decision, the Supreme Court noted that the jurisprudence on arbitrariness is not entirely settled. As the Court in *PHS Community Services* explained, in *Chaoulli*, three justices preferred an approach that asked whether a limit was "necessary" to further the state objective. At paras. 131 - 132 of *Chaoulli*, those justices noted:

> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.

> In *Morgentaler*, Beetz J., Estey J. concurring, found that the limits on security of the person caused by rules that endangered health were "manifestly unfair" and did not conform to the principles of fundamental justice, in reasons that invoke arbitrariness. Some of the limitations bore no connection to Parliament's objectives, in his view, while others were unnecessary to assure that those objectives were met (p. 110).

[1207] The other three justices preferred to avoid the language of necessity and instead approved of the prior articulation of arbitrariness in *Rodriguez* as where a deprivation of a right, "bears no relation to, or is inconsistent with, the objective that lies behind the legislation" (at 619 - 620).

[1208] The Court in *PHS Community Services* found it unnecessary to determine which approach should prevail because the government action in question satisfied both definitions of arbitrariness.

[1209] Conversely, I do not consider s. 293 to be arbitrary on either articulation of the test. The blanket criminalization of polygamy is necessary to further Parliament's objective of preventing the many harms associated with its practice for the reasons I have already discussed. As such, it cannot be said that the deprivation of the liberty interests in question "bears no relation to, or is inconsistent with, the objective that lies behind the legislation".

[1210] Many of the challengers' submissions on arbitrariness are similar to those on overbreadth, and I have addressed them already.

[1211] The challengers also say that there is no differentiation on the evidence between the harms said to be suffered by children of polygamous parents and those of abusive monogamous, serially monogamous or even single parents, yet s. 293 criminalizes only polygamous unions. Thus, they say, it is arbitrary. As *Malmo-Levine* holds in language that is apposite here (at paras. 139-140):

> However, if Parliament is otherwise acting within its jurisdiction by enacting a prohibition on the use of marihuana, it does not lose that jurisdiction just because there are other substances whose health and safety effects could arguably justify similar legislative treatment. To hold otherwise would involve the courts in not only defining the outer limits of the legislative action allowed by the Constitution but also in ordering Parliament's priorities within those limits. That is not the role of the courts under our constitutional arrangements.
>
> Parliament may, as a matter of constitutional law, determine what is *not* criminal as well as what is. The choice to use the criminal law in a particular context does not require its use in any other: *RJR-MacDonald*, *supra*, at para. 50. Parliament's decision to move in

> one area of public health and safety without at the same time moving in other areas is not, on that account alone, arbitrary or irrational.

[1212] I conclude that s. 293 is not arbitrary as that fundamental principle of justice has been elucidated in the authorities.

[1213] That brings us to the issue of gross disproportionality. *Malmo-Levine* sets out the test (at para. 143):

> In short, after it is determined that Parliament acted pursuant to a legitimate state 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*, "so extreme that they are *per se* disproportionate to any legitimate government interest" (para. 47 (emphasis added)). As we explain below, the applicable standard is one of *gross* disproportionality, the proof of which rests on the claimant.

[1214] Avoidance of harm is a legitimate state interest and in respect of polygamy, the state has demonstrated a reasoned apprehension of harm well beyond the *de minimus* threshold. Thus, the question is whether the use of a criminal prohibition that includes the possibility of incarceration is a legislative response that is so extreme that it is disproportionate to this state interest.

[1215] The Attorneys General say, and I agree, that because there is no minimum sentence for polygamy, any question of unconstitutional disproportionality must be addressed through sentencing in any given case. In *Malmo-Levine*, the accused asserted that the mere possibility of imprisonment associated with the prohibition on possession of marijuana was grossly disproportionate. In rejecting this submission, the majority stated (at paras. 164-165):

> The requirement of proportionality in sentencing undermines rather than advances the appellants' argument. There is no need to turn to the *Charter* for relief against an unfit sentence. If imprisonment is not a fit sentence in a particular case it will not be imposed, and if imposed, it will be reversed on appeal.
>
> There is no plausible threat, express or implied, to imprison accused persons - including vulnerable ones - for whom imprisonment is not a fit sentence.

[1216] It is not difficult to conceive of circumstances in which a custodial sentence would be a fit sentence for a conviction for polygamy.

[1217] Thus, the penalty that attaches to the offence in this case does not give rise to a finding of unconstitutionality.

[1218] Having said that, the primary argument being advanced here by the challengers appears to be based on s. 293's broader effects, as also recognized in *Malmo-Levine (*at para. 169):

> We thus accept that the principle against gross disproportionality under s. 7 is broader that the requirements of s. 12 [of the *Charter*] and is not limited to a consideration of the penalty attaching to conviction. Nevertheless the standard under s. 7, as under s. 12, remains one of *gross* disproportionality. In other words, 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 marihuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*.

[1219] The challengers say that criminalizing plural relationships between consenting adults is an extraordinarily deep intrusion into personal liberty and a grossly disproportionate response to addressing either the abstract objective of preventing harm (the Civil Liberties Association) or the social and indirect harms said to be associated with the practice (the *Amicus*). The result is that those affected live under the weight of bias, stigma, prejudice and fear arising from the criminalization of their conduct.

[1220] To the extent this submission is premised on the notion that polygamy is not inherently harmful, I do not credit that notion for the reasons I have already stated. Further, the risks of the social harms associated with polygamy are sufficiently serious that criminalizing all polygamous marriages is not, in my view, a disproportionate response to Parliament's objective of preventing harm.

[1221] Finally, there is the submission that the polygamy prohibition's effects on accused persons are grossly disproportionate to the state interest because the prohibition is simply ineffective − indeed, it exacerbates the potential for harm by driving its practitioners underground in isolation. I respond with the Court's statement in *Malmo-Levine* (at para. 177):

> This Court has exercised caution in accepting arguments about the alleged ineffectiveness of legal measures: see *Reference re Firearms Act (Can.)*, *supra*, where the Court held that "[t]he efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis" (para. 57). While somewhat different considerations come into play under a *Charter* analysis, it remains important that some deference be accorded to Parliament in assessing the utility of its chosen responses to perceived social ills.

