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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

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OVERVIEW

1. The issue in this Reference is the constitutionality of Parliament's decision to enact a criminal prohibition against the practice of polygamy. It is the position of the Attorney General of Canada ("Canada") that the prohibition of polygamy is constitutional.

2. The Supreme Court of Canada has recognized that Parliament is entitled to impose a criminal prohibition if there is a reasonable apprehension that a particular practice poses a risk of harm. Once it has been demonstrated that the harm is not insignificant or trivial, Parliament is entitled to deference in calculating the nature and extent of the harm and crafting an appropriate response.

3. Polygamy is the practice of being married to more than one person. Polygamy almost always manifests itself as one man marrying several women, which is also called "polygyny". In Canada's submissions, the term "polygamy" will be used to refer to polygyny unless otherwise indicated.

4. The evidence before the Court in this Reference demonstrates that polygamy results in serious and substantial harms to individuals, particularly women and children, and society. Throughout Western history and in countries around the world including Canada, polygamy has been linked to a consistent set of harms including:

- Physical and sexual abuse
- Sexual and reproductive health harms
- Psychological and emotional harms
- Physical health harms including increased mortality
- Economic deprivation
- Lower levels of education
- Sex ratio imbalance, inequality between men and the marginalization of young men

- Decreased political rights and civil liberties
- Commodification and objectification of women
- Increased discrimination

5. The criminal prohibition of polygamy, which is currently found in section 293 of the *Criminal Code*, seeks to prevent these harms to individuals and society. The prohibition of polygamy promotes human dignity and reflects the values and principles essential to a free and democratic society, including commitment to social justice and equality and faith in social and political institutions that enhance the participation of individuals and groups in society.

6. Section 293 prohibits a person from being in multiple marriages at the same time. Since marriages may be sanctioned by civil, religious, customary or other means, section 293 was drafted to try to capture all multiple marriages.

7. Section 293 does not violate the *Charter*. It is consistent with the fundamental freedoms, including freedom of religion. Freedom of religion does not protect a person's right to engage in religiously motivated practices that harm others and interfere with their *Charter* rights.

8. Section 293 is consistent with the principles of fundamental justice. The evidence demonstrates that polygamy is harmful to individuals and society. Section 293 is not vague, arbitrary or grossly disproportionate. The courts have already shown that the polygamy provision is capable of coherent judicial interpretation. Section 293 is consistent with the state's interest in preventing harm and any measure less than a criminal prohibition would be inadequate to prevent the harms associated with polygamy.

9. Section 293 does not violate equality rights. It does not draw any distinctions on the basis of impermissible stereotypes that undermine human dignity. To the contrary, the prohibition of polygamy, which is harmful to individuals and society, promotes human dignity and the values and principles essential to a free and democratic society.

10. In the alternative, if section 293 does violate a *Charter* right or freedom, any such violation is demonstrably justified in a free and democratic society. The prevention of harms to individuals and society is a legitimate objective. Criminalizing the practice of polygamy is rationally connected to the objective of preventing the harms of that practice. Section 293 is properly focused on prohibiting multiple marriages and measures short of criminal prohibition would be inadequate. Since polygamy is associated with substantial harms, the deleterious effects that its prohibition might cause are plainly outweighed by the salutary effects.

ORGANIZATION OF CANADA'S WRITTEN SUBMISSIONS

11. Canada's written submissions are intended to supplement the submissions filed by the Attorney General of British Columbia ("BC"). Canada's submissions offer additional perspectives on the prohibition of polygamy including cross-cultural, international human rights law and historical perspectives.

12. Canada's written argument is organized into five parts:

PART I – NATURE OF THE REFERENCE briefly sets out the history of the proceedings as well as the specific questions before the Court in this Reference. It also sets out the text of section 293 and the most significant earlier versions of the polygamy provision.

PART II – HARMS OF POLYGAMY examines the evidence before the Court regarding the harms of polygamy. This Part focuses on the evidence that Canada called in this Reference including the quantitative evidence of Professor Rose McDermott on the cross-cultural effects of polygamy, the evidence of Professor Rebecca Cook on the treatment of polygamy under international human rights law, and the evidence of Professor John Witte, Jr., on the historical development and evolution of the prohibition of polygamy

> Professor McDermott's cross-cultural statistical analysis shows that there are harms to individuals and society wherever polygamy occurs in the world, regardless of religious, cultural or national differences. The social science literature also documents the harms of polygamy in countries around the world.
>
> Professor Cook's evidence shows that the international human rights community has recognized the harms of polygamy.

International treaty bodies have condemned the practice of polygamy, stating that it violates the dignity of women and contravenes equality rights. A majority of countries around the world prohibit polygamy and there is a global trend toward the criminalization of polygamy.

Professor Witte's evidence shows that the practice of polygamy has been linked to harms to individuals, particularly women and children, and society throughout Western history and accordingly, consistently prohibited. The prohibition of polygamy arose in ancient Greece at the same time that principles of equality and democracy were beginning to develop.

The harms of polygamy are also shown clearly in the other evidence before this Court including evidence relating to the practice of polygamy in North America, particularly in the community of Bountiful, British Columbia, and other fundamentalist Mormon communities. This evidence demonstrates that the harms of polygamy that have been observed around the world and recognized historically by Western law-makers and thinkers manifest themselves in Canada. This other evidence is discussed only briefly in Part II because it is considered at length in BC's written submissions.

PART III – PURPOSE and INTERPRETATION OF SECTION 293

addresses the purpose and interpretation of section 293. As evidenced by the historical and legislative record, which is reviewed in detail by BC, the purpose of section 293, as well as the original polygamy provision enacted in the 1890s, was to prevent harms to individuals, particularly women and children, and society. Section 293, properly interpreted, prohibits a person from being in multiple marriages at the same time, whether the marriages are sanctioned by civil, religious, customary or other means.

PART IV – *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* responds to the various arguments that were made in the Opening Statements filed by the participants in this Reference, alleging that section 293 violates various sections of the *Charter* including section 2, the guarantee of fundamental freedoms, section 7, the right to life, liberty and security of the person, and section 15, the guarantee of equality. This Part also considers the role of international human rights law in *Charter* interpretation and analysis.

PART V – CONCLUSION sets out Canada's answers to the specific questions before the Court.

PART I – NATURE OF THE REFERENCE

A. HISTORY OF THE PROCEEDINGS

13. In October 2009, BC initiated this Reference into the constitutionality of section 293 by referring the following questions to this Court for hearing and consideration under the provincial *Constitutional Question Act*:

> 1. Is section 293 of the *Criminal Code* consistent with the *Charter*? If not, in what particular or particulars and to what extent?
>
> 2. What are the necessary elements of the offence in section 293 of the *Criminal Code*? 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?

14. The parties to this Reference are BC and Canada as well as *amicus curiae* (the "Amicus"), who was appointed by the Court to challenge the constitutionality of section 293.

15. The Court has also declared other persons and organizations to be "Interested Persons" and they are entitled to adduce evidence and make submissions in this Reference.

16. Some of the Interested Persons are arguing in favour of the constitutionality of section 293. These Interested Persons are Beyond Borders Ensuring Global Justice for Children ("Beyond Borders"), the British Columbia Teacher's Federation ("BCTF"), the Canadian Coalition For The Rights Of Children and the David Asper Centre For Constitutional Rights ("CCRC"), the Christian Legal Fellowship ("CLF"), REAL Women, Stop Polygamy in Canada ("SPC"), and the West Coast Women's Legal Education and Action Fund ("WestCoast LEAF").

17. Some of the Interested Persons are challenging section 293. These Interested Persons are the Fundamentalist Church of Jesus Christ of Latter Day Saints (the "FLDS") and James Oler in his capacity as Bishop of the FLDS, the British Columbia Civil Liberties Association ("BCCLA"), the Canadian Polyamory Advocacy Association ("CPAA") and the Canadian Association for Freedom of Expression ("CAFE") (collectively with the Amicus, the "Challengers").

B. THE POLYGAMY PROVISION

18. Section 293 prohibits the practice of polygamy and it currently provides that:

> **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,
>
> 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.

19. The first iteration of a criminal prohibition against polygamy in Canadian law appeared in 1890:

> **1890 – *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**
>
> **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. Everyone 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 give years and to a fine of five hundred dollars:

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

6. In every case arising under section four, or under subsection one of section five of this Act, the lawful husband or wife of the defendant shall be a competent, but not a compellable, witness for or against the defendant.

20. In 1954, the criminal prohibition against polygamy was redrawn to simplify the provision:

1954 – *Criminal Code*, S.C. 1953-54, c. 51, s. 243

243. (1) Everyone who

(a) practises or enters into or in any manner agrees or consents to practise or enter into

(i) Any form of polygamy, or

(ii) Any kind of conjugal union with more than one person at the same time,

whether or not it is by law recognized as a binding form or marriage; or

(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (i) or (ii) of paragraph (a),

is guilty of an indictable offence and is liable to imprisonment for five years

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

21. Since 1954, the section number of the polygamy provision in the *Criminal Code* has changed, but otherwise the provision has remained unchanged.

PART II – HARMS OF POLYGAMY

22. The evidence before the Court demonstrates that polygamy results in serious and substantial harms to individuals, particularly women and children, and society. A cross-cultural analysis shows that harms occur wherever polygamy is practiced regardless of religious, cultural or national differences and social science literature has documented the harms of polygamy in countries around the world.

23. The harms of polygamy have also been recognized by the international human rights community and there is a broad international consensus that polygamy should be abolished because of its harms.

24. Many of the same harms of polygamy that are observed today in countries around the world, including Canada, have been recognized by Western law-makers and scholars for approximately two thousand years and these harms have served as a basis for the consistent prohibition of polygamy. Even before the rise of Christianity, Greek and Roman philosophers and jurists condemned the practice of polygamy because it undermined human dignity and equality.

A. HARMS RECOGNIZED ACROSS CULTURES

1. Polygamy Statistically Linked to Harms Across Cultures

(a) Introduction

25. Canada called Professor Rose McDermott, an internationally recognized political psychologist, to provide in-depth and generalizable statistical evidence of the effects of polygamy from a cross-cultural and cross-national perspective.

26. While anecdotal and other qualitative evidence provides invaluable insight into particular instances of the harms of polygamy, quantitative research offers a comprehensive overview of the inherent connections between polygamy and a whole host of negative outcomes. This is because quantitative research and in

particular, statistical analysis, “allows us to generalize information and relationships from specific examples to broader phenomenon.”[1]

27. The Amicus’s expert, Professor Beaman, acknowledged that one of the weaknesses of qualitative research is that, unlike quantitative research, it does not facilitate such generalizations. According to Professor Beaman, qualitative research “lacks depth” when compared to quantitative analysis.[2]

28. Professor McDermott is a professor of political science at Brown University and has studied polygamy for over 10 years. Professor McDermott is the sole author of three university press books, the co-editor of two university press edited volumes, and has published over 70 peer-reviewed articles and book chapters. She has held postdoctoral fellowships at Harvard, Stanford, and the University of California, and she is the incoming president of the international society of political psychology. Professor McDermott has also been instrumental in creating the WomanStats database, the world’s most comprehensive database on issues related to women and children.

29. The Court qualified Professor McDermott as an expert in political psychology with specializations in international relations and sexual differences.[3] The Challengers did not call any evidence to challenge her methodology or findings.

30. Professor McDermott conducted a statistical analysis of the consequences of polygamy using data from 171 countries around the world. Her study powerfully demonstrates that wherever the rates of polygamy increase there is a corresponding increase in a whole host of negative consequences, not only for the individuals involved in polygamous marriages but for society in general.[4] These findings are consistent with the evidence of a number of expert witnesses in the Reference, including Professors Henrich and Grossbard, who help to

[1] Dr. McDermott, 15 December 2010, p. 80:28-30.
[2] Dr. Beaman cross-examination by Mr. C. Jones, 13 December 2010, p. 41:1-24.
[3] Dr. McDermott, 15 December 2010, p.72:38-45.
[4] Exhibit 41 at para. 14: Expert report of Dr. McDermott, 16 July 2010.

explain why polygamy inevitably leads to many of the harms identified in Professor McDermott's study. The Challengers did not call any evidence to challenge Professor McDermott's findings.

31. Professor McDermott tested the relationship between 18 variables and polygamy. These variables were chosen by Professor McDermott as the most theoretically plausible and empirically tractable.[5] Her statistical analysis demonstrates that the harmful consequences of polygamy include, but are not limited to:

- Increased levels of physical and sexual abuse against women;
- Increased rates of maternal mortality;
- Shortened female life expectancy;
- Lower levels of education for girls and boys;
- Lower levels of equality for women;
- Higher levels of discrimination against women;
- Increased rates of female genital mutilation;
- Increased rates of trafficking in women;
- Decreased levels of civil and political liberties; and,
- Increased spending on defense.

32. Professor McDermott found that there is such a significant correlation between an increase in polygamy and a corresponding increase in harms that one may infer a causal connection.[6]

33. Professor McDermott testified that statistical analysis is capable of establishing proof on a balance of probabilities.[7] Statistically significant

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[5] *Ibid* at para. 51.
[6] Dr. McDermott, 15 December 2010, pp. 80:28 to 81:27. Professor Grossbard made a similar point in cross-examination regarding causality, Dr. Grossbard cross-examination by Mr. T. Dickson, 7 December 2010, pp. 30:25-31:18.

relationships "provide the foundation of causal inference" and allow us to make assertions about cause and effect even though, strictly speaking, causation itself can only be properly tested through experimentation.[8]

34. In the case of polygamy, as in the case of genocide or war, it would be unethical and implausible to conduct experiments to determine whether or not polygamy causes certain harms.[9] Instead, we must look to the strength of the statistical relationship to establish that the probability the causation relationship is untrue is very, very unlikely.[10] In short, statistical analysis is the only viable research methodology that can be used to establish a causal relationship between polygamy and its inherent harms.

(b) Professor McDermott's Methodology and Data are Reliable and Comprehensive

35. To date, Professor McDermott's study is the most comprehensive cross-cultural and cross-national statistical analysis of the effects of polygamy.[11]

36. By analysing reliable data from every country in the world with a population over 200,000, Professor McDermott conducted a regression analysis that utilized the variances between these countries to "get traction on causal inference".[12] Such a high degree of variance helps ensure that the results are not the product of any particular difference among countries. In cross-examination, Professor McDermott confirmed that regression analysis leverages all of the data to examine whether there is a meaningful relationship between the variables.[13]

37. It is not useful nor relevant to isolate the data from a single country that is part of a regression analysis. To do so would be to misunderstand the very

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[7] Dr. McDermott, 15 December 2010, p. 81:19-27.
[8] *Ibid*, pp. 80:42 to 81:5.
[9] *Ibid*, pp. 80:45 to 81:1.
[10] *Ibid*, p. 81:6-11.
[11] *Ibid*, p. 81:40-47.
[12] *Ibid*, p. 82:18-23.
[13] Dr. McDermott, 16 December 2010, p. 38:23-29.

nature of regression analysis which is concerned with probing whether or not a statistically significant relationship exists between the variables in spite of such differences. Regression analysis is capable of establishing the likelihood that certain consequences will arise regardless of individual differences in the larger dataset.[14]

38. Professor McDermott confirmed in cross-examination that her dataset is based on credentialed and credible sources including the CIA world fact book and United Nations data.[15] Professor McDermott's report draws upon three primary data sources: the WomanStats database; the Stockholm International Peace Research Institute ("SIPRI"); and Freedom House.[16]

39. Each of these sources contains reliable, comprehensive, and unparalleled data. With respect to the WomanStats database, Professor McDermott's opinion is that "[n]o other dataset on women's issues in the world ranks as its equal, whether in terms of the breadth and depth of its coverage, the degree of its reliability checks, or the time spent in its creation."[17]

40. Similarly, SIPRI is "widely considered to be an unbiased and world-class resource for [arms expenditure] material and Freedom House is "widely considered to provide the most accurate and comprehensive data on social and political freedoms for countries around the globe."[18]

41. Using data from the aforementioned internationally recognized sources, Professor McDermott tested the relationship between polygamy and 18 variables, including age of marriage, birth rates, maternal mortality, domestic violence, rates of primary and secondary education, and political and civil liberties.[19]

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[14] *Ibid*, p. 38:23-38.
[15] *Ibid*, p. 19:32-40.
[16] Exhibit 41 at paras. 42-48: Expert report of Dr. McDermott, 16 July 2010.
[17] *Ibid* at para. 45.
[18] *Ibid* at paras. 43-44.
[19] *Ibid* at para. 49.

42. Professor McDermott hypothesized that these variables would be the outcomes most likely to be affected by polygamy; they were the "most theoretically plausible and empirically tractable."[20] While there may be other consequences that are associated with or caused by polygamy, these variables are the most easily tested because there is verifiable, comprehensive data. Additionally, the existing literature concerning polygamy suggests these consequences are the most likely to occur.

43. Importantly, Professor McDermott did not approach her analysis with a pre-existing hypothesis about the direction of causality. Instead, her use of the statistically conservative "two-tailed test" meant that the statistics could have shown, for instance, that polygamy decreases the number of births per thousand.[21] With each of the variables, however, there was a statistically significant correlation between rising levels of polygamy and rising levels of harms.

44. Professor McDermott controlled for outside factors that may have caused the correlation between polygamy and the identified harms.[22] Professor McDermott testified that she controlled for gross domestic product measured in U.S. dollars ("GDP") in her study because it is "the monster variable that explains an enormous amount of things in complex social and political systems."[23]

45. Professor McDermott acknowledged in cross-examination that there are, of course, other individual variables that may exert influence on the dependant variables she examined (age of marriage, birth rates, and so forth).[24] Crucially, though, Professor McDermott stated that "there are very few variables that would

[20] *Ibid* at paras. 50-51.
[21] Dr. McDermott, 16 December 2010, p. 8:2-16.
[22] *Ibid*, p. 2:9-39.
[23] *Ibid*, pp. 2:42 to 3:14.
[24] *Ibid*, p. 39:32-43.

be expected to affect the comprehensive totality of all the variables I examined short of GDP."[25]

46. In other words, unlike any other single variable, GDP influences a whole variety of outcomes including the amount of resources a society has to devote to legal, health, and educational structures.[26] GDP is thus a useful proxy for a whole host of individual variables and, in Professor McDermott's comprehensive cross-cultural analysis, GDP is the only outside factor that could be expected to exert an influence on all of her dependant variables.

47. Professor McDermott further testified that if you can find a variable that still emerges as significant even when GDP is controlled for, then you have a truly important finding.[27] In her analysis, she found that even with GDP controlled, all of her hypothesized variables had a statistically significant relationship to polygamy: as polygamy increased, the negative outcomes for each of these variables also increased.

(c) Harms Arise Wherever Polygamy Occurs

48. With GDP controlled, each of the 18 variables tested by Professor McDermott emerged as statistically significant:

- as polygamy goes up, discrepancy between law and practice relating to women's equality increases;[28]
- in countries with higher rates of polygamy, women, including teenagers between 15 and 19 years of age, have more children than women in less polygamous states;[29]
- boys and girls are less likely to receive an education in primary or secondary school as polygamy becomes more frequent;[30]

[25] Dr. McDermott cross-examination by Mr. Macintosh, 16 December 2010, p. 39:32-43.
[26] Dr. McDermott, 16 December 2010, p. 3:17-28.
[27] *Ibid*, p.3:10-14.
[28] Exhibit 41 at 13: Expert report of Dr. McDermott, 16 July 2010.
[29] *Ibid* at 14.

- women are more likely, relative to men, to suffer from HIV as polygamy becomes more common;[31]
- women in polygamous countries are more likely to marry at a younger age than women in countries where polygamy is less frequent;[32]
- women are more likely to die in childbirth as countries become more polygamous;[33]
- women in polygamous countries die at a younger age;[34]
- as polygamy becomes more frequent, trafficking in women becomes more prevalent;[35]
- female genital mutilation increases as polygamy increases;[36]
- domestic violence, including rape, marital rape, and honour killings, increases as the prevalence of polygamy increases;[37]
- differences in the legal treatment of women versus men become greater, to the detriment of women, in more polygamous societies;[38]
- states with higher rates of polygamy spend more money per capita on defence, particularly on arms expenditures for weapons;[39] and,
- polygamy influences the degree of rights and freedoms experienced by citizens in a given country in that states with higher rates of polygamy display fewer political rights and civil liberties than those with lower rates of polygamy.

49. Professor McDermott's statistical analysis makes possible an understanding of the inherent or structural effects of polygamy because it

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[30] *Ibid* at 14-15.
[31] *Ibid* at 15-16.
[32] *Ibid* at 16.
[33] *Ibid* at 16-17.
[34] *Ibid* at 17-18.
[35] *Ibid* at 18-19.
[36] *Ibid* at 19-20.
[37] *Ibid* at 20-21.
[38] *Ibid* at 21.
[39] *Ibid* at 21-22.

demonstrates that, even with GDP controlled and even when a very statistically conservative methodology is employed, polygamy is inextricably linked with particular harms that "hold across different contexts and across different time and across different space."[40]

50. In other words, the connection between polygamy and the above-noted harms is not dependent upon a particular religious, cultural, national, class, racial or ethnic milieu. Nor is the connection between polygamy and these harms a product of the individual circumstances of individual countries. Rather, as Professor McDermott confirmed in her examination in chief, this comprehensive regression analysis demonstrates that the harms associated with polygamy can be expected to arise wherever polygamy occurs.[41]

51. While Professor McDermott acknowledges that there may be individuals who claim to benefit from being in a polygamous union, she points out that there has been "no statistical demonstration that polygamy benefits most men or women, boys or girls or society considered as a whole."[42] Similarly, Professor McDermott concluded, after her extensive literature review that the "vast majority of the peer-reviewed literature" has not found any such benefits.[43]

52. The result of Professor McDermott's expert analysis, simply put, is this: "polygyny's negative effects are wide-ranging, statistically demonstrated, and independently verified using alternative analytical tools."[44] Wherever polygamy exists, one should expect to see an increase in the harms identified by Professor McDermott.

53. The evidence adduced from current and former residents of Bountiful, British Columbia, Canada's most prominent polygamous community, confirms the gravitas of Professor McDermott's analysis. Many, if not all, of the harms

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[40] Dr. McDermott, 15 December 2010, p. 80:33-39.
[41] Dr. McDermott, 16 December 2010, p.16:31-35.
[42] Exhibit 41 at para. 158: Expert report of Dr. McDermott, 16 July 2010.
[43] *Ibid* at para. 158, emphasis added.
[44] *Ibid* at para. 158.

predicted by her statistical model are seen in Bountiful and these harms manifest themselves in far greater numbers than are seen in the wider local community. BC has addressed this evidence in detail in its written submission.

2. Social Science Literature Documents Harms of Polygamy Around the World

(a) Introduction

54. A number of experts, including Professor McDermott, conducted reviews of the literature on polygamy.[45]

55. As noted above, Professor McDermott has studied polygamy for 10 years. She conservatively estimated that she had read several hundred articles or books on polygamy during that time. In her literature review, she presented a "fair, comprehensive, and representative sample" of the existing literature drawn primarily from peer-reviewed sources and written by authors whom she considered to be experts in their area.[46]

56. In her report, Professor McDermott summarized the prominent existing social science literature on polygamy, drawn primarily from anthropology, but supplemented by works in economics and political science. She found that many of the harms identified in the literature were the same harms predicted by her statistical analysis. Professor McDermott's literature review is corroborated by the evidence of numerous experts and the vast majority of materials in the Brandeis Brief.

[45] Much of the literature referred to by the experts is contained within the Brandeis Briefs filed by both sides in this Reference.
[46] Exhibit 41 at paras. 22-23; Expert report of Dr. McDermott, 16 July 2010.

(b) Harms to Individuals

(i) Harms to Women

57. The social science literature demonstrates that many negative consequences befall women in polygamous marriages as well as the children from such marriages.

58. Women in polygamous marriages suffer physical, mental, and emotional harms. They are at risk of increased mental health problems, including more psychological distress, problems in marital and family functioning, and lower degrees of life satisfaction. Empirical studies of Bedouin-Arab women have found that polygamy is associated with higher rates of depressive disorders, anxiety, and related mental health issues.[47]

59. Dena Hassouneh, a medical professional called by BC, indicated that in her practice she has observed symptoms such as depression, anxiety, hostility, anger and betrayal among Muslim patients involved in polygamy that she has treated in North America. She suggested that, as a result, "many of the patterns noted in the literature on Muslim women in polygamous family structures may also commonly occur in North America."[48]

60. Evidence from Africa and the Middle East indicates that the risk of increased mental health problems likely results from higher rates of domestic violence and abuse, including sexual abuse, in polygamous marriages.[49]

61. Conflicts among co-wives in polygamous marriages adds to the sources of mental health problems.[50] Professor Grossbard, the economist tendered by the

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[47] Exhibit 13, Tab B-13 at 1883: Affidavit #1 of Kaley Isbister, 30 July 2010, Alean Al-Krenawi and John R. Graham, "A Comparison of Family Functioning, Life and Marital Satisfaction, and Mental Health of Women in Polygamous and Monogamous Marriages" (January 2006) 52:1 International Journal of Social Psychiatry 5 at 13 **[Al-Krenawi, "Family Functioning"]**; Exhibit 41 at para. 26: Expert report of Dr. McDermott, 16 July 2010.
[48] Exhibit 3: Expert report of Dr. Hassouneh, 23 July 2010 (see exhibit "C" at 15, 17, 28).
[49] Exhibit 41 at para. 26: Expert report of Dr. McDermott, 16 July 2010; Dr. Shackelford, 15 December 2010, p. 44:30 to 45:42; Exhibit 4: Expert report of Dr. Henrich, 15 July 2010 (see exhibit "B" at 57).

Christian Legal Fellowship, confirmed that polygamy was associated with high levels of jealousy among co-wives and resulting psychological distress.[51]

62. These conclusions are supported by the literature review conducted by the Amicus's lead witness, Professor Campbell, in 2005. Her literature review examined much of the cross-cultural research on polygamy up to that date.[52] Professor Campbell cites research from France showing that, in certain contexts, jealousy between co-wives can escalate to intolerable levels, resulting in physical injuries sustained by the women.[53] In a subsequent article, Professor Campbell notes that feelings of competition and jealousy are present among polygamous families in the community of Bountiful.[54]

63. Professor Campbell also opined in 2005:

> Based on the available literature, it would seem that polygamy could bear quite negatively on the health of women. While some

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[50] Exhibit 41 at para. 26: Expert report of Dr. McDermott, 16 July 2010; see also Exhibit 13, Tab C-1 at 4083: Affidavit #1 of Kaley Isbister, 30 July 2010, Irwin Altman & Joseph Ginat, *Polygamous Families in Contemporary Society* (Cambridge: University of Cambridge Press, 1996) at 341 where they suggest that jealousy, tension, strain and competitiveness among co-wives is common and this conflict can extend to the children of different wives. See also Al-Krenawi, "Family Functioning", *supra* note 46 at 13, in which he finds increased family stress, marital conflict, family disruption, low self-esteem and feelings of disempowerment, and increased risk of physical and mental violence among polygynous marriages.

