

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE CONSTITUTIONAL QUESTION ACT, R.S.B.C. 1996, 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. 553 dated October 22, 2009 concerning the constitutionality of s. 293 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46

British Columbia Teachers' Federation

Closing Submissions

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I. REFERENCE QUESTION

1. The British Columbia Lieutenant Governor in Council has referred the following two questions to the British Columbia Supreme Court for hearing and consideration pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, s. 1:

1. Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular and or particulars and to what extent?
2. What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power or undue influence?

2. Section 293 of the *Criminal Code* provides:

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,
- (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.

R.S., c. C-34, s. 257.

II. POSITIONS OF THE PARTIES AND INTERESTED PERSONS

3. The British Columbia Teachers' Federation ("BCTF") applied for leave to intervene in this proceeding and was declared by the court to be a person interested in this Reference pursuant to section 5 of the *Constitutional Question Act*.
4. BCTF's interest in this Reference relates to its long history of ongoing work on issues relating to women and children, including the education of children. BCTF has a long-standing role in advocating for the rights of women and children in the community of Bountiful, B.C. The BCTF submits that the Bountiful Community provides an example of the serious effects that polygamy can have on the lives of women and children, including their education.
5. The Amicus, James Oler and the Fundamentalist Church of Jesus Christ and Latter Day Saints ("FLDS"), Canadian Polyamory Advocacy Association ("CPAA"), and the British Columbia Civil Liberties Association ("BCCLA") have all provided opening statements regarding their views on section 293 amounting to a breach of various provisions of the *Charter*. The Amicus identified sections 2(a) (religion) and (d) (association), section 7 (liberty), and section 15 (equality) of the *Charter*. The FLDS have also identified all of these sections as well as section 2(b) (thought, belief, expression) of the *Charter*. The CPAA has identified the same provisions as the FLDS. The BCCLA has focused on section 7 of the *Charter*.
6. Although each party and interested person has not identified all of the same *Charter* provisions, the collective list is captured by those provisions identified by the FLDS and the CPAA: section 2(a); 2(b); 2(d); section 7; and section 15.
7. Although the FLDS submits that it only wants polygamy decriminalised, and not necessarily legalised, if they are successful in their argument that section 293 violates the *Charter*, presumably *Charter* challenges to marriage and immigration laws would be also be successful.
8. Similar to the position taken by the Attorney General of British Columbia ("AGBC"), the Attorney General of Canada ("AG Canada") and other interested persons in this case, it is the position of the BCTF that section 293 does not amount to a breach of any of these *Charter* provisions, or if it does infringe these provisions, such infringement is demonstrably justified as reasonable in a free and democratic society.
9. The BCTF submits that in this analysis the court must consider a balancing of *Charter* rights, specifically the intersection of sections 7, 15 and 28 and the rights of women and children under these sections of the *Charter*. During the evidentiary phase of this proceeding, this court heard extensive evidence regarding the harms of polygamy, both inside of Canada and on a global basis. The BCTF submits that consideration of these harms is an important part of the analysis this court must undertake. Our submissions on this point focus on the harms of polygamy to children and their educational opportunities and attainment.

III. ELEMENTS OF THE OFFENCE

10. The court must interpret what is meant by section 293 of the *Criminal Code* which makes it a crime to practice or enter into “any form of polygamy” or “any kind of conjugal union with more than one person at the same time”.
11. As explained in the submissions of the AGBC, it seems clear that at the time this provision was enacted, Parliament was concerned with polygyny and the harmful effects of the practice. The BCTF agrees with the AGBC that the scheme and purpose of the provision was clearly addressed to harms attributed to polygyny.
12. Many of the experts who testified in this proceeding explained that when they use the term polygamy they are referring to polygyny. During our opening statement to the court, the BCTF advised that similarly our concern in this reference arises from our concern regarding polygamy as a harmful practice, as manifest as polygyny in the community of Bountiful.
13. The BCTF submits that in section 293 of the Criminal Code, polygamy and conjugal union should be read as encompassing exploitative polygamous relationships. The BCTF agrees with the submission of West Coast LEAF in this regard.
14. Some of the challengers to this section have stated that if Parliament meant to address harm, it cannot be done through a provision that criminalises the victims of the crime as well, i.e. the women in these polygynous marriages. The BCTF submits that this provision does not criminalise these women. For example, women in the FLDS have only married one man – they have not committed a crime under section 293 of the *Criminal Code*. It is only their husbands, in taking multiple wives who have committed a crime under this section.
15. The Supreme Court of Canada (“SCC”) has noted that sometimes provisions appear clear and unambiguous, but in fact prove to be ambiguous once placed in their context. This was the case in *Montreal (City)*, where the court was assessing a municipal by-law that prohibited the use of noise produced by sound equipment that could be heard from the outside of a building. The court held that, “In the interpretation process, the more general the wording adopted by the lawmakers, the more important the context becomes”.¹
16. In interpreting provisions that contain some ambiguity, the courts have a long history of undertaking processes of interpretation, “reading down” or “reading in”. In these cases, it is not always clear whether the courts are in fact using reading in or reading down techniques. In some of these circumstances the courts have explained that they are interpreting legislation or placing it in context.²

¹ *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141 at para 15.

² *Canadian Foundation for Children Youth and the Law*, Montreal (City), Zundel.

17. For example, in *A.C. v. Manitoba (Director of Child and Family Services)*, a 15 year old child and her parents refused medical treatment for the child, as being not in conformity with her religion. When the court ordered this treatment, the family brought a *Charter* challenge against the provision in the *Child and Family Services Act* which permitted the court order. Under the *Act*, the court was permitted to authorize treatment that it considered to be in the child's best interests. For a child 16 or older, the *Act* stipulated that the best interests of the child would be most effectively promoted by allowing the child's views to be determinative, unless it can be shown that the child does not understand the decision or appreciate its consequences. Where the child is under 16, no such presumption existed.³
18. The court held that properly construed to take an adolescent's maturity into account, the statutory scheme struck a constitutional balance between an individual's fundamental right to autonomous decision making in connection with his or her body and the protection of vulnerable children from harm. The court read the best interests standard as including a consideration of the child's views.⁴ In *A.C. v. Manitoba (Director of Child and Family Services)*, there is no discussion of reading in or reading down in the majority decision. The court appears to have viewed this exercise as statutory interpretation.
19. Another example of this type of interpretation was employed in *R. v. Labaye*, where the SCC interpreted "bawdy house" provisions in such a way as to limit its application to those cases in which harm was an issue.⁵
20. Canadian courts have consistently held that, "If a statutory provision is capable of an interpretation that is constitutional and one that is not, then the courts should choose the construction that conforms with the Charter".⁶ The BCTF submits that is the exercise which this court should undertake in this Reference. The BCTF submits that properly interpreted, section 293 of the *Criminal Code* conforms with the *Charter*.
21. The BCTF submits that in this Reference, whether the court views this exercise as reading down, reading in, or merely interpretation of the provision, section 293 should be interpreted as prohibiting exploitative polygamous relationships.

