No. S-097767
Vancouver Registry

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. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF S. 293 OF THE *CRIMINAL CODE OF CANADA*, R.S.C. 1985, c. C-46

CLOSING SUBMISSION OF THE *AMICUS CURIAE*

VOLUME 1 OF 2
(Parts 1 - 4)

The Amicus Curiae

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INDEX

PART 1 - OVERVIEW

1. In this Reference, the Court is asked for its opinion on two questions:

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

2. The Amicus was appointed by the Court to advance any argument he considers appropriate in support of the answer "no" to Question 1, and to advance any argument he considers appropriate regarding Question 2, particularly any argument in opposition to, or distinct from, the Attorney General of British Columbia ("AGBC") or the Attorney General of Canada ("AGC").

3. In this submission, the Amicus addresses the Reference questions in reverse order. In answer to Question 2, the Amicus says that s. 293 criminalizes anyone who knowingly participates in a polygamous conjugal union. "Polygamy", in this context, means any committed relationship that it is *not monogamous*; it refers to a relationship among more than two people, regardless of their genders. A "conjugal union" bears the same meaning as a "conjugal relationship"; it means a committed, intimate relationship of some permanence, and can be identified according to factors developed in family law.

4. The effect of s. 293 is that it criminalizes all conjugality but for monogamy. It is not limited to polygyny only, as the AGBC submits; nor to conjugal unions that have been formalized through a ceremony or contract, as the AGC argues; nor to exploitative relationships, as West Coast LEAF would have the provision read down. Rather, s. 293 criminalizes all polygamous conjugal relationships, whatever the gender arrangement, however they are formed, and however consensual and beneficial they are to their participants.

5. In answer to Question 1 of the Reference questions, s. 293 constitutes grave breaches of the *Charter*. It is plain that the *effect* of s. 293 is to substantially interfere with religious belief and practice and so breach s. 2(a) of the *Charter*, but the Amicus also says that s. 293 violates freedom of religion in its *purpose*. The provision was enacted out of animus for the Mormon religious practice of plural marriage, and was intended to mandate for Canadians a marital norm – monogamy – that was inextricably bound up with mainstream Christianity.

6. Section 293 also discriminates against polygamists, contrary to s. 15 of the *Charter*. It does so, of course, on the ground of religion, and, perhaps more centrally, it also does so on the prohibited ground of marital status. Section 293 exacerbates polygamists' historical disadvantage by treating *all* polygamous relationships as wrong and *all* polygamists as criminals, regardless of the individual circumstances of either. The astonishing overbreadth of s. 293 – the criminalization of all polygamous relationships, whether any element of harm or impairment of consent is present or not – is probably the starkest example of stereotyping by any criminal law still in force in Canada.

7. Section 293 also violates polygamists' freedom of association under s. 2(d) of the *Charter*, as well as their liberty under s. 7. The law violates s. 2(d) by prohibiting the association of three or more persons in a conjugal relationship; while the law permits those individuals to engage in activities that are polygamous in nature, it prohibits them from associating together as a polygamous conjugal unit. In interfering on a matter of such profound personal importance, s. 293 also limits polygamists' liberty interests under s. 7. That limitation is contrary to the well-known principles of fundamental justice of arbitrariness, overbreadth and gross disproportionality, which raise considerations that are largely addressed by the analysis under the *Oakes* test. The principle of fundamental justice on which the Amicus focuses in this submission is the principle that consent is a defence to criminal responsibility, except in extreme circumstances, which do not arise here. The fact that s. 293 criminalizes all adult consensual relationships – and, indeed, specifically criminalizes *the act of consenting to polygamy* – reveals the perversity of this law.

8. The Amicus respectfully submits that these *Charter* breaches cannot be justified under s. 1. The true secular purpose of the law is to impose monogamy as the only acceptable conjugal form in Canada – a purpose that is a relic of an earlier time, and cannot be pressing and substantial in modern Canadian society. Nor is s. 293 justifiable according to the objectives that the Attorneys General advance – the avoidance of harm to individuals (especially women and children) and of harm to society. On the first of these, s. 293 is drastically overbroad, in that it criminalizes entirely consensual adult polygamous relationships; s. 293 is simply not calibrated in any way to the existence of *harm* within a polygamous relationship. The second category of harm the Attorneys allege – harms to society – are entirely speculative and marginal in the context of Canadian society, and do not merit the wholesale criminalization of all polygamous relationships.

9. In this Reference, the Court has heard evidence of polygamy being practised in an abusive and harmful manner, especially (indeed, almost exclusively) within the Fundamentalist Church of Jesus Christ of Latter-Day Saints (the "FLDS"). Some of the evidence has been shocking, and the Amicus shares the view of all right-thinking people that such abuse must be prosecuted and deterred. Sexual interference, sexual exploitation, sexual assault, child trafficking – none of these can be tolerated in Canadian society, whether they occur in the contexts of polygamy or monogamy, and none can be justified under the banner of freedom of religion.

10. Other evidence, however, has clearly shown that polygamy is often practised in a manner that entails no harm to anyone at all, but rather characterizes relationships of the utmost personal importance and benefit to their participants. The polyamorous witnesses, independent fundamentalist Mormons like Alina Darger, Anne Wilde and Mary Batchelor, and some of the FLDS witnesses all demonstrated that polygamy can and is practised in ways that are entirely supportive of human dignity and fulfilment.

11. This is the central fact that must be addressed in this Reference: there is a wide variety of polygamous conjugal relationships, spanning from abusive and exploitative, to beneficial, adult and consensual. Section 293 must be evaluated in light of the plain fact

that some polygamous conjugal relationships are consensual and positive for their participants, while other polygamous relationships are exploitative and abusive.

12. It is the refusal of s. 293 to respond to the individual characteristics of particular polygamous relationships (and particular participants within those relationships) that is the law's most fatal defect. Section 293 simply cannot accommodate the fact of positive polygamous conjugal relationships. The law is premised on the stereotypical assumption that all polygamous relationships – and all polygamists – are worthy of condemnation. A law of such shocking overbreadth and prejudice on a matter of such profound importance to individuals within polygamous relationships is utterly inconsistent with the values of the *Charter* and modern Canadian society and cannot be justified.

13. The submission below begins by setting out some of the relevant factual background in Part 2. It then turns in Part 3 to the interpretation of s. 293, followed by consideration of s. 293's breaches of the *Charter* in Part 4. A variety of factual matters related to the s. 1 analysis are addressed in the following three Parts: the harms the Defenders of s. 293 say are caused by polygamy (Part 5), the harms the Amicus says are caused by s. 293 (Part 6), and the effect on the incidence of polygamy that can fairly be attributed to its criminalization (Part 7). The s. 1 analysis is set out in Part 8. In Part 9, the Amicus offers his submissions on the proper response to abuse within polygamous relationships.

PART 2 - FACTUAL BACKGROUND

A. Overview

14. This Part of the submission addresses the history and context of two sections of the *Criminal Code*, R.S.C. 1985, c. C-46: ss. 290 and 293. Sections 290 and 293 provide as follows:

Section 290	**Section 293**
(1) Every one commits bigamy [*] who (*a*) in Canada, (i) being married, goes through a form of marriage[**] with another person, (ii) knowing that another person is married, goes through a form of marriage[**] with that person, or (iii) on the same day or simultaneously, goes through a form of marriage[**] with more than one person; or (*b*) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (*a*)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.... *s. 291(1): and is thereby guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. **s. 214 ..."form of marriage" includes a ceremony of marriage that is recognized as valid (*a*) by the law of the place where it was celebrated, or (*b*) by the law of the place where an accused is tried, notwithstanding that it is not recognized as valid by the law of the place where it was celebrated	(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. <u>Evidence in case of polygamy</u> (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.

15. While disagreeing on its scope, the parties agree that s. 293 extends to matters beyond those covered by s. 290.[1] Section 293, the later provision, would otherwise be superfluous. While nonetheless largely conflated in the evidence of the Attorneys General, the breaches caused by, and justification for, s. 293 are the matters relevant to this Reference.

16. As noted in the lefthand column above, committing the offence for which s. 290 provides requires going through a "form of marriage". The Law Reform Commission of Canada noted in its 1985 Working Paper on Bigamy that "[t]his is why the prohibition of bigamy seems justified, since by assuming all the ritual and official characteristics of marriage, such conduct destroys the meaning of the institution itself. Aside from its duplicity, a bigamous marriage is a valid marriage in all respects: this is what makes it a real threat to the institution...." The Commission continued: "...bigamy is committed by use of the forms of a proper marriage. It is only in this way that it can be a real threat to the institution of marriage. In bigamy, the solemnization of marriage is itself the subject-matter of the offence".[2]

17. Section 293 arose out of the Canadian government's concern in the late 1800s with polygamy among Mormons and, less immediately, the Muslims to whom they were analogized and First Nations peoples. The association between these groups (and no others) and polygamy is referenced by both Attorneys General in their Closings as having been of concern. In seeking to address its concerns, and mindful of enforcement difficulties which had beset anti-Mormon legislation in the United States, the government hit back with all-encompassing language that the Law Reform Commission of Canada has

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1 Reference Proceedings Transcript - Day 16 at p. 57 ll. 16-19 (Cook); Isbister Affidavit #1, Exhibit "A" Tab 16, p. 597 (Cook, Rebecca J. & Lisa M. Kelly, "Polygyny and Canada's Obligations under International Human Rights Law" (Ottawa: Department of Justice, 2006), at p. 1), Reference Exhibit 13; Isbister Affidavit #1, Exhibit "A" Tab 9, p. 348 (N. Bala *et al.*, *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research Reports – An International Review of Polygamy: Legal and Policy Implications for Canada*), Reference Exhibit 13.

2 Luca Affidavit #1, Exhibit "B" Tab 11, pp. 872, 876 (Law Reform Commission of Canada, Bigamy, Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985) at pp. 11, 15), Reference Exhibit 76.

described as "a monument of legal ponderousness"[3], and which today captures a wide variety of intimate relationships.

B. History of Section 290

18. Section 290 of the *Criminal Code* has a considerably longer history than s. 293. As the Law Reform Commission of Canada noted in its Working Paper on Bigamy in 1985, "[u]nlike bigamy, the offence of polygamy in section [293] of the *Criminal Code* was introduced into our law much more recently".[4]

19. The wording of s. 290 can be traced to English legislation of 1604 (1 Jac. 1.C.11, *An Acte to restrayne all persons from Marriage until their former Wyves and former Husbandes be deade*) (the "1604 Act"), which had provided:

> Forasmuch as divers evil disposed persons beinge maried, runnge out of one Countie into another, or into places where they are not knowen, and there become to be maried, havinge another husband or wife livinge, to the greate dishonour of God and utter undoinge of divers honest mens children and others; Be it therefore enacted by the King's Majestie, with the consent of the Lordes Spirituall and Temporall, and of the Comons in the present Parliament assembled, That if any person or persons within his Majesties Domynions of England and Wales, beinge maried, or which hereafter shall marie, doe at any tyme after the ende of the Session of this present Parliament, marrye any person or person, the former husband or wife beinge alive, that then everie such offence shalbe Felonie....[5] [emphasis added]

20. This wording reflects the central purposes with which such legislation has traditionally been associated. Professor Cook describes these central purposes, up to about a decade ago, as "protecting a monogamous form of marriage, or preventing fraud against persons or the state".[6] The introduction of the 1604 Act as a criminal prohibition

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3 Luca Affidavit #1, Exhibit "B" Tab 11, p. 883 (Law Reform Commission of Canada, Bigamy, Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985) at p. 22), Reference Exhibit 76.

4 Luca Affidavit #1, Exhibit "B" Tab 11, p. 883 (Law Reform Commission of Canada, *Bigamy*, Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985) at p. 22), Reference Exhibit 76.

5 Samuel Chapman, "Polygamy, Bigamy and Human Rights Law" (Xlibris, 2001) at p. 101, Reference Exhibit 122.

6 Expert Report of Rebecca Cook at paras. 17(a), 243(a), Reference Exhibit 42; Reference Proceedings Transcript - Day 16 at p. 26 ll. 45-47 - p. 27 ll. 1-2 (Cook).

"coincide[d] with the efforts undertaken in the early seventeenth century to regulate marriage".[7]

21. The successor to the 1604 Act in England was s. 22 of the *Offences against the Person Act 1828*, 9 Geo. IV. ch. 31, which provided:

> And be it enacted, That if any Person, being married, shall marry any other Person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, shall be guilty of Felony...[8]

22. Section 22 of England's *Offences against the Person Act 1828* "was the original of the first Canadian Act passed in 1841...".[9]

23. The wording of the offence remained similar in Canada's Revised Statutes of 1886. Section 4 of the *Act Offences relating to the Law of Marriage*, R.S.C. 1886, c. 161 provided:

> Every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada, or elsewhere, is guilty of felony...

24. The wording of s. 4 of that *Act* was expanded in 1890 – at the same time that what is now s. 293 was enacted – to provide:

> Every one who, being married, married any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, and every male person who, in Canada, simultaneously, or on the same day, marries more than one woman, is guilty of felony, and liable to seven years' imprisonment. [emphasis added]

Bigamy.

25. The underlined portion is now s. 290(1)(a)(iii) of the *Criminal Code*. In 1985, at the same time that it recommended repealing the entirety of s. 293 (a recommendation which will be returned to later in this submission), the Law Reform Commission of Canada recommended repealing what is now s. 290(1)(a)(iii).

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[7] Luca Affidavit #1, Exhibit "B" Tab 11, p. 874-875 (Law Reform Commission of Canada, *Bigamy*, Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985) at pp. 13-14), Reference Exhibit 76.

[8] Samuel Chapman, "Polygamy, Bigamy and Human Rights Law" (Xlibris, 2001) at p. 103, Reference Exhibit 122.

26. In a footnote to a 2001 report, *Beyond Conjugality*, the Law Commission of Canada suggested that consideration be given, more broadly, to the wholesale repeal of s. 290: "[t]here is a strong case that the consequences of bigamy [s. 290] are also better addressed through civil sanctions. Criminal prosecutions of bigamy are rare, and the penalties imposed on conviction modest".[10]

C. Comparable Western Democracies

27. Section 290(1)(a)(i) and (ii) of the *Criminal Code* are similar to legislation found in various countries whose culture and government are comparable to Canada's.[11] However, the countries listed below have nothing comparable to s. 293, other than (to a limited extent) parts of the United States. For that reason, the ensuing portions of these Background Facts (parts D, E and F) will turn particularly to the American history, as well as that of Canada. For that reason as well, and contrary to the Closings of the Attorneys General, Canada would distinguish itself from the Western mainstream not by repealing s. 293, but by preserving it.

(1) Other National Legislation

(a) England

28. In England, s. 22 of the *Offences against the Person Act 1828* (the effective predecessor to Canada's s. 290) was succeeded by s. 57 of the *Offences against the Person Act 1861*, which remains in force.[12] Section 57 again provides that "[w]hosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony...".[13]

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9 *R. v. Brierly* (1887), 14 O.R. 525 at 536-537, per Boyd C.; *In re the Criminal Code, 1892, sections 275-276, relating to Bigamy* (1897), 37 S.C.R. 461 at 486, per Girouard J.

10 Luca Affidavit #1, Exhibit "B" Tab 10, at pp. 819-820 (Law Commission of Canada, *Beyond Conjugality: Recognizing and supporting close personal and adult relationships* (Ottawa: Law Commission of Canada, 2001) at footnote 32), Reference Exhibit 76.

11 Expert Report of Rebecca Cook at para. 4(2), Reference Exhibit 42; Reference Proceedings Transcript - Day 16 at p. 56 ll. 28-31, p. 62 ll.33-43, p. 66 ll. 32-38 and ll. 45-47, p. 67 l. 1 (Cook).

12 Reference Proceedings Transcript - Day 16 at p. 57 ll. 27-47 - p. 58 ll. 1-3 (Cook).

13 Samuel Chapman, "Polygamy, Bigamy and Human Rights Law" (Xlibris, 2001) at p. 104, Reference Exhibit 122.

29. While s. 22 uses the words "shall marry", in contrast to the words "goes through a form of marriage" found in s. 290 of the *Criminal Code*, the English wording has been construed to mean essentially the same thing: "...the words 'shall marry another person' may well be taken to mean, shall 'go through the form and ceremony of marriage with another person'".[14]

30. Professor Witte notes in his report that while this provision remains in place in England, "the crime of bigamy or polygamy is now rarely prosecuted as a separate criminal offense in England". He continues: "Instead, polygamy is usually dealt with as a civil offense yielding damages to the innocent spousal victim(s) and leading to annulment of the putative marriage(s)".[15]

31. In England, s. 57 of the *Offences against the Person Act 1861* was interpreted in a case called *R. v. Taylor*, [1950] 2 K.B. 368, which deals not with simultaneous conjugal unions but with successive ceremonies of marriage, each of which marked entry into what appeared to be a monogamous union.[16] *Taylor* makes clear that s. 57 of the *Offences Against the Person Act 1861* applies not simply to a "second" marriage ("bi") but also to third, fourth and later marriages ("poly").[17] However, the author on whom Professor Cook relies in her expert report for discussion of the English legislation notes that "[i]t is clear that if [polygamists] don't use the legal formalities that normally produce legal marriage, then they commit no offence". In his view, although this is more controversial, "[i]t is also clear that if they do go through those formalities, but already have a potentially-polygamous marriage,...they still do not commit an offence" (because potentially polygamous marriages may not be recognized as valid for this purpose).[18] Thus "many polygamists could not be guilty of the offence of bigamy, even if they tried".[19]

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[14] *R. v. Howard* (1965), 54 W.W.R. 484, 1965 CarswellBC 151 at para. 14 (Co. Ct.), citing *R. v. Allen* (1872) LR 1 C.C.R. 367.

[15] Expert Report of John Witte at para 315, Reference Exhibit 43.

[16] See also Reference Proceedings Transcript - Day 16 at p. 58 ll. 4-34 (Cook).

[17] Expert Report of Rebecca Cook, "State Obligations to Eliminate Polygyny under International Law" at para. 88, Reference Exhibit 42.

[18] The AGBC's Closing sets out some of the debate associated with this proposition, at footnote 33, with authorities older than the text on which Professor Cook relies staking out positions on both sides of the debate. Agreeing with Chapman, *Archibold's Pleading, Evidence & Practice in Criminal Cases*, 32nd ed. provides that the first marriage, for a bigamy charge, "must also have been a monogamous

32. Section 57 is the only criminal prohibition touching on this issue in England.[20] Neither in England nor elsewhere in the United Kingdom is "[t]he act of cohabitation with more than one marriage partner...an offence...and there is no evidence that it has ever been so".[21]

33. In England, Glanville Williams, the leading legal scholar, recommended repealing s. 57 and relying instead on existing offences which would address (a) bigamy involving the deceit of a female spouse, which amounts to "quasi-rape" and is "the only serious form of bigamy"; and (b) falsification of public records, which is "[t]he only social mischief that is necessarily involved in every case of bigamy".[22]

(b) Australia

34. Australia has federal legislation pertaining to this subject matter: s. 94 of its *Marriage Act 1861* (Cth).[23] Section 94 – which is entitled "Bigamy" – provides that "[a] person who is married shall not go through a form or ceremony of marriage with any person" and "[a] person shall not go through a form or ceremony of marriage with a person who is married knowing or having reasonable grounds to believe that the latter person is married". Professor Cook agrees that, as in England but unlike in Canada, there is just this one section (s. 94) that deals with the issue, rather than two.[24]

35. As part of a report that Professor Cook described (for other reasons) as "very important",[25] the Australian Law Reform Commission described the "critical act" in the offence of "bigamy" as "going through a form or ceremony of marriage which purported to be a ceremony of marriage under Australian law". The Law Reform Commission then recommended that "further consideration should be given to the question whether the

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marriage as understood in Christian countries" (Luca Affidavit #2, Exhibit "A" Tab B at 1842, 1851). That debate does not, however, affect the proposition in the earlier sentence.

19 Samuel Chapman, "Polygamy, Bigamy and Human Rights Law" (Xlibris, 2001) at 95, Reference Exhibit 122.

20 Reference Proceedings Transcript - Day 16 at p. 57 ll. 27-47 - p. 58 ll. 1-3 (Cook).

21 Samuel Chapman, "Polygamy, Bigamy and Human Rights Law" (Xlibris, 2001) at p. 95, Reference Exhibit 122.

22 Glanville Williams, "Bigamy and the Third Marriage" (1950) 13 Modern Law Review 417 at 424-426.

23 Expert Report of Rebecca Cook at footnote 121, Reference Exhibit 42.

24 Reference Proceedings Transcript - Day 16 at p. 63 ll. 23-47 - p. 64 ll. 1-4 (Cook).

25 Reference Proceedings Transcript - Day 16 at p. 27 ll. 12-14 (Cook).

policy that a person may not marry legally while already married should be enforced by a criminal offence"[26] (it also recommended against *legalizing* polygamy – Professor Cook's point[27] – which is not the issue in this Reference). The Law Reform Commission noted:

> ....It seems doubtful whether the harm done to the other party, especially in cases where that party has not been deceived, is such as to require an additional criminal sanction. It can be argued that the offence of bigamy itself is therefore no longer necessary to deter the conduct against which it is directed. It creates anomalies; although the marriage is not valid, the parties may be in a de facto relationship and certain consequences may follow from this.[28]

(c) Continental Europe

36. Legislation in France, Belgium and Luxembourg provides that one cannot enter into a second marriage before dissolution of the first[29] (Article 147 of their respective Civil Codes states: "On ne peut contracter un second mariage avant la dissolution du premier".[30]) This is the only relevant statutory provision in each country.[31]

37. While the AGBC suggests in his Closing that there was a failed French experiment in decriminalization (and then recriminalization), what appears to have changed over time is France's approach in relation to immigration restrictions on individuals who had married polygamously abroad, and to the treatment of those individuals and families once in France.[32]

38. Legislation in Switzerland provides that everyone who wants to remarry must establish that his or her prior marriage has been annulled or dissolved[33] (according to Article 96 of the Swiss Civil Code: "Toute personne qui veut se remarier doit établir que

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[26] *Multiculturalism and the Law*, Final Paper – ALRC 57 (Sydney: Australian Law Reform Commission, 1992) at p. 95, Reference Exhibit 124.
[27] Expert Report of Rebecca Cook at para. 83, Reference Exhibit 42; Reference Proceedings Transcript - Day 16 at p. 65 ll. 4-17 (Cook).
[28] *Multiculturalism and the Law*, Final Paper – ALRC 57 (Sydney: Australian Law Reform Commission, 1992) at p. 95, Reference Exhibit 124.
[29] Reference Proceedings Transcript - Day 16 at p. 67 ll. 32-42 (Cook).
[30] Expert Report of Rebecca Cook at para. 84, Reference Exhibit 42.
[31] Reference Proceedings Transcript - Day 16 at p. 67 ll. 2-6 (Cook).
[32] Expert Report of Rebecca Cook at paras. 128-133, Reference Exhibit 42.
[33] Reference Proceedings Transcript - Day 16 at p. 67 ll. 43-47 - p. 68 ll. 1-4 (Cook).

son précédent mariage a été annulé ou dissous"[34]). Again, this is the only relevant statutory provision in Switzerland.[35]

(d) United States

39. Among Western democracies comparable to Canada, the provisions most similar to s. 293 of Canada's *Criminal Code* are found in parts of the United States. As in Canada, however, these provisions seem to have emerged relatively late. In this regard, Professor Witte testified that it was "the English common law formulations in the 1604 statute issued by James the First's Parliament" that "were repeated in the American colonies".[36] As noted above, that formulation is the antecedent of s. 290 of the *Criminal Code*, not s. 293.

40. As late as the *Morrill Act* of 1862, which was the first Congressional attempt to legislate against Mormon polygamy and is returned to in more detail below under subheading E, wording similar to that still found in s. 290 of the *Criminal Code* was used in the United States. The *Morrill Act* provided:

> ...every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall...be adjudged guilty of bigamy.

41. This wording became part of s. 5352 of the Revised Statutes[37] in the United States. As returned to below in more detail, after difficulties in enforcing this provision against Mormons, s. 5352 was amended through the *Edmunds Act*, in 1882, to provide:

> Every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy...
>
> and
>
> ... if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he

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[34] Expert Report of Rebecca Cook at para. 84, Reference Exhibit 42.
[35] Reference Proceedings Transcript - Day 16 at p. 67 ll. 2-6 (Cook).
[36] Reference Proceedings Transcript – Day 18 at p. 43 at ll. 14-21 (Witte).
[37] *Reynolds v. United States*, 98 U.S. 145 (LEXIS p. 1).

> shall be deemed guilty of a misdemeanour, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court. [emphasis added]

42. As noted at para. 24 above, in 1890 a reference to marrying simultaneously (found in the first part of the *Edmunds Act* quoted above) also came to be incorporated into what is now s. 290(1)(a)(iii) of the *Criminal Code*. At the same time, s. 293 was enacted, referring to cohabitation (in any kind of conjugal union) as being among the means by which the offence under that section could be committed:

> ..."(*d*). Lives, cohabits, agrees to live or to cohabit, or consents to live or to cohabit, in any kind of conjugal union with a person who is married or with a person who lives or cohabits with another or others in any kind of conjugal union

43. Presently in the United States, the criminal provisions in this subject area which are somewhat comparable to s. 293 appear to be limited to eleven states that have gone beyond more typical bigamy provisions like s. 290. The eleven states have statutory provisions that are worded expansively to criminalize either marriage or cohabitation by (and sometimes with) a person who is already married.[38] One of those eleven states is Utah, whose Criminal Code provides, in s. 76-7-101, that "[a] person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, he purports to marry another person or cohabits with another person."[39] (Utah also criminalizes adultery[40] and fornication,[41] which Canada does not.) Although not expressly using the word "cohabitation", another example is Texas, where "a legally married person commits a crime if that person: (A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that

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[38] Reference Proceedings Transcript – Day 25 at p. 14 ll. 32-34 (Batchelor). Certain additional states require entry into two marriages but, if one of them was outside the state, provide for liability under the state statute if followed by cohabitation in the state.

[39] Isbister Affidavit #1, Exhibit "C" Tab 1 (Altman, Irwin & Joseph Ginat, *Polygamous Families in Contemporary Society* (Cambridge University Press, 1996) at 52), Reference Exhibit 13.

[40] "76-7-103. Adultery. (1) A married person commits adultery when he voluntarily has sexual intercourse with a person other than his spouse. (2) Adultery is a class B misdemeanor."

