No. S-097767
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

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

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

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

CLOSING SUBMISSIONS OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA

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Contents

I. Introduction

A. Overview

1. In his Opening Statement, the Attorney General of British Columbia identified what he predicted would be the three central issues in this case: harm, purpose and interpretation. The latter two are obviously intertwined with the first.

2. The majority of evidence presented in this case has been on the subject of harm. This Court has heard the term "convergence" to describe scientists' use of various datasets and methodologies to fix a conclusion of fact with more confidence.

3. This is a case where difficult conclusions must be drawn about the attribution of particular effects to the practice of polygamy.[1] The Attorney's case for causation rests on four main types of evidence: (a) expert theory predicting certain harms in polygamous societies; (b) cross-cultural and intra-cultural studies demonstrating the harms correlated with the degree of polygamy in a society; (c) case study observations of the harms by clinical experts; and (d) evidence, from lay witnesses and documents, of particular harms manifested.

4. The quality of evidence presented by all Participants has been extraordinary. In addition to some of the leading subject-matter and theoretical experts in the world, this Court has heard from persons who have lived – and in some cases still live – in the heart of polygamy in Canada and the US. The Court heard from the close relatives of former Bountiful Bishop Winston Blackmore, and from the brother and other family members of the current Bishop, James Oler. It heard from the daughter of Harold Blackmore, the man who founded Bountiful in 1947. It has heard from relatives of the prophet of the Church of Jesus Christ of Latter Day Saints, the largest organized polygamous sect in North America, from anonymous witnesses from Bountiful and the FLDS

[1] Except where otherwise noted, "polygamy" in these submissions is used interchangeably with "polygyny" – the practice of one man having more than one wife.

in the United States, and from many others who did not live their lives at the periphery of polygamy, but at its centre. There is an extensive Brandeis brief of social science and historical evidence, hundreds of articles, books and videos; there are documents, birth records, marriage records, and more – that tell their own stories.

5. Evidence from all these sources inexorably converges toward two broad conclusions: first, there is a significant increased risk to women and children in polygamous households, including risks to mental and physical health, strife and conflict, and possibly violence and abuse; and, second, there are significant and measurable harms to a society in which polygamy is practiced. These latter, *social* harms are felt regardless of whether any particular polygamous relationship is "good" or "bad".

6. This is what we know about polygamy, both in theory and practice: A polygamous society consumes its young. It arms itself with instruments of abuse, and shields itself behind institutions of secrecy, insularity, and control. It depresses every known indicator of women's equality. It is anti-democratic, anti-egalitarian, anti-liberal, and antithetical to the proper functioning of any modern rights-based society.

7. Special Prosecutor Richard Peck, QC, who reviewed allegations of abuse, criminality, and other concerns at Bountiful in 2007, concluded that nothing in that community would change so long as the law with respect to polygamy remained in limbo. He wrote that, in his view, "polygamy itself is at the root of the problem".[2] He could not have predicted the extent to which the evidence gathered in the course of the reference he proposed would bear this out.

8. Polygamy hurts people. The child brides smuggled across borders to serve as compliant wives to middle-aged men they have never met, the boys

[2] John Nelson Affidavit #1, Exhibit W, p. 707.

expelled or sent to work camps without an education, the harsh mechanisms of control, the grotesque subjugation of women and girls, these are not discrete harms that are simply coincidental. They are not archaic vestiges of another time or arcane consequences of fundamentalist faith. The evidence in this case shows that these harms are caused by the practice of polygamy as surely as anything can be said to be caused by anything else. These victims were inevitable. And there will be many more if the Challengers succeed in making Canada the first western nation to decriminalize polygamy.

9. The Attorney does not in these submissions emphasize evidence or arguments on certain topics dealt with by other participants. In particular, these submissions will make only passing reference to Canada's international obligations and the influence of international law on *Charter* analysis, topics that the Attorney expects will be well canvassed by Canada, the CCRC and Asper Centre, West Coast LEAF and others. These submissions also do not fully explore the remarkable findings of Professor McDermott's statistical analysis of 171 countries in the WomenStats database, because this too is fully covered by Canada.

B. Background to the Reference

10. Section 293 of the *Criminal Code of Canada* began as an amendment to *An Act respecting Offences relating to the Law of Marriage* in 1890.[3] It was enshrined in the *Criminal Code* in 1892.[4] The offence was then, as now, punishable by up to 5 years' imprisonment. It is uncontroversial that the law was enacted amid concerns over the recent influx of Mormon immigrants to what is now southern Alberta.

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[3] Bill F, *An Act to amend "An Act respecting Offences relating to the Law of Marriage"*, 4th Session, 6th Parl., 1890; *An Act further to amend the Criminal Law*, S.C. 1890, c. 37, ss. 10-11.
[4] *Criminal Code, 1892*, S.C. 1892, c. 29, ss. 278 and 706.

11. Between 1890 and 1937, there were six reported prosecutions for the offence.[5] Most of these cases were attempts to prosecute what we would recognize today as adultery, not polygamy in the sense of having multiple partners simultaneously and openly. The one exception was the *Bear's Shin Bone* case, which was a prosecution of an Indian man who had married two women in the tradition of his nation.

12. The law was amended when the *Criminal Code* was consolidated in 1954.[6] The most obvious change was the removal of a passage referring to Mormon plural marriage.

13. The polygamy prohibition was one of the laws that fell under scrutiny after the introduction of the *Charter of Rights and Freedoms* in 1982. By the 1990s, there were concerns being expressed over the polygamist Mormon community of Bountiful, near Creston, British Columbia. Bountiful had been established after the Second World War by settlers from the Mormon community in Southern Alberta, and it had flourished as a satellite of the US-based Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS). The reports and complaints about Bountiful included allegations of sexual exploitation of and trafficking in young girls. Several police investigations ensued, some resulting in charges for offences not based on the polygamy law, but with no prosecutions under section 293 itself.

14. A comprehensive 1990-91 RCMP investigation of polygamy involving two senior members of the community (one since deceased) resulted in a Report to Crown Counsel in 1991. This led the Attorney General to seek advice on whether the polygamy prohibition could be enforced. One by one, a number of counsel from the Legal Services Branch, and a respected former judge consulted

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[5] *R. v. Labrie* (1891), M.L.R. 7 Q.B. 211 (Que. Q.B.); *R. v. Bear's Shin Bone*, 1899 CarswellNWT 32, 4 Terr. L.R. 173, 3 C.C.C. 329; *R. v. Harris* (1906), 11 C.C.C. 254 (Que. C.S.P.); *Dionne v. Pepin* (1934), 72 Que. S.C. 393; *R. v. Trudeau*, [1935] 2 D.L.R. 786 (B.R. Que.); *R. v. Tolhurst*, [1937] O.R. 570 (Ont. C.A.). See also *R. v. Liston* (1893, unreported), cited in W.E. Raney "Bigamy and Divorce" (1898) 34 Can. L.J. 545 at 546, note (b).

[6] *Criminal Code*, S.C. 1953-54, c. 51, s. 243.

for his opinion, expressed their views that the law was a violation of religious freedom, and one that could not be justified under section 1 of the *Charter.* This led a representative of British Columbia's Criminal Justice Branch to publicly announce, in 1992, that the law was unconstitutional and could not be enforced.[7] British Columbia petitioned the federal government to amend the law, but the federal government declined, taking the position that it was constitutional.

15. The process was repeated under a new Attorney General in 2002, after another legal opinion, this time from former Chief Justice Allan McEachern, that the law could not withstand *Charter* scrutiny. Again, the federal government resisted provincial entreaties to redraft the legislation.

16. There was another investigation of Bountiful in 2005-06 for sexual exploitation and polygamy. The charges were reviewed by four senior Crown Counsel who decided not to approve charges.

17. In 2007, Attorney General Oppal caused the question of polygamy prosecutions to be referred to a special prosecutor, Richard Peck, QC. Mr. Peck recommended that charges not be laid, and that the question of the constitutionality of section 293 be referred to the Court of Appeal. Mr. Peck opined that the law was in fact constitutional, but that the challenge should, in fairness, play out first in a reference case rather than a prosecution. Mr. Peck's views were subsequently confirmed by Leonard Doust, QC, another senior independent lawyer who was consulted by the Attorney for his opinion.

18. Subsequently the Attorney General caused to be appointed another special prosecutor, Terry Robertson, QC. Mr. Robertson concluded that charges were warranted, and commenced a prosecution under section 293 against the two competing "bishops" of the Bountiful fundamentalist Mormon Community, Winston Blackmore and James Oler. It was alleged that the two had been

[7] See John Nelson Affidavit #1, para. 77 and following.

religiously 'married' a succession of women and girls, including a number of teenagers between 15 and 17 years old.

19. In September, 2009, Justice Stromberg-Stein of this Court found that Mr. Robertson's appointment as special prosecutor was unlawful, and that Mr. Peck's decision not to prosecute was "final" under the *Crown Counsel Act*, R.S.B.C. 1996, c. 87. The prosecution was quashed.[8]

20. The Attorney General did not appeal Justice Stromberg-Stein's decision. Instead, the government decided to refer the question of constitutionality to this Court pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68.

21. On October 22, 2009, British Columbia's Lieutenant Governor in Council referred two questions to this Court for hearing and consideration pursuant to the *Constitutional Question Act*, section 1:

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?

22. Section 293 reads:

> Polygamy
>
> **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,

[8] *Blackmore v. British Columbia (Attorney General)*, 2009 BCSC 1299.

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.

Evidence in case of polygamy

(2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

C. The Attorney General's Position on the Reference Questions

23. The Attorney General of British Columbia would answer the Reference questions the following way:

Question: 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?

Answer: Yes. Section 293 is consistent with the *Canadian Charter of Rights and Freedoms*. In particular, the ban does not offend sections 2, 7 or 15 of the *Charter*, or, if it does infringe on those rights and freedoms, it is demonstrably justified as reasonable in a free and democratic society.

Question: 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?

> Answer: Section 293 does not require proof 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. These may, of course, be aggravating factors for sentencing purposes. A person who knowingly enters into or continues a criminally polygamous relationship, or agrees or consents to do so, or who assists certain processes purporting to sanction such a relationship, is guilty of the offence.
>
> In the alternative, if the ban described above is not consistent with the *Charter*, then section 293 may be read and construed so as to apply when the polygamy or conjugal union in question involves a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence.[9]

II. The Historical and Social Context

A. The Origins of the Criminal Polygamy Ban

24. The Amicus and other Challengers assert that the historical context of the law reveals that it emanated from religious prejudice, further tainted with improper political and even racist ambitions. The Amicus wrote in his November 1, 2010 Opening Statement at para. 60:

> The criminal ban on polygamy was enacted in order to curtail a practice that was deemed to be offensive to a mainstream Christian definition of marriage. It was aimed at defending a Christian view of proper family life, and was employed in the state's cultural colonization of Aboriginal peoples. The ban was first imposed during a historical period when the imposition of Christian norms and values was deemed appropriate, but such an objective is no longer just and compelling in our free and democratic society. ...

[9] The Attorney does not expand on this alternative submission in this document, but adopts the summary of law with respect to "reading down" as advanced by West Coast LEAF.

25. The Amicus's main witness on the history of section 293 was Lori Beaman; upon her, the Amicus's entire "religious purpose" case appears to rest. Dr. Beaman said in her second affidavit at para. 38:

> Reasons for prohibiting polygamy were wide ranging. A review of the literature suggests that sexual morality, racism, nation building, colonialism and the importation of Christianity were most prevalent.

She later synopsised at para. 41:

> The criminalization of polygamy was linked to colonial ideals about citizenship and an imagined vision of the nation state which was largely white and Christian.

26. Dr. Walter Scheidel is the Chair of the Classics Department at Stanford University. Dr. Scheidel traces the origins of monogamy from its roots in the early democracies of Ancient Greece through to modern times.

27. Dr. Scheidel, together with Canada's expert historian Dr. Witte, demonstrate that legal prohibitions of polygamy trace their origins to ancient Greece and Rome. Socially-imposed universal monogamy [SIUM], as Dr. Scheidel calls it, has been a common thread of Western societies since. He writes of the early Christian monogamous traditions:

> After several centuries of Christian writing, Augustine presents an assessment of monogamy that privileges pragmatic considerations and, on one occasion, identifies monogamy as a Roman (in the sense of pre- or non-Christian custom... Over time, as Christianity turned into an effectively and formally separate religious organization, it evolved and expanded primarily within the context of a Mediterranean society that was dominated by cultures (Greek and Roman that had long been practicing SIUM. Both the increasing autonomy of Christianity from Judaism and its expansion away from the Middle East and into the core regions of prescriptively monogamous Greco-Roman civilization would have induced Christians to embrace and internalize monogamous practices even if they had not already been present from the beginning.[10]

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[10] Scheidel Affidavit #1, Exhibit B, p. 24

28. Dr. Scheidel goes on to assess that, even if Christianity developed monogamy independently (which he considers most likely occurred as a point of departure from the Judaism of the early Christian period), it quickly merged with the pre-existing Roman practice. He concludes:

> [T]he congruence between Christian and pre-existing societal norms and practices regarding monogamous unions in the Roman period and to a growing extent also in subsequent periods makes it difficult to define western SIUM neatly as a predominantly religious or secular phenomenon...SIUM cannot be regarded as an inherently distinctive or novel feature of the Christian belief system because it coincided with widespread societal norms and practices when it expanded and was institutionalized during the Roman period and later.[11]

29. Dr. Witte also traced the polygamy prohibition to its "pre-Christian" origins, and followed it through its incorporation into the Church, and then in its adoption by "post-Christian" Enlightenment philosophers. Witte noted that some opponents used the rhetoric of racial and religious prejudice, but the common thread was an appreciation of polygamy's harms to women, children, and society. Dr. Witte's analysis confirms in all essential details Dr. Scheidel's, but adds a great deal of detail regarding the historical appreciation of polygamy's harms. Dr. Witte's evidence is extensively dealt with by Canada in its submissions and so will not be referenced in detail here.

30. No expert from the Challengers, and indeed nothing in the rich literature on the subject, has cast doubt on the essentials of this narrative, which was also supported by the evidence of Dr. Henrich.[12] The roots of the polygamy ban are thus pre-Christian, and that prohibition has been justified and enforced on both religious and secular grounds over many centuries.

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[11] Scheidel Affidavit #1, Exhibit B, p. 25.
[12] Henrich Affidavit #1, Exhibit B, pp. 36-38.

31. In the 18th century, Blackstone identified polygamy as a capital crime that was included in Britain's anti-bigamy legislation, dating from 1604. At the time, Blackstone recognized that the prohibition was inherited, not only from Roman law, but also from the custom of England's Saxon ancestors.[13]

32. The 1604 law (*An Acte to restrayne all persons from Marriage until their former Wyves and former Husbandes be deade*) was worded as follows:

> If any person or persons within his Majesties Domynions of England and Wales, beinge married, or which herafter shall marie, doe at any tyme after the ende of the Session of this present Parliament, marrye any person or person, the former husband or wife beinge alive, that then everie such offence shalbe Felonie...[14]

33. Two centuries later, the *Offences Against the Person Act 1828* had similar wording:

> If any Person, being married, shall marry any other Person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, shall be guilty of Felony...[15]

34. Bigamy laws, patterned on the English, were put in place in the United States soon after the establishment of the Union, as described by the United States Supreme Court in the decision of *Reynolds v. United States*, 98 U.S. 145 (1878) and attested to by Professor Witte in his affidavit (at para. 316) and in his oral testimony. Those prior state laws had been in place for decades before Joseph Smith founded Mormonism, and half a century before Smith had made his "revelations" on the righteousness of plural marriage in 1843. The law under challenge in *Reynolds* was the 1862 Act of Congress, the *Morrill Anti-Bigamy Act*, which extended the pre-existing prohibition into the United States Territories, where the Mormons had mostly settled. It read similarly to the British laws of old:

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[13] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769, Volume IV: Of Public Wrongs* (Chicago: University of Chicago Press, 1979) at pp. 163-64.

[14] *An Act to refrain all Persons from Marriage until their former Wives and former Husbands be dead* (U.K.), 1 Jas. I, c. 11.

[15] *An Act for consolidating and amending the Statutes in England, relative to Offences against the Person, 1828* (U.K.), 9 Geo. IV, c. 31, s. 22.

> Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.

35. In *Reynolds*, the Court emphasized, at pp. 164-165, that the prohibition, while for a time enforced by the ecclesiastical courts in England, was essentially secular in its history:

> 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 of 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 reenacted, 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. [emphasis added]

36. Critics of the *Reynolds* decision often point to the first sentence of this passage, referring to polygamy as "a feature of the life of Asiatic and of African people", as proof of some racist or xenophobic inspiration. But in context, the Court was not disparaging polygamy on racial or similar grounds; it was simply explaining why, prior to Mormonism, it was not much of an issue in the United States or Europe, where it was considered "odious".[16] In fact, the principal concern of the *Reynolds* Court does not appear to have been any threat to white or Christian interests, but rather focused on the role of marriage form in democratic structure, as indicated at pp. 165-166.

> 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]

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[16] As an important aside, the context of the American campaign against the Mormon church was quite distinct from the Canadian criminalization of polygamy. The LDS church in the United States had, by the time of founding prophet Joseph Smith's death in 1844, established itself in direct (and occasionally violent) confrontation with the government and rival groups. By the time of the legislation that threatened to disenfranchise Mormons and fragment the LDS church in 1887, the church was a monolithic political, cultural and military presence in the already tumultuous west. The LDS church dominated the life of the Territory of Utah and effectively formed the government there, and many of its members and leaders sought to establish an independent state. Whether this justified the American legislation is an entirely separate question from that before this Court. The Court cannot simply assume, as the Amicus and his witness Lori Beaman appear to do, that any articulations of American animus toward the LDS can be attributed also to Ottawa, particularly in face of the facts to the contrary.

37. Importantly, the Court in *Reynolds* appears to have been sensitive to arguments that the enforcement of the polygamy prohibition was an appeal to anti-Mormon "passion and prejudices" of the day.[17] The Court held that the prohibition was based on Congress's apprehension of the harms of polygamy, and it was not inappropriate to emphasize those "evils" to the jury:

> While every appeal by the court to the passions or the prejudices of a jury should be promptly rebuked, and while it is the imperative duty of a reviewing court to take care that wrong is not done in this way, we see no just cause for complaint in this case. Congress, in 1862 (12 Stat. 501), saw fit to make bigamy a crime in the Territories. This was done because of the evil consequences that were supposed to flow from plural marriages.
>
> [Emphasis added]

38. It is striking how closely the issues in 1878 resemble some of those before the Court today. The *Reynolds* Court was considering, and rejecting, the notion that polygamy should be protected because it could be practiced "without appearing to disturb the social condition of the people who surround it". The Court found that where polygamy runs its course it "leads to the patriarchal principle, and... fetters the people in stationary despotism." The Court clearly viewed polygamy as incompatible with democratic government and individual liberty, and the American courts' view has not changed in the intervening century.[18]

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[17] The Jury charge that was the subject of objection, interestingly, focused on the harms of polygamy to women and children:

> "I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, And there are pure-minded women and there are innocent children -- innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land."

[18] Reviewing the history of Utah's polygamy prohibition in *State v. Holm*, 2006 UT 31, the Supreme Court of that State, upholding the law against attack on the basis of religious liberty, wrote at para. 58:

B. Mormon Polygamy in Canada 1886-1890

39. In the immediate aftermath of the *Reynolds* decision, some Mormons began to settle in the Canadian west. They were led by Charles Ora Card, an American polygamist who had escaped prison by jumping from a moving train, "appropriated" a nearby horse, and gone underground in the United States. Soon after his escape, Card was directed by John Taylor, the president of the LDS church (himself also then a fugitive) to form a settlement in Canada. Card scouted locations in 1886, and returned to lead 10 settler families the following year. The first 41 Mormons arrived at Lee's Creek (sometimes called Lee Creek) in June 1887.[19] They quickly established themselves as skilled farmers, and built a community that later became Cardston, Alberta.

40. In November 1889, Card led a delegation to Ottawa to petition the Canadian government to permit his followers to bring into Canada their plural wives. Accompanying him was John W. Taylor (son of the LDS Prophet John Taylor) and Francis M. Lyman, two LDS "Apostles" from Salt Lake City[20] who had recently returned from Mexico having negotiated with Mexican officials that Mormon settlers could practice polygamy "quietly" there.[21] The LDS emissaries invoked as precedent the practice of Muslims elsewhere in the Empire, and argued:

> Our State's commitment to monogamous unions is a recognition that decisions made by individuals as to how to structure even the most personal of relationships are capable of dramatically affecting public life.

[19] Brigham Young Card, "Charles Ora Card and the Founding of the Mormon Settlements in Southwestern Alberta, North-West Territories", in B.Y. Card, ed., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), pp. 85-88 (Isbister Affidavit #4, Exhibit A). Brigham Young Card, incidentally, was the son of Charles Ora Card, and for many decades a sociologist at the University of Alberta.

[20] Then, as now, the LDS church is led by a "Prophet" and a council of 12 "Apostles".

[21] Comparison and contrast of the parallel migrations of Mormon polygamist refugees to Mexico and Canada are found in Hardy, "Mormon Polygamy in Mexico and Canada: A Legal and Historiographical Review"; Embry, "Two Legal Wives: Mormon Polygamy in Canada, the United States and Mexico"; and Card, "Charles Ora Card and the Founding of the Mormon Settlements in Southwestern Alberta, North-West Territories", all in *The Mormon Presence in Canada* (Isbister Affidavit #4, Exhibit A).

> The comparatively few who need to seek rest and peace in Canada would not be a drop in the bucket compared with the millions of people who are protected in their faith and practice plural marriage under the Government of Great Britain.[22]

41. The Mormons were "firmly but politely" told that they were welcome to come to Canada, but not to practice polygamy here.[23] Sir John A. Macdonald would later recount the episode, and explained the government's position, as follows:[24]

> Mr. Card and some others came to Ottawa. Some of them 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: <u>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 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.</u> I told them this, and they professed a sincere desire—I have no reason 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.
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> [Emphasis added]

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[22] Jessie L. Embry, "Exiles for the Principle: LDS Polygamy in Canada" (Fall 1985) 18:3 Dialogue: A Journal of Mormon Thought 108-116, p. 109 (Isbister Affidavit #2, Exhibit H).

[23] The delegation is described in a number of sources, including Card, "Charles Ora Card" at p. 92; Embry, "Exiles for the Principle"; and Embry, "Two Legal Wives" in *The Mormon Presence in Canada* (Isbister Affidavit #4).

[24] *House of Commons Debates* (April 10, 1890) at 3180.

42. Most of the LDS leadership in Southern Alberta at the time were "married" to more than one wife.[25] But historians agree that the practice among polygamists (including Card himself) was to bring only one wife to Canada, leaving the remainder in the United States, what Embry calls a "*de facto* monogamy".[26] Even where historians believe that polygamous marriages occurred in southern Alberta, these were rare after 1890[27] and did not result in polygamous Canadian families:

> [O]f 85 polygamous marriages of Mormons living in Canada... only 12%... were performed after 1890. Usually only one wife lived in Canada, and one in the United States, especially in the Canadian marriages.[28]

C. The Uncertain Legal Status of Polygamy in 1889

43. In 1887, the year Card's settlers arrived, Parliament had enacted *An Act respecting Offences relating to the Law of Marriage*, R.S.C. 1887, c. 161, s. 4 which read almost identically to the English bigamy prohibitions of Acts of 1828 and 1861[29]:

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[25] Daphne Bramham, *The Secret Lives of Saints* (Toronto: Random House, 2008) citing Embry writes (Isbister Affidavit #1, Exh. D, Tab 1 at p. 37):

> Embry's research indicates that the majority of the church's Canadian leaders had at least two wives. In 1895, the four most senior Mormons in Alberta were polygamists. Of the twelve men on the high council, ten were polygamists. More than half of the high priests were polygamists. Most of those plural marriages predated Woodruff's Manifesto, but not all.

[26] Bramham, *The Secret Lives of Saints, ibid*, pp. 36-37; Jessie L. Embry, "Two Legal Wives: Mormon Polygamy in Canada, the United States and Mexico" in *The Mormon Presence in Canada*, p. 178 (Isbister Affidavit #4, Exhibit A, p. 90).

[27] Bramham, *ibid.* reports at pp. 39-40 three plural marriages performed in Alberta in 1903, in a population of nearly 7,000 Mormons. There is no confirmation that the plural families lived in Canada.

[28] Embry, "Two Legal Wives", *supra*, p. 176 (Isbister Affidavit #4, Exhibit A, p. 88). The Attorney does not here opine on whether these 'cross-border polygamists' were breaking the law after 1890. But certainly, given issues of likelihood of conviction and public interest, it was not unreasonable that they were not prosecuted here.

[29] *An Act for consolidating and amending the Statutes in England, relative to Offences against the Person, 1828* (U.K.), 9 Geo. IV, c. 31, s. 22; *An Act to consolidate and amend the Statute Law of England and Ireland relating to Offences against the Person, 1861* (U.K.), 24 & 25 Vict., c. 100, s. 57.

> 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.

44. There remained a question whether the law was sufficient to prevent the polygamy practiced by the incoming Mormons, and by Indians and Muslims. The concern was that a conviction for bigamy required an attempt to enter into two or more *legal* marriages, and that unofficial Mormon "spiritual" marriage did not qualify. Hardy writes at p. 196:

> Although the intent of Canada's anti-bigamy laws undoubtedly was to prevent the kind of marriages practiced by the Saints, as in the United States before passage of the Edmunds Act, Mormon use of private ceremonies left them technically exempt from the letter of Canadian statutes.[30]

45. It is into this context – legal uncertainty coupled with the arrival of a handful of refugee polygamists – that arrived a singular and pivotal figure: Anthony Maitland Stenhouse. Stenhouse was a middle-aged bachelor, the son of a minor Scottish noble, who had arrived on Vancouver Island in 1884 and had won a seat in British Columbia's Legislative Assembly in the 1886 election as the member from Comox. Two years later, Stenhouse shocked everybody when he resigned his seat and announced that he would convert to Mormonism and join his new brethren in Alberta. He became Canada's most vocal public advocate of polygamy.[31]

46. Stenhouse would become largely responsible for both the timing and the language of the 1890 polygamy law, and the simultaneous amendment of the bigamy provisions inherited from the English. At precisely the time that Card was in Ottawa lobbying for permission to practice polygamy, Stenhouse was in

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[30] Hardy, "Mormon Polygamy in Mexico and Canada", in *The Mormon Presence in Canada*, p. 196 (Isbister Affidavit #4 Exhibit A, p. 108).

[31] The most oft-cited and authoritative history of Stenhouse's polygamy advocacy is Robert J. McCue, "Anthony Maitland Stenhouse, Bachelor 'Polygamist'" in *Dialogue: A Journal of Mormon Thought* (Isbister Affidavit #4, Exhibit B).

Alberta writing in defence of the Mormon institution. In a letter to the *Lethbridge News* on November 20, 1889, Stenhouse wrote:

> [T]here is actually no law on the Canadian Statute book... that could touch Mormon, any more than Mohammedan, polygamy."[32]

47. Stenhouse's argument was that the Anglo-Canadian law barring subsequent marriages was directed at bigamy, which was premised on deception (of the state or, at least, of wives), not polygamy, which was a consensual arrangement that, he believed, would be legally enforced in England as well as Canada.[33]

48. Stenhouse is not known to have acknowledged the decision in *Reynolds*, where essentially identical 'bigamy' language had been applied to convict a Mormon polygamist. His argument, though, has proved resilient, and parallel suggestions have also been made that the Mexican (and hence Spanish) and English laws against bigamy apply only to attempts at sequential legal marriage and do not capture open, polygynous arrangements such as those of Brigham Young's Mormons.[34]

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[32] McCue, "Bachelor Polygamist", *ibid.*, p. 119.

[33] Stenhouse's arguments, interestingly, anticipate those being advanced today by Samuel Chapman, who similarly argues that the English bigamy law (which is unchanged from 1861) does not address polygamy. In fact there has long been a debate as the English bigamy has developed as to whether it covers "Mohammedan" polygamy. In his 1954 article "Polygamous Marriages and English Criminal Law" (1954) 17 Mod. L. Rev. 344 (Isbister Affidavit #4, Exhibit C), G.W. Bartholomew wrote by way of introduction:

> Although many of the problems that arise in connection with polygamous marriages have been subjected to a fairly detailed study, those arising in the field of criminal law have to a considerable extent been ignored. It is proposed to examine the position of such marriages in relation to the law of bigamy, an inquiry which is complicated by uncertainties in the law of bigamy itself.

[34] The uncertainty in Mexico is further discussed *infra*; for an argument that England's 1861 bigamy law does not apply to polygamists, see H.H.C. Morris, "The Recognition of Polygamous Marriages in English Law" (1953) 66(6) Harv. L. Rev. 961 (Luca Affidavit #2, Exhibit C); Samuel Chapman, "Bigamy, Polygamy and Human Rights Law", published online at http://polygamypage.files.wordpress.com/2008/12/pbhrtext.pdf. The argument is premised mostly on English cases that require that at least the first marriage to have been a legal union, and monogamous, as is expressed in *Archibold's Pleading, Evidence & Practice in Criminal Cases*, 32nd ed. (London: Sweet & Maxwell, 1949) at p. 1842: "The second marriage is not bigamous unless the first marriage was valid... And the first marriage must also have been a monogamous

49. Stenhouse also focused on the bigamy statute's requirement of *sequential* marriage, and proposed that, even if that did capture most polygamy, it still did not apply if a man married two women at the same time. He wrote on November 20, 1889:

> 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.[35]

50. The question of whether the bigamy laws were sufficient to capture Mormon polygamy swirled throughout 1888 and 1889. In December of 1889 the Northwest Mounted Police officer Sam Steele reported that it was widely believed (probably, as we shall see, erroneously) that the Mormons of Lee's Creek were practicing polygamy in secret; he urged that the laws be changed along the lines of the US model, which by then had gone much further than the *Morrill Act* with the *Edmunds-Tucker* legislation. However, A.M. Burgess, the Deputy Minister of the Interior, apparently thought that the criminal law was then sufficient. He is quoted by Palmer as saying: "if they are found to be guilty of infringing this law [marriage] they are liable to the pains and penalties upon conviction."[36]

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marriage as understood in Christian countries." There were also strict formalities of proof in English law with respect to the solemnization of the marriages involved (see e.g. *infra* at 1848). In the US, as noted, *Reynolds, supra*, settled that a bigamy law virtually verbatim to the English/Canadian language *did* prevent Mormon polygamy, and fundamentalist Mormons have been prosecuted under bigamy laws since.

[35] McCue, "Bachelor Polygamist", p. 120 (Isbister Affidavit #4 Exhibit B, p. 135).

[36] Palmer, "Polygamy and Progress: The Reaction to Mormons in Canada, 1887-1923" in *The Mormon Presence in Canada*, p. 114 (Isbister Affidavit #4 Exhibit A, p. 80). The bracketed term is Palmer's addition.

51. There also appears to have been a *public* assumption that Mormon polygamy was, at the time, illegal. Palmer cites an editorial in the *Lethbridge News* from 1887 which defended the newly-arrived Mormon community in the face of an article in the *Montreal Star* urging that "any attempt to establish polygamy in the Canadian North West must be met with the utmost severity by the Dominion Government." The *News* wrote:

> They are generally acknowledged to be a class which make the most desirable settlers and we have no hesitation in giving them and as many more as come, a hearty welcome. These settlers have come here prepared to obey the laws of Canada to the letter, and there will be plenty of time to warn the government against them when they show the least inclination to break them.[37]

52. To similar effect, Stenhouse's biographer McCue notes that in November 1889,

> The editor of the *Vancouver Daily World* suggested that Stenhouse should familiarize himself with the law, which was correctly cited as stating the 'everyone 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 a felony, and is liable to seven years' imprisonment.[38]

53. Charles Ora Card himself (who, along with the other LDS leadership in Alberta, seems to have disapproved of Stenhouse's very public pro-polygamy campaign[39]) also does not appear to have had any doubts that Mormon plural marriage could be a crime under the existing law. After Burgess forwarded the NWMP reports of rumours of polygamy in Alberta, Card wrote on February 18, 1890 (still before passage of the amended law) that "the alleged crimes to which you refer, of polygamy and cohabitation, are not practiced either in or out of

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[37] Palmer, "Polygamy and Progress", pp. 112-3 (Isbister Affidavit #4 Exhibit A, pp. 58-59).
[38] McCue, "Bachelor Polygamist", p. 120 (Isbister Affidavit #4 Exhibit A, p. 86).
[39] Palmer, "Polygamy and Progress", p. 113 (Isbister Affidavit #4 Exhibit A, p. 59).