IV. HARMS TO EDUCATION

22. The court heard extensive evidence regarding the harms of polygamy both within Canada and around the world. The evidence in this proceeding demonstrated that polygamy is associated with very tangible harms to education.

³ *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181.

⁴ *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181 at para 3, 97, 98 & 108.

⁵ *R. v. Labaye*, [2005] 3 S.C.R. 728.

⁶ *R. v. Ruzic*, [2011] 1 S.C.R. 687 citing *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078; *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 22 and 56; and also generally *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; see also *R. v. Swain*, [1991] 1 S.C.R. 933.

A. General Harms to Education

23. Professor Rose McDermott was qualified in this Reference as an expert in political psychology with specialisation in international relations and sexual differences.⁷ Professor McDermott finds that based on the best data available to date in the world, in polygynous societies:

... girls are less likely to be educated, restricting a key component allowing for upward mobility and economic independence. In societies with high rates of polygyny, up to half of the boys are ejected from their primary communities, with incalculable effects on them.⁸

24. In his affidavit, Professor Nicholas Bala indicated that most studies have found that children in polygamous families have “lower educational attainment”.⁹
25. Dr. Shoshana Grossbard was qualified in this proceeding as an expert in the areas of marriage, the economics of home production, the economics of family, the economics of polygamy, gender studies, labour economics, sociological economics and anthropological economics.¹⁰ Dr. Grossbard explained the negative effects of polygamy on education when she testified:

...another consequence is that there is limited education in polygamous societies because again it's easier to control for – for men to control uneducated women so they attempt to reduce the education that's available to women especially. But these societies also have pretty low levels of investment in human capital for all children because they typically have very high fertility and they spend their resources on quantity of children rather than quality of children...¹¹

26. Dr. Grossbard provided the court with her opinion regarding the effect on education of legalising polygamy. She testified:

I think that were Canada to legalize polygamy I think one can expect that this would negatively affect educational achievements wherever polygamy is found, in the urban centres where polygamists immigrants would reside and other communities that have polygamy.¹²

27. Dr. Lawrence Beall was qualified in this proceeding as an expert clinical psychologist entitled to provide opinion evidence on the psychological, emotional and social impacts of

⁷ Evidence of Rose McDermott, December 15, 2010, p. 73.

⁸ Exhibit 41, Rose McDermott Expert Report at para 14.

⁹ Exhibit 54, Nicholas Bala Affidavit #1 at para 56.

¹⁰ Evidence of Dr. Grssbard, December 12, 2010, p. 5 – 6.

¹¹ Evidence of Dr. Grossbard, December 7, 2010, p. 15; Exhibit 48, Affidavit of Dr. Grossbard, July 16, 2010, Exhibit B, p. 5. .

¹² Evidence of Dr. Grossbard, December 7, 2010, p. 16.

the practice of polygamy on individuals from FLDS communities.¹³ At paragraph 62 of his affidavit Dr. Beall stated:

In my observation education within the polygamist community is inferior due to the narrow scope of approved education and the lack of resources and teacher training. Work needs to be done with these children to help them catch up with their peers.¹⁴

28. Dr. Beall testified that most of his patients had attend the FLDS school in Salt Lake City, although some had also attend a public school that was run by FLDS members. Dr. Beall explained that the FLDS School in Salt Lake City had a heavy emphasis on church-related instruction with “an hour every morning was dedicated to instruction about priesthood history, instructions from leaders and so forth”.¹⁵ Dr. Beall testified that in the FLDS community “there was a lot of indoctrination in the educational system”.¹⁶
29. In addition to his psychology degrees, Dr. Beall possesses a Masters in Education and he agreed that he was familiar with critical thinking skills being an important component of public education. Dr. Beall testified that the individuals he has worked with have not acquired critical thinking skills through their education.¹⁷
30. The evidence at this Reference established significant negative outcomes of polygamy on education. Even the witnesses for the challengers had to acknowledge these findings and could not establish any good effects on education from polygamy. Witness for the Amicus, Professor Lori Beaman, agreed that she was aware of studies that found that educational outcomes were worse for children from polygamous families and that there were studies that were inconclusive. Professor Beaman was not aware of any studies that indicated that children from polygamous families had better educational outcomes. She agreed that when she used the term “mixed” in her affidavit this is what she meant.¹⁸
31. The BCTF submits that the evidence of Professor Campbell that relates to educational issues should be given no weight. Professor Campbell has no expertise in this area and her expert qualifications in this proceeding, as a legal scholar and qualitative researcher, do not provide her with qualifications to opine on these issues.¹⁹ In addition, Professor Campbell did not interview any children in Bountiful.²⁰

¹³ Evidence of Dr. Beall, December 2, 2010, p 16.

¹⁴ Exhibit 1, Affidavit #1 of Dr. Beall at para 62.

¹⁵ Evidence of Dr. Beall (cross examination by R. Trask), December 2, 2010 p. 61.

¹⁶ Evidence of Dr. Beall, December 2, 2010 p. 11.

¹⁷ Evidence of Dr. Beall (cross examination by R. Trask), December 2, 2010 p. 62.

¹⁸ Evidence of Lori Beaman (cross examination by C. Jones), December 13, 2010, p 59 – 60.

¹⁹ Evidence of Angela Campbell (cross examination by C. Milne), December 1, 2010, p. 24.

²⁰ Evidence of Angela Campbel, December 1, 2010, pp. 9 & 13.