[1222] The standard is gross disproportionality and the Court in *Malmo-Levine* concluded (at para. 175) as I conclude: "the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the constitution permits legislative action."

[1223] Section 293 is not grossly disproportionate.

[1224] Before I leave the s. 7 analysis, I should touch on the issue of vagueness. As I have said, none of the challengers specifically raised vagueness, though the AG Canada did address it in his submissions.

[1225] I have noted the concern above in the context of Dr. Drummond's writing. I began this analysis by interpreting the scope of s. 293. That exercise demonstrates (as other courts have as well) that the prohibition is not so unintelligible that it fails to provide an adequate basis for legal debate. It is not unconstitutionally vague.

[1226] In sum, for these reasons, I have concluded that s. 293 is overbroad with respect to its application to children between the ages of 12 and 17 and therefore contrary to s. 7 of the *Charter*. It is not arbitrary or grossly disproportionate.

E. Equality

1. Positions of the Parties

[1227] Section 15 of the *Charter* guarantees equality:

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

[1228] The jurisprudence establishes a two-part test for assessing a s. 15(1) claim:

a) Does the law create a distinction that is based on an enumerated or analogous ground?

b) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

(*Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 30, citing *R. v. Kapp*, 2008 SCC 41 at para. 17.)

[1229] The *Amicus* asserts that s. 293 violates the equality guarantee on the basis of both religion and marital status.

a) On the ground of religion

[1230] The *Amicus*' s. 15 claim on the ground of religion parallels much of his s. 2(a) claim. Section 293, he says, violates the equality of fundamentalist Mormons, Muslims and Wiccans by criminalizing a sincerely-held religious practice, thus "ridiculing" their beliefs that it can be a link to the divine.

[1231] A second aspect of the *Amicus*' religious discrimination claim is that s. 293 demeans religious minorities by treating the religious practice of polygamy in a manner inconsistent with the accommodations afforded mainstream religions.

[1232] A number of the defenders, for instance, have criticised fundamentalist Mormons for their patriarchal beliefs, suggesting that such patriarchy is an inherent wrong of polygamy. Those same criticisms are not levelled at the Catholic Church, another religious tradition steeped in patriarchy.

[1233] Similarly, the state is prepared to disregard religious marriages which the Catholic and Jewish faiths continue to view as binding despite a civil divorce; s. 293 has not been applied to members of these faiths. Yet, it is not prepared to grant the same accommodation to Mormon celestial marriage, and instead recognizes these religious marriages for the purposes of s. 293.

[1234] The Attorneys General counter that the distinction s. 293 draws in prohibiting polygamy is not based on religion. There is nothing about polygamy that is inherently religious in nature; it is practiced throughout the world in customary, traditional and purely secular contexts.

[1235] Nevertheless, to the extent that s. 293 does capture religiously motivated polygamy, the matter is best addressed under s. 2(a) where the jurisprudence has been carefully calibrated to the issues that arise when restrictions on religious liberty are raised: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*].

b) On the ground of marital status

[1236] The *Amicus* says that polygamy is a form of marital status and constitutes an analogous ground for the purpose of s. 15.

[1237] The Supreme Court of Canada recognized marital status as an analogous ground in *Miron v. Trudel*, [1995] 2 S.C.R. 418, and *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325. In each case, the challenger was a common law partner who had been denied benefits available to married spouses. The form of conjugal relationship was thus the basis of discrimination.

[1238] Section 293 discriminates on the basis of conjugal relationship in a similar fashion by distinguishing between the number of partners in a relationship: two is permissible, any more is not.

[1239] The *Amicus* submits that the reasons of McLachlin J. (as she then was) in *Miron* confirm that being polygamous is properly an analogous ground. McLachlin J. found three markers which taken together, drove the conclusion that marital status was an analogous ground: (1) it touches upon the essential dignity and worth of the individual; (2) persons involved in unmarried relationships constitute a historically disadvantaged group; and (3) marital status often lays beyond an individual's effective control.

[1240] According to the *Amicus*, polygamy bears each of these markers.

[1241] For participants, their polygamous relationships are central to their identities, dignity and sense of self-worth, just as any conjugal relationship is likely to be to its participants. For fundamentalist Mormons, polygamy is a fundamental spiritual principle through which they fulfil God's plan. For polyamorists, the ability to live in a family with the people they love is essential.

[1242] Polygamists are both a historically and presently disadvantaged group. Mormons have a history of persecution, particularly in the United States. Polygamy has been criminalized in Canada since 1890, and immigration legislation bars polygamists from entering the country. In the eyes of the law and much of society, polygamists are pariahs.

[1243] Finally, whether one's conjugal union is polygamous is oftentimes a matter over which an individual exercises only limited control. While polygamy is not immutable to the extent of sexual orientation, in *Miron*, McLachlin J. did observe in relation to common law relationships that "marital status often lies beyond the individual's effective control" (at para. 73). With its religious and social drivers, polygamy is certainly more immutable than a common law relationship. That polygamists continue to engage in the practice despite criminalization is testament to its significance to them.

[1244] The Attorneys General reject the proposition that polygamy is an analogous ground, and say the *Amicus*' challenge fails at this first prong of the analysis.

[1245] The Supreme Court described the rationale for the inclusion of a new characteristic as an analogous ground of discrimination in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 (at 219):

> [T]he thrust of identification of analogous grounds ... is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.

[1246] On this basis, number of spouses simply cannot constitute an analogous ground. Indeed, it can no more be said that number of spouses is an analogous ground than it can be said that having a spouse who is a blood relative is an analogous ground, an argument rejected in *R. v. M.S.*

[1247] While s. 293 does draw a distinction between those who practice polygamy and those who do not, it is not one based on impermissible stereotypes that undermine human dignity. To the contrary, it distinguishes between those who engage in harmful behaviour and those who do not. Section 293 is based on the prevention of harm to individuals and to society, one of the central purposes of criminal law.