[51] Exhibit 48: Expert report of Dr. Grossbard, 16 July 2010 (see exhibit "B" at 4). It should be noted that on this subject, Dr. Grossbard testified that there is no solid research to support Professor Campbell's assertion that polygamy is beneficial for women's psychological health, Dr. Grossbard, 7 December 2010, p.23:13-29.

[52] At no point in her affidavit evidence or in her oral testimony did Professor Campbell disavow her 2005 literature review or provide any basis to contradict its conclusions.

[53] Exhibit 13, Tab A-13 at 476: Affidavit #1 of Kaley Isbister, 30 July 2010, Angela Campbell, "How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International Comparative Analysis", *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2005) at 4 **[Campbell, "Polygamy in Canada"]**.

[54] Exhibit 13, Tab A-15 at 545: Affidavit #1 of Kaley Isbister, 30 July 2010, Angela Campbell, "Bountiful Voices" (2009) 47 Osgoode Hall LJ 183 at 206-07, 214-18; See also Exhibit 13, Tab B-59 at 2696: Affidavit #1 of Kaley Isbister, 30 July 2010, Dena Hassouneh-Phillips, "Polygamy and Wife Abuse: A Qualitative Study of Muslim Women in America" (2001) 22 Health Care for Women International 735, a study of polygyny and wife abuse amongst American sunni Muslim women which reveals the same theme of disempowerment within polygamous unions. This study found that wives felt disempowered because of their inability to prevent their husbands from taking other wives. The significance of marriage within their Muslim communities and the associated need to keep their family together in turn led to unhappiness and vulnerability to abuse.

> women might benefit from polygamous life, most research indicates that women suffer psychologically when their husbands take subsequent wives, when there is intense rivalry between co-wives and if they perceive polygamy as depriving them of individual freedom and autonomy.[55]

64. With respect to physical harms, particularly, reproductive health harms, Professor Campbell cited international literature in her 2005 report for the proposition that, "polygynous cultures are characterized by patriarchal family structures, within which women have a marginalized ability to question a husband's authority and express individual wishes, even in regard to private issues like childbearing.[56] The same lack of reproductive autonomy was described by several women from the Bountiful community who, when interviewed by Professor Campbell, told her that the rules of the community restricted their ability to use birth control.[57]

65. In addition, Professor Campbell conceded that the literature on polygamy includes reports suggesting that the patriarchal nature of polygamy leads not only to women's subordination, but also to their sexual, physical, and emotional abuse at the hands of their husbands.[58]

66. Women in polygamous marriages also suffer economic harms.[59] Numerous studies from sub-Saharan Africa demonstrate that polygamy causes economic underdevelopment.[60] Importantly, one study that used a quantitative analysis found that banning polygamy increases savings by 70 percent and increases output per capita by 170 percent.[61]

67. Professor Campbell's 2005 literature review similarly found that there is a "substantial amount of research suggest[ing] that polygamy deprives women of

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[55] Campbell, "Polygamy in Canada", ***supra*** note 52 at 21.
[56] *Ibid* at 10. See also Exhibit 64 at para. 176: Affidavit #2 of Angela Campbell, 18 October 2010.
[57] *Ibid* at paras. 35-42.
[58] *Ibid* at paras. 178-89.
[59] Exhibit 48: Exhibit C to the Affidavit of Dr. Grossbard, 16 July 2010 (see exhibit "B" at 5); Dr. Grossbard, 7 December 2010, pp.14:6-19, 15:35-40, 16:27-31.
[60] Exhibit 41 at para. 25; Expert report of Dr. McDermott, 16 July 2010.
[61] *Ibid* at para. 25, citing Exhibit 13, Tab B-99 at 3821: Michele Tertilt, "Polygyny, Fertility and Savings" (2005) 113:6 Journal of Political Economy 1341.

economic resources, and of the ability to earn income independently of their husband". She added that some research suggests that first or senior wives to a polygamous marriage are at a particular disadvantage.[62] After weighing the international literature on this subject, Campbell concluded that:

> …it seems that while some literature suggests that polygamy can be economically beneficial for women, it more often leads to deleterious effects for them. Studies illuminating women's negative economic experiences are based on analyses of specific features within polygamous families and communities that actively detract from women's access to resources. They indicated that women in polygamous families have experienced economic hardship on account of their family structure. In contrast, research suggesting that women stand to gain from polygamy bases this position primarily on speculation. [emphasis added] [63]

(ii) Harms to Children

68. The social science literature shows that children of polygamous marriages suffer physical, mental and emotional harms.

69. Perhaps most chillingly, children of polygamous marriages in Mali proved 7-11 times more likely to die than their monogamously born counterparts controlling for sex, age, economic status and other variables. Similarly, older children of polygamous marriages in Ghana also showed increased risk of mortality.

70. Such dramatic effects are not limited to particular social groups or regional areas. An examination of half a million births in more than 22 sub-Saharan countries revealed that children born to polygamous marriages are 24% more likely to die than those born to monogamous marriages. [64]

71. Research from a variety of fields shows the negative effects of early sexual activity, pregnancy and childbirth on girls.[65] There is evidence that girls

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[62] Campbell, "Polygamy in Canada", *supra* note 52.
[63] *Ibid*. See also Exhibit 64 at para. 219: Affidavit #2 of Angela Campbell, 18 October 2010.
[64] Exhibit 4: Expert report of Dr. Henrich, 15 July 2010 (see exhibit "B" at 48).
[65] Exhibit 41 at para. 28: Expert report of Dr. McDermott, 16 July 2010.

suffer serious damage to their life expectancy and well-being as a result of early sexual activity.[66] Early sexual behaviour, pregnancy and childbirth is common in polygamous marriages where young girls are typically married to much older men.[67] Additionally, shortened inter-birth intervals pose a heightened risk for various problems including pre-term birth, recurring pre-term birth and pre-eclampsia.[68]

72. Numerous international studies in the Brandeis Brief filed by BC and Canada have found that children from polygamous families tend to suffer more from emotional, behavioural and physical problems, as well as a more negative self-concept, lower school achievement, and greater difficulties in social adjustment than do children from monogamous marriages in the same

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[66] *Ibid*; See also, Lisa M. Kelly, "Polygyny and HIV/AIDS: A Health and Human Rights Approach" (2006) 31 Journal for Juridical Science 1 in which she finds that the sexual and reproductive health harms of polygyny are especially pronounced in areas with high HIV/AIDS prevalence rates. The negative effects of early marriage and pregnancy are outlined in numerous sources. See, for example, Professor Cook's report and her book, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* (Oxford University Press: Oxford, 2003) at 182 and 278 in which she cites literature establishing that early marriage and pregnancy before adolescent girls have reached sufficient physical or emotional maturity for self-care and child-care have negative health implications. Cook states that this literature further shows that early marriage can significantly limit the socio-economic development of girls, often restricting their life opportunities to childrearing or low-skilled work outside the home.

[67] See, for example, the evidence in this Reference of numerous lay witnesses from the Bountiful community which confirms that marriages between very young girls, sometimes as young as 12 years old, and much older men are common. See also evidence tendered pursuant to Court Order dated February 25, 2011, which details the recent marriages of a number of underage girls in the Bountiful community In the Brandeis Brief of BC and Canada the large age gap of polygamous marriages is extensively documented. Exhibit 13, Tab D-1 at 4147: Affidavit #1 of Kaley Isbister, 30 July 2010, Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada's Polygamous Mormon Sect* (Toronto: Vintage Canada: 2008) **[Bramham, "Secret Lives"]**; Exhibit 13, Tab A-17 at 740: Affidavit #1 of Kaley Isbister, 30 July 2010, Eve D'Onofrio, "Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States" (2005) 19:3 International Journal of Law, Policy and the Family 373 at 378; Exhibit 13, Tab A-33 at 4147; Affidavit #1 of Kaley Isbister, 30 July 2010, Maura Strassberg, "Symposium: Lawyering for the Mentally Ill: The Crime of Polygamy" (2003) 12 Temp. Pol. & Civ. Rts. L. Rev. 353 at 366-67 (that there is typically age gap of 20 or more years between polygamous men & teenage wives) **[Strassberg, "Lawyering"]**.

[68] Exhibit 41 at para. 31: Expert report of Dr. McDermott, 16 July 2010. See also the evidence of numerous lay witnesses from the FLDS. These witnesses confirm that in the Bountiful community it is common for girls between 15 and 19 years old to give birth and to produce a child every one to one and a half years, Anonymous Witness #2, 25 January 2011, pp. 38, 58, 63, 64; Anonymous Witness #4, 26 January 2011, pp. 15-17.

communities.[69] Researchers explained these differences by referencing the higher levels of jealousy, conflict, tension, emotional stress, opposing motives, insecurity, and anxiety among polygamous families.[70] In particular, rivalry and jealousy between co-wives can cause significant emotional problems for children.

73. Other studies also found reports of increased stress in mother-child relationships among polygamous respondents because of decreased social and economic resources.[71] This evidence from the Brandeis Brief is complemented by the evidence of Professor Shackelford who explained that generally mothers are more neglectful toward their non-genetically-related children and that sibling rivalry and violence increases among non-genetically related siblings in the home.[72]

74. Fathers in polygynous households are often unable to give sufficient affectionate and disciplinary attention to all their children and this can reduce children's emotional security and educational achievement.[73] In addition, polygamist men tend have more children and to invest less in each one.[74]

75. Professor Campbell specifically acknowledged the evidence of harms to children and also explained some of the mechanisms that animate this phenomenon:

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[69] See literature review in Exhibit 54 at para. 63: Expert report of Nicholas Bala, 16 July 2010, where he cites literature indicating that adolescents raised in polygamous families are far more likely to demonstrate high levels of interpersonal sensitivity, depression and paranoid ideation, as well as more problematic family functioning; Exhibit 13, Tab B-11 at 1820: Affidavit #1 of Kaley Isbister, 30 July 2010, Alean Al-Krenawi, John R.Graham & Vered Slonim-Nevo, "Mental Health Aspects of Arab-Israeli Adolescents from Polygamous versus Monogamous Families" (2002) 142:4 Journal of Social Psychology 446.

[70] *Ibid* at 456; Exhibit 13, Tab B-17 at 1913: Affidavit #1 of Kaley Isbister, 30 July 2010, A. Al-Krenawi and V. Slonim-Nevo, "Psychosocial and Familial Functioning of Children from Polygamous and Monogamous Families" (2008) 148(6) Journal of Social Psychology 745 at 746; Exhibit 42 at para.47: Expert report of Dr. Cook, 13 July 2010.

[71] Exhibit 13, Tab B-9 at 1800: Affidavit #1 of Kaley Isbister, 30 July 2010, Alean Al-Krenawi, "Women from Polygamous and Monogamous Marriages in an Out-Patient Psychiatric Clinic" (2001) 38(2) Transcultural Psychiatry 187 at 196.

[72] Dr. Shackelford, 15 December 2010, pp. 41 and 43.

[73] Exhibit 13, Tab B-35 at 2226: Affidavit #1 of Kaley Isbister, 30 July 2010, Varghese I. Cherian, "Academic Achievement of Children from Monogamous and Polygynous Families" (1989) 130(1) The Journal of Social Psychology 117 at 118.

[74] Exhibit 48: Exhibit C to the Affidavit of Dr. Grossbard, 16 July 2010 (see exhibit "B" at 5).

> Various studies confirm that children from polygamous families are at an enhanced risk of psychological and physical abuse or neglect. While not entirely conclusive, research indicates that children can be adversely affected by rivalry between sister wives, and by the fact that more children in the family may mean less time with, and attention and supervision from parents, especially their fathers.[75]

(iii) Harms to Men

76. The social science literature also indicates that the boys of polygamous marriages suffer serious consequences as a result of polygamy.

77. Polygamy causes the proportion of young, unmarried men to be high, up to 150 men to 100 women.[76] This sex ratio imbalance, which has also been identified by numerous other expert witnesses in the Reference, including Professors Henrich and Grossbard, logically means that "junior boys" must be forced out of polygamous communities in order to sustain the ability of senior men to accumulate more wives.[77]

78. Senior men often perpetuate violence against junior men and boys to push them out of the community so they will not be able to compete for desirable women.[78] Power hierarchies among men determine which men are afforded the opportunity to take multiple wives and which are necessarily excluded from the community.[79]

79. As a result of their forced exit from polygamous communities, these junior men and boys often receive very limited education and are left to navigate their way in the wider society with very few skills and little social support.[80] Polygamy has the consequence of generating a class of largely poor, uneducated and

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[75] Exhibit 64 at para. 191: Affidavit #2 of Angela Campbell, 18 October 2010.
[76] Exhibit 41 at para. 32: Expert Report of Dr. McDermott, filed July 16, 2010.
[77] Exhibit 4: Expert report of Dr. Henrich, 15 July 2010 (see exhibit "B" at 40); Exhibit 48: Expert report of Dr. Grossbard, 16 July 2010 (see exhibit "B" at 5-6).
[78] Exhibit 41 at para. 36: Expert report of Dr. McDermott, 16 July 2010; See also the testimony of various former FLDS members, including Truman Oler and Theresa Wall.
[79] Exhibit 13, Tab A-32 at 1305: Affidavit #1 of Kaley Isbister, 30 July 2010, Maura Strassberg, "Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage" (1997) 75 N.C.L. Rev. 1501 at 1586 **[Strassberg, "Distinctions of Form or Substance"]**.
[80] Exhibit 41 at paras. 32-34: Expert report of Dr. McDermott, 16 July 2010.

unmarried men who are statistically predisposed to violence as well as being further victimized.[81]

80. Professor Campbell has explicitly acknowledged these harms to young men in her 2005 literature review:

> The issue of choice in relation to marriage in a polygamous society is also linked quite closely to male hierarchies that commonly form in such communities, evidencing economic inequalities and injustices among men. A nearly universal feature of polygamous communities is that only the most affluent and high-ranking men take wives.[82]

(c) Harms to Society

81. As indicated by Professor McDermott's cross-cultural statistical analysis, the array of harms that flow from the practice of polygamy tend to ripple outward throughout society in a myriad of complex ways.

82. To begin with, the harms suffered by individuals as a result of polygamy often affect many others in the broader community. For example, as just noted, polygamy has the consequence of generating a class of largely poor, unmarried men who are statistically predisposed to violence and other anti-social behaviour.

83. The social science literature indicates, for example, that most homicides in Canada and the United States result from the actions of young, unmarried males. To the extent that polygamy causes an increase in the number of young unmarried men who are often undereducated and unmoored from the social support structures of their childhood communities, there is a corresponding increase in the crime and anti-social behaviour with which society as a whole must inevitably deal. [83]

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[81] *Ibid* at para. 34. See also Exhibit 4: Expert report of Dr. Henrich, 15 July 2010 (see exhibit "B" at 40); Dr. Grossbard, 7 December 2010, p. 16:7-22.
[82] Campbell, "Polygamy in Canada", *supra* note 52 at 8.
[83] Exhibit 41 at para. 32-38: Expert report of Dr. McDermott, 16 July 2010. See also Dr. Shackelford, 15 December 2010, p. 35.

84. Even when young men are not formally ejected from their polygamous communities, the literature suggests that the sex ratio imbalance inherent in the practice of polygamy causes problems *within* such communities. For example, in a study of 90 pre-industrial societies, violence within the community was found to be associated with the practice of polygamy.[84]

85. Another way in which the harms that polygamy causes ripple out to the broader societal level is that it ultimately inhibits the ability of individuals and states to engage in beneficial collective action. Professor Scheidel noted in his evidence, for example, that the economic and reproductive inequality suffered by men as a result of the practice of polygamy produces competition that diminishes the kind of collective action that is known to be vital to the formation and maintenance of stable nation states.[85]

86. A related observation has been made by academics such as Laura Betzig, who has described the manner in which – throughout history – the practice of polygamy has been positively associated with harmful societal level phenomena such social stratification and despotism. [86] The corollary of this association, which has also been empirically described in the literature, is that the democratic character of a society or community has been found to be *negatively* correlated with the practice of polygamy across cultures.[87]

87. The social science literature also confirms that the practice of polygamy is associated with a broad diminution in the right to equality between the sexes and an increase in rigidly patriarchal hierarchies within particular communities.[88] As was recently noted by the Quebec *Conseil du statut de la femme*, the practice of

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[84] Exhibit 41 at para. 32-38: Expert report of Dr. McDermott, 16 July 2010. See also Dr. Shackelford, 15 December 2010, p. 35.
[85] Exhibit 6: Expert report of Dr. Scheidel, 14 July 2010 (see exhibit “B” at 37).
[86] Exhibit 6: Expert report of Dr. Scheidel, 14 July 2010 (see exhibit “B” at 31).
[87] Exhibit 13, Tab B-72 at 2955: Affidavit #1 of Kaley Isbister, 30 July 2010, A, Korotayev and D. Bondarenko, “Polygyny and Democracy: A Cross-Cultural Comparison” (May 2000) 34:2 Cross-Cultural Research 190.
[88] See, for example, Campbell, “Polygamy in Canada”, *supra* note 52 at 17-18 [“It is well documented that inequality and patriarchal hierarchy are the defining features of most polygamist societies, even those that persist to this day.”].

polygamy "has a structuring effect on an entire society because it institutionalizes inequality between the sexes and reinforces the subordination of women."[89]

88. Maura Strassbourg has also pointed out that the often closed and secretive nature of polygamous communities means that they can exist as islands of unchecked oppression and inequality within modern rights-based democracies such as Canada and the United States.[90]

89. The proliferation of relatively closed polygamous communities that are in many ways cut off from the broader societal mechanisms that support and reinforce the notion of equality in particular states helps to explain Professor McDermott's finding that as polygamy goes up in a particular state, so too does the discrepancy between law and practice relating to women's equality.[91]

90. In addition to more empirically quantifiable harms to society, the literature also identifies harm to the *value* of equality as being associated with the practice of polygamy. In particular, when a state permits polygamous communities – and all that they entail – to flourish within its borders it diminishes the extent to which equality can effectively be upheld as a defining and emblematic value for all those within the state. This point was made by the Alberta Civil Liberties Research Centre as follows:

> A patchwork of [polygamous] sub-communities or sub-groups applying their own rules and laws in the area of family law could arguably undermine our notion of equality under the law and pose a potential challenge to the social cohesion of our country. In effect we would be saying that equality for all without regard to gender is not an absolute or intrinsically Canadian value.[92]

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[89] Exhibit 152: Affidavit #1 of Dany Gabay, 22 February 2011 (see exhibit 'A' at 74), Quebec *Conseil du statut de la femme*, "Avis-La polygamie au regard du droit des femmes" (2010) [English Translation].
[90] Strassberg, "Distinctions of Form or Substance" supra note 78 at 410-11.
[91] Exhibit 41 at 13: Expert report of Dr. McDermott, 16 July 2010.
[92] Campbell, "Polygamy in Canada", *supra* note 52 at 17.

B. HARMS RECOGNIZED IN INTERNATIONAL HUMAN RIGHTS LAW

1. Introduction

91. The prohibition of polygamy is supported by a broad international consensus that includes representatives of states where polygamy has historically been permitted, such as certain African and Asian nations. Increasingly, the global trend is to criminalize the practice of polygamy because of a recognition of the harms associated with it, especially the harms to women's dignity and equality.[93]

92. International treaty bodies have consistently condemned the practice of polygamy. They have stated that polygamy violates the dignity of women and an discriminates against them. They have also said that polygamous marriages contravene a woman's right to equality and can have serious emotional and financial consequences for her and her dependents. Accordingly, the treaty bodies have called for polygamy to be "definitely abolished wherever it continues to exist" and urged that polygamous marriages be discouraged and prohibited.

93. There is a strong consensus under international human rights law that states are obligated to take all appropriate measures to eliminate polygamy as a form of discrimination against women. States are also obligated to eliminate polygamy to ensure equality in marriage and family law, to ensure women's rights regarding their health and security of their persons and to ensure the protection of children and young people.[94]

94. The Court heard evidence from Professor Rebecca Cook regarding the international treaty bodies' consistent condemnation of polygamy and Canada's obligations under international human rights treaties to abolish polygamy.

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[93] Exhibit 42 at para. 146: Expert report of Dr. Cook, 13 July 2010.
[94] *Ibid* at para. 18.

95. Professor Cook is an internationally recognized scholar in international human rights law and women's rights. She is the Chair of International Human Rights Law at the University of Toronto Law School. Professor Cook has taught and written widely on international human rights including women's rights and health issues and states' obligations and responsibilities. She has taught at various universities around the world and she has been appointed to the editorial boards of several leading human rights journals. She has also served on various legal and advisory boards including the World Health Organization. Her publications have focused on different aspects of international human rights law and many of them are seen as foundational or leading works in their areas.[95]

96. Her scholarship and contributions to the field of international human rights law have been recognized in various ways including being made a fellow of the Royal Society of Canada, the national academy of distinguished Canadian scholars, artists and scientists established to recognize academic excellence and to advise governments and organizations.[96]

97. The Amicus accepted Professor Cook's qualifications and no one else challenged her qualifications. The Court qualified Professor Cook as an expert in international human rights law with a particular focus or expertise in women's rights and states' obligations under international human rights law.[97]

98. Traditionally, international law regulated the intercourse of independent nations in peace and war. However, since the Second World War, there has been a legal transformation in international law. International law now also addresses the rights and freedoms of individuals and "peoples". International law enables individuals to "appeal" from breaches of fundamental rights and

[95] Exhibit 42: Expert report of Dr. Cook, 13 July 2010; Dr. Cook, 6 January 2011, pp. 2:1 to 9:27.
[96] Exhibit 42: Expert report of Dr. Cook, 13 July 2010; Dr. Cook, 6 January 2011, pp. 2:1 to 9:27.
[97] *Ibid*, p. 9:12-27.

freedoms to international "courts", some of which may impose sanctions and all of which enjoy moral authority.[98]

99. There are several recognized sources of public international law. The most important sources are international conventions or treaties and international custom or practice.[99] International treaties, whether general or particular, establish rules that are expressly recognized by states. Treaty-based international law is premised on state consent. States agree to be bound by the obligations articulated in the treaty. Customary international law is evidenced by consistent and uniform state practice based on an understanding that the practice is required by law.

2. Canada has International Treaty Obligations Relevant to Polygamy

100. Canada has ratified various international treaties that are relevant to the practice of polygyny. Each of these treaties has a treaty body that monitors state compliance with their obligations under the treaty. The relevant treaties are:

- International Covenant on Civil and Political Rights (the "Political Rights Covenant" or "ICCPR")

  The Political Rights Covenant came into force in March 1976 and it was acceded to by Canada in May 1976. The Political Rights Covenant established the Human Rights Committee ("HRC").

- International Covenant on Economic, Social and Cultural Rights, ("ICESCR")

  The ICESCR came into force in January 1976 and it was acceded to by Canada in May 1976. The ICESCR established the Committee on Economic, Social and Cultural Rights (the "CESCR").

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[98] William Schabas & Stephane Beaulac, *International Human Rights and Canadian Law*, 3rd ed (Toronto: Carswell, 2007) at 113.
[99] Dr. Cook, 6 January 2011, pp. 13:3-40.

- Convention on the Rights of the Child (the “Children’s Convention” or the “CRC”)

  The Children’s Convention came into force in September 1990 and it was ratified by Canada in December 1991. The Children’s Convention established the Committee on the Rights of Children.

- Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW” or the “Women’s Convention”)

  The Women’s Convention came into force in September 1981 and it was ratified by Canada in December 1981. The Women’s Convention established the Committee on the Elimination of Discrimination against Women (“CEDAW Committee” or the “Women’s Committee”).

101. As already noted, Canada has acceded to or ratified all of these treaties. As a state party to these treaties, Canada has an obligation to take all appropriate measures to implement them both domestically and internationally.

102. The treaty bodies issue “General Comments” or “General Recommendations” that provide guidance to state parties on what they have to do to bring their laws, policies and practices into compliance with their obligations under a particular treaty.

103. The treaty bodies also assess reports from state parties to determine what the party has done or failed to do to comply with its obligations under a particular treaty and then issue “Concluding Observations” on these reports that assist states in complying with their obligations.[100]

104. These treaty bodies have consistently condemned the practice of polygamy. The Human Rights Committee stated in General Comment No. 28:

[100] Exhibit 42 at para. 10: Expert report of Dr. Cook, 13 July 2010.

> Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.[101]

105. The Women's Committee stated in General Recommendation No. 21:

> Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some State parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of Article 5(a) of the Convention."[102]

3. International Treaty Bodies Link Polygamy to Harms

106. The treaty bodies have recognized that there are various wrongs inherent in and harms associated with the practice of polygamy.

107. Polygamy violates women's dignity, perpetuates gender stereotypes that are hostile to women's equality and structures family life in ways that discriminate against women. The distribution of rights and obligations within polygamous marriages is based on the sex of the parties. Women as "wives" are limited to one spousal relationship while men as "husbands" are entitled to take multiple spouses.[103]

108. Both the CEDAW Committee and the HRC have emphasized that polygamy "is a discriminatory practice that undermines women's dignity".[104]

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[101] Exhibit 120, Tab 7: Binder entitled Testimony of Professor Rebecca Cook, UN Human Rights Committee (HRC), *General Comment No. 28: Equality of rights between men and women* (29 March 2000) at para. 24 (CCPR/C/21/Rev.1/Add.10).
[102] Exhibit 120, Tab 2: Binder entitled Testimony of Professor Rebecca Cook, UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Rec. No. 21: Equality in Marriage and Family Relations*, 13th Sess. (1994) at para.14.
[103] Exhibit 42 at paras. 26-38, 174-175: Expert report of Dr. Cook, 13 July 2010; Dr. Cook, 6 January 2011, pp. 18:2 to 20:39.
[104] Exhibit 42 at para. 26: Expert report of Dr. Cook, 13 July 13, 2010.

109. In addition to the harms to women's equality and dignity, treaty bodies and state parties have identified additional particular harms associated with the practice of polygamy.