B. British Columbia Independent School System

32. In order to understand the harms to education that have occurred within British Columbia, we must understand the system within which this education is provided and the required educational standards in the province.
33. Under the *School Act*, children between the ages of 5 and 16 must be enrolled in an education program. One of the ways that parents can comply with this legislation is by enrolling their children in an independent school.²¹
34. Edward Vanderboom, the Inspector of Independent Schools, testified in this Reference regarding the classification and regulation of independent schools. Mr. Vanderboom also provided evidence regarding inspection of Bountiful Elementary Secondary School (“BESS”) and Mormon Hills Elementary Secondary (“Mormon Hills”).
35. Mr. Vanderboom explained the differences between Group 1, 2, 3 and 4 schools under the *Independent School Act*. Group 1 and 2 schools receive funding from the Ministry of Education to pay operating expenses, whereas group 3 and 4 schools do not. Under the legislation, group 1, 2 and 4 schools must meet the education requirements established by the minister and employ B.C. certified teachers.²²
36. However, under the *Independent School Act*, the term “certified teacher” has a different meaning than for public school teachers as, in addition to teachers who hold their qualifications with the British Columbia College of Teachers, it includes individuals who hold a certificate of qualification issued by the Office of the Inspector of Independent Schools (“OIIS”) or an individual with respect to whom a letter of permission has been issued by the OIIS.²³
37. Letters of permission may be issued by the OIIS when an independent school finds someone who they believe is suitable to teach at their school and also demonstrate that they could not find a qualified teacher.²⁴ The school must demonstrate that they have made repeated local and province-wide advertising in a publication likely to reach potential candidates and have failed to attract a suitable teacher holding a valid BC teachers certificate.²⁵ Letters of permission must be renewed annually.²⁶

²¹ *School Act*, RSBC 1996, c. 412, section 3; Evidence of Edwards Vanderboom, February 8, 2011, p. 53.

²² Exhibit 22, Vanderboom Affidavit para 13.

²³ *Independent School Act*, RSBC 1996, c. 216, section 1; Evidence of Edward Vanderboom, February 8, 2011, p. 43 – 44.

²⁴ Evidence of Edward Vanderboom, February 8, 2011, p. 51.

²⁵ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 62.

²⁶ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 61 – 62.

38. The Schedule to the *Independent School Act* requires that all independent schools must meet the following criteria:

Before issuing or renewing a certificate of group 1, group 2, group 3, or group 4 classification to an authority the inspector must be satisfied that

- (a) no program is in existence or is proposed at the independent school that would, in theory or in practice, promote or foster doctrines of
 - (i) racial or ethnic superiority or persecution,
 - (ii) religious intolerance or persecution,
 - (iii) social change through violent action, or
 - (iv) sedition
 - (b) the independent school facilities comply with the enactments of British Columbia and the municipality or regional district in which the facilities are located, and
 - (c) the authority complies with this Act and the regulations.²⁷
39. Group 1, 2 and 4 independent schools must meet the Ministry of Education curriculum requirements, which are identified in the Ministry produced Integrated Resource Packages (“IRPs”) and specified Prescribed Learning Outcomes (“PLOs”).²⁸ In other words, the IRPs contain legally required content of the provincial education system and Group 1, 2 and 4 independent schools are required to teach the PLOs. The PLOs describe what students are expected to know by the end of a particular grade.²⁹ School must also meet time requirements regarding hours of instruction for the curriculum.³⁰
40. The Social Studies PLOs for grade three through seven include “critical thinking” as the first skill listed under the PLOs.³¹ Mr. Vanderboom agreed that critical thinking is an important component of the PLOs for Social Studies, as well as, overall, an important component of education in the elementary school context and secondary school context.³²
41. The PLOs for grade six Social Studies also include the expectation that students will be able to “assess equality and fairness in Canada with reference to the *Canadian Charter of Rights and Freedoms*”, and “compare individual and collective rights and responsibilities in Canada with those in other countries”.³³ For those who attended school before the introduction of the *Charter*, this may be somewhat surprising to learn, but it is important that we are aware that an understanding of the *Charter of Rights and Freedoms* is an essential element of the grade six curriculum. It is an element that is mandated by its inclusion in the PLOs.

²⁷ *Independent School Act*, RSBC 1996, c. 216, Schedule, section 1

²⁸ Evidence of Edward Vanderboom, February 8, 2011, p. 42.

²⁹ Evidence of Edward Vanderboom, February 8, 2011 p. 53.

³⁰ Evidence of Edward Vanderboom (cross examination by B. Olthuis), February 9, 2011, p. 3.

³¹ Exhibit 139 pp. 14 – 15.

³² Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 54 – 55.

³³ Exhibit 139, p. 30; Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 55.

42. The IRP for Health and Career Education 8 and 9 covers knowledge and skills that are required to assist students in making informed decision about their health and sexuality, their education and their future careers.³⁴ The IRP for Planning 10 covers additional education on life skills for transitioning to adult life, such as financial literacy, post secondary and career choices for students.³⁵
43. Group 3 schools do not have their educational program examined and do not need to meet these criteria.³⁶ Mr. Vanderboom agreed that if any individual ran a Group 3 school, they could issue their own high school diploma at any time. There is no regulation of that.³⁷
44. It is only by understanding the criteria that schools are expected to meet, and the level of education students are entitled to receive, that we can understand the harms to students' education occurring in Bountiful.

C. Harms to Education in Bountiful: Inadequate Instruction

45. In the 2009/2010 school years, there were 423 children enrolled in the two schools in the community of Bountiful.³⁸ The BCTF submits that the evidence presented during this Reference has established historical and continuing negative educational consequences for children receiving their education in this polygamous community.

46. Mr. Vanderboom provided evidence that, over the years, BESS has been provided the following certifications:

1991/92 to 1994/95	Group 1, K – 12
1995/96 to 2004/05	Group 1, K – 10 (grade 11 and 12 not offered)
2004/05 to 2010/11	Group 1, K – 10; Group 3, 11 – 12 ³⁹

47. Mr. Vanderboom explained that BESS does not currently have an approved graduation program for grades 11 to 12 (and has not since 1994). The Minister of Education will not issue Dogwood Certificates to students who may complete a grade 11/12 program at BESS.⁴⁰

48. Mr. Vanderboom provided evidence that Mormon Hills had been provided the following certifications:

2003/04	Group 3
2004/05	Group 1, K – 7

³⁴ Exhibit 144; Evidence of Edward Vanderboom (cross examination by B. Olthuis), February 9, 2011, p. 4.

³⁵ Exhibit 145; Evidence of Edward Vanderboom (cross examination by B. Olthuis), February 9, 2011, p. 4 – 5.

³⁶ Evidence of Edward Vanderboom, February 8, 2011, p. 44 – 45.

³⁷ Evidence of Edward Vanderboom, February 8, 2011, p. 52.

³⁸ Exhibit 51, Affidavit #2 of Gladys Reinartz, Exhibit A, page 1; Exhibit 51, Affidavit #2 of Gladys Reinartz, Exhibit B, page 9.