[41] "76-7-104. Fornication. (1) Any unmarried person who shall voluntarily engage in sexual intercourse with another is guilty of fornication. (2) Fornication is a class B misdemeanor."

would, but for the actor's prior marriage, constitute a marriage; or (B) lives with a person other than his spouse in this state under the appearance of being married".[42]

44. When Professor Cook gives examples of "polygamy" being prosecuted in the United States under bigamy provisions, she refers to Utah, which has the expansive wording of s. 76-7-101. Even in Utah, however, prosecutions under this section have been infrequent.[43] As noted in *The Primer: A Guidebook for Law Enforcement and Human Services Agencies who offer Assistance to Fundamentalist Mormon Families* issued in August 2009 by the Offices of the Attorneys General of Utah and Arizona[44] (the "Primer"), "[i]t is ...rare for consenting adult polygamists to be charged with violations of bigamy statutes, unless other crimes such as incest or unlawful sex with minors are implicated". This is a conscious policy: the Primer notes that both Utah and Arizona "have decided to focus law enforcement efforts on crimes within the polygamous communities that involve child abuse, domestic violence and fraud" (the Primer notes that it "does not presume that more crimes are committed in fundamentalist communities than elsewhere, rather that victims in this culture may face more barriers when seeking help").[45] Prior to the 2001 prosecution of Tom Green, who (like Rod Holm, whose prosecution is also

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[42] Isbister Affidavit #1, Exhibit "A" Tab 21, p. 936 (Guggenheim, Martin, "Texas Polygamy and Child Welfare" (2009) 46:3 Houston Law Review 101-51, at p. 120), Reference Exhibit 13. The Model Penal Code, which is not itself law, distinguishes between "bigamy", which occurs when a "married person...contracts or purports to contract another marriage" (Model Penal Code §230.1(1)(ALI 2000)), and "polygamy", a felony of which "[a] person is guilty of...if he marries or cohabits with more than one spouse at a time in purported exercise of the right of plural marriage. The offense is a continuing one until all cohabitation and claim of marriage with more than one spouse terminates" (§230.1(2)). The Model Penal Code "defines cohabit as 'to live together under the representation or appearance of being married.' Model Penal Code § 230.2" (Isbister Affidavit #1, Exhibit "A" Tab 33, p. 1411 (Strassberg, Maura I., "Symposium: Lawyering for the Mentally Ill: The Crime of Polygamy" (2003) 12-Temple Political & Civil Rights Law Review 353 at p. 420), Reference Exhibit 13; Martha Bailey and Amy J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges For Western Law and Policy*, Chapter 5, Reference Exhibit 126).

[43] The AGBC's assertion that the State of Utah has "been active in prosecuting polygamy there" is inaccurate (Closing at para. 102). The well-cited cases of *Green* and *Holm* both involved an additional factor, an underage marriage. See also the discussion in *Bronson v. Swensen*, 500 F.3d 1099 (2007): "[t]he defendants in these prosecutions had committed *independent* crimes" and "therefore involved remarkably different facts than...where...the plaintiffs are all adults and profess a desire to enter into a consensual polygamous relationship".

[44] Wilde Affidavit #1, Exhibit "D" (Manual, "The Primer - Helping Victims of Domestic Violence and Child Abuse in Polygamous Communities" at p. 40), Reference Exhibit 67.

[45] Wilde Affidavit #1, Exhibit "D" (Manual, "The Primer - Helping Victims of Domestic Violence and Child Abuse in Polygamous Communities" at pp. 4-5), Reference Exhibit 67.

highlighted by Professor Cook) had committed "independent crimes",[46] it appears that the last prosecution for polygamy in Utah had taken place in 1953, the same year as a raid on the FLDS community in Short Creek.[47] Arizona's Attorney General has called the Short Creek raid a "shameful mistake"[48] and the Utah Attorney General's Office has called it "a disgrace".[49]

45. More generally, Professor Witte has noted that the "polygamy laws on the books" of all American states (he equates polygamy and bigamy) "are largely dead letters".[50]

46. After referencing the Utah bigamy provision, Professor Turley, the Shapiro-Chair in Public Interest Law at George Washington University Law School[51] notes in his expert report:

> 122. Under such provisions, the existence of a private, undisclosed union is sufficient to trigger criminal prosecution. It is not the recognition but the existence of such plural unions that is the focus of the laws.
>
> 123. The closest analogies to these laws are the recently struck-down statutes in the United States where some states criminalized homosexual relations. In these cases, the gay couples did not seek recognition from the state. Rather the state sought to prosecute couples for their chosen lifestyles and relationships. After *Lawrence v. Texas*, 539 U.S. 558 (2003), those laws have been struck down in the United States.

47. Correspondingly, when Utah's bigamy provision was recently applied in prosecuting a Mormon polygamist in *State v. Holm*, 137 P.3d 726 (2006), Chief Justice Durham wrote, in a powerful dissent returned to later in this submission, that the state cannot "constitutionally criminalize private religiously motivated consensual relationships between adults" and pointed to the prosecution of other crimes as the route to addressing state concerns. Both on constitutional and other grounds, there are strong advocates of decriminalization in the United States.

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[46] *Bronson v. Swensen*, 500 F.3d 1099 (2007).

[47] Isbister Affidavit #1, Exhibit "A" Tab 7, p. 253 (Bala, Nicholas & Rebecca Jaremko Bromwich, "Context and Inclusivity in Canada's Evolving Definition of the Family" (2002) 16 International Journal of Law, Policy and the Family 145-80 at p. 167), Reference Exhibit 13.

[48] Wilde Affidavit #1, Exhibit "C" (Nancy Perkins, "Polygamists get Town Hall meeting" (March 4, 2005), Reference Exhibit 67.

[49] Wilde Affidavit #1, Exhibit "C" (Mark Havines, "Psychotherapist says polygamous Mormons, Amish have similarities", The Salt Lake Tribune (June 19, 2010)), Reference Exhibit 67.

[50] Reference Proceedings Transcript – Day 18 at p. 78 at ll. 31-47 and p. 79 at ll. 1-47 (Witte).

48. Further, while Professor Turley regards the Utah bigamy statute as probably the "closest statute to the conjugal union provision in the United States", he sees the "conjugal union language" found in s. 293 of Canada's *Criminal Code* as exceptionally broad. As Professor Turley writes in his expert report:

> 120. The conjugal union language sweeps exceptionally broadly to encompass acts outside of polygamous relationships, including casual, consensual relationships. In the United States, such a provision would be presumptively unconstitutional and its enforcement would raise selective prosecution concerns. [emphasis added]

(e) Other Countries

49. Professor Cook makes broad comments suggesting that polygamy has been criminalized in other countries. It is apparent from her reliance on the countries above in her report as instances of criminalizing polygamy that she does not mean criminalization along the lines of s. 293 of the *Criminal Code* and that (as she said once challenged on cross-examination) her study of other countries was not in any depth.[52] Further, as returned to below under the discussion of international law, it appears that a substantial number of countries still condone polygamy.

50. For his part, Professor Witte, another of the experts for the AGC who approaches the issues with a broad brush, had not systematically studied before the history of the treatment of polygamy.[53] Like Professor Cook, he conflated throughout his opinion the concepts of bigamy and polygamy, concentrated on polygyny, and while seeming in his report to address the law of various countries, restricted the countries that he addressed in his testimony.[54] He agreed he was not an expert in Canadian law or legal history.[55]

(2) Setting Canadian Policy

51. It is apparent from the above that Canada's current position falls outside the Western norm and that it would distinguish itself by *preserving*, not by repealing, s. 293.

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[51] Turley Affidavit #1 at paras. 1-3, Reference Exhibit 74.
[52] Reference Proceedings Transcript – Day 16 at p. 62 ll. 25-32, p. 76 ll. 31-33, p. 77 ll. 22-27 (Cook).
[53] Reference Proceedings Transcript – Day 18 at p. 14 ll. 9-46 (Witte).
[54] Reference Proceedings Transcript – Day 18 p. 34 at ll. 12-29, p. 64 ll. 26-27, p. 66 ll. 18-26 (Witte).
[55] Reference Proceedings Transcript – Day 18 at p. 14 ll. 42-46 (Witte).

Even if this were not the case, however, and subject to the issue of international law returned to under Part 5(B)(4) below, Canada can set its own course.

52. For example, distinguishing Canada from the United States and various other jurisdictions, Parliament decriminalized homosexual activity in 1969. In the 1970s, Parliament removed homosexuals from the list of classes of persons prohibited from being admitted to Canada. In 1995, the Supreme Court of Canada held that "sexual orientation" is an analogous ground of discrimination per s. 15 of the *Charter*,[56] and in 2002 and 2003, the Ontario[57] and BC[58] Courts of Appeal held that the common law definition of marriage as a union between one man and one woman violates s. 15(1) of the *Charter*. In 2005, Parliament extended the legal capacity for marriage for civil purposes to same-sex couples,[59] and made consequential amendments to eight other statues to ensure equal access for same-sex couples to the civil effects of marriage and divorce.

D. Mormonism and Plural Marriage

53. The enactment of s. 293 and its American antecedents occurred in the context of concern over the Mormon practice of polygamy, and to a lesser extent, over Muslim and Aboriginal practices. While the legislation was drafted in this context, however, the "moral panic" of the day did not permit much refinement.

54. The Mormon practice of polygamy arose in the United States in 1830s, but first became publicly known in the early 1850s, leading to a series of federal statutes (notably the *Morrill Act* of 1862, the *Edmunds Act* of 1882 and the *Edmunds-Tucker Act* of 1887) and prosecutions. Canada's s. 293 was enacted after Mormon settlement commenced in Alberta, which occurred after passage of the *Edmunds-Tucker Act*. This history is reviewed in greater detail below.

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[56] *M. v. H.*, [1999] 2 S.C.R. 3.
[57] *Halpern v. Canada (A.G.)* (2003), 65 O.R. (3d) 161 (C.A.).
[58] *Barbeau v. British Columbia*, 2003 BCCA 251.
[59] *Civil Marriage Act*, S.C. 2005, c. 33.

55. In 1830, the Church of Jesus Christ of Latter-day Saints (the "LDS Church" or "Mormon Church") was established by its first Prophet, Joseph Smith ("Smith"), in Fayette, New York.[60] While not originally associated with polygamy, the Mormon Church became unpopular early on because of such traits as "aggressive proselytizing", members' "apparently unquestioning obedience" of Smith, and bloc voting.[61]

56. This "aggressive proselytizing" was of a religion that was (and in some quarters still is) perceived as not quite Christian. As noted by the Conseil du statut de la femme in its November 2010 Opinion on "Polygamy and the Rights of Women", while the Mormon Church "claims to be a form of Christianity", the "doctrine of Mormonism differs from that of Christianity".[62] For example, Smith "taught that God and man are of the same nature". In this regard, he claimed "that God is not the creator of all things and that He does not have an absolute power", and that "a man could also become a god by 'exaltation'".[63] In addition, Mormons believe in "both pre-existence and life after death", in contrast to "Christian beliefs that the soul comes to the body at birth and leaves after death".[64]

57. Soon after its founding, "[Morminism's] adherents fled West, literally driven by mobs. One Presbyterian minister dubbed them 'the common enemies of mankind [who] ought to be destroyed.'" In October 1838, the Governor of Missouri called out the state militia, writing: 'The Mormons must be treated as enemies, and must be exterminated'".[65]

58. By the 1840s, the Mormons were based in Nauvoo, Illinois (where Smith was ultimately murdered, by a mob, in 1844). In 1843, Smith recorded in writing – as part of s. 132 of the *Doctrine and Covenants*, one of Mormonism's most sacred books – a revelation on "celestial marriage" which he had apparently received in 1831 and to some extent followed in the interim. That revelation provided for the practice of plural

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[60] Walsh Affidavit #1 at paras. 5, 7, Reference Exhibit 77.
[61] Luca Affidavit #1, Exhibit "I" Tab 1, (Gordon, Sarah Barringer, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America (Chapel Hill, NC: University of North Carolina Press, 2002 at pp. 24-25), Reference Exhibit 76.
[62] Gabay Affidavit #1, Exhibit "A" at p. 11, Reference Exhibit 152.
[63] Gabay Affidavit #1, Exhibit "A" at pp. 11-12, Reference Exhibit 152.
[64] Gabay Affidavit #1, Exhibit "A" at p. 12, Reference Exhibit 152.
[65] Lawrence Tribe, *American Constitutional Law*, 2d ed. (New York: The Foundation Press, Inc., 1988) at p. 1271, footnotes omitted.

marriage.[66] The revelation remained closely held, however, until 1852, when an elder of the Mormon Church, Orson Pratt, "read out Section 132 and publicly declared that polygamy was a central principle of Mormonism".[67]

59. Mormon celestial or plural marriage is not civil marriage, and is not intended to be. In the context of his evidence on the FLDS, Dr. Walsh attested:

> (a) Civil marriage and celestial marriage are separate and distinct relationships that have no correlation with one another.
>
> (b) It is not required, and it is nowhere contemplated, that the participants in a "celestial marriage" will tell others that their union is or should be recognized as a matter of civil law, or hold themselves out or otherwise pretend to have entered into a marriage that is recognized as a matter of civil law.
>
> (c) Government recognition or sanction for celestial marriage is not desired or sought.
>
> (d) No marriage sanctioned by civil law is viewed as equivalent to a celestial marriage.
>
> (e) If a legal marriage is desired, a separate ceremony that is consistent with government guidelines for that type of contractual relationship is sought.[68]

60. In 1847, Mormons migrated to the Great Salt Lake Basin, centered in Utah, "essentially...expelled from the United States due to their conflict with traditional Christianity".[69] In 1850, Utah was admitted in the United States as a territory, but not as a

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[66] Isbister Affidavit #1, Exhibit C Tab 2 (M. Bailey and A.J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy*, (Santa Barbara Calif.: Praeger, 2010) at p. 82), Reference Exhibit 13.

[67] Isbister Affidavit #1, Exhibit C Tab 2 (M. Bailey and A.J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy*, (Santa Barbara Calif.: Praeger, 2010) at pp. 83-84), Reference Exhibit 13.

[68] Walsh Affidavit #1 at paras. 31-32, 35, 39, Reference Exhibit 77. While in practical application and leadership there is considerable evidence related to FLDS divergence from other fundamentalist Mormon groups, on these doctrinal features of plural unions there appears to be none.

[69] Walsh Affidavit #1 at para. 17, Reference Exhibit 77.

state.[70] Although Mormons had petitioned for statehood in 1849 and continued to do so in the following decades, they were unsuccessful until 1896. In the meantime, the federal government could pass laws for the territory on issues that would otherwise fall within state responsibility.[71]

61. At this time polygamy in the sense espoused by Mormons was largely foreign to Western countries, although some form of non-monogamy also appears to have been practised by some Aboriginal populations:

> Bigamy, going through a second marriage ceremony when the first spouse was still living (and usually without the consent or knowledge of one or both spouses), has been a crime in Western countries for a long time. On the other hand, the concept of polygamy—a man maintaining more than one wife and family unit at a time, usually with the consent and knowledge of the other wives—was largely foreign to its citizens. Polygamy was known to North Americans largely as a practice in other cultures and in the Old Testament. Because it was so foreign, most of the laws banning this practice were enacted in reaction to the Mormon practice, unlike bigamy laws, which had a much longer history in the West....[72] [emphasis added]

62. In this context, Mormons were analogized to Muslims and polygamy to Middle Eastern "harems": "Islamophobic sentiment infuses nineteenth-century anti-Mormon discourses, and it was a critical component of the campaigns that effectively constituted polygamy as an imminent threat to the nation's moral and racial identity":

> From the moment that the exclusively white members of the [Mormon] Church came to the defense of polygamy, it was incessantly analogized to "Mohamedism" (as a form of false prophecy that has led entire races astray), as it was to the sexual excesses of Middle Eastern "harems." The emergent anti-Mormon stereotypes drew their critical force from a Christian sexual morality of monogamous restraint, which was made righteous by way of its difference from the sexual excesses of uncivilized and barbaric others, the evil of whom has been historically metaphorized through sexual transgression....

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[70] Luca Affidavit #1, Exhibit "I" Tab 1, (Gordon, Sarah Barringer, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America (Chapel Hill, NC: University of North Carolina Press, 2002 at pp. 25-26), Reference Exhibit 76.

[71] Isbister Affidavit #1, Exhibit C Tab 2 (M. Bailey and A.J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy*, (Santa Barbara Calif.: Praeger, 2010) at p. 84), Reference Exhibit 13.

[72] Isbister Affidavit #1, Exhibit C Tab 2 (M. Bailey and A.J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy*, (Santa Barbara Calif.: Praeger, 2010) at p. 164), Reference Exhibit 13.

....

> The pervasiveness of this rhetoric and the effectiveness of these particular associations between Mormonism and "Mohamedanism" should not be underestimated. They appear everywhere, from lurid fictional tales to congressional speeches....[73]

63. Polygamy was certainly a departure from the Christian ideal of marriage: the monogamous marriage of one man and one woman.[74] This is evident from the discussion in *Hyde v. Hyde and Woodmansee*, [1861-1873] All E.R. Rep. 175, an English case which dealt with polygamy in the Mormon faith. The Court in that case did not suggest that polygamy was a criminal offence, but refused to extend to Mr. Hyde the benefits of the English divorce law as the marriage he had sought to end, while not actually polygamous, could have become so. In the *Hyde* case, the Court noted that "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others". When language from *Hyde* was put to Professor Witte on cross-examination, he noted that "[t]he Court is duplicating language that is commonplace in American jurisprudence at the time".[75]

64. As a unanimous Supreme Court of Canada held in *Reference re Same-Sex Marriage*,[76] "[t]he reference to 'Christendom' is telling. *Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable". Indeed, Professor Witte has previously attested, in an affidavit put before the Supreme Court of Canada in *Reference re Same-Sex Marriage*, to the "overwhelming influence of religion upon the understanding of marriage and marriage law within the western tradition". When asked about it on cross-examination in this proceeding, he said he continues to agree

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[73] Luca Affidavit #1, Exhibit "A" Tab 3, pp. 58-60 (Margaret Denike, "The Racialization of White Man's Polygamy" (2010) 25:4 Hypatia 852-74 at pp.12-14), Reference Exhibit 76.

[74] See, for example, Isbister Affidavit #1, Exhibit "A" Tab 7, p. 234 (Bala, Nicholas & Rebecca Jaremko Bromwich, "Context and Inclusivity in Canada's Evolving Definition of the Family" (2002) 16 International Journal of Law, Policy and the Family 145-80 at p. 148), Reference Exhibit 13; Isbister Affidavit #1, Exhibit "A" Tab 9, p. 348 (Bala, Nicholas, et al., "An International Review of Polygamy: Legal and Policy Implications for Canada" in Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports (Ottawa: Status of Women Canada, 2005) at p. 28), Reference Exhibit 13. See also Reference Proceedings Transcript – Day 11 p. 91 ll. 8-23 (Henrich).

[75] Reference Proceedings Transcript – Day 18 at p. 70 ll. 7-47, p. 71 ll. 1-4 (Witte).

[76] *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 at para. 22.

with that statement.[77] Professor Drummond also refers in her report to the "religious thrust" of the common law definition of marriage.[78]

E. Statutory Evolution in the United States

(1) Morrill Act

65. Among those associating Mormonism with "Mohamedianism" were Justin Morrill, an American congressman who sponsored the first of a series of anti-polygamy federal statutes in the United States, the *Morrill Act*. "Morrill labelled the 'whole system' of Mormon polygamy 'Mohammedan barbarism revolting to the civilized world'..."[79]

66. The *Morrill Act* was passed in 1862. In the wording referenced at para. 40 which became part of s. 5352 of the Revised Statutes,[80] the *Morrill Act* provided that "every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall...be adjudged guilty of bigamy". Further, the *Morrill Act* contained provisions "which limited the power of two institutions central to the governance of Mormon Utah: the Territorial Legislative Assembly and the [Mormon] Church".[81]

67. Additional US legislation targeting Mormon polygamy was proposed in the course of the 1860s and 1870s. The *Poland Act,* in 1874, "further constrained local [largely Mormon-held] powers", although the definition of the offence remained as in the *Morrill Act*.[82]

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[77] Reference Proceedings Transcript – Day 18 at p. 74 at ll. 29-44 (Witte).
[78] Expert Report of Susan Drummond at para. 45, Reference Exhibit 65.
[79] Luca Affidavit #1, Exhibit "A" Tab 3, pp. 59-60 (Margaret Denike, "The Racialization of White Man's Polygamy" (2010) 25:4 Hypatia 852-74, at pp. 13-14), Reference Exhibit 76.
[80] *Reynolds v. United States*, 98 U.S. 145 (LEXIS p. 1).
[81] Isbister Affidavit #1, Exhibit "C" Tab 2 (Bailey, M. and A.J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy,* (Santa Barbara, Calif.: Praeger, 2010) at p. 86), Reference Exhibit 13.
[82] Isbister Affidavit #1, Exhibit "C" Tab 2 (Bailey, M. & A.J. Kaufman, Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy (Santa Barbara, Calif.: Praeger, 2010 at pp. 86-87), Reference Exhibit 13.

(2) Reynolds v. United States

68. Also in 1874, Mormon leaders decided to test the *Morrill Act*, arranging for George Reynolds, a loyal member of the Mormon Church, to be indicted.[83] The nature of the marriage sufficient to fall within the wording of the *Morrill Act* does not seem to have been at issue: it appears that Mr. Reynolds either "voluntarily provided the details of his polygamous marriage"[84] and/or, surprised by the appearance and testimony in the trial court of Mr. Reynolds' second wife, defence lawyers conceded a marriage within the terms of the prohibition to have been proved.[85]

69. Ultimately, the case came before the US Supreme Court in 1879. The Court considered whether bigamy was within the legislative power of Congress (the Court found that it was), and whether those "who make polygamy a part of their religion are excepted from the operation of the statute" (the Court found that they were not). A vigorous belief-practice distinction was part of the decision: "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices".

70. While the Court's conclusion was not based on overtly Christian reasoning, American constitutional scholar Lawrence Tribe has analyzed *Reynolds* in the following manner, in his leading treatise *American Constitutional Law*[86]:

> States often pursue – and the Court has often accepted as compelling – what might be termed diffuse societal interests. Many such goals, which seemed proper and fundamental in a religiously homogeneous society, now seem more dubious – particularly when the goal is defined to forbid any exemptions. Probably, as the *Braunfeld* Court held, enforced Sunday togetherness is a

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[83] Isbister Affidavit #1, Exhibit "C" Tab 2 (Bailey, M. & A.J. Kaufman, Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy (Santa Barbara, Calif.: Praeger, 2010 at p. 87), Reference Exhibit 13.

[84] Isbister Affidavit #1, Exhibit "C" Tab 2 (Bailey, M. & A.J. Kaufman, Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy (Santa Barbara, Calif.: Praeger, 2010 at p. 87), Reference Exhibit 13.

[85] Luca Affidavit #1, Exhibit "I" Tab 1 (Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill, NC: University of North Carolina Press, 2002) at p. 115), Reference Exhibit 76. There was, however, an issue as to whether the testimony of the second wife, which had been obtained at a prior trial, could be used in the new trial which ultimately progressed to the US Supreme Court.

[86] Lawrence Tribe, *American Constitutional Law*, 2d ed. (New York: The Foundation Press, Inc., 1988) at pp. 1270-1271.

> legitimate state goal. However, it is clear that the state's interest in *absolute* Sunday togetherness, without exemptions for Sabbatarians, cannot meet the modern free exercise test, especially given that the Sunday closing laws themselves provide for numerous exemptions.
>
> Similar problems are presented by *Reynolds v. United States*, in which the Court affirmed a polygamy conviction over the Mormon defendant's religious objection. The *Reynolds* Court perceived a sufficient secular purpose in preserving monogamous marriage and preventing exploitation of women. Few decisions better illustrate how amorphous goals may serve to mask religious persecution. The early history of the Mormons in this country is in large part a chronicle of such persecution....The anti-polygamy statutes are best understood as parts of the same stained fabric. Born in the same era and of the same fears, they should have been strictly scrutinized. [emphasis added]

71. In *Reynolds*, in language distinguishing Mormonism from the Christian mainstream, the Court noted that "until the establishment of the Mormon Church, [polygamy] was almost exclusively a feature of the life of Asiatic and of African people".[87] One commentator whose work is included in the Brandeis Brief filed by the Defenders has noted that "[b]ehind its legal sophistication, the majority opinion in *Reynolds* displayed a disdain for the Mormon church that bordered on contempt", that the prohibition of polygamy was part of "the United States' undeclared war on the Mormon Church", and that "[t]he anti-polygamy laws in *Reynolds*....were based on hatred of the Mormon Church.[88]

72. The US Supreme Court's reasoning in *Reynolds* was centrally underpinned by the work of Francis Lieber, an immigrant born in an increasingly racist Germany, a former slave owner, and (as returned to below) an opponent of women's suffrage.[89] Lieber also had very particular racial views:

> Lieber was among the political theorists to advance the popular idea that the "Anglican race," as he called it, "exhibited special traits that gave it the right to lead and control the world," and among those who promoted what Horsman calls the "aggressive racial mission of the American Anglo Saxons" (173), to *make* "our race" Anglo-Saxon or Anglo-Norman and to define non-Americans

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87 *Reynolds v. United States*, 98 U.S. 145 at 164 (1878).

88 Isbister Affidavit #1, Exhibit "A" Tab 20, pp. 895, 902, 914 (Gillett, Todd M., "The Absolution of Reynolds: The Constitutionality of Religious Polygamy" (2000) 8 William & Mary Bill of Rights Journal 497-534 at pp. 514, 521, 533), Reference Exhibit 13.

89 Luca Affidavit #1, Exhibit "A" Tab 12 (Nussbaum, Martha C., "Fearing Strangers" in Liberty of Conscience: In Defense of America's Tradition of Religious Equality (New York: Basic Books, 2008) 175-98), Reference Exhibit 76.