110. Polygamy may undermine women's mental, physical, sexual and reproductive health and deprive them women not only of their right to health but also of the enjoyment of other human rights, including the right to life, liberty and security of the person.[105]

111. In their reports to treaty bodies, state parties have recognized that competition among co-wives for material and emotional access to a husband can have negative economic and social consequences for both women and their children:

> 'first wives' are neglected as husband's time and money are spent with and on other families.[106]
>
> polygamy also gives rise to various economic and social consequences, including jealousy between wives, unequal distribution of household goods, inheritance problems and domestic squabbling, which may have a negative impact on children.[107]

112. The economic harms of polygamy can be particularly serious as societies become increasingly urbanized, with urban living conditions typically not amenable to the living space required for multiple families.[108]

113. Polygamy may negatively impact children's physical and mental health. Where practices such as polygamy undermine children's health, international law requires that states take the requisite steps to eliminate those practices.[109]

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[105] *Ibid* at paras. 187-188.
[106] *Ibid* at para. 43.
[107] *Ibid* at para. 43.
[108] *Ibid* at paras. 56-60.
[109] *Ibid* at paras. 193-196.

114. State parties have also recognized that the community norms supporting polygamy can have an negative emotional and psychological impact on women and girls:

> From the psychological and emotional standpoint, girls, especially in a rural environment, have no means for expressing their aspirations and their feelings and must submit to the customary norms and traditions of their ethnic group with regard to affective options and sex life, accepting, without any objection, their place and role in the polygamous system of relationships and inheritance rights in emotional relations.[110]

115. Children, particularly female children, raised in polygynous families in closed or semi-closed communities may be subject to demographic pressure to marry at a young age. Boys may be subject to exclusion in order to sustain an unequal sex ratio.[111]

116. Polygamy may have sexual and reproductive health implications for women and girls. Polygamy may also expose girls and women to the greater risk of contracting HIV/AIDS and other sexually transmitted diseases.[112] The CEDAW Committee has stated in a General Recommendation that:

> harmful traditional practices, such as…polygamy…may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases.[113]

117. The treaties bodies and state parties have also recognized that polygamy has negative consequences including parental neglect and economic deprivation for children:

> Polygamy "deprives many children from getting…much needed parental guidance."[114]
>
> Children from polygamous families are left neglected or poorly provided for by their fathers.[115]

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[110] *Ibid* at para. 50, fn. 60.
[111] *Ibid* at para. 193.
[112] *Ibid* at para. 54.
[113] *Ibid* at para. 55.
[114] *Ibid* at para. 66.

4. Global Trend is to Prohibit Polygamy

118. A majority of states in the world prohibit polygamy and there is a growing trend in that direction. The dominant state practice is to prohibit polygamy through the use of the criminal law.[116]

119. Polygamy is prohibited in states around the world including states in Africa, Asia, Australia and Oceania, Europe and North America.[117] Even in countries where polygamy has been practiced widely, there is a trend toward prohibition.[118]

120. Where polygamy is not prohibited, the trend is to restrict its practice. One way that states have restricted polygamy is to require husbands to obtain the permission of a governmental authority, court or quasi-judicial body to contract a polygamous marriage, which is often contingent on the wife's consent.[119]

121. Legislative attempts to loosen the restrictions on polygyny have met growing resistance. For example, when legislation was proposed in Iran that would have allowed a husband to take an additional wife without the first wife's permission, it failed, in part because of strong opposition by women's equality groups.[120]

122. Some domestic systems operate under parallel legal systems. In those countries, the legal validity of a polygynous union depends on whether the parties marry under civil, customary or Islamic law.[121] Some men have used parallel systems to their advantage.[122] The treaty bodies have strongly criticized parallel judicial systems that allow for polygamy.[123]

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[115] *Ibid* at para. 67.
[116] Dr. Cook, 6 January 2011, p. 26:11-17.
[117] Exhibit 42 at paras. 74-101: Expert report of Dr. Cook, 13 July 2010.
[118] Dr. Cook, 6 January 2011, pp. 28:6 to 29:42.
[119] Exhibit 42 at paras. 106-113: Expert report of Dr. Cook, 13 July 2010.
[120] *Ibid* at para. 102.
[121] *Ibid* at para. 114.
[122] *Ibid* at para. 116.
[123] *Ibid* at para. 114.

123. The trend in immigration laws and policies is to prohibit the entry of polygamous families.[124] In the immigration laws of Australia, Canada, France, the United Kingdom and the United States, polygamy is a bar to immigration.

124. The continued criminalization of polygamy is necessary to ensure the prohibition on immigration of polygamist families, in part because criminal conduct is a basis for exclusion under most immigration laws.[125]

5. Treaty Bodies Urge the Abolition of Polygamy

125. As a state party to the treaties, Canada is obligated to take "all appropriate measures" to eliminate discrimination against women.[126] Through their General Recommendations and Concluding Observations, the treaty bodies have urged state parties to "definitely abolish" and "prohibit" the polygamy as a form of discrimination against women.

126. The treaty bodies have provided guidance on what measures might be appropriate. Professor Cook testified that the use of the term "all appropriate measures" requires states to be comprehensive in their approach. State practice indicates that, in order for measures to eliminate polygamy to be effective, states feel obligated to use a mix of legal, educational and social measures. The legal measures include constitutional, civil and criminal prohibitions.[127] Professor Cook testified that many states feel obligated to criminalize polygamy.[128]

127. States have a margin of discretion to determine which measures are effective in their countries to eliminate polygamy. However, the discretion has limits and the measures selected as appropriate must meet international standards.[129]

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[124] *Ibid* at para. 126.
[125] *Ibid* at para. 127.
[126] *Ibid* at para. 134.
[127] *Ibid* at para. 142.
[128] *Ibid* at para. 146.
[129] *Ibid* at para. 145.

128. Professor Cook considered how the elimination of polygamy would affect contrasting rights including the right to privacy and family life, the right to freedom of religion and the right to enjoy one's culture. She found that, in state practice and the jurisprudence that has emerged under regional and international human rights treaties, the obligation to eliminate polygamy is not outweighed by these competing rights.[130]

129. For example, there is little support under international law for any claim that freedom of religion would permit the practice of polygamy.[131] A claim that freedom of religion trumps any legal prohibition of the practice can be characterized as either: a strong claim - formal state laws must yield to or even grant formal recognition to parallel normative systems; or a weak claim - the state does not have to formally recognize parallel religious or customary laws but the state should not interfere with those laws.[132]

130. The Political Rights Covenant protects religious freedom. However, the text of the Covenant and the HRC's Comments interpreting it do not support an argument that freedom of religion provides any positive right to be governed by religious law in marriage and family law.

131. Article 18 protects religious freedom:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

132. However, Article 18 provides that freedom of religion is subject to limits:

> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

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[130] *Ibid* at para. 197.
[131] *Ibid* at para. 209.
[132] *Ibid* at para. 208.

133. The HRC has interpreted the Political Rights Covenant as precluding state parties from relying on religious freedom to permit gender discriminatory practices. Given that the HRC has found that polygamy violates these equality provisions, it is clear that, from the perspective of the HRC, the prohibition of polygamy is a reasonable limit on freedom of religion.[133]

134. The text and the Committee's interpretations of the Women's Convention also do not provide any freestanding right to be governed by parallel religious family laws. Professor Cook testified that if a state party wanted to signal that it intended for one of its constitutional rights, such as freedom of religion, to take precedence over the non-discrimination articles of the Women's Convention, the appropriate approach would be for the state party to enter a reservation to these articles. Canada has not entered any reservations to the Women's Convention.[134]

135. As a further example, the right to privacy and family law does not require states to permit the practice of polygamy. The institution of marriage is a public one. The public nature of marriage is not subject to privacy protections.[135]

136. Where women are subject to discriminatory family practices, this undermines their right to equality in marriage. The HRC has stated clearly that:

> equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle….It should be definitely abolished wherever it continues to exist.[136]

As a final example, the right to one's culture does not encompass practices that violate the fundamental rights and freedoms of others. Article 3 of the ICESR expressly requires state parties to ensure the "equal right of men and women to the enjoyment of all economic, social and cultural rights" of the Covenant.

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[133] *Ibid* at para. 215.
[134] Dr. Cook, 6 January 2011, p. 45:1-16.
[135] Exhibit 42 at para. 200: Expert report of Dr. Cook, 13 July 2010.
[136] *Ibid* at para. 201; Exhibit 120, Tab 7: Binder entitled Testimony of Professor Rebecca Cook, UN Human Rights Committee (HRC), *General Comment No. 28: Equality of rights between men and women*, 29 March 2000, (CCPR/C/21/Rev.1/Add.10).

CESCR General Comment No. 21 states that "[i]mplementing Article 3 of the Covenant, in relation to Article 15, paragraph 1(a), requires, *inter alia*, the elimination of institutional and legal obstacles as well as those based on negative practices, including those attributed to customs and traditions, that prevent women from participating fully in cultural life, science, education and scientific research."[137]

[137] Exhibit 42 at para. 220: Expert report of Dr. Cook, 13 July 2010.

C. HARMS RECOGNIZED THROUGHOUT HISTORY

1. Introduction

137. Section 293 of the *Criminal Code* is the modern Canadian iteration of a consistent prohibition against polygamy that stretches back through Western history to before the rise of Christianity. Greek and Roman philosophers and jurists condemned the practice of polygamy because it undermined human dignity and equality. In contrast, monogamous marriage was extolled because it fostered democratic values.

138. Western law-makers and scholars have consistently identified the practice of polygamy with harms to individuals, particularly women and children, and to society. These harms are mirrored in the vast majority of the evidence filed in the Reference.

139. Canada called Professor Witte to provide the Court with expert evidence on the history of marriage in the Western tradition and, in particular, on the treatment of polygamous marriage. Professor Witte is a pre-eminent scholar on the legal history of marriage. His qualifications to provide opinion evidence were not challenged and the Court qualified him as an expert in legal history, marriage and historical family law and religious freedom qualified to give evidence on the historical development and evolution of the dyadic marriage structure and the prohibition of polygamy in the Western tradition.[138]

140. Professor Witte traced the history of polygamy through the watershed periods of the Western tradition from ancient Greece and Rome, through the biblical and early Christian era, the Middle Ages, the Protestant Reformation, the Enlightenment, and the common law era.

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[138] John Witte, Jr., 10 January 2011, pp. 14:27 to 15:25.

141. Professor Witte's evidence was corroborated by other experts who testified at the Reference including Professors Walter Scheidel and Joseph Henrich, who were called by BC, Professors Lori Beaman and Todd Shackelford, who were called by the Amicus and Professor Grossbard, who was called by the CLF.

2. Prohibition of Polygamy is Longstanding

142. The prohibition of polygamy pre-dates the rise of Christianity by several centuries. The prohibition arose in ancient Greece at the same time as democracy, equality and other Western values.[139]

143. The ideal of marriage as a dyadic union also originated in ancient Greece and Rome.[140] Five centuries before the rise of Christianity, a number of Greek thinkers – including Plato and Aristotle - regarded monogamous marriage as the marital structure that best served the couple, the children and the community as a whole.[141] In contrast, polygamy was a mark of tyranny.[142]

144. Roman law, which gave rise to many of the basic legal ideas and institutions of marriage that prevail at common law today, repeated and extended the prohibitions against polygamy.[143] The law of the Roman republic and early empire made it impossible to have two wives at the same time.[144] Augustine of Hippo (later Saint Augustine) expressly identified the prohibition of polygamy as a "Roman custom".[145]

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[139] John Witte, Jr., 10 January 2011, p. 41:4-10.
[140] Exhibit 6: Expert report of Dr. Scheidel, 14 July 2010 (see exhibit "B" at 31).
[141] Exhibit 43 at para. 35: Expert report of John Witte, Jr., 19 July 2010.
[142] Exhibit 6: Expert report of Dr. Scheidel, 14 July 2010 (see exhibit "B" at 31).
[143] Exhibit 43 at paras. 53-54: Expert report of John Witte, Jr., 19 July 2010.
[144] *Ibid* at para. 60.
[145] Exhibit 6: Expert report of Dr. Scheidel, 14 July 2010 (see exhibit "B" at 47).

145. Christianity carried the pre-Christian Greek and Roman philosophical understandings of monogamous marriage, replicating "Greco-Roman marriage with a twist in the sense that it moved toward greater equality."[146]

146. While the Bible did not prohibit polygamy outright, numerous biblical stories highlighted the grim plight of the ancient patriarchs, like Abraham, Jacob, David, and Solomon, who dared to practice polygamy. For the early church's theologians and philosophers, these stories demonstrated that polygamy was an obvious breach of the natural structure of marriage in which each spouse's love, friendship, and support of the other was equal and undivided and they opposed the practice.[147]

147. Medieval canon law prohibited polygamy because it was naturally unjust, especially to women and children, and was a form of enslavement of women.[148]

148. While the Protestant Reformation brought sweeping changes to the Western law and theology of marriage, polygamy remained a serious crime in most Protestant lands in the sixteenth century and thereafter. Polygamy was seen as the seat of patriarchy and abuse, of crime and exploitation, of unjust diffusion of wealth and property, of inequality and rivalry among wives and children, and the cause of many other harms.[149]

149. During the Enlightenment period in the seventeenth and eighteenth centuries, English, French, Scottish, and American philosophers argued against the practice of polygamy, not on the basis of biblical teachings or theology but on grounds of fairness and utility. Polygamy was associated with numerous harms including: exploitation and coercion of young women; jealousy and rivalry among

[146] John Witte, Jr., 10 January 2011, p. 25: 7-24, p. 35: 3-15.
[147] John Witte, Jr., 10 January 2011, pp. 5:24 to 6:41.
[148] Exhibit 43 at paras. 16-20: Expert report of John Witte, Jr., 19 July 2010.
[149] John Witte, Jr., 10 January 2011, pp. 8:71 to 9:92.

wives and their children; inequality of treatment of household members; and banishment of disfavoured children.[150]

150. Since Anglo-Saxon times, the common law has consistently denounced polygamy because of the many harms and crimes that it occasions. The common lawyers of the eighteenth to twentieth century adopted the Enlightenment rational and utilitarian arguments against polygamy and in favour of monogamy.[151]

151. In the United States, since the American Revolution of 1776 and consistently to the present day, every state has prohibited multiple marriages as a crime. In the past 150 years, most of the American cases and statutes have involved Mormons or, latterly, Fundamentalist Mormons.[152] However, the evidence discloses that the American polygamy laws were not a product of animus against Mormons *per se* but rather against the practice of polygamy itself.[153]

152. American courts have consistently held that there is no religious right to practice polygamy in violation of criminal laws. The courts have found that polygamy is the cause or consequence of numerous crimes and harms, especially to women and children, and the prohibition of polygamy serves the state's interest in protecting vulnerable individuals from exploitation and abuse.[154]

153. Professor Witte summarized the history of the prohibition as follows:

> For more than 1750 years, the Western legal tradition has declared polygamy to be a serious crime as grave as incest and rape; it was a capital crime from the ninth to the nineteenth century. While some Western writers and rulers have allowed polygamy in rare cases of urgent natural necessity, virtually all Western writers and legal systems have denounced polygamy and the occasional polygamous experiments of Jews, Anabaptists, and Mormons in

[150] John Witte, Jr., 10 January 2011, pp. 9:92 to 10:113.
[151] *Ibid*, pp. 10:113 to 11:124.
[152] *Ibid*, pp. 10:125 to 11:6.
[153] Exhibit 52: Exhibit B to Affidavit #1 of Marci Hamilton, 16 July 2010 (see exhibit "B" at 3-4).
[154] Exhibit 43 at pp. 125-131: Expert report of John Witte, Jr., 19 July 2010.

> Western history. Polygamy, they have argued, is unnatural and unjust to wives and children – a violation of their fundamental rights in modern parlance. It is the inevitable cause or consequence of sundry harms and crimes. And polygamy is a threat to good citizenship, social order, and political stability, even an impediment to the advancement of civilizations toward liberty, equality, and democratic government.[155]

3. Polygamy Linked to Harms

154. Professor Witte provided a detailed and thorough description of the harms that Western scholars, philosophers, theologians and jurists have associated with polygamy for the past two millennia. He divided these harms into four broad categories - harms against women, harms against children, harms against men and harms against society.

(a) Harms to Individuals

(i) Harms to Women

155. Professor Witte listed various harms to women that have been associated with polygamy including exploitation, commodification, objectification, social isolation, physical and mental deprecation, impoverishment, and, discrimination.[156] As he stated in his report, "[i]n modern language, polygamy is a violation of the fundamental dignity and rights of women."[157]

156. Some of the earliest accounts of the harms of polygamy, particularly to women, come from biblical sources. In these stories, the practice was associated with fraud, trickery, intrigue, lust, seduction, coercion, rape, incest, adultery, murder, exploitation and coercion of young women, jealousy and rivalry among wives and their children as one wife and her children were inevitably favoured

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[155] Exhibit 43 at para. 6: Expert report of John Witte, Jr., 19 July 2010.
[156] John Witte, Jr., 10 January 2011, pp. 59-61.
[157] *Ibid*, p. 61:8-9.

over others, dissipation of family wealth and inequality of treatment and support, banishment and disinheritance of disfavoured children[158] .

157. Later thinkers identified similar harms. For example, in the medieval period, Thomas Aquinas viewed polygamy as unjust to wives because it reduced them to servants, if not slaves, and set them in perennial competition with each other for resources and access to their shared husband, both for themselves and their children.[159]

158. In the Enlightenment era, Henry Home rejected polygamy as harmful to women and children because it fostered inequality, subjugation, rivalry, and impoverishment. Polygamy was “a patriarchal fraud” in which each wife was reduced to competing for the attention and affection of her husband.[160]

159. On a similar note, David Hume regarded polygamy as an “odious institution” with “frightful effects” on women including physical and mental abuse, and inequality. Polygamy, according to Hume, replaced the natural equality of the sexes with a form of slavery and tyranny. Polygamy led to jealousy and competition among the wives, isolated women from society, and rendered them so weak they could not leave. [161]

(ii) Harms to Children

160. Polygamy’s harms to children have also been recognized for hundreds of years. Professor Witte listed and described some of the harms that have been identified, including negative effects on the development of children caused by violence and discord in the home, competition between mothers and siblings for the limited attention of the father, impoverishment, and violation of the dignity of the child.

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[158] Exhibit 43 at pp. 22, 40-45: Expert report of John Witte, Jr., 19 July 2010.
[159] *Ibid* at p.64.
[160] *Ibid* at pp.98 - 101.
[161] *Ibid* at p.103 – 104.

161. In the medieval era, Thomas Aquinas rejected both polyandry and polygyny on the basis that they undermined parental investment and were unfair to children.[162]

162. Enlightenment thinkers echoed Aquinas' arguments about parental investment and competition between siblings. Henry Home, for example, was concerned that one man could not possibly provide food, care and nurture to the many children born of his many wives. Similarly, the wives would not be able to provide easily for their young when they are weakened by child labour and birth, needed for nursing, or distracted by the many needs of multiple children. Polygamy was linked to the neglect, impoverishment, and malnourishment of children and, potentially, death, leading Home to comment: "[h]ow much better chance for life have infants who are distributed more equally in different families."[163]

163. David Hume focussed on the poor example that polygamy set for children. Growing up in a polygamous household would lead children to "forget the natural equality of mankind" and they would be more likely to understand all relationships through the lens of slavery and tyranny.[164]

(iii) Harms to Men

164. Polygamy also has been consistently associated with harms to men, both those involved in polygamous relationships and those excluded from them. Professor Witte summarized the following harms to men that have been identified, including, for men who were excluded from polygamous relationships, the unequal distribution of spouses and the related ostracism from the community and, for men involved in polygamous relationships, the creation of a false appetite for patriarchy and hierarchy, inflammation of male lust, and deprivation of the bond of fellowship and mutuality.

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[162] *Ibid* at p.63-64.
[163] *Ibid* at p.100.
[164] *Ibid* at p.103.

165. Similarly, Dr. Scheidel noted that, historically, polygyny served as a marker and reinforcer of power and economic inequality among men, as less powerful men had less access to a spouse.[165] As a result, polygyny was and remains inherently conducive to inter-male conflict and competition, and thereby destructive of cooperation and collective action.[166]

166. In the Enlightenment era, Henry Home noted that monogamy is better suited to the roughly equal numbers of men and women in the world. He argued that, "[a]ll men are by nature equal in rank; no man is privileged above another to have a wife; and therefore polygamy is contradictory" to the natural order and to the natural right of each fit adult to marry.[167] Polygamy is simply a forum and a catalyst for adultery and lust. If a husband is allowed to satisfy his lust for a second woman whom he can add as a wife, his "one act of incontinence will lead to others without end."[168]

(iv) Harms to Society

167. In addition to harms to individuals, Professor Witte also summarized harms to society itself arising from the practice of polygamy, including increased need for social supports, threats to social order, threats to political stability, harms to good citizenship, and undermining of human dignity and equality.

168. Professor Scheidel noted that the harms of polygamy to individual men - such as economic and reproductive inequality – also create broader harms at the societal level. Polygyny is conducive to competition among men and inhibits collective action. Collective action, in turn, is seen as a vital element of successful state formation.[169]

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[165] Exhibit 6: Expert report of Dr. Scheidel, 14 July 2010 (see exhibit "B" at 35). See also Exhibit 59 at para. 41: Affidavit #1 of Angela Campbell, 7 June 2010 where she acknowledges that polygamy in the FLDS provides "reproductive privilege" to a few chosen men.
[166] Exhibit 6: Expert report of Dr. Scheidel, 14 July 2010 (see exhibit "B" at 37).
[167] Exhibit 43 at p. 100: Expert report of John Witte, Jr., 19 July 2010.
[168] *Ibid* at p. 101.
[169] Exhibit 6: Expert report of Dr. Scheidel, 14 July 2010 (see exhibit "B" at 37).

169. Many Western thinkers considered polygamy's effects on society in general. For example, Jeremy Bentham, an Enlightenment thinker, considered polygamy to be "useless" to society and individuals:[170]

> With regard to polygamy in general, independently of the circumstances [of natural necessity] which may render it tolerable, it is not of the least service to mankind, nor to either of the two sexes, whether it be that which abuses or that which is abused. Neither is it of service to the children; for one of its greatest inconveniences is, that the father and mother cannot have the same affection for their offspring; a father cannot love the same twenty children as a mother can love two…. Besides, the possession of so many wives does not always prevent their entertaining desires for those of others; it is with lust, as with avarice, whose thirst increases by the acquisition of treasure.

170. In the same vein, academics, such as Laura Betzig, have documented a close relationship between social stratification, despotism and polygamy over thousands of years of history. [171]

171. The common theme that undergirds and links most if not all of these asserted harms of polygamy to society is the erosion of equality and human dignity. Put simply, the practice of polygamy has been considered throughout the Western tradition to inevitably undermine the liberty and equality of women, children and men in various and sundry ways.

172. The Western thinkers cited by Professor Witte repeatedly articulate a consistent set of harms through this vast time period and across various cultures and traditions. Again and again, the picture that emerges is that polygamy tends to create a whole host of harms that amply justify its prohibition; as Professor Witte states "[n]ot in every case, to be sure, but in so many cases that these had to be seen as the inherent and inevitable risks of polygamy"[172]. As already noted, these same "historical" harms are widely found in the modern social science literature on the practice of polygamy.

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[170] Exhibit 43 at para.275: Expert report of John Witte, Jr., 19 July 2010.
[171] Exhibit 6: Expert report of Dr. Scheidel, 14 July 2010 (see exhibit "B" at 31).
[172] Exhibit 43 at p.10: Expert report of John Witte, Jr., 19 July 2010.

4. Monogamy Linked to Democratic Values

173. Marriage has been viewed throughout Western history as a fundamental social institution that has both public and private dimensions. As was noted by the Supreme Court of the United States in *Reynolds v. United* States, 98 U.S. 145 (1878) ("*Reynolds"*):

> 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.[173]

174. Monogamous marriage in particular has been understood throughout history to foster the very public benefits of equality, liberty and democracy, particularly when compared with polygamy.

175. Professor Witte noted that the Greeks expressly linked monogamous marriage to a wide variety of benefits to society. For example, Aristotle viewed the monogamous marital household as the foundation of the polis, the first school of justice and education and the private font of public virtue Dyadic marriage was seen to be the first experience of mutuality and equality of office in society.[174]

176. Like Professor Witte, Dr. Scheidel linked the adoption of monogamy in ancient Greece to the gradual process of building of Western civic institutions and the development of ideas of normative egalitarianism. Dr. Scheidel theorized about "a dialectical process in which monogamous norms and practices and other civic features co-evolved and mutually reinforced one another over time".[175]

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[173] *Reynolds v. United* States, 98 U.S. 145 (1878) **[Reynolds]** at 166; *See* also Exhibit 53: Affidavit #2 of Marci Hamilton, 16 November 2010 (see exhibit "A" at 6), where she stated that "[s]ex is a private activity, but marriage is a state construction that has momentous consequences for all of society. It determines the legitimacy of children, inheritance, benefits, and property ownership. Marriage law is not about who can have sex with whom. It is, instead, about who has enduring obligations to whom."

[174] John Witte, Jr., 10 January 2011, p. 41.

[175] Exhibit 6: Expert report of Dr. Scheidel, 14 July 2010 (see exhibit "B" at 42-43).

He further stated that monogamous marriage was associated with "notions of freedom".[176]

177. In Greco-Roman times, the imposition of monogamy was initially intended to reduce inequality among men.[177] Professor Scheidel emphasized the link between formal restrictions on or prohibition of polygamy, the reduction of competition and conflict between men and the promotion of cohesion, cooperation and collective action.[178]

178. Professor Henrich drew a similar link, stating that "Greek city states first legally instituted monogamy as part of many different reforms, including elements of democratic governance, which were meant to build egalitarian social solidarity among their citizenries".[179]

179. In the Medieval era, Thomas Aquinas favoured monogamous marriage because it was based on the dignity and inherent worth of all persons. It was more just for women and provided the best environment to raise children, fostering parental certainty and investment and reducing strife.[180]

180. The imposition of monogamous marriage, which put peasants and nobility on the same footing with regard to marriage can be seen as a "key step in the development of modern notions of equality – both of the equality among men, and of male-female equality".[181] The imposition of monogamous marriage "temporally preceded" all of the West's eventual development of human rights, women's liberation, etc."[182]

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[176] Exhibit 6: Expert report of Dr. Scheidel, 14 July 2010 (see exhibit "B" at 32).
[177] *Ibid* at 38.
[178] *Ibid* at 37; See also Exhibit 13, Tab B-89 at 3474: Affidavit #1 of Kaley Isbister, 30 July 2010, Steven Pinker, *How the Mind Works* (New York: Norton, 1997) at 425-520 as quoted in cross-examination of Dr. Shackelford, 15 December 2010, p. 24:39-30:40.
[179] Exhibit 5: Expert report #1 of Dr. Henrich, 15 July 2010 (see exhibit "B" at 37); Dr. Henrich, 9 December 2010, p.34.
[180] Exhibit 43 at pp.60-65: Expert report of John Witte, Jr., 19 July 2010.
[181] Exhibit 5: Expert report #1 of Dr. Henrich, 15 July 2010 (see exhibit "B" at 38); Dr. Henrich, 9 December 2010, p.34.
[182] *Ibid*.