[1248] At the second stage of the *Withler* analysis - whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping - the *Amicus* argues that criminalization of polygamy amounts to substantive discrimination against polygamists. His submissions focus on three hallmarks of discrimination.

[1249] First, polygamists have historically suffered disadvantage. Section 293 perpetuates and exacerbates this disadvantage by criminalizing them in respect of a matter that is profoundly important. Criminalization is society's strongest message of opprobrium, and the legislative record is clear that Canada's prohibition on polygamy was originally aimed at Mormons and First Nations, groups that already faced disadvantage.

[1250] Second, s. 293 is the legal embodiment of stereotyping, as it is a sweeping condemnation of all polygamy without any sensitivity to the actual circumstances of any individual polygamous relationship. While the Attorneys General allege that polygamy is correlated to a number of harms, criminal liability under s. 293 simply does not depend on the existence of harm.

[1251] Third, criminalization of polygamy is inconsistent with Canada's treatment of other intimate and conjugal relations as a matter of privacy and individual choice.

[1252] Beginning with the decriminalization of sodomy in 1969, Canadian society has increasingly viewed sex as a private matter to be interfered with only in cases of abuse. We have also come to recognize an increasing diversity in conjugal relationships. Against these developments, the continued penal prohibition of polygamy is anachronistic. Adultery, for instance, entails enormous costs; nevertheless, the law generally does not punish those who engage the practice. Nor does it not punish those who engage in group sex or "swinging" when conducted in private: *Labaye*.

[1253] The Attorneys General reject the submission that polygamists are a historically disadvantaged group, arguing that most of the evidence is to the contrary. Across cultures, and including within the FLDS, polygamy is reserved for the relatively privileged and powerful men in society.

[1254] Moreover, the fact that the practice of polygamy has, throughout history, been consistently associated with a set of harms and condemned accordingly does not make those who engage in the practice today part of a historically disadvantaged group.

[1255] To similar effect, the enduring understanding that polygamy is harmful does not mean that the prohibition is based in any way on prejudice or stereotyping. As the evidence in this reference confirms, the generalization that polygamy is harmful is objectively true.

[1256] The s. 15 analysis is both subjective and objective. The reasonable person fully apprised of the confirmed harms that have been empirically, internationally and historically associated with polygamy would not see s. 293 as based upon stereotypes, prejudice or otherwise demeaning to the dignity of polygamists. To the contrary, that reasonable person would be forced to recognize that the prohibition appropriately corresponds to the serious harms that are associated with polygamy in a manner that promotes the very interests that underpin s. 15.

[1257] Section 293 is consistent with s. 15, which promotes human dignity and the values and principles essential to a free and democratic society. Those values include a commitment to social justice and equality, and faith in social and political institutions, such as monogamy, that enhance the participation of individuals and groups in society.

[1258] As for the submission that polygamy is an immutable characteristic, the Attorneys General again disagree. There is no evidence that a predisposition toward polygamous marriage is anything more than how the expert psychologists described it, an advantageous strategy available to those with the inclination and resources to pursue it. Further, if willingness to pursue behaviour in the face of criminal prohibition constitutes immutability for s. 15 purposes, then a breach of equality would be found any time the state maintained a prohibition in the face of defiance.

2. Conclusion

[1259] I can dispense with the s. 15 claims quite briefly, starting with marital status.

[1260] Assuming for the sake of argument that s. 293 creates distinctions on the basis of marital status, it fails the second prong of the analysis under *Kapp* since any such distinction does not create a disadvantage by perpetuating prejudice or stereotyping.

[1261] Not every distinction, even if based on an enumerated or analogous ground, is discriminatory. As the Supreme Court of Canada explained in *Withler* (at para. 39):

> Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the

> circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

[1262] Any differential treatment that flows from s. 293 is not based on stereotypes with respect to particular marital forms (or, for that matter, particular religions). As I have discussed at length, polygamy has been condemned throughout history because of the harms consistently associated with its practice. Section 293 was not enacted for a discriminatory purpose but for the neutral object of protecting individuals and society more generally from these perceived harms. Indeed, to the extent that polygamy undermines the equality and dignity of women and children, s. 293 promotes the values that underlie the equality guarantee.

[1263] In *R. v. M.S.*, the claimant, a father who was charged with incest in relation to his adult daughter, argued that "his desire to have a consensual sexual relationship with a blood relative and to form a family through this relationship is a personal characteristic which has lead to discrimination because s. 155 of the *Code* prohibits such a relationship" (at para. 45).

[1264] Justice Donald assumed without deciding that the claimant had met the first stage of the test, that is, a distinction resulting in a violation of one of the equality rights. In concluding that the distinction was not discriminatory, he wrote (at para. 50):

> In deciding whether a distinction is discrimination under s. 15(1) we must examine the questioned law in the larger social, political and legal context because "[i]f the larger context is not examined, the s. 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation": *Turpin* at p. 1332. Viewed in that context, the evidence in this case demonstrates that the law makes a relevant, rational distinction concerning sexual choice, between those who would have sex with their daughter and those who would not. The personal attribute which the appellant says leads to discrimination goes to the very reason for the law: it is the proclivity to engage in behaviour that exploits the child, harms the well-being of the family and hence the community, and genetically endangers the offspring of the relationship.

[1265] Parallel reasoning applies to s. 293, which draws a relevant, rational distinction on the basis of a marital form which creates, at least a risk of, if not actual, harm.

[1266] There is an argument that Parliament has also drawn a distinction on the basis of marital status by criminalizing only polygamists even though polyamorists (or others in multi-party

unions who do not come within the ambit of s. 293 as I have interpreted it) engage in similar conduct. Again, the distinction between the two groups is not one based on stereotypes but, rather, on harm, in particular in this scenario, harm to the institution of monogamous marriage.

[1267] With respect to the religious discrimination claim, the *Amicus* concedes that it parallels much of his religious freedom claim. In that regard, the situation is similar to that which arose in *Hutterian Brethren*, where the appellant claimed a breach of religious liberty, and, for substantially similar reasons, religious discrimination under s. 15. The Court addressed the claim under s. 2(a) and not s. 15, writing (at para. 108):

> Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(). There is no breach of s. 15(1).