Cardston..." and asked "that you will give our people a chance to prove their innocence."[40]

54. This is all in accord with the view of LDS authorities in Salt Lake City. Embry writes of the aftermath of the 1888 delegation to Ottawa:

> When the apostolic delegation returned from Ottawa in 1888, Francis Lyman told the [Alberta] Saints, "We must comply with every law of the land and the Priesthood would not accept breaking the law and fellowship would be withdrawn from those who violated the laws." When John W. Taylor visited the colonies, on 30 June 1889, he "said we would have opposition, as in other lands. Exhorted the saints to observe the laws of the land scrupulously."[41]

55. Nevertheless, Sir John Thompson from Nova Scotia, the Minister of Justice, believed that the new law *was* necessary. McCue describes the origin of the legislation as follows:

> On 4 February 1890 Senator Macdonald, from Victoria, British Columbia, presented in the Canadian Senate a bill designed to remove any doubt as to whether bigamy laws applied to polygamy, and it specifically mentioned the "spiritual or plural marriages" of the Mormons... It was dropped from the agenda of the Senate on 4 March in favor of similar legislation introduced in the House of Commons on 7 February by Sir John Thompson, minister of justice... His bill covered a wider scope of offenses than the Macdonald proposal, which was largely adopted as section 8 of the proposed legislation... In explaining his intent, Thompson said:
>
> > Section 8 is intended to extend the prohibition of bigamy. It is to make a second marriage punishable... whether the marriage took place in Canada or elsewhere, or whether marriages takes [sic] place simultaneously or on the same day. In [the latter case]... the parties were not punishable under the present law. Section 9 deals with the practice of polygamy, ... 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, ... rather than we

[40] Palmer, "Polygamy & Progress", p. 114-115 (Isbister Affidavit #4 Exhibit A, pp. 60-61).
[41] Embry, "Two Legal Wives", p. 183 (Isbister Affidavit #4 Exhibit A, p. 95).

> should wait until it has been established in Canada (*Debates* 1890, 3162).[42]
>
> [Emphasis added]

56. *An Act respecting offences relating to the Law of Marriage*, including what is now section 293 of the *Criminal Code*, was Parliament's response. McCue writes:

> This bill was passed by the Commons on 16 April 1890 and became law one month later on 16 May while Stenhouse was still [visiting] in Utah... It left no doubt that polygamy was illegal in Canada and specifically prohibited the simultaneous multiple marriage scheme proposed by Mr. Stenhouse: "4.... 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"...[43]
>
> [Emphasis added]

D. First Nations Polygyny

57. The Amicus's expert witness Dr. Beaman confirmed in her testimony[44] that the single accepted reference source on First Nations polygyny in the 19th and early 20th centuries is Sarah Carter's *The Importance of Being Monogamous*.[45]

58. Carter's book reveals that, numerically at least, polygamy among First Nations in western Canada was a far greater problem than among Mormons.[46] Many of the First Nations were traditionally partially polygnyous, with a few of the highest-status males in each group having from two to five wives each.[47] This attracted the attention of the Indian agents and HBC men, who also made disturbing reports of the age at which girls were being promised into marriage.[48]

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[42] McCue, "Bachelor Polygamist", pp. 120-21 (Isbister Affidavit #4 Exhibit B, pp. 135-136).
[43] McCue, "Bachelor Polygamist", p. 121.
[44] Transcript Day 12 (December 13, 2010) p. 64.
[45] Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008) (Isbister Affidavit #1, Exhibit C.3).
[46] See in particular pp. 20-60, 103-144.
[47] Carter, *ibid.*, p. 115.
[48] Nelson Affidavit #1, Exhibit H, Tab 6, pp. 95-118.

59. There was at least one successful prosecution of a First Nations man for marrying polygamously in accordance with his customs,[49] and there is archival evidence to indicate that other prosecutions were sought.[50] However, by and large it appears that the response of the authorities was to treat the criminal prohibition as only one tool among several available to deal with the problem. More often, it appears, federal officials would use other techniques in an attempt to curtail the practice. The Law Clerk of Indian Affairs wrote in 1903:

> As to whether Indians who have taken more than one wife shall be dealt with under Section 278 of the Criminal Code is a matter involving grave considerations of policy. It appears from Mr. Short's letter that Mr. Markell, the Indian Agent, considers that moral suasion will be the most effective means of checking these plural marriages. There is reason to consider the subject as one which can not be dealt with drastically.[51]

60. These efforts appear to have been successful, and like plural marriage in the LDS, by the end of the first quarter of the twentieth century, First Nations polygyny seems to have all but disappeared.

E. Polygamy in Bountiful

61. The community now known as Bountiful was initially settled in 1946 by Harold Blackmore. Blackmore was a businessman, husband, and father from Cardston, Alberta. He was not, prior to his relocation to British Columbia, a polygamist, nor was he the scion of a polygamist family. But in the 1940s he, like his father John Horne Blackmore, long-time Social Credit Member of Parliament for Lethbridge, adopted a belief in polygamy and began preaching the doctrine at a series of "cottage meetings" in Alberta. He and his wife became pariahs in the Mormon community and were threatened with excommunication. Harold Blackmore made contact with fundamentalist Mormons in Utah, and decided to relocate to British Columbia, where he bought a large area of land near Creston,

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[49] *R. v. Bear's Shin Bone*, 1899 CarswellNWT 32, 4 Terr. L.R. 173, 3 C.C.C. 329.
[50] Nelson Affidavit #1, Exhibit H, Tab 6, p. 103.
[51] Nelson Affidavit #1, Exhibit H, Tab 6, p. 107.

just metres north of the US border.[52] In a ceremony conducted by the fundamentalist Prophet Joseph Musser (the founder of the fundamentalist cology at Short Creek) in Utah, Blackmore took his wife's sister as his second bride, and moved his family to Lister.[53]

62. Harold Blackmore then set about recruiting other families who wished to "live the Principle" to move to British Columbia. Affiliation with Musser's emerging fundamentalist Church in the US (what would become the FLDS[54]) would also be a source of immigrants. Still, polygamy was practiced secretly by the fundamentalist Mormons in Bountiful, unlike their contemporaries, the Freedomites.[55] Blackmore did not immediately bring his second wife to join him, and when he did she was initially accommodated separately from his family. Harold and his wives even lied to their children regarding the familial relationships involved, until the children were let into the secret upon baptism at age 8.[56] When Ray Blackmore's friend Charles Quinton was polygamously married in the early 1960s,

> The marriage was so secret that not even Quinton's first wife knew about it. Quinton and his first wife didn't live in Lister, they lived in Rosemary,

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[52] The most comprehensive story of the founding of Bountiful is found in Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada's Polygamous Mormon Sect* (Toronto: Vintage Canada, 2008) at pp. 47-66 (Isbister Affidavit #1, Exhibit D.1). This Court was also fortunate to hear the *vive voce* evidence of Brenda Jensen, Harold Blackmore's daughter, who described the establishment of the polygamous community that became Bountiful. In explaining why Bountiful was selected, Brenda Jensen said, "It was closer – close to the border. It was isolated at that time. Very isolated. The farm was very surrounded by trees. Hard to get to. No amenities. We were pretty much invisible, and then also the easy access to the border." (Transcript Day 22 (January 17, 2011) p. 4 lines 22-26).

[53] Brenda Jensen, Transcript Day 22 (January 17, 2011) pp. 4-5.

[54] The establishment of the US Fundamentalist Mormon movement is well documented in Richard S. Van Wagoner, *Mormon Polygamy: A History*, 2nd ed. (Salt Lake City, Utah: Signature Books, 1989) pp. 177-217 (Isbister Affidavit #1, Exhibit D.13).

[55] In January 1947, there had been a public outcry over polygamy among the Freedomites, a particularly outspoken group of Doukhobours in the British Columbia Interior. Sons of Freedom leader Joe Eli Podovinikoff publicly renounced "private ownership of persons and families", asserting that wives and children were common property. The Attorney General of the day, Gordon Wismer, reportedly decided to take no action. The Freedomite movement self-destructed soon thereafter. See Bramham, *The Secret Lives of Saints*, p. 66.

[56] Bramham, *The Secret Lives of Saints*, p. 77.

> Alberta, where he returned after the wedding and remained a member in good standing in the LDS church.[57]

63. In July 1953, Arizona authorities conducted the notorious raid on polygamists in Short Creek, arresting dozens of men and seizing hundreds of children. At that same time, R. Scott Zimmerman, president of the western mission of the LDS, sent letters to a number of Lister residents accusing them of apostasy. It was widely reported in the Canadian press that some in Lister had been "tried" by the LDS and excommunicated for polygamy, news that was circulating as reports of the Short Creek raid made headlines across North America. Zimmerman, however, denied the excommunications to the *Creston Review*, and that newspaper reported on a concurrent police investigation of the alleged polygamy as follows:

> A special detail of the RCMP who have spent considerable time investigating rumours, direct and indirect relative to polygamy and malpractices, reported nothing substantial in their investigations which terminated last weekend.[58]

64. The following year, Parliament removed the reference to Mormon plural marriage from the *Criminal Code*.[59] At least one historian reports that this was at the lobbying of the LDS church through Alberta Mormon leaders John Horne Blackmore and Solon Earl Lowe[60] (both Mormon men were Social Credit Members of Parliament from Southern Alberta), but details of their efforts are not known.

65. There is nothing in the historical records or the archival research to indicate any further complaints to, or investigations by, the police regarding Mormon polygamy prior to the 1990s.

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[57] Bramham, *ibid.*, p. 91.
[58] Bramham, *The Secret Lives of Saints*, p. 79
[59] *Criminal Code*, S.C. 1953-54, c. 51, s. 243.
[60] Hardy, "Mormon Polygamy in Mexico and Canada", in *The Mormon Presence in Canada*, at p. 209 (footnote 76) (Isbister Affidavit #4 Exhibit A, p. 121).

66. Harold Blackmore had relocated to Colorado City in the early 1960s, and was supplanted as Bountiful's leader by his uncle Ray Blackmore, who followed the direction of the FLDS and made communal all of the sect's Canadian property by its incorporation into the United Effort Plan (UEP). Harold became disaffected with the increasingly autocratic rule of FLDS Prophet LeRoy Johnson and left the Short Creek community to live in Le Verkin, Utah as an independent fundamentalist Mormon.[61] In 1990 he would write to the RCMP to complain of "selling of girls", "brainwashing", and "the promotion of plural marriage for personal and monetary gain" in the community of Bountiful, which he had founded 40 years previously.[62]

67. It seems that the intense secrecy of Bountiful kept fundamentalist Mormon polygamy in Canada out of the public eye. Harold Blackmore appeared on the Phil Donohue show in 1978 to defend the practice after some Utah men had been arrested for having sex with underage girls. He subsequently self-published a book called *All About Polygamy: Why and How to Live It!* [63] but by then had been living in the US for over a decade.

68. Over the years, a number of police complaints were filed with respect to Bountiful, one, as mentioned, by Harold Blackmore himself. Some investigations led to charges; most did not. The first criminal investigation into polygamy began in 1990-91. However, at that same time, the constitutionality of section 293 had been cast into doubt, an uncertainty made official when, in 1992, the Criminal Justice Branch in British Columbia announced that the law was void and unenforceable.[64]

F. Muslim Polygamy in Canada

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[61] As recounted in the testimony of his daughter, Brenda Jensen, Transcript Day 22 (January 17, 2011) p. 20 lines 44-47, p. 21 lines 1- 10, p. 22 lines 10 – 13.
[62] Bramham, *The Secret Lives of Saints*, p. 165.
[63] Bramham, *The Secret Lives of Saints*, pp. 68-69.
[64] Nelson Affidavit #1, paras. 77-79.

69. Polygamous Muslim immigrants have been barred from Canada through invocation of section 293.[65] However, recently there have been reports that, emboldened by the uncertainty of the law's constitutionality, some among Canada's male Muslim population have begun to take second, or perhaps third, wives. In May of 2008, as the Yearning for Zion controversy was at its peak in the United States and media attention in Canada was focused on inaction in this country, a series of exposés in the *Toronto Star* revealed that a single Imam in Scarborough had performed dozens of plural marriage ceremonies, openly declaring his *Charter* right to do so.[66]

70. The *Star* reported that Safa Rigby, mother of five, had been in Egypt when she received a call informing her that her husband in Canada had taken another wife. Aly Hindy, the Toronto Imam who had claimed to have officiated at more than 30 polygamous marriages, defended polygamy, and even the practice of keeping the new wife secret from the first for a period of time:

> "This is in our religion and nobody can force us to do anything against our religion," he said. "If the laws of the country conflict with Islamic law, if one goes against the other, then I am going to follow Islamic law, simple as that."[67]

71. In a much more recent news report, Hindi is quoted again regarding the prevalence of polygamy in Ontario:

> Aly Hindi, an outspoken imam at Salaheddin Islamic Centre in Scarborough, Ont., said there are more than 200 polygamous Muslim marriages in the Greater Toronto Area alone. The figure is impossible to verify as polygamy among Muslim and other immigrant groups in Canada is often shrouded in mystery.[68]

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[65] See for instance *Ali v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1640 (T.D.) at paras. 12-13.
[66] Alia Hogben Affidavit #1, Exhibit A; see also Quebec *Conseil du statut de la femme*, "Polygamy and the Rights of Women", Part Two, English Translation attached to Gabay Affidavit #1.
[67] Hogben Affidavit #1, Exhibit A.
[68] Marten Youssef, "Immigrants involved in multiple marriage watching polygamy test case: Imam" *Maclean's* (February 21, 2011), http://www.macleans.ca/article.jsp?content=n6024530.

III. The Purpose of Section 293

A. Historical Evidence of the Purpose of Section 293

72. During the 1890 debates in the House of Commons and the Senate, members of both houses expressed their objection to polygamy in terms of strong moral condemnation, but it was directed at the *practice*, not the *religion*, describing polygamy variously as an "abominable practice... [engaged in] under the pretence of religion",[69] an "abuse,"[70] "what may become a serious moral and national ulcer",[71] a "pernicious habit",[72] and a "nefarious practice".[73]

73. The animating motivation behind the enactment of section 293 was the emerging threat posed by polygamist Mormon immigrants, but also, at the same time, Parliament sought to 'cover off' the practice of polygamy by other groups. In the Senate, the leader of the house, Senator John Caldwell Abbott, indicated that the new provision was "...mainly devoted to the prevention of an evil which seems likely to encroach upon us, that of Mormon polygamy, and it is devoted largely to provisions against that practice."[74] However, following this acknowledgement of the impetus for the new provision, Senator Abbott clarified that the purpose of the law was of broader reach, transcending the Mormon religion and culture:

> 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.[75]
>
> [Emphasis added]

74. The original version of the statute was explicit: it referred to polygamous relationships under "any denomination, sect or society, religious or secular, or by

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[69] Mr. Blake, *Debates of the House of Commons* (April 10, 1890) at 3175
[70] Mr. Blake, *Debates of the House of Commons* (April 10, 1890) at 3176
[71] Mr. Mulock, *Debates of the House of Commons* (April 10, 1890) at 3177
[72] Mr. McMullen, *Debates of the House of Commons* (April 10, 1890) at 3178
[73] Hon. Mr. Power, *Debates of the Senate* (April 25, 1890) at 584
[74] Hon. Mr. Abbott, *Debates of the Senate* (April 25, 1890) at 583
[75] Hon. Mr. Abbott, *Debates of the Senate* (April 25, 1890) at 585

any form of contract, or by mere mutual consent, or by any other method whatsoever".

75. Although there is no express reference to women's equality in the legislative record, broader consideration of historical context reveals that concern for the well-being of women and children was a strong component of anti-polygamy sentiment in the late 1800s.[76] In fact the historical record evidences a core preoccupation with polygamy as oppressive and harmful to women and girls.

76. The Amicus's case to the contrary is based on the expert evidence of Dr. Beaman, who insisted that the "most prevalent reasons" for the law in 1890 were "sexual morality, racism, nation building, colonialism and the importation of Christianity",[77] and "an imagined vision of the nation state which was largely white and Christian".[78] In her affidavit she was categorical:

> In short, the anti-polygamy criminal law provisions were created in a context of imagined harm and were designed to impose a particular moral model of family, sexuality and state.[79]

77. On cross-examination, Dr. Beaman was confronted with the fact that Sarah Carter, whose work was the sole source on which she relied for her Canadian history, instead took repeated note of the protection of women as "a central rationale" for the prohibition. For instance (it was pointed out to Dr. Beaman), Carter wrote in a book chapter which Dr. Beaman cited as authority that:

> Antipolygamists claimed that polygamy meant unmitigated lives of slavery, bondage, and horror for the wives.[80]

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[76] See Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002) (Luca Affidavit #1, Exhibit I.1) and Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008) (Isbister Affidavit #1, Exhibit C.3).
[77] Beaman Affidavit #2, para. 38.
[78] Beaman Affidavit #2, para. 40.
[79] Beaman Affidavit #2, para. 41.
[80] Sarah A. Carter, "Creating 'Semi-Widows' and 'Supernumerary Wives': Prohibiting Polygamy in Prairie Canada's Aboriginal Communities to 1900" in Picklles and Rutherdale, eds., *Contact*

And later:

> There was concern that Canadian men might be tempted to join up...Other concerns were that the Mormons would proselytize, dragging young non-Mormon girls into lives of degradation. But polygamy was seen as a deeper threat to the very fabric of the young nation. As one Ontario Liberal parliamentarian declared in the House of Commons during the 1890 debate on "An Act respecting Offences relating to the Law of Marriage," polygamy was "a serious moral and national ulcer."[81]

And again:

> A central rationale for eradicating polygamy was that women were to be saved from lives of slavery...[82]

78. In Carter's book *The Importance of Being Monogamous*, at p. 49:

> A Utah based "Ladies Anti-Polygamy Society," formed in 1878 and made up of former plural wives and gentile supporters, condemned polygamy for violating the rights and the dignity of women. Their own print forum, the *Anti-Polygamy Standard*, blamed men for plural marriage, and swore to "fight to the death that system which so enslaves and degrades our sex, and which robs them of so much happiness."

79. Other examples abound. Moreover, at pp. 83-84 of Carter's book *The Importance of Being Monogamous* (which Beaman accepted as "respected" and the only comprehensive history of its kind), we see that there is concern for genetic health and mortality rates of children of polygamous relationships. Carter cites an anti-polygamy advocate of the day as saying:

> [T]he offspring, though numerous, are not long-lived, the mortality in infantine life being very much greater than in monogamous society.

80. In fact Sarah Carter did not list *any* of Dr. Beaman's parade of horribles as "central rationales" for the prohibition, with the possible exception of "nation building". Carter repeatedly references the protection of women and the

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Zones: Aboriginal and Settler Women in Canada's Colonial Past (Vancouver: UBC Press, 2005) p.143 (Exhibit 114, Tab 6).

[81] *Ibid.*, p. 145.

[82] *Ibid.*, p. 149.

preservation of the authority of the state[83] as the main objectives of anti-polygamy forces. Dr. Beaman's contrary views were revealed under cross-examination to be a very inadequate summary of the historical context (particularly misleading inasmuch as it cited Carter in support), perhaps tailored to Dr. Beaman's predetermined conclusions more than to the historical record.[84] This is perhaps not surprising, as Dr. Beaman explained that she saw her role, not as presenting an accurate or exhaustive summary of the law's purposes, but rather only as offering "one perspective":

Q Well, you don't claim to be exhaustive, Dr. Beaman, but appreciate that, absent the site [sic] checking that we've engaged in, it would be possible for His Lordship to be depending entirely on your summary?
A He could depend entirely on my summary. My guess is he would not depend -- His Lordship would not depend entirely on my summary, that there are multiple perspectives offered. And that I have offered one, suggested that some of the reasons and rhetoric around the development of these laws related to the things that I have stated, and by no means have I suggested they are exhaustive.
Q So you think then that that last sentence is a fair summary of what Sarah Carter said was linked to the criminalization of polygamy?
A I think that that describes an overall theme in her work.[85]

81. Notwithstanding Dr. Beaman's gloss, it is plain that, even in the late 1800s, when the protection of vulnerable persons was of less concern to democratic governments than it is today, the proponents of anti-polygamy

[83] Carter wrote at p. 145 of "Creating Semi-Widows", supra that, beyond concern over religious conversion and the fate of plural wives, "polygamy was seen as a deeper threat to the very fabric of the young nation."
[84] This was of course not the only instance where Beaman's characterization of facts was unsupported even by the very authorities she cited. Her assertions regarding the polygamy of "Yeminite [sic] Jews in Israel" and the polygyny in First Nations "linked to their religions" were completely at odds with her cited authorities, and her characterizations of other matters, such as the "largely unfounded" allegations of abuse at the Yearning for Zion Ranch in Texas, were no less mistaken.
[85] Transcript Day 12 (December 13, 2010) p. 70.

codification invoked the harms of polygamy, including the threat it presented to the status of women, rather than relying on biblical or ecclesiastical authority. Contemporary American cartoons illustrated the criticism of polygamy as entailing the enslavement and denigration of plural wives.[86]

82. The expert witness Dr. Grossbard considered it significant that polygamy was a main object of concern for the fledgling suffragette movement in the mid- to late nineteenth century.[87] And in that period, it is undoubted that one of the most influential figures in the anti-polygamy movement in the United States was Brigham Young's estranged wife, Ann Eliza Young. Young toured the country, and the President and numerous Congressmen listened to her speak of polygamy's harms.[88] In the final chapter of her broadly popular 1876 memoir, Young described her moral objection to polygamy precisely in terms of equality of the sexes:

> All this while I was gaining knowledge of the domestic customs and relations of the "Gentiles." At nearly every place that I visited I was entertained in some private family, and my eyes were constantly being opened to the enormities of the wicked system from which I had escaped.
>
> I had felt its misery; I had known the abject wretchedness of the condition to which it reduced women, but I did not fully realize the extent of its depravity, the depths of the woes in which it plunged women, until I saw the contrasted lives of monogamic wives.
>
> I had seen women neglected, or, worse than that, cruelly wronged, every attribute of womanhood outraged and insulted. I now saw other women, holding the same relation, cared for tenderly, cherished, protected, loved, and honoured. I had been taught to believe that my sex was inferior to the other; that the curse pronounced upon the race in the Garden of Eden was woman's curse alone, and that it was to man that she must look for salvation. No road lay open for her to the throne of grace; no gate of eternal life swinging wide to the knockings of her weary hands; no loving Father listened to the wails of sorrow and supplication wrung by a worse than death-agony from her broken heart. Heaven was inaccessible to her, except as she might win it through some man's will. I found, to my surprise, that woman was made the companion and not the subject of

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[86] Barringer Gordon, *The Mormon Question*.
[87] Transcript Day 9 (December 7, 2010) pp. 16-17.
[88] Barringer Gordon, *The Mormon Question*, p. 112.

> man. She was the sharer alike of his joys and his sorrows. Morally, she was a free agent. Her husband's God was her God as well, and she could seek Him for herself, asking no mortal intercession. Motherhood took on a new sacredness, and the fatherly care and tenderness, brooding over a family, strengthening and defending it, seemed sadly sweet to me, used as I was to see children ignored by their fathers.

83. Another indication of the secular quality of the 19th century polygamy debate is the fact that even the LDS's religious adherents felt obliged to defend it on non-religious grounds. Monogamy, Anthony Maitland Stenhouse wrote, "trammels a woman", while polygamy will "enlarge her scope".[89] In another letter he argued for the interests of women from a Darwinian perspective:

> It secures a husband for every woman that wants one.... Under a well ordered system of plural families, marriage would no longer be a lottery where ladies draw a blank, a fool or a husband, according to luck. They would no longer be daily insulted with the alternatives of a fool or none—and thus the law of natural selection, now so grossly outraged, would find its due accomplishment in the survival and perpetualtion of the fittest family and the fittest race. It is true that some men would be wifeless, but these would mostly be men whose marriage and multiplication are a curse to the race.[90]

84. Under cross examination, Dr. Beaman conceded that harm to women and children *had* been a dominant part of the anti-polygamy discourse in the 19th century, but dismissed this as mere "rhetoric". But to the extent that social context and legislative facts are important in determining section 293's purpose, the "rhetoric" of concern for women and children, as well as for the threat posed by polygamy to the nascent state, as "central rationales" for the law simply cannot be ignored.

B. The Legal Significance of Religious Origin

85. It is true that if a law was enacted with no other purpose than to enforce religious practice, it is bad law.[91] But that principle does not extend to prohibit

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[89] McCue, "Bachelor Polygamist", p. 119.
[90] Ibid., p. 120
[91] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

laws that have otherwise valid purposes, simply on the basis that they were earlier (or even originally) argued or articulated in religious terms. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, Chief Justice Dickson wrote:

> Our society is collectively powerless to repudiate its history, including the Christian heritage of the majority. My opinion in this respect is reinforced by the words of Warren C.J., writing for the majority of the United States Supreme Court in *McGowan v. Maryland*, 366 U.S. 420 (1961), at p. 445:
>
> > To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

86. An objection similar to the Amicus's "religious origin" argument was raised by the defendant to an incest prosecution in *R. v. M.S.*, [1996] B.C.J. No. 2302 (C.A.). Once part of ecclesiastical law (like the bigamy prohibition), incest laws disappeared from the books between the 17th and 19th centuries, to re-emerge in Canada through codification in 1892 in more or less their present form.[92] Considering the implications of the asserted "religious origin" of the incest prohibition, Donald J.A. in *M.S.* said:

> 54 [The Appellant] notes that in England incest was a matter for the ecclesiastical courts until this century thereby confirming the religious nature of the offence. He cites the decision in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 as authority for the proposition that our courts are concerned with justice not morals. He puts the argument this way:
>
> > Canada is a multi-cultural society and does not hold any particular religious beliefs in special regard. The incest statute, being divine law, is an impermissible basis for state legislation.
>
> 55 I think this argument is utterly specious. The criminal law fundamentally deals with right and wrong. The Criminal Code gives expression to our society's moral principles. 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.

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[92] The history of the incest law is well canvassed by the Nova Scotia Court of Appeal in *R. v. F. (R.P.)* (1996), 105 C.C.C. (3d) 435, and by Southin J., concurring, in *M.S.*

87. The challenger in *M.S.* was not, of course, asserting that incest was a religious practice, but the religious freedom argument was the same. He was arguing, in effect, that his own beliefs about incest differed from the state's, and if the state's position was a religious one, he had a right to be free from its imposition.

88. It also has to be recalled that the involvement of the ecclesiastical courts was considered by the US Supreme Court in *Reynolds*:

> 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.

89. In other words, it would be as logical to attribute a discriminatory religious purpose to the incest prohibition, or the law of wills and estates, as to the law against polygamy.

C. Has the Purpose Impermissibly "Shifted"?

90. The Amicus's argument implies that the Attorney's support for s. 293, premised heavily, as it is, on the demonstrable harms associated with polygamy, reflects a "shifting purpose" from the original religious roots of the law.

91. It is true that, very early in *Charter* jurisprudence, the Supreme Court of Canada declined to adopt the "shifting purpose doctrine", and held that a law's constitutionality must be judged with reference to its original objective, not any

purpose that can be ascribed, *ex post*, to justify it.[93] However, the "purpose" of a criminal law need only be defined in general terms, while its particular content may legitimately evolve over time. In *R. v. Butler*, [1992] 1 S.C.R. 452, the Court confirmed that laws premised on ideas of morality and social harm could withstand scrutiny notwithstanding that the content of these notions had changed over time. Sopinka J. wrote at para. 85:

> 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. [emphasis added]16. As the Interested Person SPC notes, the limits of the "shifting purpose" analysis were recently recognized by the Ontario Superior Court in *R. v. Levkovic* (2008), 235 C.C.C. (3d) 417 (Ont. S.C.), (rev'd on other grounds 2010 ONCA 830), at para. 112:
>
> > Just as "a particular type of conduct may involve several types of harm" (*R. v. Labaye*, 2005 SCC 80, (2006) 203 C.C.C. (3d) 170 at para. 38), depending on the circumstances, a piece of legislation will have a particular purpose or mix of purposes. While a particular legislative objective may no longer be defensible in light of the *Charter*, provided a rational and non-arbitrary purpose of the statutory provision remains the protection of society from harm in some identifiable measure, the shifting purpose rule may not be contravened. In other words, the originalism philosophy is not without its limits.

92. The purpose of section 293 has always been (to paraphrase *Butler*) to enforce a moral standard for "the protection of society from harms associated" with polygamy. It has always been expressly premised on the belief that

[93] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

polygamy, like obscenity in *Butler*, "had a detrimental impact" on persons involved, particularly women, and "on society as a whole." It is true that our understanding of the harms associated with polygamy has become more nuanced in recent years (and indeed in the course of developing the evidence presented in this Reference). It is also true that our understanding of the nature of women's rights and interests has evolved since 1890. We would expect such evolution in thought and understanding with respect to almost any law, including the incest prohibition which originated centuries, perhaps millennia, before we understood the full genetic implications of intra-family sexual relationships or the psychology of relationships of dependence.

93. Similarly, we have evidence available to us regarding polygamy's harms that couldn't have been conceived of in 1890; there can be nothing objectionable about referring to it. The majority in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 wrote:

> ...In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert *post facto* a purpose which did not animate the legislation in the first place (see *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 335). However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective (see *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (S.C.C.), [1986] 2 S.C.R. 713, at p. 769). It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the changing of circumstances.
>
> [Emphasis added]

IV. The Interpretation of Section 293

A. Applying the Rules of Statutory Interpretation

94. This Court need not define the offence described in section 293 with surgical precision for all purposes and for all time. As with "obscenity" or "child pornography" in *Butler* and *Sharpe*, the measures will be constitutional if they are precise enough to give guidance to the citizenry and can withstand the application of the facts of the present case and reasonable hypotheticals. Beyond this general constitutional assessment, a provision's applications in particular situations will be determined case-by-case.

95. The familiar rule of statutory interpretation is that "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." In addition, definitions of terms within statutes must, where possible, be read consistently with *Charter* values, and the evolving norms and mores of society. This is so even if it requires modification of definitions as originally understood. In the present case, the *Charter* values at stake are religious freedom, liberty and security of the person, equality, democracy, and the protection of vulnerable individuals and groups.

96. The Supreme Court of Canada has recently made it plain that the "legislative evolution and history" of an enactment is "a relevant consideration in interpreting legislative intent".[94] In *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, the Court held that an amendment providing full indemnity for legal costs incurred disputing an expropriation should be interpreted in light of the law's evolution,[95] as well as the historical context in which the amendments were introduced.[96]

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[94] Para. 49.
[95] The Court wrote at para. 49: "A brief overview of the *NEBA's* statutory antecedents is not only appropriate, but particularly instructive."
[96] Para. 54. The historical context described by the Court in *Smith* was the general trend toward full compensation in expropriation law at the time that the amendments were made, as described

97. As originally enacted, the polygamy law was phrased this way:

> **5.** Everyone 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 the 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 any such consent which so purports,—
>
> Is guilty of a misdemeanour, and liable to imprisonment for five years and to a fine of five hundred dollars [.] [97]

98. The only nontrivial changes to this were made in 1954, when the *Criminal Code* was substantially overhauled and streamlined.[98] The sections setting out

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in the case law, in a Law Reform Commission working paper, and in the Minister's comments in *Hansard.*

[97] *An Act respecting Offences relating to the Law of Marriage*, R.S.C. 1886, c. 161, as amended by *An Act further to amend the Criminal Law*, S.C. 1890, c. 37, s. 11.

[98] *Criminal Code*, S.C. 1953-54, c. 51, s. 243.

the categories of polygamy were reduced to two, and as a result the operative provisions of section 293 then read as follows:

> **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.

99. Put simply, "polygamy" is marriage to, or conjugal union with, more than one person at the same time. Webster's definition of 1913 sets out the "ordinary meaning" of the term well:

> **Po*lyg"a*my**, n. [Gr. ; cf. F. *polygamie*.]
>
> **1.** The having of a plurality of wives or husbands at the same time; usually, the marriage of a man to more than one woman, or the practice of having several wives, at the same time; -- opposed to *monogamy*; as, the nations of the East practiced **polygamy**. See the Note under Bigamy, and cf. Polyandry

"Conjugal" is in turn described this way:

> **Con"ju*gal**, a. [L. *conjugalis*, fr. *conjux* husband, wife, consort, fr. *conjungere* to unite, join in marriage. See Conjoin.]
>
> Belonging to marriage; suitable or appropriate to the marriage state or to married persons; matrimonial; connubial.
>
> "*Conjugal* affection." *Milton.*

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.