181. Protestant thinkers subsequently described monogamous marriage as the "natural foundation of civil society." They called the household a "little church," a "little state," a "little seminary," or a "little commonwealth" whose proper functioning was essential to the operation of each. The Lutheran jurist, Justin Göbler, argued that, "[f]rom the administration of the household […] comes the administration of a government, a state being nothing more than the proliferation of households."[183]

182. Enlightenment thinkers reasoned that monogamous marriage was a vital foundation of the democratic republic – at once a cradle of conscience, a matrix of citizenship, and the first school of love and justice, caring and sharing, public spiritedness and responsibility. Marriage was described as a building block of society.[184] Marriage was seen as the parent, not the child of society, and the source of the city.[185]

183. In the Enlightenment era, the public nature of monogamous marriage was clearly articulated. The rights, duties and obligations arising from marriage were so important that they could not be left to the discretion of the participants, but needed to be regulated by the public law.[186]

184. Since Anglo-Saxon times, the common law has embraced monogamous marriage because of the many private and public goods that it offers. The common lawyers of the eighteenth to twentieth century found attractive the Enlightenment argument that a stable monogamous household was a vital foundation of the democratic republic.[187]

185. Monogamous marriage has been and remains a foundational institution in Canadian society.

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[183] Exhibit 43 at 79-80: Expert report of John Witte, Jr., 19 July 2010.
[184] John Witte, Jr., 10 January 2011, p. 48: 6-19.
[185] Exhibit 43 at 117-18: Expert report of John Witte, Jr., 19 July 2010; John Witte, Jr., 10 January 2011, p. 46.
[186] Exhibit 43 at 117-18: Expert report of John Witte, Jr., 19 July 2010; John Witte, Jr., 10 January 2011, p. 46.
[187] Exhibit 43 at 113-24: Expert report of John Witte, Jr., 19 July 2010.

186. Canadian courts have consistently held that the institution of marriage is central to the organization and stability of Canadian society. In the recent same-sex marriage litigation, Chief Justice McMurtry of the Ontario Court of Appeal, described marriage as a "fundamental societal institution"[188] and a "stabilizing and effective societal institution"[189] that provides numerous goods to the individual participants and to society generally:

> Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world.

187. The Court in *Halpern et al. v. Attorney General of Canada et al.*, [2003] O.J. No. 2268, 65 O.R. (3d) 161 (C.A.) (QL) ("*Halpern")* (recognized many of the same goods that the Greeks ascribed to marriage. Monogamous marriage remains a vehicle for fostering equality and dignity.

188. The courts are not alone in their recognition of marriage as a foundational institution in Canadian society. Recent public surveys, as outlined by the Amicus's expert, Professor Wu, confirm the important role that monogamous marriage continues to play in Canada. Professor Wu expressly acknowledged that, "legal marriage remains the core institution that establishes and structures Canadian families"[190] and marriage "continues to be a valued social institution".[191]

189. Professor Wu agreed that for the majority of Canadians, dyadic marriage remains the predominant form of relationship and that upwards of 85 percent of the Canadian population will enter into a dyadic or monogamous marriage at some point in the lives.[192] In addition to being the predominant form, Professor

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[188] *Halpern et al. v. Attorney General of Canada et al.*, [2003] O.J. No. 2268, 65 O.R. (3d) 161 (C.A.) (QL) **[Halpern]**
[189] *Ibid* at para. 129.
[190] Exhibit 61: Affidavit #1 of Dr. Wu, 4 June 2010 (see exhibit "B" at 6).
[191] *Ibid* at 22.
[192] Dr. Wu cross-examination by Mr. C. Jones, 7 December 2010, pp. 59:31 to 60:5.

Wu testified that marriage is also more stable and enduring than unmarried cohabitation.[193]

190. In summary, the historical evidence in the Reference demonstrates that polygamy is harmful and undermines democratic values, while monogamy tends to foster equality and dignity. Polygamy has a negative structuring effect on society because it institutionalizes inequality between the sexes and reinforces the subordination of women.[194]

191. While no one argues that monogamous marriage is – or has ever been – entirely free of the trappings of inequality and patriarchy, its structure carries the potential for a relationship in which the parties share both the benefits and burdens of family life on an egalitarian basis. Without affirming that monogamous marriage is the guarantee of democracy or equality, history reveals that it constitutes an important component of democratic societies. [195] As Professor Henrich stated in his testimony, “monogamy […] can create fertile conditions for gender equality”.[196]

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[193] *Ibid*, p. 76.
[194] Exhibit 152: Affidavit #1 of Dany Gabay, 22 February 2011 (see exhibit "A" at 74), Quebec *Conseil du statut de la femme*, “Avis-La polygamie au regard du droit des femmes” (2010) [English Translation].
[195] *Ibid* at 81-85.
[196] Dr. Henrich, 9 December 2010, p.37:27-30.

PART III – PURPOSE AND INTERPRETATION OF SECTION 293

A. PURPOSE OF SECTION 293 TO PREVENT HARM

192. The purpose of section 293 is to prevent harms to individuals, particularly women and children, and to society. This purpose is evidenced in the historical and legislative record.

193. The purpose of Canada's prohibition of polygamy cannot be understood in a historical vacuum. Section 293 is a reflection of the longstanding recognition of the harms associated with polygamy in the Western legal and philosophical tradition. In modern times, reading legislation in its historical context is not only permitted but encouraged as useful for uncovering legislative intent.[197]

194. As set out above, polygamy has been prohibited in the Western world since ancient Greece because of the harms associated with it. The harms of polygamous marriages included the commodification of women and children, the physical, mental and emotional abuse of women and children including sexual abuse, the impoverishment of women and children, the ostracism of young men and boys, the undermining of the democratic citizen capacities, and the betrayal of the fundamental ideals of mutuality and egalitarianism attached to the institution of monogamous marriage.

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[197] *Smith v. Alliance Pipeline Ltd.* 2011 SCC 7 at para. 49. See also: BC's Written Submissions, Appendix – Use of Extrinsic Evidence of History.

195. The legislative record and historical context of the enactment of the original polygamy provision demonstrate that the provision was directed at the harms that had been identified consistently by Western law-makers and philosophers. The practice of polygamy, regardless of the context in which it occurred, was understood as oppressive and harmful to women and girls and to society in general.

196. BC has reviewed the legislative record and historical context of the enactment of the original polygamy provision and Canada adopts BC's submissions.[198]

197. BC's review demonstrates that in both Canada and the United States that there was widespread recognition that polygamy was oppressive and harmful to women and girls. Prior to the enactment of Canada's polygamy provision, the harms of polygamous marriage were recognized and articulated in American jurisprudence. For example, in *Reynolds*, the Supreme Court of the United States provided a comprehensive overview of the harms of polygamy. The Court viewed polygamy as incompatible with democratic government. The Court describes polygamy as "odious" because it undermines the principles upon which democracy rests and "fetters the people in stationary despotism."[199]

198. Furthermore, section 293 did not emanate from religious prejudice. As BC notes in its submissions, the text of the original provision expressly prohibited the practice of polygamy "whether religious or secular".[200]

199. With respect particularly to Mormons, it was the practice of polygamy, not the religious beliefs of the early Mormon settlers, which concerned Canadian lawmakers.[201] Sir John A. Macdonald, in his discussions with early Mormon

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[198] See, in particular BC's closing submissions at Section III: The Purpose of Section 293; Subsection A: Historical Evidence of the Purpose of Section 293.
[199] *Reynolds, supra* note 173.
[200] See BC's closing submissions at Section IV: The Interpretation of Section 293, Subsection A: Applying the Rules of Statutory Interpretation.
[201] *Debates of the House of Commons of the Dominium of Canada* (7 February 1890) at 342; *Debates of the House of Commons of the Dominium of Canada* (10 April, 1890) at 3174;

leaders, welcomed Mormon settlement in the Northwest Territories as long as the laws of Canada, including the prohibition on polygamy, were followed:

> You must understand that there must be no mistake about it; there will be no leniency, there will be no overlooking this practice, but as regards your general belief, that is a matter between yourselves and your conscience. We are glad to have you in this country so long as you obey the laws, we are glad to have respectable people. Her Majesty has a good many British subjects who are Mohammedans, and if they came here we would be obliged to receive them; but whether they are Mohammedans or Mormons, when they come here they must obey the laws of Canada.[202]

200. The Minister of Justice at the time, John Abbott, speaking in the Senate, confirmed that the polygamy provision was not targeting the Mormons or any other religious group:

> Of course, the Bill is not directed against any particular religion or sect or Mormon more than anyone else; it is directed against polygamists. In so far as Mormons are polygamists it attaches to them.[203]

201. As discussed further below and in BC's submissions, the polygamy provision was drafted and enacted to ensure that all forms of multiple marriages were prohibited. There was some concern at the time as to whether the prohibition of bigamy, which Canada had inherited from the United Kingdom was sufficient to prohibit all forms of multiple marriages, particularly the religious and cultural polygamy practiced by some Mormons, Aboriginals and Muslims.

Committee of the Whole, *Debates of the House of Commons of the Dominium of Canada* (10 April 1890) at 3180. Exhibit 157, Tab 2B: Section 293 Legislative History Brief, *House of Commons Debates*, No. 53, Vol. XXIX (7 February 1890) at 342; Exhibit 157, - 2B: Section 293 Legislative History Brief, *House of Commons Debates*, No. 53, Vol. XXX (10 April 1890) at 3174 and 3180.

[202] Exhibit 157, 2B: Section 293 Legislative History Brief, *House of Commons Debates*, No. 53, Vol. XXX (April 10, 1890) at 3180.

[203] Exhibit 157, Tab 2C: Section 293 Legislative History Brief, *Debates of the Senate* (25 April 1890) at 583-586.

B. SECTION 293 PROHIBITS MULTIPLE MARRIAGES

202. The modern approach to statutory interpretation requires 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.

203. Properly interpreted, section 293 prohibits practicing or entering into multiple marriages, whether they are sanctioned by civil, religious or other means.

1. Polygamy is an Offence Linked to Marriage

204. Polygamy has always been linked to marriage. The Oxford English Dictionary ("OED") defines polygamy as involving multiple marriages:

> The practice or custom of having more than one spouse at the same time. Contrasted with *monogamy*. Chiefly applied to the practice or custom (more explicitly called *polygyny*) in which a man has several wives at once, but also including *polyandry*, in which a woman has several husbands.[204]

205. The etymology of "polygamy", as outlined in the OED, further demonstrates that the term has always meant multiple marriages: "post-classical Latin *polygamia* frequent marriage (early 5th cent. in Jerome); […]Hellenistic Greek *πολυγαμία* frequent marriage, polygamy < *πολύγαμος* often married; […] French *polygamie*, †*poligamie*(1558 in sense 'fact of having more than one wife at a time'. [205]

206. The criminal prohibition of polygamy was first introduced in Parliament in 1890 in a bill to amend "*An Act Respecting Offences Relating to the Law of*

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[204] *The Oxford English Dictionary,* 2d ed. *sub verbo* "polygamy".
[205] *Ibid.*

Marriage". Section 293, the current prohibition of polygamy, remains in the *Criminal Code* in a section titled "Offences Against Conjugal Rights". All of the offences found in this section of the *Criminal Code*, which include polygamy and bigamy, are related to marriage.

207. The jurisprudence further confirms that the polygamy offence is related to marriage. In one of the earliest cases, *The Queen v. Labrie*, (1891) 7 M.L.R. (Q.B.) 211 ("*Labrie*"), the Quebec Court of Queen's Bench held that the polygamy offence did not extend to the "mere cohabitation" of two persons, each of whom was married to another person.[206] Rather, the Court agreed with defense counsel's argument that the offence could only apply if these two persons had gone through "a marriage of some sort – a 'conjugal union.'"[207]

208. Nearly 50 years later, in *Rex v. Tolhurst, Rex v. Wright* (1937) 3 D.L.R. 808 ("*Tolhurst"*), the Ontario Court of Appeal also determined that the polygamy offence did not extend to two individuals who were merely living together while still married to other individuals. The Chief Justice held that the words "any kind of conjugal union" "predicate some form of union under the guise of marriage."[208]

209. In each of the above cases, the courts noted that the legislative record confirmed that the polygamy offence was aimed solely at multiple marriages. Parliament, according to the courts, "had no intention in this section of the Code of dealing with the question of adultery."[209] Rather, from the outset, the polygamy offence was found in "An Act Respecting Offences Relating to the Law of Marriage."[210] The courts understood that the polygamy offence was intended to capture Mormon spiritual marriage and other forms of marriage that were not civilly sanctioned.[211]

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[206] *The Queen v. Labrie,* (1891) 7 M.L.R. (Q.B.) 211 **[Labrie]**.
[207] *Ibid*.
[208] *Rex. v. Tolhurst, Rex v. Wright* (1937), 3 D.L.R. 808 (Ont. C.A.) at 808-809 **[Tolhurst]**.
[209] *Ibid*.
[210] *Ibid*.
[211] *Ibid*.

210. Most recently, Justice Rothstein, in the context of an immigration proceeding, *Ali v. Canada (Minister of Citizenship and Immigration)* [1998] 154 F.T.R. 285, confirmed that the practice of polygamy is the practice of having more than one spouse at the same time: "[p]olygamy does not depend upon where the spouses reside or whether there is cohabitation in both marriages at the same location […] On its face, the practice of polygamy is having more than one spouse at the same time."[212] Implicit in Justice Rothstein's understanding of polygamy is that, by its very definition, the practice of polygamy involves marriage.

2. The Section Prohibits Multiple Marriages

211. Section 293 prohibits multiple marriages, whether sanctioned by civil, religious, customary or other means:

> Polygamy
>
> (1) Every one who
>
> (a) practises or enters into or in any manner agrees or consents to practise or enter into
>
> (i) any form of polygamy, or
>
> (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or
>
> (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
>
> 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

[212] *Ali v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1640 at paras. 12-13; 154 F.T.R. 285 (QL).

persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

212. Section 293(1)(a) prohibits two categories of conduct:

(a) Section 293(1)(a)(i) prohibits practicing or entering into any form of polygamy (the "any form of polygamy" offence); and

(b) Section 293(1)(a)(ii) prohibits practicing or entering into any kind of conjugal union with more than one person at the same time (the "conjugal union" offence).

213. The "any form of polygamy" offence and the "conjugal union" offence are distinct but complementary offences. The "any form of polygamy" offence and the conjugal union offence are separated by the word "or". In the ordinary and grammatical sense, this means that they are separate offences.

214. The history of the polygamy provision also indicates that the "any form of polygamy" offence and the "conjugal union" offence are distinct. When *An Act Respecting Offences Relating To The Law Of Marriage* was consolidated into the *Criminal Code* in 1892, the polygamy provision prohibited any form of polygamy, any kind of conjugal union with more than one person at the same time, Mormon spiritual or plural marriage and cohabitation in a conjugal union.

215. In the 1950s, a Royal Commission was tasked with clarifying and simplifying the *Criminal Code* to, among other things, eliminate redundancies by omitting and combining provisions. On the recommendation of the Commission, Parliament amended the polygamy provision to refer only to "forms of polygamy" and multiple "conjugal unions". There is no evidence that the amendments were intended to be substantive. To the contrary, the available evidence indicates that the provision was redrawn to simplify.[213] Since the amendments were not

[213] Exhibit 157, Tab 7(H): Section 293 Legislative History Brief, "Minutes of Evidence" in *The Senate of Canada: Proceedings of the Standing Committee on Banking and Commerce To whom was referred the Bill (H-8);* Exhibit 157, Tab 7(I): Section 293 Legislative History Brief, "Re Criminal Code – General Remarks", *Brief on the 1952 Bill.*

substantive, Mormon spiritual or plural marriage must have remained prohibited and been subsumed into the “conjugal union” offence. If it had been subsumed into the “any form of polygamy” offence, the “conjugal union” offence would have been rendered redundant.

(a) The Section Prohibits “Any Form of Polygamy”

216. Section 293(1)(a)(i) prohibits practicing or entering into multiple marriages at the same time that are legally valid under the law where they were celebrated. Given that it is not possible to marry multiple people legally in Canada, this part of the polygamy offence should be interpreted as referring to people who are not Canadian residents who marry their spouses in a foreign country in accordance with the laws of that place and then come to Canada. Upon their arrival in Canada, they are “practicing polygamy” within the meaning of section 293(1)(a)(i).

(b) The Section Prohibits Multiple “Conjugal Unions”

217. Section 293(1)(a)(ii) prohibits practicing or entering into multiple “conjugal unions”. There are two important aspects to this offence: first, the conjugal union offence, like all of the offences in this section of the *Criminal Code*, is aimed at marriage, not mere cohabitation; and, second, the conjugal union offence captures all non-legally valid multiple marriages, including Mormon celestial marriage.

218. The phrase “conjugal union” is broad enough to capture marriages sanctioned by religious or other means. However, it is narrow enough to exclude individuals who lived together without entering into a marriage.

219. The “conjugal union” offence can be seen as an anti-circumvention provision. The “conjugal union” branch of section 293(1) was enacted, in part, to

prevent individuals from escaping criminal liability by having their multiple marriages sanctioned only by religious or other means.

220. The language of the provision supports an interpretation of the "conjugal union" offence grounded in the concept of marriage. At the time of the enactment of the offence, the phrase "conjugal union" was commonly defined as "[o]f or pertaining to marriage or to husband and wife in their relation to each other, matrimonial."[214]

221. As noted above, the courts have similarly interpreted the "conjugal union" offence as an offence relating to marriage and requiring more than mere cohabitation. [215] For instance, the Ontario Court of Appeal in *Tolhurst* held that a long term adulterous relationship is not a conjugal union. Rather, according to the Court, "any kind of conjugal union" meant any kind of marriage: "these words predicate some form of union under the guise of marriage, and Parliament had no intention in this section of the Code of dealing with the question of adultery."[216]

222. As an offence related to marriage, the "conjugal union" offence implicitly includes two important elements - first, a conjugal union, like a marriage, comes into being through a marriage ceremony or other sanctioning event; and second, the participants in the conjugal union, like the participants in a marriage, are tied or bound together in a marital structure or institution.

223. It is important to recognize both elements. Although some form of sanctioning event is necessary to create a conjugal union, the harms associated with polygamy do not result from the sanctioning event alone. As a foundational social structure, the institution of marriage wields extraordinary power to organize

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[214] *The Oxford English Dictionary,* 2d ed. *sub verbo* "conjugal union". The OED lists numerous examples of how 'conjugal' has been used historically. All of these examples indicate that 'conjugal union' was used synonymously with 'marriage'. See in particular, the example cited from 1626: "1626 L. Andrewes *Serm.* (1631) I. 9 Whereby He and we become 'one flesh' as man and wife do by conjugal union."
[215] *Labrie, supra* note 206; *Tolhurst, supra* note 208.
[216] *Tolhurst, supra* note 208 at 808-809.

relationships between individuals and between individuals and the state. Marriage creates a solemn tie between individuals that engenders a whole host of rights and responsibilities.[217]

224. The Amicus's family law expert, Susan Drummond, confirms that historically "conjugal unions were not formed on the basis of cohabitation alone."[218] Drummond further comments that, "[c]ohabitation alone, without some form of intentional act that binds the parties contractually, does not meet the criteria of conjugal union set out in the polygamy section."[219]

225. In interpreting the conjugal union provision, the courts have thus recognized that it is important to understand the distinctions between the term "conjugal union" and other forms of long-term relationships.[220] A "conjugal union" is a long-standing legal concept, used to describe a marriage, whether valid under civil law, valid only in religious law or existing only in the view of the parties and the communities to which they belong.

226. "Conjugal union" is legally distinct from "conjugal relationship" which is a term that has recently acquired a legal meaning that did not exist at the time of the introduction of the polygamy offence.[221] "Conjugal relationship" is now most commonly applied to describe a "common law relationship", or an unmarried cohabitation-based relationship.

227. One of the key differences between a "conjugal union" and a "conjugal relationship" is that a "conjugal union", like any marriage, is created in a moment by a marriage ceremony or other sanctioning event. In a conjugal union, again

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[217] Professer Henrich testified that, from an anthropological perspective "marriage is an institution because it is a set of different rules that regulate the pair bond" and "[marriage] regulates all kinds of things besides sex, it regulates economic behaviour, social behaviour and may or may not be sanctioned by formal law […] It's typically marked by some kind of public ritual but not always.", Dr. Henrich, 9 December 2010, pp. 2:43-45, 28.
[218] Exhibit 65 at para. 57: Affidavit #1 of Susan Drummond, October 14, 2010, analysing *Labrie, supra* note 206,.
[219] Exhibit 65 at para. 60: Affidavit #1 of Susan Drummond, October 14, 2010, analysing *Tolhurst, supra* note 208..
[220] *Labrie, supra* note 206; *Tolhurst, supra* note 208.
[221] *M. v. H,* [1999] 2 S.C.R. 3 at paras. 59-62 **[*M v. H*]**.

like in any marriage, the couple are bound together from the moment of the ceremony and it is at that moment that both parties enter the institution of marriage.[222]

228. In contrast, a "conjugal relationship" develops only over time and there is no specific moment of its creation, such as a marriage ceremony. In law, a "conjugal relationship", unlike a marital relationship, must be proven by evidence of living together, most often for a period of a year or more, in a common, shared life that meets the elements of "conjugal" set out in *Molodowich* v. *Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), as cited in *M.* v. *H.*, [1999] 2 S.C.R. 3. Also, a "conjugal relationship" may be dissolved unilaterally by the actions of one party and without a formalized divorce process.

229. Similarly, sexual activity with multiple partners does not result in multiple "conjugal unions".

(c) The Provision Prohibits Assisting in the Sanctioning of Multiple Marriages

230. Section 293(1)(b) criminalizes celebrating, assisting or being a party to a rite or ceremony that purports to sanction any form of polygamy or a conjugal union with more than one person.

231. The wording of this branch of section 293 provides further evidence that the polygamy prohibition is focused exclusively on multiple marriages, rather than cohabitation or other forms of non-formalized relationships. Numerous terms are used in section 293(1)(b) that are associated with and have a distinct meaning within the context of marriage such as: "rite", "ceremony", and "sanction". These terms of art each reference the process of being bound or tied to another individual through the institution of marriage.

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[222] Professor Wu, 7 December 2010, pp. 77-78; See also *Cohabitation: The Law in Canada*, Barbro E. Stalbecker-Pountney and Winnifred H. Holland, Carswell, vol.1, p. 1-5 and following.

232. Based on the historical and legislative context, section 293(1)(b) must be understood as furthering Parliament's intention of discouraging the practice of multiple marriages. While there has been no judicial treatment section 293(1)(b), it appears to be directed at leaders and communities who facilitate the performance of multiple marriages.

(d) The Provision Does Not Require Proof of the Method

233. Subsection 293(2) provides that no averment or proof of the method by which the multiple marriage is entered into is necessary to obtain a conviction. Additionally, this subsection provides that no averment or proof is necessary to demonstrate that the individuals who enter into the multiple marriage had or intended to have sexual intercourse.

234. Put simply, subsection 293(2) makes clear that the particulars of the sanctioning event are not essential elements of the offence. The prosecutor must show only that a sanctioning event occurred. For example, the prosecutor would only have to prove that the individuals were married, but not the words they spoke or the type of ceremony that was performed, or the place where it occurred.

3. The Polygamy and Bigamy Offences are Complementary

235. Polygamy and bigamy are both related to marriage in the *Criminal Code* and together they prohibit all forms of multiple marriages. However, the polygamy and bigamy provisions capture different ways in which the multiple marriages may occur.

236. Bigamy was first made a crime in the UK in 1604.[223] In 1828, the *Offences Against the Persons Act (UK)*[224] maintained the criminal prohibition on bigamy,

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[223] *An Act to restraine all Persons from Marriage until their former Wives and former Husbands be dead,* 1604 (UK), 1 J.A.C. 1 C. 11.
[224] *Offences Against the Persons Act (UK),* 1928 (U.K.), 9. Geo. IV, c. 31 s. 22.

which was further amended by the *Offenses Against the Persons Act (UK)* 1861[225]. This statute remains in force in the UK.

237. The 1604 prohibition applied in the British North American colonies by virtue of the rules of reception, adoption, conquest and by statute.

238. Post-confederation, the UK enacted *Offences Against the Persons Act (Canada)*[226] which essentially consolidated the relevant laws which applied in the four founding provinces. This 1869 Act contained the already existing bigamy offence but modified its penalty once again, providing for a two-year minimum sentence, and adding the extra-territorial element of "leaving with the intent to commit the offence".

239. Canada enacted its own federal offence against bigamy in 1886 in *An Act respecting Offences relating to the Law of Marriage*, at the same time removing the minimum penalty and the possible penalty of hard labour. This bigamy offence was further amended in 1890 in the same bill that introduced the first polygamy offence in Canada. [227] The 1890 amendments to bigamy included adding the specific act of marrying two people simultaneously as a way to commit bigamy. The offence of bigamy, along with the polygamy offence, were shortly thereafter incorporated into Canada's first *Criminal Code* in 1892. [228]

240. The current bigamy offence reads in section 290 of the *Criminal Code* as follows:

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

[225] *Offenses Against the Persons Act (UK),* 1861 (U.K.) 24 & 25 Vic., c. 100 s. 57.
[226] *An Act respecting Offences Against the Person,* 32 & 33 Vic., c. 20, s. 58.
[227] Exhibit 157, Tab 2A: Section 293 Legislative History Brief, *An Act to further Amend the Criminal Law*, S.C. 1890, c. 37, ss. 10-11.
[228] *An Act respecting Offences relating to the Law of Marriage*, R.S.C. 1887, c. 161, s. 4.