> along racial lines as external to the body politic. In his text *On Civil Liberty and Self Government* (1874), which was widely used as a college text at the close of the nineteenth century (Cott 2000, 114), Lieber gave clear expression to this racial project, fostering the equation between "we the people" and "Anglican race" in his text: "We belong to the Anglican race, which carries Anglican principles and liberty over the globe,... We belong to that race whose obvious task it is, among other proud and sacred tasks, to rear and spread civil liberty over vast regions in every part of the earth, on continent and iles" (Lieber 1874/1901, 21)....[90] [emphasis added]

(3) Edmunds Act

73. Despite Mr. Reynolds' conviction, few indictments using the bigamy charge for which the *Morrill Act* had provided were laid: "[p]roving a second (or third or fourth) marriage in a jurisdiction that had no official registration provisions, in a church that purportedly kept no records of marriages, and in the midst of a recalcitrant population was a burden prosecutors could not meet".[91] Accordingly, federal legislation was amended and expanded in the *Edmunds Act*, passed in 1882. As noted in para. 41 above, this legislation amended s. 5352 of the Revised Statutes to read:

> Every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy... [emphasis added]

74. Further, the *Edmunds Act* introduced a new provision, unlawful cohabitation, providing:

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

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[90] Luca Affidavit #1, Exhibit "A" Tab 3, pp. 57-60 (Denike, Margaret, "The Racialization of White Man's Polygamy" (2010) 25:4 Hypatia 852-74 at pp. 11-14), Reference Exhibit 76.

[91] Luca Affidavit #1, Exhibit "I" Tab 1 (Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill, NC: University of North Carolina Press, 2002) at p. 147), Reference Exhibit 76.

75. Professor David Chambers explains that Congress, "with the ultimate aim of crippling the Mormon Church", enacted laws aimed at curtailing "unlawful cohabitation" because, "[s]ince Mormon men did not seek marriage licences for their plural marriages, they could not be charged with having more than one 'wife' at the same time". Therefore, "they were not usually charged with the crime of bigamy but with the crime of unlawful cohabitation".[92] Writes Jon Krakauer in one of the popular works included in the Brandeis Brief filed on behalf of the Defenders: "After the *Edmunds Act*, "Utah's polygamists were derogatorily referred to as 'co-habs,' and swarms of federal agents descended on Utah to carry out 'co-hab hunts' in virtually every town in the territory. By the late 1880's, some one thousand Saints had been thrown in jail..."[93] Indeed, "unlawful cohabitation" - under which "it need not be proven that the man and women had gone through a form of marriage[94] - was much easier to prove, and "from 1882 to 1896, there were more than 1400 indictments for unlawful cohabitation".

76. In the United States, "co-habitation" was broadly interpreted. In *United States v. Musser*, 4 Utah 153, 7 P. 389 at 390-391 (1885), one of the early cases applying the *Edmunds Act*, the Supreme Court of Utah noted that:

> (a) "the weight of authority is to the effect that the crime of unlawful cohabitation, as defined in the statute under consideration, is made out <u>without proof of sexual intercourse</u>, and that proof of non-intercourse is not a defense"; and
>
> (b) "[i]t appears plain that the intention was to protect the monogamous marriage by prohibiting all other marriage, either in form or in appearance only, <u>whether evidenced by a ceremony, or by conduct and circumstances alone</u>" (emphasis added).

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92 Luca Affidavit #1, Exhibit "B" Tab 3, p. 409 (Chambers, David L., "Polygamy and Same-sex Marriage" (1997) 26:1 Hofstra L Rev 53-83 at p. 63, footnote 52), Reference Exhibit 76.

93 Isbister Affidavit #1, Exhibit D Tab 3 (Krakauer, Jon, *Under the Banner of Heaven: A Story of Violent Faith* (New York: Doubleday, 2003) at p. 253), Reference Exhibit 13.

94 Isbister Affidavit #1, Exhibit "C" Tab 2 (Bailey, M. & A.J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara, Calif.: Praeger, 2010 at pp. 90-91), Reference Exhibit 13.

The "unlawful cohabitation" offence was applied broadly even to men who had left their polygamous relationships but continued to provide financial support for former spouses or visit their children.[95]

(4) Edmunds-Tucker Act

(a) Challenging the Existence of the Mormon Church

77. The *Edmunds Act*, together with the subsequent *Edmunds-Tucker Act* in 1887, also targeted Mormons by other means. One such means – carrying on the tradition of the *Morrill Act* – was to challenge the very existence of the Mormon Church. For example, s. 17 of the *Edmunds-Tucker Act* provided:

> That the acts of the legislative assembly of the Territory of Utah incorporating, continuing, or providing for the corporation known as the Church of Jesus Christ of Latter-Day Saints, and the ordinance of the so called general assembly of the State of Deseret incorporating the Church of Jesus Christ of Latter-Day Saints, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said corporation, in so far as it may now have, or pretend to have, any legal existence, is hereby dissolved....

78. The US Supreme Court affirmed the power of Congress to enact such legislation in *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890). In doing so, the Court again - as Professor Turley describes - "express[ed] open animus for the Mormons and polygamists from an expressly Christian perspective"; Professor Turley described this as one of a series of decisions "rife with sectarian and religious bias by the court".[96] The majority noted:

> The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the western world.

79. Four months after the decision in *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*, then-President Woodruff of the Mormon

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[95] Isbister Affidavit #1, Exhibit "C" Tab 4 (Daynes, Kathryn M., *More Wives Than One: Transformation of the Mormon Marriage System*, 1840-1910 (Chicago: University of Illinois Press, 2001) at p. 210-14), Reference Exhibit 13.

[96] Turley Affidavit #1, Exhibit "A" at paras. 158-159, Reference Exhibit 74.

Church issued a Manifesto that declared the Mormon Church did not teach polygamy or plural unions and did not permit any Church member to enter into such a union.[97]

80. Utah was admitted as a state in 1896, with an "anti-polygamy" provision having been included in its constitution.[98] In this regard, in 1888, Congress required the inclusion of "anti-polygamy provisions" in the constitutions of four states - each a western state where Mormons might settle"[99] – as a condition of statehood: Arizona, New Mexico, Oklahoma and Utah.[100] Idaho, where Mormons were also settling,[101] adopted a similar constitutional prohibition of its own accord.[102] Sensitive to criticism or ridicule for its heavily Mormon past, and particularly its polygamous component, Utah has preserved this constitutional provision ("polygamous or plural marriages are forever prohibited"):

> In 1991 a commission to revise the Utah State Constitution proposed that statement banning polygamy be removed on the grounds that the language was archaic, few other states had such a prohibition, and existing laws regarding bigamy would suffice. But a prominent member of the commission countered: "Outside of Utah, I am worried some may latch on to it, saying 'What are those crazy Mormons in Utah doing now?' The national press could have a field day. Some outside the state see us in a strange light, the Singers, polygamy, Hoffman, that kind of thing. My opinion is, the less said about it (polygamy), the better" (*Deseret News*, September 11012, 1991).[103]

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[97] Isbister Affidavit #1 Exhibit "C" Tab 2 (Bailey, M. & A.J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara, Calif.: Praeger, 2010) at p. 93), Reference Exhibit 13.

[98] When Professor Cook refers at para. 93 of her report to "nine states criminaliz[ing] polygamy in their penal codes", three of the provisions to which she refers are prohibitions in state constitutions (Arizona, New Mexico and Oklahoma), not penal legislation (Reference Exhibit 64); see also *Bronson v. Swensen*, 500 F.3d 1099 (2007).

[99] Isbister Affidavit #1, Exhibit "A" Tab 20, p. 914 (Gillett, Todd M., "The Absolution of Reynolds: The Constitutionality of Religious Polygamy" (2000) 8 William & Mary Bill of Rights Journal 497-534 at p. 533), Reference Exhibit 13.

[100] Isbister Affidavit #1, Exhibit "A" Tab 21, pp. 935-936 (New York University School of Law – New York University Public Law and Legal Theory Working Papers – Texas Polygamy and Child Welfare at pp. 117-120), Reference Exhibit 13.

[101] Luca Affidavit #1, Exhibit "I" Tab 1, (Gordon, Sarah Barringer, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America (Chapel Hill, NC: University of North Carolina Press, 2002 at p. 26), Reference Exhibit 76.

[102] Isbister Affidavit #1, Exhibit "A" Tab 21, pp. 935-936 (New York University School of Law – New York University Public Law and Legal Theory Working Papers – Texas Polygamy and Child Welfare at pp. 117-120), Reference Exhibit 13.

[103] Isbister Affidavit #1, Exhibit "C" Tab 1 (Altman, Irwin & Joseph Ginat, *Polygamous Families in Contemporary Society* (Cambridge University Press, 1996) at p. 58), Reference Exhibit 13.

(b) Edmunds-Tucker Act as Part of Evolving Attitudes Toward Mormon Women

81. The *Edmunds-Tucker Act* also struck at one of the surprisingly progressive features of women's rights in Utah – their right to vote. Women in Utah had received the franchise in 1870,[104] approximately 45 years before women received the right to vote in Canada. (Further, in Canada, only in 1929 – through a decision of the Privy Council which reversed the Supreme Court of Canada on the point – were women recognized as "persons" who could be appointed to the senate, in the famous "Persons" case.) Anti-polygamy activists had anticipated that Mormon women would use their right to vote to rally against polygamy, but in fact they did not; they used their voting rights to reinforce Mormon political power in the territory. Under the *Edmunds-Tucker Act*, women's right to vote in Utah was removed.

82. More generally, through the mid- to late-1880s, much of the sympathy for female "victims" of polygamy which had earlier fuelled some of the anti-polygamist sentiment in the United States had been eroded. The chronology set out by Sarah Barringer Gordon (in whose book, Professor Witte notes, "[t]he story [of the anti-polygamy campaign] is well told and the literature well sifted"[105]) and others, makes clear that as Mormon resistance to federal legislation continued through the 1880s, "patience wore thin", especially with Mormon women who insisted on their willing participation in polygamy, did not cooperate with prosecutors of Mormon men, and attempted, when forced to testify, to protect them.[106] In this context, "[t]hey could hardly be treated as innocent victims". Thus "[t]o federal officials, and to many antipolygamists by the mid-1880s, Mormon women required punishment as well as pity".[107]

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[104] Luca Affidavit #1, Exhibit "A" Tab 12, pp. 328-329 (Nussbaum, Martha C., "Fearing Strangers" in *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008) 175-98 at pp. 190-191), Reference Exhibit 76.

[105] Expert Report of John Witte at footnote 305, Reference Exhibit 43.

[106] Luca Affidavit #1, Exhibit "A" Tab 12, p. 335 (Nussbaum, Martha C., "Fearing Strangers" in *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008) 175-98 at p. 197), Reference Exhibit 76; Luca Affidavit #1, Exhibit "I" Tab 1 (Gordon, Sarah Barringer, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill, NC: University of North Carolina Press, 2002) at pp. 150-154), Reference Exhibit 76.

[107] Luca Affidavit #1, Exhibit "I" Tab 1 (Gordon, Sarah Barringer, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill, NC: University of North Carolina Press, 2002) at pp. 150-154), Reference Exhibit 76.

83. Under the *Edmunds Act* – passed while Mormon women were still seen more as victims than willing participants, in 1882 – this punishment could not be meted out under the "unlawful cohabitation" provision that often formed the basis for charges against Mormon men: as it was worded, the offence could only be committed by men (see paras. 41 and 74 above.) Instead, and while there is no record of incarceration pursuant these charges:

> ...federal law enforcement officials for the first time began the wholesale indictment of pregnant women in plural marriages for fornication. Almost 200 women were indicted between 1887 and 1890, a stunning transformation in their perceived status as victims of Mormon men. Many antipolygamists in Congress and elsewhere finally accepted the truth of what Mormons had been saying all along - that Mormon women would not voluntarily abandon their religion, even if given the vote, or if their husbands were prosecuted for sexual offenses. Indicted as fornicators, with no vote, these women had gone, in less than a decade, from being called victims to being labelled criminals.
>
> ....
>
> The charge of fornication, the standard provision used for the punishment of prostitutes under state law, labelled women in plural marriages as fallen rather than just kidnapped or duped. The acceptance of the essentially criminal nature of these wives - their transformation into the legal equivalent of prostitutes - may have reconciled Eastern antipolygamists to a legal regime that in fact punished Mormon women. The stigma attached to the fornicator label apparently was deeply felt. None of the contemporary histories mention such indictments, nor have modern scholars unearthed this prosecutorial strategy. Women jailed for contempt for refusing to testify appeared in the Mormon press and histories as heroines; the wives indicted for fornication received no such play. The victims were criminalized and then forgotten.[108] [emphasis added]

F. Mormons in Canada

(1) Canadian Statutory Evolution

84. As noted earlier, as of 1886, the Canadian prohibition on bigamy – s. 4 of *An Act respecting Offences relating to the Law of Marriage*, R.S.C. 1886, c. 161 – read simply as follows:[109]

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[108] Luca Affidavit #1, Exhibit "I" Tab 1, (Gordon, Sarah Barringer, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America (Chapel Hill, NC: University of North Carolina Press, 2002 at p. 181), Reference Exhibit 76.

[109] Legislative History Brief at para. 4, Tab 1(A), Reference Exhibit "X" for identification.

> Every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada, or elsewhere, is guilty of felony...

85. In 1887, after passage of the *Edmunds-Tucker Act*, Mormons from the United States began establishing settlements in southern Alberta which were "visually, institutionally and culturally distinctive communities. Cardston, Magrath, Stirling and Raymond, unique place-names, demarked 'Mormon Country,' a new term for Canadians".[110] "By 1891, there were 359 Mormons in Cardston and vicinity. By October 1894, the number of Mormons in that area was 674".[111]

86. Reaction to the Mormon arrival was mixed, but was in some quarters animated and hostile.[112] Generally speaking, the Canadian government appeared to favour Mormon immigration, but was decidedly opposed to the Mormon practice of polygamy. The Law Reform Commission of Canada noted in its Working Paper on Bigamy that "[t]here is no question that at this time Canadian legislation fell under the influence of American law, which was trying by means of the criminal law to stamp out a resurgence of the practice of polygamy among members of the Mormon community, especially in the state of Utah".[113] Correspondingly, in Canada, "[t]he language of the original polygamy section was drafted with the vagaries of the American polygamy statutes targeting Mormons squarely in mind": when they set about drafting the legislation, Canadian lawmakers considered American legislation and the difficulties that had arisen in obtaining convictions.[114]

87. Concern about Mormon polygamy was apparent in the legislative debates in Canada which preceded the enactment of s. 293. The first iteration of s. 293 was found in Bill F, *An Act to amend "An Act respecting Offences relating to the Law of Marriage"*, which Senator William John MacDonald introduced into the Senate on February 4, 1890 but withdrew on March 4, 1890 "[i]n view of the legislation promised by the Minister of

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[110] Isbister Affidavit #4, Exhibit "A" (Brigham Y. Card, *The Mormon Presence in Canada* (Edmonton, Alberta: The University of Alberta Press, 1990 pp. 5, 23, 29, 34), Reference Exhibit 150.
[111] Isbister Affidavit #4, Exhibit "A" (Brigham Y. Card, *The Mormon Presence in Canada* (Edmonton, Alberta: The University of Alberta Press, 1990 p. 37), Reference Exhibit 150.
[112] Isbister Affidavit #4, Exhibit "A" (Brigham Y. Card, *The Mormon Presence in Canada* (Edmonton, Alberta: The University of Alberta Press, 1990) pp. 54-55), Reference Exhibit 150.
[113] Luca Affidavit #1, Exhibit "B" Tab 11, p. 883 (Law Reform Commission of Canada, Bigamy, Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985) at p. 22), Reference Exhibit 76.

Justice in another place".[115] Bill F would have added a new section (s. 5) to the *Act respecting Offences relating to the Law of Marriage*, reproduced in full at Appendix A to this submission and quite similar to the provision set out below. Senator MacDonald:

(a) justified Bill F on second reading by noting that "[i]f there are Mormons in the North-West Territories, wherever they settle will practise the tenets and customs of their sect. It is, therefore, necessary and wise that we should at once prevent the spread of this canker in our country". He noted that "it is said, wherever they are they are sure to practise polygamy".[116] Later in the session, in describing Bill F, Senator MacDonald noted that he had taken "a good deal of trouble in the early part of the session to prepare a Bill regarding Mormonism".[117]

(b) described as the "best feature of the Bill" a provision "disqualifying offenders from being candidates for election to serve as members of the House of Commons of Canada, or Legislative Assembly of the North-West Territories, to serve as jurors, or to hold any office under the Crown or any public or municipal office in the North-West Territories". Senator MacDonald believed that "[i]t will be one of the chief means of obtaining information and securing convictions under the Act".[118] This disqualification provision was not preserved in the provision ultimately enacted.

88. Bill F provided that the new section "shall not apply to any Indian belonging to a tribe or band among whom polygamy is not contrary to law, nor to any person not a subject of Her Majesty, and not resident in Canada." Another member of the Senate, Mr. Dickey, voiced his view that "that is a very dangerous exception to make, because it may have the effect of excepting the very class to whom the Bill is intended to apply"[119]; indeed, this exception was not found in the legislation ultimately enacted. If Senator Dickey's reference was to "any Indian belonging to a tribe or band among whom

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[114] Expert Report of Susan Drummond at para. 21, Reference Exhibit 65.
[115] Legislative History Brief at para. 4, Reference Exhibit "X" for identification.
[116] Legislative History Brief at Tab 1(C), p. 112, Reference Exhibit 157.
[117] Legislative History Brief at p. 584, Reference Exhibit 157.
[118] Legislative History Brief at Tab 1(C), p.112, Reference Exhibit 157.
[119] Legislative History Brief at Tab 1(C), p. 142, Reference Exhibit 157.

polygamy is not contrary to law", this may have been because of concern that the Mormons arriving in Canada were settling near Aboriginal populations, partly with a view to conducting missionary work. The anticipated outcome was that the Mormons would encourage Aboriginal groups to continue to practise polygamy, that the Mormons would make these groups' conversion to mainstream Christianity more difficult, and perhaps that the Mormons would learn from the Aboriginal groups among whom polygamy was practised that it "was in fact permitted in Canada".[120]

89. As noted earlier, Senator MacDonald ultimately withdrew Bill F in favour of legislation to be introduced by the Minister of Justice. The Minister of Justice, Sir John Thompson proceeded to introduce Bill 65, which became an Act to Further Amend the Criminal Law, S.C. 1890, c. 37, s. 11[121] (the "1890 Act"). As enacted, this legislation had two relevant components.

90. Firstly, the 1890 Act repealed s. 4 of the *Act respecting Offences relating to the Law of Marriage* and substituted the following:

> **4.** Every one who, being married, married any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, and every male person who, in Canada, simultaneously, or on the same day, marries more than one woman, is guilty of felony, and liable to seven years' imprisonment." Bigamy.

91. During discussion of this section in Committee, when another member commented that "[h]e cannot marry more than one at the same time very conveniently", Sir John Thompson responded that "[t]hat is the Mormon practice".[122] This amendment apparently was prompted by a proposition advanced by Anthony Stenhouse, a politician who had recently converted to Mormonism[123] and had suggested that simultaneous marriage would be permissible under Canadian law. As noted earlier, the *Edmunds Act* had earlier

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[120] Isbister Affidavit #1, Exhibit "C" Tab 3 (Carter, Sarah, The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915 (Edmonton: University of Alberta Press, 2008), Reference Exhibit 13; Drummond Affidavit, Exhibit "B" at para. 73, Reference Exhibit 65.
[121] Legislative History Brief at para. 5, Reference Exhibit "X" for identification.
[122] Legislative History Brief, Tab 2(C) at p. 3171, Reference Exhibit 157.
[123] Isbister Affidavit #4, Exhibit "B" (Robert J. McCue, "Anthony Maitland Stenhouse, Bachelor 'Polygamist' (Spring 1990) 23:1 Dialogue: A Journal of Mormon Thought, pp. 108-125), Reference Exhibit 150.

prohibited simultaneous marriages as well, criminalizing for polygamy "any man who hereafter simultaneously, or on the same day, marries more than one woman".

92. Discussing the Canadian prohibition (at the time of its writing numbered s. 254(1)(a)(iii), and now s. 290(1)(a)(iii)) in its Working Paper on Bigamy, in 1985, the Law Reform Commission of Canada wrote:

> In actual fact, this provision covers two distinct situations. To begin with, if an individual goes through a form of marriage with more than one person on the same day, there is a good chance that he is, in fact, going through two forms of marriage. In that case, the first marriage is legally valid and the second form of marriage constitutes the bigamy. This situation is already covered by. subparagraph 254(1)(a). The other situation described in this section corresponds to an individual who goes through; a single form of marriage simultaneously with more than one person. Such a situation is legally impossible in terms of Canadian matrimonial law. There is no "form of marriage recognized as valid in Canada" for a union of more than two persons.
>
> Spiritual marriage.
>
> This section in fact applies to polygamous marriage. By a species of legal acrobatics, it might still be argued that this criminal sanction is directed essentially at polygamists who, in their union, use the external forms of the marriage ceremony: without the knowledge of the celebrant; or, with his collusion. In the first case, however, it must be assumed that both ostensibly and officially only a single monogamous marriage was solemnized. In the second case, the marriage can have no official status and a best is a sham ceremony....[124]
>
> [emphasis added]

93. The second relevant element of the 1890 Act was its addition of s. 5 to the *Act respecting offences relating to the Law of Marriage*:

> **"5.** Every one who practises, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into - Polygamy.
>
> "(*a.*) Any form of polygamy; or -
>
> "(*b.*) Any kind of conjugal union with more than one person at the same time; or - Conjugal union with more than
>
> "(*c.*) What among the persons commonly called Mormons is known as spiritual or plural marriage; or -

[124] Luca Affidavit #1, Exhibit "B" Tab 11 (Law Reform Commission of Canada, Bigamy, Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985) at p. 20), Reference Exhibit 76.

> "(*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 - (Living with a person who is married or who lives with another.)
>
> "2. Every one who, -
>
> "(*a.*) Celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in sub-section one of this section; or - (Celebrating rites. &c.)
>
> "(*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 - (Forms &c.)
>
> "(*c.*) Procures, enforces, enables, is a party to, or assists in the execution of any such form of contract which so purports, or the giving of any such consent which so purports, - (Contracts and consent.)
>
> "Is guilty of a misdemeanor, and liable to imprisonment for five years and to a fine of five hundred dollars: (Penalty.)
>
> "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."[125] (Requisites of indictment and proof.)

94. Sir John Thompson noted on second reading[126] that what became s. 5 of the *Act respecting Offences relating to the Law of Marriage* "deals with the practice of polygamy, which I am not aware yet exists in Canada, but which we are threatened with; and I think it will be much more prudent that legislation should be adopted at once in anticipation of the offence, if there is any probability of its introduction, rather than we should wait until it has become established in Canada" (p. 3163). Later that day, one of the speakers, Mr. Blake, referred to "the persons whose existence in our midst has given rise to this legislation" - "these persons called Mormons, or Latter Day Saints", who practised "[s]imple cohabitation...in conformity to the Mormon custom" (pp. 3173-3174). Mr. Blake "highly approve[d] of the effort which the hon. Minister of Justice is making to provide stringent laws against the practices which are condemned by these clauses of the Bill",

[125] Legislative History Brief, Tab 2(A), Reference Exhibit 157.
[126] Legislative History Brief, Tab 2(B), Reference Exhibit 157.

and in urging that the government go further (to discourage settlement at all), he read aloud from the will of Brigham Young:

> ...After having made provision for these numerous persons, he says in the 34th clause:
>
> > "To avoid any question, the words married or marriage, in this will, shall be taken to have become consummate between man and woman, either by ceremony before a lawful magistrate or according to the order of the Church of Jesus Christ of Latter-Day Saints, or by their cohabitation in conformity to our custom."
>
> Simple cohabitation, therefore, in conformity to the Mormon custom is one of the rules by which Mormon marriage shall be recognised.[127]
> [emphasis added]

95. Correspondingly, in moving the second reading of Bill 65 in the Senate, the Honourable Mr. Abbott noted that "[t]he third chapter is mainly devoted to prevention of an evil which seems likely to encroach upon us, that of Mormon polygamy, and it is devoted largely to provisions against that practice" (emphasis added). Later in the debate, Mr. Abbott also said that "[o]f course the Bill is not directed against any particular religion or sect or Mormon more than anybody else; it is directed against polygamists. Insofar as Mormons are polygamists of course it attaches to them".[128] The only two other groups which are suggested by the Attorneys General in their Closing are Muslims and Aboriginal populations.[129]

96. Subsequently, with some re-wording, the offence at s. 4 of the *Act respecting Offences relating to the Law of Marriage* became s. 275 of the *Criminal Code*, 1892, S.C. 1892, c. 29, [130] and s. 5 of the *Act respecting Offences relating to the Law of Marriage* became ss. 278 and 706 of the *Criminal Code, 1892*. As the Attorneys General noted in their Legislative History Brief, the *Criminal Code, 1892*, was Canada's first comprehensive criminal code and consolidated most of Canada's pre-existing criminal laws, including *An Act respecting Offences relating to the Law of Marriage*.[131]

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[127] Legislative History Brief, Tab 2(B), Reference Exhibit 157.
[128] Legislative History Brief, Tab 2(C), at pp. 583-585, Reference Exhibit 157.
[129] AGBC's Closing at paras. 44 and 109; AGC Closing at para. 201.
[130] Legislative History Brief, Tab 3(A), at para. 7, Reference Exhibit "X" for identification.
[131] Legislative History Brief at para. 6, Reference Exhibit "X" for identification.

97. As enacted as part of the *Criminal Code, 1892*, ss. 275, 278 and 706 provided as follows:

> **275.** Bigamy is -
>
> Bigamy defined.
>
> (*a.*) the act of a person who, being married, goes through a form of marriage with any other person in any part of the world; or
>
> (*b.*) the act of a person who goes through a form of marriage in any part of the world with any person whom he or she knows to be married; or
>
> (*c.*) the act of a person who goes through a form of marriage with more than one person simultaneously or on the same day.
>
> 2. A "form of marriage" is any form either recognized as a valid form by the law of the place where it is gone through, or, through not so recognized, is such that a marriage celebrated there in that form is recognized as binding by the law of the place where the offender is tried. Every form shall for the purpose of this section be valid, notwithstanding any act, or default of the person charged with bigamy, if it is otherwise a valid form. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.
>
> ....
>
> **278.** Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars, who -
>
> Punishment of polygamy.
>
> (*a.*) practices, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into
>
> (i.) any form of polygamy;
>
> (ii.) any kind of conjugal union with more than one person at the same time;
>
> (iii.) what among the persons commonly called Mormons is known as spiritual or plural marriage;
>
> (iv.) who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union; or
>
> (*b.*) celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (*a*) of this section; or
>
> (*c.*) procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any such form, rule or custom which so purports; or

(*d.*) procures, enforces, enables, is a party to, or assists in the execution of, any form of contract which purports, or the giving of any such consent which so purports. 58 V., c. 37, s. 11.