[1268] For the reasons just discussed, the same outcome with respect to discrimination prevails here. The substance of the *Amicus*' s. 15(1) religious discrimination claim has been dealt with in my treatment of the s. 2(a) claim and in the justification analysis under s. 1 to follow.

[1269] I find no breach of s. 15(1) of the *Charter*.

[1270] Having concluded that s. 293 violates both religious liberty as guaranteed by s. 2(a) and the s. 7 liberty interests of children under 18, I turn to consider whether that violation can be justified under s. 1 of the *Charter*.

F. Section 1

[1271] Section 1 of the *Charter* provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[1272] The burden thus rests upon the Attorneys General to establish on a balance of probabilities that s. 293 constitutes a reasonable limit on the rights and freedoms protected by s. 2(a) and 7.

[1273] The relevant analytical framework was set out in *Oakes*, as recently summarized in *Hutterian Brethren*. The analysis proceeds through these steps:

a) Is the purpose for which the limit is imposed pressing and substantial?

b) Are the means by which the goal is furthered proportionate?

i. Is the limit rationally connected to the purpose?

ii. Does the limit minimally impair the *Charter* right?

iii. Is the law proportionate in its effect?

[1274] Section 1 also requires the Court to satisfy itself that the measure in question is "prescribed by law" before this proportionality analysis is undertaken.

[1275] As legislation passed by Parliament in accordance with federal constitutional authority, s. 293 of the *Criminal Code* is a limit prescribed by law as required by s. 1.

1. Positions of the Parties

[1276] The Attorneys General contend that s. 293 is amply justified under s. 1.

[1277] The challengers argue that s. 293 has fatal weaknesses at every stage of the analysis.

a) Pressing and Substantial Objective

[1278] The Attorneys General submit there can be no question that the prevention of harm to individuals and to society is an objective that is pressing and substantial. This objective was pressing and substantial when the provision was first enacted and remains so today.

[1279] The Attorneys General say that international human rights law and international trends confirm that preventing the harms that flow from polygamy is a pressing and substantial objective.

[1280] Canada's international treaty obligations, particularly under *CEDAW* and the *ICCPR*, include a duty to take all appropriate measures to eliminate discrimination against women. As part of this duty, the treaty bodies have encouraged member states to abolish polygamy.

[1281] Similarly, the international trend among nations, particularly those to which Canada would invite comparison, is to increasingly restrict polygamy through measures that include criminalization.

[1282] The *Amicus* concedes that the objective of protecting individuals from harm is meritorious. However, he disputes that deterring the alleged social harms of polygamy is a pressing and substantial objective. In this regard, he argues (at paras. 621 - 624):

> The second objective advanced by the Attorneys is to protect *society* from harms caused by polygamy.
>
> The theory upon which the Attorneys rely was advanced by Professor Henrich. It is that polygamy generally manifests as polygyny, and so imposes on society a "cruel arithmetic" that creates a pool of unmarried men, who are more prone to anti-social behaviour. It also thereby creates more competition for women. While from an economic perspective such higher competition might be expected to be empowering for women, proponents of this theory suggest that it leads to the earlier sexualization of girls, along with greater social dominance by men. This "cruel arithmetic" theory is said to lead to a host of social ills, including more crime, earlier sexualization of girls, lower levels of education, fewer civil liberties, even (according to Professor McDermott) greater national spending on defence.
>
> Certainly the protection of society against harms like these, to the extent they may exist, is pressing and substantial, but that is not the real question. The true analysis must focus on whether the avoidance of the "cruel arithmetic" justifies s. 293's grave intrusions into *Charter* rights. It is important to keep in mind just what this cruel arithmetic theory is attempting to justify: that everyone who enters into a conjugal union with more than one other person be subject to penal sanction, *not* because of some harm they have directly inflicted upon someone else, but rather because the gender arrangement of their intimate and personal conjugal union has to some degree skewed the gender ratio among unmarried persons in the rest of the population such that unmarried men may be more prone to anti-social behaviour. On that basis (the Attorneys General say), s. 293 imposes penal liability. The harms alleged are *impossibly remote* from the criminalized act, and this supposed moral gravamen of the crime is entirely indiscernible at the point of its commission.
>
> For the cruel arithmetic theory to come anywhere close to justifying the *Charter* breaches, therefore, the pool of unmarried men must constitute the gravest social concern. As discussed above and further below, it simply is not. Nor does polygamy contribute to that pool in any significant way. And nor should it be expected to if it were decriminalized. They theory is ungrounded speculation, utterly detached from reality.

[1283] The *Amicus*' submissions on this point touch both upon whether s. 293's objective is pressing and substantial, and whether its benefits outweigh its deleterious effects under the final stage of the *Oakes* analysis.

b) Proportionality

i. Rational Connection

[1284] The second step in the *Oakes* analysis requires an assessment of whether the infringing measure is rationally connected to the pressing and substantial objective it is said to serve. This requirement is satisfied where there is "a link or nexus based on and in accordance with reason, between the measures enacted and the legislative objective": *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (at para. 99) [*Prostitution Reference*].

[1285] In *Hutterian Brethren*, the majority referred to the rational connection requirement, stating (at para. 48):

> The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.

[1286] The rational connection test is not a particularly onerous one: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2002 SCC 69 (at para. 228).

[1287] The Attorneys General submit that criminalizing polygamy is rationally connected to the objective of reducing the harms associated with its practice. They say that while Parliament is not required to demonstrate that a criminal activity would have been more prevalent had it not been criminalized, the evidence on this reference is that s. 293 has functioned historically as a prophylactic and deterrent, and that, if upheld, it will continue to do so.

[1288] Despite the arrival of Mormons in Canada in the late 1880s, the 1890 polygamy and bigamy laws, backed by threats of rigorous enforcement, prevented polygamy from gaining a foothold here as it had in the Utah Territory.

[1289] In the United States, polygamy flourished in the Utah Territory until passage of federal anti-polygamy legislation. Enforcement of the polygamy ban in the late 19th and early 20th centuries eventually resulted in the complete abandonment of the practice by the mainstream Mormon Church.