> (ii) knowing that another person is married, goes through a form of marriage with that person, or
>
> (iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or
>
> (b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (a)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

241. The term “form of marriage” is explained in section 214 of the *Criminal Code* as follows:

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

242. The bigamy provision is focuses on attempts to enter into multiple marriages by way of the civil marriage process. In a bigamous marriage situation, each of the marriages satisfies the civil marriage requirements with regard to form but only the first marriage is legally valid. The subsequent marriages would be valid but for the fact that they do not meet the legal capacity or substantial requirements because of the prior existing marriage.

243. The use of the phrase “form of marriage” in the bigamy provision confirms that the provisions focuses on multiple marriages which satisfy the civil marriage requirements. “Form of marriage” is a marriage ceremony that is either recognized as valid by the law of the place it was celebrated or recognized as valid by the law of the place where the accused is tried. The courts have

established that there must be a ceremony recognized by law as resulting in a legally valid marriage.[229]

244. In Canada, the commission of bigamy inevitably involves perpetuating a fraud against the state in that the state's marriage requirements are employed for a marriage that is a nullity. It often involves a deception against one of the individuals involved but this is not an essential element of the offence and need not be the case for bigamy to be committed. The form of the marriage is always conducted by a registered officiant and usually includes registration of the marriage, either in fact or as part of the expectation of the officiant and possibly others. The bigamy offence thus involves an individual(s) who misleads the officiant with respect to their existing marital status. The bigamy offence helps protect the state from having invalid marriages registered and counted for official purposes and relied on for multiple purposes like obtaining survivor benefits.

245. If individuals enter into multiple marriages but do not attempt to do so through the use of the civil marriage process, they will not be captured by the bigamy offence. Multiple religious marriages, such as Mormon celestial marriages, do not comply with the proper civil marriage requirements and are often kept secret from the state, although they are almost always known to the community to which the couple belong.[230]

246. As BC notes in its written submissions, the potentially narrow ambit of the bigamy provision was of concern to the legislators of the polygamy offence in 1890.[231] While, at that time, Canada had in place the bigamy prohibition that was inherited from the English, there was concern that polygamy, especially as practised by the Mormons, would not be captured by the bigamy offence because the marriages entered into were not legally valid marriages from the state's perspective. The Minister of Justice at the time, Sir John Thompson, introduced the polygamy legislation in 1890 in part to "make more effectual

[229] *R. v. Howard*, [1966] 3 C.C.C. 91 (B.C. Co. Ct.).
[230] *Hyde* v. *Hyde and Woodmansee*, [L.R.] 1 P. & D. 130.
[231] See, in particular, BC's closing submissions at Section II: The Historical and Social Context; Subsection C: The Uncertain Legal Status of Polygamy in 1890.

provision for the suppression of polygamy"[232] and to remove any doubt as to whether the bigamy laws applied to polygamy, especially Mormon spiritual marriage.[233]

247. The codification of bigamy and polygamy left no doubt that all forms of multiple marriages were illegal in Canada. One could not circumvent the prohibition against multiple marriages by engaging in multiple marriages under Muslim, Mormon, or other religious traditions and avoiding the state's requirements. Even if the bigamy provision did not capture these types of multiple non-legally valid marriages, the conjugal union offence – which does not require that civil requirements also be met - would do so.

248. The bigamy and polygamy provisions are complementary and they both target multiple marriages. The bigamy provision targets only multiple marriages entered into through the civil process. The polygamy prohibition targets marriages entered into in compliance with legal requirements in countries that permit polygamy where the participants subsequently come to Canada, and marriages where the parties have circumvented the civil marriage requirements. These bigamy and polygamy provisions work harmoniously together to ensure that all forms of multiple marriages are prohibited in Canada and that there are no "loopholes" which would permit individuals to circumvent Parliament's intention.

4. The Section Prohibits All Forms of Multiple Marriages

249. Section 293 prohibits "any form of polygamy". The term "polygamy" can include both "polygyny", which is the practice of one man being married to several women, and "polyandry", which is the practice of one woman being

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[232] Exhibit 157, Tab 2B: Section 293 Legislative History Brief, *House of Commons Debates*, No. 53, Vol. XXIX (7 February 1890) at 342.
[233] See, in particular, BC's closing submissions at Section II: The Historical and Social Context; Subsection C: The Uncertain Legal Status of Polygamy in 1890.

married to several men.[234] The open-ended language of "any form" suggests that the legislators meant to capture all types of multiple marriages, including polyandrous marriages.

250. That the provision captures polyandry is further supported by the language of the conjugal union offence which prohibits "any kind of conjugal union with more than one person". The gender neutral language of this provision lends support to the argument that the offence was meant to apply to any polygamous union, whether headed by a woman or a man. As well, it is clear that the bigamy offence applies regardless of whether a man or woman marries more than once.

251. Around the world, both historically and at present, polygamy almost always manifests itself as polygyny. Many of the expert witnesses in the Reference testified that, by far, the international research into the effects of polygamy has been focused on polygyny because it is the predominant form of polygamy.[235] For this reason, virtually all of the witnesses, including Canada's experts, used polygamy to mean polygyny.

252. While the concept of polyandry was known before the 1890s, then, as now, it was an extremely rare phenomenon with scant research devoted to it.[236] There were criminal prosecutions for polyandry in England in the 1700s and the historical record indicates that the practice of polyandry was occurring in some of the British colonies.[237] The legislative record with respect to the polygamy

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[234] The Oxford English Dictionary defines polygamy as involving multiple marriages: The practice or custom of having more than one spouse at the same time. Contrasted with *monogamy*. Chiefly applied to the practice or custom (more explicitly called *polygyny*) in which a man has several wives at once, but also including *polyandry*, in which a woman has several husbands.

[235] See, for example, the testimony of Professor Henrich in which he stated that polyandry is extremely rare around the world. According to the Ethnographic Atlas, which compiles data on 1231 different societies, only three percent have polyandry. Dr. Henrich, 9 December 2010, p. 29:30-38.

[236] On behalf of the Amicus, Professor Turley asserted that polyandry "has been long practiced and is particularly present among Canada's diverse families." He also asserted that polyandrous families had been given legal protection in Saskatchewan, Exhibit 74, Expert Report of Professor Turley, 21October 2010. Unfortunately, Professor Turley neglected to cite any authority for the former proposition and the single authority he provided for the latter (*Winik v. Wilson Estate)* neither involved polyandry nor extended any legal protections to polyandrous families.

[237] Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008), pp. 175-176. See also:

prohibition does not expressly refer to polyandrous marriages and it is obvious that the concern in the late nineteenth century was with the proliferation of polygynous marriages in Canada.

253. When the Parliament first considered the polygamy prohibition, the conjugal union offence expressly referred to “any kind of conjugal union with more than one person of the opposite sex at the same time”. However, during the legislative debates, the words “opposite sex” were described as “a surplusage that might well be left out”. In the version of the conjugal union offence that was subsequently enacted, the words “opposite sex” were omitted and the offence prohibited “any kind of conjugal union with more than one person at the same time”. The original wording and the reason for the change both evince an intention to capture polygyny and polyandry.

254. It is reasonable to assume that many of the same harms that are associated with polygyny in the evidence in the Reference will also manifest in polyandrous marriages.[238] For instance, as noted in BC’s written submissions, 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. Dr. Shackelford, for instance, 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 unions can be expected to carry a greater risk of spousal

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In 1736, a woman was charged having two husbands. The Crown maintained that the criminal statute captured both a man with two wives and a woman with two husbands and that both men and women had been indicted under the statute. The accused was acquitted of having two husbands because there was insufficient evidence to prove the marriages. The Court declined to say whether polyandry was captured by the statute. (Proceedings of the Old Bailey, London’s Central Criminal Court, The Case of Mary Sommers, December 8, 1736, Reference Number T17361208-82).

[238] Professor Witte notes that polyandry had been considered in the Western tradition as early as Plato. In the thirteenth century, Thomas Aquinas addressed the harms of polyandry as undermining paternal certainty and consequent paternal investment in their children’s care. Aquinas believed that the children of polyandrous relationships would suffer from neglect and that the wife would be overburdened trying to care for them and tend to her multiple husbands at once. Exhibit 43 at paras. 159-160: Expert report of John Witte, Jr., 19 July 2010.

violence and violence against children in the home than either monogamous or polygynous ones.[239]

255. Further, even though the prohibition on polygamy is most solidly founded on harm reduction, it can only achieve this purpose through the enforcement of a definable standard. The public has an interest in coherent and universal legal rules, restricting individuals from engaging in all types of multiple marriages, including polygamous, polyandrous, and same-sex multiple marriages.

256. Permitting some members of society to engage in an activity that is, for others, prohibited, may serve to weaken the moral standards that are addressed by the law. Such an interpretation might also give rise to discrimination on the basis of gender, by permitting conduct to women and denying it to men, or religion since most religions that permit polygamy permit only polygyny.

[239] Dr. Shackelford, 15 December 2010, pp. 41-43.

PART IV – *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

257. Canada generally adopts BC's submissions in respect of the consistency of section 293 of the *Criminal Code* with the *Charter*. The following submissions are intended to complement those of BC by focusing on the broad historical and international perspectives that are highlighted in the evidence of Professors Witte, Cook and McDermott. These perspectives support the conclusion that the criminal prohibition on the practice of polygamy is constitutional.

A. INTERNATIONAL HUMAN RIGHTS LAW RELEVANT TO *CHARTER* INTERPRETATION AND ANALYSIS

258. A proper consideration of international human rights law, both in terms of Canada's international treaty obligations and in terms of international trends, makes it clear that the prohibition on the practice of polygamy in section 293 is consistent with the *Charter*. International human rights law has consistently established that polygamy is profoundly harmful to women, children and society such that its criminalization is an appropriate measure for a state to pursue in order to abolish polygamy wherever it might be practiced. Moreover, international human rights law confirms that the right to freedom of religion cannot be used as a legal justification to engage in this harmful practice.

259. Since the enactment of the *Charter* in 1982, international human rights law has been used by the courts to assist with defining the content of the rights included in the *Charter* as well as the justifiability of limits to those rights under section 1.

260. An oft-cited judicial statement on the role of international law in the interpretation and application of the *Charter* can be found in the dissenting reasons of Justice Dickson (as he then was) in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313. Dickson J. wrote that, "[t]he various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals,

customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions [emphasis added]." [240]

261. International human rights law is a relevant and persuasive source in the interpretation of the *Charter*'s provisions because, as a matter of historical context, the *Charter* itself is part of a broader and ongoing effort that has been undertaken by the nations of the world since the close of the Second World War. Namely, the nations of the world have sought to develop and adhere to standards and principles that are necessary to ensure freedom, dignity and social justice for individual citizens. This international effort has taken the form of a "body of treaties (or conventions) and customary norms" that must be taken into account by the courts as they construe the meaning of the provisions in the *Charter* itself.[241]

262. The idea that international human rights law represents a body of law with particular importance and credibility insofar as the interpretation of the *Charter*'s provisions is concerned has been accepted and reiterated by the Supreme Court of Canada (among other appellate courts) on numerous subsequent occasions.[242]

1. The Courts Have Looked to a Variety of International Human Rights Law Sources

263. Dickson, C.J.'s reference in *Reference Re Public Service Employee Relations Act (Alta.)*, to the relevance of "[t]he various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial

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[240] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at para. 57 **[Re Public Service Employee Relations Act]**.

[241] *Ibid* at para. 57. See also *R. v. Hape*, [2007] 2 S.C.R. 292 ***[Hape]***; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at para. 57.

[242] See, for example, *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 ***[Slaight]*** at para. 23, *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 750 and 790-91; *R. v. Zundel*, [1992] 2 S.C.R. 731 at para. 160; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-70 ***[Baker]***; *U.S.A. v. Burns*, [2001] 1 S.C.R. 283 at para. 88 ***[Burns]***; *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paras. 175-180 ***[Sharpe]***; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 46 ***[Suresh]***; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 at para. 69 ***[Health Services Barganing Assn.]***; *Hape*; *Victoria (City) v. Adams*, 2009 BCCA 563 at para. 35.

decisions of international tribunals, [and] customary norms" presaged a judicial approach whereby the courts would look to a broad array of international sources in *Charter* interpretation and analysis.[243]

264. This broad array of sources has included norms by which Canada is legally bound as well as norms and principles not legally binding on Canada: international customary law treaties and conventions that Canada has ratified, treaties that Canada has not ratified, treaties to which Canada is not a party (or to which Canada could not possibly become a party),[244] interpretive guidelines issued by international treaty bodies, and international trends in the practices of other democratic states to which Canada generally would invite comparison.

(a) Courts Have Relied on Ratified International Instruments

265. In using international human rights law as a persuasive source for the interpretation of the *Charter*, the courts have often looked to international instruments (such as treaties, conventions and covenants) that Canada has ratified. Common examples of such instruments include the *Women's Convention*, the *Political Rights Convention* and the *Children's Convention*. In so doing, the courts have not required that the text of those instruments be directly incorporated into domestic law by Parliament.

266. For example, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada considered the *Children's Convention* in litigation concerning the validity of a "humanitarian and compassionate decision" made in the immigration context. While Canada had ratified the convention, the text had not been incorporated into Canadian law by

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[243] *Re Public Service Employee Relations Act, supra* note 240 at para. 57.

[244] There have been several cases in which the SCC has looked to international sources to which Canada was not (and indeed could not be) bound. For example, in *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, Bastarache J. (writing in dissent) cited a provision in the *African Charter on Human and Peoples' Rights* (a regional pact to which Canada could not be a party) in interpreting the content of the right to freedom of association under s. 2(d) of the *Charter*. In that same case, Justice Lebel, writing for the majority, relied on the *European Convention on Human Rights*, which is another regional human rights instrument from which Canada is necessarily excluded, in coming to the opposite conclusion.

Parliament. Writing for the majority of the Court at para. 69, L'Heureux Dubé J. explained that the Convention remained an important consideration in the Court's analysis:

> …the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.
>
> Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:
>
> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.
>
> The important role of international human rights law as an aid in interpreting domestic law…is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, [1990] 3 S.C.R. 697 [emphasis added].

(b) The Courts Have Relied Upon the Interpretive Guidelines Issued by International Treaty Bodies

267. The kinds of international sources cited by the courts in construing the meaning of the *Charter*'s provisions are so varied that they cannot be conveniently listed. As noted above, these sources certainly include the obvious candidates such as the texts of various international instruments and the decisions of international adjudicative bodies. However, an important source of guidance that bears specific mention has been the interpretive documents – such as "Concluding Observations" and "General Comments" – that have been issued by international treaty bodies.

268. As noted above in respect of the evidence of Professor Cook, Concluding Observations are issued by international bodies such as the U.N. Human Rights Committee in order to assess reports issued by states that are parties to

instruments such as the *Political Rights Convention* or the *Children's Convention*. Through these observations, the committees assess the extent to which particular state practices comply with specific provisions in the international instruments that states are obligated to implement.

269. As an illustration of how Concluding Observations have been employed by the courts, the Human Rights Committee's Concluding Observations on Canada were relied upon by the Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 in support of the proposition that section 2(d) of the *Charter* includes a procedural right to collective bargaining.[245] Similarly, in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, the Concluding Observations of the U.N. Committee on the Rights of the Child were cited in dissent in an effort to show that corporal punishment of children does not accord with the principles of fundamental justice under section 7 of the *Charter*.[246]

270. Similar to Concluding Observations, General Comments are issued by international bodies in order provide general interpretive guidelines on the meaning and construction of specific provisions in international instruments.[247] While these General Comments are not strictly binding on state parties, along with Concluding Observations they are often regarded as persuasive sources of interpretation, given that they are adopted by consensus among Committee members who come from a wide variety of cultures, ideologies, religions, traditions and legal systems.[248]

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[245] *Health Services Bargaining Assn., supra* note 242 at para. 74.
[246] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 **[Canadian Foundation for Children]**.
[247] William Schabas & Stephane Beaulac*, International Human Rights and Canadian Law*, 3d ed. (Toronto: Carswell, 2007) at 174-77.
[248] *Ibid* at 176.

271. As an example of the role played by General Comments in *Charter* litigation, in *Sauvé v.* Canada *(Chief Electoral Officer)*, [2002] 3 S.C.R. 519, the Supreme Court of Canada relied upon a General Comment of the U.N. Human Rights Committee in respect of Article 25 of the *Political Rights Convention*, which pertains to the right to vote.[249] The Court cited this General Comment in attempting to construe the meaning of s. 3 of the *Charter* and the extent to which it protects the right of prisoners to vote in federal elections.

(c) The Courts Have Relied on International Customary Law

272. In addition to the texts of international instruments and interpretive observations and comments issued by international bodies (i.e. *conventional* international law), the courts have also looked to *customary* international law in order to interpret and apply the *Charter*. As noted above, customary international law consists of rules of law derived from the consistent conduct of states acting out of the belief that the law requires them to act that way.[250] Customary international law can be discerned by a widespread repetition by states of similar acts over time (i.e. state practice) where such acts occur out of a sense of obligation ("*opinio juris*").[251]

273. An example of a case in which the Supreme Court of Canada looked to customary international law in interpreting the *Charter* is *R. v. Hape*, [2007] 2 S.C.R. 292 ("*Hape").*[252] *Hape* concerned the question of whether the *Charter* applies to the actions of Canadian law enforcement officials that gather evidence outside of Canada for criminal prosecution in Canada. Section 32(1) of the *Charter* sets out the organs of government to which the *Charter* applies, but does not specify whether it continues to bind them when they leave Canadian soil.

274. McLachlin C.J., writing for the majority of the Court in *Hape,* considered the rules of customary international law to be "important interpretive aids for

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[249] *Sauvé v.* Canada *(Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at para. 133.
[250] S. Rosenne, *Practice and Methods of International Law* (New York: Oceana, 1984) at 55.
[251] *Hape, supra* note 241 at para. 46.
[252] *Hape, supra* note 241.

determining the jurisdictional scope of s. 32(1) of the *Charter*."[253] The Court went on to rely on the customary international law rule of respect for the sovereignty of other states in formulating a test for the application of s. 32(1) to particular cases involving extraterritoriality.[254]

(d) The Courts Have Relied Upon International Trends

275. In addition to looking to the texts and interpretations of conventional and customary international law, the courts in *Charter* cases have looked to trends in the practices of the nations of the world that do not rise to the level of international custom (particularly in respect of the *opinio juris* requirement). Pursuant to this approach, the courts have paid particular attention to the existence of trends among democracies with political and legal systems similar to that of Canada.

276. The courts have most commonly looked to trends among comparable democracies in applying section 1 of the *Charter* since what is reasonable in other "free and democratic" societies is more likely to be considered reasonable under the *Charter*.

277. For example, in *R. v. Sharpe*, [2001] 1 S.C.R. 45 ("Sharpe") the Supreme Court considered as relevant in a case concerning the constitutionality of a prohibition on the possession of child pornography the fact that the impugned provision was consistent with a growing trend around the world towards the criminalization of the possession of child pornography.[255] That trend was evidenced by the domestic legislation of Australia, Belgium, England, Ireland, New Zealand and the United States.

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[253] *Hape*, *supra* note 241at para. 35.
[254] See also *Slaight, supra* note 242 at para. 23:…the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective." [Emphasis Added].
[255] *Sharpe, supra* note 242.

278. Similarly, in *U.S.A. v. Burns***,** [2001] 1 S.C.R. 283, a case that concerned the constitutionality of extradition to face possible capital punishment, the Court took note of an international trend toward the abolition of the death penalty.[256] Significantly, the (unanimous) Court held that the trend was particularly salient as far as the section 7 *Charter* analysis was concerned since "the trend to abolition in the democracies, particularly the Western democracies, mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada."[257] The Court reiterated the importance of looking to "the practice of other countries with whom Canada generally invites comparison" in assessing the scope of the principles of fundamental justice.[258]

2. The Courts Have Looked to International Human Rights Law to Assess Limits on *Charter* Rights

279. The courts have looked to international human rights law in interpreting the scope and content of virtually every provision in the *Charter*. One of the consistent functions played by international human rights law in the interpretation and application of the *Charter* has been assisting the courts to identify internationally recognized norms or values that serve either to limit the scope of particular substantive *Charter* rights (particularly through the principles of fundamental justice under section 7) or to justify their limitation under section 1.

280. For example, in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 ("*Taylor*"), a majority of the Supreme Court cited provisions in several international human rights treaties and the jurisprudence of the U.N. Human Rights Committee in upholding the validity of a statutory provision in the *Canadian Human Rights Act*.[259] The impugned provision deemed the telephonic communication of hate speech against an identifiable group to be a "discriminatory practice."

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[256] *Burns, supra* note 242**.**
[257] *Ibid* at para. 92.
[258] *Ibid* at para. 128.
[259] *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 **[Taylor]**.

281. Writing for the majority of the Court in *Taylor*, Dickson C.J. explained that "[t]he stance taken by the international community in protecting human rights is relevant in reviewing legislation under s. 1, and especially in assessing the significance of a government objective [emphasis added]."[260] The Court concluded that – in light of the international sources on point – the goal of preventing the harms caused by hate propaganda was "pressing and substantial" under the first prong of the test in *R. v. Oakes*, [1986] 1 S.C.R. 103 ("*Oakes"*).

[260] *Ibid* at para. 43.

B. SECTION 293 DOES NOT VIOLATE THE *CHARTER*

1. SECTION 2 – Section 293 is Consistent with Fundamental Freedoms

282. Section 2 of the *Charter* provides in part:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> … and
>
> (d) freedom of association.

(a) No Violation of Freedom of Religion

283. The Supreme Court of Canada has repeatedly underscored that no matter how sincerely held the practice, section 2(a) of the *Charter* does not protect the ability of individuals to engage in religiously motivated practices that interfere with the rights and freedoms of others. This principle can be traced back to the decision of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 ("*Big M Drug Mart*"), wherein Dickson J. (as he then was) wrote that "[f]reedom [of religion] means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience [Emphasis added]."[261]

284. The Supreme Court has since reiterated and reapplied this holding in a variety of different contexts. A notable example is *Trinity Western University v.*

[261] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 337 **[Big M Drug Mart]**.

British Columbia College of Teachers, [2001] 1 S.C.R. 772 (*"Trinity Western")*, in which the Court considered the extent to which teachers in public schools could hold discriminatory religious beliefs about gay and lesbian persons. The Court found that determining this question created a potential conflict between sections 2(a) and 15 of the *Charter*.

285. The Court held that any such potential conflict "should be resolved through the proper delineation of the rights and values involved."[262] In so doing, the Court cited a line of cases in which the religious rights of parents were found not to include the right to deprive children of their right to physical or psychological well-being through the carrying out of religiously motivated practices.

286. For example, the Court in *Trinity Western* cited *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141 in which L'Heureux-Dubé J. held:

> As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion. [Emphasis added.][263]

287. The same point was made by McLachlin J. (as she then was) in *Young v. Young*, [1993] 4 S.C.R. 3 at p. 122:

> It is clear that conduct which poses a risk of harm to the child would not be protected. As noted earlier, religious expression and comment of a parent which is found to violate the best interests of a child will often do so because it poses a risk of harm to the child. If so, it is clear that the guarantee of religious freedom can offer no protection [emphasis added].

288. The Court in *Trinity Western* also cited the holding of Iacobucci and Major JJ., writing on behalf of the minority in *B. (R.) v. Children's Aid Society of*

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[262] *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 29 **[Trinity Western]**.
[263] *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141 at 182.

Metropolitan Toronto, [1995] 1 S.C.R. 315.[264] In that case, which concerned the right of Jehovah's Witnesses to deprive their children of medically necessary blood transfusions, Iacobucci and Major JJ. concluded that section 2(a) of the *Charter* could not be successfully invoked by the parents on the following basis:

> Just as there are limits to the ambit of freedom of expression (e.g. s. 2(*b*) does not protect violent acts: *R. v. Zundel*, [1992] 2 S.C.R. 731, at pp. 753 and 801; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 732 and 830), so are there limits to the scope of s. 2(*a*), <u>especially so when this provision is called upon to protect activity that threatens the physical or psychological well-being of others</u>. In other words, although the freedom of belief may be broad, <u>the freedom to act upon those beliefs is considerably narrower</u>, and it is the latter freedom at issue in this case. [Emphasis added.][265]

289. In short, section 2(a) of the *Charter* does not protect the freedom to act on one's religious beliefs in a way that harms others and, in particular, their ability to enjoy their own fundamental rights and freedoms.

290. The evidence in this Reference overwhelmingly establishes that – whether motivated by religious reasons or otherwise – the practice of polygamy is harmful to women and children and interferes with their *Charter* rights.

291. While the evidence establishes this point in numerous ways and from a wide variety of perspectives, the evidence of Professor McDermott is particularly compelling. In her cross-cultural study of polygamy, Professor McDermott found a significant (and likely causal) correlation between the incidence of polygamy and (among many other harms) increased levels of physical and sexual abuse against women, increased rates of maternal mortality, shortened female life expectancy, lower levels of education levels for girls and boys, lower levels of equality for women, higher levels of discrimination against women, increased rates of female genital mutilation and increased rates of trafficking in women.

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[264] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 ***[B. (R.)]***

[265] *Ibid* at para. 226. While Iacobucci and Major JJ. were in the minority in *B. (R.)*, their holding on this point was cited with approval by the majority of the Court in *Trinity Western, supra* note 262 at para. 30.

292. Professor McDermott also found that the rights of all citizens are negatively impacted by the practice of polygamy. In particular, she found that around the world, as the prevalence of polygamy goes up in any particular state, political rights and civil liberties decrease.[266]

293. The rights of women and children to be free from physical, psychological, economic, social and legal harms are enshrined in sections 7, 15 and 28 of the *Charter.* The courts have repeatedly held that these rights must be assiduously guarded.[267]

294. Similarly, the interpretations of numerous conventions and treaties to which Canada is a signatory (including the *Political Rights Convention*, the *Women's Convention*, and the *Children's Convention*) have recognized the right of women and children to be free from the kinds of harms that flow from the practice of polygamy.

295. International human rights law also confirms that polygamy is not be protected by the right to freedom of religion because polygamy tends to deprive women and children of their own fundamental rights. For example, while the Political Rights Covenant protects freedom of religion, the text of the Covenant and the interpretive comments of the UN Human Rights Committee make it clear that polygamy is not protected by the Covenant.

(b) No Violation of Freedom of Expression

296. The Challengers may argue that section 293 violates section 2(b), which protects the right to freedom of expression. There is no authority that would

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[266] Exhibit 41 at 21-22: Expert report of Dr. McDermott, 16 July 2010.