³⁹ Exhibit 22, Vanderboom Affidavit para 18.

⁴⁰ Exhibit 22, Vanderboom Affidavit para 24.

2005/06	Group 1, 1 – 7
2006/07	Group 1, K – 7; Group 3, grade 8 – 9
2007/08	Group 1, 1 – 7, Group 3, 8 – 10
2008/09	Group 1, 1 – 9; Group 3, K and 10 – 12
2009/10	Group 1, K – 10; Group 3, 11 – 12
2010/11	Group 1, K – 12 ⁴¹

49. The current 2010/2011 school year will be the first year that Mormon Hills will be qualified to have its students issued Dogwood Certificates by the Minister of Education.⁴²

50. In his affidavit, Professor Nicholas Bala reviews the findings of the Committee on Polygamous Issues and notes that the Committee “expressed concern about the limited and doctrinal nature of the education provided to children in the community”. The Committee found that:

Given the focus on religious instruction in the schools, children do not have the benefits of the education received by other children in Canada. Children who left Bountiful and joined the regular school system were far behind other students of the same age.⁴³

51. Truman Oler testified at this proceeding regarding his personal experience growing up and attending school in the FLDS community in and around Bountiful. Truman Oler made the decision to leave the FLDS community when he was in his early 20s.⁴⁴ Truman Oler was 29 years old at the time he gave his testimony.⁴⁵ The BCTF submits that his experience in Bountiful is not of long ago historical events or an anomaly. Truman Oler’s experience is representative of the harm to education that students in Bountiful are experiencing.

52. In his affidavit entered in evidence in this proceeding, Truman Oler swears:

I went to school in Bountiful from kindergarten through grade 9. I do not remember getting any practical education at the Bountiful school that would have prepared me for life as an adult. When I was growing up, the boys were encouraged to leave school early to work. The girls were taught that their role was to have lots of children and to obey the men. I do remember that we were taught religion for 1-2 hours per day. We were taught that the boys should follow their priesthood duty, obey everything you were told by the prophet or the bishop and in this way show that you were worthy to have one or more wives assigned to you. This was a lesson the boys and girls were taught every day, not just at school but also at home.⁴⁶

53. The BCTF submits that teaching that one should “obey everything you were told by the prophet or the bishop” is clearly in contrast with the essential component of critical

⁴¹ Exhibit 138; Evidence of Edward Vanderboom, February 8, 2011, p. 37 – 38.

⁴² Exhibit 22, Vanderboom Affidavit para 35.

⁴³ Exhibit 54, Nicholas Bala Affidavit #1 at para 41.

⁴⁴ Evidence of Truman Oler, January 18, 2011, p. 26.

⁴⁵ Evidence of Truman Oler, January 18, 2011, p. 3.

⁴⁶ Exhibit 38, Truman Oler Affidavit, July 9, 2010, para 8.

thinking, which is a skill students are expected to learn. As the evidence of Dr. Beall and Mr. Vanderboom confirmed, this is a concept that is an important part of elementary and secondary education and is a large component of the elementary curriculum. This PLO is clearly not being met in Bountiful. This constitutes a serious harm to education.

54. Truman Oler testified that when he dropped out of school after grade nine, he went to make fence posts with a business in the community.⁴⁷ At the time he attended school in Bountiful, the school only went to grade 10.⁴⁸ Truman Oler recalled it being said in church that “all they’re going to be doing is making fence posts so why do they need any more education than that”.⁴⁹
55. The one area of his education in which it appears he received significant instruction was FLDS religious teaching. Truman Oler testified that he received one to two hours a day of religious instruction in school in Bountiful. Every morning there was an assembly that was the main religion class and then throughout the day there was another religion class. Students also had reading assignments for religious books.⁵⁰ Similarly, Anonymous Witness #3 testified that tapes of Warren Jeff’s sermons were played during the morning religious instruction at BESS.⁵¹
56. Truman Oler also testified that he was taught to stay away from girls. He was taught in school to treat girls like dangerous snakes.⁵²
57. Truman Oler testified that the only thing he heard about the *Charter of Rights* growing up was about the rights and freedom to live and teach religion. He testified that other than religious freedom “we never as children knew of charters and rights and freedoms”.⁵³ He testified that later he looked up the *Charter of Rights* on the internet and concluded that, “the teachings of that one religion is taking away all the rest of the rights on that charter”.⁵⁴ The BCTF submits that an educational program that does not teach about the key components of the *Charter of Rights and Freedoms* does not comply with the legally mandated PLOs and constitutes harm to these students’ education.
58. Anonymous Witness #3 testified as a witness for the FLDS regarding her personal experience growing up in Bountiful. Anonymous Witness #3 testified that when she completed her schooling at BESS in 2005, only some of the teachers were university

⁴⁷ Evidence of Truamn Oler, January 18, 2011, p. 14.

⁴⁸ This would have been during the time period between the late 1990s and early 2000s as identified in Exhibit 22, the Affidavit of Edward Vanderboom, para, 18.

⁴⁹ Evidence of Truamn Oler, January 18, 2011, p. 16.

⁵⁰ Evidence of Truamn Oler, January 18, 2011, p. 14 – 15.

⁵¹ Evidence of Anonymous Witness #3 (cross examination by L. Greathead), January 26, 2011, p. 45.

⁵² Evidence of Truamn Oler, January 18, 2011, p.15.

⁵³ Evidence of Truamn Oler, January 18, 2011, p 32.

⁵⁴ Evidence of Truamn Oler, January 18, 2011, p 32.

educated.⁵⁵ Anonymous Witness #3 testified that at the time she attended BESS, all of the teachers, the principal and other staff were members of the FLDS and that is true today.⁵⁶

59. Anonymous Witness #3 testified that her schooling did not include a sexual education component or a life skills component.⁵⁷ Truman Oler testified that he did not receive any career planning in school.⁵⁸ The BCTF submits that this is also clearly another example of non-compliance with the PLOs and constitutes harm to these students education.