[1290] The Attorneys General submit that not only do reason and logic suggest that the incidence of polygamy would increase in a non-trivial way if it were decriminalized, but that considerable evidence exists regarding this point. For example, the evolutionary psychology evidence supports the notion that polygyny is an advantageous mating strategy for men who are able to afford it. Dr. Heinrich considered its non-trivial adoption "very plausible". Dr. Walsh gave evidence that a large number of mainstream Mormons would embrace the practice if permitted, and Dr. Grossbard rejected the suggestion that polygyny could not catch on in a complex society such as Canada, citing the experience in France.

[1291] The *Amicus* submits that a rational connection implies a measure of precision that is absent from s. 293. A rational law aimed at protecting women and children, for example, would target instances of harm caused to women and children; it would not criminalize those very women and children when they are parties to polygamous unions.

[1292] The *Amicus* further argues that the existence of constitutionally valid laws that address any harms that may arise in a particular polygamous union vividly illustrate the disconnect between s. 293 and actual harm.

[1293] The *Amicus* disputes the assertion that s. 293 has kept polygamy in check, pointing to the fact that prior to its attempted use against Mr. Blackmore and Mr. Oler a few years ago, the provision had been dormant since 1937. The rare application of s. 293 approximates having no criminal prohibition at all, yet very few people in Canada engage in polygamy.

[1294] The *Amicus* submits that we should not expect there to be an uptake in the incidence of polygamy if s. 293 were to be repealed. Dr. Henrich's evidence in this regard is pure speculation. Moreover, the suggestion that Canadians would enter into polygamous relationships in the absence of a criminal prohibition ignores the cultural, demographic and economic realities of Canada.

[1295] The *Amicus* additionally maintains that with respect to religiously motivated polygamy, criminalization is not an effective deterrent. A number of the fundamentalist Mormon witnesses gave evidence that they entered into plural marriages knowing it was against the law. Historically as well, 19th century prosecutions for Mormon polygamy in the United States did not

end the practice but simply drove it underground. The criminal prohibition was accompanied by increasingly draconian measures against the Church and its members; thus, it cannot be said that the criminal prohibition itself was the basis for the abandonment of the practice by the mainstream Mormon Church.

[1296] The FLDS also rejects s. 293 as being rationally connected to the objective of avoiding the harms alleged to flow from polygamy. They do so on the basis that polygamy *per se* does not cause harm. The evidence in this reference with respect to harm - including abuse of women and children, lower educational achievement and the problem of Lost Boys - relates to the practices of certain members of the FLDS. The evidenced harms are not a necessary or definitive aspect of polygamy, or even of fundamentalist Mormon polygamy.

[1297] The FLDS further submits that many of the harms alleged to occur in a polygamous family also occur in other family structures, whether or not they exist in a closed, patriarchal religious community. It is not the form of marriage which is the predictor of harm but, rather, other unrelated factors which give rise to the risk of harm. Those behaviours are already the subject of existing laws and for those that are not, such as assigned or underage marriage, there is nothing prohibiting the enactment of valid, narrowly construed laws addressed to those harms.

[1298] Indeed, the *Amicus* suggests that in light of the disturbing evidence regarding the FLDS practice of placement marriage, the AG Canada should consider criminalizing forced marriage, whether polygamous or monogamous. This is the kind of targeted measure that could permissibly be used to target actual harm, as opposed to marital status.

ii. Minimum Impairment

[1299] The legislative goal, if found to be pressing and substantial, grounds the minimum impairment analysis.

[1300] Chief Justice McLachlin described the question to be addressed in *Hutterian Brethren* (at paras. 53-54):

> The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the

> legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.
>
> In *RJR-MacDonald*, the minimal impairment analysis was explained as follows, at para. 160:
>
> > As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail [Emphasis added; citations omitted.]

[1301] At para. 55, she added:

> I hasten to add that in considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350. While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner.

[1302] The Attorneys General stress that in assessing whether there are less harmful means of achieving the legislative goal, Parliament is entitled to deference. This is particularly so with respect to complex social issues where Parliament may be better positioned than the courts to choose among a range of alternatives. That is certainly the case here.

[1303] The Attorneys General say that s. 293, as they interpret it, is narrowly focussed and minimally impairing. The prohibition does not restrict freedom of belief but only the ability to engage in a demonstrably harmful practice. This is important given the frequent reminder from the Supreme Court that "although the freedom of belief may be broad, the freedom to act upon

those beliefs is considerably narrower": *Trinity Western* (at para. 30); *Children's Aid Society of Metropolitan Toronto* (at para. 226).

[1304] Moreover, the Attorneys General argue that there is no evidence to suggest that any measure short of criminalization will be as effective as s. 293 at deterring individuals from practicing polygamy. The fact that the practice has, at times, flourished in Bountiful in the face of the criminal prohibition is clear evidence that any measure short of criminalization would logically be ineffective in deterring the practice. The evidence of Dr. Henrich and Dr. Shackelford about the natural tendency among humans towards polygamy further suggests that measures short of criminalization are unlikely to be effective in counteracting this deep seated cross-cultural phenomenon.

[1305] The *Amicus* characterizes s. 293 as the antithesis of a minimally impairing section, describing it as "maximally impairing". He and his allies submit that the plethora of constitutionally sound *Criminal Code* provisions that address the specific harms the defenders raise as relating to polygamy, firmly establishes that s. 293's sweeping ban is not minimally impairing. They also say that to the extent there are unique problems associated with plural marriage, Parliament is able to craft laws to address those problems without imposing a blanket prohibition on the practice.

iii. Proportionality of Effects

[1306] The final stage of the proportionality analysis looks at whether the overall effects of the law on the claimants is disproportionate to the government's objective.

[1307] In *Hutterian Brethren*, McLachlin C.J.C. explained (at para. 76):

> It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis - pressing goal, rational connection, and minimum impairment - could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the "severity of the deleterious effects of a measure on individuals or groups". As President Barak explains:
>
> > Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with

> the deleterious effect upon the human right ... It requires placing colliding values and interests side by side and balancing them according to their weight.