[267] With regard to the rights of children, see, for example, *Children's Aid Society of the County of Simcoe v. S.*, [2001] O.J. No. 1380 (S.C.J.) at paras. 195-96; *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48l; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 93; *Canadian Foundation for Children, supra* note 246 at para. 225; *B. (R.), supra* note 264 at para. 88. With regard to the rights of women, see *R. v. Ewanchuk* [1999] 1 S.C.R. 330 at paras. 70-73; *Jane Doe v. Toronto (Metropolitan) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Ct. J. (Gen. Div.)) at para. 163.

suggest that freedom of expression embraces the practice of polygamy or other types of marriage.

(c) No Violation of Freedom of Association

297. Section 293 does not engage the protection of section 2(d) of the *Charter.* Section 2(d) protects the freedom to establish, belong to and maintain an association for the pursuit of common collective goals. This provision is designed to promote social interaction and collective action of a public nature.[268]

298. Section 2(d) does not protect the ability of individuals to form and freely participate in intimate personal and familial relationships.[269] In *R. v. M.S.*, [1996] B.C.J. No. 2302 (C.A.) ("R. v. *M.S.*")[270], the BCCA agreed with the views of Tarnopolsky J.A. in the case of *Catholic Children's Aid Society of Metropolitan Toronto v. S.(T.)*, a case concerned with the denial of the birth parents' right of access to their children after adoption.[271] In his reasons, Tarnopolsky J.A. rejected the application of freedom of association to families:

> The freedoms of assembly and association are necessarily collective and so mostly public. Our constitutional concerns have not been with assemblies within families or associations between family members. Rather, the protections we have been concerned with are for those assemblies and associations that take us outside the intimate circle of our families. The family is a collective, but the desire of one family member to associate with another is not so much for the purpose of pursuing goals in common, nor even pursuing activities in common.[272]

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[268] *Reference re Public Service Employees Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act*, [1987] 1 S.C.R. 313.
[269] *R. v. M.S.,* [1996] B.C.J. No. 2302 (C.A.) (QL) ***[R. v. M.S.]***; *Catholic Children's Aid Society of Metropolitan Toronto v. S.(T.)* (1989), 69 O.R. (2d) 189 (C.A.) ***[Catholic Children's Aid Society]***.
[270] *R v. M.S, supra* note 269.
[271] *Catholic Children's Aid Society, supra* note 270.
[272] *Ibid*.

299. Furthermore, in the same sex marriage litigation, the courts did not accept that section 2(d) protected a person's right to marry.[273]

2. SECTION 7 - Section 293 is Consistent with the Principles of Fundamental Justice

300. Section 7 of the *Charter* provides that "[e]veryone 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."

301. At the first stage of a section 7 analysis, the claimant must establish that his or her life, liberty or security of the person interests are engaged by the impugned legislation. The second stage involves identifying and defining the relevant principles of fundamental justice that bear upon the analysis. Finally, it must be determined whether these constitutionally protected interests are infringed or denied in a manner that does not accord with the relevant principles.[274]

302. It is well established that the risk of being sent to jail will engage an individual's liberty interest under section 7 of the *Charter*. As with any offence for which imprisonment is a possibility, the potential deprivation of liberty that arises by virtue of section 293 of the *Criminal Code* must accord with the principles of fundamental justice.

303. In their Opening Statements, the Challengers identified three principles of fundamental justice that they argued are contravened by the prohibition on the practice of polygamy: vagueness, arbitrariness and gross disproportionality.[275] However, none of these asserted breaches withstand scrutiny.

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[273] See *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (S.C. Div. Ct.) at paras. 30-31, 33, 72, and 212; *EGALE Canada Inc. v. Canada (Attorney General)*, 2001 BCSC 1365 at paras. 134-139; *EGALE Canada Inc. v. Canada (Attorney General),* 2003 BCCA 251 at paras. 97-100.

[274] *R. v. White* (1999), 135 C.C.C. (3d) 257 (S.C.C.) at para. 38; *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571 ***[Malmo-Levine]***.

[275] See, for example, the Opening Statement of the Amicus on Breach, para. 59.

(a) The Section is not Vague

304. Section 293 of the *Criminal Code* is not unconstitutionally vague. It provides an adequate framework for judicial interpretation and sufficiently delineates the areas of risk for those who might consider engaging in the practice of polygamy.

305. It is a well-recognized principle of fundamental justice that individuals cannot be deprived of their liberty under a law that is vague.[276]

306. However, the threshold for finding a law unconstitutionally vague is very high. Indeed, only one provision in the *Criminal Code* has ever been found to be unconstitutional on the grounds of vagueness.[277]

307. A law will only be found to be vague when the impugned provision is so unintelligible that it fails to provide an adequate basis for legal debate. A vague law is one that is incapable of coherent judicial interpretation.[278]

308. In determining whether a law gives sufficient guidance for legal debate, a court must first interpret it, not in the abstract, but within a larger interpretive context developed through an analysis of considerations such as the purpose, subject-matter and nature of the impugned provision, societal values, related legislative provisions and prior judicial interpretations of the provision.[279]

309. Section 293, properly interpreted, prohibits multiple marriages, whether the marriages are sanctioned by civil, religious, customary or other means.

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[276] See *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289 at 302 ***[Nova Scotia Pharmaceutical Society]***; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 46 ***[Canadian Pacific Ltd.]***.
[277] See *R v. Spindloe*, (2001), 154 C.C.C. (3d) 8 (Sask. C.A.) at para. 78; *R. v. Morales*, [1992] 3 S.C.R. 711.
[278] *Nova Scotia Pharmaceutical Society, supra* note 276 at para. 63; *Canadian Foundation for Children, supra* note 246 at para. 15; *Canadian Pacific Ltd., supra* note 276 at para. 79.
[279] *Ibid* at para. 47.

Furthermore, the courts have shown that section 293 is capable of coherent judicial interpretation.[280]

310. For example, in *R. v. Tolhurst, R. v. Wright* the Ontario Court of Appeal clearly appreciated that the prohibition on polygamy is directed at multiple marriages, whether or not they were legally sanctioned and not, for example, mere cohabitation or adultery:

> The crucial words…are "any kind of conjugal union"; these words predicate some form of union under the guise of marriage, and Parliament had no intention in this section of the Code of dealing with the question of adultery. The section is headed "Polygamy and Spiritual Marriages", and it was originally enacted by 53 Vict., ch. 37, sec. 11, as an amendment to An Act Respecting Offences Relating to the Law of Marriage; it is said to have followed the Edmunds Law in the United States, and was aimed at prohibition of polygamy under any guise [emphasis added].[281]

311. "Conjugal union" is legally distinct from "conjugal relationship" which is a term that has acquired a recent legal meaning that did not exist at the time of the introduction of the polygamy offence.[282] "Conjugal relationship" is now applied to describe a "common law relationship", or an unmarried cohabitation-based relationship. The meaning of the term, "conjugal relationship" has evolved from its original premise of an unmarried couple who held themselves out to family, friends and community as married, although they were not, ordinarily because one had a bar to a marriage (such as a previous existing marriage where the spouses had separated but not divorced), to a newer premise of an unmarried couple that hold themselves out to family, friends and community as unmarried.

312. The contemporary determination of whether or not an unmarried couple is in a "conjugal relationship" is a complicated process in which various factors such as "shared shelter, sexual and personal behaviour, services, social activities,

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[280] *Labrie, supra* note 206*; Tolhurst, supra* note 208.
[281] *Tolhurst, supra* note 208 at 808-809.
[282] *M. v. H.*, [1999] 2 S.C.R. 3 ***[M. v. H.]***.

economic support and children, as well as the societal perception of [a] couple" are weighed in each individual case.[283]

313. However, section 293 is concerned only with "conjugal unions" – i.e. marriages, whether civil, religious, or customary – and the complex and fact-dependent meaning of the term "conjugal relationship" is therefore irrelevant to understanding the ambit of the polygamy prohibition.

314. Furthermore, a law is not vague simply because it does not predict with certainty the outcome of every conceivable fact situation. A law need provide only a framework delineating an area of risk, which is sufficient to provide general guidance for legal debate.[284]

315. The Supreme Court of Canada has been clear that hypothetical scenarios, no matter how reasonable they may be, have no place in a constitutional vagueness analysis. This follows from the fact that vagueness is only concerned with whether the impugned provision is reasonably capable of interpretation. If a provision applies without question to certain core conduct, but it is uncertain whether it applies to borderline cases, the statute is not vague.

316. In such circumstances, the law provides a basis for legal debate. The task of the judiciary then is to determine whether the peripheral conduct falls within the terms of the statute. As Gonthier J. said in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031:

> ...I take the view that reasonable hypotheticals have no place in the vagueness analysis under s. 7.
>
> Where a court is faced with a vagueness challenge under s. 7, the focus of the analysis is on the terms of the impugned law. The court must determine whether the law provides the basis for legal debate and coherent judicial interpretation. As I stated above, the first task of the court is to develop the full interpretive context surrounding the law, since vagueness should only be assessed

[283] See *M. v. H., supra* note 282 at para. 59.
[284] *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *R. v. Hall*, [2002] 3 S.C.R. 309.

> after the court has exhausted its interpretive function. If judicial interpretation is possible, then an impugned law is not vague. A law should only be declared unconstitutionally vague where a court has embarked upon the interpretive process, but has concluded that interpretation is not possible [Emphasis added].[285]

317. As already noted, the courts have been able to interpret and apply what is now section 293 of the *Criminal Code*.

(b) The Section is not Arbitrary

318. In their Opening Statements, the Challengers alleged that section 293 is arbitrary.

319. The most commonly cited judicial formulation of the arbitrariness standard as a principle of fundamental justice is that of the Supreme Court in *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519 *("Rodriguez")*. Sopinka J. held that a law is arbitrary if it "bears no relation to, or is inconsistent with, the state interest that lies behind the legislation."[286]

320. Canada anticipates that the Challengers may argue that some polygamous marriages are harmless and therefore section 293 is arbitrary because it criminalizes all polygamous marriages including those, for example, in which adult participants freely consent to the arrangement. The Challengers may also argue that section 293 is arbitrary because it criminalizes the conduct of both men and women that marry polygamously. Finally, the Challengers may argue that since Canadians are increasingly engaging in conjugal relationships that are not formalized through marriage, the fact that section 293 targets marriage renders the prohibition irrational or arbitrary. None of these arguments is supported by the evidence or the relevant case law.

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[285] *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at paras. 78-79.
[286] *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519 at 594.

(i) There is a Reasonable Apprehension of a Risk of Harm

321. In several challenges to criminal prohibitions such as the possession and trafficking of marihuana,[287] the possession and distribution of child pornography[288] and the prohibition on incest,[289] the courts have made it clear that so long as there exists a *reasonable apprehension* that particular conduct poses a *risk* of harm (even if mainly to a more vulnerable subset of the population), Parliament is permitted to enact criminal prohibitions in respect of that conduct without running afoul of section 7 of the *Charter*.

322. One of the most thorough judicial analyses of this issue was undertaken by the Supreme Court of Canada in *R. v. Malmo-Levine; R. v. Caine* [2003] 3 S.C.R. 571 ("*Malmo-Levine*").[290] In that case, the Court upheld the prohibition on the possession of marihuana despite evidence suggesting that for some recreational users of the drug the effects were relatively benign. In so doing, the Court held that the avoidance of harm, particularly insofar as it pertained to the protection of vulnerable groups, was a perfectly valid state interest, insofar as a criminal prohibition is concerned, so long as the harm can be shown to be more than "trivial or insignificant."[291]

323. It is important to note that in assessing the constitutionality of the prohibition on the possession of marihuana in *Malmo-Levine*, the majority of the Court analysed the *risk* of harm posed by the targeted conduct. For example, Gonthier and Binnie JJ. wrote that "while the risk of harm to the great majority of users can be characterized at the lower level of 'neither trivial nor insignificant', the risk of harm to members of the vulnerable groups reaches the higher level of 'serious and substantial' [emphasis added]."[292]

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[287] *Malmo-Levine, supra* note 274; *R. v. Kharaghani*, 2011 ONSC 836.
[288] *Sharpe, supra* note 242.
[289] *R. v. C.J.F.* (1996), 105 C.C.C. (3d) 435 (N.S.C.A.) ***[R. v. C.J.F.]***; *R. v. M.S.*,*supra* note 269.
[290] *Malmo-Levine, supra* note 274.
[291] *Ibid* at paras. 130-134.
[292] *Malmo-Levine, supra* note 274 at para. 134.

324. The majority of the Court in *Malmo-Levine* held that, as a result of the evidence that had been adduced in that case, the prohibition on the possession of marihuana "is not arbitrary but is rationally connected to a reasonable apprehension of harm."[293]

325. The same is true in the case of the prohibition on the practice of polygamy. The evidence before the Court establishes that a risk of very serious and substantial harm exists for *all* practitioners of polygamy as well as their families and communities.

(ii) Polygamy is Always Risky

326. The evidence in this Reference confirms that all polygamous marriages expose the participants, their children, families and their communities, up to and including the state level, to the risk of significant harms.

327. Whether or not one can point to abuse or coercion in any particular polygamous marriage, the evidence is clear that marrying polygamously exposes the participants and their children to a heightened risk of many serious harms. These harms include increased maternal mortality, decreased longevity for women, increased domestic violence including sexual assault and rape, decreased educational attainment for children and expulsion of junior boys.[294]

328. Moreover, states suffer from distinct harms on the broader societal level in the proportion to which they permit polygamy to be practiced within their borders. For example, as the prevalence of polygamy goes up in any particular state, so too does the discrepancy between law and practice relating to women's equality. Similarly, as the tolerance and prevalence for polygamy goes up in a state, all of its citizens enjoy the protection of fewer political rights and civil liberties. Crime levels also rise, affecting all members of society.[295]

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[293] *Ibid* at para. 136.
[294] Exhibit 41 at 14-22: Expert report of Dr. McDermott, 16 July 2010.
[295] Exhibit 41 at 21-22: Expert report of Dr. McDermott, 16 July 2010.

329. With regard to polyamory, the CPAA might argue that if its members were actually to marry polygamously the ensuing marriages would be harmless (both to the participants and the broader community). There is, however, no evidentiary (or theoretical) basis to support such an assertion.

330. First, the term "polyamory" does not have any defined meaning. Those witnesses who testified on the matter offered unhelpful and circular definitions simply characterizing polyamory as polygamy that was not harmful. For example, the CPAA said in its Opening Statement that polyamory was restricted to polygamy where the participants agree not to discriminate on the basis of gender or sexual orientation.[296]

331. Similarly, Professor Drummond described polyamory (or "polyfidelity" or "post-modern polygamy" or "post-modern polyfidelity") as "a form of commitment which is flexible and responsive to the needs and interest (sic) of the individuals involved rather than a rigid institution with hierarchical gender norms embedded within it."[297]

332. These definitions are, by their very nature, incapable of supporting any practical distinction between harmful polygamy and supposedly benign polyamory.

333. Second, there is no evidence that even one group of polyamorists has ever practiced polygamy within the meaning of section 293 of the *Criminal Code*. That is, the only evidence in the case at bar about polyamory (a practice about which the Court could not plausibly take judicial notice) has been presented by the CPAA. None of the CPAA's affiants describes arrangements in which even a

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[296] Canadian Polyamory Advocacy Association's Opening, para. 13 states:
"Polyamory" is the practice of having emotionally intimate, sexual relationships within groups of three or more people, where at least one person in the group has more than one emotionally intimate, sexual relationship at a time and where all members of the group formally or informally adopt these principles:
a) men and women have equal rights in establishing the configurations of the groups; no gender has privileges with respect to intimate relationships that the other gender lacks
b) no sexual orientation is regarded as superior to any other.

[297] Exhibit 65 at 31, paras. 86-88: Affidavit #1 of Susan Drummond, 14 October 2010.

single polyamorist was actually married to more than one person at the same time.

334. Third, even if a polyamorist had entered into multiple marriages, there is no reason to believe that the absence of a religious motivation for doing so, or the presence of a professed belief in equality would somehow mitigate the harms to the individual participants, their children and society in general that are associated with multiple marriages.

335. For example, the evidence of the Amicus's expert, Dr. Shackelford, suggests that domestic violence is overwhelmingly more common among non-related cohabitants. Using Dr. Shackelford's data, Dr. Henrich concluded that intra-familial violence, abuse, child mortality, neglect, stress levels, and sexual jealousy will be almost certainly worse in polygamous families whether they are religious or not.[298]

336. Given that – like religious polygamy – polyamorist polygamy necessarily involves an increase in the number of non-related cohabitants, there is no reason to expect that the predicted increase in associated harms would apply with any less rigour than it would in the context of religiously motivated polygamy.

(iii) Consent is Irrelevant

337. An argument that section 293 is arbitrary because it criminalizes polygamous marriages in which the participants are freely consenting adults is not supported by the relevant law.

338. It is open to Parliament to criminalize behaviour on the basis of societal interests even where the individual participants may consent. For example, section 155 of the *Criminal Code* makes it an offence to commit incest. Consent is not available as a defence even in the case of adult siblings. In *R. v. C.J.F.* (1996), 105 C.C.C. (3d) 435 (N.S.C.A.), the Nova Scotia Court of Appeal held:

[298] Todd Shackelford, 15 December 2010, pp. 41:6 to 43:43; Exhibit 5 at Exhibit pp. 2-5: Affidavit #2 of Dr. Henrich, 15 November 2010.

> There are some activities which cannot be allowed, even with consent of the participants, for example, assault causing bodily harm (*Jobidon*), assisted suicide (*Rodriguez*), sexual exploitation of a young person, s.153 *R. v. Hann*, (1992), 15 C. R. (4th) 355 (NfId.C.A.)) and obscene performances, s.167(1) (*R. v. Mara*, 1996 O.J. No.364 (Q.L.) (Ont.C.A.)). Incest is one of those offences. The denial of the defence of consent to the offence of incest does not, in my opinion, violate the principles of fundamental justice, nor have the appellants demonstrated that the operation of s. 155 infringes their rights guaranteed by s. 7 of the *Charter*.[299]

339. As mentioned by the Court in *F. (R.P.)*, in *R. v. Jobidon*, [1991] 2 S.C.R. 714, the Supreme Court of Canada held that consent to the application of force was vitiated where an adult intentionally applied force, causing non-trivial bodily harm in the course of a fist fight, despite the fact that those who had been watching the fight said that it was a fair, consensual fight. In so doing, the Court noted that:

> "the notion of policy-based limits on the effectiveness of consent to some level of inflicted harm is not foreign. Parliament as well as the Courts have been mindful of the need for such limits. Autonomy is not the only value which our law seeks to protect."[300]

340. Just as consent is no defence for incest or physical assault causing bodily harm, for public policy reasons, the consent of the complainant does not constitute a defence to the charge of sexual assault causing bodily harm. In such cases, the courts have held that while the law must recognize individual freedom and autonomy, in certain circumstances the personal interests of the individuals involved must yield to the more compelling societal interests that are challenged by such behaviour.[301]

341. In the case of the prohibition of polygamy, the consent of the participants is also irrelevant to the section 7 analysis. Their interests in making autonomous decisions about how many people they might want to marry must give way to the plethora of compelling societal interests including the interests of any children

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[299] *R. v. C.J.F.*, *supra* note 289 at 102-103.
[300] *R. v. Jobidon*, [1991] 2 S.C.R. 714 at para. 120.
[301] *R. v. Welch* (1995), 25 O.R. (3d) 665 (C.A.) at 688.

within the family. The children cannot "consent" to their situation, which includes the harms that flow from their parents' form of relationship.

(iv) Criminalizing Polygamy for Both Men and Women is not Arbitrary

342. An argument that section 293 is arbitrary because – at least in theory – women in polygamous unions are as exposed to prosecution as men is again not supported by the relevant law.

343. There are numerous constitutionally valid criminal prohibitions that are designed to protect people from harming themselves. As was explained by the majority of the Court in *Malmo-Levine*:

> …we do not accept the proposition that there is a general prohibition against the criminalization of harm to self. Canada continues to have paternalistic laws. Requirements that people wear seatbelts and motorcycle helmets are designed to "save people from themselves". There is no consensus that this sort of legislation offends our societal notions of justice. Whether a jail sentence is an appropriate penalty for such an offence is another question. However, the objection in that aspect goes to the validity of an assigned punishment — it does not go to the validity of prohibiting the underlying conduct [emphasis added].[302]

344. Moreover, the protection of women is only one of the aims that underlie the prohibition on the practice of polygamy in section 293. As already submitted, the prohibition is also designed to prevent the risk of harm to children and to the broader community. Accordingly, it is open to Parliament to criminalize the practice of polygamy for both men and women.

(v) Criminalizing Only Multiple Marriages is not Arbitrary

345. The fact that section 293 prohibits only multiple marriages as opposed to other forms of multiple unmarried relationships does not render the section arbitrary.

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[302] *Malmo-Levine, supra* note 274 at para. 134.

346. Even assuming that some or all of the harms that are caused by polygamous marriages are also present in non-formalized conjugal relationships involving more than two people, this would not mean that section 293 is arbitrary. Instead, what it would mean is that the section could have gone *further* in seeking to prohibit harmful conduct. That kind of underinclusivity is not a valid basis for constitutional attack.

347. A very similar underinclusivity argument was advanced by the claimants in *Malmo-Levine* and soundly rejected by a majority of the Supreme Court of Canada. In that case the claimants argued that Parliament's failure to criminalize the consumption of alcohol and tobacco, which were certainly harmful, while continuing to criminalize the use of marihuana, meant that the impugned prohibition was arbitrary. In rejecting this argument, Gonthier and Binnie JJ. wrote, on behalf of the majority of the Court, (at para. 139):

> …if Parliament is otherwise acting within its jurisdiction by enacting a prohibition on the use of marihuana, it does not lose that jurisdiction just because there are other substances whose health and safety effects could arguably justify similar legislative treatment. To hold otherwise would involve the courts in not only defining the outer limits of the legislative action allowed by the Constitution but also in ordering Parliament's priorities within those limits. That is not the role of the courts under our constitutional arrangements.
>
> Parliament may, as a matter of constitutional law, determine what is *not* criminal as well as what is. The choice to use the criminal law in a particular context does not require its use in any other: *RJR-MacDonald*, *supra*, at para. 50. Parliament's decision to move in one area of public health and safety without at the same time moving in other areas is not, on that account alone, arbitrary or irrational [emphasis added].

348. Similarly, Parliament's decision to criminalize polygamous marriages and not multiple unmarried relationships does not render section 293 arbitrary or irrational.

349. The Challengers may also argue that section 293 is arbitrary or irrational because the percentage of couples in Canada who choose to marry, as opposed to merely cohabit, has declined in recent years. However, as the courts have recognized, marriage remains a foundational institution in Canadian society. More fundamentally, if polygamous marriages are harmful to individuals and society, Parliament is entitled to prohibit polygamy regardless of how many couples choose marriage.

(c) The Section is not Grossly Disproportionate

350. Once the threshold of non-arbitrariness is passed, it is open to Parliament to criminalize targeted conduct, "subject to the constitutional standard of *gross* disproportionality [emphasis in original]."[303] This principle of fundamental justice precludes legislative measures that are "so extreme that they are *per se* disproportionate to any legitimate government interest."[304]

351. In the case of section 293, the question is whether the use of a criminal prohibition that includes the possibility of incarceration (and no mandatory minimum sentence) is a legislative response that is so extreme that it is necessarily disproportionate to the government's legitimate interest in preventing the harms associated with the practice of polygamy. Canada submits that this is not the case.

352. Firstly, there are certainly cases where a term of incarceration would be a fit sentence for a breach of section 293. Secondly, a narrower prohibition (or set of prohibitions) that does not criminalize the practice of polygamy itself would be ineffective in responding to the harms caused by the practice. Finally, with respect to the argument that the prohibition causes more harm than good (e.g. through further marginalization of insular polygamous communities) this is a consideration that belongs not in the section 7 gross disproportionality analysis,

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[303] *Malmo-Levine, supra* note 274 at para. 139.
[304] See *Suresh, supra* note 242 at para. 47; *Burns*, *supra* note 242 at para. 78.

but under the weighing of salutary and detrimental effects in the section 1 *Oakes* test.

(i) The Possibility of Incarceration is not Grossly Disproportionate

353. In order to assess whether the possibility of incarceration is grossly disproportionate in the case of section 293, one need only ask whether there exists *any* case where incarceration might be a fit sentence.

354. It would be legally inappropriate for the Court to consider the potential misuse of incarceration in cases where incarceration would be an *unfit* sentence. Section 718.1 of the *Criminal Code* requires that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender") and section 12 of the *Charter* prevents the imposition of cruel and unusual punishment.[305]

355. In *Malmo-Levine*, the claimants also asserted that the mere possibility of incarceration associated with the prohibition on the possession of marihuana was grossly disproportionate. In rejecting that argument, the majority of the Court cited the principle of proportionality in section 718.1 of the *Criminal Code* and section 12 of the *Charter* before concluding that "[t]here is no plausible threat, express or implied, to imprison accused persons — including vulnerable ones — for whom imprisonment is not a fit sentence."[306] This was so because "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."[307]

356. In the case of the possession of marihuana, the Supreme Court held that since there was no mandatory minimum sentence and since there were at least

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[305] The importance of proportionality in punishment has been discussed on several occasions by the SCC. See, for instance, *R. v. Proulx*, [2000] 1 S.C.R. 61 at para. 82, where Lamer C.J., writing for the Court, referred to "the fundamental principle of sentencing, which provides that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender". See also *R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18, at para. 18; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 40; and *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, *per* Wilson J. (concurring), at 533.

[306] *Malmo-Levine, supra* note 274 at para. 165.

[307] *Ibid* at para. 164.

some cases where incarceration would constitute a fit sentence, the mere availability of imprisonment on a charge of marihuana possession did not violate the section 7 principle against gross disproportionality.[308]

357. The same is true in the case of the prohibition on the practice of polygamy in section 293. There is no mandatory minimum sentence of incarceration and there are cases where incarceration would be a fit sentence. For example, if a court were faced with a case where a community leader had taken several young girls as wives and had impregnated many of them, there could be no question that some term of incarceration would be a fit sentence.

(ii) Criminalizing Polygamy is Necessary to Mitigate its Harms

358. One aspect of the gross disproportionality analysis involves an examination of the means chosen by the state in relation to its objective and whether those means are broader than necessary to accomplish the state's objective.[309] The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.[310]

359. In scrutinizing an impugned measure for overbreadth, the courts have been adamant that deference must be afforded to Parliament's policy choices.