....

Evidence in case of polygamy, &c.

706. In the case of any indictment under section two hundred and seventy-eight (*b*), (*c*) and (*d*), no averment or proof of the method in which the sexual 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 persons implicated. 53 V., c. 37, s. 11.[132]

98. As to s. 278, the following exchange occurred during legislative debate in the House of Commons:

> Mr. FRASER. It appears not to be made an offence for a man to live with a woman who is not married. This appears to be one-sided legislation.
>
> Sir JOHN THOMPSON. It is not intended to include that class of moral offences. I may state the history of this section. It was inserted the first time three years ago, when an attempt was made to put down offences connected with Mormonism and plural marriages, and after considering the laws of every state in the United States which attempted to deal with that question, we found that that was the best way we could express it, and the section received very careful attention from lawyers on both sides of the House. I am aware that the attention of members has been called to the class of cases mentioned by the hon. Member for Guysborough, but we have not introduced that class into this Bill, and it is questionable whether we should make that a crime. [emphasis added]

99. While s. 290 was amended in 1954, including by the deletion of express reference to Mormons, as the Attorneys General correctly noted in their Legislative History Brief "[t]here is nothing in the legislative record to suggest that these changes were intended to be substantive".[133] Correspondingly, in his Closing, the AGC describes s. 293 as having been "redrawn to simplify [it]", confirms that "[t]here is no evidence that the amendments were intended to be substantive" and notes that "Mormon spiritual or plural marriage must have remained prohibited" (paras. 20, 215). Since 1954, the number of the polygamy section of the *Criminal Code* has changed, but the section has not.[134]

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[132] Legislative History Brief, Tab 3(A), Reference Exhibit 157.
[133] Legislative History Brief at para. 13, Reference Exhibit "X" for identification.
[134] Legislative History Brief at para. 19, Reference Exhibit "X" for identification.

(2) Early Case Law and Legal Argument

100. Early case law and legal argument reflected an attempt to narrow the application of s. 293 to Mormons, in accordance with its historical context. Interpreting *R. v. Labrie* (1891), 7 M.L.R. Q.B. 211 (Que. C.A.), the report of which is very brief, Professor Drummond notes: "Case law immediately following the promulgation of the polygamy offense confirmed the anti-Mormon animus of the legislation. In (hereinafter *Labrie*), Labrie's lawyer argued that '[t]he object of the statute was to repress Mormonism.'" Evidently in the unreported decision of *The Queen v. Liston*, noted at 34 CLJ 546, tried at the Toronto Assizes in 1893, Chief Justice Armour held that s. 278 of the Criminal Code was intended to apply only to Mormons.[135]

101. On the wording of the section itself, however, this narrow application is not borne out, as early commentators recognized and as is returned to in Part 3 of this submission. Writing in 1915, commentators noted:

> The law, as interpreted in Ontario, which tolerates polygamy in practice among nominal monogamists, but punishes polygamists who are also Mormons in name, is by common consent a scandal...
>
> ....
>
> The Criminal Code prohibits the practice "of any form of polygamy or of any kind of conjugal union with more than one person at the same time, or what among persons commonly called Mormons is known as spiritual or plural marriage," under penalty of imprisonment for five years and a fine of five hundred dollars. The teeth of the polygamy section of the Code were, however, drawn in 1893, when it was held by Chief Justice Armour of the Ontario bench that this section was intended to apply only to Mormons. Under the laws of Canada as interpreted by this decision it would appear to be no offence for a resident of Canada to occupy the relation of husband to two or more women at the same time, so long as he is not a Mormon and so long as he is careful not to contravene the bigamy sections. In other words, he may be a polygamist in practice, but must not be also a Mormon in name.
>
> But the language of the polygamy section is wide and it is worth noting that the view of Chief Justice Armour was not followed by a Quebec Judge in a more recent case. An authoritative pronouncement on the subject by an appellate Court is to be desired. [emphasis added][136]

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[135] Drummond Affidavit #1, Exhibit "B" at para. 22, Reference Exhibit 65.
[136] "Marriage and Divorce in Canada" (1915) 51 Canada Law Journal at 86, 89-90.

102. Certain later commentators have also attributed to s. 293 a religious rather than secular purpose (pointing to the ecclesiastical origins of proscriptions against bigamy, the timing of s. 293 and its express reference to Mormons[137]) although noting as well the section's extraordinary breadth. Professor Drummond, upon whom the Attorneys General rely for her analysis of the early case law but not her own analysis of the section, is among them. She concludes that:

(a) the section was "problematically drafted" at its inception;

(b) "[i]n light of socio-legal developments since the polygamy laws were drafted, it is now almost impossible for citizens to foresee what conduct they must avoid in order to remain beyond the reach of s. 293";

(c) the section is both vague and overbroad; and

(d) the section has been applied in a highly selective way, in accordance with being targeted against Mormons and Aboriginal groups, but not in accordance with the wording employed. Professor Drummond notes:

> The odour of religious persecution lingers over the offence particularly when conjoined with the ways in which they have been historically directed or applied to socially and politically marginalized groups. The fear that a reasonable person would have difficulty discerning the mischief of polygamy is compounded by an historical predilection of the provision to target minority social groups. This history leaves a creepy aura of winking and nodding around s.293 to the effect that: although a vast number of us may be theoretically vulnerable to prosecution, most of us don't need to worry: it is "them" we are after.[138]
>
> [emphasis added]

103. Indeed, this "odour of religious persecution" pervades the prosecution of this Reference, much of which has focussed on fundamentalist Mormons – and particularly members of the FLDS – who retain traditional Mormon practices. Cross-examination of

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[137] Isbister Affidavit #1, Exhibit "A" Tab 5, pp. 206-207 (*Equality's Nemesis?* (Journal of Law and Quality, University of Toronto) at paras. 14, 15, 17), Reference Exhibit 13; Isbister Affidavit #1, Exhibit "A" Tab 2, pp. 120-121 (*Polygamy in Canada: Legal and Social Implication for Women and Children – A Collection of Policy Research Reports – Expanding Recognition of Foreign Polygamous Marriages: Policy Implication for Canada* at pp. 22-23), Reference Exhibit 13.

[138] Isbister Affidavit #1, Exhibit "A" Tab 18, pp. 771-772 (*Comparative Research in Law & Political Economy – Polygamy's Inscrutable Secular Mischief* (CLPE Research Paper 02/2009 – Vol. 05 No. 01 (2009) at pp. 11-12), Reference Exhibit 13.

witnesses who came forward from the ranks of fundamentalist Mormons was replete with efforts to (a) unveil practices which, within majority religions as well as certain other minorities, are the norm – patriarchy, male priesthood, encouragement of marriage at a young age, encouragement to have many children, and traditional roles for women within the household; and (b) denigrate practices that are perceived as different from those more familiar to us. Professor Beaman's caution against stereotyping members of minority religions is apt in this regard:

> ...sometimes when we're looking at religious minority groups we'll identify particular religious practices as being harmful or as causing harm. It can be at the individual level or the societal level. And when I talk about social construction what I am arguing or implying is that harm or definitions of harm vary depending on social context, historical context and so on.
>
> ....
>
> And the use of the word "social construction" would imply that we need to examine or think carefully about who is doing the defining, in what context and why. And against what is the practice being defined. So very frequently we will find the majority of religious practice is acting as a reference point for the definition of harm.
>
> ....
>
> ...very often it's religious... minority practices that are especially flagged as being harmful. Religious majorities don't tend to come under the same scrutiny.[139]
>
> [emphasis added]

[139] Reference Proceedings Transcript - Day 12 at p. 16 ll. 1-35 (Beaman).

PART 3 - QUESTION 2: THE ELEMENTS OF SECTION 293

A. Overview of the Amicus' Position

104. Question 2 of the Reference questions asks:

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

105. Section 293 purports to make it a criminal offence to agree or consent to or practise, any form of polygamy, or 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. No proof of the method by which the alleged relationship was entered into is necessary to make out the offence. Nor is it an element of the offence that the parties to the relationship have had, intended to have or intend in the future to have, sexual intercourse.

106. Section 293 also purports to impose criminal liability on anyone who celebrates, assists or is party to a rite, ceremony, contract or consent that purports to sanction either of the kinds of relationship set out in s. 293(1)(a).

107. "Polygamy" is not defined in the *Criminal Code*. Polygamy is generally understood to be an umbrella term that encompasses polygyny (one husband with multiple wives), polyandry (one wife with multiple husbands) and what is referred to as group marriage or polyamory (more than two people of whatever gender). By the inclusion of the words "[e]very one" and "any form of" in relation to polygamy, and "any kind of" in relation to conjugal unions, s. 293 prohibits all of these forms of polygamy.

108. The usual definition of "polygamy" is something like "the condition or practice of having more than one spouse at the same time". The reference here to "spouse" reflects the usual understanding that polygamy is a form of *marriage*: that is, that the relationship is composed of multiple marriages. With s. 293, however, it appears that Parliament's intention was not to restrict the prohibition of polygamy to cases where the relationship is actually composed of multiple *marriages*. Rather, Parliament's intention appears to be to

also capture *de facto* polygamy, meaning where a person is in multiple marriage-*like* relationships. The first version of s. 293 in the 1890 Act expressly stated that it is a crime to enter into any form of polygamy, "whether in a manner recognized by law as a binding form of marriage or not". Subsequent amendments to the polygamy offence limited this language only to s. 293(1)(a)(ii) (multiple conjugal unions), but there is no evidence that such amendment was intended to substantively change the law.

109. Similarly, the term "conjugal union" is not defined in the *Criminal Code*. In the Amicus' submission, that term is intended to capture the notion of *conjugality* – it refers to "marriage-like relationships". In modern society and law, conjugality includes marriage and what are now referred to as common law relationships. Whether a relationship amounts to being "conjugal" is a multi-factor test, which has been set out in the family law context in such cases as *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 and *M. v. H.*, [1999] 2 S.C.R. 3. In the latter case, Cory and Iacobucci JJ. stated at para 59:

> *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal.

110. The language of s. 293 as presently drafted does not articulate whether it is aimed solely at a person who him- or herself has multiple marriage-like relationships, or whether it also captures the other parties to those relationships, whether or not they are themselves in multiple marriage-like relationships. Reference to the 1890 Act reveals that Parliament intended the latter also to be covered. Section 11 of the 1890 Act, at subparagraph (d), included within the scope of the prohibition everyone "[w]ho 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". Again, there is no evidence in the legislative record to suggest that the change to the present wording was intended to be substantive, and the language of s. 293 in its present form appears to cover both categories.

111. As for the second part of Question 2, the elements of the offence of polygamy do not include the involvement of a minor or a context of dependence, exploitation, abuse of authority, a gross imbalance of power or undue influence. Had Parliament intended to limit the offence to relationships involving any of those elements, it could and would have stated as much. Indeed, the language of s. 293 suggests that Parliament was not concerned with targeting relationships where participants did not give their free consent (such as by being underage, or being dependent upon or unduly influenced by the spouse or some other relevant person). To the contrary, one of Parliament's concerns appears to be to prohibit *consenting to* polygamy: s. 293 imposes criminal liability on "[e]very one who ... practises or enters into or in any manner agrees or consents to practise or enter into" polygamous relationships (emphasis added).

112. The Defenders have disparate and conflicting interpretations of s. 293. The AGBC seeks to limit s. 293 to polygyny only. The AGC, on the other hand, limits the scope of "any kind of conjugal union" to something narrower than a "conjugal relationship" (a synonym with "common law relationship"). A "conjugal union", he says, "comes into being through a marriage ceremony or other sanctioning event" and binds the participants together "in a marital structure or institution".[140] West Coast LEAF, on the other hand, would have this Court read down s. 293 so that it applies to "exploitative" polygamous relationships only.

113. With respect, none of these limitations on the scope of s. 293 is consistent with the language of the section and common sense, as is set out in the following three sections of this Part. The statutory language and the legislative history of s. 293 plainly reveal an intention that s. 293 not be limited to one gender arrangement (polygyny) only, but rather prohibit all forms of polygamy. Further, Parliament's intention was to ban all polygamous forms of *conjugality*, regardless of how that conjugal relationship was formed. Last, the plain language of s. 293 is utterly at odds with any notion that exploitation is a necessary element of the offence.

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[140] AGC's Closing, para 222.

B. Section 293(1)(a)(i): "Polygamy" Is Not Limited to "Polygyny"

114. The AGBC takes the position that s. 293 prohibits only polygyny – that is, an arrangement by which there is one man and multiple women in a conjugal relationship of some kind. That is plainly incorrect. To the contrary, s. 293 prohibits "any form of polygamy" and "any kind of conjugal union with more than one person at the same time".

115. The AGBC's narrow definition of "polygamy" in s. 293 is inconsistent with modern statutory interpretation, which requires that the words of a statute "be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[141] The AGBC's definition of "polygamy" conflicts with the ordinary meaning of the term, as well as the scheme of s. 293 and the intention of Parliament. When taken together, these interpretive factors make clear that, as it appears in the *Criminal Code*, "polygamy" encompasses all gender orientations of committed, multi-partner relationships, including polygyny, polyandry and same-sex polygamy.

(1) Ordinary Meaning

116. The ordinary meaning of "polygamy" generally means have more than one spouse, with "polygyny" referring to that form of polygamy where a husband has more than two wives, and "polyandry" relating to a wife having more than two husbands. The *Shorter Oxford English Dictionary*, 3rd ed. contains the following definitions:[142]

> **Polygamy** ... 1591 ... **1.** Marriage with several, or more than one, at once; plurality of spouses; usu. the practice or custom according to which one man has several wives. ...
>
> **Polyandry** ... 1780 ... That form of polygamy in which one woman has two or more husbands at the same time; plurality of husbands (Corresp. to POLYGYNY.)
>
> **Polygyny** ... 1780 ... That form of polygamy in which one man has several wives (or concubines) ...

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[141] See E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87 and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

[142] C.T. Onions ed., Vol. II (Oxford: Oxford University Press, 1973) at pp. 1623-1624 (emphasis added).

117. These definitions demonstrate that, in its ordinary sense, the word "polygamy" refers to both polygyny and polyandry. The latter are, notably, defined as forms of polygamy.

118. Certainly that is generally how the experts in this Reference referred to "polygamy". While it is true, as the AGBC states in his footnote 110, that many of the Defenders' experts focused their comments on "polygyny", they did so after noting that "polygyny" is a more common form of "polygamy" than "polyandry".[143]

119. But in any event, a contorted reading of "polygamy" to mean only "polygyny" does nothing to cast a particular gender arrangement on the words "any kind of conjugal union with more than one person at the same time" (emphasis added) in s. 293(1)(a)(ii). The underlined words are plainly gender-neutral, reflecting Parliament's objective of capturing all polygamous forms of conjugality, no matter the particular gender arrangement.

(2) Context

120. Since its enactment in 1890, the *Criminal Code*'s provision regarding polygamy has made it an offence to practice or enter into "any form of polygamy" (emphasis added). As such, the immediate context of the *Criminal Code* plainly contemplates that polygamy is a practice having multiple forms. To restrict its interpretation solely to the form of one man having multiple wives would be to contradict Parliament's inclusion of the words "any form of" in the statute.

121. In footnote 110 of his Closing (as in his Opening Statement), the AGBC argues that "[t]he words "any form of" do not add polyandry or same sex conjugal unions into the definition, but rather ensure that all forms of polygamous marriage with which the legislators were explicitly concerned (explicitly if not exclusively Mormon, "Mohammedan", and "Indian" forms of marriage) were captured." It is certainly the case that, in 1890, Parliament was driven to enact what is now s. 293 because of an animus toward Mormon, Muslim and Indian polygamy, which were regarded as barbaric and unchristian. In

[143] These include the more prominent of the Defenders' experts. As for Professor Cook, see her report at para. 13, Reference Exhibit 42; for Professor Henrich, see Reference Proceedings Transcript – Day

prohibiting polygamy, however, Parliament plainly did not limit what is now s. 293 only to polygamy arising out of those traditions. Rather, Parliament enacted a provision of such breadth as would capture all forms of polygamy, however practised.

122. The original 1890 version of the polygamy prohibition, inserted as s. 5 of *An Act respecting Offences relating to the Law of Marriage*, R.S.C. 1886, c. 161, stated in part as follows:

> 5. Every one who practises, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practice or enter into
>
> (a.) Any form of polygamy; or –
>
> (b.) Any kind of conjugal union with more than one person at the same time; or –
>
> (c) What among the persons commonly called Mormons is known as spiritual or plural marriage; or –
>
> (d) Who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union;
>
> [emphasis added.]

123. Parliament is presumed not to speak in tautologies. As Professor Sullivan states, "every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant".[144] The AGBC's interpretation does just that to the words "any form of".

124. The underlined words in the opening words of s. 5, which precede "any form of polygamy" in subparagraph (a), clearly and expressly capture the different religious forms that the practice can take, including those the AGBC identifies. It would be redundant for the words "any form of" to also refer to the different religious methods of entering polygamous marriage. They would become, as Lamer C.J. put it in *R. v. Proulx*, [2000] 1 S.C.R. 61 at para. 28, "mere surplusage". While that express reference to religious forms

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11 at p. 81 l. 40 – 42; and for Professor Grossbard, see the first paragraph of her report, at Grossbard Affidavit, Exhibit "B", Reference Exhibit 48.

of polygamy has been deleted from the present version of the provision, the parties appear to all agree that the amendments to the original provision were not intended to be substantive. In any event, s. 293 continues to expressly capture "any manner" of agreeing or consenting to the practice of any form of polygamy.

125. Given this context within the *Criminal Code*, "polygamy" must be interpreted to include all of its known forms, including polygyny and polyandry.

(3) Parliamentary Intention

126. The AGBC says at footnote 109 of his Closing that "[a]ll indications from the legislative record and surrounding historical context are that the term "polygamy" in 1890 was understood and discussed purely with reference to polygyny".[145] That is not correct.

127. The legislative record in fact strongly suggests that Parliament's intention was *not* to limit the polygamy prohibition to any particular gender arrangement. When Parliament first passed the polygamy prohibition in 1890, in the same bill it amended the bigamy provision to cover multiple marriages *simultaneously*. That provision, which became s. 4 of *An act respecting Offences relating to the Law of Marriage*, R.S.C., c. 161, read as follows:

> Every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, and every male person who, in Canada simultaneously, or on the same day, marries more than one woman, is guilty of felony, and liable to seven years' imprisonment. [emphasis added]

128. It is plain from this provision that "[e]very one" in the first line does not mean "every male person"; nor does "[e]very one" in the polygamy provision bear that meaning. The bigamy provision shows clearly that Parliament was capable of distinguishing between *polygyny* and other forms of polygamy. Had Parliament intended to restrict what is now s. 293 to cases of polygyny only, it would have passed a provision similar to the latter half of the bigamy provision. It did not do that, of course, because that was not its intention.

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[144] *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham, Butterworths, 2002) at p. 159.
[145] AGBC's Closing, p. 51.

129. Similarly, as discussed above, the AGBC's narrow interpretation of "polygamy" cannot be reconciled with subsection 293(1)(a)(ii), which prohibits "any kind of conjugal union with more than one person at the same time".

130. The AGBC's argument also overlooks two important presumptions of statutory interpretation:

(a) a legislature is presumed "to know all that is necessary to produce rational and effective legislation"; and

(b) "a legislature is an idealized speaker. Unlike the rest of us legislatures say what they mean and mean what they say. They do not make mistakes".[146]

131. Professor Sullivan quotes the following authorities for the second of these presumptions:[147]

> In *Dillon v. Catelli Food Products Ltd.*, [[1937] O.R. 114, at 176 (C.A.)], Riddell J.A. wrote:
>
> > The modern principle is to credit the legislators with knowing what they intend to enact into law, and with a knowledge of the English language which enabled them to express their meaning.
>
> In Spillers Ltd. v. Cardiff Borough Assessment Committee, [[1931] 2 K.B. 21, at 43], Lord Hewart said:
>
> > It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing their proposition lies heavily.

132. From the *OED* definitions above, it is clear that polygamy has a gender neutral meaning and can be both the practice of one man having multiple wives and one woman having multiple husbands. It is also clear from the *OED* that the terms "polygyny" and "polyandry" were in use in the English language by at least 1780, or more than a century prior to the first enactment of Canada's *Criminal Code*. "Polygamy" has been in use since at least 1591. What is more, the contemporaneous legal definition of polygamy was also

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[146] R. Sullivan, *Construction of Statutes*, *supra*, at pp. 154-155.
[147] Ibid. at p. 155 (emphasis added).

gender neutral. This is reflected in the seventh edition of *Wharton's Law Lexicon*, published in 1883 (J.M. Lely ed., London: Stevens and Sons), which defined polygamy as follows at p. 636 (emphasis added): "[... Gk., many; and ... marriage], plurality of wives or husbands".

133. Accordingly, the Parliament of 1890 must be taken to have known of the existence and definitions of all of these terms and to have used the one that best expressed its intended meaning. If it had only intended to criminalize the practice of one man having multiple wives, then presumably Parliament would have chosen to use the term "polygyny" to express that intention, or would have used language similar to what it included in the latter half of the bigamy provision in 1890. Instead it opted to use "polygamy", the meaning of which then as now includes both polygyny and polyandry.

(4) Historical Versus Current Meaning

134. The AGBC's insists that "polygamy" meant "polygyny" in 1890, such that s. 293 should now be interpreted to apply to polygyny only. As set out above, the premise of the AGBC's assertion – that "polygamy" did not have a gender neutral meaning in 1890 – is plainly inaccurate. Moreover, the AGBC's argument overlooks the fact that the polygamy prohibition was amended a number of times after 1890, the last being in 1954. Had Parliament in 1954 thought that the prohibition should be restricted to "polygyny" only, it would amended the provision to use that word only.

135. The AGBC's argument also has a further frailty, which is that it is contrary to modern statutory interpretation to assess a provision according to the historical meaning of terms, as opposed to their current meaning. The words used in a statute are not typically fixed in time according to the meaning they bore when the law first came into force; to the contrary, a statute is "always speaking".

136. A unanimous Ontario Court of Appeal recognized this feature of statutory interpretation in *Ackland v. Yonge-Esplande Enterprises Ltd.* (1992), 95 D.L.R. (4th) 560. After posing the question whether the correct interpretative approach to identify the meaning of particular terms used in a statute is "an historical one or an updating or

ambulatory one", Morden A.C.J.O. conducted the following analysis of the authorities (at pp. 566-568), which is worth quoting at length:

> To the extent that general propositions are helpful in matters of statutory interpretation, I think that the more general presumption favours the latter approach and that the former one is an exception to it: see Cross, *Statutory Interpretation*, 2nd ed. (1987), at pp. 49-54; Bennion, *Statutory Interpretation*, 2nd ed. (1992), s. 288; and Coté, *The Interpretation of Legislation in Canada*, 2nd ed. (1991), at p. 226.
>
> Cross, at p. 50, says:
>
> > But the proposition that an Act is always speaking is often taken to mean that a statutory provision has to be considered first and foremost as a norm of the current legal system, whence it takes its force, rather than just as a product of an historically defined Parliamentary assembly. It has a legal existence independently of the historical contingencies of its promulgation, and accordingly should be interpreted in the light of its place within the system of legal norms currently in force. Such an approach takes account of the viewpoint of the ordinary legal interpreter of today, who expects to apply ordinary current meanings to legal texts, rather than to embark on research into linguistic, cultural and political history, unless he is specifically put on notice that the latter approach is required.
>
> At pp. 617 and 630 of Bennion, *op. cit.*, it is said:
>
> > It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). [p. 617]
> >
> > . . . . .
> >
> > A fixed-time Act is one which, contrary to the usual rule, was intended to be applied in the same way whatever changes might occur after its passing. It has as it were a once for all operation. It is to such an Act that the oft-quoted words of Lord Esher chiefly apply: "the Act must be construed as if one were interpreting it the day after it was passed". [*The Longford* (1889), 14 P.D. 34, at p. 36] [p. 630]
> >
> > . . . . .
> >
> > The presumption however is that an Act is intended to be an ongoing Act, since this is the nature of statute law: an Act is always speaking. So there must be some reason adduced on account of which Parliament is taken to depart in a particular case from this principle. [p. 630]

Earlier, at p. 617, Bennion refers to the case of the Act that is to be of unchanging effect (a fixed-time Act) as "the comparatively rare case".

Coté, *op. cit.*, at p. 226 says:

> But merely because the meaning of legislation at the time of its enactment must be respected in no way suggests that the statute's effect is confined to material or social facts or events then existing. It is necessary to distinguish the meaning of a term from the things that may be included in its ambit.
>
> An enactment dated January 15, 1980 dealing with "automobiles" will obviously apply to cars built in 1981: the law "is ever commanding"; "and whatever be the sense of the verb or verbs contained in a provision, such provision shall be deemed to be in force at all times and under all circumstances to which it may apply". The guideline favouring the common meaning at the time of adoption does not mean ". . . that all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted."

Section 4 of the *Interpretation Act*, R.S.O. 1990, c. I.11, which provides, in part, that:

> 4. The law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise

supports the use of this general presumption. In *Cash v. George Dundas Realty Ltd.* (1973), 1 O.R. (2d) 241, 40 D.L.R. (3d) 31 (C.A.), affirmed [1976] 2 S.C.R. 796, 6 N.R. 469, Estey J.A. said for this court, at p. 38:

> The Court in interpreting and applying a statute must of course attribute to its provisions their plain meaning according to the understanding and practices of the times. A statute speaks continuously as though freshly enacted at the time the issue in question arose: s. 4, *Interpretation Act*, being R.S.O. 1970; c. 225; *Craies on Statute Law*, 7th ed. (1971), pp. 81-2. Courts are no longer concerned with the bygone canons of equitable consideration [construction?], the mischief rule and the many other aids and procedures formerly invoked in the interpretation of legislation. We are now concerned only with applying the statute according to its plain meaning in the light of the current practices and standards of the community: *Campbell College, Belfast v. Com'r of Valuation for Northern Ireland*, [1964] 1 W.L.R. 912, *per* Lord Upjohn at p. 941; *Craies, supra*, p. 64.
>
> [emphasis added]

> I think that the general presumption in favour of the updating or ambulatory approach is the correct one ... [148]

137. There is nothing about the term "polygamy" that requires that it be interpreted contrary to this general rule. Indeed, it is plain from the inclusion of s. 293(1)(a)(ii) – prohibiting "any kind of conjugal union with more than one person" – that Parliament did not intend to restrict s. 293 to a narrow definition of "polygamy" as "polygyny". Rather, Parliament was attempting to capture *any form of conjugality other than monogamy*, and so it used broad, overlapping terms.[149] Indeed, the original 1890 provision included two additional provisions to further describe the broad scope of the prohibition. One of those provisions is particularly broad, and is explicitly gender neutral in its language: "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" (emphasis added). The AGBC's interpretation of s. 293 would plainly be contrary to Parliament's intention to capture polygamy in all its forms, regardless of any particular gender arrangement.