101. There have been very few cases interpreting the polygamy prohibition in Canada. Usually they were attempts to prosecute acts which more closely fit the definition of adultery than polygamy, but in any event, in every case the Courts held that "mere cohabitation" did not make the behaviour a crime, whatever the breadth of the provision's application.[99] These cases speak for the proposition that an essential element of the offence is, as one put it, the "guise of marriage"[100], or a "binding contract".[101] This is confirmed by the Amicus's expert historian Susan Drummond, in her report.[102]

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[99] *R. v. Labrie* (1891), M.L.R. 7 Q.B. 211 (Que. Q.B.); *R. v. Harris* (1906), 11 C.C.C. 254 (Que. C.S.P.); *R. v. Tolhurst*, [1937] O.R. 570 (C.A.).
[100] *R. v. Tolhurst*, at para. 4.
[101] *R. v. Labrie*.
[102] See Drummond Affidavit #1, Exhibit B, paras. 22, 56-60. Summarizing the case law, Professor Drummond writes: "No offence was committed between the parties where there was no form of contract." And at para. 66 she summarizes the "definition of 'conjugal union' in Labrie, Lison and Tolhurst" as "'some form of union under the guise of marriage' or 'some form of contract between the parties, which they might suppose to be binding on them'". Later, Professor Drummon says that developments elsewhere in family law in the decades since *Tolhurst* might be imported into the definition to make "conjugality" for criminal purposes according to more objective criteria.

102. The State of Utah has been active in prosecuting polygamy there, and recently several cases have been brought against polygamist fundamentalist Mormons who have married young girls. In *State v. Holm,* 2006 UT 31, the Supreme Court of Utah considered the constitutionality of that state's anti-bigamy prohibition, which was challenged by an accused member of the FLDS, a former policeman who had taken a teenager as his second wife. The Court took a pragmatic approach to the scope of behaviour governed by Utah's law:

> 26. [T]he well-documented legislative history of this State's attempts to prevent the formation of polygamous unions supports our conclusion 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." *Green*, 2004 UT 76, para. 47. In *Green*, we allowed an unsolemnized marriage to serve as a predicate marriage for purposes of a bigamy prosecution. If an unlicensed, unsolemnized union can serve as the predicate marriage for a bigamy prosecution, we are constrained to conclude that an unlicenced, solemnized marriage can serve as a subsequent marriage that violates the bigamy statute. [emphasis added]

103. In Canada, we have separated the prohibition on bigamy from that of polygamy, so the analogous part of the Utah court's definition is "duplicative marital relationships that are not legally recognized... [with] all the indicia of marriage".

104. This Attorney's 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 that had a certain degree of formality or binding commitment. This is further bolstered by the phrase "whether or not it is *by law* recognized as a binding form of marriage", suggesting that its main application was thought to be on purportedly binding forms of marriage, whatever their legal status. This context is even more plain in the 1890 version, subsection 2(a) of

which makes it criminal to participate in a "rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in sub-section one of the section."

105. The three original provisions of the 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)).

106. 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 "conjugual 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 susbsection 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). In the Parliamentary debate of 1890, it was noted:

> [I]t is right to observe that the difficulties which the United States has had to contend with in respect to the Mormons of Utah since the Brigham Young dispensation are serious and growing; and that from time to time earnest efforts have been made to overcome what seems to be an almost insuperable difficulty, owing to the extraordinary solidarity of these people and their determination to persist in and to conceal all legal evidence, at any rate, of their practices.[103]

107. The Parliamentary debates evince a concern with the difficulty of capturing polygamy under then-existing law without proof of formalized marriage:

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[103] Mr. Blake, *Debates of the House of Commons* (April 10, 1890) at 3174.

> Sometimes they have witnesses, sometimes not; if they think any trouble may arise from a marriage, or that a woman is inclined to be a little perverse, they have no witnesses, neither do they give marriage certificates, and if occasion requires it, and it is to shield any of their polygamous brethren from being found out, they will positively swear that they did not perform any marriage at all, so that the women in this church have but a very poor outlook for being considered honorable wives.[104]

108. When the first iteration of the polygamy offence was introduced into the Senate in February 1890, the section included a proviso that it would 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." To this, one senator commented, "I think that is a very dangerous exception to make, because it may have the effect of exempting the very class to whom the Bill is intended to apply", prompting the bill's proponent to reply that the exception would be struck out.[105] The final version provided no exemptions to any class or group of persons.

109. Each of the three forms of polygyny of concern to the government of the day (Mormon, Indian, and Muslim) was a form of multiple *marriage*: a relationship recognized as originating in some sort of purportedly binding authority. With the Mormons the source of the authority was plain: it was the doctrine and the instruction of the successive prophets of the Latter Day Saints Church, which was in the mid-19th century a disciplined and hierarchical organization with territorial, political and even military ambitions. With respect to Indians, a review of the available histories suggests that there was no invocation of *religious* authority to enforce polygynous "Indian marriage" (notwithstanding Dr. Beaman's initial – then subsequently withdrawn – assertions[106]); however it is also clear that the marriages were arranged by (and for the benefit of) powerful male tribal

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[104] Ibid.
[105] Hon. Mr. Dickey and Hon. Mr. MacDonald (B.C.), *Debates of the Senate* (February 25, 1890) at 142
[108] G.W. Bartholomew, "Polygamous Marriages and English Criminal Law" (1954) 17 Mod. L. Rev. 344 (Isbister Affidavit #4, Exhibit C); Samuel Chapman, "Bigamy, Polygamy and Human Rights Law", published online at http://polygamypage.files.wordpress.com/2008/12/pbhrtext.pdf.

leaders with their own authority in their communities.[107] With Muslim polygamists it was likely a mix of the two models, with some adding wives from religious beliefs and some exercising local cultural traditions that also coincided with permissive religious teachings. Muslim polygamy would also, in many cases, have enjoyed state endorsement in its places of origin.

110. In *Charter* cases, when defining the scope of a law, the Courts struggle to apply an interpretation that is tailored to the harm sought to be addressed by Parliament. Thus in *R. v. Sharpe*, 2001 SCC 2, the term "person" (referring to a child depicted in a sexual image) was read to include both real and imaginary persons, because the harms proven from pornography were seen to attach regardless of whether the pornography depicted an actual child.

111. The concerns most apparent from the historical record (and discussed in the previous Part) – that is, the protection of women and children and the preservation of the cohesiveness and authority of the state – are concerns that relate to polygamy at the point that it becomes in some measure *institutional*. This is also, on the evidence, the point at which polygamy is more likely to proliferate and become self-sustaining. But this is not to say that less formal forms of polygamous marriage do not have attendant risks or do not contribute to social harms.

112. Even if a law that is substantially valid captures some behaviour at its periphery that cannot be justified on the basis of the harms sought to be addressed by the prohibition, it is nevertheless justifiable if no halfway measure can achieve Parliament's goal: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519. If, on the other hand, exceptions might be legitimately crafted, then *R. v. Sharpe*, permits the Court to "read in" exemptions from the law

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[108] G.W. Bartholomew, "Polygamous Marriages and English Criminal Law" (1954) 17 Mod. L. Rev. 344 (Isbister Affidavit #4, Exhibit C); Samuel Chapman, "Bigamy, Polygamy and Human Rights Law", published online at http://polygamypage.files.wordpress.com/2008/12/pbhrtext.pdf.

(see discussion of polyandry, below). By and large, these questions must be left to future cases.

B. Polygamy versus Bigamy

113. At the same time as the polygamy prohibition was introduced, Canada's bigamy provision, which as noted earlier traced its language back through the 1604 law, was strengthened with the addition of a section forbidding a man from simultaneously marrying two women. As noted, it appears plain that this addition was made in response to Anthony Maitland Stenhouse's public threat to do precisely that.

114. Why did Canada need two separate provisions for polygamy and bigamy? If the polygamy law was aimed at "the trappings of marriage, duplicated", why is this not covered by the bigamy provision, as it has been found to be in the series of US cases beginning with *Reynolds*?

115. It may well be that some plural marriages, involving a ceremony and otherwise all the trappings of marriage, duplicated, would have been both bigamy prior to 1890 and polygamy afterwards.

116. The new provision did away with any argument that criminal bigamy required proof of a second ceremony *per se*; the focus of the offences was different. With respect to bigamy, the crime would be committed upon the attempt at second or subsequent marriage. With the polygamy provision, proof of the circumstances or even the date of the second marriage was unnecessary; it would be sufficient that multiple parties were living as married: "practicing" polygamy.

117. But a principal salutary purpose behind a separate polygamy provision appears to have been to simply resolve the controversy that Stenhouse pressed

and, even today, casts some uncertainty over the laws of England – whether bigamy required some element of deception, either of the parties or the state, and what proof it required of the solemnization of first or second marriages that formed the basis of the indictment.[108] The polygamy prohibition made the answer plain.

C. Polygamy versus Polyandry

118. The Amicus and other challengers suggest that the gender-neutral language in section 293 "sweeps in" harmless behaviour, such as "polyamory", polyandry, and multi-partner same-sex unions.

119. It is the fringe question of polyandry (and the related question of same-sex multi-partner conjugality) that may prove most challenging from the constitutional point of view.

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.

121. These things may each be doubted.

122. First, this Court may interpret "polygamy" to mean "polygyny". This is consistent with the context in which the prohibition was designed,[109] as well as

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[108] G.W. Bartholomew, "Polygamous Marriages and English Criminal Law" (1954) 17 Mod. L. Rev. 344 (Isbister Affidavit #4, Exhibit C); Samuel Chapman, "Bigamy, Polygamy and Human Rights Law", published online at http://polygamypage.files.wordpress.com/2008/12/pbhrtext.pdf.

[109] All indications from the legislative record and surrounding historical context are that the term "polygamy" in 1890 was understood and discussed purely with reference to polygyny; the latter sub-term was never used. The scheme and purpose of the Act were clearly addressed to harms attributed to polygyny (witness the constant reference to the "enslavement of women", and so on), consistent with the evidence of harm presented to this Court in the Reference.

with the most consistently-used understanding of the word.[110] The Attorney General of Canada makes the case that the use of the gender-neutral "person" in the "conjugal union" provision, coupled with the removal by Parliament of the term "of the opposite sex" as redundant indicates that that provision, at least, was meant also to apply to polyandry, a position that finds support in at least one judicial decision.[111] But this Court is not bound by the original definition. The interpretation of words in a statute can evolve over time as the norms and mores of society change. Courts in the same-sex marriage cases redefined "marriage", the term that was used in legislation, from meaning "a union between one man and one woman to the exclusion of all others" to "a lawful union of two persons to the exclusion of all others".[112] As West Coast LEAF points out in its closing submissions, if two plausible definitions of a provision are available, the Court will prefer one that is *Charter*-compliant over one that is not, an interpretive process sometimes called "reading down"[113] So it would be perfectly in keeping with the rules of statutory interpretation to define "polygamy" in section 293 to mean

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[110] In its ordinary sense, "polygamy" is usually used to mean only "polygyny". In the present Reference, it is instructive that virtually every witness, including every expert who is not explicitly also discussing polyandry (and therefore must be careful of too general a term), used "polygamy" to mean "polygyny" exclusively. The words "any form of" do not add polyandry or same sex conjugal unions into the definition, but rather ensure that all *forms* of polygamous marriage with which the legislators were explicitly concerned (explicitly if not exclusively Mormon, "Mohammedan", and "Indian" forms of marriage) were captured. Samuel Johnson's 1799 *Dictionary of the English Language*, Volume 2 defined "polygamy" as a "plurality of wives". A century later, Skeat's *Concise Etymological Dictionary of the English Language* said that "polygamy" means "a marrying of many wives." Neither source has a listing for polygyny or polyandry.

[111] At least one court historically (albeit in *obiter*) interpreted the "conjugal union" provision as extending the polygamy ban to "polyandry". If this is what it does, and if this is all it does, and *if* polyandry cannot constitutionally be banned, then the solution would be to strike down only that subsection. But under the Attorney's analysis, such parsing is unnecessary.

[112] *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472, 2003 BCCA 251 at para. 159. See also *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.); *Hendricks v. Québec (Procureur général)*, [2002] R.J.Q. 2506 (Sup. Ct.); *Dunbar v. Yukon*, [2004] Y.J. No. 61 (QL), 2004 YKSC 54; *Vogel v. Canada (Attorney General)*, [2004] M.J. No. 418 (QL) (Q.B.); *Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (QL) (S.C.); and *N.W. v. Canada (Attorney General)*, [2004] S.J. No. 669 (QL), 2004 SKQB 434.

[113] In *Schachter v. Canada*, [1992] 2 S.C.R. 679, Lamer C.J., writing for himself and four other members of the Court, held that reading in or reading down may be warranted where: (i) the legislative objective is obvious, and reading in or reading down would constitute a lesser intrusion on that objective than striking down the legislation; (ii) the choice of means used by the legislature is not so unequivocal that reading in or reading down would unacceptably intrude into the legislative sphere; and (iii) reading in or reading down would not impact on budgetary decisions to such an extent that it would change the nature of the legislation at issue.

"polygyny", regardless of whether it had that meaning in 1890, particularly if to do otherwise would render the section unconstitutional.

123. But, as suggested earlier, even if polyandry and same-sex multi-partner conjugality *were* prohibited by section 293, it is by no means certain that this would render the section constitutionally problematic. It would be open to this or another Court to decide that polyandry also carries with it constitutionally-significant harms;[114] that broader inclusion confirms a defensible uniform moral standard,[115] and that, as a consequence, its prohibition is, like polygyny's, minimally-impairing.[116] It may also be that there are strong equality reasons to support the application of the polygamy ban regardless of the gender of the conjugal participants.[117]

124. Fourth, if an inclusive definition *would* be problematic, then a court may, as in *R. v. Sharpe*, 2001 SCC 2, "read in" exceptions from it.[118]

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[114] It may well be that social harms associated with polyandry, while not as direct or severe as those associated with polygny, nevertheless justify prohibition. For instance, harms to children based on divided parental investment may still occur; violence and neglect that appear to occur in higher proportions in families where there is less genetic-relatedness of family members might also be apprehended. Indeed, in his testimony, Dr. Shackelford confirmed that the highest risk factor for domestic violence was the presence of an unrelated adult male in the household. If this is true, then polyandrous relationships can be expected to carry a greater risk of domestic violence than would either monogamous or polygynous ones.

[115] It is legitimate objective of the criminal law to enforce threshold standards where the denigration of those standards could be harmful to society. The prohibition on polygamy may be most solidly founded in harm reduction, but it achieves this through the enforcement of a definable standard. Permitting some members of society to engage in activity that others may not may serve to weaken the moral standards addressed by the law. This appears to be, at least in part, the rationale underlying the decision in *Little Sisters* that banning demeaning pornography was justified even in contexts, such as gay and lesbian pornography, where it was disconnected from the harm that justified prohibition: at para. 60 ("Parliament's concern was with behavioural changes in the *voyeur* that are potentially harmful in ways or to an extent that the community is not prepared to tolerate. There is no reason to restrict that concern to the heterosexual community.")

[116] Given the public interest in coherent and universal legal rules, restricting persons from engaging in all types of polygamous arrangements, including polyandrous and same-sex arrangements, is minimally-impairing and accords with the principles of fundamental justice.

[117] Felix Frankfurter said we should be wary of laws that do nothing more than ensure "the equal treatment of unequals." But in a modern state which has evolved increasingly along the lines of both substantive and formal equality, the dignity of women and sexual minorities may also be impaired to the extent that the law treats equals as unequals.

[118] In *Sharpe*, even having carefully defined the prohibitions in a way carefully tailored to the harms associated with child pornography, the Court found that there were two types of material

125. If these analyses and remedies are available, then the question of overbreadth, to the extent that it relies on the provision's application to non-polygynous polygamy, may be left for another day.

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.[119] 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. .[120]

127. The Wiccan priest Samuel Wagar avers that *his* religious freedom is impaired because he is not able to "bless" multi-partner unions, but even he does not present a fact pattern where this has actually occurred, let alone with a polyandrous or same-sex union.[121] And it is by no means clear that, if Mr. Wagar did "bless" such a union (in his religious, rather than secular, capacity[122]), it would be a "marriage or marriage-like relationship"– the Wiccan belief system, as Mr. Wagar (briefly) describes it, appears premised largely on a *disavowal* of authority. The Wiccan religion does appear to countenance all forms of intimate

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captured that were unrelated to the harm and thus that could not be justifiably banned: private writings and private depictions by teenagers of their own lawful sexual activity. The Court at paras. 114-116 "read in" exceptions to the prohibition for these "peripheral unconstitutional... applications" of the law, rather than render the prohibition invalid.

[119] Dr. Henrich describes the practice among some small isolated communities in Northern India, but these structures are considered by anthropologists to be an aberration created by unique environmental conditions.

[120] Zoe Duff speaks of being interested in a "Wiccan handfasting ceremony", which she believes would make her relationship illegal under section 293. Ms. Dettileaux, who is legally married to one member of her "triad", says that she has "the desire" to "act on" the idea of having a ceremony.

[121] Wagar Affidavit #1.

[122] Wagar apparently (though this is not perfectly clear), would wish to "bless" these unions in his capacity under the provincial *Marriage Act*, something that is obviously not before the Court here.

relationship, but there is nothing to indicate that the religion endorses any form of multiparty marriage, beyond the "blessing" he describes.

128. It is true that a court could find a piece of legislation generally unconstitutional on the basis of facts not before it – through the invocation of the "reasonable hypothetical". However, the Supreme Court of Canada has emphasized that a hypothetical used to attack the constitutionality of a statute must have the air of reality about it, and the Court has repeatedly confirmed that it would not make decisions absent an adequate factual matrix.[123]

129. The standard of a "reasonable hypothetical" was set out in *R. v. Goltz*, [1991] 3 S.C.R. 485, where Gonthier J. stated, for the majority, at pp. 515-16:

> It is true that this Court has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the *Charter* (*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099, and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62). Yet it has been noted above that s. 12 jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance. The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life. [Emphasis added.]

130. Here, the hypothetical, while perhaps not completely unimaginable, is nevertheless far-fetched. Can it truly be said that polyandrous or same-sex multi-partner marriage or conjugality is a circumstance "which could commonly arise in day-to-day life"? This is not to say it could never occur, but rather to emphasize that the "reasonable" in "reasonable hypothetical" suggests that Courts are reluctant to entertain a challenge *in advance of the hypothetical occurring and coming before the court on its own facts*, unless the hypothetical is self-evident or obvious.

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[123] *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099, and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62.

131. In the event that a person in Canada decides to participate in polyandrous polygamy or a same-sex multi-partner union contrary to section 293 (that is to say, one that relies on some authority and purports to be binding), *and* the state decides to commence a prosecution, *and* if the accused invokes the *Charter*, *then* a Court will have the full factual matrix on which to decide whether the constitution forbids criminalization of such relationships. Absent that factual record, it may be best to leave that question, for now, unanswered. This Court can free itself to focus on the effect of the statute with respect to what is, on the evidence, the most prevalent, pervasive, and pernicious form of polygamy in Canada and elsewhere – patriarchal, religiously, or culturally-based polygyny.

V. Harms of Polygamy

A. Overview

132. The evidence in this reference is that there are harms that arise from polygamy, which, individually and taken together, are significant and substantial.

133. There are a number of sources of expert evidence for polygamy's harms. Most of them identify correlations between polygyny and a given phenomenon, which can be judged according to strength. As Professor McDermott testified, one cannot ethically set up a controlled experiment for polygamy any more than one can set one up to prove that smoking causes lung cancer in healthy humans. This does not mean we cannot conclude that smoking causes lung cancer.

134. So we rely on comparing populations. There are *intra-cultural* studies where polygamous populations in a particular society (i.e. Bedouin Arabs) are compared to their non-polygamous neighbours; and *cross-cultural* studies where entire societies or countries are compared to one another, having been classified according to the degree to which polygyny is present in each.

135. But this is a case where harms, particularly difficult-to-isolate, indirect, *social* harms, are proven through convergence. Courts must take a robust, pragmatic and common sense approach to questions of causation, whether in tort or constitutional cases, and look to see if a harm is genuinely attributable to its alleged source. Here, it is submitted that the Court should ask:

- Whether a harm is a predictable consequence of polygamy either as a matter of common sense or scientific theory, or both;
- Whether the harm is correlated with the presence of polygamy cross-culturally or intra-culturally, and the strength of the correlation; and
- Whether the harm is manifest in particular social contexts where polygamy is practiced.

136. In the present case, the evidence converges on two main conclusions: (a) that polygamy carries with it an increased risk of harm to individual members of polygamous families; and (b) that polygamy causes, mostly indirectly, massive social harm in the larger community where it is practiced.

B. Increased Risks in Polygamous Families

137. The social harms of polygamy (young brides, 'lost boys', etc.) will be found throughout a partially-polygnous society, in polygamous as well as in non-polygamous family structures. But polygamous families also suffer from an increased risk of discrete harms that are associated with the structure itself.

(1) The Expert Evidence

138. Polygamy is associated with a number of harms to members of polygamous families, such as exploitation and oppression of wives and girls, negative mental health outcomes for wives, reduced educational attainment for children, and reduced opportunities for adolescent boys. Polygamous marriages

may also create significant problems for support of children both during a polygamous marriage and upon its dissolution.

139. A number of expert witnesses have provided evidence of the harms suffered by the participants in polygamous relationships and their children. The Attorney's lead expert is Dr. Joseph Henrich from the University of British Columbia. Dr. Henrich holds the Tier-1 Canada Research Chair in Culture and Cognition. He is a world renowned anthropologist, and holds tenure in both Economics and Psychology. While Dr. Henrich's evidence is mainly focused on social harms, Dr. Henrich also canvasses some of the literature with respect to harms to participants in his original report.

140. The Amicus's expert Professor Todd Shackelford concedes that "Professor Henrich has ably summarized various negative correlates and apparent consequences associated with polygamous... relationships".[124] Professor Shackelford offers in response that "negative correlates and apparent consequences can be seen in any kind of mating or marriage relationship." He then describes harms that befall women and children in monogamous marriages.

141. In his reply report addressed to Dr. Shackelford's assertions, Dr. Henrich uses the principles and data gathered by Dr. Shackelford from his research in monogamous households (such as the observation that domestic violence is overwhelmingly more common among non-related cohabitants, and that male violence against women becomes worse as the age disparity between husbands and wives increases) and applies them comparatively in polygamous households. Dr. Henrich concludes that, on the Amicus's own evidence, intra-familial violence, abuse, child mortality, neglect, stress levels, and sexual jealousy will be at least as bad, and in fact almost certainly worse, in polygynous families and societies as contrasted with monogamously marrying families and

[124] Shackelford Affidavit #1, para. 5.

societies. Professor Henrich then supports these predictions with ethnographic observations from North American and other polygamous communities.

142. Under cross-examination, Dr. Shackelford conceded each element of Dr. Henrich's analysis, but was concerned that his findings from monogamous relationships could not simply be applied "holus bolus" to polygamous ones. This is, of course, true. But the point of Dr. Henrich's exercise was to demonstrate that what is important is a comparison between monogamous and polygamous households, not simply whether some non-trivial level of violence exists with monogamy. So from that point of view, Dr. Shackelford's affidavit is beside the point (though his *vive voce* testimony on other topics within his expertise was informative).

143. The Christian Legal Fellowship's expert, the San Diego economist Dr. Grossbard, documents that polygynous men shift their investments from their children to obtaining more wives, with associated impacts on the health and mortality of children.[125] These effects were also described by Dr. Henrich.[126]

144. And when she consults the scientific literature, even the Amicus's expert Professor Campbell concedes that:

> Various studies confirm that children from polygamous families are at an enhanced risk of psychological and physical abuse or neglect.[127]

145. Drs. Shackleford and Henrich both speak to the increased risk of cohabitation with non-related family members (particularly parents). There is little non-anecdotal evidence one way or the other. The evidence of Professor Campbell in her second report, at paras. 46 and 48, is that there is "often deep affection for the sister wives", but she suggests that children's relationships with

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[125] Grossbard Affidavit #1, Exhibit B, p. 5.
[126] Henrich Affidavit #1, Exhibit B, pp. 46-49.
[127] Campbell Affidavit #2, para. 191.

their non-biological "mothers" are less "special" and "intense", and lack the "special connection with and love for their own mothers".

146. In the end, it is difficult to measure the degree of strife in polygamous families versus monogamous families in North America. Dr. Shackelford's work, as interpreted by Dr. Henrich, suggests that violence might be increased in polygamous families. The relative lack of parental investment can be expected to result in increased harm to children, and also child mortality, and these things are borne out in the cross-cultural studies.

147. Dr. Beall, an immensely respected Utah clinical psychologist and trauma counsellor who has spent many years working with victims of polygamous societies in the United States, provided the benefit of his experience treating persons who have left polygamous Mormon communities in the United States, whom he refers to as "polygamy survivors". In his affidavit and more particularly in his testimony, Dr. Beall painted a stark picture of the harm suffered by these victims. The Amicus originally filed a rebuttal to Dr. Beall in the form of the affidavit of Dr. Matt Davies, but then withdrew it, conceding that "the evidence of Dr. Davies will not be of assistance to the Reference".

148. Dr. Dena Hassouneh, an Associate Professor with the Oregon Health & Sciences University School of Nursing, and an expert on trauma in marginalized populations, summarized the literature and her experience with polygamy in Muslim populations. She noted that the harms associated with polygamy in the international literature are consistent with her 'case study' observations among Muslim women in the United States.

149. Alia Hogben, director of the Canadian Council of Muslim Women, also filed an affidavit expressing concern based on her own experience counseling and referring Muslim women.

150. Dr. Susan Stickevers is Chief of Physical Medicine & Rehabilitation Services at the Department of Veterans Affairs Medical Center in Northport New York, and also the Director of the Residency Program and Assistant Clinical Professor at the State University of New York at Stony Brook. She has treated 18 women in polygamous relationships over a 10-year period. The women were Muslim immigrants to New York from Pakistan and Africa.

151. Dr. Stickevers, like Ms. Hassouneh, conducted a literature review of the evidence of harm in international studies. From this, she concluded at para. 7 of her affidavit:

> 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.

152. Dr. Stickevers then compared these findings to her experience treating women of Muslim polygamous relationships in New York, and noted that she had observed many of the same phenomena in her New York patients. She deposed in her affidavit at para. 16:

> 17 out of 18 (94%) of my polygamous female patients scored for high levels of depression, somatization, and anxiety on psychometric testing. This is significantly higher than the prevalence of depression and anxiety I observed in my monogamously married female patients.

153. Dr. Stickevers also noted that 94 percent of her patients' polygamous marriages were non-consensual, and said that "many Muslim polygamous marriages in NYC come about as a result of coercion" (para. 4).

154. The Challengers assert that there may be some *advantages* inherent to the polygamous form of family. Accounts of cooperative childcare are a frequent feature of the affidavits, and there is the thread of an argument that simultaneous multi-marriage may be preferential to serial divorce and remarriage, particularly for children. But each time these claims are examined, they appear less supportable. Perhaps surprisingly, polygamous marriages are often less stable than monogamous ones, and divorce is more frequent, not less.[128] And accounts of the difficulties encountered when children of polygamous families are raised with a number of different "mothers" were a common theme in the personal testimony of witnesses.[129]

(2) Evidence of the Personal Witnesses

155. The Amicus and several Interested Persons argue that polygamy is not *always* bad in its effects on the participants in the union, or their children. The Attorney agrees that this must necessarily be so, but that nevertheless it is open to the Court to consider that polygamy carries with it a high degree of *risk* of harms, a risk so serious that, even without the broader social harm described above, its criminalization is justified.

156. This point goes to the heart of the case advanced by the Amicus and also those of the BCCLA, CPAA, and the Canadian Association for Free Expression: The absence of harm in any particular case is not in any way determinative of the

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[128] See Henrich Affidavit #2, Reply Report at p. 3 footnote 2; Grossbard Affidavit #1, Exhibit B, p. 3.

[129] E.g., Brenda Jensen, Transcript Day 22 (January 17, 2011) pp. 9-11; p. 10 lines 1-7 and 45-47; p. 11 lines 1-7; p. 14 line 47; p. 15 lines 1-13; p. 24 lines 40-47; p. 26 lines 17-28; p. 27 lines 45-47; p. 28 lines 1-19.

constitutional question. The Supreme Court has already ruled that the criminal law can legitimately prohibit consensual conduct that is harmless to the participants themselves (and may even be beneficial), on the basis of a "reasoned risk of harm" when permitted of others (*R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571). In that case, it was found that while there may have been no harm to Malmo-Levine himself from marijuana use, and no direct harm to anyone else, other vulnerable persons – such as schizophrenics, for example – were at an increased risk of harm beyond *de minimus*.

157. A number of the personal witnesses described for this Court in graphic terms co-wife conflict, lack of attention from both fathers and non-related mothers, and other forms of family strife unique to polygamous households.[130] These accounts are consistent with the risks identified by the experts in this case.

158. Counsel for Challengers have promised, at various times, to introduce evidence showing that, although there are people with horror stories about polygamy, there are also large numbers of people who report positive experiences.

159. What is remarkable, as this evidence has been presented and tested, is the extent to which the "good stories" have turned out not to be very "good" at all. The Amicus's witness, Mary Batchelor, described her experiment with polygamy

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[130] Brent Jeffs, Transcript Day 15 (January 5, 2011) p. 65 lines 19-22, 28-41; Ruth Lane, Transcript Day 15 (January 5, 2011) p. 91 lines 31-45, 42-47; Truman Oler, Transcript Day 23 (January 18, 2011) p. 12 lines 22-38, p. 13 line 37 – p. 14 line 1, p. 29 lines 6-40; Howard Mackert, Transcript Day 14 (December 16, 2010) p. 58 lines 5-13, p. 59 line 13 – p. 60 line 9; Don Fischer, Transcript Day 21 (January 13, 2011) p. 13 lines 5-40; Brenda Jensen, Transcript Day 22 (January 17, 2011) p. 5 lines 24-36; Carolyn Jessop, Transcript Day 20 (January 12, 2011); Teressa Wall, Transcript Day 10 (December 8, 2010) p. 21 lines 30-47, p. 22 lines 1-7, p. 38 lines 29-39, p. 62 lines 1 – 10; Sarah Hammon, Transcript Day 10 (December 8, 2010); Rowena Mackert, Transcript Day 10 (December 8, 2010) pp. 4, 8, 9, 14, p. 15 lines 1 – 35; Mary Mackert, Transcript Day 19 (January 11, 2011) pp. 3-6, 12-13, p. 16 lines 13-47, p. 17 lines 1 -11, p. 18, 34; Paula Barrett, Transcript Day 17 (January 7, 2011) pp. 22- 23

to be something approaching idyllic; it seemed less so when Batchelor was confronted with the acerbic and poisonous letter she had written to her former 'sister wife'. Anonymous Witnesses 2 and 4 [wasn't there a #3 as well, the girl who was studying to be a teacher in Utah?], the only FLDS polygamists to testify in direct and be cross-examined, still believe that their marriages were ordained by God and they describe them in their affidavit in glowing terms. Only in Court was it revealed that they were 16 and 17 at their times of their arranged marriages to much older men; their sister wives were 16 and 15, respectively.

160. The fact that these social harms are present even in the families put forward by the FLDS as representative of the "good side" of polygamy should give this Court pause. One cannot simply count up anecdotes on one side or the other and decide whether there is indeed an increased risk of harm to participants. But again, this is a case about *convergence* of evidence. And in this case, the evidence from the personal witnesses overwhelmingly points to the conclusion that polygamous marriages carry with them significant risk of harm to members of the polygamous households themselves.

C. Social Harms Caused by Polygamy

(1) Overview

161. The mathematics of polygamy indicate (and a wealth of social science evidence demonstrates) that an increase in the degree of polygyny in society will result in an increase in the earlier sexualization of girls or the antisocial behaviour of boys and men, or both. This is because polygyny *ipso facto* requires an increased supply of women and/or a creation of a pool of surplus, unmarriageable males, in direct proportion to the number of "plural wives" in the same community. In this way polygyny "externalizes" (to use an economics term) its harm throughout society.

162. These externalities are important because they have been until now completely ignored in the legal analysis, as the Amicus concedes at para. 33 of his Reply Opening. Apologists for decriminalization of polygamy typically base their views on the harms associated with criminalization weighed only against the harms to polygamist families themselves. They then suggest, not without some logic, that criminalization is only justifiable in harmful polygamous relationships (and by extension that only the harm should be criminalized, not the relationship itself). This argument collapses completely if it is accepted that polygamy, like marijuana use in *Malmo-Levine* or the "harmless" "virtual" child porn in *Sharpe,* carries with it social harms regardless of its immediate effect on the participants and their families.

163. Dr. Henrich's work meticulously documents what is apparent upon reflection. In a society with equal numbers of men and women, polygamy creates two obvious types of pressure: First, the need to recruit more women into the marriage market (as both polygamous and monogamous wives) drives down into adolescence the age at which girls are targeted for marriage (and increases the age disparity between husbands and wives). Second, corresponding pressure is created on men who are prevented from acquiring wives to take risks to climb up the ladder of social status. Thus polygamy creates a gender imbalance that becomes harmful in itself, confirmed by recent trends in India and China, where various forms of gender-selection have led to societies with more young men than young women. Reliable data from those countries show that even relatively small excesses in the proportion of men lead to striking increases in criminality and other social problems.