D. Harms to Education in Bountiful: Inadequate Oversight

60. The BCTF submits that oversight of education in Bountiful by the OIIS has failed to mitigate harms to students' education in Bountiful.
61. Anonymous Witness #3 is 22 years old and undertook her elementary and secondary schooling in Bountiful.⁵⁹ She does not have a Dogwood Certificate.⁶⁰ She is currently taking summer semester courses at Southern Utah University⁶¹ towards a degree from that institution in elementary education.⁶² She has also taken some online courses as part of this program.⁶³ She testified that if she is able to test out some of the courses, she will be able to finish her program after two more summer sessions in Utah.⁶⁴ Anonymous Witness #3 testified that she is a teacher at BESS on a letter of permission.⁶⁵
62. Although Mr. Vanderboom testified that BESS would have complied with the advertising requirements before being granted a letter of permission,⁶⁶ it seems unlikely, that at a time when there are many unemployed and underemployed teachers in the province,⁶⁷ the school was unable to attract a certified teacher. The BCTF submits that issuing permission for a perhaps well meaning, but unqualified individual to teach at this school amounts to a harm to education. The issuing of letters of permission in these circumstances is most likely to have a negative effect on education of students at this school.
63. Mr. Vanderboom testified that BESS has been inspected more than the average independent school because of directions his office received from the Ministry of Education related to public concerns regarding the educational program at BESS.⁶⁸ It is

⁵⁵ Evidence of Anonymous Witness #3 (cross examination by L. Greathead), January 26, 2011, p. 46.

⁵⁶ Evidence of Anonymous Witness #3 (cross examination by L. Greathead), January 26, 2011, p. 44.

⁵⁷ Evidence of Anonymous Witness #3 (cross examination by L. Greathead), January 26, 2011, p. 50.

⁵⁸ Evidence of Truman Oler, January 18, 2011, p. 14.

⁵⁹ Evidence of Anonymous Witness #3, January 26, 2011, p. 30 – 31.

⁶⁰ Evidence of Anonymous Witness #3 (cross examination by L. Greathead), January 26, 2011, p. 46.

⁶¹ Evidence of Anonymous Witness #3 (cross examination by L. Greathead), January 26, 2011, p. 37.

⁶² Evidence of Anonymous Witness #3 (cross examination by L. Greathead), January 26, 2011, p. 45.

⁶³ Evidence of Anonymous Witness #3 (cross examination by L. Greathead), January 26, 2011, p. 39.

⁶⁴ Evidence of Anonymous Witness #3 (cross examination by L. Greathead), January 26, 2011, p. 39.

⁶⁵ Evidence of Anonymous Witness #3 (cross examination by L. Greathead), January 26, 2011, p. 43.

⁶⁶ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 62.

⁶⁷ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 61.

⁶⁸ Evidence of Edward Vanderboom, February 8, 2011, p. 47.

troubling that these inspections have been unable to address serious problems regarding the delivery of an adequate education program in Bountiful.

64. The Independent School Inspector appoints individuals to undertake inspections and report to his office regarding a variety of different types of reports.⁶⁹ Depending on this type of report, the inspection team would include between one and four members.⁷⁰ The inspections are between one and two days in length.⁷¹ Mr. Vanderboom agreed that there are practical limitations as what the committee members can see during that time.⁷²
65. The majority of inspectors are from the independent school system.⁷³ Mr. Vanderboom would not agree that the majority of inspectors were from Christian schools, but when we reviewed the list of inspectors from inspections and program evaluations in 2007 and 2008, he agreed that five of the individuals were from Christian schools (including Catholic and Mennonite schools), while two of the inspectors were from public schools.⁷⁴ The BCTF submits that this is problematic.
66. Before an inspection takes place, the school fills out an “Evaluation Catalogue for Independent Schools”.⁷⁵ This is a substantial document which provides the OIIS with quite a lot of information about the school and its compliance with OIIS requirements.⁷⁶
67. The Evaluation Catalogue includes a checkbox for the independent school to fill out indicating they are complying with section 1 of the Schedule of the *Independent School Act*, as well as an area for the school to self report on the hours of instruction they deliver to students.⁷⁷ Mr. Vanderboom agreed that it was important for schools to make this declaration because the inspectors cannot be there to monitor them every day. Mr. Vanderboom agreed that his office needed a declaration from independent schools that they are complying in this manner.⁷⁸ The BCTF submits that this is clearly an inadequate process for ensuring independent schools are complying with these requirements.
68. During the process of the inspections, the inspectors meet with principals and teachers. They may have a conversation in passing with students, but they do not interview students.⁷⁹ Mr. Vanderboom agreed that there was no evidence that Health and Career

⁶⁹ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 56.

⁷⁰ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 57.

⁷¹ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 57.

⁷² Evidence of Edward Vanderboom (cross examination by B. Olthuis), February 9, 2011, p. 9.

⁷³ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 59.

⁷⁴ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 59 – 61.

⁷⁵ Exhibit 140; Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 57.

⁷⁶ Exhibit 140; Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 58.

⁷⁷ Exhibit 140, p. 5; Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p.58.

⁷⁸ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p.58.

⁷⁹ Evidence of Edward Vanderboom (cross examination by R. Trask) February 8, 2011 p. 61; Exhibit 22, Affidavit of Edward Vanderboom, November 9, 2010, Exhibit D.

Education 8 and 9 or Planning 10 were observed in their taught application by the committees.⁸⁰

69. Mr. Vanderboom was not aware if any of the inspectors ever made any enquiries regarding whether any of the students at BESS or Mormon Hills were married.⁸¹ When asked if it would cause him concern to learn that a grade nine student at a school his office inspected was married to a man in his 40s, Mr. Vanderboom indicated that it would “give pause for reflection and we would likely need to consider what actions we would need to take or what further enquiries we would need to engage in”.⁸² Mr. Vanderboom was not aware of any members of an evaluation committee ever making a report to a child protection worker regarding any students in Bountiful.⁸³
70. Section 13 and 14 of the *Child Family and Community Service Act* requires every person who has reason to believe a child is in need of protection to report the matter to a child protection worker.⁸⁴ Independent school authorities are required to have policies and procedures in place to response to allegation or situations of suspected abuse. The Guide produced by the OHS refers to the mandatory reporting under the *Child, Family and Community Service Act*.⁸⁵ Mr. Vanderboom conceded that although the inspection committee would ask the school if they have a policy, the inspection committee might not actually review the policy.⁸⁶
71. In 2007, BESS applied for a Group 1 classification for its grade 11 and 12 program.⁸⁷ A program evaluation was undertaken and the ultimate decision was not to award the Group 1 classification to the grade 11 and 12 program.⁸⁸
72. The report concluded that there was insufficient time allocated for courses, including Planning 10, there was insufficient content differentiation in the Religion 10, 11 and 12 courses, and there was insufficient course planning to confirm that the grade 11 and 12 courses offered at the school would meet the PLOs.⁸⁹ This report was completed by Mr. Vanderboom and a former superintendant of a public school.⁹⁰ The BCTF submits that the conclusion of the program evaluation to not extend Group 1 status to grade 11 and 12 at the school was appropriate. Unfortunately, this does not address the fact that the overall oversight of this school has not addressed the harms to education that have occurred.