360. For example, in *R. v. Heywood*, [1994] 3 S.C.R. 761, Cory J. explained that "[i]n analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature."[311] While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices." In *Malmo-Levine*, the majority of the Court clarified that "[t]he appropriate degree of

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[308] *Ibid* at para. 168.
[309] *R. v. Heywood*, [1994] 3 S.C.R. 761 at para. 49.
[310] *Ibid* at para. 49.
[311] *Ibid* at para. 51.

deference referred to in *Heywood* is built into the applicable standard of 'gross disproportionality'."[312]

361. With regard to the prohibition on the practice of polygamy, Canada anticipates that the Challengers may assert that the law is overbroad because harms such as coerced and underage marriage, as well as domestic abuse and human trafficking, can be dealt with directly either through existing or new criminal sanctions without criminalizing all polygamous relationships. For the following reasons, this argument must be rejected.

362. To begin with, the fact that Parliament can and has addressed some of the harms associated with the practice of polygamy through the enactment of other criminal prohibitions does not mean that it may not also prohibit the practice itself. A similar point was made by the majority of the Court in *Malmo-Levine* in response to the argument that since some of the harms associated with the consumption of marihuana (e.g. impaired driving) were dealt with through existing criminal prohibitions, there was no need to criminalize the possession of marihuana:

> It is true that Parliament can and has directly addressed some of the potential harmful conduct elsewhere in the *Criminal Code*. Section 253, for example, prohibits driving while impaired. One type of legal control to prevent harm does not logically oust other potential forms of legal control, subject as always to the limitation of gross disproportionality [emphasis added].[313]

363. Moreover, in the particular case of section 293, a narrower prohibition, or set of prohibitions, that does not criminalize the practice of polygamy itself would be manifestly ineffective in responding to the harms caused by the practice for several reasons.

364. First, as is noted above, there is the risk of harm present in every polygamous marriage and the harmful effects of polygamy extend well beyond

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[312] *Malmo-Levine, supra* note 274 at para. 39.
[313] *Ibid* at para. 137.

the immediate participants to their children, the broader community and state level.

365. Second, even if one were only concerned with harm to the participants (e.g. domestic abuse), there is no way to identify in advance which polygamists will engage in this conduct. In this respect there is yet another parallel to the failed arguments raised by the claimants in *Malmo-Levine*. The Court in that case explicitly rejected the notion that the prohibition on the possession of marihuana was overly broad because it captured individuals who will not harm either themselves (since they are not part of that subset of people that are vulnerable to the substantial harms that marihuana can cause) or anyone else. In so doing, Gonthier and Binnie JJ. held:

> As to the argument that the prohibition is overly broad because it includes smokers who have "not really not done anything wrong", there is no doubt that Parliament intended a complete prohibition and that is what it enacted. The evidence indicated that a narrower prohibition would not be effective because the members of at least some of the vulnerable groups and chronic users could not be identified in advance [emphasis added].[314]

366. Similarly, in *Sharpe*, the accused argued that the prohibition on the possession of child pornography was overbroad because the goal of preventing the exploitation of children during the manufacture of child pornography was already dealt with through other criminal provisions. McLachlin C.J. disagreed:

> …[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.[315] [Emphasis Added]

[314] *R. v. Clay*, [2003] 3 S.C.R. 735 at para. 40.
[315] *Sharpe*, *supra* note 242 at para. 93. See also *R. v. Whyte*, [1988] 2 S.C.R. 3.

367. Finally, as confirmed by Professors Wu and Shackelford,[316] crimes involving child exploitation, sexual assault and domestic violence, which are all associated with the practice of polygamy, are woefully underreported. It bears noting in this regard that, some of the anonymous witnesses in this case testified that they did not see anything wrong with a teenage girl being married to a much older man with only a few hours notice.[317] There are therefore serious concerns that the parents of the children are not able to identify harmful experiences to which their children are subject, and thus unable to bring such matters to the attention of authorities. As such, relying on the existence of other prohibitions is no substitute for the criminalization of polygamy itself.

(iii) Balancing Criminalization Against Broader Social Harms is not Appropriate at the Section 7 Stage

368. In its Opening Statement, BCCLA argued that section 293 is grossly disproportionate because "the criminalization of [polygamous] unions promotes marginalization, which tends to reinforce insularity in specially polygamous communities."[318] While Canada disputes this factual assertion, in any event it is not the proper subject of consideration at the section 7 stage of the *Charter* analysis.

369. The Supreme Court dealt with and rejected a very similar argument in *Malmo-Levine*, wherein the claimants argued that the prohibition on the possession of marihuana was grossly disproportionate because, for example, it caused "disrespect for the law among those who disagree with it; distrust of health and educational authorities who have 'promoted false and exaggerated allegations about marihuana' ".[319]

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[316] Todd Shackelford, 15 December 2010, pp. 48:3-46; Dr. Wu, 7 December 2010, p. 44:33-45, 68:4-18.
[317] Anonymous Witness # 4, 26 January 2011, 24:17-19.
[318] British Columbia Civil Liberties Association's Opening on Breach, para. 11.
[319] *Malmo-Levine, supra* note 274 at para. 180.

370. The Court rejected this argument and found that, in effect, the argument being advanced sought to balance the law's salutary and deleterious effects through a consideration of the social and economic consequences of the impugned prohibition. The Court held that that those "are the types of social and economic harms that generally have no place in s. 7." Rather, such considerations are "more properly reserved for s. 1".[320]

371. The same is true in respect of the assertion that the prohibition on polygamy in section 293 is grossly disproportionate because it exacerbates the marginalization of (already insular) polygamous communities such as that of the FLDS in Bountiful. Canada addresses the balancing of salutary and deleterious effects under the section 1 analysis below.

3. SECTION 15 - Section 293 Does Not Violate Equality Rights

372. Section 15 of the *Charter* 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, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin.

[320] *Ibid* at para. 181.

373. The Supreme Court of Canada has articulated a two-part test for showing discrimination under section 15 that involves asking the following: (1) Does the law create a distinction based on an enumerated or analogous ground? If so, (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[321]

374. While section 293 of the *Criminal Code* draws a distinction, it is not one that is made on the basis of an enumerated or analogous ground. Nor, in any event, does it create a disadvantage through the perpetuation of prejudice or stereotyping.

375. The distinction that is drawn by section 293 is between those who practice polygamy and those who do not. In other words, the provision distinguishes between those who have married more than one person (whether legally or otherwise) and those that have married one (or no) persons. The former are subject to criminal sanction while the latter are not.

376. This distinction is not based on impermissible stereotypes that undermine human dignity, but on precisely the opposite: the simple fact that multiple marriages are *demonstrably* harmful to the participants, their children and the broader community. As is canvassed above, the evidence in this Reference establishes that the harms that are caused by the practice of polygamy undermine the dignity and equality of women and children and detract from their participation in society.

377. Section 293 does not violate the norm of substantive equality. To the contrary, it is consistent with section 15 of the *Charter*, which is the promotion of human dignity and the values and principles essential to a free and democratic society. Those values include a commitment to social justice and equality and

[321] *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 17 ***[Kapp]***.

faith in social and political institutions, such as monogamous marriage that *enhance* the participation of individuals and groups in society. [322]

(a) The Section Does Not Draw a Distinction on the Basis Of Enumerated or Analogous Grounds

378. A law that distinguishes between those who have more than one spouse and those that have one or no spouses is not based on enumerated or analogous grounds of discrimination. As such, a section 15 challenge to section 293 cannot pass the first prong of the *Kapp* test.

379. The grounds enumerated in section 15 of the *Charter* are race, national or ethnic origin, colour, religion, sex, age and mental and physical disability. The courts have held that other characteristics, such as sexual orientation and marital status, are also prohibited bases for discrimination as they are commonly used to make distinctions that have little or no rational connection with the subject matter, and generally reflect demeaning stereotypes about a discrete group that has been historically subject to discrimination.[323]

380. When one examines the rationale for including a new characteristic as an analogous ground of discrimination, it is evident that "number of spouses" does not qualify. As was held by the Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*:

> [T]he thrust of identification of analogous grounds…is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. [emphasis added][324]

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[322] *Withler v. Canada Attorney General)*, 2011 SCC 12; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras. 105–108 ***[Hutterian Brethren]***; *Canadian Foundation for Children* at paras. 54–68; *Kapp*, *supra* note 322 at para. 15, citing *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 ***[Andrews]***.
[323] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13.
[324] *Ibid* at para. 13.

381. Being a polygamist is a “personal characteristic” only in the very limited sense that it is achieved when one engages in a demonstrably harmful practice that the government has a legitimate interest in seeking to stop.

382. It can no more be said that the number of spouses that one has is an analogous ground of discrimination than it can be said that having a spouse who is a blood relative is an analogous ground under section 15.

383. In *R. v. M.S.* the BC Court of Appeal rejected a section 15 *Charter* challenge to the prohibition on the practice of incest on very similar grounds. The claimant in that case, a father who was changed with having sexual relations with his daughter in contravention of section 155 of the *Criminal Code*, argued that “his desire to have a consensual sexual relationship with a blood relative and to form a family through this relationship is a personal characteristic which has lead to discrimination because s. 155 of the Code prohibits such a relationship.”[325]

384. The Court of Appeal disagreed and held that:

> …the evidence in this case demonstrates that the law makes a relevant, rational distinction concerning sexual choice, between those who would have sex with their daughter and those who would not. The personal attribute which the appellant says leads to discrimination goes to the very reason for the law: it is the proclivity to engage in behaviour that exploits the child, harms the well-being of the family and hence the community, and genetically endangers the offspring of the relationship.[326]

385. While section 293 is directed at harmful family structures rather than harmful sexual practices, the reasoning is the same. A criminal law that distinguishes between those that engage in harmful behaviour and those that do not is not based on an analogous ground of discrimination. Instead, it is based on the prevention of harms to individuals and to society, which is one of the central purposes of the criminal law.

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[325] *R. v. M.S., supra* note 268 at para. 45.
[326] *Ibid* at para. 50.

386. In an attempt to overcome this difficulty, some of the Challengers argued in their Opening Statements that section 293 makes a distinction on the basis of two different grounds that have previously been recognized by the courts: religion and marital status.[327] For the following reasons, these arguments must be rejected.

(b) The Section Does Not Draw a Distinction on the Basis of Religion

387. Just as there is nothing necessarily religious about the institution of marriage, so too there is nothing about the practice of polygamy that is necessarily religious in nature. One can, and people around the world do, engage in the practice in a wide variety of contexts, including not only religious, but also customary, traditional and purely secular contexts. As such, the distinction that is drawn by the prohibition on the practice of polygamy in section 293 is not made on the basis of religion.

388. To the extent that section 293 captures polygamy that is religiously motivated, this issue is best dealt with under section 2(a) of the *Charter*. The jurisprudence under section 2(a) has been carefully calibrated to the specific issues that arise when restrictions on the freedom to practice one's religion are at issue.

389. The recent decision of the Supreme Court of Canada in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 ("*Hutterian Brethren"*), is instructive on this point. In that case, the Court was confronted with a situation in which a party claimed a violation of freedom of religion under section 2(a) and, for substantially the same reasons, religious discrimination under section 15. The majority of the Court responded by dealing with the substance of the party's claim under section 2(a) rather than section 15.[328]

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[327] See, for example, the Opening Statement of the Amicus on Breach, paras. 53-56.
[328] *Hutterian Brethren, supra* note 322at paras. 105–108.

390. In the present case, as the Amicus admitted in his Opening Statement,[329] the religion-based section 15 arguments are really nothing more than a repetition of the arguments that are made under section 2(a). As such, as in *Hutterian Brethren*, these arguments should be dealt with under the rubric of freedom of religion.

(c) The Section Does Not Draw a Distinction on the Basis of Marital Status

391. Some of the Challengers have suggested that section 293 also draws a distinction on the ground of marital status. While marital status has been recognized by the Supreme Court as an analogous ground of discrimination, the Court did not indicate that the protection included the *number* of spouses that a person has under that rubric. Rather, the Court was referring to the status of either being legally married (to one person) or in an unmarried common law relationship (again, with just one person).

392. In *Miron v. Trudel*, [1995] 2 S.C.R. 418 ("*Miron"*), the Supreme Court of Canada was faced with a challenge to the definition of the word "spouse" in a provincial *Insurance Act*.[330] As a result of that definition, which did not include an unmarried common law partner, the claimant was unable to collect certain benefits under his partner's insurance policy.

393. In finding that the provision unjustifiably violated section 15 of the *Charter*, a majority of the Court found that marital status was an analogous ground of discrimination. However, in so doing, they made it clear that they were referring only to the status of being in a married or unmarried relationship with one person. In particular, McLachlin J. (as she then was) held:

> What then of the analogous ground proposed in this case -- marital status? <u>The question is whether the characteristic of being unmarried -- of not having contracted a marriage in a manner</u>

[329] Amicus's Opening Addressing Section 1, para. 23: the Amicus says, "[t]he equality claim on the ground of religion overlaps considerably with the s. 2(a) claim."
[330] *Miron v. Trudel*, [1995] 2 S.C.R. 418 **[Miron]**.

> recognized by the state -- constitutes a ground of discrimination within the ambit of s. 15(1). In my view, it does [emphasis added].[331]

394. In concluding that "marital status" was an analogous ground of discrimination, the Court in *Miron* did not contemplate including distinctions that are made on the basis of the *number* of legal or non-legal spouses that a person has. Polygamy was simply not at issue in that case.

395. Similarly, in *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 (*"Walsh"*), the Court reiterated that marital status was an analogous ground of discrimination under section 15, but did so in the context of a challenge to the exclusion of unmarried cohabiting monogamous couples from a provincial *Matrimonial Property Act*.[332] Like *Miron v. Trudel*, *Walsh* had nothing to do with polygamy and was only concerned with the legal treatment afforded to couples who were married versus couples who were not.

(d) Any Distinction is not Discriminatory

396. Even if one were to accept, for the sake of argument, that section 293 does draw a distinction on the basis of an enumerated or analogous ground, any such distinction cannot properly be regarded as discriminatory under the second stage of the *Kapp* analysis.

397. As a general principle, not every distinction amounts to discrimination for the purposes of section 15. The Supreme Court of Canada set out the reason for this in *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143:

> It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the *Charter*. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules,

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[331] *Ibid* at para. 150.
[332] *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325.

> regulations, requirements and qualifications to different persons is necessary for the governance of modern society.[333]

398. Section 15 prevents governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating group disadvantage and prejudice or imposes disadvantage on the basis of stereotyping.[334] This requires a court to consider indicia of discrimination such as whether the claimant belongs to a vulnerable, historically disadvantaged group, or to a "discrete and insular" minority that has been subjected to stereotyping and prejudice.[335]

399. In the case of polygamy, the group that is burdened by the provision is in short, polygamists. When one recalls the wide variety of bases and contexts in which people can and do practice polygamy – ranging from the secular to the customary to the religious, from the urban neighbourhoods of France to rural Sub-Saharan Africa – polygamists are perhaps the very antithesis of a discrete and insular minority. The only feature that this diverse group has in common is that they wish to engage in a demonstrably harmful practice.

400. The fact that the *practice* of polygamy, throughout history, has been consistently associated with a set of harms and condemned accordingly, does not mean that those who engage in the practice of polygamy today belong to an historically disadvantaged group.

401. Nor does the longstanding understanding that polygamy is harmful mean that the prohibition is in any way based on prejudice or stereotyping. As the evidence in this Reference confirms, the generalization that polygamy is harmful is objectively *true*.

402. The analysis under section 15 is both subjective and objective. The analysis must be undertaken from the point of view of the reasonable person,

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[333] *Andrews, supra* note 322 at 168-169.
[334] *Kapp, supra* note 322 at para. 25.
[335] *Ibid* at paras. 23-25; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 63-68 ***[Law v. Canada]***.

"dispassionate and fully apprised of the circumstances" in circumstances similar to those of the claimant.[336]

403. While the average practitioner of polygamy might be understandably reluctant to make such a concession, the reasonable person, who is fully apprised of the confirmed harms that have been empirically, internationally and historically associated with the practice of polygamy, would not see section 293 as based upon stereotypes or prejudice or otherwise demeaning to the dignity of polygamists.

404. Rather, the reasonable and informed person would be forced to recognize that the prohibition appropriately corresponds to the serious harms that are associated with the practice of polygamy in a manner that *promotes* the very interests that underpin section 15 of the *Charter*.

C. SECTION 293 IS CONSISTENT WITH SECTION 1 OF THE *CHARTER*

405. If section 293 is found to violate a *Charter* right, any such violation is saved as a reasonable limit under section 1 in accordance with the well-known justification analysis in *Oakes*.

406. Pursuant to *Oakes*, the state bears the onus of proving, on a balance of probabilities, each of the following four elements:

1) the objective of the law must be pressing and substantial;
2) there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve that objective;
3) the impugned law must be minimally impairing; and
4) there must be a proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law.[337]

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[336] *Ibid* at paras 59-60, 88; *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 56.

407. The *Oakes* analysis must be guided by the values underlying a free and democratic society. These values include respect for the inherent dignity of the individual, a commitment to social justice and equality and faith in institutions that enhance an individual's participation in society.[338]

1. The Objective of the Section is the Prevention of Harms

408. The identification of Parliament's objectives in adopting section 293 is of great importance, as this will have a considerable impact on the analysis of the remaining stages of the test.[339] In identifying the objective, the courts are entitled to consider the purpose of the legislation in the broadest sense.[340] For example, in *R. v. Butler*, [1992] 1 S.C.R. 452 ("Butler") the Supreme Court of Canada characterized the purpose of the obscenity prohibition in the *Criminal Code* as "the protection of society from harms caused by the exposure to obscene materials."[341] Similarly, in *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, the Supreme Court characterized the purpose of provisions that limited spending on advertising during election periods as the promotion of electoral fairness.[342]

409. Some of the Challengers, including the Amicus, have argued that section 293 was passed with an anti-Mormon animus in order to impose a form of Christian or Victorian morality on Mormons. They say that any attempt to rely on less odious purposes violates the well known "shifting purpose doctrine."[343]

410. Canada submits that – as is comprehensively detailed above – when it was enacted, the broad purpose of section 293 was to prevent the harms to individuals (especially women and children) and society that are wrought by the practice of polygamy. Canada also agrees with BC that while there may have

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[337] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-139 ***[Oakes]***.
[338] *Ibid* at 138-139.
[339] *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R. 721 at para. 20.
[340] *Toronto Star Newspapers Ltd. v. Canada* (2009), 94 O.R. (3d) 82 (C.A.) at para. 38; affirmed at [2010] 1 S.C.R. 721.
[341] *Butler,* [1992] S.C.J. No. 15; [1992] 1 S.C.R. 452 at para. 85 (QL) ***[Butler]***.
[342] *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 at para. 26 ***[Harper]***.
[343] See *Big M Drug Mart, supra* note 261.

been a “moral” tone in some of the individual comments of politicians at the time, when one considers the overall tenor of the Parliamentary debates as well as the broader historical context, the purpose of the provision was plainly the prevention of harm both to individuals, particularly women and children, and to society that flowed from the practice of polygamy.

411. The evidence of Professor Witte shows that throughout two millennia of Western history, the basis for the polygamy prohibition, which pre-dates Christianity, was the protection of individuals, especially women and children, and society.

412. These concerns carried through to the enactment of section 293. As is detailed in BC’s submissions, the central rationales that motivated anti-polygamists in Canada and the United States in the late nineteenth century included, preventing (1) women from suffering “lives of slavery, bondage, and horror;”[344] (2) children from suffering increased mortality and genetic defects;[345] and (3) the state from losing its democratic character.[346]

413. The Challengers’ argument on this point mirrors arguments that have been deployed and rejected by the courts in several other *Charter* challenges to longstanding criminal prohibitions that touch on matters of morality. In each of these cases, those alleging a breach of the *Charter* sought to seize upon the use of morality-based language deployed by individual Members of Parliament in order to impugn the purpose of the provision under review. And, in each of these cases, that type of argument has failed.

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[344] Exhibit 13 at 4091 (p. 143 of book): Affidavit #1 of Kaley Isbister, 30 July 2010, Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008) which was described by Professor Lori Beaman as a “respected” text and the only comprehensive history of its kind: Lori Beaman, 13 December 2010, p. 64:4-19.

[345] Exhibit 13 at 4091 (p. 83-84 of book): Affidavit #1 of Kaley Isbister, 30 July 2010, Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008)

[346] See *Reynolds, supra* note 173 at 166: “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.”

414. For example, in *R. v. B.E.* (1999), 139 C.C.C. (3d) 100, the Ontario Court of Appeal was faced with a *Charter* challenge to section 172 of the *Criminal Code*, which prohibits the commission of "sexual immorality" that "endangers the morals of a child." An *amicus curiae* charged with arguing against the constitutionality of the provision asserted that the purpose of section 172 was to enforce majoritarian concepts of morality. The Court disagreed and held:

> I cannot accept the submission of the amicus curiae that the purpose of s. 172 is to enforce majoritarian concepts of morality. That contention, while reflecting some of the statements made by members of Parliament when the crime was first enacted, cannot stand in light of my interpretation of the phrase sexual immorality and the word morals in s. 172(1). It is no doubt true that community standards of tolerance have changed in the 80 years since the legislation was enacted. It may also be that the concept of the morals of a child have evolved over that time. Neither change affects the overriding objective of the provision. It was and remains the protection of children from harmful conduct [emphasis added][347]

415. While Parliament did not have at its disposal the sophisticated understanding of the harms of polygamy that are set out in the reports of Professors McDermott, Henrich or Grossbard, this does not mean that the purpose underlying the provision has impermissibly shifted. That this is so is also confirmed by the holding of the Court in *Butler*:

> …with the enactment of [the obscenity provision], 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].[348]

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[347] *R. v. B.E.* (1999), 139 C.C.C. (3d) 100 (Ont. C.A.) at para. 48 ***[R. v. B.E.]***. *Harper, supra* note 342.
[348] *Butler, supra* note 341 at para. 85 (QL).

2. This Objective is Pressing and Substantial

416. There can be no doubt that the objective of preventing the numerous well documented harms to individuals and society that flow from the practice of polygamy was pressing and substantial when section 293 was first enacted and remains so today. The evidence before the Court establishes that these harms are serious and that they manifest themselves wherever and whenever polygamy is practiced. That the goal of preventing them is pressing and substantial is confirmed by the relevant international human rights law sources that urge states to abolish the practice of polygamy. The prevention of the kinds of harms associated with polygamy, such as abuse, domestic violence, exploitation, sexualisation and so forth, have also been considered to be pressing and substantial in the jurisprudence of the Supreme Court of Canada.

417. In terms of the evidence of harms in this Reference, Professor McDermott's testimony establishes that whether it is practiced in a Western democracy or sub-Saharan Africa, polygamy produces harmful effects that ripple throughout a society. To reiterate some of these, those countries around the world where polygamy is practiced suffer from increased levels of physical and sexual abuse against women, increased rates of maternal mortality, shortened female life expectancy, lower levels of education for girls and boys, lower levels of equality for women, higher levels of discrimination against women, increased rates of female genital mutilation, increased rates of trafficking in women and decreased levels of civil and political liberties for all citizens.

418. International human rights law and international trends also confirm that preventing the harms to society and individuals that flow from the practice of polygamy is a pressing and substantial objective. As is discussed above, Canada's international treaty obligations, especially under the *Women's Convention* and the *Political Covenant*, include a duty to take all appropriate measures to eliminate discrimination against women. As part of this duty, the

treaty bodies have encouraged member states to *abolish* the practice of polygamy.

419. In addition, the trend among nations throughout the world is to increasingly restrict polygamy through measures that include criminalization. A majority of states in the world employ outright prohibitions on the practice, including many of the nations to which Canada would invite comparison, including the United States, France, Belgium, Germany, Australia, New Zealand and the United Kingdom.[349]

420. Finally, the purpose of a legislative measure designed to mitigate even one of the harms at issue would be pressing and substantial. For example, if the provision were only designed to protect children from the harms of polygamy, that objective, on its own, would be pressing and substantial. The courts have repeatedly emphasized that the protection of children from harmful conduct is a pressing and substantial concern.[350] Logically, the goal of preventing harm to children and the plethora of other harms that flow from the practice of polygamy must be pressing and substantial.

3. The Means Chosen by Parliament are Rationally Connected to the Objectives

421. The second step in the *Oakes* test is to determine whether there is a rational connection between the infringing measure and the pressing and substantial objective that the infringement is said to serve. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, ("*Prostitution Reference*"), Lamer J. (as he then was) held that the rational connection requirement is satisfied where there is "a link or nexus based on and in accordance with reason,

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[349] Exhibit 42 at paras. 74-101: Expert report of Dr. Cook, 13 July, 2010.
[350] See for example, *R. v. B.E., supra* note 347 at para. 50; *Baker, supra* note 242 at paras. *73-75*; *Sharpe, supra* note 242 at pp. 155-158; *Ontario (Attorney General) v. Langer* (1995), 97 C.C.C. (3d) 290 at 321-22 (Ont. Gen. Div.), leave to appeal to SCC refused *Ontario (Attorney General) v. Langer* (1995), 100 C.C.C. (3d) vi.

between the measures enacted and the legislative objective".[351] In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, Iacobucci J. noted that "[t]his test is not particularly onerous". *[352]*

422. Criminalizing the practice of polygamy is rationally connected to the objective of limiting the harms caused by that practice. As noted by Lamer J. in the *Prostitution Reference*, "[r]egulating 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 [emphasis added]."[353]

423. Criminalization makes the practice of polygamy less attractive and serves to publicize society's disapproval of patriarchal, unequal, and abusive marriages. It is logical to assume that the criminal prohibition on polygamy is likely to reduce the incidence of the practice of polygamy, where it is enforced. In fact, one need only look to the experience of the United States where the enforcement of the polygamy ban in the late nineteenth and early twentieth centuries resulted in the complete abandonment of the practice by the mainstream Mormon Church and its members.

4. The Section is Minimally Impairing

424. The question at the minimal impairment stage is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit.[354] Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal.[355]

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[351] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1195 ***[Prostitution Reference]***. See also *Harper, supra* note 342 at para. 29; *Sharpe, supra* note 242 at para. 85; *Butler,supra* note 341 at 504.
[352] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 228.
[353] *Prostitution Reference, supra* note 351 at 1195.
[354] *Hutterian Brethren, supra* note 322 at para 35.
[355] *Ibid*.