[1308] This final stage of the analysis allows for a broader assessment of whether the benefits of the impugned provision are worth the cost of the rights limitation.

[1309] In *Hutterian Brethren*, McLachlin C.J.C. also commented upon the extent to which the seriousness of a violation of religious liberty may vary (at para. 89):

> There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.

[1310] The Attorneys General submit that the evidence suggests that insofar as Muslims are concerned, polygamy is purely optional. As such, it cannot be seriously argued that the interference with the individual's freedom of religion is serious in such cases. The adherent is not faced with a stark choice between compliance with the dictates of his or her faith or compliance with the law.

[1311] With respect to fundamentalist Mormons, the case is rather more complex, as there is evidence that, at least doctrinally, some individuals sincerely believe that they must practice polygamy as part of their religion. However, the evidence also suggests that many members of fundamentalist Mormon communities can, and do, choose to live monogamously without running afoul of their religious beliefs.

[1312] Professor Campbell gave evidence that "while FLDS tenets indicate that plural marriage is a requirement for spiritual fulfilment, some residents of Bountiful currently see themselves as in a position [to] choose monogamy over polygamy. Those who choose monogamy still see themselves as FLDS followers, and suggest that their devoutness is reflected in their openness to the possibility of plural marriage" (Affidavit #2 at para. 18). This evidence was confirmed by Anonymous Witness No. 2, who testified that not all FLDS members necessarily aspire to enter into the highest level of the celestial kingdom, and therefore choose not to marry polygamously.

[1313] Further, Anne Wilde and Mary Batchelor no longer engage in polygamy themselves, despite being independent fundamentalist Mormons who advocate in favour of the practice.

[1314] The Attorneys General say that this evidence suggests that even the most devout fundamentalist Mormons can comply with s. 293 while still adhering to their religious beliefs.

[1315] In any event, to the extent that particular individuals sincerely believe that polygamy is a religious obligation, the impact of s. 293 on their religious freedom is outweighed by its countervailing salutary effects.

[1316] The evidence demonstrates that polygamy is associated with very substantial harms. The prevention of these harms is salutary. Some of the beneficial effects of the ongoing prohibition of polygamy include:

a) Increased per-child parental investment, with the expected increase in the mental and physical wellbeing of children overall;

b) Reduced social strife, conflict and crime expected from more uneven distribution of the opportunity to marry;

c) Reduced average age gaps between husbands and wives, increasing equality in marriages;

d) Reduction in sexual predation on young girls;

e) Reducing incentives for male control over women and their reproductive capacity; and

f) Consistency with Canada's international treaty and legal obligations.

[1317] The statistical evidence shows that as levels of polygamy increase in a society, there is a corresponding decrease in political and civil liberties. It is reasonable to assume that the decriminalization of polygamy would make Canada an attractive destination for polygamists from other countries, and there is no evidence that Canada would be immune from the impacts of such an influx.

[1318] The prohibition of polygamy has been linked, both temporally and philosophically, with the rise of democracy and its attendant values of liberty and equality.

[1319] The *Amicus* responds that s. 293 is a serious intrusion on civil liberties for little positive gain. He contends that s. 293:

a) Criminalizes a religious practice, forcing those who would engage in it for the purpose of connecting with the divine to choose between obedience to the law and obedience to their consciences;

b) Prohibits and condemns all polygamy irrespective of harm;

c) Criminalizes all polygamists without inquiry into the circumstances of any particular relationship;

d) Takes away freedom of choice with respect conjugal lives, a matter that is intensely private; and

e) Denies polygamists the defence of consent, unlike almost every other criminal offence.

[1320] The *Amicus* submits (at para. 655):

> Ultimately, a fair assessment of s. 293's constitutionality must account for these inescapable facts: that there exist many polygamous conjugal relationships that are comprised entirely of consenting adults, and which create happy, healthy and nurturing familial environments; that polygamy is sometimes pursued out of deep religious conviction; that, except in cases of coercion or abuse, polygamous conjugal relationships are of profound personal significance to their participants; and that s. 293 criminalizes every polygamous conjugal union and every polygamist.

[1321] While the defenders of s. 293 point to its utility in deterring and punishing abuse, the *Amicus* says it has significant drawbacks that undermine its utility in this regard:

a) As a prosecutorial tool, the provision has been of no value. There have been only two convictions in its 120 year history; neither involved an abusive polygamous relationship;

b) A host of other criminal laws exist which target the abuse that can arise in any familial context, including polygamy;

c) The criminalization of all polygamy, detached from any particularized harm within a particular relationship, causes polygamists to withdraw from mainstream society and polygamous communities to become more insular. The result is that investigation and prosecution of actual abuse becomes more difficult;

d) Section 293 criminalizes a practice that is unlikely to be deterred. Unlike marijuana use in *Malmo-Levine*, polygamy engages fundamental interests. In a real and practical sense, conjugality is immutable; and

e) Section 293 fails to accurately convey society's denunciation. The conduct that calls out for moral condemnation is not polygamy *per se*, but the abuse that motivates the prosecution.

[1322] The FLDS argues that since polygamy *per se* does not cause harm or the reasoned apprehension of harm, s. 293 has no salutary effects.

[1323] Its deleterious effects on members of the FLDS, however, are numerous. It prohibits them from practicing a core element of their religion. It has the perverse effect of further isolating the community from mainstream society.

[1324] The Attorneys General challenge some of the deleterious effects identified by the challengers. With respect to stigma and insularity, they point out that these are effects legitimately visited upon persons who violate the law. The court's role in the s. 1 analysis is not to weigh the negative effects of criminalization, but the harms to the exercise of the *Charter* right(s) that have been infringed. Thus, the only deleterious effects appropriately considered are the consequences of obeying the law.

[1325] The Attorneys General further argue that, in any event, the evidence does not bear out the assertion that s. 293 promotes marginalization, therefore reinforcing insularity in polygamous communities.