⁸⁰ Exhibit 145; Evidence of Edward Vanderboom (cross examination by B. Olthuis), February 9, 2011, p. 13.

⁸¹ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 61.

⁸² Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 61.

⁸³ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 61.

⁸⁴ Child, Family and Community Service Act, RSBC 1996, c. 46, ss. 13 and 14.

⁸⁵ Exhibit 146; Evidence of Edward Vanderboom (cross examination by B. Olthuis), February 9, 2011, p. 5 – 7.

⁸⁶ Evidence of Edward Vanderboom (cross examination by B. Olthuis), February 9, 2011, p. 7.

⁸⁷ Exhibit 22, Affidavit of Edward Vanderboom, November 9, 2010 Exhibit C; Evidence of Edward Vanderboom, February 8, 2011, p. 47 – 48.

⁸⁸ Exhibit 22, Affidavit of Edward Vanderboom, November 9, 2010, Exhibit D; Evidence of Edward Vanderboom, February 8, 2011, p. 48.

⁸⁹ Exhibit 22, Affidavit of Edward Vanderboom, November 9, 2010, Exhibit D p. 28.

⁹⁰ Exhibit 22, Affidavit of Edward Vanderboom, November 9, 2010, Exhibit D, p. 26.

73. Prior to his appointment to the OIIS, Mr. Vanerboom was the principal at Credo Christian High School from 1981 until 2005.⁹¹ During that time, he oversaw and provided opinion pieces for a school newsletter that was distributed in the church community for parents and students to read.⁹² In an article he wrote for the school newsletter in 2005 entitled "...a hidden curriculum...", Mr. Vanderboom addressed sexual orientation and the redefining of marriage and opined,

Some point to the introduction of the Charter as the time when things really started to fall apart with Canadian society. Perhaps they are right. Hindsight has a way of bring the past into focus.⁹³

74. The BCTF submits that this view of the *Charter* by the Inspector may provide some insight into the overall inadequacy of the oversight of Bountiful schools. The BCTF submits that it is troubling that Bountiful schools have continued to receive public funding while students' education at these schools has been harmed.
75. BCTF submits that the evidence at this Reference has established that the regulation process for independent schools is inadequate to protect students from the harm their education is suffering in Bountiful.

E. Harms to Education in Bountiful: Results

76. The evidence in this Reference is that since 1991, 13 students who have ever attended BESS have received Dogwood Certificates. Seven students who have ever attended BESS have received BC Adult Graduation Diplomas.⁹⁴ Since Mormon Hills opened in 2003/2004, six students who ever attended Mormon Hills have received a Dogwood Certificate, all from the Homelinks Centre. Five students who have ever attended Mormon Hills have received BC Adult Graduation Diplomas, all but one from the Homelinks Centre.⁹⁵ When compared to the number of students ever enrolled in these schools, the BCTF submits that this is evidence of woeful educational attainment for these students.
77. Students from Bountiful appear to be unaware that their future education prospects are affected by this. Anonymous Witness #3 was not aware that universities in British Columbia required a Dogwood Certificate.⁹⁶
78. The BCTF submits that the education of students in Bountiful has also been affected by the marriage, and subsequent pregnancies, of young girls in the community. Whereas schools

⁹¹ Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 63.

⁹² Evidence of Edward Vanderboom (cross examination by R. Trask), February 8, 2011, p. 63 – 64.

⁹³ Exhibit 141.

⁹⁴ Exhibit 22, Affidavit of Edward Vanderboom, November 9, 2010 para 31.

⁹⁵ Exhibit 22, Affidavit of Edward Vanderboom, November 9, 2010 para 37.

⁹⁶ Evidence of Anonymous Witness #3 (cross examination by L. Greathead), January 26, 2011, p. 49.

should offer protection from these types of abuse, in Bountiful this has been specifically accepted at these schools.

79. Anonymous Witness #4 testified that she was 17 years old (by a week⁹⁷) in 2003 when she married her husband and moved from the United States to Bountiful.⁹⁸ Her husband was in his late 30s or early 40s at the time of the marriage.⁹⁹ Anonymous Witness #4 testified that her husband had a position of status within the FLDS.¹⁰⁰
80. Half a year after they were married, her husband arrived home with another wife who was 15.¹⁰¹ The 15 year old sister wife began to attend grade 9 at BESS.¹⁰² Anonymous Witness #4 was also a student at BESS and she and the 15 year old wife rode the bus to school together.¹⁰³
81. Anonymous Witness #4 had her first child at 18.¹⁰⁴ Anonymous Witness #4 recalled that her 15 year old sister wife had her first child at 17.¹⁰⁵
82. There is no evidence at this proceeding that anyone at BESS ever raised any concerns regarding the sexual abuse of these students. In fact, Anonymous Witness #4 testified that no one ever raised any concerns with her.¹⁰⁶
83. Perhaps Truman Oler put it best when he testified:

And I just feel it is -- just not necessary at all to take -- to take a child, boys, young boys', young girls' ability and willing to think away from them.¹⁰⁷
84. The BCTF submits that we should heed the concern of Truman Oler when we consider harm to education in this context.

F. Analysis of Harm

85. In *Butler*, the SCC found that proof of actual harm is not required; just that Parliament has a reasonable basis for concluding that harm will result.¹⁰⁸ The evidence presented at this

⁹⁷ Evidence of Anonymous Witness #4 (cross examination by C. Jones), January 26, 2011, p 18.

⁹⁸ Evidence of Anonymous Witness #4 (cross examination by C. Jones), January 26, 2011, p. 12.

⁹⁹ Evidence of Anonymous Witness #4 (cross examination by C. Jones), January 26, 2011, p 13.

¹⁰⁰ Evidence of Anonymous Witness #4 (cross examination by C. Jones), January 26, 2011, p. 20.

¹⁰¹ Evidence of Anonymous Witness #4 (cross examination by C. Jones), January 26, 2011, p 12 – 13.

¹⁰² Evidence of Anonymous Witness #4 (cross examination by C. Jones), January 26, 2011, p. 15.

¹⁰³ Evidence of Anonymous Witness #4 (cross examination by C. Jones), January 26, 2011, p 15.