(5) Conclusion on the Meaning of "Polygamy"

138. On the foregoing principles of modern statutory interpretation, "polygamy" in s. 293 of the *Criminal Code* should not be given a narrow definition tantamount to polygyny. Given its ordinary meaning, context within the statute, and Parliament's intention, polygamy must have a broad definition that includes polyandrous, polygynous, same-sex and group unions. As a term susceptible to an updating or ambulatory interpretation, it should be interpreted consistently with current understandings and so as to encompass any form of committed, multi-partner relationship.

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[148] Underlining and comment in square brackets inserted by the Court in *Ackland*. See also the *Interpretation Act*, R.S.C. 1985, c. I-23, s. 10: "The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning."

[149] Indeed, the Amicus agrees with the AGBC's comment that "[i]t seems clear from the history and context that the overlap among the provisions was deliberate": AGBC's Closing, p. 47, para 106.

C. Section 293(1)(a)(ii): A "Conjugal Union" Is a Marriage-Like or Conjugal Relationship

139. Section 293(1)(a)(ii) renders it criminal for any one to practise or enter into or agree or consent to practise or enter into "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". "Conjugal union" is not defined in the *Criminal Code*, and there is disagreement among the parties as to the meaning of that phrase.

140. In the Amicus' submission, "conjugal union" means a "marriage-like relationship" or a "conjugal relationship". It is a broad term, encompassing formal marriages but also including what are sometimes called "common law relationships". The word "conjugal" describes the *substance* of a relationship, rather than its legal form: it speaks to a relationship between persons that is committed, interdependent and of some permanence. Within the broad category of "conjugal unions" or "conjugal relationships", the law recognizes at least marriage and common law relationships; within the context of immigration, Canadian law also recognizes a third relationship between "conjugal partners".

141. In the Amicus' submission, s. 293(1)(a)(ii) prohibits all such relationships when pursued by more than two people. Whether a relationship amounts to being "conjugal" is a multi-factor test, which, as seen above, has been set out in a family law context in such cases as *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) and *M. v. H.*, [1999] 2 S.C.R. 3. In the latter case, Cory and Iacobucci JJ. stated at para 59:

> *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal.

142. The Amicus says that this is the test that ought to be applied to determine whether a multi-partner relationship falls within the scope of s. 293(1)(a)(ii). This interpretation of "conjugal union" as meaning a "conjugal relationship" is supported by its ordinary meaning, the context of s. 293, and Parliament's intention, as discussed further below.

143. As outlined briefly above, the AGC disagrees that the term "conjugal union" is as broad "conjugal relationship" and would impose two limitations on the term. First, the AGC says that "a conjugal union, like a marriage, comes into being through a marriage cermeony or other sanctioning event";[150] it "is created in a moment by a marriage ceremony or other sanctioning event",[151] as opposed to developing over time like a conjugal relationship. Second, the AGC says that a "conjugal union" binds the participants together "in a marital structure or institution".[152]

144. The AGBC is less clear on this aspect of the interpretation of s. 293. He says that the "core" polygamy is that which "is or purports to be a marriage, including when it is or purports to be a pairing sanctioned by some authority and binding on its participants".[153] When specifically addressing the interpretation of ss. 293(1)(a)(ii), however, the AGBC appears to take the position that the subsection "refers to a polygamous marriage-like union even if it cannot be proven to have been formalized through recognized ceremony or celebration that would have made it either a "form of polygamy" under subsection 11(5)(a) (now subsection 293(1)(a)(i)) or "what among the persons commonly called Mormons is known as spiritual or plural marriage" under then subsection 11(5)(c)."[154]

145. For the reasons set out below, the AGC's narrow interpretation of "conjugal union" ought to be rejected. Rather, the term "conjugal union" bears the same meaning as "marriage-like relationship" or "conjugal relationship". This interpretation is supported by the ordinary meaning of the term, the context in which the term is used in s. 293, and the evidence of Parliament's intention, as discussed under the next three subheadings. Some practical considerations that also support this interpretation are set out under subheading (4) below.

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[150] AGC's Closing, p. 66, para 222.
[151] AGC's Closing, p. 67, para 227.
[152] AGC's Closing, p. 66, para 222.
[153] AGBC's Closing, p. 45, para 100.
[154] AGBC's Closing, p. 47, para 106.

(1) The Ordinary Meaning of "Conjugal Union"

146. The term "conjugal union" is not one that is often used, but when it is, it is taken to mean a "conjugal *relationship*". Indeed, many courts, tribunals and commentators use these two terms as synonyms.

147. The federal *Immigration and Refugee Protection Regulations*, SOR/2002-227 states, in s. 2, that "'conjugal partner' means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year" (emphasis added). In determining whether that test was met in the recent case of *Mbollo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1267 (an appeal from 2009 CanLII 29462 (I.R.B.)), Boivin J. had no hesitation in interchanging the terms "conjugal relationship" and "conjugal union":

> 24 An appeal before a panel is a hearing *de novo*. Accordingly, the applicant and his spouse had to provide sufficient reliable evidence showing that their conjugal relationship was genuine and that it was not entered into primarily for the purpose of acquiring a status under the Act (*Froment v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1002, 299 F.T.R. 70 at para. 19, citing *Sanichara* at para. 8; *Mohamed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 696, 296 F.T.R. 73 at para. 40; *Morris v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 369, 147 A.C.W.S. (3d) 489 at para. 5).
>
> 25 The consideration of conjugal partner status under section 2 of the Regulations is an integral part of interpreting section 4 of the Regulations. If it is not established on a balance of probabilities that a conjugal relationship exists, the relationship is not genuine, and it may be inferred that it was entered into primarily to obtain a status or privilege under the Act.
>
> 26 The panel based its analysis on the non-exhaustive factors for identifying a conjugal relationship as established in *M. v. H.*, [1999] 2 S.C.R. 3, 238 N.R. 179. The weight to be assigned to the different factors varies, and a flexible method must be adopted in determining whether a **conjugal union** exists (*Cai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 816, 159 A.C.W.S. (3d) 428 at para. 12).
>
> [Underlining and bolding added]

148. Similar use of the term "conjugal union" was used in a recent Immigration Appeal Board decision, *Maier v. Canada (Citizenship and Immigration)*, 2009 CanLII 72215 (I.R.B.):

> [1] Klaus Alfred MAIER (the "appellant") applied to sponsor Olena ISAYEVA (the "applicant") as a conjugal partner as provided for pursuant to subsection 117(1) of the *Immigration and Refugee Protection Regulations* (the "*Regulations*") and was refused by the visa officer on the basis that the applicant did not meet the definition of conjugal partner. Conjugal partner is defined as:
>
> > "conjugal partner" means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year.
>
> [2] It is common ground in this appeal that a conjugal relationship has been interpreted as a "marriage-like" relationship. So, the question in this appeal is whether the appellant has established, on the balance of probabilities that he has been in a marriage-like relationship with the applicant for at least one year preceding his application to sponsor. The appellant's application to sponsor the applicant is dated October 13, 2006, so the relevant time period for assessing the nature of the relationship is the one year prior to that date.
>
> [3] The *Molodovich* case is oft citied for the generally accepted characteristics of a **conjugal union**. They include; shared shelter, sexual and personal behaviour, services, social activities, economic support, children and societal perception of the couple. *M.* v. *H.* is cited for the proposition that the factors referenced above may be present in varying degrees and that it is not necessary for all these factors to be present for a relationship to meet the conjugal test.
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> [Underlining and bolding added; footnotes removed]

149. The same sort of analysis was also conducted in *Labreche v. Canada (Citizenship and Immigration)*, 2009 CanLII 82437 (I.R.B.).[155]

150. The term "conjugal union" was also used as a synonym with "conjugal relationship" in a recent case from Quebec, *A. v. B.*, 2009 QCCS 3210. The term was used a number of times in that case; para 182 is perhaps the best example:

> 182 The case law clearly shows that provinces have the jurisdiction under s. 92(12) of the *Constitution Act, 1867* to dictate procedure for the formation of marriage, just as they have the power under s. 92(13) of the *Constitution Act, 1867* to regulate **conjugal unions** that do not constitute marriage, although they may resemble it. In *Reference re Same-Sex Marriage*, the Supreme Court stated the following:
>
> > [33] Our law has always recognized that some conjugal relationships are based on marital status, while others are not. The provinces are vested with competence in respect of non-marital same-sex relationships, just as

[155] See paras 10, 11, 34, 36 and 37.

> they are vested with competence in respect of non-marital opposite-sex relationships (via the power in respect of property and civil rights under s. 92(13)). For instance, the province of Quebec has established a civil union regime as a means for individuals in committed conjugal relationships to assume a host of rights and responsibilities: *See the act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6. Marriage and civil unions are two distinct ways in which couples can express their commitment and structure their legal obligations. Civil unions are a relationship short of marriage and are, therefore, provincially regulated.
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> [Bolding added; underlining in original]

151. Moreover, the term "conjugal union" is often used by Statistics Canada as a synonym with "conjugal relationship", encompassing both marriage and common law unions. The following are a few examples:

(a) N. Zukewich and M. Cooke-Reynolds, "Days of our lives: time use and transitions over the life course":[156]

> This study of union formation compares getting married with entering a common-law union. In an attempt to capture the respondent's first transition into a conjugal union, the population was restricted to those aged 20 to 34. This was based on average age at first marriage and the fact that people tend to enter their first common-law relationship at slightly younger ages then when they marry (Statistics Canada 2000). However, married people in this age range are somewhat more likely than cohabiting people to be in their first union.
>
> [emphasis added]

(b) W. Clark, "Delayed transitions of young adults".[157] This paper "explores the transitions that young people make on their way to adulthood". One "marker of adult transition" used in the study is "ever in a conjugal union", which is defined as:

> is married, widowed, separated or divorced (i.e., ever married) or is currently in a common-law relationship. In the text, this concept is referred to as "ever in a conjugal union".
>
> [emphasis added]

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[156] In *Transitions to Union Formation, 1998, No. 2* (Statistics Canada: 2003) at pp. 8-9 (found at: http://dsp-psd.pwgsc.gc.ca/Collection/Statcan/89-584-M/89-584-MIE2003002.pdf).

[157] Found at: http://www.statcan.gc.ca/pub/11-008-x/2007004/10311-eng.htm#a1.

(c) C. Le Bourdais, G. Neill, and P. Turcotte, "The changing face of conjugal relationships",[158] a study that examines how women's conjugal life choices have changed over time:

> While the tendency for women to form unions has remained consistently high over the years, the nature of these unions has changed fundamentally. Although marriage still accounts for the majority of relationships, its one-time near-universal appeal has given way to ever more popular common-law unions. Using data from the 1995 General Social Survey (GSS), this article examines how the types of conjugal unions women enter have changed over time. It also asks if starting life together in a common-law union as opposed to a marriage influences the chances of the relationship breaking up or predicts the types of relationships that may follow.
>
> [pp. 14-15; emphasis added]
>
> The proportion of women who started their first conjugal union in a marriage fell from 95% of those in their 60s to 56% of women in their 30s and to a still lower 35% of those in their 20s. Clearly, common-law has become younger people's favoured arrangement for a first conjugal relationship. While only 1% of women aged 60 to 69 lived common-law in their first union, 38% of 30- to 39-year-olds and 52% of 20- to 29-year-olds started conjugal life with this option.
>
> [p. 15; emphasis added]

(d) Statistic Canada's publication *The Daily* included this language in its October 3, 2006 issue:[159]

> With Canada's increasing cultural diversity, interreligious conjugal unions are on the rise, but the vast majority of couples still consist of partners from the same broad religious affiliation group, according to a new study.
>
> The study, based on census data and published today in the online version of *Canadian Social Trends*, found that in 1981, 15% of people in couples were in an interreligious union, either marriage or common-law.
>
> [emphasis added]

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[158] In *Canadian Social Trends*, Spring 2000 (Statistics Canada – Catalogue No. 11-008) at pp. 14-17 (found at: http://www.statcan.gc.ca/pub/11-008-x/11-008-x1999004-eng.pdf).

[159] Found at http://www.statcan.gc.ca/daily-quotidien/061003/dq061003b-eng.htm.

152. The Law Commission of Canada also uses the terms "conjugal union" and "conjugal relationship" interchangeably. In its *Beyond Conjugality*[160] report at p. 2, under the heading "Conjugal Relationships", the Commission writes:

> Almost all Canadians form a conjugal union at some point in their lives. A clear majority of Canadians – over 60 percent – were married or cohabiting in a conjugal relationship at the time of the 1996 census.[161]

153. What these sources demonstrate is that the natural and ordinary meaning of "conjugal union" is a "conjugal relationship" or a "marriage-like relationship", which refer broadly to a committed, intimate relationship of some permanence. When "conjugal union" is used in normal parlance, it is used to encompass both marriage and common law relationships. A "conjugal union" is simply a union between people that is "conjugal".

(2) The Context of "Conjugal Union"

154. The context of the phrase in s. 293 also supports this interpretation of "conjugal union".

155. The first point lies within the text of subsection (1)(a)(ii). That subsection speaks to "any kind of conjugal union with more than one person at the same time" (emphasis added). These words are very broad, and appear aimed at capturing any kind of committed, permanent relationship between three or more people. Indeed, for greater clarity, Parliament confirmed that it was criminalizing every such relationship "whether or not it is by law recognized as a binding form of marriage". "Form of marriage" is defined in s. 214 this way:

> "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

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[160] *Beyond Conjugality: Recognizing and supporting close personal and adult relationships* (Ottawa: Law Commission of Canada, 2001).

[161] Luca Affidavit #1, Exhibit "B", Tab 10 (Law Commission of Canada, Beyond Conjugality: Recognizing and supporting close personal and adult relationships (Ottawa: Law Commission of Canada, 2001)) emphases added; citations removed, Reference Exhibit 76.

156. Unlike the bigamy provision (s. 290), s. 293 is *not* restricted to a person entering into multiple overlapping forms of marriage. Rather, s. 293 aims at prohibiting "any kind of conjugal union between more than one person at the same time".

157. The second point arises with the opening words of subsection (a): "practises or enters into or in any manner agrees or consents to practise or enter into". Again, this language is extremely broad, reflecting the objective of capturing any kind of multi-party conjugal relationship, no matter how it is formed. In particular, as will be discussed further below, the word "practises" is distinguished from "or enters into", indicating that it is *not* a requirement of s. 293's application that the conjugal union have been formed in a particular way. Moreover, s. 293 also includes the broad words "agrees or consents", which encompass the casual manner in which many common law unions are formed: first by deciding to cohabit, and then by each party consenting to that continuing state of affairs.[162] The opening words of subsection (1) reveal that s. 293 is not concerned with any notion about how a multi-party conjugal relationship came about: all the Crown must prove is that the accused is *practising* such a relationship, or has "in any manner" agreed or consented to practising such a relationship. It is simply the fact that the accused is *in* the relationship that matters; the manner in which the relationship was formed is irrelevant. Indeed, that point is put beyond any doubt by the language of subsection (2): "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".

(3) Parliament's Intention

158. The legislative record also demonstrates that Parliament did not intend to distinguish a "conjugal union" from a "conjugal relationship". That intention is best evinced by the form of the provision that Parliament first passed in 1890. Section 5 of *An Act respecting Offences related to the Law of Marriage*, R.S.C., c. 161 stated:

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[162] As Professor Wu has written in his academic work (see Wu Affidavit #1, Exhibit "B" at p. 4; citation omitted):

> [I]t is wrong to assume that the act of commitment is not possible outside of legal marriage. The commitment-making act is multifarious and occurs through non-institutionalized processes. Throughout Canada (and especially Québec), common-law marriage has transformed from an uncommon experience into a normative behaviour for millions of

5. Every one who practises, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into –

(a) Any form of polygamy; or –

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

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

(d) Who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union; and –

2. Every one who, -

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

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

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

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

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

159. In the Amicus' submission, this original provision makes it clear beyond doubt that Parliament intended to prohibit *all* conjugal relationships between more than two people, even if they were formed merely by cohabitation and ongoing consent. A number of points in this text drive that conclusion.

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people. The growth of common-law marriage and other non-traditional households should caution us against defining conjugal unions and families in an inflexible manner.

160. First, the opening words of the section make clear that criminal liability extends to anyone who "practises" any form of polygamy or any multi-partner conjugal union. The verb "practises" relates to an ongoing state of affairs, entirely divorced from how the relationship was formed in the first place. Indeed, s. 293 makes that point explicit: after criminalizing anyone who "practises" polygamy, it sets out various means by which a polygamous relationship might be formed, all in the alternative and independent of one another: "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, ... agrees or consents to practise or enter into" (emphases added). The references to rites and ceremonies, customs and contracts all modify the words "agrees or consents to practise or enter into"; they are not related to the first instance of "practises". Plainly Parliament did not originally intend to limit the polygamy prohibition to relationships that have been created in a particular way.

161. Second, even where Parliament refers in the opening words of s. 5 to methods of entering a polygamous relationship or multi-party conjugal union, it does so in a list of alternatives, some of which are extremely broad. For instance, while an impugned relationship clearly may be created "by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular", it may also be created "by any form of contract, or by mere mutual consent, or by any other method whatsoever". These latter methods plainly do not require a ceremony. Indeed, the inclusion of "mere mutual consent" mirrors the manner in which many common law relationships are formed.[163]

162. Third, subsection (1)(d) reveals Parliament's intention to criminalize multi-party "cohabitation" where the participants do so in a conjugal union: "Who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union". Contrary to the Attorneys General's views, Parliament plainly *was* of the view that mere cohabitation could create a conjugal union. Indeed, that notion of *cohabition* in subsection 1(d) exactly parallels the more modern concept of a common law

[163] See *Austin v. Goertz*, 2007 BCCA 586, 74 B.C.L.R. (4th) 39 at para. 58; quoted with approval in Stace-Smith v. Lecompte, 2011 BCCA 129.

relationship. The provision at issue in *M. v. H.*, which created common law rights which the SCC then extended to same-sex couples, incorporated a requirement that the couple "cohabit", a term that in turn was defined as: "to live together in a conjugal relationship, whether within or outside marriage".[164]

163. Fourth, it is worth observing these words in subsection 2: "any of the sexual relationships mentioned in sub-section one of this section" (emphasis added). The phrase "sexual relationships", which is repeated in subsection 3, is somewhat inaccurate, in that subsection 3 expressly points out that proof of sex in the relationship is *not* required. However, by describing all of the four relationships mentioned in subsection 1 as "sexual relationships", Parliament appears to have been focusing on the intimate nature of the relationships as between the parties, rather than any formalized, social status.

164. The polygamy provision was, of course, somewhat rewritten in later versions. For instance, in 1900 the "cohabitation in conjugal union" provision became detached from the other three forms of relationship, and stood as its own subsection. Then in 1952 it was removed. Other words were also removed over the years, such as the modifier "sexual" before "relationship. However, as the AGBC says of the changes in 1954, "[t]here is nothing in the legislative record to suggest that these changes were intended to be substantive."[165] Indeed, before the Subcommittee considering the draft 1952 bill (which had the same wording as s. 293 now) the section was listed as being "[c]hanged in form only", and a Department of Justice briefing note indicated that the section "has been redrawn to simplify".[166]

(4) Labrie and Tolhurst

165. Among the very few cases that have considered the polygamy prohibition are *The Queen v. Labrie* (1891), 7 M.L.R. 211 (Que. Q.B.) and *R. v. Tolhurst*, [1937] O.R. 570 (C.A.). The AGC relies on these cases in defence of his position that "conjugal union" is

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[164] *M. v. H.* at para 19.
[165] Legislative History Brief, para 13, Reference Exhibit "X" for identification..
[166] Legislative History Brief, para 15, and Tab 7(H-I), Reference Exhibit "X" for identification and Exhibit 157.

not synonymous with "conjugal relationship", and instead requires a ceremony or contract under a sanctioning authority.

166. The facts of *Labrie* and *Tolhurst* are roughly similar. In each case the accused was married but abandoned the marriage and lived in adultery with another person. The question in each case was whether living in adultery – that is, living with one person while married to another person – falls within the scope of the polygamy provision. Both courts found it does not. The report of *Labrie* attributes the following reasoning to Dorion C.J.: "It was apparent from the statute that there must be some form of contract between the parties, which they might suppose to be binding on them, but which the law was intended to prohibit." The court in *Tolhurst* came to a similar conclusion, stating:

> We think the crucial words of s-s. (b) are "any kind of conjugal union;" that these words predicate some form of union under the guise of marriage, and that Parliament had no intention in this section of the Code of dealing with the question of adultery. The section is headed "Polygamy and Spiritual Marriages" and it was originally enacted as an amendment relating to An Act Respecting Offences Relating to the Law of Marriage by 53 Vict., c. 37, s. 11, and it is said to have followed the Edmunds Law in the United States and was aimed at prohibition of polygamy under any guise.

167. Contrary to the tenor of the AGC's Closing, these cases do not stand for the proposition that a "conjugal union" is something narrower than a "conjugal relationship", for two reasons.

168. First, the comments of both courts are consistent with the concept of a conjugal relationship. The *Tolhurst* court's comment that a "conjugal union" means "some form of union under the guise of marriage" is entirely consistent with the modern concept of a conjugal relationship. What the court was invoking was the concept of *conjugality*: merely cohabiting with a person is not enough to constitute a conjugal union; there must be something more; the union must be a *conjugal* one. In 1937 the *Tolhurst* court lacked the language we now have to speak of conjugality in terms other than marriage, and so it analogized to marriage: the conjugal union must be "under the guise of marriage". That is what a common law relationship is. Similarly, the parties to a conjugal relationship agree to form a union together, with attendant responsibilities; there is, in the words of *Labrie*,

"some form of contract between the parties, which they might suppose to be binding on them".

169. If it is thought, however, that the *Labrie* and *Tolhurst* courts went further and were distinguishing a "conjugal union" from a "conjugal relationship", then they should not be followed. For one thing, the courts' comments are *obiter*. In both cases the courts were determining that a married person simply cohabiting with another person is not sufficient to engage the provision – they were, on the facts of the case, dealing with the question of *adultery*, not multi-party conjugal relationships. For another, those cases are inconsistent with one of the two cases in which a conviction was secured on the polygamy provision, *R. v. Harris* (1906), 11 C.C.C. 254. In that case, the court held that if the prohibition meant "anything at all . . . [it was] meant to apply to just such a case as this, where the parties are living together in open continuous adultery to the scandal of the public."[167]

170. In any event, any conclusion that a "conjugal union" is distinguishable from a "conjugal relationship" is contrary to the plain wording of the statute, for the reasons discussed above. That conclusion would also be irrational in its effects, as discussed below.

(5) The Consequences of the AGC's Interpretation

171. There are two further reasons for rejecting the AGC's narrow interpretation of "conjugal union", flowing from the consequences that such an interpretation would entail.

172. First, the AGC's interpretation would severely restrict the utility of s. 293. If polygamists could avoid criminal sanction by simply not having a ceremony or not forming some kind of specific contract, then obviously that is what some of them would do. Their relationship would be the same in every other respect; none of the "harms" the AGC alleges would be prevented, and yet punishment would be avoided. Obviously such a state of the law would not make any sense.

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[167] *R. v. Harris, supra,* at 255.

173. Indeed, it appears that Parliament had just this concern when it enacted the original provision. In the debates in the House of Commons on April 10, 1890 on the original bill,[168] Mr. Blake made these comments:

> [I]t is right to observe that the difficulties which the United States has had to contend with in respect to the Mormons of Utah since the Brigham Young dispensation are serious and growing; and that from time to time earnest efforts have been made to overcome what seems to be an almost insuperable difficulty, owing to the extraordinary solidarity of these people and their determination to persist in and to conceal all legal evidence, at any rate, of their practices.[169]
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> ...
>
> Simple cohabitation, therefore, in conformity to the Mormon custom is one of the rules by which Mormon marriage shall be recognised. I find, in the compilation which contains this will, this statement with reference to Mormon marriages:
>
> > "Sometimes they have witnesses, sometimes not: if they think any trouble may arise from a marriage, or that a woman is inclined to be a little perverse, they have no witnesses, neither do they give marriage certificates, and if occasion requires it, and it is to shield any of their polygamous brethren from being found out, they will positively swear that they did not perform any marriage at all, so that the women in this church have but a very poor outlook for being considerered honorable wives."[170]

174. Whether or not the passage quoted above by Mr. Blake has any truth, he was clearly concerned about it. And while that speech by one Parliamentarian may not be solid evidence of what was intended by Parliament as a whole, certainly it is the kind of concern which one might *expect* Parliament to have. Indeed, the AGC characterizes the "conjugal union" offence "as an anti-circumvention provision".[171] Interpreting "conjugal union" so as to require the state to prove that the relationship was formalized by "a marriage ceremony or other sanctioning event" and binds the parties into a "marital structure or institution" is clearly not consistent with that objective.

175. Parliament strove to make this point plain in s. 293(2), where it confirmed that, "[w]here 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

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[168] Legislative History Brief, Tab 2B, Reference Exhibit 157.
[169] *Ibid.*, p. 3173; emphasis added.
[170] *Ibid.*, p. 3174; emphasis added.

to is necessary ... on the trial of the accused". The AGC says of this subsection that it just "makes clear that the particulars of the sanctioning event are not esential elements of the offence", such that "[t]he prosecutor must show only that a sanctioning event occurred".[172] With respect, that argument does not at all reflect the words of s. 293(2). Parliament did not direct that a ceremony must be proven, but not the *particulars* of that ceremony. Rather, it stipulated that "no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary" (emphasis added).