164. The competition for women in a polygynous society will also predictably increase men's tendencies to control female reproductive capacity, leading to rigid, patriarchal social systems; similarly, the need to provide an ever-increasing supply of willing younger girls will require mechanisms of indoctrination and normalization.

165. If current scientific understanding of mating and marriage behaviour is correct, we would expect a society's degree of polygyny to correlate with decreased age of girls at first marriage and with age disparity between husbands and brides (in both polygamous and monogamous marriages). It does. We would expect polygyny to correlate with social instability and crime. It does. We would expect it to negatively correlate with accepted measures of women's equality. Again, it does.

166. The only assumption necessarily underlying the demonstrable harms of polygamy is that it will manifest as polygyny rather than polyandry. And of course it overwhelmingly does. All of the established religious forms of polygamy are polygynous. Polyandry remains "vanishingly rare" and in those exceptional instances where it has existed it has usually been a temporary adaptation to environmental stresses or ecological factors. Evolutionary psychology provides the obvious answer as to why: the genetic prospects of a man are increased by multiple partners in a way that those of a woman are not. Thus, throughout the anthropological record, partial polygyny is the rule, universal monogamy the exception, and polyandry the statistical aberration.

(2) The Experts' Views of Harms Attributable to Polygamy

167. A number of experts discussed the literature that established associations of polygamy with harms to participants and with social harms. None of them disputed that the associations were established; the question remaining, if any, was the evidence of causation. Drs. Henrich, Grossbard, and McDermott, and Professor Campbell each gave their opinions on the strength of the association, with Dr. Grossbard and Dr. Henrich generally of the view that many of the identified harms were caused by polygamy, and Professor Campbell, while conceding the association, argued for a weaker connection between the harms

and polygamy *per se* (and indeed suggested that some negatives were caused by criminalization rather than polygamy).

168. To the extent that there is any disagreement, there is good reason to prefer the evidence of Drs. Henrich and Grossbard to that of Professor Campbell. Dr. Henrich is the only expert qualified in the fields from which the majority of the social science literature emerges: psychology, economics, and anthropology. In his cross-examination, the Amicus's expert demographer Dr. Wu confirmed that he, as a sociologist, could not call into question a literature review undertaken by someone, like Dr. Henrich, more conversant in the fields in question.[131] Similarly, Dr. Grossbard is an expert economist, focusing on the evidence from the literature within that field, and moreover one who has dedicated much of her 30-year professional career to the study of the available literature documenting the harms associated with the practice of polygamy.

169. Professor Campbell, on the other hand, was qualified as "a legal scholar and qualitative researcher". While either qualification might involve reviewing social science evidence from other disciplines, she has no graduate education in those fields (indeed she has no graduate education beyond her one-year Master's degree in Law), and it cannot be suggested that she possesses expertise comparable to Dr. Henrich or Dr. Grossbard. Indeed nothing in Professor Campbell's qualifications put her in any better position than the Court in that respect, and the weight of her evidence cannot be compared to that of the established experts in their field.

170. Dr. Grossbard cast doubt on the conclusions Professor Campbell had reached in her literature review, and in particular questioned her characterization of the balance of evidence with respect to harm.[132]

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[131] Transcript Day 9 (December 7, 2010) pp. 68-69.
[132] Transcript Day 9 (December 7, 2010) pp. 22-23.

171. The essentials of Dr. Henrich's propositions were put through cross-examination to each of the Amicus's principal expert witnesses, Professor Campbell and Dr. Wu. Neither could find fault with the essentials of the theory, and Professor Campbell said that, in assessing the harms of polygamy, if evidence were provided in support, this would give rise to a concern "to be reckoned with".[133]

(3) Polygamy and the Predation of Girls

172. Mormon polygamy has always been noted for the youth of its brides. Joseph Smith was said to have married several teenagers. And Van Wagoner wrote of 19th century Mormon polygamists:

> Although defenders of Mormon polygamy stress that the principle was intended for religious rather than sexual purposes, plural wives tended to be much younger than their husbands. A 1987 study completed by the Charles Redd Center for Western Studies at Brigham Young University found that 60 percent of the 224 plural wives in their sample were under the age of twenty. The man was usually in his early twenties when he married his first wife, who was in her late teens. When he took a second wife he was generally in his thirties and his new wife between seventeen and nineteen years of age. Men who married a third wife were commonly in their late thirties. The average age of third wives was nineteen as were fourth wives whose husbands by then were between thirty-six and forty-five (Embry 1987, 34-35).[134]

173. FLDS historian Benjamin G. Bistline, in his work on the history of Short Creek, notes that during the 1950s girls were viewed as of marriageable age at thirteen. Bistline explains in his affidavit that in the late 1950s the Short Creek

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[133] Transcript Day 7 (December 1, 2010) p. 57 lines 31-34.
[134] Richard S. Van Wagoner, *Mormon Polygamy: A History*, 2nd ed. (Salt Lake City, Utah: Signature Books, 1989), p. 91 (Isbister Affidavit #1, Exhibit D.13)

polygamists moved away from allowing courtship to directing placement marriage:

> At the time that I married, 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).[135]

174. When the polygamist community of Short Creek was raided in 1953, the action was justified in part on the basis its residents were engaged in a "conspiracy to commit statutory rape". The Governor of Arizona described Short Creek as:

> ...dedicated to the wicked theory that every maturing girl child should be forced into the bondage of a multiple wifehood with men of all ages for the sole purpose of producing more children to be reared to become more chattels of this lawless enterprise.[136]

175. The evidence of child brides at Bountiful and throughout the FLDS communities in North America is simply overwhelming. One of Professor Campbell's interview subjects reported that at least 23 of her 25 sisters were married before reaching the age of 18.[137] Anonymous Witness #2 married at 16, as did her sister wife (also her biological sister). Her own daughter married

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[135] Bistline Affidavit #1, paras. 19-20.
[136] Van Wagoner, *Mormon Polygamy*, p. 195.
[137] Transcript Day 7 (December 1, 2010) p. 59.

(monogamously) at 15.[138] The prosecutions in Texas have led to the uncovering of numerous young brides.[139]

176. Dr. Beall said that 30 percent of his female patients from polygamous marriages (from inside and outside the FLDS) were married at 16 or less.[140] Ruth Lane, former wife of Winston Blackmore, reported him as having married a couple of 15 year-olds: "They can stretch it however they want", she said, "They were 15."[141] Susie Barlow was assigned into marriage with her 51-year-old cousin when she was 16;[142] Lorna Blackmore had a daughter assigned to Jimmy Oler when she was 16, and a daughter assigned to Jimmy's half brother when she was 17.[143] Carolyn Jessop was married at 18 to a man who was 32 years older than her.[144] Jessop also testified that her sister wife Tammy was 18 when she married the 88-year-old "Uncle Roy" and that Kathleen was 17 when she too married "Uncle Roy", who was around 96 at the time.[145] Winston Blackmore

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[138] Transcript Day 26 (January 25, 2011) pp. 5, 7-8

[139] Nichols Affidavit #1, documenting the following marriages from the prosecutions in Texas thus far that have led to "guilty pleas" or convictions:

- On August 5, 2004, at age 45, Michael Emack entered a "celestial marriage" to Ruleen Johnson Jessop Emack, who was 16. Ruleen was Emack's fourth wife.
- On October 3, 2005, at age 26, Lehi Jeffs entered a celestial marriage to Rachel Keate, who was 15 (born July 25, 1990). Rachel gave birth to Jeffs' son on June 11, 2007 (she was 16). Rachel was Jeffs's third wife.
- On August 12, 2004, at age 33, Raymond Merril Jessop entered a celestial marriage to Janet Jeffs, who was 15 (born September 16, 1988). Janet gave birth to Jessop's child in August 2005 (she was 16).
- On May 5, 2005, at age 52, Allan Keate entered a celestial marriage with Merilyn Barlow, who was 15 (born January 7, 1990). Merilyn gave birth to Keate's child in December, 2006 (she was 16). This was Merilyn's second marriage.
- On January 18, 2004, Allan Keate gave his daughter, Veda Lucille Keate, to Warren Jeffs in celestial marriage. Veda was 14 (born April 20, 1989).
- On July 27, 2006, at age 32, Merril Leroy Jessop ("Leroy") entered a celestial marriage with LeAnn Jeffs / Nielsen, who was 15 (born March 24, 1991). He had at least two other wives at the time.
- On or about October 5, 2005, at age 34, Abram Jeffs entered a celestial marriage with Suzanne Johnson / Jessop, who was 14 (born November 13, 1990). Suzanne was one of Jeffs' many wives.

[140] Beall Affidavit #1, para. 20.

[141] Transcript Day 15 (January 5, 2011) p. 91 lines 33-37.

[142] Susie Barlow Affidavit #1, para. 12.

[143] Lorna Blackmore Affidavit #1, paras. 18-19.

[144] Transcript Day 20 (January 12, 2011) p. 17 lines 6-9.

[145] Transcript Day 20 (January 12, 2011) p. 21 lines 6 – 14. Both Tammy and Kathleen married Fredrick Merril Jessop after Uncle Roy's death.

required Teressa Wall to marry at 17.[146] Teressa described her 13-year-old sister being forced to marry their cousin and another sister at 18 marrying Rulon Jeffs when he was well into his 80s.[147] Rowena Mackert was married at 17.[148] Mary Mackert spoke of the former Prophet Leroy Johnson taking a 12 year old wife.[149] Truman Oler described the typical age of marriage for girls in Bountiful as sixteen.[150] Again and again, the testimony was the same.[151]

177. Both Teressa Wall and Carolyn Jessop testified that the Canadian girls were typically required to marry earlier than their American counterparts, at least with Uncle Rulon was the Prophet. Wall explained:

> ... growing up in Salt Lake when Rulon Jeffs was the leader he was more—he really supported girls waiting until they were younger, but in Canada girls for the most part were married 15, 16, and then as the years went by even younger and younger. And I know Winston was a big believer in he felt like well, let's get them married off while they're young and they don't have a mind of their own, you know. He really liked to get them married off young.[152]

178. Some empirical corroboration of this overwhelming anecdotal evidence can be found in the birth registration records from Bountiful, which indicate that about a third of mothers identified by the BC Vital Statistics Agency official Bruce Klette as coming from Bountiful first gave birth as teens, a rate that is some seven times the provincial average.[153]

179. Teen pregnancy, of course, is only one indicator of the real problem: the sexual targeting of girls by much older men in a polygynous society. The

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[146] Teressa Wall, Transcript Day 10 (December 8, 2010) p. 29 line 23.
[147] Teressa Wall, Transcript Day 10 (December 8, 2010) p. 24 lines 12 – 29, p. 42 lines 17-18, p. 41 lines 34-44.
[148] Rowena Mackert, Transcript Day 10 (December 8, 2010) p. 7 line 26.
[149] Mary Mackert, Transcript Day 19 (January 11, 2011) p. 30 lines 37- 47.
[150] Transcript Day 23 (January 18, 2011) p. 16 line 42 – page 17 line 6.
[151] See Sarah Hammon Transcript Day 10 (December 8, 2010), p. 75, lines 19-23, p.81, lines 24-35; Kathleen Mackert Transcript Day 10 (December 8, 2010), p. 97, lines 6-13; Jorjina Broadbent Transcript Day 17 (January 17, 2011), p. 55, lines 22-39.
[152] Teressa Wall, Transcript Day 10 (December 8, 2010) p. 30 lines 45 -47, p. 31 lines 1 – 12; Carolyn Jessop, Transcript Day 20 (January 12, 2011) pp. 21-23.
[153] Klette Affidavit #1, para. 47.

usefulness of teen birth statistics at Bountiful is that, as Professor Campbell confirmed, they are a virtually conclusive identifier of teen *marriages* (because out-of-wedlock pregnancies in Bountiful are, she says, unknown[154]). Teen pregnancy may be a problem in other cultures or particular communities, but it is not the heart of the problem with polygamy. The problem with polygamy is that girls will be raised to become adolescent – or even pre-adolescent – sexual targets of much older men. The evidence of that phenomenon from Bountiful and the FLDS is simply overwhelming, while there is no evidence of this harm in other communities that the Amicus identifies as having high teen pregnancy rates. Presumably, teen pregnancy in those places is the more familiar kind, where young people engage in risky behaviour with one another with serious consequences. It does not indicate or confirm a pattern of methodical predation on girls by persons in positions of authority.

180. While Professor Campbell struggles mightily to characterize child brides at Bountiful as a "historical" phenomenon, and a practice "no longer followed",[155] her simultaneous assertions that some of the women to whom she spoke are dedicated to eliminating the practice belies this, as do the numerous reports of underage marriage in the new century. One mother interviewed by Campbell, who had married at 16, bemoaned the fact that her own daughter had become a teenage bride despite the mother's misgivings.[156] Anonymous Witness #2, a woman in her forties who had married at 16, told a similar story of seeing her daughter marry at 15.[157] Anonymous Witness #4 described her own marriage and that of her sister wife, at ages 17 and 15 respectively; these occurred in 2003 and 2004.[158] The dozen child brides identified in the report of the Texas Child Protective Services at Yearning for Zion were married between 2004 and 2006 as young as 12 years old. The Attorney General presented evidence of 13

[154] Transcript Day 7 (December 1, 2010) p. 40.
[155] Campbell Affidavit #2, para.19.
[156] Campbell Affidavit #2, paras. 21-22.
[157] Transcript Day 26 (January 25, 2011) pp. 7-8.
[158] Transcript Day 27 (January 26, 2011) pp. 12-17.

Bountiful girls[159] married in the United States between 2004 and 2006, aged 12 to 18. These facts indicate that Professor Campbell's characterization of teen marriage as "historical" suffers from the same frailties of so much of her "qualitative research" – she tends to uncritically adopt the stories told to her, even where there is readily-available data and information directly contradicting her conclusions. This appears to be particularly so where the data is inconvenient to her revisionist characterization of Bountiful and the FLDS as an unfairly-maligned community of odd but generally-harmless religious adherents.

181. There is nothing in the Mormon, let alone fundamentalist Mormon, faith that dictates or encourages brides below the age of legal marriage.[160] If members of the FLDS were marrying younger than mainstream Mormons and others outside their community, the question is: why?

182. The answer lies in the simple arithmetic of polygamy. A polygamous society *ipso facto* creates a demand for more women than men. Absent importation of sufficient numbers of marriageable women, the principal source for a larger available pool of prospective partners will be younger and younger girls.

183. This is borne out by careful cross-cultural studies, such as those described by Dr. Henrich, which show that a society's degree of polygny correlates with the youth of girls at first marriage and with the age disparity between the brides and their much older husbands.[161]

184. Dr. Henrich, of course, is well aware that correlation does not prove causation. He writes:

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[159] Most were girls from Bountiful bound for US husbands, but several were US girls headed north.
[160] Walsh cross-examination: Transcript Day 15 (January 5, 2011) p. 54. Mainstream Mormons do, according to one source, marry somewhat earlier than average Canadians (Luca Affidavit # 2, Exhibit A), but there is no record or suggestion of the pattern of adolescent marriage apparent in the FLDS.
[161] Henrich Affidavit #1, Exhibit B, pp. 49-55.

> The challenge of testing these ideas against evidence arises from the fact that most highly polygynous countries in the world today are in Africa, and are among the least developed nations. Several countries in the Middle East allow limited polygyny (often based on Islamic prescriptions), but only low percentages of rich men actually have more than a single wife. This uneven distribution of polygynous societies means that it is difficult to tease apart the effects of polygyny vs. the effects of all the other variables that might influence Africa's situation.[162]

185. Dr. Henrich's approach to this problem is to pull together a number of different types of mutually-corroborative evidence. First, he uses cross-cultural regression analyses of societies rated according to the degree of polygny in each, comparing, wherever possible, like with like; controlling for location (especially Africa), for level of development, and for other factors. Second, he exploits economic modeling to test the predictions of imposing monogamy on highly polygynous societies. Third, he examines data from particular societies where both monogamy and polygyny is practiced. Finally, he uses data regarding sex ratio imbalances as a predictive proxy.

186. Dr. Henrich's report demonstrates that the age of first marriage of girls goes down as the degree of polygyny goes up. In highly polygynous countries, girls marry, on average, in their teens. The average age in comparable (i.e., poor African) monogamous countries was 23, and the average for developed nations, such as Canada, is closer to 30.[163] This data converges with intra-cultural studies, which demonstrate that, even within a single culture, polygamists tend to marry younger than monogamists, perhaps as a result of increased need for control of wives by men.[164]

187. The correlation between polygyny and youth of brides also featured in the evidence of Professors Grossbard[165] and McDermott[166]. No evidence was led to

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[162] Henrich Affidavit #1, Exhibit B, p. 49.
[163] Henrich Affidavit #1, Exhibit B, p. 31.
[164] Transcript Day 11 (December 9, 2010) pp. 49-51.
[165] Grossbard Affidavit #1.
[166] McDermott Report.

counter this observation, nor was the correlation questioned in cross-examination.[167]

188. Young marriage as a consequence of sex ratio imbalance is a feature that runs through all the polygynous cultures in evidence in this Reference. The propensity to marry adolescent girls was noted as a peculiar feature of the Yemenite Jewish community, where polygamy was practiced until the mid-20th century.[168] Youth of brides, and age disparity between men and women at marriage, was also noted among the polygamous cultures of rural Turkey, southern Ethiopia, the Middle East and Australia.[169] Among polygamous African immigrants in France, it was noted by the French National Consultative Commission of the Human Rights that:

> [Translation] Most of the time, these wives are young girls... Married most often by force or in any case without having had a choice, they find themselves isolated, under the total domination of the husband.[170]

189. On the American frontier, where there was a marked sex ratio imbalance, marriages of girls as young as 12 or 13 were reported.[171]

190. When Indian agents assigned to the Blackfoot First Nation complained to Ottawa about the polygyny there at the turn of the last century, they simultaneously noted the phenomenon of young girls being offered into marriage, with one Indian Agent writing in 1903:

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[167] Except that the Amicus suggested to Professor McDermott that there had been inadequate control of confounding variables beyond GDP – a criticism that could not be, and was not, leveled at Dr. Henrich's report where many more variables *were* controlled for.
[168] Aharaon Gaimani (2006) "Marriage and Divorce Customs in Yemen and Eretz Israel", cited in Beaman Affidavit #1, para. 7.
[169] Henrich Affidavit #1, Exhibit B, p. 54.
[170] Quoted in Quebec Report "Polygamy and the Rights of Women" at p. 67, attached to Gabay Affidavit #1.
[171] Henrich Affidavit #1, Exhibit B, pp. 55-56; Joseph Henrich, Transcript Day 11 (December 9, 2010) p. 53.

> There are instances here of parents selling, bartering, or giving their girls—under 10 years of age—to be the wife of men of various ages. Furthermore, within the last year, several Indians have contravened the law regarding polygamy. I would like to know whether these Indians are to be allowed to retain these girls as wives, and whether the Indians who have plural wives are to go unpunished, providing they refuse to discard wife #2.[172]

191. The concern was reiterated by the Assistant Inidan Commissioner following a visit in the field, who noted that "I was assured that children as young as 5 years of age were so disposed of..."[173]

192. Sarah Carter also mentions this phenomenon among the polygynous Plains Indians in the same period. She notes contemporary reports of girls commonly marrying between the ages of 16 and 18, but being "pledged or betrothed at a young[er] age", in one documented case at age seven.[174]

193. This is convergent with Dr. Henrich's report on the consequences of the rising sex ratio in China. There, the practice of "minor marriage" – where an infant girl is promised in marriage to a wealthy family, has been "spreading rapidly" as the more numerous male offspring of the 'one child policy' reach adulthood.[175]

194. The Amicus's counter-evidence on the question of youth of brides is indirect and unpersuasive. On one hand, he may say that there are many factors contributing to teen pregnancy, and he can demonstrate that, at least with respect to older teens (younger than age 20) the rates vary considerably across the province. But he has introduced no evidence of any other community where "marrying" girls at 15, 16 or 17 is widespread (never mind the practice of marriage to much older men, common in polygamy), and in fact has introduced no evidence of a single such "marriage" outside the fundamentalist Mormon faith.

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[172] Nelson Affidavit #1, Exhibit H, Tab 6, p. 96.
[173] Nelson Affidavit #1, Exhibit H, Tab 6, p. 101.
[174] Carter, *The Importance of Being Monogamous*, p. 107.
[175] Transcript Day 11 (December 9, 2010) pp. 52-53.

The Amicus *has* introduced an essay through the Brandeis Brief that indicates that somewhat more 'mainstream' Mormons marry as teenagers than do average Canadians, but not by much.[176] And again, there is no evidence at all that any member of the 'mainstream' Mormon population has married as young (12-16 years) as members of the FLDS in Bountiful and the United States.[177] The FLDS expert Dr. Walsh confirmed in his testimony that there is no *religious* reason for church members to marry young.[178]

195. It is possible that Professor Campbell is in one respect correct, and that since 2002 the incidence of child brides within the Winston Blackmore side of the Bountiful "split" has been reduced. It is also possible that in this same period the incidence of plural marriage has been reduced, perhaps as a result of increased scrutiny, the threat of prosecution, or perhaps from a genuine liberalization of the community. In fact, Campbell, who says she has stayed in touch with many of her sources, said she has no knowledge of any plural marriage occurring on the Blackmore side of the "split" since 2002. It is also accepted that, in June 2008, the FLDS in the US and Canada announced a policy whereby there would be no "sealings" of girls under the legal age of marriage.[179] Perhaps predictably, it also appears that there have been no sealings at all since that policy has been in place.[180]

196. The history of fundamentalist Mormonism in North America shows a clear pattern, from the 19- and 20-year-old brides of the 19th century through the 15-17 year olds of the postwar period, descending over time as shortages became

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[176] 40 percent of Mormon women in that sample married before age 20, compared to about 30 percent of the entire population (Luca Affidavit #2, Exhibit A, p. 289).
[177] In fact, the data in the article are apparently based on statistics for *legal* marriage, which in Canada would not include persons in the 12-15 range at all.
[178] Transcript Day 15 (January 5, 2011) p. 54.
[179] *El Dorado Investigation: A Report from the Texas Department of Family and Protective Services* (December 22, 2008), p. 15 (Isbister Affidavit #1, Exhibit F.2).
[180] Of course, Warren Jeffs, the Prophet of the FLDS and the person who both arranges and performs the "sealings", has been in prison for that period, charged and convicted on charges of accessory to child rape in Utah. Jeffs' conviction was set aside on appeal and a new trial ordered, but he has now been extradited to Texas to be tried on similar charges.

acute, and culminating in the nadir of the last decade, when marriages of 12 and 13 year olds became regular events. This is predictable – a polygnous society consumes its young.

(4) Commodification and Control of Women

197. Dr. Henrich notes that "[a]s women become scarce they tend to be viewed as commodities".[181] This manifests through exertions of male control and dominance, including rape and sexual exploitation. Dr. Henrich notes:

> In cross-national analyses, greater polygyny is robustly associated with higher incidence of rape, even when controlling for economic differences and including continental control variable. This same relationship is found when the percentage of unmarried men is used instead of polygyny: more unmarried men, more rape.[182]

198. Professor Grossbard, the expert economist from the University of San Diego put forward by the Interested Person Christian Legal Fellowship, has studied the economic consequences of polygamy for almost three decades. She described in her affidavit the progression of her thinking from one of 'polygamy is good for women' (based on libertarian economic theory) to 'polygamy is bad' (based on subsequent study of the real effects of the practice). She explained that while in theory polygamy increases the value of women in the marriage marketplace, this added value is not captured by the women themselves. In fact, she said:

> As pointed out in Guttentag and Secord (1983) and Grossbard-Shechtman (1993), the high value of women in marriage markets in polygamous societies is expected to increase men's incentives to control women by way of political and religious institutions, such as arranged marriages and marriages of minors.[183]

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[181] Henrich Affidavit #1, Exhibit B, p. 55.
[182] Henrich Affidavit #1, Exhibit B, p. 57.
[183] Grossbard Affidavit #1, Exhibit B, pp. 1-2.

199. Professor Grossbard went on to note that cross-cultural studies demonstrate that polygyny corresponds with both the youth of brides and arranged marriages, among a host of other negative "institutions". The number of correlations in accord with the expectations of control mechanisms led Professor Grossbard to conclude that the relationships are causal, not simply coincidental. Dr. Grossbard, after 30 years' study of polygamy, summarized her conclusions in direct examination as follows:

> That, in the cultures and societies worldwide that have embraced it, polygamy is associated with undesirable economic, societal, physical, psychological and emotional factors related especially to women's well-being.[184]

200. And Professor Grossbard considered it significant as a political economist that, from the early suffragette movement in the United States to the present, it was women's groups who were at the forefront of anti-polygamy activism.[185] The report "Polygamy and the Rights of Women" from the Quebec *Conseil du statut de la femme* makes the same point, pointing to Egypt, Iran, and Morocco as places where women's groups are agitating for reform.[186] Indeed the *Conseil* report is itself an indication of the concern of women's groups in this country.

201. Worldwide, the degree of polygyny in a society correlates directly with a depression in markers of female equality. This is an area explored by Dr. Henrich, using the same multi-pronged approach he employed when analyzing the youth of brides. The effect of polygyny on a host of women's rights is also the central focus of the massive project undertaken by Dr. McDermott and her team, and presented by the Attorney General of Canada.

202. The results are unmistakable: Dr. Henrich found that polygamy can be expected to increase age gaps between husbands and wives, decrease the age

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[184] Transcript Day 9 (December 7, 2010) p.16.
[185] Transcript Day 9 (December 7, 2010) p. 17.
[186] See Report at pp. 57-59, attached to Gabay Affidavit #1.

of brides, increase rape and sexual exploitation of women and girls, and encourage social institutions that control and commodify women. Dr. McDermott's analysis examined a database of 171 countries, each rated for degree of polygyny. Using a regression analysis controlling for GDP, Professor McDermott found that polygyny negatively correlated with virtually every possible indicator of female wellbeing, including age at marriage, maternal mortality, life expectancy, legal equality, and domestic violence.[187]

203. The Amicus's experts Angela Campbell and Lori Beaman opined that the evidence of polygamy's harms was "mixed" or inconclusive. What they appear to mean by this is that some studies have found harm linked to polygamy, and some have not. They do not acknowledge that the overwhelming weight of the international cross-cultural literature indicates a positive correlation. They do not cross-reference their brief review of these studies with econometric modeling and case studies (as did Dr. Henrich) or conduct a comprehensive *de novo* data analysis (as did Dr. McDermott).

204. The cross-examination of Professor Campbell and Dr. Beaman revealed problems well beyond a simple lack of expertise in the areas of science and methodology in which they were straying (they are professors of law and religious studies respectively). The cross-examination of each revealed a troubling incompleteness of analysis, a lack of rigour and, frankly, an unwillingness or inability to provide truly impartial descriptions of facts or events.[188] As such, the Court should prefer the careful and comprehensive

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[187] McDermott Report.

[188] Both of these experts dismissed allegations of abuse at Yearning for Zion – where 161 perpetrators of child abuse and neglect were found, connected to the rapes of at least 12 children over a two-year period – as "unfounded". By the time these witnesses testified, 8 of the 12 "husbands" had been convicted of crimes including child rape, with sentences of up to 75 years imposed. In her testimony, Professor Campbell acknowledged that her opinion that the allegations were "unfounded" was based on a discussion with a lawyer representing FLDS members (Transcript Day 7, p. 29). Professor Campbell did not know that any convictions had occurred for anything but bigamy (Transcript Day 7, p. 33). Dr. Beaman had never read the report of the Texas child protection authorities, though it was freely available on the Internet, and

evidence of Drs. Henrich, Grossbard and McDermott wherever there is disagreement.

205. Again, the convergence in the evidence from the high-level predictions of the experts to the evidence 'on the ground' is remarkable. For instance, one expected pressure is on reproductive control: in a male-controlled reproductive marketplace, you would expect to see women having more children as they have less power to control their reproductive health. This correlation is borne out in the international studies.[189] It is also a notable feature of almost all the evidence regarding the FLDS communities in North America.

206. In the FLDS, extraordinarily large families are not unusual, with women having, in some cases, 15 children (Truman Oler's mother) or even more.[190] Jorjina Broadbent said that her husband would say "It's not quality we're looking for, it's quantity, how many children we have before this life is up". Jorjina had 12 children.[191]

207. The Amicus's expert Angela Campbell acknowledges that large families are the norm in the Bountiful community. She also concedes that women can practice birth control only surreptitiously[192] (a development that Professor Campbell nevertheless seems to view as a promising example of women's empowerment). Other witnesses suggested that birth control was not allowed, and even that women had to have a medical excuse for not having children.[193] Carolyn Jessop, despite numerous progressively difficult pregnancies, had no choice whether or not she became pregnant:

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based her own conclusion that the allegations were "largely unfounded" on an unpublished book chapter and newspaper articles that she had "looked at": Transcript Day 11, pp. 70-75.

[189] Henrich Affidavit #1, Exhibit B.

[190] Carolyn Jessop testified that it was not unusual in her community to have 12-16 kids. She cited one example of 21 children. Transcript Day 20 (January 12, 2011) p. 25 lines 37-39.

[191] Jorjina Broadbent, Transcript Day 17 (January 17, 2011) p. 55 lines 44-47. See also: p. 66 lines 2-9.

[192] Campbell Affidavit #2, paras. 33-43.

[193] Howard Mackert, Transcript Day 14 (December 16, 2010) p. 65 lines 39-47.

> 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[194]

208. Women were taught that they should want to have children as long as they were biologically capable.[195] The reproductive life of women was used to its maximum potential. As Brenda Jensen explained, girls in her generation were turned over to the Prophet to be assigned in marriage at 16, that age selected because "they felt like a 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."[196] Another witness reported that girls in the church are taught that their life's purpose is to get married and have as many babies as possible for the kingdom of heaven. He said: "They're not really treated as anything but cattle."[197] Teressa Wall explained that at her school, "there was a class called child development and they would have all the girls go 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."[198] Orders relating to a woman's reproductive behaviour came, not only from husbands, but from the Prophet as well. Rowena Mackert testified that:

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[194] Transcript Day 20 (January 12, 2011) p. 27 lines 34-47, p. 28 lines 1 -3.
[195] Truman Oler, Transcript Day 23 (January 18, 2011) p. 6 lines 25-36
[196] Brenda Jensen, Transcript Day 22 (January 17, 2011) p. 11 lines 31-36. Rownena Mackert noted that it was really difficult for her mother as "her worth as a woman depended on how many faithful children that she raised for the principle and every one of her children has left": Transcript Day 10 (December 8, 2010) p. 14 lines 24-28.
[197] Don Fischer, Transcript Day 21 (January 13, 2011) p. 25 lines1-36.
[198] Teressa Wall, Transcript 10 (December 8, 2010) p. 30 lines 3 – 12.

> I remember distinctly being called into Roy Johnson's [the former Prophet's] office and he demanded to know what I was doing to keep from becoming pregnant. He lectured me on the many kinds of birth control and how it was killing babies, and that if I was doing these things I was murdering the spirits that were supposed to come down through me.[199]

209. But fecundity is only half of the reproductive control equation. In societies where men dominate women's reproductive choice and women are commodified, we will also expect to see strict prohibitions on sex *outside* of the approved unions. Thus, in the FLDS, girls are rigorously segregated from boys, with girls and boys taught to regard each other as "poisonous snakes", according to a number of witnesses.[200] The segregation policy can be extreme in its enforcement: Brent Jeffs testified that he was shipped off to "reform camp" in Canada after he was caught talking to a girl.[201] Likewise, Richard Ream testified that he was sent from Utah to work with Winston Blackmore to get him away from girls.[202]

210. In the United States, the FLDS's control mechanisms took on a fully sinister aspect. Dr. Beall spoke of the sister wives' constant presence as one of several bars to the 'escape' of mothers who wish to leave, and Carolyn Jessop's breathtaking account of her own pre-dawn escape from both the FLDS-controlled police and the church's own roving "God Squad" breathes life into the stories of

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[199] Rowena Mackert, Transcript Day 10 (December 8, 2010) p. 9 lines 16-30. See also Nichols Affidavit #1, Exhibit O, p. 350, Dictations of President Warren Jeffs on Thursday, January 5, 2006 – "I met with Allan Keate and his young wife Merilyn. She has been withdrawn from him all this time since she was married. I gave very direct training on the need to be close and how to be close. She wouldn't even hold his hand. So I said, 'Hold hands, and walk home all the way holding hands. Go have a good hour talk,' because she still hasn't hardly talked to him."