¹⁰⁴ Evidence of Anonymous Witness #4 (cross examination by C. Jones), January 26, 2011, p. 18.

¹⁰⁵ Evidence of Anonymous Witness #4 (cross examination by C. Jones), January 26, 2011, p. 17.

¹⁰⁶ Evidence of Anonymous Witness #4 (cross examination by C. Jones), January 26, 2011, p. 16.

¹⁰⁷ Evidence of Truamn Oler, January 18, 2011, p. 32.

¹⁰⁸ *R. v. Butler*, [1992] 1 S.C.R. 452.

Reference has more than met this requirement. Even where only some people experience harm, the state interest in protecting from that harm is valid.¹⁰⁹

86. Harm to individuals or society undermines or threatens to undermine a value reflected in and formally enforced through the Constitution, including such concepts as: autonomy, liberty, equality and human dignity.¹¹⁰ In *Butler*, the SCC noted that where legislation is aimed at avoiding harm, it seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other.¹¹¹
87. The BCTF submits that recognition of the harms of polygamy to women and children, including harm to education, is an important part of the analysis in this reference.

V. CHARTER ANALYSIS IN THE CONTEXT OF COMPETING RIGHTS

88. Where two sets of rights come into conflict, one right is not privileged over another. The *Charter* requires a balance to be achieved that fully respects the importance of both sets of rights.¹¹² There is no hierarchy of rights and one *Charter* right does not trump another.
89. Not all ethnic, religious or cultural differences are compatible with Canada's fundamental values (democratic values, public order, and the well being of citizens), and accordingly, not all barriers to their expression are arbitrary.¹¹³ The BCTF submits that the protection of children, including equal education of children and their right to receive a quality education, should be considered within the fundamental values analysis.
90. The SCC has found that when interpreting legislation, courts can opt for a constitutional interpretation and thereby avoid an unconstitutional result.¹¹⁴ The BCTF submits that such is the appropriate course for the court to take in this Reference.

A. Section 2(a)

91. Section 2(a) of the *Charter* provides
 2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion;
92. In considering whether or not there has been a breach of section 2(a), the SCC has held that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm or interfere with the rights of others.¹¹⁵

¹⁰⁹ *R. v. Malmø-Levine; R. v. Caine*, [2003] 3 S.C.R. 571.

¹¹⁰ *R. v. Labaye*, [2005] 3 S.C.R. 728.

¹¹¹ *R. v. Butler*, [1992] 1 S.C.R. 452.

¹¹² *Trinity Western University v. BC College of Teachers*, [2001] 1 S.C.R. 772 para 31; *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para 1.

¹¹³ *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, 2007 SCC 54, at paras 2, 73.

¹¹⁴ *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181 at para 98.

93. Religious freedom is inherently limited by the rights and freedoms of others. Religious freedom is not absolute and cannot justify behaviour which potentially causes harm to others.¹¹⁶ The BCTF submits that other *Charter* rights, especially sections 7, 15 and 28, must be considered as part of this analysis. Where these fundamental rights and freedoms intersect, freedom of religion must be balanced with and is limited by these other *Charter* rights. When there are competing rights at stake, this reconciling may take place within the section 2(a) analysis.¹¹⁷

94. In considering freedom of religion and freedom of belief in *R. v. Big M, Drug Mart Ltd.*, the SCC stated:

...The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.¹¹⁸

95. The invocation of freedom of religion does not, by itself, grant immunity from the need to weigh the assertion against competing values or harm, including democratic values, public order and the general well-being of citizens.¹¹⁹

96. As the SCC stated in *Amselem*:

...respect for religious minorities is not a stand-alone absolute right; like other rights, freedom of religion exists in a matrix of other correspondingly important rights that attach to individuals.¹²⁰

97. In addition, there is a distinction between belief and conduct. Although freedom of belief is relatively broad, the freedom to act on those beliefs is considerably narrower.¹²¹

98. The BCTF submits that the evidence at this hearing has established that while polygamous relationships might not always result in abuse or exploitation, abuse and exploitation can be a result of such relationships and, in fact, are prevalent in certain communities that have a strong adherence to polygamy. The evidence has established that generally extreme

¹¹⁵ *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 at para 26; *Trinity Western; Reference re Same-Sex Marriage; Bruker v. Marcovitz*.

¹¹⁶ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 para 1; *Trinity Western* at para 29.

¹¹⁷ *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 at para 26; *Trinity Western; Reference re Same-Sex Marriage; Bruker v. Marcovitz*.

¹¹⁸ *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para 123.

¹¹⁹ *Bruker v. Marcovits* para 73; *Alberta v. Hutterite Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, 2009 SCC 37, at para 90.

¹²⁰ *Amselem* at para 1.

¹²¹ *Trinity Western* at para 36.

patriarchy, the exploitation and abuse of women and children, and polygamy occur in concert.

99. The BCTF submits that freedom of religion is not absolute and cannot be interpreted to allow for the abuse, exploitation, or oppression of women and children; nor can it allow for the unequal treatment of or limitation of the rights of women and children, including their right to an appropriate education.

B. Section 2(b)

100. Section 2(b) of the *Charter* provides

2. Everyone has the following fundamental freedoms: ...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

101. As with other *Charter* rights, there are limits to the rights contained in section 2(b). For example, freedom of expression does not protect violent acts.

102. In *Butler*, the SCC considered the definition of obscenity in the *Criminal Code* provision which outlawed the publication, distribution and circulation of obscene material. Although the appellant had argued that the provision was vague, and that the provision had a shifting purpose which changed over time from regulating morality to the avoidance of harm, the SCC found that the provision, properly interpreted, was constitutional.¹²²

103. The BCTF submits that a similar analysis is appropriate in these circumstances. Freedom of belief cannot be interpreted in a way that allows for the exploitation of women and children, including harm to children's educational opportunities.

C. Section 2(d)

104. Section 2(d) of the *Charter* provides

2. Everyone has the following fundamental freedoms: ...

(d) freedom of association.

105. Under section 2(d) of the *Charter*, when an individual has a constitutional right to other freedoms, such as freedom of religion, the right continues to be protected if the individual chooses to exercise the right in association with others.¹²³ It appears to be an exercise of belief and religion, in association with others, that the Amicus and allied interested persons assert under this section of the *Charter*.

¹²² *R. v. Butler*, [1992] 1 S.C.R. 452.

¹²³ Peter Hogg 44-10 citing *Professional Institute v. N.W.T.*, [1990] 2 S.C.R. 367, 402-403 per Sopinka J referring to supporting dicta.