[1326] The only polygamous community in Canada about which the Court has any evidence is Bountiful. That evidence suggests that the FLDS members who reside in the community perpetuate and cherish their insularity on the basis of an explicit disapproval of the values of mainstream Canadian society. This insularity would most likely persist without the prohibition on polygamy.

[1327] The evidence of Professor Campbell was that a number of the women she interviewed in the Bountiful community said they were comfortable with the idea of accessing resources outside the community, such as medical assistance and social services support, and that they had in fact done so.

[1328] If the nature of the exercise of an infringed right is itself distant from the values the *Charter* was designed to protect, the weight accorded to its infringement as a deleterious effect at the balancing stage is minimal, at best: *R. v. Keegstra*, [1990] 3 S.C.R. 697. To the extent that s. 293 captures only polygyny, the religious practice being defended is, in itself, discriminatory against women. As such, *Charter* values of equality and dignity are promoted to the extent the practice is curtailed.

2. Conclusion

[1329] Having found s. 293 to infringe both s. 2(a) and s. 7 of the *Charter*, I advance to apply the *Oakes* test to each infringement.

a) Section 2(a)

[1330] To constitute a justifiable limit on a right or a freedom, the objective of the impugned measure must advance concerns that are pressing and substantial in a free and democratic society.

[1331] As I have concluded, s. 293 has as its objective the prevention of harm to women, to children and to society. The prevention of these collective harms associated with polygamy is clearly an objective that is pressing and substantial.

[1332] The positive side of the prohibition which I have discussed - the preservation of monogamous marriage - similarly represents a pressing and substantial objective for all of the reasons that have seen the ascendance of monogamous marriage as a norm in the West.

[1333] I reject the *Amicus'* concentration on, and rather dismissive critique of, the harms associated with the so-called "cruel arithmetic" of polygamy. The existence of these harms has been demonstrated by the defenders.

[1334] At the next stage of the analysis, the Court turns to determine whether there is a rational connection between the criminal prohibition of polygamy and Parliament's pressing and substantial objective.

[1335] Having found a reasoned apprehension that polygamy is associated with numerous harms, it follows that criminalizing the practice is one way of limiting those harms. As Chief Justice Lamer observed in the *Prostitution Reference* (at 1195):

> Regulating or prohibiting the cause is at least one method of controlling its effects. A piece of legislation that proceeds upon such a premise does, in my view, exhibit a rational connection between the measures and the objective.

[1336] The government need only show that "it is reasonable to suppose that the limit [on the right] may further the goal, not that it will do so" (*Hutterian* Brethren at para. 48). It is certainly reasonable to suppose that the limits on religious liberty that s. 293 imposes may further the objectives of the provision. The evidence that the incidence of polygamy would plausibly increase in a non-trivial way if not criminalized certainly makes this point.

[1337] The *Amicus* suggests that s. 293 has not been effective, and points to the miniscule number of prosecutions over the provision's 120 year history. The Supreme Court answered this submission in *R. v. Lucas*, [1998] 1 S.C.R. 439, where it rejected a similar argument with respect to s. 300 of the *Criminal Code*, the prohibition of defamatory libel (at 466):

> The appellants argued that the provisions cannot be an effective way of achieving the objective. They contended that this was apparent from the fact that criminal prosecutions for defamation are rare in comparison to civil suits. However, it has been held that "[t]he paucity of prosecutions does not necessarily reflect on the seriousness of the problem", rather it "might be affected by a <u>number</u> of factors such as the priority which is given to enforcement by the police and the Crown" (*R. v. Laba*, [1994] 3 S.C.R. 965, at p. 1007 (emphasis added)). There are numerous provisions in the *Code* which are rarely invoked,

> such as theft from oyster beds provided for in s. 323 or high treason in s. 46. Yet, the infrequency of prosecutions under these provisions does not render them unconstitutional or ineffective. I agree that the small number of prosecutions under s. 300 may well be due to its effectiveness in deterring the publication of defamatory libel (*Stevens, supra,* at p. 310).

[1338] The *Amicus* also maintains that s. 293 is not an effective deterrent since those who are religiously motivated to practice polygamy will do so regardless of its criminalization. Again, the Supreme Court answered this submission in *Malmo-Levine* (at paras. 177-178):

> This Court has exercised caution in accepting arguments about the alleged ineffectiveness of legal measures: see *Reference re Firearms Act (Can.)*, *supra*, where the Court held that "[t]he efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis" (para. 57). While somewhat different considerations come into play under a *Charter* analysis, it remains important that some deference be accorded to Parliament in assessing the utility of its chosen responses to perceived social ills.
>
> Questions about which types of measures and associated sanctions are best able to deter conduct that Parliament considers undesirable is a matter of legitimate ongoing debate. The so-called "ineffectiveness" is simply another way of characterizing the refusal of people in the appellants' position to comply with the law. It is difficult to see how that refusal can be elevated to a constitutional argument against validity based on the invocation of fundamental principles of justice. Indeed, it would be inconsistent with the rule of law to allow compliance with a criminal prohibition to be determined by each individual's personal discretion and taste. [Emphasis added]

[1339] While the Supreme Court made these comments in the context of s. 7 of the *Charter*, in my view they have equal application to the rational connection analysis under s. 1.

[1340] As for the suggestion that a more focussed measure, rather than a general prohibition of polygamy, is more rationally connected to the objective, I have dealt with this submission in my discussion of the s. 7 claim. Many of the conclusions there are apposite here and, in my view, answer the challengers' submissions under this head.

[1341] Moving to minimal impairment, it is my view that s. 293 minimally impairs religious freedom.

[1342] In addressing the harms reasonably believed to be associated with polygamy - inherently I add - Parliament is entitled to some deference. This is a complex social issue. Parliament is better positioned than the Court to choose among a range of alternatives to address the harms.

[1343] When one accepts that there is a reasoned apprehension that polygamy is inevitably associated with sundry harms, and that these harms are not simply isolated to criminal adherents like Warren Jeffs but inhere in the institution itself, the *Amicus'* complaint that there are less sweeping means of achieving the government's objective falls away. And it most certainly does when one considers the positive objective of the measure, the protection and preservation of monogamous marriage. For that, there can be no alternative to the outright prohibition of that which is fundamentally anathema to the institution. In the context of this objective, there is no such thing as so-called "good polygamy".