[200] Brent Jeffs, Transcript Day 15 (January 5, 2011) p. 72 lines 14-33; Don Fischer, Transcript Day 21 (January 13, 2011) p. 20 lines 11-35; Susie Barlow Affidavit #1, para 13; Truman Oler, Transcript Day 23 (January 18, 2011) p. 15 lines 6-39; Teressa Wall, Transcript Day 10 (December 8, 2010) p. 32 lines 26-7. Even the FLDS Witness #2 confirmed that the term was used: Transcript Day 26 (January 25, 2011) p. 33 lines 17-28.

[201] Brent Jeffs, Transcript Day 15 (January 5, 2011) p. 75 lines 33-41.

[202] Richard Ream, Transcript Day 17 (January 7, 2011) p. 7 lines 25-36, p. 10 lines 43-47, p. 11 lines 1 -6, p. 16 lines 31-47, p. 17 lines 1 -47, p. 18 lines 1 -2 – "When I wanted to enrol in 7th grade 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."

the FLDS culture of mutual surveillance.[203] Dr. Beall described the stress of the "climate of danger".[204]

211. Some of polygamy's exacerbation of women's inequality is related to the youth of brides. In polygynous societies, one expects that women will marry younger, and as noted, they do. But this is not simply an absolute depression of age; women and girls also marry men who are considerably older. The effect is statistically significant with respect to first marriages, and becomes more and more so with subsequent marriages (polygynous marriages tend to be spaced a number of years apart) to the point where, for instance, Witness #4, her husband's fourth wife, married him when she had just turned 17 and he was in his late thirties or early forties. It is difficult to imagine that such a relationship could be anything approaching "equality", and indeed Witness #4, under cross-examination, appeared to have difficulty even understanding the term as it applied to husbands and wives.[205]

212. Warren Jeffs explained marriage of girls in the FLDS in part because they were so malleable. After describing his marriage to yet another young teen, he wrote:

> These young girls have been given to me to be taught and trained how to come into the presence of God and help redeem Zion from their youngest years before they go through teenage doubting and fears and boy troubles. I will just be their boy trouble and guide them right, the Lord helping me. I need to work with them more. Now I have a quorum of seven young girls living at R1.[206]

213. In the FLDS, the dominance of women by men is complete. The Prophet is a man, as are all his lieutenants. The bishops are men. Each woman is

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[203] Carolyn Jessop, Transcript Day 20 (January 12, 2011) pp. 34-40.
[204] Transcript Day 8 (December 2, 2010) p. 11.
[205] Transcript Day 27, p. 19-20.
[206] Record of the President Warren Jeffs, March 2, 2004, pp. 89-90. "R1" is a coded reference to an FLDS location – each was assigned a number according to how many hours' drive it was from Short Creek (thus, for instance, Yearning for Zion was "R17").

assigned a "priesthood head"; initially, that person is her father, until she is assigned in marriage, at which point the husband takes over. Women may only enter the afterlife through their husbands, and may only enter the highest levels of the eternal kingdom by becoming plural wives. Needless to say, there are no "plural husbands".

214. Dr. Beall refers to male domination that is the rule in FLDS communities as "an institutionalized power imbalance between males and females."[207] All of the women Dr. Beall counselled had been sexually and/or physically abused. "Unwanted sex was a common feature in these relationships."[208]

215. Girls in the FLDS reported to Dr. Beall feeling like a "bargaining chip" – given to older men in order to promote their father's standing.[209] After marriage, a girl becomes her husband's property. Dr. Beall summarizes the reality by saying that "Within the polygamous community a woman is by and large an object."[210] Carolyn Jessop explained more than once how she was made to feel like chattel. She told that the day after she married Merrill, as she sat amongst her new "family", he said that a dog is better than new wife because a dog is more loyal.[211]

216. Brenda Jensen recalled her devout polygamist father's crushing disillusionment when he returned from meetings of FLDS elders where girls were bartered over and 'distributed' among them.[212] The arranged marriage of women, and especially of very young girls, is, on the evidence, the very essence of FLDS marriage practices. Carolyn Jessop spoke of the need for doctors in the Short Creek community and her desire to become a paediatrician. Carolyn was pulled out of school at grade 8. She had to beg to complete high school and

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[207] Beall Affidavit #1, para. 24.
[208] Beall, Transcript Day 8 (December 2, 2010) p. 45 lines 20-36.
[209] Beall Affidavit #1, para. 33.
[210] Beall Affidavit #1, Exhibit B, p. 10 (upper right hand corner).
[211] Carolyn Jessop, Transcript Day 20 (January 12, 2011) p. 20 lines 18 -33.
[212] Transcript Day 22 (January 17, 2011) p. 12.

could only do so through a home program. She pleaded with her father to ask the Prophet, Leroy Johnson at the time, for the opportunity to attend college so that she could become a doctor. Her father was hesitant about asking the Prophet. Carolyn described the Prophet's response:

> Uncle Roy said I could not be a doctor, but he would give me permission to be a teacher. However, if I wanted to pursue a college education I belonged to Merril Jessop and I would have to marry him before I left. The other understanding is that Merril would be my priesthood head. He would own me. I would be his. If he decided that he didn't want his wife to have a college education, there was that conflict, but Uncle Roy had given permission, so there was also the opportunity that I might be able to.[213]

217. Dr. Henrich quotes the Anthropologist William Jankowiak's description of FLDS practices as follows:

> In this setting, fathers often exchanged daughters in order to marry them... men wanted to marry off their daughters before they could decide to select from within their age cohort. By the 1990s Second Ward fathers began to negotiate marital exchanges not for themselves but for a favourite son, or in some cases a grandson.[214]

218. Dr. Henrich reports Jankowiak's findings that within the First Ward, families also gave/give daughters as a kind of patronage to the prophet:

> The prophet's age does not restrict families from offering their daughters to him.. the reasons why fathers give their daughters to the prophet (often with a wife's encouragement) are to gain prestige and to obtain material and spiritual benefits.[215]

219. Marriages in the FLDS are centrally arranged through the Prophet's "revelations". Although some witnesses report "courtship marriages", the more common practice by far is that of "assignments" made on short notice – Witness #4, for instance, described her own marriage a week after her 17th birthday to a

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[213] Transcript Day 20 (January 12, 2011) p. 9 lines 46-47, p. 10 lines 1-4.
[214] Henrich Affidavit #2, Exhibit A, pp. 9-10.
[215] Henrich Affidavit #2, Exhibit A, p. 10.

man she had never met. She was married half an hour after learning his identity, and two hours after that was being driven to Canada to begin her new life with her husband. Carolyn Jessop was awoken from bed at 2 in the morning and told she would be married. She was then kept within her parents' sight until the wedding could take place a few days later.[216] These arranged marriages[217] on little or no advance notice[218] are routine in the FLDS.

220. Women and their children can be "reassigned" to other men at the whim of the Prophet.[219] Existing wives may have little or no choice in the new marriage,[220] and at times are not informed of the wedding until after it has occurred.[221]

221. The necessity in a polygynous society that women's options be strictly controlled means the imposition of a general culture of subservience and obedience of children and adults, male and female.

222. Many witnesses referred to the pliability of FLDS members. Dr. Beall said

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[216] Transcript Day 20 (January 12, 2011) p. 9 lines 20 – 27, p. 15 lines 36-47, p. 16 lines 1 -4.
[217] Ruth Lane, Transcript Day 15 (January 5, 2011) p. 83 lines 4-14; Howard Mackert, Transcript Day 14 (December 16, 2010) p. 61 line 40 – p. 62 line 9, p. 74 lines 36-42; Rowena Erickson Affidavit #1, para. 18; Susie Barlow Affidavit #1, para. 12; Truman Oler, Transcript Day 23 (January 18, 2011) p. 8 lines 26-30, 39-41; Lorna Blackmore Affidavit #1, paras. 8, 11-12; Carolyn Jessop, Transcript Day 20 (January 12, 2011); Sarah Hammon, Transcript Day 10 (December 8, 2010); Brenda Jensen, Transcript Day 22 (January 17, 2011); Rowena Mackert Transcript Day 10 (December 8, 2010) p. 7 lines 14-24, p. 10 lines 20 -29; Richard Ream, Transcript Day 17 (January 7, 2011) pp. 4-5, p. 10 lines 21-47, p. 11 lines 1-6, pp. 20, 25; Teressa Wall, Transcript Day 10 (December 8, 2010) pp. 22- 27, 29.
[218] Brent Jeffs, Transcript Day 15 (January 5, 2011) p. 71 lines 7-17; Ruth Lane, Transcript Day 15 (January 5, 2011) p. 87 lines 10-18; Brenda Jensen, Transcript Day 22 (January 17, 2011) p. 17 lines 28-38; Rowena Mackert, Transcript Day 10 (December 8, 2010) p. 8 lines 4-11; Richard Ream, Transcript Day 17 (January 7, 2011) p. 10 lines 30-36; Teressa Wall, Transcript Day 10 (December 8, 2010) p. 33 lines 22-26.
[219] Brent Jeffs, Transcript Day 15 (January 5, 2011) p. 68 lines 28-38; Susie Barlow Affidavit #1, paras. 6-10, 12; Teressa Wall, Transcript Day 10 (December 8, 2010) p. 39 lines 1-23, p. 56 lines 9-47, p. 57 lines 1-15.
[220] Ruth Lane, Transcript Day 15 (January 5, 2011) p. 88 lines 20-32, p. 95 lines 28-36; Carolyn Jessop, Transcript Day 20 (January 12, 2011) p. 18 lines 34-47, p. 19 lines 1-5; Teressa Wall, Transcript Day 10 (December 8, 2010) p. 62 line 15.
[221] Witness #4.

that "Polygamous conditioning discourages independent thinking and feeling",[222] and that this indoctrination impairs development and function of the brain in adolescence.[223] Brent Jeffs described the main teachings of the FLDS as perfect obedience and perfect faith – "...basically doing everything that they ask no matter what without question, without opinion, nothing."[224] Many other witnesses described the process of indoctrination and the impairment of independent and critical thinking.[225]

223. Training of children for "obedience" appears to have been extreme in fundamentalist Mormon communities[226]. Two witnesses independently described the use of suffocation of crying infants to train obedience.[227] Brenda Jensen testified as to the frequent use of physical violence to instil rigid obedience, not only to parents, but to the dictates of the church.

224. Religious instruction provides the necessary preparation of girls to accept, even welcome, marriage to much older men, a process Dr. Beall describes as "sexual grooming" whereby young girls are "conditioned to marry at a young age,

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[222] Beall Affidavit #1, paras 23, 32.
[223] Transcript Day 8 (December 2, 2010) p. 21 line 36 – p. 22 line 44
[224] Transcript Day 15 (January 5, 2011) p. 70 lines 27-38. See also Howard Mackert, Transcript Day 14 (December 16, 2010) p. 75 lines 9-30, p. 76 lines 37-47 ("...just the ability to make a decision and stick with and see it through is just really void in that community.")
[225] Howard Mackert, Transcript Day 14 (December 16, 2010) p. 89 lines 2-12; Don Fischer, Transcript Day 21 (January 13, 2011) p. 22 lines 7-17; Rowena Erickson Affidavit #1, paras. 15, 20; Susie Barlow Affidavit #1, para. 19. Carolyn Jessop, Transcript Day 20 (January 12, 2011) p. 4 lines 7 – 17, p. 10 lines 14-28; Brenda Jensen, Transcript Day 22 (January 17, 2011) p. 5 lines 24-36, p. 20 lines 5-16, p. 23 lines 10-13; Teressa Wall, Transcript Day 10 (December 8, 2010) p. 44 lines 8-18, p. 47 lines 27-47, p. 48 lines 1-7. Dr. Beall summarized (Affidavit #1, paras. 29, 44-45) that "Under the conditions of the FLDS community, the adolescent girl or boy cannot give voluntary consent".
[226] Beall Affidavit #1, Exhibit B, p. 8 (upper right hand corner); Don Fischer, Transcript Day 21 (January 13, 2011) p. 14 lines 4-12; Rowena Erickson Affidavit #1, para. 5; Truman Oler, Transcript Day 23 (January 18, 2011) p. 5 lines 20-26; Brenda Jensen, Transcript Day 22 (January 17, 2011) p. 13 lines 7-15, p. 20 lines 5-16, p. 23 generally, p. 24 lines 24-31.
[227] Carolyn Jessop, Transcript Day 20 (January 12, 2011) p. 48; Brenda Jensen, Transcript Day 22 (January 17, 2011) p. 9 lines 39-47, p. 10 lines 1-6.

to whomever the prophet directs". He says that this raises a "core issue" of "whether young women are capable of giving true consent to sexual contact."[228]

(5) Trafficking in Girls

225. Dr. McDermott's regression analysis confirmed the association of polygamy with female trafficking cross-culturally.[229]

226. The evidence from Bountiful is, again, striking in the degree of its corroboration. A number of the personal witnesses described the movement of teenagers from communities in the US to be brides in Bountiful,[230] and some also described movement the other way.

227. Dr. Beall described the trafficking between the US communities and Bountiful as follows:

> A I learned from my patients that most of them had travelled back and forth between what they call Short Creek, which means the Hildale/Colorado City area, and Bountiful. There was a lot of travel back and forth especially as young girls, potential marriage partners, that kind of thing.[231]

228. The BC Vital Statistics Agency's birth registration records show that, of the 65 teen mothers documented in the Bountiful cohort, over half of them (57

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[228] Transcript Day 8 (December 2, 2010) p. 24 lines 1-39; Affidavit #1, paras. 37-40; Affidavit #2, paras. 23-42. See also the evidence of Teressa Wall, that it was viewed by many young girls as prestigious to "marry" the Prophet or a Bishop and that "there were a lot of girls that either asked to marry Rulon or Winston". Marrying the Prophet or a Bishop meant that generally you would be well cared for, although as Teressa noted, now Winston has so many wives that, " a lot of his wives are living in poverty": Transcript Day 10 (December 8, 2010) p. 37 lines 12 – 29.
[229] Exhibit 41 at pp. 18-19: Expert report of Dr. McDermott, 16 July 2010.
[230] Ruth Lane, Witness #2, Witness #4; Carolyn Jessop, Transcript Day 20 (January 12, 2011) p. 5 lines 19 -21.
[231] Transcript Day 8 (December 2, 2010) p. 16.

percent) had been born outside British Columbia (32/65 in Utah, 1/65 in Arizona, and 4/65 in Alberta).[232]

229. Recall the description of the process by Witness #4: she was born and raised into the FLDS in the United States, then received an 'assignment' by the Prophet to marry a foreign stranger on a half hour's notice. She was bundled into a car for the 18-hour drive north and taken across the border with a false note from the girl's parents (listing the purpose of the entry as to "visit an aunt").[233] Then the whole process was repeated with Witness 4's 15-year old junior wife, half a year later.

230. Perhaps the most eloquent documentary evidence concerns James Oler, the Bishop of the Bountiful FLDS community and a Participant in this Reference. In March, 2004, FLDS records indicate that Mr. Oler delivered two teenaged sisters to the United States to be married by Warren Jeffs. A few months later, he delivered his own 15-year-old daughter. Eleven minutes after witnessing her marriage, he himself married a 15-year-old girl, who moved back with him to Canada.

231. Ruth Lane, Winston Blackmore's former wife, testified that Blackmore married her a week after he married two American sisters, all in the US. Blackmore drove back to Canada with his three new wives.[234] Truman Oler reported that girls from the United States were always being placed with men in Canada, and vice versa, and that it was common for girls to be sent across the border for marriage.[235]

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[232] Klette Affidavit #1. This is not to say that the total is representative as a percentage (because the cohort was selected, in part, based on the birthplace of the mothers in known FLDS communities), but even as raw numbers the figure is striking, given a community of only a few hundred residents.
[233] Transcript Day 27 (January 26, 2011) pp. 24-25.
[234] Ruth Lane, Transcript Day 15 (January 5, 2011) p. 87 lines 10-18.
[235] Truman Oler, Transcript Day 23 (January 18, 2011) p. 9 lines 36-42, p. 10 lines 21-31.

232. We now also know something of the scale of movement of girls *from* Bountiful. In 2004 and 2005, at least three girls, aged 12 and 13, were taken to the United States by their parents to be "celestially married" to Warren Jeffs. The church records referenced in the Affidavit of Nick Hanna indicate more than a dozen girls trafficked between Bountiful and the FLDS communities in the US, with an ongoing investigation of many more.

233. In other contexts, the 'importation' of brides into a polygynous community should offset the age-depressing effects of polygyny. It does not do so at Bountiful or elsewhere in the FLDS because the entire pool of fundamentalist Mormons is affected by the practice of polygyny on both sides of the border. So while there may be more girls and women available through trafficking, this does not ease the overall downward pressure on their age. Trafficking in the FLDS is simply a reflection of the intensity of the market in young girls created by polygamy.

(6) "Lost Boys", Crime, and Antisocial Behaviour

234. The other obvious result of polygamy's simple mathematics is that it will result in an increased number of unmarried boys and men, and in fact ensure that a significant number of men will never be able to marry.

235. This is of course of serious concern to boys growing up in polygamous societies, but it is also problematic for those societies themselves because, as all the experts in this case agree, the more narrowly-distributed opportunities to reproduce are, the more risk-taking and violent behaviour will be seen among men. Harvard psychologist Steven Pinker writes:

> Among polygynous mammals such as ourselves, reproductive success varies enormously among males, and the fiercest competition can be at the bottom, among males whose prospects teeter between zero and nonzero. Men attract women by their wealth and status, so if a man

> doesn't have them and has no way of getting them he is on a one-way road to genetic nothingness. As with birds that venture into dangerous territories when they are near starvation, and hockey coaches that pull the goalie for an extra skater when they are a goal down with a minute to play, an unmarried man without a future should be willing to take any risk. As Bob Dylan pointed out, "When you got nothing you got nothing to lose."
>
> Youth makes matters even worse. The population geneticist Alan Rogers has calculated from actuarial data that young men should discount the future steeply, and so they do. Young men commit crimes, drive too fast, ignore illnesses, and pick dangerous hobbies like drugs, extreme sports, and surfing on the roofs of tram cars and elevators. The combination of maleness, youth, penury, hopelessness, and anarchy makes young men indefinitely reckless in defending their reputation.[236]

236. The Amicus's expert evolutionary psychologist, Dr. Shackelford, quite enthusiastically agreed with the description of polygamy that included the following passages:

> Whenever polygyny is allowed, men seek additional wives and the means to attract them...
>
> ...Under polygyny, men vie for extraordinary Darwinian stakes – many wives versus none – and the competition is literally cutthroat. Many homicides and most tribal wars are directly or indirectly about competition for women...[237]

237. There is substantial cross-cultural evidence that even a modest degree of polygyny may have an enormous impact on levels of crime and antisocial behaviour. Dr. Henrich reviewed the problem three ways. First, he used data relating crime statistics to degree of polygyny, cross-culturally. GDP, Gini coefficient (income equality), and degree of democracy were held constant. Second, the same analysis was done but using the percentage of unmarried men over 15 as a proxy for polygamy. The third prong of Dr. Henrich's analysis was to look at sex ratio information from India and China, which have, through male

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[236] Steven Pinker, *How the Mind Works* (New York: Norton, 1997) at pp. 497-98 (Isbister Affidavit #1, Exhibit B.89).
[237] Pinker, *How the Mind Works*, at pp. 476-78; Shackelford, Transcript Day 13 (December 15, 2010) p. 25, 30.

selection preference, developed an excess of unmarried young men similar to that which polygyny creates in a society. The advantage of the China studies is that the 'one child policy' that created the imbalance came into effect at different times in different provinces, allowing the effect on crime not only to be measured, but allowing causation to be confidently established.[238]

238. Each of these methodologies produced the same striking prediction: as the degree of polygyny increases and even a relatively very small pool of lower-status, unmarried men is created, crime rates (particularly violent crimes like murder and robbery) will increase, and strikingly so. Dr. Henrich notes that these predictions appear consistent with historical accounts of areas where marriage opportunities were scarce, and with the anthropological record.[239]

239. The Amicus apparently intends to argue that "Within the Canadian population, polygamy is statistically almost non-existent. The pool of unmarried men that already exists in Canada is many times greater than the populations of all the polygamous communities in Canada combined."[240] He relies on the data supplied by Dr. Zheng Wu. However, when confronted with this passage from the Amicus's Opening Statement in cross-examination, Dr. Wu said that there are no figures available for the number of polygamists in Canada. Asked to comment on the subsequent proposition advanced by the Amicus that "Any 'pool of unmarried men' that might realistically be created through polygamy is statistically meaningless." – again, presumably in light of Dr. Wu's figures – Dr. Wu confirmed that his figures did not demonstrate anything of the sort.[241]

240. During his direct examination, Dr. Wu did produce a document indicating that there was *already* an imbalance in the gender ratios of single men and women in the Canadian population (Exhibit 110). This, however, does not assist

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[238] Transcript Day 11 (December 9, 2010) pp. 46-47.
[239] Henrich Affidavit #1, Exhibit B, pp. 42-46.
[240] Amicus's Opening Statement, para. 45.
[241] Transcript Day 9 (December 7, 2010) pp. 54-55.

the Amicus, and in fact does the opposite: it means that there can be *no* absorption effect, as there might be if there were a disproportionate number of women, as Dr. Henrich pointed out when the document was put to him in examination in chief.

241. The evidence from the FLDS and Bountiful put a human face on the "lost boys" problem. In those communities, of course, the criminal harm will not be apparent; the "excess" boys and men can simply be expelled, or will leave on their own when their prospects appear so bleak that they overcome family loyalties and religious affinity. The boys are turned out for real or imagined behavioural problems[242] or "rebelliousness". Carolyn Jessop testified that as far back as she can remember young boys had to be excommunicated or otherwise sent away from the community.[243] Don Fischer, for example, was expelled when he was 15 years old. He and his brother were given $100, and a garbage bag with clothes.[244] Richard Ream was told point blank that he would not be eligible for marriage in the FLDS Church, but in hindsight says, "Honestly, Warren Jeffs telling me to remove myself from that society is probably the only good thing the man's ever done for me".[245] Others were sent to work for church-controlled industries for little or no compensation, in what appears to have been a common practice.[246] Benjamine Bistline writes of the arithmetic of polygamy:

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[242] Dr. Beall reported that boys he treated had been expelled from the community on one of 2 grounds: reassignment of father, or the umbrella term of "rebelliousness": Transcript Day 8 (December 2, 2010) p. 16 line 45 – p. 17 line 4, p. 20 line 39 – p. 21 line 10. Dr. Beall says that young boys were aware of the reality that necessitated their being ostracized. Young men had to be kicked out of the community to make room for older men marring younger girls: Affidavit #1, para. 17. Also, Teressa Wall testified to four of her brothers being kicked out of their home and the community: Transcript Day 10 (December 8, 2010) p. 22 lines 27-35, p. 23 lines 6 – 21, p. 41 lines 13-27. See also: Sarah Hammon Transciprt Day 10, (December 8, 2010) p. 80 lines 39-47, p. 81 lines 1-23.

[243] Transcript Day 20 (January 12, 2011) p. 53 lines 10-14. See also Rowena Mackert, Transcript Day 10 (December 8, 2010) p. 18 lines 15-22; Mary Mackert, Transcript Day 19 (January 11, 2011) p. 34 lines 26-42.

[244] Don Fischer Jan 13/ Day 21 Page 17, line 39; Page 18, line 4; Page 18, lines 22-36

[245] Richard Ream, Transcript Day 17 (January 7, 2011) p. 25 lines 10-37, p. 26 lines 11-39.

[246] Brent Jeffs, Transcript Day 15 (January 5, 2011) p. 76 lines 7-21; Howard Mackert, Transcript Day 14 (December 16, 2010) p. 62 lines 21-30; Don Fischer, Transcript Day 21 (January 13, 2011) p. 15 lines 28-46 (sent to Bountiful "reform camp" in Canada, kept working night and day and was paid $60 Canadian every 2 weeks); Truman Oler, Transcript Day 21 (January 13, 2011) p. 20 lines 10-25 (worked full time over the summers and was paid $20 every 2 weeks, went to

> The birth ratio of boys to girls among the Polygamists is the same as it is anywhere in the world, pretty much one boy to one girl. If one man has even two wives, then some boy in the society must not get married. The doctrine of the Polygamists is that a man must have at least three wives to reach the highest degree of heaven. The perceived importance of a man goes up by the number of wives he has, thus the ratio of wives to a man is important; those in leadership positions have wives numbering into the tens. This causes a dilemma for the Polygamist Leaders, what to do with the surplus of boys.[247]

242. According to one FLDS witness, the mathematical problem of polygamy is offset because boys in the community engage in high-risk activities or jobs and are simply killed off,[248] a macabre manifestation of evolutionary psychology's prediction of increased risk-taking among boys in a scarce marriage market such as that created by polygyny. The witness perhaps exaggerated, but the evidence of "lost boys" driven from the community implicitly or explicitly because they have no future there is both predictable and compelling.

243. Dr. Henrich quotes the anthropologist William Jankowiak, who spent 15 years studying the FLDS communities at Short Creek and Centennial Park, as follows:

> There is a shortage of eligible women to marry in every polygynous society, and this is a primary factor responsible for intergenerational conflict in Colorado City/Centennial Park. Senior males are always on the marriage market and thus compete with younger men for mates in a limited pool of eligible women.... The competition for mates is acute... Young men know... that if they do not find a girlfriend before they graduate from high school, they probably will never have one. Without a girlfriend, they will leave the community to find a wife.

244. Dr. Beall has testified about a number of young men he has treated who were "expelled" from the US communities, and the problems they encountered in the greater society. Carolyn Jessop told the story of "Sam", a friend of her son

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work full time at age 15 and made $60 every 2 weeks); Richard Ream, Transcript Day 17 (January 7, 2011) pp. 7-8,12-15, 19, 31-32.

[247] Bistline Affidavit #1, referencing pp. 142-143 of his appended book.

[248] Witness #2, Transcript Day 26 (January 25, 2011) p. 62 lines 8-13.

Arthurs, who unable to cope outside of the community took his own life. Carolyn explained her concerns with the surplus boys:

> 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.[249]

245. For the Amicus, Professor Campbell gave evidence to cast doubt on the phenomenon of 'lost boys'. She said that none of her interviewees mentioned it as an issue.[250] In the face of the evidence going the other way, her evidence is unpersuasive. Under cross-examination, Professor Campbell acknowledged that 'lost boys' are frequently mentioned in the literature as a harm associated with polygamous practice,[251] but agreed that she had never asked any of her interviewees about the problem.[252] She further admitted that, in fact, she had deliberately avoided interviewing any males in the community on that or any other topic.

246. In any event, there is compelling evidence that the Bountiful FLDS community has somehow dealt with the numbers problem. The demographic breakdown that they have provided indicates a significant number of missing boys and men, compared to women. Either through the recruitment of new women (from US communities), the marriage of children, or through the effective expulsion of excess men (and, given all the convergent evidence, apparently through some combination of all three), the demands of polygamy for a gender imbalance in the Bountiful FLDS community have been satisfied.[253]

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[249] Transcript Day 20 (January 12, 2011) p. 54 lines 15-27.
[250] Transcript Day 7 (December 1, 2010) p. 42 lines 8-15.
[251] Transcript Day 7 (December 1, 2010) p. 34 lines 27-30.
[252] Transcript Day 7 (December 1, 2010) p. 42 Lines 16-26
[253] Henrich Affidavit #2, Exhibit A, pp. 10-11.

247. The mathematics of polygyny in the FLDS have another implication at Bountiful and elsewhere. If it is true that the FLDS believes that achievement of the highest level of exaltation require the practice of polygamy in this life, or even that one's eternal status is affected by marriage and procreation, then a substantial proportion of the population are prevented from fulfilling their own religious ambitions in even a limited, monogamous way by the dominance of polygamy practiced by a few older men. A number of the personal witnesses described the lengths they would go to in order to curry favour with the church authorities and secure a first wife. Indeed the promise of an opportunity to marry *at all* seemed to be an institutional control mechanism within the FLDS.

(7) Educational Impacts

248. Cross-culturally, polygyny is correlated with poor educational outcomes for women.

249. The evidence from Bountiful is intriguing in this regard. It is uncontroverted that Bountiful students have a very low high school completion rate, in that they almost never earn provincial accreditation for grade 12 completion. This appears to be the case for both women and men. Of the students who were in grade seven at Bountiful Elementary and Secondary School (BESS) (an FLDS-run Independent School at Bountiful) between 1994/5 and 2003/4, only 7 percent of female students and 6 percent of males were issued either a Dogwood or Adult Diploma signifying completion. This is compared to provincial averages of 78 percent of females and 72 percent of males. It is much lower than the completion rate for Aboriginal students in the province (41 percent), and cannot be explained by reference to the fact that BESS does not offer provincially-accredited graduation, because it remains a tiny fraction of that of other isolated communities where this is also the case, such as Alert Bay in the far North, and Bowen Island. In those communities, students

either commute to a more distant school in their upper years, or complete their provincial qualifications through distance education.

250. Nor can the rates be explained by reference to a theory of "poor start", as might be the case with, for instance, Aboriginal populations. The FLDS introduced evidence through its cross-examination of Mr. Vanderboom (from the BC Ministry of Education) that, at least as of Grade 4, BESS students are among the most accomplished in the province as measured by the provincially-standard FSA test. Clearly, something is happening to turn ordinary elementary students into high school dropouts in Bountiful. In the Attorney's submission, the natural inference to be drawn is that girls are being 'streamed' toward a future as wives and mothers, while boys, if they stay, are expected to serve the local industries.

251. Many personal witnesses testified that education not valued in the FLDS, [254], and many children do not finish high school. Instead, there has been an emphasis on acquiring "practical skills" such as mechanics, midwifery, etc.[255] This devaluing of education beyond the elementary years was a frequent theme of the personal witnesses – girls left school to start families, boys to work.[256] Truman Oler recalled that the boys at Bountiful joked that all they needed to do was learn to count to 175 because that is how many fence posts were in a bundle.[257] Truman left school after grade 9 to go to work – he testified that "I don't even recall knowing what a college was through my younger days."[258]

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[254] See for example the FLDS Records seized by the Texas authorities which are attached as Exhibit Q to the Nichols Affidavit #1, at p. 492: "Dear Uncle Warren, In regard to sending children to school, we have Kendra who is now seven years old and she desires to go to first grade. ...She knows she has to be obedient and sweet at home before she can go to school. LeAnn [the author's wife] has finished 8th grade and is wondering what I would like her to do. Unless you direct otherwise, I would like her to be home where there is much to do in taking care of the children, house and yard."

[255] Beall Affidavit #1, para. 18.

[256] Howard Mackert, Transcript Day 14 (December 16, 2010) p. 73 lines 26-39; Brent Jeffs, Transcript Day 15 (January 5, 2011) p. 76 lines 29-38; Susie Barlow Affidavit #1, para. 18; Don Fischer, Transcript Day 21 (January 13, 2011) p. 22 lines 18-42; Teressa Wall, Transcript Day 10 (December 8, 2010); Richard Ream, Transcript Day 17 (January 7, 2011) p. 7 lines 9-28, p. 13 lines 18-40; Mary Mackert, Transcript Day 19 (January 11, 2011) p. 22 lines 6-42.

[257] Truman Oler, Transcript Day 23 (January 18, 2011) p. 16 lines 6-19.

[258] Truman Oler, Transcript Day 23 (January 18, 2011) p. 14 lines 26-39.

Teressa Wall testified that her husband Roy, who grew up in Bountiful, "got snatched out of school and sent to work" in 7th or 8th grade. Teressa explained that, "Winston felt like that boys were getting a better education working than in books and so I don't know very many boys at all that actually finished high school. There was some so bad they didn't even know how to read and they were sent to work." [259] While a member of the FLDS, Carolyn Jessop's son Arthur was only allowed to attend school only until the end of grade 7. After that, from the age of 12 until 15, when he left the FLDS with his mother, he worked construction with his brothers. It was a type of work that he was used to having worked around heavy equipment since he was 6 years old.[260] After leaving the FLDS Arthur completed his high school and became the first of Merril's 26 sons to go to college.[261]

252. FLDS historian Benjamin Bistline wrote in a passage of his book referenced in his affidavit that:

> The Polygamists teach that love is not necessary before marriage. Women are inferior to men and must learn to school their feelings, yielding to the desires of their husband. The girls of Colorado City Polygamists are considered as chattel, to be used by the leaders to reward faithful men of the Group for their support of the Priesthood Work.
>
> Very few of them ever achieve any more than bearing as many children as possible, usually between the number of 15-20. Most are expected to work, turning what money they earn over to their husband to use as he sees fit. A few become school teachers to work in the public schools, while others become nurses to work in the hospitals of nearby communities. None are ever allowed to become professors, doctors, lawyers, or achieve other professional goals. Mostly they work at whatever unskilled jobs are available in the area.[262]

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[259] Teressa Wall, Transcript Day 10 (December 8, 2010) p. 54 lines 8-14.
[260] Carolyn Jessop, Transcript Day 20 (December 12, 2010) p. 13 lines 25-29, p. 15 lines 3-7.
[261] Carolyn Jessop, Transcript Day 20 (December 12, 2010) p. 46 lines 5-11.
[262] Bistline Affidavit #1, para. 22.