(a) Parliament is Entitled to Deference

425. In assessing whether there are less harmful means of achieving the legislative goal, the courts must accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.[356] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 ("RJR MacDonald"), this aspect of the minimal impairment analysis was explained as follows:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement…On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Emphasis added; citations omitted.][357]

426. The voluminous evidence that has been adduced in this Reference demonstrates that the problems associated with the practice of polygamy are numerous and highly complex. The fact that the practice has been empirically linked to harms as diverse as increased rates of maternal mortality, lower levels of education for children and a discrepancy between law and practice relating to women's equality shows that the ramifications of the practice extend throughout society and into many different social, institutional and legal contexts. Parliament's decision to address these diverse harms through the criminalization of polygamy is therefore entitled to some deference from the Court.

427. It should also be noted that the need for deference to government decision-making in areas of complex policy has been found by the Supreme

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[356] *Ibid*; *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 160.
[357] *Ibid*.

Court of Canada to be particularly important in cases involving freedom of religion. In *Hutterian Brethren*, McLachlin C.J. held:

> Freedom of religion presents a particular challenge in this respect because of the broad scope of the *Charter* guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs…to the overall detriment of the community [emphasis added].[358]

(b) The Section is Narrowly Focused

428. In their Opening Statements, many of the Challengers set up section 293 as a straw man by interpreting it extremely broadly. They suggested, for example, that through the use of the term "conjugal union" the provision sweeps in even the most informal of intimate relationships involving more than two adults.[359] However, as noted above, such an interpretation is inconsistent with Parliament's desire to draw the line at multiple *marriages* (whether they are sanctioned by the state or otherwise). When properly interpreted, the scope of section 293 is radically narrowed from the caricature that the Challengers have sketched.

429. Section 293 is not concerned with the sexual behaviour or the cohabitation arrangements of individuals. Polygamy, by definition, means multiple marriages. The relevant jurisprudence has confirmed that the provision does not extend to non-marital relationships such as adultery or "mere cohabitation".[360]

430. Another way in which section 293 must be understood as being narrowly focused and minimally impairing is by the fact that the prohibition does not restrict anyone's freedom of *belief*. Members of the FLDS (and LDS) Church, for example, remain free to believe that polygamy is a good and beneficial practice.

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[358] *Hutterian Brethren, supra* note 322 at para. 36.
[359] See, for example, the Opening Statement of the CPAA, paras. 6-10.
[360] *Labrie, supra* note 206*; Tolhurst, supra* note 208.

Section 293 only restricts the ability to engage in the practice itself, which is demonstrably harmful. This is important given the repeated reminder of the Supreme Court of Canada that "although the freedom of belief may be broad, the freedom to act on those beliefs is considerably narrower."[361]

431. Since *Big M Drug Mart*, the courts have consistently emphasized that it is entirely appropriate that the freedom to act on one's religious beliefs must be subject to "such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[362] To the extent that section 293 does limit the ability of Fundamentalist Mormons or others to carry out their religious beliefs, such a limitation is certainly appropriate in the interests of protecting public health, safety and the fundamental rights and freedoms of others.

(c) Lesser Measures would not be Effective

432. There is no evidence to suggest that any measure short of full criminalization would be anywhere as effective as section 293 at deterring people from practicing polygamy and thereby causing the harms that necessarily arise as a result. Indeed, the fact that the practice of polygamy has at times flourished in the Bountiful community in the face of the criminal prohibition is clear evidence that any measure short of criminalization would logically be ineffective in deterring the practice.

433. The Court heard considerable and unrefuted evidence from Professors Henrich and Shackelford about the natural tendency among humans toward the practice of polygamy. In short, high status men will accumulate multiple wives if permitted to do so.[363] Measures short of criminalization are unlikely to be effective in counteracting this deep seated cross-cultural phenomenon.

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[361] See, for example, *Trinity Western, supra* note 262 at para 30; *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 226.
[362] *Big M Drug Mart, supra* note 261 at para 95; *Re Church of Scientology and The Queen (No. 6)* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.) at p. 469.
[363] Dr. Shackelford, 15 December 2010, pp. 22, 25, 26; Dr. Henrich, 9 December 2010, pp. 37:2 to 38:30, 74:12 to 75:39.

434. As BC has dealt with at length in their submissions, it is reasonable to imagine that Canada would become a destination for polygamist families if the practice were decriminalized.[364]

435. Relying on civil law alone would not be effective to deter people from practicing polygamy. The civil law could only refuse to include polygamous marriages within spousal benefits and obligations under statute and regulation. Indeed, the civil law already provides that a valid civil marriage can only be monogamous.[365] Additionally, existing civil law could not be stretched to encompass polygamous relationships without fundamentally rethinking the structure of Canadian society and our societal institutions.[366]

(i) Lack of Enforcement and Low Numbers of Practitioners Confirm the Effectiveness of the Prohibition

436. The Challengers would have the Court infer from the lack of enforcement of section 293 and the relatively low number of persons presently practicing polygamy in Canada that criminalization is unnecessary in order to achieve Parliament's legislative objectives. To the contrary, as the Supreme Court of Canada has repeatedly held, lack of enforcement may well be a sign that a provision is effective in deterring the prohibited conduct. For example, in upholding the prohibition on defamatory libel in section 300 of the *Criminal Code* in *R. v. Lucas,* [1998] 1 S.C.R. 439, the Supreme Court held:

> 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

[364] BC closing submissions, Part VIII – Section 7 of the *Charter*.
[365] *Civil Marriage Act*, s. 2.
[366] For example, should support be enforced on relationship breakdown between a man and one of his wives against another of his wives who has been contributing to the household income? Should the unrelated wife be granted custody of a child she raised? Similarly, what would be the impact on employment related health and pension survivor benefits?

> 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). [367]

437. Far from demonstrating its ineffectiveness, the fact that the number of people presently practicing polygamy in Canada may be relatively low vividly illustrates the important deterrent effect that section 293 has already produced. The abandonment of polygamy by mainstream Mormons in the United States also confirms that a criminal prohibition against polygamy does indeed work, even where strong religious convictions are at play.

(ii) The Insistence of Fundamentalists on Practicing Polygamy is Both Overstated and Irrelevant

438. The Challengers have argued that section 293 is superfluous as the only people in Canada who wish to practice polygamy are religious fundamentalists who would do so whether or not the conduct was prohibited. This argument is untenable both factually and legally.

439. Factually, it is unclear that only a small number of religious fundamentalists would engage in polygamy if the practice were decriminalized. For example, Dr. John Walsh, who was called by the FLDS as an expert on religious studies, testified that the official theological position of the mainstream LDS Church continues to be that polygamy ought to be practiced and that up to 50-60% of the *millions* of Mormons who live around the world (including Canada

[367] *R. v. Lucas,* [1998] 1 S.C.R. 439 at para 55.

and the United States) “would like the return of polygamy, and believe that's a holy principle that should be eternally practised.” [368]

440. In addition, Dr. Henrich, an expert in evolutionary psychology, economics and anthropology testified that if polygamy were decriminalized it could easily spread throughout mainstream Canadian society, especially if a few high status males (whose behaviour is often emulated by others) begin publicly taking up the practice.[369]

441. Moreover, the evidence suggests that even ardent religious fundamentalists can be deterred from engaging in polygamy when the prohibition is actually enforced. For example, several witnesses from the Bountiful community testified that since Winston Blackmore and James Oler were charged under section 293 several years ago, not a single polygamous marriage has been conducted in that community despite the fact that the practice remains deeply rooted in the community’s sincerely held religious belief system.[370] And, of course, millions of mainstream Mormons in the United States who continue to believe that polygamy ought to be practiced have for decades been abstaining from doing so as a direct result of the enforcement of the criminal prohibition in the late nineteenth and early twentieth centuries.[371]

442. In any event, as a matter of law, the fact that some might continue to engage in prohibited conduct does not mean that criminalization is somehow unconstitutional. In *Malmo-Levine* the Supreme Court highlighted the extent to which such an argument is anathema to the fundamental principle of the rule of law:

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[368] Dr. Walsh, 5 January 2011, pp. 32:13 to 33:7; Exhibit 77 at para. 25: Affidavit #1 of Dr. Walsh, 7 June 2010.
[369] Dr. Henrich, 9 December 2010, pp. 73:38 to 74:11.
[370] In this vein, Professor Campbell testified that prior to 2002 the insularity of the Bountiful community meant that many were unaware that polygamy was criminal. Professor Campbell also testified that she was unaware of any polygamous marriages in the community since 2002: Cross-examination of Angela Campbell, 7 December 2010, pp. 32:32 to 33:2, 41:37 to 42:7.
[371] Dr. Walsh, 5 January 2011, p. 32:13-39.

> 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].[372]

443. While the foregoing comments from *Malmo-Levine* were made in the context of an allegation of overbreadth under section 7 of the *Charter*, they apply with equal force to the minimal impairment prong of the section 1 analysis.

(d) The Challengers' Section 7 Overbreadth Arguments are Equally Inapplicable under Section 1

444. The Challengers' arguments in respect of the polygamy prohibition's asserted overbreadth that are dealt with above apply in respect of section 7. These arguments apply with equal force should they be made in the minimal impairment analysis under section 1. For ease of reference, they can be summarized as follows:

- The Challengers assert that there exist "harmless" classes or cases of polygamy and that section 293 goes too far by capturing these cases as well. The evidence before the Court indicates that all polygamous

[372] *Malmo-Levine, supra* note 274 at paras. 177-178.

marriages expose the participants, their children and their communities (up to and including the state level) to the risk of significant harms.

- The Challengers argue that section 293 goes too far by criminalizing not only cases of coerced polygamy but also those cases in which adults freely consent to the practice. However, Parliament frequently makes constitutionally valid policy decisions to criminalize activities regardless of the consent of the parties. . In addition, the children cannot be held to have consented in any way.

- The Challengers argue that section 293 goes too far by criminalizing the practice even for women, who are often victimized by polygamy. However, there are numerous constitutionally valid criminal prohibitions that protect people from harming themselves. Also, the prohibition is designed not only to prevent the risk of harm to women, but also harm to children and the broader community.

- The Challengers argue that by threatening incarceration, even for coerced underage brides, section 293 goes too far. This argument must be rejected firstly because section 293 has no mandatory minimum sentence. As such, only those for whom incarceration is a fit sentence would be so sentenced. Since such cases plainly exist, the possibility of incarceration does not invalidate the provision.

5. The Salutary Effects of the Section Outweigh the Deleterious Effects

445. The final stage of the *Oakes* test involves determining the proportionality of salutary and deleterious effects. This allows the Court to assess whether the overall benefits of the impugned law are worth the cost of the rights limitation at issue.[373] In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, Bastarache J. explained that the weighing of salutary and deleterious effects:

[373] *Hutterian Brethren, supra* note 322 at para. 77.

> … provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*.[374]

446. Canada submits that the beneficial effects of prohibiting polygamy far outweigh any detrimental effects on those who wish to engage in the practice. The prohibition is consistent with the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*.

(a) The Deleterious Effects of the Section are Limited

447. In their Opening Statements, the Challengers identified three main deleterious effects that are appropriately considered at this stage of the analysis. First, they argue that section 293 causes members of polygamous communities to experience increased marginalization and insularity.[375] Second, they argue that section 293 has a deleterious effect on the ability of those whose religions either condone or recommend polygamy to freely carry out those practices.[376] Third they argue that the prohibition, if upheld, would have the effect of breaking up their families.[377] Each of these will be discussed in turn.

(i) The Section Does Not Cause Marginalization

448. Some of the Challengers have attacked section 293 on the basis that "the criminalization of [polygamous] unions promotes marginalization, which tends to reinforce insularity in specially polygamous communities."[378] The evidence does not bear this assertion out.

449. The only "specially polygamous" community in Canada about which the Court has any evidence is that of the FLDS in Bountiful. The evidence suggests

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[374] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 125.
[375] See, for example, the Opening Statement of the Amicus on Section 1, para. 40; Opening Statement of the FLDS on Section, para. 21.
[376] See, for example, the Opening Statement of the Amicus on Breach, para. 9.
[377] *Ibid*, para. 29.
[378] British Columbia Civil Liberties Association's Opening on Breach, para. 11.

that the members of the FLDS who reside there perpetuate and indeed cherish their insularity on the basis of an explicit disapproval for the values of mainstream Canadian society.[379] This insularity would certainly persist without the prohibition on the practice of polygamy.

450. In any event, a number of women interviewed by Professor Campbell in the Bountiful community said both that they were comfortable with the idea of accessing resources outside the community, such as psychological counseling, medical assistance, and social services support, and that they had in fact done so.[380]

451. There is a stigma that attaches to individuals who commit criminal offences. That is part of the point of any criminal prohibition and one of the mechanisms through which deterrence of harmful conduct is achieved.[381] This means that individuals belonging to communities that openly engage in and even celebrate such harmful conduct are also likely to face a degree of public opprobrium. However, this is really nothing more than saying that the law under review is a criminal one. Such an observation cannot possibly weigh heavily in the balancing of salutary and deleterious effects.

(ii) The Deleterious Effects of the Section on Religious Rights are Limited

452. The evidence discloses that many of the people who wish to engage in polygamy in Canada do so for religious reasons (e.g. members of the FLDS) or at least with the tacit approval of their religions (e.g. Muslims). However, the mere fact that a practice has some religious character does not assist the Court in determining the seriousness of the limit on the individual's freedom of religion if she is prevented from undertaking that practice. In fact, the seriousness of the

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[379] Anonymous Witness No. 4, 26 January 2011, p. 6:1-21; Angela Campbell, 7 December 2010, p. 32:34-45.
[380] Professor Campbell acknowledges that the FLDS' aversion to seek some community services might be due to the norms of the community and not due fear of prosecution: Exhibit 64 at para. 132: Affidavit #2 of Angela Campbell, 14 October 2010.
[381] *Malmo-Levine, supra* note 274 at para. 172.

limit on freedom of religion varies from case to case, depending on "the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society".[382]

453. As was noted by McLachlin C.J. in *Hutterian Brethren*, (at para. 89) "[t]here is no magic barometer to measure the seriousness of a particular limit on a religious practice." Some aspects of a religion may be "so sacred that any significant limit verges on forced apostasy." By contrast, "[o]ther practices may be optional or a matter of personal choice." Between these two extremes "lies a vast array of beliefs and practices, more important to some adherents than to others."

454. The evidence in this case suggests that insofar as Muslims are concerned, the practice of polygamy is purely optional. Indeed, according to Professor Anver Emon who was called as an expert in Islamic Law, the Qur'an (4:3) provides men with a "conditional license" to marry up to four women, so long as they are treated "justly."[383] Professor Fadel goes even further and states that "within Islam, a polygamous marriage is not considered religiously meritorious, and may in fact be religiously blameworthy, even if it is not sinful."[384] As such, it can scarcely be argued that the interference with the individual's freedom of religion is serious in such cases. The adherent is not faced with a stark choice between compliance with the dictates of his or her faith and compliance with the law.

455. The case of Fundamentalist Mormons is somewhat more complicated as, at least doctrinally, there is evidence that some individuals sincerely believe that they must engage in polygamy as part of their religion. However, the evidence suggests that many members of various Fundamentalist Mormon communities

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[382] *Oakes, supra* note 337at 138-140.
[383] Exhibit 63: Report of Anver Emon, 13 October 2010 (see exhibit "B" at 10-11).
[384] Exhibit 2: Affidavit #1 of Dr. Fadel, 22 July 2010 (see exhibit "B" at 18). Interestingly, Professor Fadel noted subsequent wives in a polygamous marriage are referred to using the word "*darra*" which is derived from the Arabic root, "to harm": Exhibit 2: Expert report of Dr. Fadel, 22 July 2010 (see exhibit "B" at 20).

can and do choose to live monogamously without running afoul of their religious beliefs.

456. For example, with respect to the Bountiful community, Professor Angela Campbell observed that "[w]hile FLDS tenets indicate that plural marriage is a requirement for spiritual fulfillment, some residents of Bountiful currently see themselves as in a position [to] choose monogamy over polygamy. Those who choose monogamy still see themselves as FLDS followers, and suggest that their devoutness is reflected in their openness to the possibility of plural marriage."[385]

457. FLDS witnesses testified that – from a theological perspective – polygamy was only necessary in order for an individual to enter into the highest level of the "celestial kingdom."[386] They also testified that not all members of the FLDS aspire to that level and therefore choose not to marry polygamously.[387]

458. Similarly, both Anne Wilde and Mary Batchelor, who are outspoken independent Fundamentalist Mormons who advocate in favour of the practice of polygamy, no longer engage in the practice themselves (Ms. Wilde is a widow and Ms. Batchelor's only "sister wife" left the family after three years of living polygamously).[388]

459. This evidence suggests that – like mainstream Mormons who still believe that the practice of polygamy is an "eternal principle" – even the most devout Fundamentalist Mormons can comply with section 293 while simultaneously adhering to their religious beliefs.

460. In any event, even to the extent that particular individuals may believe that the practice of polygamy represents a sincere religious obligation, the impact on

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[385] Exhibit 64 at para. 18: Affidavit #2 of Angela Campbell, 14 October 2010. See also Exhibit 73 at para. 47: Affidavit #2 of Lori Beaman, 13 October 2010.
[386] See for example, Anonymous Witness No. 2, 25 January 2010, pp. 5:19-26, 28:16-26.
[387] *Ibid*, p. 60:37-41.
[388] Mary Batchelor, 20 January 2010, p. 9:5-28; Exhibit 67 at para. 11: Affidavit #1 of Anne Wilde, 15 October 2010.

those individuals' freedom of religion is outweighed by the countervailing salutary effects that are associated with section 293.

461. In their Opening Statements, the Challengers have argued that have argued that if the prohibition is upheld as valid, it would have the effect of forcing the destruction of stable families.[389] This claim is both erroneous and overstated.

462. People are convicted of criminal offences every day, and many of them must serve a prison term, and it cannot be reasonable to argue that this fact alone can amount to a deleterious effect of a criminal prohibition. The family related impacts of holding people responsible for their criminal acts cannot serve to undermine the criminal prohibition itself.

(b) The Salutary Effects of the Polygamy Prohibition are Significant

463. As noted above, the evidence shows that the polygamy prohibition has and continues to deter many from engaging in the practice. For the few who have continued to engage in the practice in the face of the criminal prohibition, the evidence suggests that the mere threat of enforcing section 293 has reduced or even stopped the practice altogether. As such, to the extent that the practice of polygamy can be associated with serious harms there can be no doubt that the salutary effects of the ongoing prohibition are substantial.

464. The evidence in this Reference has demonstrated that the practice of polygamy is associated with very substantial harms whose prevention is clearly salutary. These harms, which need not be repeated here, involve harms to the equality, autonomy and dignity of women and children as well as a grave intrusion into the enjoyment of fundamental freedoms by all citizens.

465. As submitted above, the statistical evidence shows that as levels of polygamy increase in a society there is a corresponding decrease in political and civil liberties. It is reasonable to assume that the decriminalization of polygamy

[389] See, for example, the Opening Statement of the Amicus on Breach, para. 29.

would make Canada an attractive destination for polygamists from other countries and there is no evidence that Canada would be immune from the impacts of such an influx. To the contrary, there is evidence that members of the Bountiful community enjoy fewer political and civil liberties.

466. In addition, as is discussed above in the context of the historical evidence, the prohibition of polygamy has been linked both temporally and philosophically with the rise of democracy and its attendant values of liberty and equality for all.

467. The fact that the prohibition on the practice of polygamy is a salutary goal that justifies any limited intrusion into the rights of individuals that might arise as a result, is confirmed by numerous international treaty bodies who urge the elimination of the practice of polygamy through all appropriate measures. Canada, along with virtually all democratic nations, is seeking to eliminate polygamy through a narrowly tailored criminal prohibition.

468. In this regard, it should be recalled that the Supreme Court of Canada has frequently looked to international human rights law as evidence that the salutary effects of a rights limitation were particularly weighty. For example, in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, the Court held that "the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective."[390]

469. For these reasons Canada submits that to the extent that section 293 violates any of the *Charter* rights that have been raised in this Reference, any such violation is demonstrably justified as a reasonable limit in a free and democratic society under section 1.

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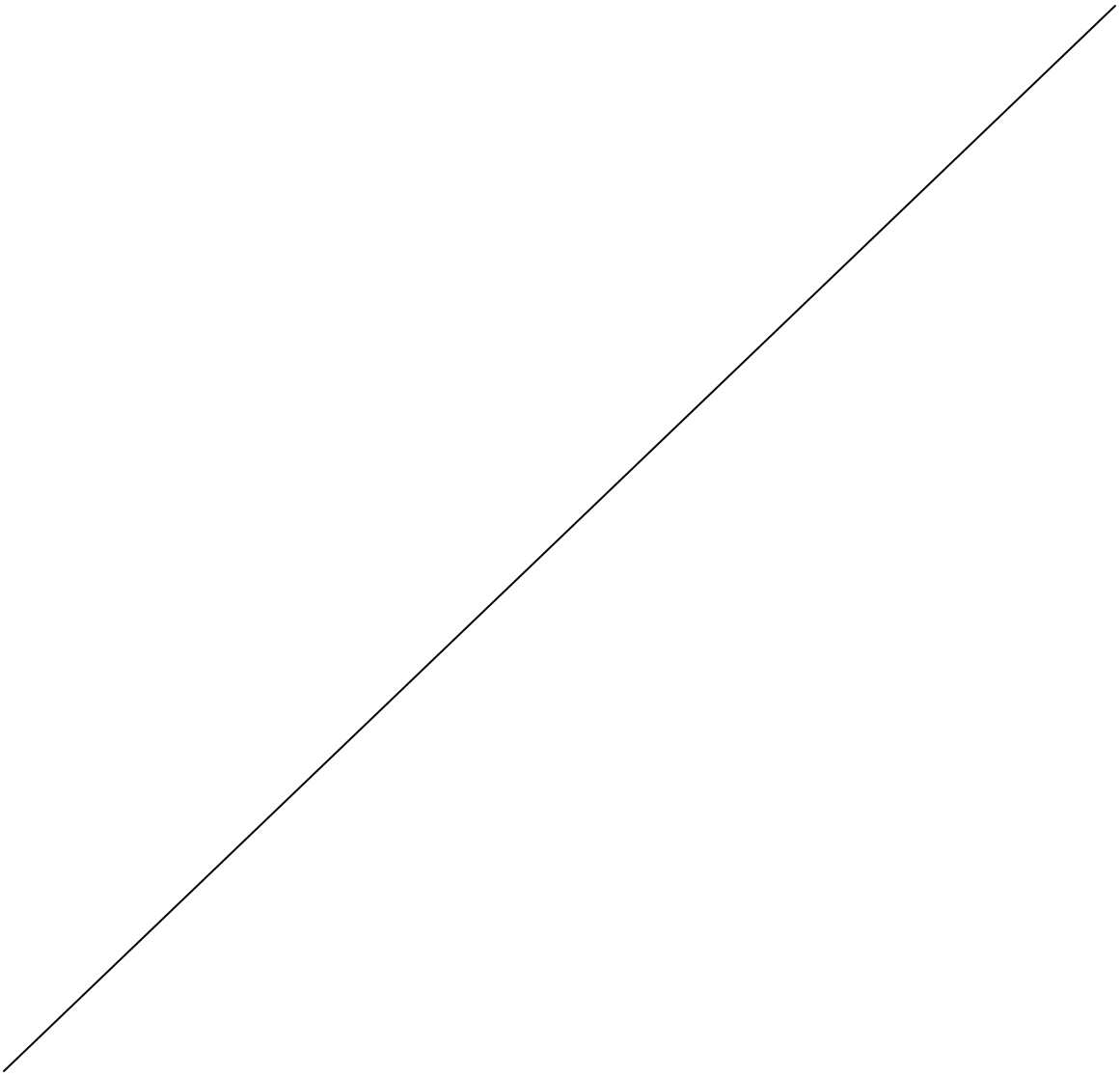
[390] *Slaight, supra* note 242.

PART V – CONCLUSION

470. In conclusion, the evidence before the Court in this Reference demonstrates that polygamy results in serious and substantial harms to individuals, particularly women and children, and society. Parliament's decision to enact a criminal prohibition on the practice of polygamy was an appropriate and lawful response to the harms of polygamy.



471. Canada would answer the Reference questions in the following way:

Question: Is section 293 of the *Criminal Code* consistent with the *Charter*? If not, in what particular or particulars and to what extent?

Answer: Yes, Section 293, properly interpreted, is consistent with the *Charter*. In particular, section 293 is consistent with sections 2(a), 2(b), 2(d), 7 and 15 of the *Charter*. Alternatively, if section 293 is inconsistent with one or more of these *Charter* rights and freedoms, any breach is justified under section 1.

Question: What are the necessary elements of the offence in section 293 of the *Criminal Code*? 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 prohibits multiple marriages whether the marriages are sanctioned by legal, religious, cultural or other means. Section 293 does not require that the polygamy or conjugal union in question involved a minor, or occurred in the context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence. While these things are often present in polygamous marriages, they are not necessary elements of the section 293 offence that need to be proved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, March 4, 2011.

R. Keith Reimer
Counsel for the Attorney General of Canada

Appendix A – Section 293 of the *Criminal Code*

Criminal Code, R.S.C. 1985, c. C-46 s. 293.

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,

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.

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

Polygamie

293 (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans quiconque, selon le cas:

a) pratique ou contracte, ou d'une façon quelconque accepte ou convient de pratiquer ou de contracter:

(i) soit la polygamie sous une forme quelconque,

(ii) soit une sorte d'union conjugale avec plus d'une personne à la fois,

qu'elle soit ou non reconnue par la loi comme une formalité de mariage qui lie;

b) célèbre un rite, une cérémonie, un contrat ou un consentement tendant à sanctionner un lien mentionné aux sous-alinéas a)(i) ou (ii), ou y aide ou participe.

Preuve en cas de polygamie
(2) Lorsqu'un prévenu est inculpé d'une infraction visée au présent article, il n'est pas nécessaire d'affirmer ou de prouver, dans l'acte d'accusation ou lors du procès du prévenu, le mode par lequel le lien présumé a été contracté, accepté ou convenu. Il n'est pas nécessaire non plus, au procès, de prouver que les personnes qui auraient contracté le lien ont eu, ou avaient l'intention d'avoir, des rapports sexuels.

S.R., ch. C-34, art. 257.