176. There is a second point against the AGC's interpretation. If s. 293 is truly confined to cases where the parties take part in ceremonies or form contracts, then it would then appear to be targeting the parties' *expressions* of their commitment to one another. The law would in effect say this: you may have a committed, intimate relationship with two other people at the same time, so long as you do not celebrate that relationship, or express your intentions, or specifically agree with one another to commit to that relationship. Such an interpretation would raise obvious, facial issues regarding freedom of religion under s. 2(a) and freedom of expression under s. 2(b). And to what end? As set out above, targeting the law at such expressions of commitment would make it relatively simple to circumvent. Whatever way s. 293 is read it entails serious and far-reaching breaches of *Charter* rights, but it should nonetheless be interpreted in such a way as to avoid such an obvious violation of freedom of expression, especially in the absence of any logical objective.

D. Section 293 Cannot Be Read Down to Target Only Exploitative Relationships

177. As with the two Attorneys, West Coast LEAF also urges this Court to read s. 293 in a manner that restricts its scope. Specifically, West Coast LEAF submits that "section 293 of the Criminal Code shold be read down to only apply in exploitative

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[171] AGC's Closing, p. 65, para 219. At p. 47, para 106 of his Closing, the AGBC also refers to s. 293(1)(a)(ii) as "an anti-circumvention measure".
[172] AGC's Closing, p. 69, para 234; underlining added.

circumstances".[173] West Coast LEAF provides a list of suggested factors to inform this analysis at para. 48 of its Closing.

178. West Coast LEAF takes this position, of course, because of its view that s. 293, as the Attorneys and the Amicus interpret it, is overbroad. It bases its reading down argument on the "principle of constitutionality", which holds that "if legislation is amenable to two interpretations, a court should choose the interpretation that upholds the legislation as consitutional because the courts must presume that Parliament intended to enact constitutional legislation and strive, where possible, to give effect to this intention."[174]

179. The Amicus agrees that s. 293 is overbroad. However, West Coast LEAF's proposal to read down s. 293 as being limited to exploitative relationships is untenable. The language of s. 293 simply cannot bear that interpretation.

180. Before turning back to the interpretation of s. 293, it is important to keep in mind the narrowness of the doctrine of reading down. As noted by West Coast LEAF and quoted above, the doctrine of reading down only applies "if legislation is amenable to two interpretations", one of which is constitutionally sound. As West Coast LEAF further notes in its argument, "merely invoking the presumption of constitutionality does not give a court complete freedom to depart from the terms of a statute employed by the legislature"; to the contrary, "[i]f the terms of the legislation are so unequivocal that no real alternative interpretation exists, respect for legislative intent requires that the court adopt this meaning, even if this means that the legislation will be struck down as unconstitutional."[175] Peter Hogg describes reading down this way in his classic text:[176]

> Reading down is the appropriate remedy when a statute will bear two interpretations, one of which would offend the *Charter of Rights* and the other of which would not. In that case, a court will hold that the latter interpretation, which is normally the narrower one (hence reading *down*), is the correct one. When a statute is read down to avoid a breach of the Charter, there is no

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[173] West Coast LEAF's Closing, p. 2, para 4; emphasis added. The BCTF adopts West Coast LEAF's submissions in this regard.

[174] *Ibid.*, p. 2, para 5; emphasis added; quoting Lamer C.J.'s dissent in *R. v. Mills*, [1999] S.C.J. No. 68 at para 56.

[175] Ibid., pp. 4-5, para 11, quoting Lamer C.J.'s dissent in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para 15.

[176] *Constitutional Law of Canada*, 1998 (Scarborough: Carswell, 1998) at s. 37.1(b).

> holding of invalidity. The vindication of the Charter right is accomplished solely by interpretation. Reading down is another doctrine of judicial restraint, because it minimizes the impact of a successful Charter attack on a law.
>
> Reading down should not be confused with reading in ... Reading in involves the insertion into a statute of words that Parliament never enacted. It is not a technique of interpretation but rather a technique of judicial amendment, altering the statute to make it conform to the Constitution. Reading in usually has the effect of extending the scope of the statute. Reading down, on the other hand, involves giving a statute a narrow interpretation in order to avoid a constitutional problem that would arise if the statute were given a broad interpretation.
>
> [emphasis added]

181. The essential prerequisite to reading down, therefore, is that the text of the law can actually bear the narrower interpretation. The failure to meet that prerequisite is the critical frailty in West Coast LEAF's argument. In the Amicus' submission, it is simply impossible to ascribe to s. 293 the interpretation West Coast LEAF advances. Section 293 is plainly and obviously *not* aimed only at polygamous relationships that involve exploitation; it is clearly intended to cover all polygamous relationships, no matter how consensual and innocuous – or indeed *beneficial* to their participants. Three elements within the text of s. 293 make this point clear.

182. First, s. 293 criminalizes *everyone* who engages in polygamy. It does not criminalize only alleged exploiters, or only men, or only adults; *it criminalizes alleged wrongdoers and victims alike.* If Parliament were concerned about prohibiting exploitation, then obviously it would be perverse to criminalize the *victims* of that exploitation. But that was not Parliament's intention at all. What Parliament meant to do was to outlaw *every* polygamous relationship, no matter if it is beneficial, exploitative, or something in between.

183. The second point in the text against West Coast LEAF's interpretation is in the words of subsection (1)(a): "practices or enters into or in any manner agrees or consents to practise or enter into" (emphasis added). Subsection (1)(b) also criminalizes celebrating or being a party to a "consent" purporting to sanction a polygamous relationship. Section 293 criminalizes *consenting to* polygamy. It is not at all confined to instances where the consent of one or more of the parties was impaired – where there

was undue influence, or a gross imbalance of power, or an abuse of authority, or a context of dependence, or where one of the parties was a minor; in short, where there is exploitation. It is not the *absence* of full and valid consent that brings a polygamous relationship into the ambit of s. 293; to the contrary, s. 293 makes it illegal to *consent* to polygamy. No matter if a polygamous relationship is composed solely of highly informed, autonomous, consenting adults – s. 293 deems their relationship to be criminal.

184. The third point is that s. 293 is not premised in any way on the involvement of either a child or sexual relations. In its Closing, West Coast LEAF turns to s. 153 of the *Criminal Code* (sexual exploitation) as a template for how to determine the existence of exploitation. There are profound differences between s. 153 and s. 293, however. Unlike s. 293, s. 153 *expressly* includes the following elements (not all of which need be present):

(a) there is sexual activity involving the victim at the instance of the accused;

(b) the accused is in a position of trust or authority;

(c) the victim is a young person;

(d) the victim is in a relationship of dependency with the accused; and

(e) the relationship between the victim and the accused is exploitative of the young person, as inferred by reference to i) the age of the victim, ii) the age difference between the accused and the young person, iii) the evolution of the relationship, and iv) the degree of control or influence by the accused over the young person.

185. Section 293 references *none* of these elements. Subsection (2) makes clear that sexual activity is not an element of the offence of polygamy. Nor is age or any other impairment of consent an element of the offence. To the contrary, while s. 153 vitiates the consent of young persons who are exploited, s. 293 *criminalizes* the act of *consenting* to polygamy; that is, while the consent of an exploited young person is removed as a *defence* to s. 153, the consent of an adult to a polygamous relationship is an *offence*.

186. There is simply no language within s. 293 at all that could anchor the "exploitative" analysis that West Coast LEAF would have it incorporate. Unlike s. 212, which criminalizes "[e]very one who lives wholly or in part on the avails of prostitution of another person", there is no notion at all in s. 293 of the prohibited relationships being only exploitative ones. The definition of s. 293 that West Coast LEAF urges simply bears no relation to the actual language employed by Parliament.

187. The absence of any element of exploitation in s. 293 means that section cannot be "read down" in the manner West Coast LEAF urges. Nor can it be read down to incorporate any of the other limitations set out in Question 2 of the Reference Questions. There is simply no language within s. 293 that could bear any such limitations. If the polygamy prohibition were to be restricted in any of these ways, then an entirely new provision would be required. As will be submitted toward the end of this submission, any such redrafting must be conducted by Parliament, not the courts.

188. The Amicus does agree with West Coast LEAF that "[t]he practice of having multiple partners can be an expression of diverse forms of family and sexuality that respects the individual agency of each member of the union or it can be a means to control women's sexual, reproductive and economic freedom."[177] Indeed, examples of the former have been introduced into this Reference through the polyamorists and the independent fundamentalist Mormons (Alina Darger, Anne Wilde, Mary Batchelor and Marianne Watson), and examples of the latter have been introduced from certain experiences in the FLDS. The Amicus also agrees that is important that criminal exploitation be prosecuted where it arises in polygamy, just as it ought to be in monogamous relationships. Such prosecutions can and should make use of criminal provisions that apply to polygamy and monogamy alike, and critical provisions – such as s. 153 – exist already in the Criminal Code. The one exception, which the Amicus will address below, relates to forced marriage (and forced conjugal relationships). No provision currently exists in the Criminal Code prohibiting the forcing of someone into marriage, and Parliament should consider enacting such a provision.

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[177] West Coast LEAF's Closing, p. 18, para 45.

E. The Overbreadth Issue

189. As discussed in the preceding three sections, the two Attorneys General and West Coast LEAF all seek to limit the scope of s. 293. Although they advocate very different limitations, they are united in motivation: they all do so out of recognition that s. 293 is too broad in its sweep to pass constitutional muster; it captures far too many non-harmful polygamous relationships to justify any valid objective it may have. There is no reason why the polyamorists or the independent fundamentalist Mormons (or, for that matter, some of the FLDS witnesses) should be criminalized simply for wanting to form a conjugal union with more than two people. If they have been complicit in underage sex or child trafficking or any other criminal provision, then that behaviour is rightly condemned and ought to be prosecuted. But forming a consensual polygamous relationship among adults cannot, by itself, be constitutionally criminalized, given the grave *Charter* breaches it entails, as discussed in the next Part.

190. The preceding three sections of the Amicus' Closing have addressed how none of the AGBC's, the AGC's or West Coast LEAF's interpretations of s. 293 is supportable, but it is also worth considering at this stage how those three approaches attempt to deal with the question of overbreadth.

191. The AGBC does so by reading s. 293 as if it only applies to polygyny. He does this, of course, in an attempt to be consistent with his theory that polygyny causes societal harms by creating a pool of unmarried men. Below, under the s. 1 analysis, the Amicus will submit that these remote and speculative societal harms fall drastically short of justifying the criminalization of a consensual polygynous relationship among adults, such as in the cases of Alina Darger, Anne Wilde, Mary Batchelor and Marianne Watson. The point that will be addressed here, however, is that a *gendered* definition of criminal polygamy raises obvious and serious problems on its face.

192. Criminalizing one gender arrangement (polygyny) but not another (polyandry) is plainly and obviously discriminatory on the basis of gender.[178] It is also absurd. Consider a heterosexual couple, A and B, who live in a conjugal union. They begin relations with a

[178] Indeed, the AGBC appears to acknowledge this point at p. 53, para 123 of his Closing.

third person, C, who over time commits to joining their conjugal union. If the AGBC's theory were applied rigorously, then if C were a man this private and consensual conjugal union would perfectly acceptable; but if she were a woman, it would be criminal. If C were indeed a woman, however, then the conjugal union would be decriminalized if D, a man, joined the conjugal union as a committed partner.

193. It appears from his Closing, however, that the AGBC seeks not to take his gendered theory of s. 293 to its logical conclusions. He does not say, for instance, that s. 293 criminalizes all forms of polygamy that involve more women than men. Why not? Whereas on his theory a typical polygynous triad adds *one* man to the pool of unmarried men, a lesbian triad adds *three* men to that pool![179] And for that matter, why are lesbian *couples* not criminalized? After all, they deprive two men of wives – twice as many as the typical polygynous unit. Indeed, the *71,000 lesbians* in Canada[180] would, on the AGBC's theory, appear to add a substantial portion to the roughly *550,000 more men* than women who have never been married and are not in a common law relationship.[181] And why not criminalize spinsters, who force men to be bachelors? And wives who initiate divorce proceedings against their husbands – do they not add to this social evil? Roughly 10,000 divorces occur *every year in BC alone*.[182]

194. As will be discussed later in this Closing, criminalizing private intimate relations on the basis of gender because of alleged social effects that are utterly remote from the relations themselves constitutes grave and unjustifiable breaches of the *Charter*. The point here is that the AGBC's interpretation is simply absurd, because it fails to accommodate the reality of non-polygynous forms of polygamy. The AGBC's only answer is to try to avoid the issue, by saying this:[183]

> [130] ... Can it truly be said that polyandrous or same-sex multi-partner marriage or conjugality is a circumstance "which could commonly arise in day-to-day life"? This is not to say it could never occur, but rather to emphasize that

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[179] It should be noted that nine respondents to the CPAA's survey indicated that they are or have been in a conjugal union consisting of three women: Cosco Affidavit #1 at Exhibit "B", p. 4, Reference Exhibit 94.
[180] Reference Proceedings Transcript - Day 9 at p. 45, ll. 34-38 (Wu).
[181] Reference Proceedings Transcript - Day 9 at p. 46, ll. 4-16 and p. 47, ll. 15-46 (Wu).
[182] Wu Affidavit #2, paras 21 and 22, Reference Exhibit 72.
[183] AGBC's Closing, pp. 55-56.

> the "reasonable" in "reasonable hypothetical" suggests that Courts are reluctant to entertain a challenge *in advance of the hypothetical occurring and coming before the court on its own facts*, unless the hypothetical is self- evident or obvious.
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> [131] In the event that a person in Canada decides to participate in polyandrous polygamy or a same-sex multi-partner union contrary to section 293 (that is to say, one that relies on some authority and purports to be binding), *and* the state decides to commence a prosecution, *and* if the accused invoked the *Charter*, *then* a Court will have the full factual matrix on which to decide whether the constitution forbids criminalization of such relationships. Absent that factual record, it may be best to leave that question, for now, unanswered. This Court can free itself to focus on the effect of the statute with respect to what is, on the evidence, the most prevalent, pervasive, and pernicious form of polygamy in Canada and elsewhere – patriarchal, religiously, or culturally-based polygyny.
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> [Italics in original; underlining added]

195. With respect, this is a blatant attempt to evade the factual matrix that does exist in this Reference. The AGBC brought this Reference to determine the constitutionality of s. 293 once and for all, and he brought it in the trial court in order to allow the courts the benefit of a full evidentiary record. The CPAA was granted standing to participate (with the consent of the AGBC), and introduced affidavits of five polyandrous conjugal unions, along with a survey relating to the practice of polyamory in Canada. The AGBC had the right to cross-examine the CPAA's witnesses on this evidence, and chose not to – presumably because of his view that the evidence could not seriously be challenged.

196. The AGBC seeks to avoid the fact of polyandry, of course, because his theory of s. 293 simply cannot accommodate it. But the evidence in this Reference establishes conclusively that polyandry is an existing and significant phenomenon in Canada. The five personal experience affidavits introduced by the CPAA describe five committed and stable polyandrous conjugal unions.[184] The CPAA's survey indicates that another 69 respondents are or have been in a polyandrous conjugal union.[185] By contrast, the only

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[184] Contrary to the AGBC's suggestion that none of them is a conjugal union because none is "long-standing", John Bashinski's triad began on about July 25, 2007 (Bashinski Affidavit, para 20, Reference Exhibit 93); Karen Detillieux's began in June of 2007 (Detillieux Affidavit, para 7, Reference Exhibit 95); Zoe Duff's began in March of 2009 (Duff Affidavit, paras 9 and 10, Reference Exhibit 96); Forrest Maridas's has existed for two years (Maridas affidavit, para 9, Reference Exhibit 97); Sarah White's appears to have begun in 2008 (White Affidavit, paras 11 – 16, Reference Exhibit 98).

[185] See the Cosco Affidavit #1 at Exhibit "B", p. 4, Reference Exhibit 94.

hard numbers in this Reference relating to polygyny in Canada are that, out of the 548 people living in the FLDS community at Bountiful, only 55 of them are practising polygamy.[186] Even if it is assumed that an equal number is practising polygyny in the Blackmore community at Bountiful, clearly polyandry is a significant phenomenon that must be accounted for in any serious analysis of s. 293's constitutionality. The fact that the AGBC's theory of the provision cannot accommodate the phenomenon of polyandry is a glaring and fatal weakness.

197. The AGC's interpretation of s. 293 is no less problematic than the AGBC's. According to the AGC, it is perfectly lawful for three people to regard themselves as a committed conjugal union in every way – just so long as they do not purport to sanction that union through a ceremony or contract. *But why?* Such polygamous conjugal unions might entail a wide variety of harms to one or more of their participants; they might be coercive, exploitative and patriarchal. Why should they be exonerated simply because they were not formed by a ceremony or contract? And for that matter, what *is* it about a ceremony or contract that is harmful? Aside from the point, discussed above, that such a distinction causes an obvious violation of freedom of religion and expression (and is discriminatory insofar as it suggests that polygamists may live privately but not publicly), the distinction is utterly *arbitrary*: it criminalizes consensual adult polygamy simply for being formalized, and exonerates exploitative polygamy simply because it isn't.

198. A fundamental fact in this Reference is that polygamy is often practised in a way that entails no harm to its participants and no harm to society. That is an indisputable fact that cannot be evaded. It is also a fact that the Attorneys General's respective theories of s. 293 entirely fail to accommodate. While they seek to read various limitations into the scope of s. 293, ultimately those limitations (even if they could be plausibly supported by the language of the section) fail to address s. 293's overbreadth because neither s. 293 as it actually reads, nor s. 293 as the Attorneys General would limit it, is calibrated to harms that may actually arise in a particular polygamous relationship. No matter how the Attorneys attempt to limit s. 293, the section continues to criminalize polygamous

[186] Henrich Affidavit #2, p. 11, Table 1, Reference Exhibit 5.

relationships even when they cause no harm to anyone. Such an overly broad provision can never justify the grave *Charter* breaches it entails.

199. West Coast LEAF appears to understand this problem, and so it urges a reading of s. 293 that would criminalize only those polygamous relationships that are found to be "exploitative". The Amicus will address any merits of such a law later in this submission; the point here is just that s. 293 is plainly and obviously *not* that law, for the reasons set out above. It is simply not an element of s. 293 that the polygamous relationship be "exploitative".

200. This overbreadth is the fundamental failure of s. 293. It is undoubted that harms can and do arise in polygamy. Indeed, this Court has heard significant evidence of harmful, exploitative practices within the context of polygamy in the FLDS community. The Amicus shares the concerns of other participants about these practices – particularly underage sex, child trafficking and forced marriage. But the correct response to the existence of these harms is to prosecute wrongdoers and accomplices for inflicting *those harms* – not to brand all polygamists as criminals, regardless of whether their relationships harm anyone. Such a blunt and discriminatory approach may have been acceptable in 1890, but it is not today.

PART 4 - BREACH OF THE CHARTER

A. Overview

201. The Amicus respectfully submits that s. 293 constitutes a grave breach of the *Charter*. It does so in four ways, as set out under the subheadings below. First, it intrudes deeply on freedom of religion, both in purpose and effect, contrary to s. 2(a). Second, it discriminates against polygamists, contrary to s. 15. It also violates polygamists' freedom of association contained in s. 2(d), and interferes with polygamists' liberty in respect of family formation in a manner that is contrary to principles of fundamental justice. Indeed, the Amicus knows of no law currently in force that violates the *Charter* more seriously than does s. 293.

B. Section 2(a): Freedom of Religion

202. Legislation can breach the *Charter* by either (or both) purpose or effect.[187] If the purpose of legislation violates a *Charter* right, then that legislation is invalid and there is no recourse to justification under s. 1. Legislation that that breaches the *Charter* in its effects, on the other hand, may still be saved under s. 1 if it is "demonstrably justified in a free and democratic society".[188]

203. The Amicus submits that s. 293 breaches s. 2(a) of the *Charter* in both its purpose and its effects, for the reasons set out below.

(1) A Religious Purpose

204. There are two aspects to s. 293's religious purpose.

205. The first is that s. 293 was targeted at Mormons and Aboriginals. The fact that the enactment of the original polygamy prohibition in 1890 was motivated by the immigration of Mormons from the United States has been well-canvassed in this Reference. Faced with this influx of Mormons from the south, Parliament looked to the experience in the United States, where Congress had passed a series of highly restrictive laws aimed at

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[187] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 331.
[188] *R. v. Big M Drug Mart Ltd.*, *supra*, at pp. 332-333.

breaking the power of the Mormon Church: the 1882 *Edmunds Act*, for instance, barred people who practised or believed in polygamy from jury service, and barred actual polygamists from voting and holding public office; the *Edmunds-Tucker Act* of 1887 disinherited polygamists' children, took away voting rights from all Utah women, and seized the Mormon Church's property and revoked its corporate charter.[189] Both of these statutes were passed in a national fever of antipathy toward the Mormons, who were regarded as committing both political treason, by establishing a theocracy in Utah, and race treason, by adopting a supposedly barbaric and Asiatic marital form.[190] Cartoons from that period vividly display the disdain and contempt in which mainstream American society held Mormons.[191]

206. Faced with growing Mormon immigration into Canada, Parliament followed the American example and banned polygamy, drawing on the American legislation for guidance. That the polygamy prohibition was aimed specifically at Mormons cannot seriously be doubted; after all, the original provision specifically outlawed "[w]hat among the persons commonly called Mormons is known as spiritual or plural marriage" – wording that remained in the provision until it was removed in 1954 as part of a streamlining of the *Criminal Code*. Indeed, the Law Reform Commission of Canada noted in its Working Paper on Bigamy that "[t]here is no question that at this time Canadian legislation fell under the influence of American law, which was trying by means of the criminal law to stamp out a resurgence of the practice of polygamy among members of the Mormon community, especially in the state of Utah".[192] Correspondingly, in Canada, "[t]he language of the original polygamy section was drafted with the vagaries of the American polygamy statutes targeting Mormons squarely in mind".

207. The polygamy provision was not aimed solely at Mormons, however; as the legislative history makes clear, Parliament was also concerned to employ it against Aboriginal persons. As noted above in the statement of facts, the original Bill F provided that the new section "shall not apply to any Indian belonging to a tribe or band among

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[189] Ertman Affidavit at para 10, Reference Exhibit 69.
[190] Ertman Affidavit at paras 7 and 11-14, Reference Exhibit 69.
[191] See the Ertman Affidavit, Reference Exhibit 69.

whom polygamy is not contrary to law, nor to any person not a subject of Her Majesty, and not resident in Canada", but that exception was removed after another member commented that "that is a very dangerous exception to make, because it may have the effect of excepting the very class to whom the Bill is intended to apply".[193] The provision has since been used against an Aboriginal person, Bear's Shin Bone,[194] in one of only two convictions in the history of the law. In her expert report, Professor Drummond links the use of the polygamy prohibition against Aboriginals to the state's "larger coercive colonial project intended to "civilize" Aboriginal populations that included residential schools".[195]

208. The polygamy prohibition was therefore primarily aimed at prohibiting Mormon belief and practice regarding plural marriage, as well as the Aboriginal cultural practice of polygamy.[196] As we have seen, however, s. 293 is not limited to the practices of these groups. Rather, *s. 293 prohibits all conjugality but for monogamy*, whether the prohibited conjugal form arises in a religious or secular context. The AGBC relies on this broad scope of s. 293 in denying that the provision has a religious purpose. He points to the language of the original 1890 provision, which referred to polygamous relationships under "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."[197] This argument sits uneasily with later of the AGBC's assertions to the effect that, when it first passed the prohibition in 1890, Parliament was concerned with three forms of polygyny – Mormon,

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[192] Luca Affidavit #2, Exhibit "B" Tab 11, p. 883 (Law Reform Commission of Canada, Bigamy, Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985) at p. 22), Reference Exhibit 76.
[193] Debates of the Senate (February 25, 1890) at p. 142 (Legislative History Brief, Tab 1C, Reference Exhibit 157).
[194] *The Queen v. Bear's Shin Bone* (1899), 4 Terr.L.R. 173.
[195] Drummond Affidavit, Exhibit "B", para 71, Reference Exhibit 65.
[196] The AGBC took issue with Professor Beaman's suggestion that a practice of polygamy in the First Nations context "can be linked to their religions", and revives this at para. 109 of his Closing. Professor Beaman noted, referencing polyandry in Tibet, that "there tends to be sometimes a minimization of indigenous religious traditions, so it gets passed off as culture", and then noted "we tended to do the same thing in the Canadian context as well, in other words, see First Nations aboriginals as being without religion and subsuming the idea of religion under the idea of culture" (Reference Proceedings Transcript – Day 12, p. 43 ll. 8-26, p. 54 l. 41 – p. 55 l. 9 (Beaman)). Whether characterized as religious or cultural, the point is the same.
[197] AGBC's Closing, pp. 32-33, para 74; underlining added by the AGBC.

Indian and Muslim[198] – and his argument that religion itself is what renders polygamy most harmful. He expresses the latter point this way:[199]

> [B]ecause the polygamy prohibition is legitimately focused on the "core" and most harmful forms of multiparty marriage, those invoking a binding authority, it is naturally and almost uniquely at odds with religious teaching such as the FLDS's. That is to say, unlike virtually any other act that might be defended on the basis of religious freedom – the wearing of a turban or kirpan, the erection of a succah, and so on – religiously mandated plural marriage is harmful (and thus the legitimate target of the criminal law) in part *because* of its religiosity, and the more profound and controlling the religious belief, the more harmful it can be. It is the religious nature of plural marriage that permits the cradle-to-the-grave indoctrination of adherents into teh acceptance of the practice; it is the religious nature that has permitted it to expand so rapidly in Bountiful from a single family in 1947 to about a thousand souls today. Most types of polygamy may be, on balance, bad, but religiously-mandated polygamy is many times worse.

209. As can be seen from this passage, the AGBC regards s. 293 as being focused on religiously-based polygamy. It is not just targeting a practice; rather *it is aimed at a belief system.* Religious beliefs themselves – particularly fundamentalist Mormon beliefs – are the central target of the law. This focus on s. 293 on religious belief and practice embodies the opposite of a guarantee of religious freedom, the "essence" of which is "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination".[200] The state's direct prohibition against religious practice is precisely what s. 2(a) is intended to restrain.