[1344] It is therefore my opinion that s. 293 is "carefully tailored so that rights are impaired no more than necessary" (*RJR-MacDonald*, at para. 160).

[1345] Finally, I find s. 293 to be proportional in its effects.

[1346] As Aharon Barak, former president of the Supreme Court of Israel, explained (in turn adopted by McLachlin C.J.C. in *Hutterarian Brethren*):

> ... the test of proportionality (*stricto sensu*) examines whether realization of this proper objective is commensurate with the deleterious effect upon the human right ... It requires placing colliding values and interests side by side and balancing them according to their weight.

[1347] I start with the deleterious effects.

[1348] I accept that for some, especially fundamentalist Mormons, the interference with a sincerely held belief represented by the prohibition in s. 293 is very significant. Still, I acknowledge the point made by the Attorneys General that some fundamentalist Mormons do choose to live monogamously without sacrificing their religious beliefs. And as we have seen, polygamy in Islam is not mandated, although it is permitted by the Qu-ran.

[1349] Further, I accept that the prohibition tends for some to encourage isolationism and insularity.

[1350] But, in my view, the salutary effects of the prohibition far outweigh the deleterious. The law seeks to advance the institution of monogamous marriage, a fundamental value in Western

society from the earliest of times. It seeks to protect against the many harms which are reasonably apprehended to arise out of the practice of polygamy.

[1351] Finally, and not insignificantly, the prohibition is consistent with, and furthers, Canada's international human rights obligations. In my view, this adds very significant weight to the salutary effects side of the balance.

[1352] To the extent that s. 293 breaches the right guaranteed by s. 2(a) of the *Charter*, the Attorneys General have clearly met the burden of demonstrating that it is demonstrably justified in a free and democratic society.

b) Section 7

[1353] Laws which have been found to violate principles of fundamental justice are not easily saved by s. 1: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9. As McLachlin C.J.C. explained "[t]he rights protected by s. 7 - life, liberty, and security of the person - are basic to our conception of a free and democratic society, and hence are not easily overridden by competing social interests" (at para. 66). Although she acknowledged that the task may not be impossible, it is nevertheless a hurdle that s. 293 is unable to overcome.

[1354] My conclusions with respect to pressing and substantial objective and rational connection in the context of the s. 2(a) infringement apply equally here.

[1355] However, it is at the minimum impairment stage that s. 293 fails the justification analysis, which is not surprising as its deficiency lies in its overbreadth.

[1356] In criminalizing "every one" in a prohibited union, s. 293 includes within its ambit young persons who are parties to such unions. This serious impairment of young persons' liberty interests does not advance the important objectives of s. 293. Even according Parliament a healthy measure of deference, it cannot be said that the measure, in this limited respect, is "carefully tailored so that rights are impaired no more than necessary" (*RJR-MacDonald*, at para. 160).

[1357] Accordingly, I find that to the extent s. 293 is contrary to the principles of fundamental justice guaranteed by s. 7 of the *Charter* by criminalizing young persons between the ages of 12

and 17 who marry into polygamy or a conjugal union with more than one person at the same time, the Attorneys General have not met the burden of demonstrating that this infringement is justified in a free and democratic society.

VIII. DISPOSITION

[1358] It remains then to answer the questions posed on the reference.

> **1. 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?**

[1359] For the reasons I have given, s. 293 is consistent with the *Canadian Charter of Rights and Freedoms* except to the extent that it includes within its terms, children between the ages of 12 and 17 who marry into polygamy or a conjugal union with more than one person at the same time.

[1360] For greater clarity, as I have indicated in my reasons, the inconsistency does not extend to persons who marry into polygamy before the age of 18 but are 18 years of age or older at the time of the laying of the Information in respect of conduct that occurred at or after 18 years of age.

[1361] Granting a constitutional remedy in light of that conclusion is not within the terms of this reference. If it were, I would respectfully adopt the approach taken by McLachlin C.J.C. in *Sharpe*, that is, confronted, as here, with a law that is substantially constitutional and peripherally problematic, one alternative is to read into the law an exclusion of the problematic application. Here, I would do so in respect of the noted group of potential accused persons.

[1362] Alternatively, but to the same effect, I would read down "every one" in s. 293 to exclude the noted group of potential accused persons.

> **2. What are the necessary elements of the offence in s. 293 of the *Criminal Code of Canada*? Without limiting this question, does s. 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?**

[1363] It is interesting to note that the primary question posed here speaks of the "necessary elements of the offence in s. 293...". The singular is used. That sits well with my conclusion that the elements of the polygamy offence (s. 293(1)(a)(i)) and those of the conjugal union offence (s. 293(1)(a)(ii)) are the same:

1. an identified person, who
2. with the intent to do so,
3. practices, enters into, or in any manner agrees or consents to practice or enter into,
4. a marriage, whether or not it is by law recognized as a binding form of marriage, with more than one person at the same time.

[1364] Section 293 does not 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.

[1365] The parties did not in any substantial way deal with the offence created by s. 293(1)(b) of the *Code* and I have, accordingly, assumed that Question 2 is limited to the polygamy/conjugal union offence.

[1366] It remains for the Court to thank counsel for the parties and the Interested Persons.

[1367] Their submissions on the law, their development of the record before the Court, and their demonstrated professionalism throughout have made the timely, efficient and informed disposition of this matter possible and, as well, a rewarding exercise of the process contemplated under the *CQA*.

"The Honourable Chief Justice Bauman"

APPENDIX "A"

Materials Contained in Affidavit #1 of Kaley Isbister Sworn 30 July 2010

a. Articles by Legal Academics

1. Alberta Civil Liberties Research Centre, "Separate and Unequal: The Women and Children of Polygamy" in *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2005);

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18. Drummond, Susan G., "Polygamy's Inscrutable Secular Mischief” (2009) 5:1 CLPE Research Paper Series;

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