253. It is commonly accepted, even acknowledged by each of the FLDS anonymous witnesses, that not a single Bountiful student has gone on to earn professional accreditation in anything but nursing, midwifery, or teaching. These are, perhaps not coincidentally, the three professions where church control would be particularly advantageous in keeping prying eyes of outsiders away from issues around the sexual exploitation of children. Witness #4 described how, after she and her 15-year-old sister wife were brought up from the United States to marry their husband, they rode the school bus together to BESS.[263] She also noted that school officials, like all other members of the community, expressed to her knowledge no concern at all that the two had become the plural wives of a man in his 40s.[264] It is difficult to imagine any other context where this could be considered anything but worthy of official concern in the school setting.

D. Polygamy and the Polyamorists

254. The evidence before the Court with respect to polyamory is scant and somewhat indirect. The evidence of the Canadian Polyamory Advocacy Association's five affiants describes only polyandrous relationships among mostly middle-aged citizens. The relationships described were all of less than three years' duration.

255. It does not appear that this handful of polyandrous relationships is representative of the entire "movement" (if it can be called that), as the respondents to the CPAA's own poll indicate a heavy preference for polygyny over polyandry or same-sex relationships.[265] This is so even though the poll was only of those polyamorists who would declare themselves to be committed to equality between the sexes. The literature put forward by the CPAA likewise offers little beyond anecdotal evidence of the nature of polyamory as a phenomenon, and in particular no article provides hard figures regarding the

[263] Transcript Day 27 (January 26, 2011) p. 15 lines 6-44.
[264] Transcript Day 27 (January 26, 2011) pp. 15-16.
[265] Cosco Affidavit #2.

prevalence of polygyny versus polyandry among polyamorists, however that term is defined.

256. It is an intriguing question whether the spread of polygamy within a population of perfectly egalitarian citizens would overcome the evolved tendency to polygyny, and thus mute the consequences predicted by Dr. Henrich. But unfortunately, there is no evidence that it would do so, even if such perfect equality had been achieved in Canada.

E. Harms Not Subject to Conclusive Proof

(1) Antidemocratic and Macroeconomic Effects

257. Dr. Walter Scheidel of Stanford University traces the origins of what he calls socially-imposed universal monogamy (SIUM) from its roots in the early democracies of Ancient Greece through to modern times. Dr. Scheidel's work, like that of Dr. Henrich and Dr. Witte, a witness of the federal Attorney General, demonstrates that the imposition of monogamy has been concurrent with the growth and success of the Western democratic way of life and the development of a rights-based culture, to the point where some theorists suggest that one would not be possible without the other. Harvard evolutionary psychologist Steven Pinker has observed that in recent centuries "egalitarianism and monogamy go together as naturally as despotism and polygyny".[266]

258. Although the experts universally observe that rights-based democracies appear to be incompatible with polygamy, the precise causation cannot be determined (that is, does monogamy contribute to democracy, or does democracy lead to monogamy, or is there another development that leads to both?). Stanford Classics Chair Dr. Scheidel describes the debate:

> Price's potentially most promising observation is that contemporary monogamous societies that can be classified as successful (in terms of

[266] Stephen Pinker, *How the Mind Works* (New York: W.W. Norton & Co., 1997) at 478.

> the indicators listed above) are otherwise quite diverse (encompassing European, Latin American, and South-East Asian countries) whereas polygamous societies that are less successful are also otherwise quite diverse (encompassing Central Asian Muslim, Arab, and sub-Saharan African countries). This would seem to lend a measure of support to his claim that SIUM has indeed been a distinct and causally significant factor in societal development. However, I am not aware of scholarship that would address this issue in greater detail.[267]

259. Dr. Scheidel, after extensive review of the available literature, notes that "the causes for the 'rise of the West' continue to be hotly debated in the academic literature and no consensus appears to be in reach".[268] In other words, the hypothesis is plausible, but unprovable.

(2) Harm to Moral Values

260. The Supreme Court has said that "morality" is a proper subject for the criminal law. It is open to Parliament to legislate "on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society".[269] The Court in *Malmo-Levine* noted that this does not justify codification of "mere 'conventional standards of propriety' but must be understood as referring to *societal values beyond the simply prurient or prudish* [emphasis added]".[270]

261. The Attorney accepts that, if harm to "conventional standards of propriety" were all that supporters of section 293 could invoke, justification for the polygamy ban would be tenuous. The Challengers' arguments seem largely premised on the belief that the prohibition against polygamy is, as a societal value, "simply prurient and prudish". The evidence in this case demonstrates that this is not the case. But even so, the fact that socially-imposed monogamy is so deeply imbedded in the moral fabric of our society cannot be dismissed lightly. The courts' deference to Parliament on matters of morality, while certainly not

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[267] Scheidel Affidavit #1, Exhibit B, p. 15.
[268] Scheidel Affidavit #1, Exhibit B, p. 15.
[269] *Malmo-Levine* at para. 116, citing *R. v. Butler*, [1992] 1 S.C.R. 452 at 498
[270] *Malmo-Levine* at para. 77, citing *R. v. Butler*, [1992] 1 S.C.R. 452 at 498; *R. v. Murdock* (2003), 11 C.R. (6th) 43 (Ont. C.A.) at para. 32.

absolute, reflects an understanding that strong moral codes may evolve for an important reason, even if it is imperfectly understood at any given time.

(3) Harms to the Value of Equality and the Protection of Vulnerable Groups

262. Polygamy, when permitted, manifests overwhelmingly as polygyny. In every significant religious or cultural manifestation, this means that the women in the relationship are limited to one partner of the other sex while the men are not. This inequality reinforces also the simple apparent mathematics of a polygynous household: the suggestion that a man is 'worth' several women.

263. Equality is one of the fundamental values of Canadian society[271] – it is enshrined in sections 15 and 28 of the *Charter*, and its protection is beyond "simply prurient or prudish" concern. The more important the institution, the more important it is that we honour the right to equality within that institution. Marriage is an institution sufficiently fundamental to Canadian life that it was the subject of careful constitutional assignment in 1867. It is certainly true that our ideas of what marriage is and should be has changed over time, but the centrality of the human pair bond remains a defining characteristic of Canadian culture, to the point where its recent extension to gays and lesbians is seen as a watershed moment in those groups' quest for equal dignity and status.

264. Section 293 protects women and children from commodification and exploitation. A criminal law may be justified without proving direct harm if it protects vulnerable groups, such as racial minorities,[272] women,[273] or children[274].

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[271] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.
[272] *R. v. Keegstra*, [1995] 2 S.C.R. 381, the Supreme Court upheld the hate speech provision in the *Criminal Code* under s. 1 because of the potential that it could increase attacks on minorities.
[273] In *R. v. Butler*, [1992] 1 S.C.R. 452 the Court wrote at p. 497 that "legislation proscribing obscenity is a valid objective which justifies some encroachment on the right to freedom of expression" because of the impact of the exploitation of women and children, depicted in publications and films, which can in certain circumstances, lead to "abject and servile victimization".

This law protects women, children, and in particular vulnerable female members of immigrant populations and discrete and insular religious sects.

265. More broadly, to the extent that polygyny is inherently unequal and conceptually degrading to women and girls, the prohibition serves to advance their equality throughout society. Equality within the family unit is especially worthy of legal reinforcement. Children experience societal norms first and most importantly within those units, and that is especially true within closed or insular minority groups where other cultural influences are *ipso facto* limited. And while it is true that gender inequality can exist within monogamous marriages, it is not a defining feature of such marriages, as it is of polygynous ones.

266. This last point is worthy of some weight, because an important role of the criminal law is public denunciation; it is an expression of society's deepest values, including, in this case, the value it attributes to women's equality.

VI. Section 2: Religion, Expression and Association

A. Section 2(a): Freedom of Religion

267. It is trite that religiosity of a practice does not automatically render it immune from prosecution. There are very few crimes that have not, at one time or another, been excused on religious bases, from petty fraud to genocide. Some clearly criminal activities, such as female genital mutilation, 'honour killings', ritual animal sacrifice and cannibalism may be closely connected with deep religious or cultural beliefs. The religious origin or nature of a prohibited activity, in other words, is not the end of the analysis, but the beginning.

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[274] In *R. v. Sharpe*, [2001] 1 S.C.R. 45, the Court upheld the prohibition on the possession of child pornography (even where the possession of the material was not directly related to any quantifiable harm), noting that the prevention of harm by reducing the market for child pornography justified the limit on freedom of expression.

268. In *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, Iacobucci J. wrote (for the majority) at para. 56:

> ...[A]t 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.

269. But there are two other stages to the analysis: the first asks whether the infringement is trivial or insubstantial (which, again, the Attorney does not dispute for present purposes); the second requires the religious freedom to be balanced against other rights and interests. Iacobucci J. wrote further in *Amselem*, at para. 62:

> ...[O]ur jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises. [Emphasis added]

270. *Amselem* confirmed a broad interpretation of 2(a) *Charter* protections in two other important respects: first, it reiterated the rejection, dating from *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, of a distinction between religious views and practices, holding both to be equally protected. And second, it rejected the notion that the protected views must be part of an established faith, or even

shared with others: it was enough that they were sincerely held by the individual asserting the right.

271. The evidence indicates that it is possible for individuals to observe any religion in which polygamy is accepted or encouraged without actually practicing polygamy, although some, including some fundamentalist Mormons, do appear to believe that there are advantages in the afterlife to those who practice, as opposed to simply espouse, the principle. The Attorney therefore accepts that some people practice polygamy in accord with deeply-held religious views.[275]

272. Since *R. v. Big M*, the Court has confirmed that "religious freedoms were nonetheless subject to limitations when they disproportionately collided with other significant public rights and interests" and that other jurisdictions too have generally recognized that "the invocation of freedom of religion does not, by itself, grant immunity from the need to weigh the assertion against competing values or harm."[276] The question remaining is whether these harms should be an internal limit to section 2(a) or weighed under section 1.

273. The Attorney says that, where the "competing values" are themselves protected *Charter* rights, it is appropriate to weigh them in the balance at the section 2(a), rather than the section 1 stage.[277] This is especially so in light of the overriding presence of section 28. So even where polygamy can be said to rise to the level of a fundamental tenet for *Charter* purposes, and assuming that the infringement is non-trivial, the Attorney does not concede a breach of section 2(a) because the practice is inherently harmful and infringes on the fundamental

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[275] The nature of the religious challenge presented by the CPAA is not quite clear. On the one hand the group seems to suggest that "conjugal polyamory" is a deeply held matter of conscience and therefore deserving of section 2(a) protection as such. In other passages, the group suggests that it is a desire to formalize polyamorous relationships through religious ceremony that permits its members to invoke freedom of religion. Even assuming both to be true, the arguments would add no further dimension to the section 2(a) arguments advanced by the other Challengers.

[276] *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, 2007 SCC 54 at paras. 72-73; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6, at para. 26.

[277] *Multani, supra*, at paras. 28-29.

rights of others. However, most commentators, the Attorney acknowledges, say that the Supreme Court of Canada has moved away from internal limits to section 2(a), holding that weighing the rights and interests of others should occur at the section 1 stage. Hogg writes:

> The idea that freedom of religion authorizes religious practices only so far as they do not injure others has been abandoned by the Supreme Court of Canada in favour of an unqualified right to do anything that is dictated by a religious belief.[278]

274. If Professor Hogg is correct, then any crime at all – from writing a bad cheque to mass murder – is a protected exercise of religion if a single individual sincerely believes that there is a religious imperative, or even a religious permission, to do so. In every case, under this analysis, it would be up to government to justify the infringement. This protection, which would go well beyond even that afforded to expression (where expressive actions have been held to be unprotected in many contexts), seems unsupportable.

275. But in truth, this is a case where the analyses of breach of section 2(a) merges with the question of arbitrariness under section 7, and justification under section 1, as it did in the recent decision of *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, where MacLachlin C.J. (concurring) wrote at para. 155:

> [155] In this case, the s. 7 and s. 2(*a*) claims merge, upon close analysis. Either the *Charter* requires that an ostensibly "mature" child under 16 have an unfettered right to make all medical treatment decisions, or it does not, regardless of the individual child's motivation for refusing treatment. The fact that A.C.'s aversion to receiving a blood transfusion springs from religious conviction does not change the essential nature of the claim as one for absolute personal autonomy in medical decision making.

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[278] Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, vol. 2 (Toronto: Carswell, 2007—), p. 42-9.

276. Here, the essence of the fundamentalist Mormon claim, like that of a polygamous Muslim, is the same: one for "absolute personal autonomy in [marriage structure] decision making." As such, the asserted right must be weighed against the social interest in placing restrictions upon it. This can be analyzed under section 2, section 1, or section 7, but the answer must be the same. The fact that the restriction interferes with religious as well as secular practice, does not change the result. Personal autonomy and religious freedom should yield to the more substantial interests at stake.

277. There is one final aspect of the religious freedom claim that will be discussed more fully under 'salutary and deleterious effects' within section 1. 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 witness alike indicates that, the greater the religious fervor with which polygamy is intertwined, the more harmful it can be expected to be. This is not so with any other case asserting a religious right to do something prohibited.

B. Section 2(b): Freedom of Expression

278. Only the CPAA argues freedom of expression under the *Charter.* The group suggests that "conjugal polyamory" is a protected expressive activity.

279. Pitfield J. in *EGALE Canada Inc. v. Canada (Attorney General)* (2001), 95 B.C.L.R. (3d) 122 (S.C.) held at para. 132 that "the words 'freedom of expression' are not apt to describe the formalization of the legal relationship that is marriage". Though polygamous marriages are not *legal* relationships, the analogy is apt.

280. Assuming any particular polyamorous relationship falls within section 293's definition, it is difficult to comprehend the commission of a crime as an

independent protected form of expression *per se*. Any non-secret breach in the face of a law is, on some level, an expressive act – it is, at least, an expression of defiance of the law. Parking a car, the Supreme Court has confirmed, can be an expressive activity. But this is if it is done to convey meaning, not if it is done for its own sake.

281. This does not elevate every flagrant crime to the level of protected speech. If section 293 is otherwise valid law, freedom of expression could not be used to permit its breach.

282. It might be argued that because the Attorney's definition of criminal polygamy as a relationship that *purports* to be a marriage or otherwise binding on the participants, the definition captures or is aimed at expression. But this is not tantamount to criminalizing the expressive act. The essence of the crime is entering into or being in a particular type of sanctioned *relationship*, when viewed in all the circumstances. What is said about that relationship might affect its legal status (if, for instance, a Prophet says it is ordained by God and cannot be exited), but this is only one component of the legal context. Entering into a fraudulent contract or proffering a counterfeit banknote are also illegal and do not attract *Charter* protection, even though an important component of the *actus reus* in either case is unquestionably communicative. It is no more a protected expressive act to marry polygamously as to marry a young child or one's sibling or parent.

C. Section 2(d): Freedom of Association

283. Here, the Amicus says that the law permits multi-partner sexual activity, but not "polygamous groupings" and so violates freedom of association. Others of the Challengers appear to take similar positions.

284. The scope of freedom of association was most recently considered by the Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27. In that case, the Court decided that the protections of 2(d) should be extended to include collective bargaining. It did so after finding first that an interpretation of section 2(d) that precludes collective bargaining from its ambit would be inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association; second, that collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees; and finally that interpreting section 2(*d*) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms, and values.

285. In this case, the Amicus and others do not suggest that there is any authority in the case law for inclusion of polygamous marriage as protected under section 2(d). Indeed, the argument that freedom of choice in intimate partners is a protected form of association was rejected by the British Columbia Court of Appeal in the "adult consensual incest" case of *R. v. M.S., supra*. In that case, the Court invoked the Ontario Court of Appeal's decision in *Catholic Children's Aid Society of Metropolitan Toronto v. S.(T.)* (1989), 69 O.R. (2d) 189, for the proposition that the protection in section 2(d) was clearly designed to protect association with persons beyond the primary family unit. At pp. 203-204 of his reasons in *Catholic Children's Aid Society*, Tarnopolsky J.A. wrote:

> 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.

286. Further, as Canada points out in its submissions, freedom of association was raised by claimants in both the British Columbia and Ontario challenges to the exclusion of same-sex couples from the traditional definition of marriage, but

no court in any province accepted that section 2(d) could be engaged by the inability to marry.[279]

287. 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 Challengers have produced no evidence supporting the idea of polygamous marriage as a component of association at international law (and in fact, the consensus in international law is that polygamy should be banned). Finally, they have articulated, at this point, no argument that a right to polygamous marriage is consistent with or promotes other *Charter* rights, freedoms, and values, and indeed on the evidence of this case the Attorney General submits it clearly does the opposite.

288. There is, therefore, no conceivable case to be made for inclusion of a right to polygamous marriage within the section 2(d) guarantee. If one emerges, the Attorney will address it in reply.

VII. Section 7: Liberty and Security of the Person

A. The Asserted Infringements

289. The Attorney accepts that section 293 engages section 7 of the *Charter* because it permits imprisonment. However, the Challengers here assert a broader interest, connected with the infringement of the liberty to marry a person of one's choice. The BCCLA also suggests that security of the person is engaged through the consequences of criminalization in the form of "psychological stress", which might be also linked to the insularity of Bountiful and other polygamous communities and which could tend to make residents of those communities reluctant to access health and other services.

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[279] See *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.) at paras. 30-31, 33, 72, 212; *EGALE Canada Inc. v. Canada (Attorney General)*, 2001 BCSC 1365 at paras. 134-139; *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 406 at paras. 97-100.

B. Liberty to Marry More than One Person

290. It is true that liberty may be engaged under section 7 without the threat of imprisonment. In *Malmo-Levine*, the Supreme Court of Canada summarized the law as follows:

> 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.).

291. In *Godbout v. Longueuil (City),* [1997] 3 S.C.R. 844, LaForest J., writing for three members of the Court, found that the choice of residence was a "liberty interest" within the meaning of section 7 (the remainder of the Court did not consider section 7). At para. 68, he quoted approvingly from the respondent's factum:

> [Translation] Residence determines the human and social environment in which an individual and his or her family evolve: the type of neighbourhood, the school the children attend, the living environment, services, etc. In this sense, therefore, residence affects the individual's entire life and development.

292. On analogous reasoning, the Attorney accepts that fundamental choices of family arrangements engage the liberty interest in section 7, and although the

cases are not determinative of the issue, is prepared to argue on the basis that section 7's liberty interest is engaged with or without the threat of incarceration.

293. The consequences of this are limited, given that liberty is in any event engaged by the penal sanctions of section 293. However, it does require that this Court weigh this infringement of liberty as well in the "fundamental justice" analysis, particularly with respect to proportionality.

C. Security of the Person

294. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Dickson C.J. accepted that "serious state-imposed psychological stress" (p. 56 (emphasis added)) could trigger section 7 protection. In *Malmo-Levine*, it was accepted, at least in obiter, that preventing a person from gaining access to medical help may engage the "security of the person" interest in section 7.

295. The BCCLA appears to be arguing that the fear of prosecution is "serious state-imposed psychological stress", and moreover that the insularity to which this leads may be depriving individuals of the opportunity to access needed medical and other services. There is also some suggestion that the insularity of the communities like Bountiful makes the commission of crimes against those persons more difficult to defend against.

296. Fear of criminal prosecution no doubt has contributed to making the residents of Bountiful, and US FLDS communities, secretive and insular. But is this fear of prosecution under section 293 (which had not been prosecuted for a century until 2009, and was declared in 1992 by a representative of the Crown prosecutor's office to be unconstitutional and unenforceable), or fear of prosecution for the other crimes that polygamy causes? In any event, there is in this case no evidence of serious psychological harm resulting from any state action, as it was described for instance in *Blencoe v. British Columbia (Human*

Rights Commission), [2000] 2 S.C.R. 307. Witness #2 said in her affidavit that her seven-year old child has had terrible fears about authorities "coming to get us", but then confirmed under cross-examination that this could only be as a result of what the boy had been taught by members of the community, not as a result of any state action.[280]

297. If this Court accepts that what we have learned about criminality at Bountiful – the trafficking in and sexual exploitation of girls, for instance, or harsh physical abuse in order to instil discipline and obedience – is ancillary to the creation of the supply of child brides that polygamy demands, then decriminalizing polygamy is unlikely to make Bountiful less insular. It seems fantastic to suggest that these crimes are hidden because polygamy has been driven underground. These crimes are hidden because they are crimes, they flow from polygamy, and they need to be kept secret in order for their perpetrators to be able to continue committing them.

298. If any proof of the distinction urged here is necessary, it is perhaps this: Since the early 1990s, many in Bountiful have been quite open about their polygamy. That is, a number of Bountiful polygamists have appeared before the media to describe and defend their conjugal arrangements. Yet prior to this proceeding, there were no public revelations of crimes such as sexual exploitation or procuring of a minor. A person who has traded his 15-year-old daughter in Mesquite, Nevada for a 15-year-old child bride is unlikely to welcome government scrutiny of any aspect of his life.

299. Setting aside whether there is a *causal* relationship between criminalization and insularity, there is actually conflicting evidence of *correlation.* The Amicus's own expert Professor Campbell readily admitted that Bountiful, once a community so insular that it had the reputation for entirely shunning

[280] Transcript Day 26 (January 25, 2011) pp. 50-51. The witness described the stress as resulting from apprehensions arising from the Yearning for Zion search and rescue operation and also school inspections.

contact with the outside world, has in recent years become less insular and more open (at least the 'Blackmore faction', which was the subject of her study). She acknowledged that this renewed engagement with the outside world came at a time when Bountiful residents (some of whom had been unaware that polygamy was even illegal) came under increased legal scrutiny and the criminal prohibition increasingly weighed on their minds.

> 45 Q Right. So it's safe to say I think then in the
> 46 timeframe in which criminalization has been
> 47 weighing more heavily on residents' minds that
> 1 that has also been a period in which the community
> 2 has been less insular and isolated; is that true?
> 3 A I think that's a fair parallel.[281]

300. Only one witness from Bountiful spoke to the expected effects of decriminalization on the insularity of Bountiful. Witness #4 testified that she expected that the community would remain insular and isolated after decriminalization. That is, she said, the way she liked it:

> 2 So your expectation is that if polygamy were
> 3 decriminalized then -- and combined with your hope
> 4 that your community would remain isolated and
> 5 insulated, you would -- you would expect that if
> 6 it was decriminalized you would be able to
> 7 continue that isolated and insulated existence; is
> 8 that right?
> 9 A Yes.[282]

301. Overall, the evidence on the harm of insularity is weak. No Challenger has pointed to any incident where a person has suffered injury as a result of a reluctance to approach authorities for fear of being 'outed' as a polygamist.

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[281] Transcript Day 7 (December 1, 2010) pp. 32-33.
[282] Transcript Day 26 (January 25, 2011) p. 4.

VIII. Section 7: Fundamental Justice

A. The Role of Harm in Analysis of Fundamental Justice

302. The Challengers have identified three principles of fundamental justice in their section 7 argument that they say are violated: arbitrariness, overbreadth, and disproportionality.

303. However, there is also another principle that is never clearly articulated as such, but that should probably be discussed first. That is, one of the Challengers' section 7 arguments appears to be that, even if it were permissible to ban polygamy involving children or coercion, it is a violation of the principles of fundamental justice to criminalize consensual, adult polygamy where there is no harm in the relationship itself. The argument integrates notions of liberty to make life choices (discussed above) with a simultaneous assertion of harmlessness, folding consent and privacy into arguments based on harm. These two things – the question of consent (going to liberty) and the question of harm (going to fundamental justice) should be kept conceptually distinct at the section 7 phase.

304. With respect to liberty and harm, the appellate courts have upheld incest laws in the face of section 7 attack in the context of consensual, adult incest without proof even of a power imbalance. In both *R. v. M.S.*, *supra* and *R. v. F. (R.P.)* (1996), 105 C.C.C. (3d) 435 (N.S.C.A.), the Courts found that the harm of incest generally justified its prohibition in every case.

305. The Supreme Court of Canada, in *Malmo-Levine*, *supra*, rejected the idea that fundamental justice necessarily requires an element of harm to be present, either in an individual case or in society generally. However, it is clear that no claim for breach of fundamental justice could succeed where harm from the prohibited activity *is* demonstrated beyond *de minimis*, as it is here. Gonthier and Binnie JJ. wrote for the majority at para. 133:

> 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. ... 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[.]
>
> [Emphasis added]

306. Here also, it is important to note that it does not offend principles of fundamental justice to impose laws that reduce risk to individuals, as well as to society itself:

> 124 [W]e 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.
>
> 125 A recent discussion policy paper from the Law Commission of Canada entitled *What is a Crime? Challenges and Alternatives* (2003) highlights the difficulties in distinguishing between harm to others and harm to self. It notes that "in a society that recognizes the interdependency of its citizens, such as universally contributing to healthcare or educational needs, harm to oneself is often borne collectively" (p. 17).
>
> 126 In short, there is no consensus that tangible harm to others is a necessary precondition to the creation of a criminal law offence.

307. There is, after *Malmo-Levine*, no argument that it is a principle of fundamental justice that social harm, or indeed any harm beyond *de minimus*, must be demonstrated before Parliament can act. And more particularly, it is not an independent principle of fundamental justice (that is, apart from arbitrariness,

overbreadth, and disproportionality) that the harms of an activity must outweigh the deleterious effects of the prohibition.

B. Arbitrariness

308. It is a principle of fundamental justice that laws should not be arbitrary: *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, 2009 SCC 30, at para. 103; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, at paras. 129 and 231; *Malmo-Levine*, *supra* at para. 135; *Rodriguez*, *supra* at pp. 594-95. In *Chaoulli*, McLachlin C.J. and Major J. (with Bastarache J. concurring) stated at paras. 130-131:

> A law is arbitrary where 'it bears no relation to, or is inconsistent with, the objective that lies behind [it]'. To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision .is meant to reflect: *Rodriguez*, at pp. 594-95.
>
> 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.

309. The Supreme Court of Canada has said that the utility of its chosen methods is an area in which Parliament is entitled to deference. In *Malmo Levine* at p. 657, the majority wrote:

> 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]

310. In order to be found arbitrary, a law must bear *no* relation to, or be inconsistent with, the state's legitimate objective. Here, the objective is to reduce polygamy and its attendant social harms. Section 293 clearly bears a relation to that objective, and is not inconsistent with it.

311. All of the arguments of the Challengers advanced with respect to arbitrariness are re-articulations of two assertions: first, that polygamy causes no harm, or second, if it does cause harm, its criminal prohibition is ineffective at reducing polygamy.

312. The harms attributable to polygamy are addressed throughout these submissions and need not be repeated here. The main question remaining is whether the law is effective at deterring or reducing polygamy.

313. The Attorney says that a causal connection between a law and the reduction in the harm it seeks to address is not a factor to be considered under arbitrariness under section 7, and deals with it instead under "rational connection" under section 1.

C. Overbreadth

(1) Polygamy and Polyamory

314. The Supreme Court has recognized that it is a principle of fundamental justice that criminal legislation must not be overbroad: *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *R. v. Heywood*, [1994] 3 S.C.R. 761; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

315. In *Heywood*, Cory J. wrote for the majority at 792-94:

> 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.
>
> Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual. This type of balancing has been approved by this Court: see *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, *per* Sopinka J., at pp. 592-95; *R. v. Jones*, [1986] 2 S.C.R. 284, *per* La Forest J., at p. 298; *R. v. Lyons*, *supra*, *per* La Forest J., at pp. 327-29; *R. v. Beare*, [1988] 2 S.C.R. 387, at pp. 402-3; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 538-39; and *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at pp. 151-53. However, where an independent principle of fundamental justice is violated, such as the requirement of *mens rea* for penal liability, or of the right to natural justice, any balancing of the public interest must take place under s. 1 of the *Charter*. *Re B.C. Motor Vehicle Act*, *supra*, at p. 517; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977.

> In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator. It is true that s. 7 of the *Charter* has a wide scope. This was stressed by Lamer J. (as he then was) in *Re B.C. Motor Vehicles Act*, *supra*, at p. 502. There he observed:
>
> > Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice.
>
> However, before it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

316. As with incest and obscenity, many of the harms associated with polygyny exist whether or not any particular polygynous relationship is directly harmful to the participants, and irrespective of the degree of consent in any particular relationship. The Attorney accepts that such consensual, non-harmful, polygynous polyamorous relationships can be presumed to exist. Nevertheless, it is open to the Court to find that the harms at large, without aggravating circumstances in a particular case, are sufficient to support a blanket ban on polygyny.

317. In the first place, all polygynous relationships contribute to the 'marketplace' harms described by Drs. Henrich, Grossbard, and McDermott. In addition, each carries with it, if not realized harm, at least an increased risk of harm to the participants and children inherent in the family form.

318. It is not necessary to "hive off" or exclude something called "polyamory" from the *Criminal Code*'s prohibition of "polygamy". This is not an exercise in subjective self-definition. There have been many defining distinctions suggested

for "polyamory": the degree of consent, the "loving nature" of polyamorous relationships, the "honesty" of the participants, their assertedly "egalitarian" design or absence of patriarchal trappings. None has legal coherence.

319. Consider the idea of polyamory urged by the CPAA at para. 13 of its Opening Statement, where the defining characteristic is said to be that "all members of the group formally or informally adopt" principles of equality between genders and among sexual orientations. If the criminal law can legitimately address polygamy at all, how could its application truly depend on an assessment of the degree to which participants have "adopted" certain laudable "principles"? Could a "polyamorous" relationship become criminal polygamy simply because one member of such a grouping decides that he or she no longer believes in principles of equality? Could a criminally-polygamous individual escape section 293 simply by "formally adopting" a commitment to such principles?

320. In truth, it would appear that most relationships that the CPAA describes as "polyamorous" would not meet the criminal definition of polygamy under section 293. If they do meet the definition, that is, when they become "marriages" or "marriage-like" through the influence of a binding authority or otherwise, then they are criminally polygamous and ought to be banned.

(2) The 'Criminalization of Victims'

321. If section 293 is justified, at least in part, on the basis that its objective is to protect women, can it still sanction prosecution of both husbands and wives? Several of the Challengers point to the law's application to all participants in a polygamous relationship as proof of clumsy over-reach. The Amicus writes in his Reply Opening at para. 40:

> Obviously, it would be absurd to criminalize the alleged victims. But that is precisely what s. 293 does. The polygamy ban does not simply target

> those who might exploit others for their own interests; rather, it criminalizes all participants, alleged victims and alleged wrongdoers alike. It is hard to conceive of a law more flagrantly overbroad in its effects.

322. Here, the Challengers' objection is based on the false premise that the sole legitimate objective of s. 293 is the protection of the wives themselves. The women in any given polygamous relationship may or may not be "alleged victims". The Attorney says that the risks and harms caused by polygamy, to the participants, to children, and to society at large, occur regardless of the individual circumstances of the participants. While in many, perhaps most, cases, the wives themselves will suffer harm, this harm is not the sole source of, or justification for, the prohibition.

323. Again, this reasoning is paralleled in the incest laws, which although intended to protect children against, *inter alia*, exploitation by parents, criminalize both parties to an incestuous union. Similarly, women and even children may be subject to prosecution under the *Criminal Code* for creating obscenity or child pornography. Here, we rely on the common sense of judges and prosecutors to ensure that the *prima facie* blanket prohibition is not unreasonably applied, and we rely on the constitution to ensure that, in any particular case, the punishment is not grossly disproportionate to the crime (as discussed below).

324. The Challengers reject reliance on discretion in prosecution, in an argument that suggests that it could *never* be appropriate to prosecute a wife in a polygamous marriage. But is that so? In a case like that of Witness #4, where a husband and three fully-adult sister wives participate in a polygamous marriage with 17- and 15-year-old girls, should they be held immune from account? And if it is true that polygamy causes social harm even where it is practiced only by fully consenting adults, then the wives' status as such should make them liable for entering into an enterprise that is socially harmful.

D. Disproportionality

325. Much of the anticipated argument against section 293, however it is characterized in terms of legal analysis, may be reduced to this: jailing harmless polygamists is a disproportionate response to any problems associated with some polygamy, and will cause more harm than good.

326. So a distinction must be drawn between the justification of *criminalization* and the justification of *imprisonment*. This Reference is solely about the former. Because there is no minimum sentence for polygamy, any question of unconstitutional disproportionality must be addressed through *Charter*-compliant sentencing in a particular case. In *Malmo-Levine*, the Supreme Court rejected the idea that marijuana laws were unconstitutional because a maximum of seven years' imprisonment was an impossibly harsh response to harmless possession and use of marijuana. The majority stated at paras. 164-65:

> 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. [Emphasis added]

327. Similarly here, if a sentence of incarceration was grossly disproportionate to the crime then it is a sentence that could not constitutionally be imposed. This does not call into question the constitutionality of section 293 providing that, in some instances, incarceration *would* be a fit sentence. This Court has heard stories of the predation on countless young girls by high officials of the FLDS church. It may well be that such behaviour would befit a custodial sentence. In other cases, incarceration would clearly not be proportional to the crime. This is not a question that goes to the constitutionality of the provision.