210. While religiously-based polygamy may be the central target of s. 293, as noted above the law goes far further to prohibit all conjugality other than monogamy, whether it be religious or secular. The question is whether this broader scope displaces the conclusion that s. 293 has an improper religious purpose. In the Amicus' submission, it does not, because the second aspect of s. 293's religious purpose is to mandate a practice – monogamy – that was intrinsically rooted in the dominant religion of the day, mainstream Christianity. In so doing, the state impermissibly involved itself in the establishment of a particular religious viewpoint.

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[198] *Ibid.*, p. 48, para 109.
[199] *Ibid.*, p. 162, para 438; italics in original; underlining added.

211. The linkage between Christianity and the state's marriage laws can be observed through the evidence of the AGC's witness, Professor Witte. While in his expert report in this proceeding, Professor Witte strained to characterize monogamy as a secular ideal that had its roots in ancient Greece and Rome, in other court proceedings involving marriage he has candidly acknowledged the inextricable linkage between Christianity and the West's marriage laws. Specifically, in *Halpern v. Canada (A.G.)* (2002), 60 O.R. (3d) 321 (Div. Ct.), (2003), 65 O.R. (3d) 161 (C.A.), as an expert for the AGC, Professor Witte made the following statements in an affidavit,[201] all of which he agreed on cross-examination in this Reference are true:[202]

(a) One of the tasks he performed in his affidavit was to "explain how early 19th and 20th century law in the United States understood marriage and built upon religious, and particularly (but not exclusively) Protestant formulations of marriage".[203]

(b) He gave this overall opinion: "It is also my opinion that marriage, as it is understood in the West, developed from, and is a reflection of the understanding of marriage that is developed in the major Western Christian religions. The Western Christian understanding is, in turn, influenced by and largely inherited from, classical Greek and Roman literature. Of particular importance and influence in the Western tradition are the Roman Catholic and Protestant formulations of marriage. The Western understanding of marriage is also informed by an Enlightenment tradition, which came to legal ascendancy in the past century."[204] Professor Witte agreed that the reference here to "the past century" meant the 20th century.[205]

(c) Professor Witte noted that "the expertise I offer in this affidavit is with respect to the historical roots of marriage with a view to demonstrating its core

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[200] *Big M*, *supra*, at para 94.
[201] Witte Affidavit, Tab 2, Reference Exhibit 129.
[202] Reference Proceedings Transcript – Day 18 at p. 71, l. 47 – p. 74, l. 44 (Witte).
[203] Witte Affidavit, Tab 2, para. 2, Reference Exhibit 129.
[204] Witte Affidavit, Tab 2, para. 4, Reference Exhibit 129. This passage was quoted by the Ontario Division Court at para 6.
[205] Reference Proceedings Transcript – Day 18 at p. 74, ll. 5-10 (Witte).

> features. This exercise necessarily involves an historical examination of religion and law, given the overwhelming influence of religion upon the understanding of marriage, and of marriage law, within the Western tradition."[206]

212. The link between the Christian roots of Western marriage laws and the exclusion of polygamy as a permitted marital form are clearly seen in the case of *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130. Lord Penzance's definition of marriage as "the lawful and voluntary union of one man and one woman to the exclusion of all others" subsequently defined the Canadian common law definition of marriage for the next 140 years, until Canada passed the *Civil Marriage Act*, S.C. 2005, c. 33.[207]

213. *Hyde v. Hyde* concerned a petition for divorce in respect of a marriage that was conducted in Utah when the parties to the marriage were both Mormons. The husband subsequently abandoned the faith and wound up in England, and there sought his divorce. The court refused to grant it to him, on the basis that it would not recognize his marriage because it was conducted in a territory that allowed for polygamy. In forming his judgment, Lord Penzance held that English law reflected a Christian view of marriage, which was incompatible with polygamy. The following passages from his judgment illustrate this link between Christianity and the exclusion of polygamy as a legally valid marital form:[208]

> I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered "husband" and "wife" in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has satisfied me that this Court cannot properly exercise any jurisdiction over such unions.
>
> Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during

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[206] Witte Affidavit, Tab 2 para. 11, Reference Exhibit 129.

[207] See *Halpern (Div. Ct.)* at para 3: "'Marriage', as currently defined in the common law, is "the lawful and voluntary union of one man and one woman to the exclusion of all others": see, *Hyde v. Hyde and Woomansee...*".

[208] Underlining and italics added; footnotes removed.

the lives of the parties, and induce definite lights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, *as understood in Christendom*, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms – countries in which this Institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian "wife." In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things – laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word "wife." But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the words "husband" or "wife," but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer. The language of Lord Brougham, in *Warrender v. Warrender*, is very appropriate to these considerations:– "If, indeed, there go two things under one and the same name in different countries – if that which is called marriage is of a different nature in each – there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere. Therefore, all that the Courts of one country have to determine is whether or not the thing called marriage – that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with – has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those Courts will

> deal with the rights of the parties under it according to the principles of the municipal law which they administer." "Indeed, if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by, and subsisting with, another, polygamy being there the essence of the contract."
>
> Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation; that of the wife gives a right to a divorce; and that of the husband, if coupled with bigamy, is followed by the same penalty. Personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured may claim a judicial separation and a permanent support from the husband under the name of alimony at the rate of about one-third of his income. If these and the like provisions and remedies were applied to polygamous unions, the Court would be creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence. For it would be quite unjust and almost absurd to visit a man who, among a polygamous community, had married two women, with divorce from the first woman, on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy. Nor would it be much more just or wise to attempt to enforce upon him that he should treat those with whom he had contracted marriages, in the polygamous sense of that term, with the consideration and according to the status which Christian marriage confers.
>
> If, then, the provisions adapted to our matrimonial system are not applicable to such a union as the present, is there any other to which the Court can resort? We have in England no law framed on the scale of polygamy, or adjusted to its requirements. And it may be well doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex.

214. Professor Witte's affidavit from Halpern was part of the record before the Supreme Court of Canada in the *Marriage Reference*.[209] In the Reference, the Court commented on *Hyde v. Hyde*, noting that it articulated the common law's definition of marriage. After quoting the portion of the judgment underlined in the quotation above (beginning with:

"What, then, is the nature of this institution as understood in Christendom?"), the Court said this at para 22:

> The reference to "Christendom" is telling. *Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution.

215. It is true that Canada is now a pluralistic society where marriage and religion are no longer inseparable, but the same cannot be said for s. 293. The law, first passed in 1890, mandated the *Christian* conjugal form – monogamy – as the only possibility for Canadians.

216. The AGBC responds to this argument by pointing to social context and Hansard extracts indicating some concern when the provision was first passed for the "harm to women and children" that was sometimes attributed to polygamy.[210] But this argument is undermined by the sheer breadth of s. 293. As discussed above with respect to the interpretation of s. 293, the law is plainly and obviously not calibrated so as to capture *harmful* polygamous relationships; rather, it captures all polygamous relationships. Nor does the law criminalize only those who *cause* harm; to the contrary, s. 293 criminalize "[e]very one" who practices polygamy.

217. The only secularly-defined objective that accords with the scope and true effect of s. 293 is that *Parliament sought to prohibit all forms of conjugality but for monogamy*. In 1890, however, that objective was very far from secular. To the contrary, it was tightly bound up in the *inseparability* of marriage and religion at the time. Section 293 is the penal counterpart to Lord Penzance's observation that "it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy."

218. These are the two aspects of s. 293 that the Amicus says infringe s. 2(a) in its purpose. Faced with the emergence of Mormon religious beliefs that ran contrary to mainstream Christianity, Parliament responded by mandating the conjugal form

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[209] *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698. See Reference Exhibit 129, Tab 3.

recognized in "Christendom". Parliament was both motivated by an animus against Mormon belief and overwhelmingly influenced in its policy by the Christian view of marriage. In this manner, s. 293 echoes Dickson J.'s (as he then was) analysis of the Lord's Day Act in *Big M*:[211]

> To the extent that it binds all to a sectarian Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.

219. The same can be said of s. 293. Earlier versions of the law overtly target and discriminate against Mormons, and the law as a whole takes the Christian monogamous model of marriage and imposes it on all Canadians, regardless of their beliefs and regardless of their individual circumstances, and backs up that Christian standard with penal consequences.

220. Since it was first enacted in 1890, the polygamy prohibition has remained on the books essentially unchanged. While the language has been amended from time to time – most notably in 1954 – the parties appear to be agreed that none of these amendments were intended to be substantive. The provision was used a handful of times until 1937,[212] when it fell into a long period of legal oblivion under the AGBC sought to resurrect it in the last few years.

221. The regulation of abuse in polygamous relationships is obviously an important objective, and one that the Amicus urges the AGBC to pursue, just as he ought to in respect of any conjugal form. But this law is not a sound vehicle for that pursuit. On

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[210] See, for instance, the AGBC's Closing at p. 37, para 84.
[211] *Big M., supra*, at para 97.
[212] Isbister Affidavit #1, Exhibit "A" Tab 9, p. 348 (Bala, Nicholas, et al., "An International Review of Polygamy: Legal and Policy Implications for Canada" in Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports (Ottawa: Status of Women Canada, 2005) at p. 28), Reference Exhibit 13.

balance, s. 293 is simply too intertwined with religious animus and discrimination. The purpose of the law is contrary to the *Charter* and modern Canadian values and is constitutionally unsound.

(2) Anti-Religious Effects

222. It is, in the Amicus' submission, even clearer that s. 293 breaches s. 2(a) in its effects. Section 293 outlaws a practice that for some is tightly bound up in their religous beliefs and subjects practitioners of polygamy to penal sanction.

223. Freedom of religion is triggered where an individual shows that:

> (a) "he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials";
>
> (b) "he or she is sincere in his or her belief".[213]

224. There can be no doubt that these criteria are met in this case with respect to three different religious systems: fundamentalist Mormonism, Islam and Wicca.

225. The evidence of fundamentalist Mormon beliefs in plural marriage has been extensive in this Reference, and the Amicus does not intend here to review that evidence fully. There can be no question that some fundamentalist Mormons have sincere religious beliefs that motivate them to practice plural marriage and thereby connect with the divine and reach the highest kingdom of heaven. The Amicus sets out here only a few quotations to this effect from the vast body of evidence addressing the point:

> (a) "Those who participate in plural marriage from the LDS tradition do so as a matter of deeply held religious belief, rooted in eternal principle, and with eternal

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[213] *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 at para. 56.

significance": "[e]ternal blessings [are] believed to flow from the righteous living of this principle".[214]

(b) Mary Batchelor, an independent fundamentalist Mormon, testified that "[p]lural marriage is a very vital and intricate part of my belief system, and I do not believe that I can achieve the fullness of my potential as a woman and as well as a daughter of God without it".[215] She testified that "exaltation...can be achieved through obedience to certain principles...including plural marriage".

(c) The Committee on Polygamous Issues wrote in its "Life in Bountiful: A Report on the Lifestyle of a Polygamous Community" (April 1993) that "[a]n essential part of Fundamentalist Mormon theology is the practice of polygamy...."[216]

(d) Irwin Altman and Joseph Ginat note in *Polygamous Families in Contemporary Society* (Cambridge University Press, 1996) that "[w]hy fundamentalists believe in and practice polygyny is straightforward. They believe themselves to be following Mormon religious doctrine" (p. 4).[217]

226. The evidence regarding Muslim beliefs is far less extensive. The Amicus was not able to find a Muslim individual who would come forward in this Reference and testify as to a nexus for him or her between polygamy and the divine, but it is clear that such a nexus is possible within Islam. As the Amicus' expert, Professor Emon, states in his affidavit, Muslims "who engage in polygynous marriages in Canada may justify their acts by reference to the Qur'an, and subsequent legal doctrines.[218]

227. As to Wicca, Samuel Wagar testifies that within that religion, "all forms of consensual sexual and emotional ties that adults freely enter into are sacred, or at a

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[214] Wilde Affidavit #1 at para. 5(d) and (e), Reference Exhibit 67.
[215] Reference Proceedings Transcript – Day 25 at p. 5 ll. 41-44 (Batchelor).
[216] Isbister Affidavit #1, Exhibit "F" Tab 1 at pp. 4261-4262, 4266, 4273-4275, 4280, 4302, 4306, 4372 (Committee on Polygamous Issues, "Life in Bountiful: A Report on the Lifestyle of a Polygamous Community" (April 1993) - CCRC & DACCR, West Coast LEAF), Reference Exhibit 13.
[217] Isbister Affidavit #1, Exhibit "C" Tab 1 (Altman, Irwin & Joseph Ginat, *Polygamous Families in Contemporary Society* (Cambridge: Cambridge University Press, 1996) at 91-93, 102-103, 364-365), Reference Exhibit 13.

minimum, are potentially routes to an encounter with the sacred", and "[t]his specifically includes relationships that involve more than two adults".[219]

228. There is no doubt that this testimony and these opinions are sincerely given, and that freedom of religion is engaged in this case. These beliefs were never questioned in this Reference.

229. There also can be no doubt that s. 293 interferes with fundamentalist Mormon, Muslim and Wiccan beliefs and practices in respect of polygamy. The degree of interference necessary to breach s. 2(a) was set out in *Amselem*:[220] it "suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial."

230. That s. 293 interferes with the religious beliefs and practices of fundamentalist Mormons and some Muslims and Wiccans by criminalizing them is obvious. But it is useful as well to keep in mind the *consciousness* with which s. 293 criminalizes these beliefs and practices. Prior to 1954 the law criminalized "[w]hat among the persons commonly called Mormons is known as spiritual or plural marriage" (emphasis added). When originally enacted in 1890, the law prohibited everyone from entering into polygamy "by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular" (emphasis added). Section 293(1)(b) continues to criminalize everyone who "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)" (emphasis added). And it appears that s. 293 would, if upheld, be used in practice to target only *religiously-based* polygamy, as that is what the AGBC has declared he views as the "core" object of the law.

231. There is probably no better example of a law that violates s. 2(a) of the *Charter* than s. 293 of the *Criminal Code*.

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[218] Emon Affidavit, Exhibit "B" at para. 22, Reference Exhibit 63.
[219] Wagar Affidavit #1 at paras. 8-9, Reference Exhibit 60.
[220] *Amselem, supra*, at para 59; underlining in original.

232. The Defenders of s. 293 mount essentially two arguments in their efforts to avoid this conclusion. First, some of the Defenders say that s. 2(a) protects only beliefs, not practices, following some of the comments in American case law. With respect, that is plainly not the case in *Canadian* constitutional law, as the following extracts from the case law make clear:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.[221]
>
> To summarize up to this point, our Court's past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.[222]

233. The second of the Defenders' arguments is more substantial. They say that s. 2(a) is limited by the rights of others and that a religious practice that interferes with others is not protected under the banner of freedom of religion. The AGC, for instance, puts it this way: "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 tehir own fundamental rights and freedoms."[223] Some of the Defenders suggest that the religious practice of polygamy harms others ("women and children", according to the AGC[224]), such that the prohibition against polygamy does not violate s. 2(a).

234. There have been comments in the case law over the years that suggest that, where a religious belief or practice interferes with others, that interference should be weighed at the stage of the s. 2(a) analysis to determine whether the belief or practice may be constitutionally curtailed. Other case law suggested that any such balancing

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[221] *Big M*, *supra*, *per* Dickson J. at pp. 336-37; quoted with approval in *Amselem*, *supra*, at para 40; emphasis added in *Amselem*.
[222] *Amselem*, *supra*, at para 46; emphasis added.
[223] AGC's Closing, para 289.
[224] AGC's Closing, para 290.

exercise must occur at the s. 1 stage, and that the state bears the onus in justifying the impugned limitation on freedom of religion. The debate was put to rest, however, in *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6. After reviewing the case law and noting that "the Court has on numerous occasions stressed the advantages of reconciling competing rights by means of a s. 1 analysis", Charron J. stated for the majority:[225]

> This Court has frequently stated, and rightly so, that freedom of religion is not absolute and that it can conflict with other constitutional rights. However, since the test governing limits on rights was developed in *Oakes*, the Court has never called into question the principle that rights are reconciled through the constitutional justification required by s. 1 of the *Canadian Charter*. In this regard, the significance of *Big M Drug Mart*, which predated *Oakes*, was considered in *B. (R.)*, at paras. 110-11; see also *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 733-34. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, the Court, in formulating the common law test applicable to publication bans, was concerned with the need to "develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution" (p. 878). For this purpose, since the media's freedom of expression had to be reconciled with the accused's right to a fair trial, the Court held that a common law standard that "clearly reflects the substance of the *Oakes* test" was the most appropriate one (p. 878).
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> Thus, the central issue in the instant case is best suited to a s. 1 analysis.

235. In the Amicus' submission, it cannot seriously be contended that any balancing of competing rights in this case must take place at the s. 1 stage, and that is where the Amicus will address the bulk of this issue.

236. However, the Amicus does say this at this stage. It is undoubtedly true that freedom of religion is not absolute and that it does not give license to anyone to cause substantial harm to anyone else. This Court has heard of harmful practices in the FLDS context that the Amicus says could not for one moment be protected under banner of freedom of religion. Child rape, child trafficking, forced marriage – all of these the state is or would be constitutionally justified in prohibiting and punishing. As the Amicus notes, there is disturbing evidence in this Reference of these harms being perpetrated in some polygamous relationships within the FLDS.

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[225] *Multani, supra,* at paras 30-31; emphasis added.

237. The s. 2(a) issue in this Reference, however, is not whether these practices are protected. The s. 2(a) claim is not the straw man the AGBC constructs; it is not a claim "for absolute personal autonomy in [marriage structure] decision making."[226] No one would ever seriously dispute that underage marriage and the consequential child rape is an appropriate matter for state intervention. Rather, *the issue is whether freedom of religion protects the rights of sincerely believing adults to form a consensual conjugal union.* Alina Darger, Anne Wilde, Mary Batchelor, Marianne Watson and Sam Wagar – those are the claimants who pose the real test on s. 2(a) in this Reference. On the basis of the evidence we have heard in this Reference, there is no question that Warren Jeffs and his cronies, as well as some husbands (and some wives) within the FLDS, have committed crimes for which they are justifiably liable to prosecution. The question, however, is whether the state is justified in outlawing polygamy itself without proof of any tangible harm arising out of a particular polygamous relationship. The Amicus respectfully says it is not. Such would far too deeply trench on the fundamental right of freedom of religion, and would do so on the back of mere stereotypes. Such state action is precisely what the *Charter* restrains, as Dickson J. made clear in *Big M*:

> [121] What unites enunciated freedoms in the American First Amendment, s. 2(*a*) of the *Charter* and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v. Southam Inc., supra*, the purpose of the *Charter* was identified, at p. 155, as "the unremitting protection of individual rights and liberties". It is easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection.
>
> [122] It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

[226] AGBC's Closing, p. 108, para 276.

C. Section 15: Equality

238. Section 293 violates s. 15(1) of the *Charter*. Section 15 states:

> 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.

239. In criminalizing *all* polygamy, s. 293 discriminates by treating *all* polygamists as meriting the condemnation of the criminal law, regardless of the circumstances of any particular polygamous relationship or any particular participant.

240. The test for a claim under s. 15(1) was most recently set out by the Court in *Withler*:[227]

> The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) does the law create a distinction that is based on an enumerated or analogous ground? and (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

241. The Amicus says that s. 293 discriminates on two enumerated and analogous grounds: religion and marital status.

(1) On the Ground of Religion

242. The s. 15 claim on the ground of religion parallels much of the s. 2(a) claim set out above. Specifically, s. 293 criminalizes all polygamy, even – indeed, *especially*, according to the Attorneys General – where it is motivated by religious conviction. In outlawing *all* consensual polygamous relationships, regardless of whether they can be directly tied to any concrete harm, s. 293 ridicules the belief of Mormons, Muslims and Wiccans that polygamy can be caring, supportive, beneficial and a link to the divine. Section 293 demeans religiously-motivated polygamists' beliefs in a manner that obviously impairs their dignity.

243. There is another aspect to the s. 15 claim on the ground of religion, however, which is that s. 293 demeans religious minorities by engendering persecution of them for

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[227] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para 30.

conduct that is tolerated and accommodated when undertaken by religious *majorities*. Two examples illustrate the point.

244. First, in defending s. 293, a number of the Defenders have criticized fundamentalist Mormons for their patriarchal beliefs, suggesting that such patriarchy is an "inherent wrong" of polygamy, as the AGC's expert Professor Cook asserts.[228] What the AGC's expert criticizes in the context of fundamentalist Mormonism, however, Canada tolerates and accommodates when it is practised by mainstream religions. Every Sunday, millions of Canadians attend a Catholic church where the gospel is preached, as a rule, by a man. In this centre of holiness, where parents bring their children to be brought up in the faith, the congregation's nexus with the divine is mediated always by a man and never by a woman. Baptisms and eucharists are performed solely by men, never women. Confession is taken from and absolution granted by a man, not a woman. Yet despite this obvious patriarchy, no one would suggest that Catholics are not entitled to hold, foster, disseminate and practice these beliefs.

245. Nor is it ever seriously suggested that religious bodies like the Catholic church are not entitled to hold discriminatory views about homosexuality. The view that homosexuality is sinful and wrong – once widely shared by Canadians and enforced by the state through a variety of means – is now a more marginal one, and one that breaches s. 15 where it is manifested through state action. Yet mainstream religious organizations are wholly tolerated and accommodated in holding this discriminatory view. Moreover, when Canada finally admitted defeat in the same-sex marriage legislation and crafted the *Civil Marriage Act*, S.C. 2005, c. 33, it expressly (if redundantly) stated that religious beliefs to the contrary are protected:

> **Religious officials**
>
> **3.** It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.
>
> **Freedom of conscience and religion and expression of beliefs**
>
> **3.1** For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the

[228] Professor Rebecca Cook Expert Report, p. 8, subheading "A. Inherent Wrongs of Polygyny", Reference Exhibit 42.

> Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

246. Second, some of the Defenders and their witnesses criticize religious beliefs in patriarchal polygamy for limiting women's autonomy. Professor Cook, again, in her section decribing the "inherent wrongs of polygyny", says this of the "sexual stereotypes" perpetuated by such beliefs: "The inherent wrong of this sex role stereotype is that it prohibits women from making or fairly negotiating their own life plans in ways that are equal to their husband's ability to determine his life course."[229] Certainly Professor Cook is entitled to her own view, but the implied suggestion that the beliefs in plural marriage held by such women as Alina Darger, Anne Wilde, Mary Batchelor and Marianne Watson are *inherently wrong and unworthy of respect and protection* is demeaning, discriminatory and violative of their autonomy. It is also, with respect, hypocritical. As Professor Beaman notes, "there is little discussion of rescuing Roman Catholic nuns who choose to live a life of celibacy in the service of the Church, while accepting a secondary status to priests, always male, within the organizational hierarchy of the Church".[230] This despite the fact that such nuns have likely been raised in that patriarchal Catholic church "from the cradle" (to adopt the AGBC's phrase).

247. A third point, more legally focused, is made by Professor Drummond. For members of religious majorities, the government is prepared to disregard, for the purpose of s. 293 and restrictions on remarriage, religious marriages which that faith continues to view as binding despite a civil divorce. As Professor Drummond notes, Canadian law has not been applied in such a manner to penalize under s. 293 members of the Catholic (or Jewish) faith who have entered into religious unions still considered by those religions to be permanent when their members subsequently enter into a civil marriage. By virtue of the *Divorce Act*, those prior religious marriages are not lawful impediments to marriage under provincial solemnization statutes. Recognizing Mormon celestial marriage for the

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[229] Professor Rebecca Cook Expert Report, pp. 11-12, para 35, Reference Exhibit 42.
[230] Beaman Affidavit #2 at para. 46, Reference Exhibit 73; Reference Proceedings Transcript – Day 12, p. 27 ll. 18-40 (Beaman).

purpose of applying s. 293, but not taking the same stance toward Catholic or Jewish religious unions, privileges the members of those faiths, or suggests that the conduct relevant to s. 293 is cohabitation which Catholics or Jews who have moved on from earlier spouses no longer have.[231]

248. Section 293 plainly violates the freedom of religion of fundamentalist Mormons, Muslims and Wiccans by criminalizing sincerely-held religious practices. But s. 293 also *discriminates* on the basis of religion by treating the religious practice of polygamy in a manner wholly inconsistent with the accommodations afforded more mainstream religions, and thereby breaches s. 15.

(2) On the Ground of Marital Status

249. The Amicus submits that s. 293 also discriminates on the basis of marital status. Whereas the law imposes no penalty whatsoever on anyone in a monogamous relationship or on anyone who remains single, it *criminalizes* all polygamists. The law singles out one marital form – polygamy – and imposes on those who practice it the most severe sanction available in our society – criminalization, and potentially incarceration. In so doing, the law perpetuates prejudice against polygamists, and treats them in a stereotypical manner by assuming that *all* polygamous relationships are bad. Section 293 is not at all responsive to the nature of any particular polygamous relationship, nor to the actions of any particular polygamist; it simply outlaws all polygamists. Indeed, the Amicus knows of no law that is *less* attuned to the actual realities of the members of a group claiming under s. 15.

250. The argument below follows the two-step test from *Withler*, addressing first, whether the law creates a distinction on a prohibited or analogous ground, and second, whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

(a) Section 293 Distinguishes on the Basis of Marital Status

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[231] Drummond Affidavit #1 at Exhibit "C" (Comparative Research in Law & Political Economy – Polygamy's Inscrutable Secular Mischief (CLPE Research Paper 02/2009 – Vol. 05 No. 01 (2009) at pp. 27-33), Reference Exhibit 65.

251. Marital status was recognized in *Miron v. Trudel*, [1995] 2 S.C.R. 418 and *Nova Scotia v. Walsh*, [2002] 4 S.C.R. 325 to be a prohibited ground of discrimination that is analogous to those enumerated within s. 15. In each of these cases, the challenger was a common law partner who was denied benefits that the law made available to married spouses: in *Miron* the benefit was coverage for spouses in statutorily-prescribed automobile insurance, while in *Walsh* it was property division upon separation as regulated by Nova Scotia's family law legislation. That is, in those cases the laws drew distinctions between two forms of conjugal relationships, and afforded benefits to one form (marriage) and not another (common law relationships).

252. Section 293 also discriminates according to forms of conjugal relationship, although on a different basis. Instead of distinguishing with respect to whether or not a conjugal relationship has been *formalized through marriage*, s. 293 distinguishes between the *number* of participants in a conjugal relationship: it says there may be two members to a conjugal relationship, but not more. Similar to the laws in *Miron* and *Walsh*, s. 293 distinguishes between forms of conjugal relationship: a *monogamous* conjugal relationship is acceptable, but a *polygamous* conjugal relationship is not.