106. The BCTF submits that the *Charter* analysis under section 2(a) and 2(b) addresses this issue as well. The BCTF submits that in the context of this case, section 2(d) does not give polygamous groups a constitutional right to engage in activities which are not protected by another section of the *Charter*.

D. Section 7

107. Under section 7 of the *Charter*, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. The Amicus and allied interested persons point to the threat of imprisonment and the curtailment of personal choice as deprivations of liberty and security of the person. The BCTF submits that, properly interpreted, any deprivation of liberty under section 293 is in accordance with the principles of fundamental justice.

108. There is no rule of fundamental justice which is offended by section 293. To qualify as a principle of fundamental justice the rule must be a legal principle; there must be “significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate”; and the rule must be capable of being “identified with sufficient precision to yield a manageable standard”.¹²⁴ The BCTF submits that, properly interpreted, section 293 is not overbroad, disproportionate or arbitrary.

109. The evidence at this hearing has established that women and children are disproportionately affected by abuse or exploitation in polygamous communities. Section 7 engages the rights of women and children in these communities.

110. Health and safety issues that affect children certainly engage the security of their person. The higher than normal teenage pregnancy rate in Bountiful provides an example of section 7 concerns as they relate to children in polygamous communities. There has been substantial evidence proffered during this Reference that the marriage of young girls is endemic to polygynous societies. The BCTF submits that this practice engages security of the person rights of children. The BCTF submits that protecting the health and safety of vulnerable children are principles of fundamental justice that should be considered in this analysis.

E. Section 15

111. Section 15 (1) provides:

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

¹²⁴ *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571 at paras 102 – 129.

112. In *Reference re Same-Sex Marriage*, in considering section 15 of the *Charter*, the SCC stated:

...The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster.¹²⁵

113. In the Reference before this court, the Amicus and allied interested persons have taken the position that section 293 is a violation of the section 15 rights of those who practice polygamy. The BCTF disagrees with this submission. The BCTF submits that section 293 does not impose a disadvantage on the claimants in comparison to other comparable persons. Every person is equally subject to the law. Section 293 is not a provision which prohibits a particular religious group from marrying. This section protects the equality rights of women and children in all communities.

114. The BCTF submits that the section 15 and section 28 equality rights of women and children are engaged by this Reference question. The evidence at this hearing has shown that children in polygamous communities have not received adequate educational opportunities, when compared with children in public schools. Legally mandated PLOs, which are delivered in other schools, are not being met. Educational institutions in polygamous communities are not offering the protection to girls that one would expect from a school. The BCTF submits that the section 15 and 28 rights of these children must play a prominent role in this analysis.

F. Section 1

115. The BCTF submits that any infringement of these provisions of the *Charter* is demonstrably justified in a free and democratic society.

116. As discussed under the heading “Elements of the Office” above, the BCTF submits that the scheme and purpose of this legislation is clearly addressed to harms attributed to polygamy. There has been substantial evidence at this proceeding demonstrating those harms. The BCTF submits that the legislation is rationally connected to this objective, minimally impair the rights in question and that the salutary effects of the objective outweigh the deleterious impact of the infringement. The BCTF agrees with the submission of West Coast LEAF in this regard.

VI. INTERNATIONAL OBLIGATIONS

117. Section 293 of the *Criminal Code* is also consistent with Canada’s international obligations. Children have international and domestic rights to equal access to quality education, and to an unbiased, non-discriminatory educational program, including rights to access equal education as between the sexes.

¹²⁵ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para 46.

118. As set out in Professor Rebecca Cook's affidavit, Canada has ratified several applicable international conventions, including the *Convention on the Rights of the Child* and the *Convention on the Elimination of all Forms of Discrimination against Women*. Both of these conventions are applicable to this analysis.
119. The BCTF agrees with the submission of the AG Canada regarding Canada's international obligations to eliminate polygamy.

VII. CONCLUSION

120. Professor Grossbard explained in her affidavit that the undesirable social features that occur in association with polygamy may be the result of polygamy, or both polygamy and these other features could be the cause of other factors, but in any event "it is very revealing that cross-culturally polygamy is associated with a large number of features that seem undesirable either from a strictly female perspective or from the perspective of society's best interest".¹²⁶
121. It is not contentious to submit that the *Criminal Code* has a valid role to play in protecting individuals from sexual exploitation and other crimes. All of the parties and interested persons participating in this proceeding have expressed concern about potential harm to women and children. The Amicus and allied IPs say that harms that amount to other crimes can be tried under those sections of the *Criminal Code*.
122. Witnesses for the FLDS expressed their view that they agreed with state protection from underage marriage.¹²⁷ As stated in the affidavit of Anonymous Witness #2, "I think that if the legal age to marry any person one chooses is 18 we can do well to avoid stress by waiting at least until 18".¹²⁸ Professor Beaman, witness for the Amicus, also agreed that state rules about age of marriage could counteract any downward trend on age of the marriage.¹²⁹ Presumably this is because they view underage marriage as harmful to girls. Similarly, the BCTF submits that as the evidence has shown polygamy to be a harmful practice, the state should, and certainly is justified in protecting individuals and society from it.
123. The BCTF submits that while polygamous relationships might not always result in abuse or exploitation, abuse and exploitation can be a result of such relationships; and women and children are disproportionately affected by abuse or exploitation in polygamous communities.
124. The *Charter* rights of women and children, especially section 7, 15 and 28, must be considered as part of the analysis on this Reference. The BCTF submits that the proper

¹²⁶ Exhibit 48, Shoshana Grossbard Affidavit, Exhibit B, page 2

¹²⁷ Exhibit 79, Affidavit of Anonymous Witness #2, October 15, 2010, para. 8; Anonymous Witness Number #2, January 25, 2011, p. 7.; Exhibit 89, Affidavit of Anonymous Witness #12, October, 2010, para 6.


¹²⁸ Exhibit 79, Affidavit of Anonymous Witness #2, October 15, 2010, para. 8

¹²⁹ Evidence of Lori Beaman, (cross examination by C. Jones), December 13, 2010 p. 85.

balancing of these rights, in accordance with Canadian jurisprudence, reveals that section 293 does not amount to a breach of any of the *Charter* provisions cited by the Amicus and allied interested persons. If section 293 does infringe any of these provisions, the BCTF submits that such infringement is demonstrably justified as reasonable in a free and democratic society.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 4, 2011.



Robyn Trask, Counsel for
British Columbia Teachers' Federation

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