328. The Attorneys General need not defend section 293 in its harshest possible application to the most innocent conceivably-captured behaviour, which is inevitably the scenario urged by the Challengers. The Attorneys need only defend the spectrum, or range of punishments available. In the case of section 293, the spectrum – from an absolute discharge up to five years' imprisonment – is perfectly proportionate to the scale of wrongdoing to which the section might apply.

329. As for the further arguments that the *consequential* impacts of criminalization are disproportionate to the harms of polygamy, this is not an element of section 7 analysis, as the Court in *Malmo-Levine* held:

> 174 On this branch of the case the Court can only ask whether the effects on the accused are so grossly disproportionate that they render the prohibition contrary to s. 7 of the *Charter*. Once it is determined that Parliament acted pursuant to a valid state interest in attempting to suppress the use for recreational purposes of a particular psychoactive drug, and given the findings of harm flowing from marihuana use, already discussed, we do not think that the consequences in this case trigger a finding of gross disproportionality. Firstly, the consequences are largely the product of deliberate disobedience to the law of the land. In his factum, Malmo-Levine speaks of "mass civil disobedience". He writes (at para. 10):
>
> > The glaring hypocrisy of the war on "some" drugs, and the obvious effectiveness of cannabis will ensure users are never going to back down, and that we intend to out-grow the "low-functioning" stigma foisted upon us and assume our rightful place as the "mellow and imaginative" section of society.
>
> This may be so, but evaluation of adverse effects has to take the nature of this political confrontation into account. Secondly, if the court imposes a sentence on conviction that is no more than a fit sentence, which it is required to do, the other adverse consequences are really associated with the criminal justice system in general rather than this offence in particular. In any system of criminal law there will be prosecutions that turn out to be unfounded, publicity that is unfairly adverse, costs associated with a successful defence, lingering and perhaps unfair consequences attached to a conviction for a relatively minor offence by other jurisdictions, and so on. These effects are serious but they are part of the social and individual

> costs of having a criminal justice system. Whenever Parliament exercises its criminal law power, such costs will arise. To suggest that such "inherent" costs are fatal to the exercise of the power is to overshoot the function of s. 7. [emphasis added]

330. Apart from the consequences of *disobedience*, the Challengers assert that there are harms associated with *obedience* to the law under section 7 that are distinct from the loss of religious freedom (which is discussed under section 1, salutary and deleterious effects, below).

331. It is true that obeying the law requires that Canadians subvert their desires to explore multi-partner personal arrangements at the point where those arrangements become marriages, or marriage-like.

332. The restriction on the "freedom to be polygamous" has deleterious effects on some persons, without doubt. Any criminal law restricts one's ability to do as one pleases, and all deprive the aspiring criminal of the profits (financial, emotional, or otherwise) that one might gain through the commission of an offence. The point of the criminal law is that it holds all to the same standard of behaviour. In a Rawlsian sense, criminal laws represent an *ex ante* bargain whereby citizens agree to restrain their self-serving behaviour in pursuit of the greater common good. The polygamy prohibition is just such a bargain. Men agree not to take more than one wife, and women agree not to share a husband with other wives, in order to have the benefits of a more equal, stable and responsible society. As with any criminal law, there will be those who see the advantages of being outside this bargain as weighing more heavily than the broader social benefits; they find themselves in the *ex post* position of opportunity and power. The sacrifice will be, for them, greater. This does not undermine the legitimacy of the criminal law, in fact quite the opposite: it confirms it.

333. This is not to make light of the liberty lost: the sacrifice is of a preference close to the heart of a person's private desires. But the limitation on those desires themselves is not extreme. Section 293 simply says that more than two persons cannot enter into a form of marriage. This is a limit, but surely, given the harms from polygamy at large, it is not a disproportionate one.

IX. Section 15(1): Equality

A. Religious Discrimination

334. The Amicus's religious discrimination argument is found in two paragraphs of his Opening Statement: the first alleges a discriminatory *effect* of s. 293; the second also describes a discriminatory effect, but appears to go further and reiterate a discriminatory *purpose*:

> 54. Section 293 breaches section 15(1) for many of the same reasons as it breaches section 2(a). The provision draws a distinction between religious practices which the state deems to be acceptable (monogamous marriage) and those that are subject to criminal sanction (polygamous marriage). Even if not prosecuted, religious practitioners of polygamy are stigmatized by the law and treated as less worth of respect and concern.
>
> 55. Section 293 is based on an assumption that polygamy is a practice uniformly associated with harm; essentially, that it is "barbarous". The law is based entirely on presumed, stereotypical characteristics, is not responsive to the actual characteristics of the particular polygamous relationships, and has the effect of demeaning the dignity of practitioners of polygamy.

335. The Attorney has addressed the purpose of section 293 earlier in these submissions.

336. The Supreme Court of Canada has struggled with articulating the test for discrimination under section 15. However, what has been clear from the first section 15 jurisprudence is that any discrimination analysis involves comparison

using a substantive contextual approach.[283] In *Andrews,* McIntyre, J. describes it as follows:

> It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well that identical treatment may frequently produce serious inequality.[284]

337. In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, part of the contextual analysis involved an inquiry into whether the differential treatment had a negative impact on "human dignity". Following *Law* the focus in many of the Supreme Court of Canada section 15 cases was to identify a "comparator group" to which the complaint could "properly claim unequal treatment"[285]. Identification of the appropriate comparator group was described by Binnie, J. as "crucial":

> The identification of the group in relation to which the appellant can properly claim "unequal treatment" is crucial. The Court established at the outset of its equality jurisprudence in *Andrews, supra*, that claims of distinction and discrimination could only be evaluated "by comparison with the conditions of others in the social and political setting in which the question arises.[286]

338. Subsequently, the Supreme Court abandoned the "human dignity" test, finding that it imposed an unfair additional burden on claimants to establishing discrimination. In 2008, in *Kapp* the Supreme Court of Canada, after outlining the important contributions of the *Law* decision stated:

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[283] *Law Society of British Columbia v. Andrews* [1989] 1 S.C.R. 143
[284] *Andrews, supra.*
[285] *Granovsky v. Canada,* [2000] 1 S.C.R. 703; *Hodge v. Canada (Minister of Human Resources Development), [2004] 3 S.C.R. 357; and Auton (Guardian ad litem) v. British Columbia (Attorney General), [*2004] 3 S.C.R. 657.
[286] *Granovsky, supra* at para 45.

> **21** At the same time, several difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. As Dickson C.J. said in *R. v. Oakes*, [1986] 1 S.C.R. 103:
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> > The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. [p. 136]
>
> **22** But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.1 Criticism has also accrued for the way *Law* has allowed the [page505] formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.[287]

339. In *Kapp,* the Supreme Court of Canada suggested that the focus should not be on whether the claimant had established injury to dignity but rather courts should examine all contextual factors in a two-part test:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[288]

340. Most recently, on March 4, 2011 the Court revisited the use of the mirror comparator groups, holding in *Withler v. Canada (Attorney General) 2011 SCC*

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[287] *R. v. Kapp,* 2008 SCC 41, [2008] 2 S.C.R. 483.
288 R. v. Kapp, supra at para. 17.

12 that a comparator group analysis is not strictly required[289]. The Court set out a more general analysis as follows:

> [40] It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.

The Court elaborated:

> **[35]** The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1). Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Thus judges have noted that historic disadvantage is often linked to s. 15 discrimination. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, for example, Wilson J. identified the purposes of s. 15 as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society" (p. 1333). See also *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at pp. 1043-44; *Andrews*, at pp. 151-53, *per* Wilson J.; *Law*, at paras. 40-51.
>
> **[36]** The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. Typically, such stereotyping results in perpetuation of prejudice and disadvantage. However, it is conceivable that a group that has not historically experienced disadvantage may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group. If it is shown that the impugned law imposes a disadvantage by stereotyping members of the group, s. 15 may be found to be violated even in the absence of proof of historic disadvantage.

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[289] *Withler v. Canada (Attorney General)* 2011 SCC 12.

> **[37]** Whether the s. 15 analysis focuses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.
>
> **[38]** Without attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered. Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances. Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.

341. The single important thread throughout this jurisprudence is the principle that not every distinction drawn by laws, even those based upon protected grounds, will be discriminatory. In *Withler,* the applicant was unable to establish discrimination on the basis of age when her claim was examined in its full context. The relevant legislation provided death benefits to spouses, however the amount of the benefit was reduced by 10 percent for each year by which the plan member exceeded a prescribed age. The Supreme Court of Canada found that when this supplementary death benefit was considered in the context of other pensions and benefits to which surviving spouses are entitled, it was clear that the purpose of the scheme corresponded to the needs of the applicants and there was no discrimination.

342. In the present Reference, there is no argument that section 293 places any burden on the majority of FLDS members who are not polygamous.

343. And even if it could be said that section 293 distinguishes between polygamists and non-polygamists on the basis of religion, such a distinction is not

discriminatory when viewed in its complete context as required by section 15(1) of the *Charter.* Contrary to the Amicus's assertions, section 293 does not reflect either prejudice against, or the stereotyping of, those who practice polygamy for religious reasons. It is based on the conviction that polygamy constitutes a profound assault on the equality of male and female persons, and is associated with significant risks of harm to the participants, to children within polygamous families, and to society at large.

344. Furthermore, in undertaking this contextual analysis, the purpose of section 293 in *protecting* members of the group to whom it applies must be considered in assessing any alleged adverse treatment. The Court in *Withler* said, discussing benefit schemes but in language that is also apt here: "the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis." Women and children, in particular, who are members of religious groups practicing polygamy *benefit* from the prohibition when the harms of polygamy are weighed in the balance. So, of course do other vulnerable members of society.

345. Any religious-based differential treatment that results from section 293 corresponds to very real differences between those who practice polygamy and those who practice monogamy. In *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, McLachlin C.J. held (for the majority), 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.

346. At bottom, the Amicus's argument is that, because the state has criminalized a practice that, for some, is religious, and because it does not criminalize a practice (monogamous marriage) that is, for some others, also religious, it is engaging in religious discrimination. But here, the section 15

argument adds nothing to the section 2(a) argument, and the question of infringement of religious belief is more appropriately analyzed through that section.[290]

347. This is every bit as true in the case at bar. The Chief Justice of Canada continued in *Hutterian Brethren*:

> 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(*a*). There is no breach of s. 15(1).

B. Discrimination on the Basis of Marital Status

348. Section 293 cannot be said to violate section 15(1) on the basis of marital status either. The Supreme Court of Canada may have accepted that marital status is an analogous ground for the purposes of section 15. However, there is no indication in the jurisprudence that that analogously protected group should be understood to include persons who are engaged in marital arrangements that are (otherwise legitimately) prohibited by the *Criminal Code*.

349. The test for establishing an analogous ground was established in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, where the majority wrote at para. 13:

> It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made <u>not on the basis of merit</u> but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal <u>grounds based on characteristics that we cannot change or that the government has no</u>

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[290] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 at paras. 105-108.

> legitimate interest in expecting us to change to receive equal treatment under the law. [emphasis added]

350. In other words, if the Court accepts that there is a reason to distinguish polygamous marriage (for instance on the basis of harm), then "practitioner of polygamy" cannot be an analogous ground for section 15 purposes, either under marital status or otherwise.[291]

351. Even if it were, there is no evidence "that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group". Practitioners of polygamy have not, as any identifiable class, been subject to prejudice or discrimination on any basis other than their chosen activity was illegal. That cannot form the basis of a historical claim to substantive inequality.

X. Justification under Section 1

A. Overview

352. Section 1 of the *Charter* provides that the rights and freedoms it describes are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

353. Section 293 is a limit "prescribed by law"; it is a piece of legislation passed by Parliament in accordance with the federal constitutional authority. The Challengers do not say that the law is unconstitutionally vague under section 7, so they likely will concede that it is prescribed by law both formally and

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[291] The CPAA's s. 15 argument is not developed beyond that made by the Amicus and amounts to the same thing: that, at least in the case of *polygynous* polyamory, the law is discriminating against polyamorists on the basis that they practice polygamy. But, for the reasons articulated here, such is not an enumerated or analogous ground. The fact that some types of polyamory, such as polyandry and multiple-partner same-sex unions, fall clearly outside the scope of section 293 is demonstration that the distinction is based on the harm of polygyny, and is emphatically not a prejudice toward non-monogamous conjugality *per se*.

sufficiently for the purposes of section 1. The question therefore turns to whether it can be demonstrably justified, using the *Oakes* test.

B. Pressing and Substantial Concern

354. The first two aspects of the *Oakes* test are infused with the weighing of harm. That is to say, if there *is* harm from polygamy, or the reasoned apprehension of harm, then there is a pressing and substantial concern under the first branch. Because the measure in question is a criminal prohibition, it follows virtually automatically that, once the harm of polygamy is demonstrated, measures to prevent the harm are rationally connected for *Charter* purposes.

355. Harm has a particularly important role in the context of the criminal law. To justify criminalization, the Attorney General must show the "reasonable apprehension" of a harm that is "not insignificant or trivial", and once that is done, "the precise weighing and calculation of the nature and extent of the harm is Parliament's job."[292] In the case of polygamy, this requirement is met and far exceeded.

C. Rational Connection

(1) The Reasoned Apprehension of a Causal Link

356. The second part of the *Oakes* analysis requires that the measures taken be rationally connected to the objective of the law, in this case the reduction of the harms attributable to polygamy. The rational connection 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".[293]

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[292] *Malmo-Levine, supra* at para. 133.
[293] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; See also *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 at para. 29; *Sharpe*, *supra* at para. 85; *Butler*, *supra* at p. 504.

357. In *Butler*, the majority wrote:

> Accordingly, the rational link between s. 163 and the objective of Parliament relates to the actual causal relationship between obscenity and the risk of harm to society at large. On this point, it is clear that the literature of the social sciences remains subject to controversy.
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> ***
>
> While a direct link between obscenity and harm to society may be difficult, if not impossible; to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.

358. The Court cited *Irwin Toy* and *Keegstra*, as well as a number of other decisions, for the proposition that Parliament need only a "reasoned apprehension" of the causal link. This was reiterated by the Court in *Hutterian Brethren* at para. 48:

> [48] At this [rational connection] stage, the Province must show that the universal photo requirement is rationally connected to the goal of preserving the integrity of the driver's licensing system by minimizing the risk of identity theft through the illicit use of driver's licences. To establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153. The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. <u>The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so</u>. [emphasis added]

359. The test of rational connection "is not particularly onerous".[294] As Lamer J. (as he then was) pointed out in the prostitution reference, if the object of a criminal law is to reduce the harm from the crime, then it is virtually *ipso facto* rationally connected:

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[294] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, at para. 228

> 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.[295]

360. The Amicus and others suggest that there is no rational connection because the law does not reduce polygamy and section 293 is thus unrelated to the purpose of the law – the reduction in polygamy's harms. In other words, the Challengers say that Lamer's formulation only holds true if there is a cause-and-effect relationship between the prohibition and the reduction in harm. If this is the argument, it is incorrect. It is the connection with *polygamy and harm* that is relevant to the analysis, not the connection between the prohibition and amelioration.

361. In *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, the Court was satisfied that the targeted activity (tobacco consumption) caused massive social harm. What was far from certain, however, was that the criminal restrictions on advertising would reduce that consumption.

362. The majority in *RJR* inferred causation (and thereby mitigation) through "reason and logic" rather than strict proof:

> 154 The causal relationship between the infringement of rights and the benefit sought may sometimes be proved by scientific evidence showing that as a matter of repeated observation, one affects the other. Where, however, legislation is directed at changing human behaviour, as in the case of the *Tobacco Products Control Act*, the causal relationship may not be scientifically measurable. In such cases, this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective: *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 768 and 777; *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 503. As Sopinka J. wrote of the causal link between obscenity and harm to society in *Butler,* at p. 502:

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[295] Reference re *ss. 193 and 195.1(1)(c) of the Criminal Code* (Man.), [1990] 1 S.C.R. 1123.

> While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.

363. The Challengers rely on the lack of prosecutions to argue for section 293's ineffectiveness. The Amicus said at para. 40 of his Opening Statement Addressing Section1:

> [T]he notion that s. 293 provides a more effective mechanism for prosecuting wrongdoers [than the use of other criminal sanctions to reduce polygamy's harms] is utterly belied by its history. There have been exactly two convictions under the polygamy ban in its entire 120 year history. Prior to the AGBC's failed attempt to prosecute Messrs. Blackmore and Oler, the last prosecution occurred in 1937.

364. The answer to this argument is provided by the Supreme Court of Canada n *R. v. Lucas*, [1998] 1 S.C.R. 439. There, the Court held (at para. 55):

> 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 number 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).

(2) Section 293 as a Deterrent

365. The Challengers' "ineffectiveness" argument is apparently premised on the idea that historically, section 293 was neither prosecuted nor acting as a

deterrent, and yet polygamy still did not flourish. Parliament is not required to demonstrate that a criminal activity would have been more prevalent if it had not been criminalized. But even if it were necessary, the evidence here is that the law has functioned historically as a prophylactic and deterrent; and that, if upheld, it will continue to do so.

366. In 1887, the year Card arrived with his settlers, there were 41 Mormons in southern Alberta. By 1891 there were 359 Mormons in Cardston and vicinity, but the colony was growing rapidly, almost doubling in size by 1894[296] and reaching nearly 10,000 by 1911 (10.8 percent of the population of Southern Alberta[297]). There was no comparable Mormon presence anywhere else in Canada at the time.

367. After the enactment of the *Criminal Code*'s anti-polygamy provisions, Card's settlers in Southern Alberta continued to reassure the Canadian government that they had no intention of living polygamously there. And, as noted earlier, almost without exception, the Mormons were true to their leaders' word, at least to the extent that they did not actually *live* polygamously in Canada.

368. Soon after the criminal law was amended, the LDS Church in Salt Lake City issued the 1890 Manifesto declaring that the Church would endorse no marriages that were "contrary to the laws of the land."[298] According to Palmer, "the Manifesto effectively ended the fears about a large-scale migration of Mormons coming to escape anti-polygamy laws." Most of the press commentary regarding Mormons in the next few years was positive, and in 1893 Lethbridge's Mayor Bentley is reported to have told the press on a visit to Central Canada that

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[296] Brigham Young Card, "Charles Ora Card and the Founding of the Mormon Settlements in Southwestern Alberta, North-West Territories" in *The Mormon Presence in Canada*, p. 91. (Isbister Affidavit #4, Exhibit A, p. 37).
[297] Howard Palmer, "Polygamy and Progress: The Reaction to Mormons in Canada, 1887-1923" in *The Mormon Presence in Canada*, p. 117 (Isbister Affidavit #4, Exhibit A, p. 63).
[298] Embry, "Two Legal Wives", *supra*, p. 174 (Isbister Affidavit #4, Exhibit A, p. 86).

"polygamy was 'unknown' in the Mormon settlements in southern Alberta", adding that the Mormon settlers were "all conspicuously honest."[299]

369. The contrast between the experience of LDS polygamy in pre-revolutionary Mexico and Canada is instructive. Mexico had, at the time, an anti-bigamy provision,[300] but never extended it to polygamy and tacitly agreed that the settlers in that country could practice plural marriage "quietly". There were no bars on polygamist men bringing in additional wives, and they did so. Embry writes of LDS polygamy after 1890:

> According to one contemporary nineteenth-century account, the practice of polygamy in the colonies was "almost universal" and "close to 100 percent of the people then living at Juarez Stake [Mexico] were so attached to this order that it was the very woof and warp of their domestic life and also the theme and central idea of community worship."

370. Embry confirms the rarity of the practice of polygamy in Canada after the enactment of the revised provisions and the issuance of the 1890 Manifesto:

> In contrast [to Mexico], Latter-day Saints in Canada lived a de facto monogamy. Husbands usually lived with one wife in Canada, leaving their other wife or wives in the United States... To date, only three men can be proved to have brought more than one wife to Canada: John Lye Gibb, Franklin Dewey Leavitt and Thomas Rowell Leavitt. Their wives lived in different communities... As William L. Woolf, who grew up in Alberta, explained, 'The Canadian government['s] ... agreement was generally adhered to.' Interviewed in 1972, he remembered 'four to six' men who lived with more than one wife in Alberta.[301]

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[299] Palmer, "Polygamy and Progress" *supra*, p. 117 (Isbister Affidavit #4, Exhibit A, p. 63).

[300] See generally B. Carmon Hardy, "Mormon Polygamy in Mexico and Canada: A Legal and Historiographical Review" in *The Mormon Presence in Canada* (Isbister Affidavit #4, Exhibit A, p. 98) describing polygamy as contrary to the 'intent' of Mexico's bigamy prohibition but possibly not captured by its precise language. He writes at p. 189 (Isbister Affidavit #4, Exhibit A, p. 101):

> ...Mormon polygamous unions were not formally contracted by public magistrates. Therefore, as the products of private religious ceremonies, Mormon polygamous arrangements were not, strictly speaking, in violation of Mexican law. This, unquestionably, is the reason that some have alleged that those Latter-day Saints who went to Mexico to practise plural marriage did so legally.

[301] Embry, "Two Legal Wives" *supra*, p. 178 (Isbister Affidavit #4, Exhibit A, p. 90).

371. Hardy agrees that the different legal response to LDS polygamy in Canada and Mexico was the reason for the absence of the practice in this country:

> With the amendment of Canadian law in 1890, identifying the private ceremonies employed in Mormon multiple marriages as prohibited, the intent of the earlier Canadian statutes was made explicit. Unlike in Mexico, where legal intent also existed but was never reified, the Canadians moved to meet Mormon plural marriage in the same way as it had been done in the United States with the Edmunds Act of 1882. The result was that, although plural family life existed in Canada after 1890, as it did in the United States, it was both less frequent and less openly acknowledged than in Mexico.[302]

372. The Manifesto drove polygamy further underground among Latter-day Saints in the United States, and it did not become public until 1904 that there had been authorized plural marriages in the LDS after 1890. In that year, LDS president Joseph F. Smith issued the Second Manifesto, and the Church began to discipline and excommunicate its recalcitrant polygamists.[303]

373. As noted earlier, there are some historical accounts of a very few Mormon men (three documented cases) cohabiting with two wives in Alberta in the subsequent decades, and also some reports of plural marriages solemnized by US-based LDS officials, but the practice by the mid-20th century seems to have almost entirely disappeared, and indeed John Horne Blackmore, who represented the region in the House of Commons, was excommunicated from the LDS when word reached Salt Lake City that he had even spoken in favour of polygamy (Blackmore himself married only once).[304] Palmer summarizes:

> Charges that Mormons were practicing polygamy in secret were misleading and wildly exaggerated. A rearguard attempt was made by a

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[302] Hardy, "Mormon Polygamy in Mexico and Canada", p. 197 (Isbister Affidavit #4, Exhibit A, p. 109).
[303] Embry, "Two Legal Wives" *supra*, p. 175 (Isbister Affidavit #4, Exhibit A, p. 87).
[304] Bramham, *supra*, p. 47.

> few Mormon leaders to keep polygamy alive in southern Alberta, but it was limited to a handful of people, and plural wives did not live in Canada.[305]

374. There is, therefore, no record of any contemporarily-known or officially-confirmed case of polygamy among fundamentalist Mormons in Canada between 1890 and 1953. Nor is there any record of any complaint being made to any police force that any particular Mormon person was violating the laws against polygamy. Virtually every Mormon man, including those who had been polygamous in the United States, refrained from living polygamously in Canada. The few who carried on the practice, to the extent that it continued, did so in secret, with their wives living apart in different communities, and polygamy appears to have become virtually non-existent among the Latter-day Saints in Canada by World War II. McCue writes of the period that "interest in Mormons subsided as polygamy became less of an issue, and the newspapers seldom mention them after 1890."[306]

375. In the Utah Territory, where the law against polygamy had been imposed *after* the Mormons settled, the experience was diametrically different. Polygamy had flourished prior to the passage of the federal anti-bigamy legislation in the US. After its passage, a wave of prosecutions followed. Between 1885 and 1889, somewhere between 970 and 1300 Mormon men had been convicted of bigamy or unlawful cohabitation, or almost one a day for four straight years.[307]

376. So, far from being a "dead letter", it would appear that the 1890 Canadian polygamy and bigamy laws, backed by the threats of rigorous enforcement by the federal government, had precisely the effect that Sam Steele of the NWMP had wished in his report of 1899: they prevented the practice of polygamy from gaining a "foothold" on the Canadian frontier as it had in the Utah Territory and

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[305] Palmer, "Polygamy and Progress" *supra*, p. 128 (Isbister Affidavit #4, Exhibit A, p. 74).
[306] Robert J. McCue, "British Columbia and the Mormons in the Nineteenth Century" in *The Mormon Presence in Canada*, p. 50 (Isbister Affidavit #4, Exhibit A, p. 20).
[307] The figure of 970 was from the Utah Territory Attorney General; the LDS church itself estimated the number at 1,300: Richard S. Van Wagoner, *Mormon Polygamy: A History* (Salt Lake City: Signature Books, 1989) (Isbister Affidavit #1, Exhibit D.13), p. 123.

pre-revolutionary Mexico, where the lack of explicit laws or government acquiescence had the opposite effect. In fact, the Canadian foothold would not be established until a handful of Canadian Mormons who had taken an interest in polygamy founded Bountiful in the late 1940s.

(3) Would Polygamy Increase if the Law Were Struck Down?

377. The Challengers suggest that, if polygamy were decriminalized, its small numbers of practitioners would be insufficient to create any of the social harms demonstrated by Dr. Henrich. The Amicus went so far as to say, in his opening submissions, that

> If 293 is struck down, as I say it must be, as a matter of law, then what happens, *and all that happens*, is that being a polygamist no longer turns someone into a criminal.[308] [Emphasis added]

378. In the present case, "reason and logic" indicate that some persons will take up the practice of polygamy if it were not criminally-barred. But there is also considerable evidence on the point.

379. Evolutionary psychology supports the idea that polygyny is, for men who can afford it, an advantageous mating strategy, as it permits a wealthy male to have both multiple partners and still adequate investment in the offspring.[309] If the principal tenets of evolutionary psychology are correct, then, humans will have a tendency to adopt the practice when the environment permits it. Both experts in evolutionary psychology, Dr. Henrich (for the Attorney) and Dr. Shackelford (for the Amicus), consider the phenomena of "serial monogamy" (particularly divorce and remarriage to sequentially younger women) and patterns of infidelity and overlapping relationships among North American men to be

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[308] Transcript Day 3 (November 24, 2010), p. 48, lines 2-6.

[309] Dr. Henrich notes that children of polygamous men tend to have a lower survival rate than those of monogamous men, but this is more than compensated for by the numbers of children a polygamous man can have.

suggestive that males are adopting essentially polygynous mating strategies to the extent that they are legally and socially able. Dr. Shackelford agreed that laws have been enacted to control the practice of serial monogamy by imposing costs upon it.[310]

380. Both Drs. Shackelford and Henrich spoke of indications that surprising numbers of university students appeared willing to entertain the idea of polygamy. In Shackelford's study, over 5 percent of male respondents indicated that their "ideal" mating behaviour would involve simultaneous marriage to between two and ten women (a percentage that Shackelford considered, if anything, low).[311] In Dr. Henrich's impromptu quiz of his female third-year university students, 70 percent said that, given the choice between becoming the second wife of a billionaire or the only wife of an otherwise identical middle-class man, they would either very likely or certainly choose the billionaire, a rate that Dr. Henrich (and Dr. Shackelford) thought surprisingly high. Dr. Shackelford said under cross-examination that he thought 17% would be a more expected figure:

> Q But nevertheless it doesn't surprise you that a significant portion of even well educated presumably successful unlimited option university women would select that option given those choices?
> A No, it doesn't surprise me, yes.[312]

381. The experts quite properly were reluctant to speculate on the rate at which polygyny might spread in the mainstream if permitted. Dr. Henrich agreed that it

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[310] Transcript Day 13 (December 15, 2010) pp. 30-31. It would be disingenuous to argue, however, that "serial monogamy" is the equivalent of true polygyny in terms of harm. There can be no "hyperpolygynists" under present laws; even the most successful serial monogamists will have only a handful of wives or families over their lifetime (Dr. Shackelford suggested that it generally happens at 20-year intervals), and their obligations to former spouses and their children are strictly regulated by law. In polygyny, even in North America, we have seen individuals amassing 60 wives at once (Brigham Young, Warren Jeffs); even lesser polygynists (like the bishop Winston Blackmore) can have dozens. Historically, in periods of great wealth inequality, polygyny customarily reaches "ridiculous levels" (a quote from Steven Pinker, adopted by Dr. Shackelford).

[311] Transcript Day 13 (December 15, 2010) p. 51.

[312] Transcript Day 13 (December 15, 2010) p. 52.

was unlikely to turn Canada into a significantly-polygynous society immediately, but considered that, in 50 years, its non-trivial adoption (and a loss of ground on women's equality and other factors) was "very plausible". He held this position in the face of vigorous cross-examination by the Amicus and the BCCLA.

382. Dr. Shackelford, the Amicus's expert, was ambivalent. On the one hand, he said he "generally agree[d]" with Steven Pinker's statement that "whenever polygyny is allowed men seek additional wives and the means to attract them."[313] He noted, however, that there were presently no "high status" polygynist role models that others might emulate, and the present practitioners of polygamy seemed in fact to have little social status. This he considered a factor militating against the spread, or at least against its rapid spread.

383. When pressed on the question, Dr. Shackelford first said that the spread of polygyny in North America is "plausible... terribly, terribly unlikely, but plausible." Nevertheless, almost in the next breath, he agreed that, of men those who could "afford the costs", "some would" pursue polygyny.[314]

384. It was the FLDS's expert Dr. Walsh who appeared most enthusiastic about the possibility of polygamy's proliferation. He estimated that as many as half of the millions of "mainstream" Mormons would embrace the practice if it were permitted:

> 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

[313] Transcript Day 13 (December 15, 2010) p. 25 lines 33-38.
[314] Transcript Day 13 (December 15, 2010) p. 55 line 18.

> 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.[315]

385. The wealthiest and most powerful FLDS leaders accumulate many wives. Winston Blackmore has around 25.[316] Rulon Jeffs had 80 at the time of his death.[317] Warren Jeffs is thought to have had more than 60. Paul Kingston (current leader of the Kingston group) had 15 wives when Rowena Erickson was still with the group, and now probably has 30.[318]

386. As Dr. Henrich pointed out, the preconditions for hyperpolygyny are present in North America with its excessive disparity in wealth and status. This, coupled with an already established group of polygamists including hyperpolygamists, suggests that polygamy's practitioners would have an even greater impact than they do in cultures where wives are generally few. Dr. Henrich concluded in his first Report:

> If this combination of theory and evidence is correct, legalizing all forms of polygamy will principally result in an increase in polygynous marriages by wealthy, prestigious men.[319]

387. Dr. Wu, the University of Victoria demographer, confirmed that he had no knowledge of polygamy or its potential for expansion. The expert political economist Dr. Grossbard rejected the Amicus's suggestion that because monogamy and industrialization are closely correlated, polygamy simply could not catch on in a complex society such as Canada. Dr. Grossbard emphasized the experience of France, where a 13 year "window" of decriminalization had led to a community of 200,000 members of polygamous families in that country, a

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[315] Transcript Day 15 (December 15, 2010) pp. 32-33.
[316] Ruth Lane (Winston Blackmore's former wife), Transcript Day 15 (January 5, 2011) p. 91 lines 20-30.
[317] Brent Jeffs (Rulon Jeffs' grandson), Transcript Day 15 (January 5, 2011) p. 66 lines 19-25.
[318] Rowena Erickson Affidavit #1, para. 27.
[319] Henrich Affidavit #1, Exhibit B, p. 59.

point made also in the Quebec *Conseil du statut de la femme* Report, discussed below.

388. It would appear that the human drive to polygamous practice is sufficiently strong that it will even lead some to convert to unfamiliar religions. Recently, the Supreme Court of India attempted to close the door on what had become a widespread practice of Hindu men converting to Islam in order to take a second wife under an Indian law that permits polygamy for Muslims but not for Hindus: *Thomas vs. Union of India* [2000] 6 SCC 224, 2000 AIR 1650. Nevertheless, since that time a number of very high-profile Hindus, including Bollywood stars and high government officials, have married second wives after a "conversion" to Islam.[320] This problem of the spread of polygamy among the educated urban elite has become sufficiently worrisome that the Law Commission of India has recommended changing the laws of marriage to stop it.[321]

389. If the challengers succeed here, of course, such artifice would not be necessary. Polygamous marriage would be available to any regardless of belief or religious practice. But the fact that persons are willing to change religions (or in some cases perhaps create religious dictates) to facilitate polygamy indicates that the domestic adoption of the practice should not be discounted.

390. Of course, it is possible that the evolutionary psychology model is incorrect, and the apparent robustness in the practice of polygyny is related to cultural factors, especially the structural inequality of men and women. In such a case, the argument goes, we need not worry about polygamy happening here.

391. The argument was put in economic terms by economists Gould et al:

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[320] Coomi Kapoor, "India Diary: Dodging the anti-bigamy laws" (Monday January 19, 2009), *The Star Online*, http://thestar.com.my/news/story.asp?file=/2009/1/19/focus/3046397&sec=focus.

[321] Law Commission of India, *Report No. 227, Preventing Bigamy via Conversion to Islam – a Proposal for giving Statutory Effect to Supreme Court Rulings* (August 2009), http://lawcommissionofindia.nic.in/reports/report227.pdf.

> In developed countries, bans on polygyny seem to be effective, but this is most likely due to the low demand for polygyny in equilibrium. In this sense, we follow the line of reasoning in Becker (1992) and Jon Elster (1989) by arguing that laws and norms may effect behavior, but they rarely evolve if personal incentives are weak to uphold them. Our model should be considered an attempt to explain how personal incentives to become polygynous decline naturally with development and, therefore, align themselves with laws and norms to reinforce a monogamous outcome.[322]

392. The argument is not reassuring, for several reasons. First, even if polygyny were attenuated with development and the equality of women, parity between the sexes – economic, social, political – is hardly a completed project in Canada.

393. Second, it seems uncontroversial that the factors that are asserted to attenuate polygyny – from women's equality to economic development – are not equally distributed throughout the country. There are many communities where women's rights are not culturally recognized, even if they legally exist. And it is among these communities that polygamy can be expected to spread.

394. Third, polygamy can spread rapidly even where women and children are accorded the fullest possible legal rights. If any proof is needed, it is provided again by Bountiful. Polygamy among Mormons in Canada swelled from a single family of a husband and two wives – Harold Blackmore's – in 1947 to a community of over a thousand by the turn of the Century, where men had as many as 25 wives. This happened despite the fact that women's legal rights were as advanced in Lister as they were elsewhere in Canada. As the rights of women and children advanced in general, so they withered in Bountiful. In light of this experience, it is simply not possible to say

395. Presently, the illegality of polygamy is a bar to immigrants who wish to bring their polygamous families to Canada, and it restricts persons who have

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[322] Eric Gould, Omer Moav, and Avi Simhon, "The Mystery of Monogamy" (2008), 98:1 American Econ. Rev. 333-357 at p. 349, appended to Affidavit of Emma Lehrer Sworn December 2, 2010.

moved here from polygamous societies to adopt the practice in Canada after relocating. It is uncontroversial that Canada is a preferred immigration destination from the developed world, including from countries where polygamy is practiced.[323] If Canada were to become the only nation to decriminalize polygamy, it would be 'the only game in town' – the only possible immigration destination for polygamist families.

396. The lesson of France is instructive. That country introduced a family reunification policy permitting immigration by members of polygamous families in order to spur immigration in response to postwar labour shortages. A review of the literature reveals the catastrophic consequences as the numbers of polygamists in France swelled to hundreds of thousands. The research indicated that the situation for polygamist immigrants in France was dire indeed: often worse, in fact, than in their home countries. The French government reversed direction in 1993, but the damage was already done and the harms persist almost two decades later. Indeed, the 're-criminalization' of polygamy seems to have added yet another layer of oppression on the victims of polygamy, indicating that decriminalization is not something that can be approached as a harmless social experiment.[324]

397. Aside from the third world, of course, there would be immigration from polygamists presently in the United States, including fundamentalist Mormons and the others that Dr. Walsh described as inclined to the practice, and other Western countries who would view Canada as a preferred destination.

398. In short, "reason", "logic", and all the evidence in this case indicates that if polygamy were decriminalized, its practice would increase in a nontrivial way.

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[323] "What the World Thinks of Canada: Canada and the World in 2010 – Immigration and Diversity", Ipsos Reid for Historica Dominica Institute, Isbister Affidavit #1, Exh. F, Tab 4.
[324] "Polygamy and the Rights of Women", Quebec *Conseil du statut de la femme* Report, Gabay Affidavit #1, Exh. B.

D. Minimal Impairment

(1) The Two Arguments

399. In the Attorney's submission, the evidence of harm in this case is more than sufficient to demonstrate that government action is justified. The question is therefore: is section 293 the *right* prohibition, or at least one that falls within the range of reasonable alternative measures?

400. The Challengers present two arguments. The first is that the law is unnecessary because the harms of polygamy can be addressed through alternative means; the second is that, if a polygamy law is justified, it could capture less than the present law does. This is, therefore, another iteration of the "overbreadth" argument already addressed in these submissions in the context of section 7 of the *Charter.*

(2) Alternative Means

401. This leads the challengers of section 293 to say "if the problem is the youth of brides, or exploitation, or trafficking, or erosion of women and children's rights, then why not rely on laws against those activities instead of the polygamy prohibition? Or why not modify and extend them?"

402. This assertion implies that Parliament is restricted from imposing complementary measures to address social harms. In *R. v. Sharpe*, [2001] 1 S.C.R. 45 the accused argued that, if the problem is the exploitation of children in the manufacturing of child pornography, then the solution would be the enforcement of laws against that activity; the 'market reduction' targeted by the law against simple possession was unnecessary. McLachlin C.J. rejected the idea, writing 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.

403. But more important is the point that implementing stricter child-exploitation or trafficking laws, or effecting the more vigorous enforcement of those in place, is only an answer to the extent that such crimes are reported, investigated, and prosecuted. This is obviously not the case, and in fact the crimes upon which the FLDS and Amicus would rely as alternatives (sexual exploitation of a minor, sexual assault, trafficking in persons, and so forth) are both under-reported and difficult to investigate and prosecute, and this is particularly true with respect to insular populations of vulnerable immigrant groups or closed religious communities where polygamy is mostly likely to prosper.

404. The Utah Supreme Court in *State v. Green* 2004 UT 76 wrote:

> ¶40 Most importantly, Utah's bigamy statute serves the State's interest in protecting vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support. *See* Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. Legis. & Pub. Pol'y 225, 239-45 (2001). Moreover, the closed nature of polygamous communities makes obtaining evidence of and prosecuting these crimes challenging. *See id.* at 243 ("Given the highly private nature of sexual abuse and the self-imposed isolation of polygamous communities, prosecution may well prove impossible. This wall of silence may present a compelling justification for criminalizing the act of polygamy, prosecuting offenders, and effectively breaking down the

wall that provides a favorable environment in which crimes of physical and sexual abuse can thrive.").

405. Every expert witness asked the question confirmed that, even outside closed and insular religious communities, crimes within the family are severely unreported, especially crimes against children. Thus, permitting an activity (polygamy) that will increase harm (including criminal harm) against children or women cannot be supported on the basis that the harm can be adequately addressed through enforcement of other laws. It simply cannot.

406. The Bishop of the FLDS, James Oler, declared in his affidavit that in all "instances where members of the community have been suspected of criminal offences... reports have been made to the police."[325] Mr. Oler, a participant in the proceedings, purported to withdraw his affidavit rather than face cross-examination upon it.

407. Yet it was Mr. Oler himself who is recorded as delivering his two teenaged sisters to be married to Warren Jeffs in 2004, and later witnessing the marriage of his 15-year-old daughter in Mesquite Nevada minutes before collecting his own 15-year-old bride. Polygamy laws made that activity illegal, and a prosecution was commenced against Mr. Oler for violating section 293 (with respect to allegations of his "marriage" to another teen bride). Mr. Oler has never faced charges for trafficking, exploitation, or other offences.

408. The pattern of apparent criminality within the FLDS demonstrates eloquently why the harms caused by polygamy cannot be easily addressed through the enforcement of child exploitation, sexual assault, procurement, or other laws. Were it not for a very particular confluence of events – the prank call to Texas authorities, the keeping by the FLDS of such meticulous records of its

[325] James Oler Affidavit #3, para. 14.

own abuses, the testimony of the FLDS's Anonymous witnesses in this Reference – the details of this behaviour would never have come to light.

409. Even with such compelling documentary evidence, there still remains a question of whether the crimes detailed could ever be prosecuted – without the cooperation of the victim, it is virtually impossible to prove sexual contact as an element of exploitation or assault, unless the girl becomes pregnant while still a teen. And surely public policy cannot require the government to wait until that point before addressing a serious social harm.

410. It is a nice idea that the harms that go hand in hand with the practice of polygamy could be addressed if only the practice would be brought into the sunlight through decriminalization. But there is no reason to believe that this would happen. Polygamy needs insularity to hide the abuses that it requires to sustain itself through generations. It requires insularity to shield the methods of control and indoctrination that will guarantee the next generation of willing child brides.

411. In any event, the Supreme Court has made it plain that Parliament should be given great latitude for dealing with social harms once they have been identified. The Court in *R. v. Butler* [1992] 1 S.C.R. 452 wrote at paras. 122-24:

> Finally, I wish to address the arguments of the interveners, the Canadian Civil Liberties Association and Manitoba Association for Rights and Liberties, that the objectives of this kind of legislation may be met by alternative, less intrusive measures. First, it is submitted that reasonable time, manner and place restrictions would be preferable to outright prohibition. I am of the view that this argument should be rejected. Once it has been established that the objective is the avoidance of harm caused by the degradation which many women feel as "victims" of the message of obscenity, and of the negative impact exposure to such material has on perceptions and attitudes towards women, it is untenable to argue that these harms could be avoided by placing restrictions on access to such material. Making the materials more difficult to obtain by increasing their cost and reducing their availability does not achieve the same objective.

> Once Parliament has reasonably concluded that certain acts are harmful to certain groups in society and to society in general, it would be inconsistent, if not hypocritical, to argue that such acts could be committed in more restrictive conditions. The harm sought to be avoided would remain the same in either case.
>
> It is also submitted that there are more effective techniques to promote the objectives of Parliament. For example, if pornography is seen as encouraging violence against women, there are certain activities which discourage it -- counselling rape victims to charge their assailants, provision of shelter and assistance for battered women, campaigns for laws against discrimination on the grounds of sex, education to increase the sensitivity of law enforcement agencies and other governmental authorities. In addition, it is submitted that education is an under-used response.
>
> It is noteworthy that many of the above suggested alternatives are in the form of responses to the harm engendered by negative attitudes against women. The role of the impugned provision is to control the dissemination of the very images that contribute to such attitudes. Moreover, it is true that there are additional measures which could alleviate the problem of violence against women. However, given the gravity of the harm, and the threat to the values at stake, I do not believe that the measure chosen by Parliament is equalled by the alternatives which have been suggested. Education, too, may offer a means of combating negative attitudes to women, just as it is currently used as a means of addressing other problems dealt with in the *Code*. However, there is no reason to rely on education alone. It should be emphasized that this is in no way intended to deny the value of other educational and counselling measures to deal with the roots and effects of negative attitudes. Rather, it is only to stress the arbitrariness and unacceptability of the claim that such measures represent the sole legitimate means of addressing the phenomenon. Serious social problems such as violence against women require multi-pronged approaches by government. Education and legislation are not alternatives but complements in addressing such problems. There is nothing in the *Charter* which requires Parliament to choose between such complementary measures.

412. The analogy here is apt on a number of levels. If the Court accepts that the harms described are caused by polygamy, then, as the Court points out, there can be no obligation of Parliament to deal only with the symptoms.

(3) Overbreadth

413. The second assertion made by the Challengers under the rubric of 'minimal impairment' is that, if a polygamy law is justified, then *this* polygamy law captures too much. Could, in other words, a less minimally-impairing ban achieve the same goals? It is difficult to see how it could.

414. The main areas of over-inclusiveness argued by the Challengers are three. They suggest (at various times and in different ways) that the law could be more carefully tailored if it: (a) did not include polyandry or same sex partnerships; (b) did not include any non-exploitative, consensual adult multiparty relationships; and (c) applied to only the men in polygynous households. No actual language has so far been proposed that *might* make the provision constitutional.

415. These concerns have already been addressed: (a) was discussed in the course of the early "Interpretation" section IV(D), and (b) and (c) were dealt with in the discussion of "Overbreadth" in section VIII(C). Properly interpreted, the Attorney says that the law does not apply to polyandry or same-sex multiparty relationships. However, the main point to be made is that redrafting the law as mooted to capture only exploitative or underage marriages, or to apply only to polygynist men, would not help for the simple reason that the harms of polygamy are felt throughout a society regardless of whether they felt in any particular relationship.

416. The difficulty in requiring, as West Coast LEAF and the BCCLA would, elements of exploitation or inequality in order to commence a prosecution for polygamy is the same. If polygamy is harmful, it is not necessary or desirable to parse it into 'good' and 'bad' polygamy by reference to its consequences in any given situation.

417. And needless to say, given that on all the evidence religious polygamy is, if anything, worse than any secular variant, there can be no accommodation for religion as there might be with, for instance, helmet or kirpan exceptions for religious Sikhs.

418. The final argument expected from the Amicus with respect to minimal impairment is an argument that the prohibition in section 293 is unnecessary, argued by way of international comparison and legal history. The argument would go like this: Until 1890, Canada and Great Britain shared virtually identical criminal prohibitions on bigamy. In 1890, Canada bolstered its law with the specific provisions regarding polygamy, Great Britain did not. Now, over 100 years later, Great Britain and Canada are *both* experiencing low levels of polygyny, according to comparative sources like Professor McDermott (whose team rated both countries as "1" on the 1-4 scale of degree of polygyny).

419. The argument is facially appealing but has many difficulties. First of all, as described at length elsewhere, the uncertainty about the application of the bigamy prohibition to polygamy that existed in Canada in 1889 endures in England to this day. It is not possible to know whether English bigamy laws, like the almost identical American versions in *Reynolds* and *Holm*, would be applied to bar polygamy or whether they would not.

420. And as for assessing the impact of the English legal framework on the spread of polygamy in that country, we really have very little evidence on either subject – that is, the state of the law (including immigration practices, enforcement policies, and so forth) or the presence of polygamy.

421. But the argument from international comparison founders most badly on the shoals of the hard experience of other nations: the example of pre-revolutionary Mexico, which became a haven for polygamist Mormons at precisely the time when Canada did not, arguably because it had no polygamy

law *per se* and did not enforce the polygamy law against the immigrants; and the sobering example of France, which relaxed its own laws for a period of 13 years and experienced a massive wave of polygamous immigrant families. And there is the United States itself, which followed up the relatively ineffective bigamy provisions of 1862 with the far more comprehensive legislation of the 1880s.

E. Salutary and Deleterious Effects

(1) Salutary Effects of the Polygamy Prohibition

422. The evidence indicates that reduction in polygamy has the following beneficial effects, all of which have been described in the evidence of harm earlier in these submissions:

- Increased per-child parental investment, with expected increase in the mental and physical wellbeing of children overall;
- Reduced social strife, conflict and crime that is expected as a result of more uneven distribution of the opportunity to marry;
- Reduced average age gaps between husbands and wives, increasing equality in marriages;
- Reduction in the sexual predation on young girls;
- Reduction in incentives for male control over women and their reproductive capacity; and
- Consistency with Canada's international treaty and legal obligations.

423. In addition, eliminating the right of citizens to marry polygamously increases the opportunity of others to marry at all. In *Miron v. Trudel*, [1995] 2

S.C.R. 418, the minority opinion in the 4-4-1 split (dissenting in the result but not on this point), made some important observations about marriage as not only a fundamental institution,[326] but actually a fundamental human right that was formally recognized under the United States constitution[327] and international law.[328] This Court does not have to recognize any legal aspect to the right to marry, it need only recognize its more widespread distribution as a social good.

424. The Amicus in his Opening Statement took sharp exception to this argument, suggesting it disparaged women by treating them as a resource to be distributed to placate men. Setting aside the irony of this position (on the evidence, is it not the polygamists who appear to be 'trading' in women and girls?), the Attorney is not suggesting that there is some duty on the state to ensure that marriage opportunity is equally spread throughout the population, or that someone might be subject to criminal sanction just because their life choice (for instance a decision not to marry) will impact someone else's right to marry at all.[329] But to the extent that the *Charter* is involved in the balancing of rights throughout society, it is not irrelevant that in denying one class of persons the right to marry plurally, the law is distributing the right to marry overall more equitably through society.

425. There is also substantial international evidence that prohibiting polygamy leads to increases in levels of democracy, human rights, and economic development. How these effects have played out in Canada, and how they might

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[326] Para. 41, citing *Maynard v. Hill*, 125 U.S. 190 (1888), at pp. 205 and 211.

[327] Para. 42, citing inter alia *Meyer v. Nebraska*, 262 U.S. 390 (1923), at p. 399 which asserted that the Fourteenth Amendment includes "the right of the individual . . . to marry, establish a home and bring up children".

[328] Gonthier J. wrote at para. 44:

> Moving from domestic to international law, art. 16 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), which is binding on Canada, and art. 12 of the *European Convention on Human Rights*, 213 U.N.T.S. 221, provide individuals with "the right to marry". For example, art. 16 of the *Universal Declaration* states that "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution".

[329] As it might if more persons of one gender decided not to marry than the other.

be affected by decriminalization, can only be the subject of reasoned speculation, but given their fundamental importance to Canadian society, we should not put them lightly in peril.

426. The Amicus, of course, asserts that, even if these salutary effects could be linked with reducing polygamy, the prohibition in section 293 does *not* reduce polygamy and therefore the salutary effects cannot be attributed to the law. The Attorney has dealt with this "ineffectiveness" argument in "The History and Purpose of S. 293" and his response to the "arbitrariness" argument under section 7, and has dealt with the "unnecessary" aspects of it under "minimal impairment", above, and repeats here only that section 293 has proven manifestly effective at reducing and deterring the practice historically, and on the evidence it continues to do so today.

(2) Deleterious Effects

427. The deleterious effects identified by the Amicus and FLDS and their allies fall into two broad categories. The first category contains a number of asserted harms:

- The stigma and discrimination against practitioners of polygamy.
- The insularity caused by fear of prosecution.
- The harms of the criminal process itself (possible arrest, prosecution, incarceration).

428. There is one general observation that should be made about all of these deleterious effects: they are visited on persons who *violate* the law, not on persons who *obey* it. This may seem self-evident and thus unimportant but it is not. The weight or harshness of the criminal process is properly considered under the question of "gross disproportionality" under sections 7 and 12. Where

a law has met this test, the harms visited upon the *criminal* should not be resurrected at the section 1 stage: *R. v. Malmo Levine.*

429. And under section 1, it is not the role of the courts to weigh, in a global sense, all the negative effects of criminalization against the benefits gained. Rather, the benefits of prohibition are weighed only against the harms to the exercise of the *Charter* rights breached.[330] So in the present case, it would not be relevant to consider, at the section 1 stage, any deleterious effect except that affecting the free exercise of religious, expressive, or associational rights. Only if section 15 were found to have been breached would it be arguably appropriate to consider factors such as stigma.

430. The second broad category of asserted deleterious effects, and the one that *is* properly considered at the section 1 stage, involves the consequences of *obeying* the law. These are legitimately considered at the section 1 stage. They include essentially two ideas.

431. First and most obviously, there is a deprivation of religious freedom. For those very few persons in Canada who believe that polygamy is *ordained*, rather than simply permitted, by their religions, this deprivation could be significant.

432. Secondly, there may be an equivalent loss of secular liberty – the loss of the freedom to choose to have more than one wife or to share a husband with another wife. But in order for this to rise to the level of deleterious effect under section 1, it must be a deprivation of liberty that was not in accordance with the principles of fundamental justice. The Supreme Court has long held that any law that does not survive section 7 challenge will be impossible to justify under

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[330] *Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* [1990] 1 S.C.R. 1123, paras. 11, 106; *R. v. Butler* [1992] 1 S.C.R. 452 at paras. 120, 122; *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (AG)* [1998] 1 S.C.R. 877 at paras. 125, 129; *R. v. Sharpe* [2001] 1 S.C.R. 45 para. 78; *Alta. v. Hutterian Brethren of Wilson Colony* [2009] 2 S.C.R. 567 at paras. 73, 89, 95, 102.

section 1 except in cases of dire emergency, and so it must be taken as a given that, if the analysis has proceeded to this stage, section 7 has not been violated.

433. So the deleterious effects that may be legitimately viewed at the proportionality stages are reduced to one: the loss of religious freedom.

434. Fundamentalist Mormonism appears to be the only religion that mandates polygamy. Islam's only religious dictate with respect to polygamy is to place restrictions upon its practice; there is no suggestion that the practice itself has a religious origin. Mainstream Mormons may or may not believe that plural marriage in the afterlife is an advantage, but they accept that, in the present, God's laws can legitimately yield to governments'.

435. It is arguable, of course, that the FLDS church and faith arose from a desire to practice polygamy, rather than the reverse. But this is really, given the scope of the harms attached to polygamy, of little consequence. A religion may hold as a central tenet human or animal sacrifice, punishment of religious transgression by stoning or immolation, genocidal war, or infanticide. The only time a criminal law has been struck down because of conflict with religious practice was in *Big M* itself, and there it was the religious *purpose* of the law offended.

436. The only way a polygamy prohibition could *not* offend religious practice would be if it were to hive off a religious exception or accommodation, as did the Sunday-observance law upheld subsequently in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

437. But such an exemption would defeat the very purpose of the prohibition.

438. As the Attorney earlier submitted, because the polygamy prohibition is legitimately focused on the "core" and most harmful forms of multiparty marriage,

those invoking a binding authority, it is naturally and almost uniquely at odds with religious teaching such as the FLDS's. That is to say, unlike virtually any other act that might be defended on the basis of religious freedom – the wearing of a turban or kirpan, the erection of a succah, and so on – religiously mandated plural marriage is harmful (and thus the legitimate target of the criminal law) in part *because* of its religiosity, and the more profound and controlling the religious belief, the more harmful it can be. It is the religious nature of plural marriage that permits the cradle-to-the-grave indoctrination of adherents into the acceptance of the practice; it is the religious nature that has permitted it to expand so rapidly in Bountiful from a single family in 1947 to about a thousand souls today. Most types of polygamy may be, on balance, bad, but religiously-mandated polygamy is many times worse.

439. Consider the question of religious impairment in the context of the true objects of the protection. The evidence of those who have left the FLDS indicates the extent to which that religion is used, not as a vehicle for self-fulfilment, but as an impairment of it, as a mechanism of control, not liberation. Adherents are taught that if they disobey the direction of the church leaders, they are going against God;[331] and if they persist, they are expelled from the only community they have known.[332] Once expelled, the member is an "apostate" and may be shunned even by family members.[333] Surely this is not the purpose of section 2(a)'s protections.

440. Moreover, as noted earlier in the discussion of section 2(a), the religious practice being defended is, in itself, discriminatory against women as it embraces

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[331] Dr. Larry Beall, Transcript Day 8 (December 2, 2010) p. 28 lines 35-44; Beall Affidavit #1, para. 59; Brent Jeffs, Transcript Day 15 (January 5, 2011) p. 77 lines 33-40.

[332] Howard Mackert, Transcript Day 14 (December 16, 2010) p. 77 line 47, p. 78 line 6; Rowena Erickson Affidavit #1, para. 9; Truman Oler, Transcript Day 23 (January 18, 2011) p. 7 lines 23-31.

[333] Brent Jeffs, Transcript Day 15 (January 5, 2011) p. 67 lines 19-27; Don Fischer, Transcript Day 21 (January 13, 2011) p. 23 lines 29-37, p. 24, lines 43-47; Susie Barlow Affidavit #1, para. 3; Lorna Blackmore Affidavit #1, para. 21; Truman Oler, Transcript Day 23 (January 18, 2011) p. 30 lines 18-40, p. 31 lines 25-31.

only polygny. As such, *Charter* values of equality and dignity are *promoted,* not offended, to the extent that the practice is curtailed. 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 its infringement as a deleterious effect at the balancing stage should be minimal, at best: *Keegstra*.

441. If the harms attributable to authoritarian patriarchal polygyny generally, and fundamentalist Mormon polygyny in particular, are accepted by this Court, and given the inherent inequality of *all* known traditions of religious polygamy, then restricting this manifestation of religiosity must be seen as, on balance, a salutary, not deleterious, effect.

XI. Conclusion

442. For thirty years many academics and lawyers have said, without the benefit of much evidence, that prohibiting polygamy was an unjustifiable infringement on the liberty of citizens. It is not.

443. This Court has seen an overwhelming amount of evidence on the harms of polygamy. Experts have shown what theory predicts about those harms, and they have shown that, around the world, the harms are manifest in correlation with polygamy. At some point, it is natural, indeed necessary, to conclude that the relationship is causal. It is, at root, a question of arithmetic.

444. The Challengers say that it could not happen here.

445. It did happen here. Where polygamy, through isolation, secrecy, and government inaction was permitted to take root and grow, it did, and it had all the negative consequences seen around the world. The abuses of Bountiful are on the record.

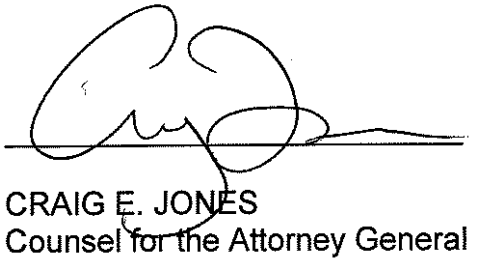
446. The Challengers say that we need not worry, because polygamy "is simply not a practice that appeals to the vast majority of Canadians". The same could be said, thank goodness, of rape, or virtually any crime.

447. There has never been a forum where the harm of polygamy has been made more plain, where the arguments in favour of permitting it have been shown to be so empty. In this hearing, even polygamy's enthusiastic practitioners have revealed the depth of their own wounds and the scale of the devastation around them. There is no better way to conclude than with Truman Oler, a heavy duty mechanic whose constitutional analysis embarrasses us in its simplicity and power:

> I looked it up a little bit on the Internet and I read through that second -- that second Charter and that one -- the one thing they're trying to do is use that right to protect themselves... but... the teaching of that one religion is taking away all the rest of the rights on that *Charter*. And I just -- it's just -- I don't know if they – we never as children knew of charters and rights and freedoms, but I just don't understand. Well, I guess I kind of understand now but it's just -- it's just doesn't feel right to me why I know it's not for children to have to go through what I went through and all for no reason.

448. It is not an exaggeration to say that the world is watching this case. It has been by far the most thorough and profound exploration of polygamy and its harms in any courtroom, ever. If the prohibition against polygamy cannot be supported today, on this record, then it could never be supported.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th Day of March, 2011.



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APPENDIX: THE USE OF EXTRINSIC EVIDENCE OF HISTORY

1. In an earlier hearing, this Court invited the Participants to make submissions on the use that the Court might make of historical and other social science evidence contained in the Brandeis brief materials.

2. The Supreme Court of Canada has confirmed that any section 1 analysis under *Oakes* must be undertaken with a "contextual" approach. In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 87:

> The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.

3. In *M. v. H.*, [1999] 2 S.C.R. 3, Bastarache J. (concurring) elaborated on the utility of Brandeis brief material in the section 1 analysis:

> 295 Background is particularly important in determining the deference to be afforded to the legislature. The degree of deference cannot be determined by a crude distinction between legislation that pits the state against the individual and legislation that mediates between different groups within society. A court should consider a variety of factors when assessing whether a limit has been demonstrably justified in accordance with s. 1. In *Thomson Newspapers*, I considered the following factors to be of importance: the vulnerability of the group which the legislator seeks to protect (as in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 88); that group's own subjective fears and apprehension of harm (as in *R. v. Keegstra*, [1990] 3 S.C.R. 697, *per* McLachlin J., at p. 857); and the inability to measure scientifically a particular harm in question, or the efficaciousness of a particular remedy (as in *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 502). These are not rigid

categories of justification, but rather instances of relevant contextual factors.

Context of the Exclusion: The Social Science Evidence

296 I have been greatly aided in my consideration of the existing social science evidence by the voluminous Brandeis briefs and articles submitted by the respondent. While this evidence is an important source of information for this Court, I must stress that care should be taken with social science data. When dealing with studies exploring the general characteristics of a socially disadvantaged group, a court should be cautious not to adopt conclusions that may in fact be based on, or influenced by, the very discrimination that the courts are bound to eradicate. Judges, in fact, should be diligent in examining all social science material for experimental, systemic or political bias of any kind. With this caution in mind, I will briefly consider the material before this Court.

4. This is also the practice where a law's effect, historically and in the present, is at issue under s. 7 of the Charter. In *Bedford v. Canada*, 2010 ONSC 4264, for instance, Justice Himmel admitted a vast array of social science evidence (e.g. government reports, statistics, expert testimony from a variety of fields, including history, sociology, and psychology), to assist her in determining the effect of the impugned laws, which were being challenged on s. 7 grounds.

5. Social science and historical evidence has also been very heavily relied upon in determining the content of substantive provisions of the *Charter*, as in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27, where the Court referred extensively to Brandeis brief articles to determine the history of collective bargaining in Canadian society as context in the development of labour law over the last century.

6. In this case, it does not appear that any party objects to this Court considering social science evidence, and all have submitted material to be added to the Brandeis brief. The historical materials cited in these submissions from the Attorney General are not, on his understanding, questioned or controversial.

Their reliability is also supported by the fact that there is complete consensus among the stated authorities (with respect to historical facts, if not the interpretation of them).

7. Beyond the *Charter*, there is also the question of whether and to what extent these materials might assist in the interpretation of an ordinary statute.

8. Although once controversial, in modern times reading legislation in its historical context is not only permitted, but encouraged as useful to uncovering legislative intent.[334] It is no longer necessary for a court to find statutory language unclear before considering the context in which it was enacted,[335] and general concerns regarding the frailty of extrinsic evidence are giving way to case-by-case assessments of authoritativeness, regardless of the type of evidence involved.[336] Today courts readily look to the history of a provision, including its antecedent legislation, its place in broader movements of reform, evidence of government's intent in introducing the legislation, and other extrinsic historical information from which intent may be inferred. The Supreme Court of Canada has recently made it plain in that the "legislative evolution and history" of an

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[334] *Smith v. Alliance Pipeline Ltd.* 2011 SCC 7 at para. 49. Also, in *McDiarmid Lumber Ltd. v. God's Lake First Nation* [2006] 2 S.C.R. 846 at para. 46, Chief Justice McLachlin stated that

> "[i]t is often helpful to consider the history of a provision in assigning meaning to a disputed term. The events and debates surrounding the adoption of the provision may provide insight into Parliament's purpose" (emphasis added).

Indeed, some decisions have been overturned for either relying exclusively on the words of a provision, or failing to take a contextual approach, e.g. *Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27 at para. 23 and *Ontario (Provincial Police) v. Cornwall (Public Inquiry)*, 2008 ONCA33 at para. 27. In *Manitoba Metis Federation Inc. v. Canada (AG)*, 2007 MBQB 293, aff'd by [2010] 3 C.N.L.R. 233 (B.C.C.A.)., historical evidence was used to put the language of both the Act and Parliamentarians during debate in context, so as to elucidate legislative intent (see paras. 561, 600, 648, 650-658).

[335] As explained in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 29-30:

> [O]ne must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations... It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and *thereafter* to determine if "the words are ambiguous ..." [first emphasis added; second emphasis in original].

See also *Castillo v. Castillo* [2005] 3 S.C.R. 870 at para. 23

[336] See *Dore v. Verdun (City)*, [1997] 2 S.C.R. 862 at para.13 and *Diamond Estate v. Robbins*, [2006] N.J. No. 3 (Nfld. C.A.) at para. 62.

enactment is "a relevant consideration in interpreting legislative intent".[337] In *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, the Court held that an amendment providing full indemnity for legal costs incurred disputing an expropriation should be interpreted in light of the law's evolution,[338] as well as the historical context in which the amendments were introduced.[339]

9. Recourse to the historical materials may, in this case, not be strictly necessary to properly interpret the statute, but to the extent that it is, it is appropriate.

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[337] Para. 49. See also *Canada 3000 Inc., Re: Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865 at para. 43, 57; *McDiarmid Lumber Ltd, supra*, at paras. 46, 49 and 56; and *Rizzo & Rizzo Shoes, supra,* at para. 31, for examples of the use of legislative history to interpret the meaning of ordinary statutes.

[338] The Court wrote at para. 49: "A brief overview of the *NEBA's* statutory antecedents is not only appropriate, but particularly instructive."

[339] Para. 54. The historical context described by the Court in *Smith* was the general trend toward full compensation in expropriation law at the time that the amendments were made, as described in the case law, in a Law Reform Commission working paper, and in the Minister's comments in *Hansard.*