253. This distinction is analogous to the prohibited grounds enumerated in s. 15, as can be seen from a review of the main judgment in *Miron*, written by McLachlin J. (as she then was). McLachlin J. undertakes her analysis as to whether marital status is an analagous ground at paras. 144 to 154 of the judgment. She finds three markers of marital status that, taken together, drive the conclusion that it is an analogous ground. As she states at para. 149, it is not the case that any or all of these factors must be present for a ground to be analogous, but their presence sends a strong signal that it is. The markers she finds are these:

> [151] First, discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from *Charter* consideration on the ground that its recognition would trivialize the equality guarantee.

> [152] Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1) of the *Charter*. Persons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historical disadvantage associated with this group cannot be denied.
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> [153] A third characteristic sometimes associated with analogous grounds -- distinctions founded on personal, immutable characteristics – is present, albeit in attenuated form. In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints -- these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control. In this respect, marital status is not unlike citizenship, recognized as an analogous ground in *Andrews*: the individual exercises limited but not exclusive control over the designation.
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> [emphasis added]

254. As with the distinction as to marital status in *Miron* – "the characteristic of being unmarried"[232] – *the characteristic of being polygamous* is an analogous ground. As set out further in the paras. below, polygamy is a matter that plainly engages the essential dignity of individuals; polygamists have obviously been historically disadvantaged; and whether or not one's conjugal union is polygamous is sometimes a matter over which an individual exercises only limited control.

255. As to the first of these elements, there can be no serious question that, to participants in polygamous relationships, those relationships are central to their identities, their dignity and their sense of self-worth – just as any conjugal relationship is likely to be to its participants. For Fundamentalist Mormon polygamists, polygamy is – among other things – a fundamental spiritual principle through which they fulfil God's plan. But for all

polygamists, the ability to live in a family with the people they love is essential to them, as these examples from the polyamorist witnesses demonstrate:

(a) John Bashinski testifies:[233] "Our family is by far the greatest source of my daily pleasure and contentment, and is one of the most personally and emotionally valuable elements of my life." (para 96) "My membership in our family is a defining part of my personal identity." (para 99)

(b) Karen Detillieux's detailed description of her polyamorous triad shows throughout its obvious importance to her.[234] She says that "polyamory now seems in my life to be the natural order of things" (para 17). Speaking from the perspective of her triad, she states that "[o]ur conscious intent in building our family relationships has resulted in a stable, loving and supportive home environment" (para 55), and "we anticipate that the clarification, removal or replacement of Section 293 will bring us a profound sense of relief that comes with the hope of living confident and fully integrated lives as Canadian citizens" (para 56).

(c) Zoe Duff testifies[235] that "I can't imagine not being polyamorous for myself and understand that both of my conjugal partners have personalities and preferences suited to this type of relationship." (para 17) She further states at para 20: "Our triad functions much like a married copule. We do everything together and when attending events where one of us has had to work, the other two talk about the missing one and feel a loss at his/her absence."

(d) Forrest Maridas[236] lives in a polyamorous quad comprising two women and two men. Ms. Maridas has conjugal relationships with the two men, while only one of the men has conjugal relationships with both of the women. Ms. Maridas testifies at para. 15: "Our family believes a non-monogamous lifestyle choice facilitates us all to grow to more complete, supported and aware selves." At para.

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[232] See *Miron, supra,* at para 150.
[233] Bashinski Affidavit #1, Reference Exhibit 93.
[234] Detillieux Affidavit #1, Reference Exhibit 95.
[235] Duff Affidavit #1, Reference Exhibit 96.
[236] Maridas Affidavit #1, Reference Exhibit 97.

18, she states: "We see ourselves as a household, a chosen family, and a cohesive group. ... We all believe we are hard-wired to be polyamorous." At para. 38: "We view polyamory as a means for increased personal growth, when one person is assisted by their partners."

(e) Sarah White[237] lives in a polyamorous family with two men, with each of whom she has conjugal relationships. She states at para. 19: "Polyamory now seems to me the standard operating procedure in my family. It has allowed me to pursue relationships with the two men for whom I have deep emotional ties. It has saved not only both these relationship but also those between myself and my closest friends." She says at para. 20 that "I consider myself to have 2 life partners", and at para. 21 she affirms that "[w]e view our family as a long term commitment and consider ourselves to be a closed polyamorous unit."

256. It also cannot be doubted that polygamists are a historically disadvantaged group. Not only has polygamy been criminalized since 1890, it has never been recognized or in any way legitimized by the Canadian state. Unlike conjugal relationships short of marriage (that is, common law relationships), Canadian law has never provided any recognition or legitimacy to consensual, adult polygamous relationships. Indeed, Canadian immigration legislation bars polygamists from entering Canada. In the eyes of the law and much of society, all polygamists are pariahs.

257. Moreover, polygamists – particularly Mormon polygamists – have suffered direct persecution by the state, especially by the United States. As set out by the Amicus' expert Professor Ertman, the United States Congress passed laws that went far beyond outlawing polygamy: the 1882 statute, for instance, barred people who practised or believed in polygamy from jury service, and barred actual polygamists from voting and holding public office; the 1887 statute disinherited polygamists' children, took away voting rights from all Utah women, and seized the Mormon Church's property and revoked its corporate charter.[238] Professor Ertman demonstrates that these egregious laws were passed to punish Mormons for two forms of treason: 1) political treason, in supposedly

[237] White Affidavit #1, Reference Exhibit 98.

establishing a theocracy in Utah, and 2) race treason, in being white and yet adopting a supposedly barbaric marital form.[239]

258. Canada's anti-polygamy laws have not, of course, gone as far, although they almost did. The first proposed Bill with a polygamy prohibition – Bill F[240] – contained this provision:

> 2. Every one who has been convicted of any offence against this Act shall not be qualified, -
>
> (a). To be a candidate at, or to be registered in any list of electors for, or to vote at any election of a member to serve in the House of Commons of Canada or in the Legislative Assembly of the North-West Territories; nor, -
>
> (b). To serve as a juror in the North-West Territories; nor, -
>
> (c). To hold any office under the Crown in right of the Dominion of Canada, or any public or municipal office in the North-West Territories.

259. That Bill had been proposed by Senator William John MacDonald (B.C.). On second reading, the Hon. Mr. MacDonald said this of his Bill:[241]

> I hope in moving the second reading of this Bill I shall carry with me the feeling of the members of the Senate that such a measure is necessary. If there are Mormons in the North-West Territories, wherever they settle they will practise the tenets and customs of their sect. It is, therefore, necessary and wise that we should at once prevent the spread of this canker in our country. I am not in possession of any figures bearing on this subject. I do not know how many Mormons there are in the North-West Territories, or to what extent they practise polygamy. I think the best feature of the Bill is that which disqualifies offenders from being candidates for election to serves as members of the House of Commons of Canada, or Legislative Assembly of North-West Territories, to serve as jurors, or to hold any office under the Crown or any public or municipal office in the North-West Territories. It will be one of the chief means of obtaining information and securing convictions under the Act. At election time, no doubt those people will take different sides, and their opponents will find out all the weak spots in their characters.

260. The Bill was withdrawn after the Minister of Justice introduced the Bill that ultimately put the polygamy prohibition into place. One Senator, the Hon. Mr. Power, was

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[238] Ertman Affidavit at para 10, Reference Exhibit 69.
[239] Ertman Affidavit at paras 7 and 11-14, Reference Exhibit 69.
[240] Bill F, *An Act to amend "An Act respecting Offences relating to the Law of Marriage"*, 4th Session, 6th Parl., 1890 (Legislative History Brief, Tab 1B, Reference Exhibit 157).

not pleased by the omission of these provisions from the Bill that was ultimately adopted. In the Senate debate on that Bill, he stated:[242]

> I am glad that the Government have undertaken to deal with the practise of poygamy. It is understood that some Mormons have settled in our North-West Territories, and the probabilities are that if the Government and Parliament of Canada did not take some steps to indicate that they did not propose to allow those people to continue to indulge in their nefarious practice in this country, we might ere long have a wholesale exodus from the United States, where they are now being followed up energetically by the law into this country. I think it would be a great misfortune, and upon this point I am pleased that the hon. gentleman from Victoria has referred to the objection there is to have such characters serve on juries or voting in elections. It is desirable that no one holding views which Mormons do should be allowed to vote or serve as jurors.

261. Last, along with "the characteristic of being unmarried", polygamy bears the third marker of an analogous ground – that the distinction is founded on personal, immutable characteristics. Obviously, neither polygamy nor unmarried conjugality is immutable to the extent that sexual orientation is, but as McLachlin J. stated in *Miron*, "marital status often lies beyond the individual's effective control".[243] Indeed, the evidence in this reference illustrates that point in a number of different ways. First, most people – perhaps all – have little control as to whom they in love with. Our hearts are not governed by our heads. Some of the polyamorist witnesses describe how, while they were in one relationship, they fell in love with someone else. While some people faced with that dilemma might leave or cheat on their first partner, for these witnesses those were not viable options, and so they were drawn into polyamory. Karen Detillieux testifies on this point this way:[244]

> It is my experience that the development of an intimate relationship is, at the emotional level, beyond the simple matter of conscious choice. However, how one chooses to act on the developemtn of an emotional bond is governed by conscious effort and intent. Mr Mahaffy never pressured me to act, and as an expression of my commitment to Mr Detillieux, I chose not to act on my feelings for Mr Mahaffy without first confiding in Mr Detillieux. My relationship with Mr

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[241] Debates of the Senate (February 20, 1890) at 112 (Legislative History Brief, Tab 1C, Reference Exhibit 157).
[242] Debates of the Senate (April 25, 1890) at 585 (Legislative History Brief, Tab 2C, Reference Exhibit 157); emphasis added.
[243] *Miron, supra,* at para 153.
[244] Detillieux Affidavit, para 15, Reference Exhibit 95.

> Mahaffy has thus developed with Mr Detillieux's full and ongoing knowledge, consent and support.

262. Some of the polyamorist witnesses also speak more broadly of how their personalities are *oriented* to polyamory. Zoe Duff states that "I can't imagine not being polyamorous for myself and understand that both of my conjugal partners have personalities and preferences suited to this type of relationship."[245] Karen Detillieux states that "polyamory now seems in my life to be the natural order of things".[246]

263. Fundamentalist Mormons are also drawn to polygamy through their spiritual beliefs. They believe that polygamy will allow them into the highest level of heaven; essentially, polygamy will allow them to be spiritually fulfilled. While not all Fundamentalist Mormons actually practice polygamy (indeed, a minority of them do), it certainly appears that those who do sometimes do so because they are compelled as a matter of personal conscience and belief.

264. Some members of the FLDS have still less choice in the matter. Many of them believe in the rightness of *placement* marriage, and indeed the rightness of being placed by their Prophet into a polygamous relationship. In this Reference, we have heard from some of the AGBC's witnesses of instances of *coercion* through placement marriage, but we have also heard from some FLDS witnesses who consent to such placements.

265. All of these paths to polygamy demonstrate that participants in polygamous relationships often find themselves in such relationships for reasons not entirely within their control. A person sometimes has only limited control over whether to enter into polygamy. Moreover, once a person is in that relationship – once he or she has formed intimate, familial bonds with two or more other people – the bonds can only be broken at unacceptable personal cost. In this sense, every polygamous relationship that a participant does not wish to leave is truly *immutable* for the purposes of s. 15: it is of such importance to the participants that they would suffer the law's disadvantages rather than give it up. Indeed, polygamists in Canada continue to practice polygamy despite the criminal ban precisely because their polygamous relationships are of such importance to

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[245] Duff Affidavit, para 17, Reference Exhibit 96.

them. Moreover, witnesses such as the polyamorists and the independent Fundamentalist Mormons have come forward to give evidence in this reference without anonymity – hence risking future prosecution – because it is worth it to them to defend their right to practice a relationship of such profound importance to them.

266. For all of these reasons, the Amicus submits that polygamy is a form of marital status and is an analogous ground for the purposes of s. 15.

(b) The Criminalization of Polygamy Perpetuates Prejudice and Stereotyping

267. The second step in the *Withler* test is whether the distinction based on an enumerated or analogous ground creates a disadvantage by perpetuating prejudice or stereotyping. There can be no serious doubt the criminalization of polygamy does.

268. In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, Iacobucci J., writing for the Court, set out the purpose of s. 15 at para. 51 of the judgment:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.

269. Iacobucci J. described the concept of "human dignity" this way at para. 53:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs,

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[246] Detillieux Affidavit, para 17, Reference Exhibit 95.

> capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

270. Later, at paras. 62 to 75, Iacobucci J. famously listed four "contextual factors" to guide the analysis as to whether a distinction amounts to substantive discrimination. In *Kapp*,[247] McLachlin C.J. and Abella J. summarized those factors this way at para. 19: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected. In *Kapp*, however, the Court stressed that "[t]he factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143] — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping."[248]

271. The submission that follows focuses on three themes, which the Amicus says demonstrate that the criminalization of polygamy amounts to substantive discrimination against polygamists. First, polygamists have historically suffered disadvantage and s. 293 perpetuates – indeed, it *exacerbates* – that disadvantage by criminalizing them in respect of a matter of profound importance to them. Second, s. 293 evinces not the slightest concern on the part of Parliament for the actual circumstances of individual polygamous relationships, or the participants in those relationships; to the contrary, it imposes a total ban on polygamy, no matter how beneficial a polygamous relationship may be. Third, the criminalization of polygamy is wholly contrary to our society's modern approach of treating intimate and conjugal relations as a matter of privacy and personal choice.

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[247] *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483.
[248] *Kapp, supra*, at para. 24.

(i) Exacerbation of Historical Disadvantage

272. As discussed above in respect of polygamy as an analogous ground, it is clear beyond debate that polygamists have historically suffered disadvantage. Their form of conjugal relationship has never been recognized under Canadian law, nor indeed under English law. For many centuries, the law of "Christian nations" has recognized only monogamous marriage. As Lord Penzance in *Hyde v. Hyde* acknowledged of English law, "it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy." Canada has also legislated bars to immigration by polygamists with their families.

273. The criminalization does more than just *perpetuate* these disadvantages. Criminalization is the greatest burden that the state may impose on a group. Not only does criminalization carry with it the threat of punishment – including, in the case of polygamy, incarceration – but criminalization is also society's strongest message of moral opprobrium. Through criminalization the state announces that the impugned activity is unworthy of respect and indeed merits condemnation. As for those who engage in the impugned activity, criminalization necessarily sends the message that they too are less worthy of consideration and respect.

274. The criminalization of polygamy has been used to target groups that are already disadvantaged. The clearest examples, of course, are Fundamentalist Mormons and Aboriginal persons.

275. Canada's criminal prohibition on polygamy was, of course, originally aimed at Mormons. The original provision included among the prohibited activities "[w]hat among the persons commonly called Mormons is known as spiritual or plural marriage" (*An Act further to amend the Criminal Law*, S.C. 1890, c. 37, s. 11 (Legislative Brief Tab 2B)). Various members of Parliament noted that the law was aimed at Mormons:

(a) Hon. Mr. Blake:[249]

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[249] House of Commons Debates (April 10, 1890) at 3173 (2r and com) (Legislative History Brief, Tab 2B, Reference Exhibit 157).

The question with which we are now dealing is one of considerable importance today, and it may be of still more importance in the future. I think it is not unfit that we should have what the attitude of the Government is, with reference to the persons existence in our midst has given rise to this legislation. We have noticed from time to time in the public prints reference, to visits of persons of high consideration and authority in the dominion, to the settlement of these persons called Mormons, or Latter-Day Saints, in the North-West, and occasionally encouraging words have been used towards them with the suggestion, I believe, that they have got to obey our laws – but still encouraging words which it would seem to me were, perhaps, rather out of place. There are, in the Province of Ontario, in various sections, certain small scattered communities of Mormons of the earlier period under the Joseph Smith dispensation, who remain monogamists, who, I believe, separated from the Church of Latter-Day Saints on the occasion of the change which was effected at the time of Brigham Young, and which change mainly consisted in the matter which we are now engaged in attempting to meet. With reference to such persons, we, of course, have nothing to say, but it is right to observe that the difficulties which the United States has had to contend with in respect to the Mormons of Utah since the Brigham Young dispensation are serious and growing; and that from time to time earnest efforts have been made to overcome what seems to be an almost insuperable difficulty, owing to the extraordinary solidarity of these people and their determination to persist in and to conceal all legal evidence, at any rate, of their practices. As far as one can judge, there is now a disposition on the part of a considerable number of these people – if not on the part of their authorities themselves – to seek some more congenial place, wherein they hope to be able to carry on these practices, for the sake of which they are prepared to give up their position in Utah. It seems to me, as far as I can judge, that it is in the course of an effort to find a resting-place elsewhere than in Utah that the settlement has been made n the North-West Territories; and being made under such circumstances, and as far as I can see, with such intention, I can only highly approve of the effort which the hon. Minister of Justice is making to provide stringent laws against the practices which are condemned by these clauses of the Bill. But I think it well, also, to say that the questions is, in more respect than this, a serious one, and that it calls upon us for some very strong expressions of sentiment in discouragement of the settlement of Mormons with these peculiar views and motions in our midst.

(b) Hon. Mr. Blake again:[250]

[250] House of Commons Debates (April 10, 1890) at 3175 (2r and com) (Legislative History Brief, Tab 2B, Reference Exhibit 157); emphases added.

Therefore it seems to me that we are bound, not merely to support the hon. gentleman in any reasonable effort to stamp as a crime and to render as effective as the circumstances of the case will allow the provisions of any law against the crime, but that also it should be indicated at the earliest hour that it is not words of encouragement but words of discouragement which this Parliament, as the representatives of the people, have for the Mormons and their abuses, and practices, and the views they entertain of civil government and allegiance and on this marriage question, with the intention of carrying out which, I fear, they are coming amongst us.

(c) Hon. Mr. Charlton:[251]

I doubt very much whether the Government would be justified, in view of the experience of the United States in reference to the Mormons, in offering any encouragement to the immigration of those people. It has been found in the United States, that they form an element which is opposed to all the existing forms of society, it has been found there to be thoroughly disloyal to the institutions of the country, and it has been necessary to refuse to admit the territory of Utah as a State of the Union, or to allow these people to form their own institutions in any way whatever. If that element of population in the United States was large enough to resist the constituted authorities, no doubt it would do so, and if we were to permit the introduction into the North-West of a large number of Mormons – and there are many in Idaho and in Utah who would be anxious to come here – we would probably find that we had a great deal of trouble on our hands. I do not believe that this is a desirable class of immigration. I must admit that Utah, which I have visited twice, has been converted by them from a wilderness into a cultivated land, but, notwithstanding this, I think it is not the class of population which we desire, and the history of the United States proves that it forms an element which the American people would be glad to be rid of. The American people would, no doubt, be glad to have these Mormons go either to Mexico or to the Canadian North-West.

(d) Hon. Mr. McCullen:[252]

I think it is to be regretted that any inducement should have been held out to these people to settle in the North West, and I am glad to see this law so framed that it will reach the pernicious habits practised by these people. I am afraid, however, that if they get a settlement in the North West, they will continue secretly to practice those abominations which

[251] House of Commons Debates (April 10, 1890) at 3178 (2r and com) (Legislative History Brief, Tab 2B, Reference Exhibit 157); emphases added.

[252] House of Commons Debates (April 10, 1890) at 3178 (2r and com) (Legislative History Brief, Tab 2B, Reference Exhibit 157); emphases added.

> they are guilty of in other parts of the world, and I think it was exceedingly unwise that the slightest inducement should have been held out to them to come into that country. It would have been better, if possible, to prevent any of them from coming in there, but, if they do come in there, they should be made to understand that the law will be strictly applied, and that it will crush out the improprieties which they have been guilty of.

276. In *The Queen v. Liston* (unreported, Toronto Assizes), which was decided in 1893, only three years after the original criminal provision was passed, Chief Justice Armour held that the provision was intended to apply only to Mormons.

277. Another group that has faced discrimination in relation to the polygamy ban is Aboriginals. The original polygamy provision debated by Parliament – which was contained in Bill F[253] – contained this provision:

> 4. This section shall not apply to any Indian belong to a tribe or band among whom polygamy is not contrary to law, nor to any person not a subject of Her Majesty and not resident in Canada.

278. In the Senate debate on Bill F, the Hon. Mr. Dickey took exception to that limiting provision, stating: "I think that is a very dangerous exception to make, becuase it may have the effect of excepting the very class to whom the Bill is intended to apply."[254] Indeed, only of the only two persons who have been successfully prosecuted under the polygamy ban was Aboriginal: *The Queen v. Bear's Shin Bone* (1899), 4 Terr.L.R. 173, 3 C.C.C. 329 (Southern Alberta Judicial District). Bear's Shin Bone's conviction was part of the state's "civilizing" mission in respect of Aboriginal peoples, which included residential schools.[255] Professor Drummond further observed:[256]

> The Department of Indian Affairs circulated a memo in 1882 in which husbands were not permitted to draw annuities from the federal government for more than one wife. Indian Superintendent J.F. Graham wrote in a departmental circular that "there is no valid reason for perpetuating polygamy by encouraging its continuance in admitting any further accessions to the number already existing, and I...instruct you not to recognize any additional transgressions by allowing more husband to draw annuities for more than their legal wives."

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[253] Legislative History Brief, Tab 1B, Reference Exhibit 157.
[254] Debates of the Senate (February 25, 1890) at p. 142 (Legislative History Brief, Tab 1C, Reference Exhibit 157).
[255] Drummond Affidavit, para 71, Reference Exhibit 65.
[256] Citations to Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: Athabaska University Press, 2008) at 200 removed.

279. More broadly, however, s. 293 plainly exacerbates the disadvantages suffered by *all* persons in polygamous conjugal unions. In his affidavit,[257] John Bashinski describes some of the fears that s. 293 causes him, which can also be seen reflected in the evidence of other polygamists. He says that he fears s. 293 will interfere with his triad's ability to care for their daughter, in that he fears persecution from child welfare authorities and fear that he (who is not the biological father) would be denied custody if his conjugal partners died or were incapacitated. Likewise, Mr. Bashinski, an American, fears that s. 293 may cause Canada to deny him permanent residency or citizenship. And he feels that s. 293 contributes in a number of ways to a lack of positive legal or social recognition of his relationship:

> Among these, the most keenly felt by me is my lack of formal or universally recognized authority to make decisions regarding Kaia in the absence of her other parents. Other concerns include the possibility of exclusion from access to one another in medical emergencies, and the lack of numerous other privileges, advantages and preferences provided to families by both private and government actors. I believe that the presence of Section 293 in the Criminal Code contributes to this lack of recognition, and furthermore that its removal, or a clear declaration of its invalidity, is a prerequisite for greater positive recognition of our family and of other polyamorous families.

(ii) Section 293 Is Unresponsive to Individual Circumstances

280. A second broad factor that demonstrates that s. 293 amounts to substantive discrimination is that it imposes a *total* ban on all polygamous relationships, regardless of whether that relationship is harmful in any way. No matter how beneficial a polygamous relationship is to its participants and no matter the absence of any substantial harm caused to anyone by the relationship, the criminal law deems it to be illegal and its participants criminals. Section 293 is the legal embodiment of stereotyping: it says that *all* polygamous relationships are criminal and *all* polygamists are criminals. As discussed further below, s. 293's broad stereotyping can easily be observed from these two perspectives: polygamous *relationships* and polygamous *persons*.

281. As for *polygamous relationships*, the court has heard in this reference of many instances of polygamous relationships gone wrong, particularly within the FLDS. The

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[257] Bashinski Affidavit, at paras 111 – 115, Reference Exhibit 93.

AGBC's personal fact witnesses testified of a number of instances of statutory rape, sexual exploitation, sexual assault, forced "marriage" and child trafficking. However, there is also extensive evidence in this reference of beneficial and non-harmful polygamous relationships, such as with the polyamorists, the Independent Fundamentalist Mormons, and some of the Bountiful witnesses. Regardless of the fact that no "criminal" harm is apparent from these relationships, s. 293 criminalizes them. Parliament simply made no effort to distinguish between "harmful" and "beneficial" polygamous relationships; rather, it simply criminalized all polygamous relationships.

282. The result is that, while the Attorneys General and their allies have alleged that polygamy causes or is correlated to a number of harms, none of these harms is an element of the offence of polygamy. Criminal liability for polygamy is not limited in any way to the existence of any of these harms. The harms the Attorneys General and their allies have most frequently alleged are the following:

(a) Harm to female partners in a polygamous relationship: Contrary to the AGBC's argument, s. 293 is in no way confined to polygyny. In any event, many women find polygamy to be beneficial, and it is not an element of s. 293 that some harm be caused to a female partner in a polygamous relationship. Moreover, s. 293 criminalizes "[e]very one" who practices polygamy, including the women in those relationships.

(b) Harm to a minor in a polygamous relationship: There is simply no reference in s. 293 to any requirement that one of the participants to a polygamous relationship be under the age of 18 either at the time charges are laid or at the time the relationship is formed; entirely adult polygamous relationships are also criminalized.

(c) Dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence: Question 2 of the reference questions asks whether any of these elements needs to be present to render a polygamous relationship criminal under s. 293. As discussed above, they do not. Section 293 is not at all premised upon the existence of any of them. Not only is it not an element of s. 293 that

there be some impairment to a participant's consent in a polygamous relationship, but *s. 293 actually criminalizes consenting to polygamy.*

(d) Harm to children raised in a polygamous relationship: One of the allegations made is that children raised in a polygamous setting are somehow disadvantaged. Regardless of whether there is any substance to this allegation (including when compared with other non-criminal family arrangements, such as single parent families, or families that include a step-parent), it is not an element of s. 293 that a child result from the relationship. Indeed, s. 293(2) expressly states that it is not necessary to prove on the trial that the parties to the relationship have had or intend to have sex, and in any event, s. 293 criminalizes wholly homosexual polygamy along with heterosexual polygamy.

(e) Gender Inequality: The Attorneys General and their allies have alleged that polygamy routinely manifests as polygyny, and that polygyny is harmful in that it is premised on gender inequality. The assertion that polygyny is "vanishingly rare" (in the words of the AGBC) is doubtful in light of the polyamory evidence, but anyway the fact is that polyandry does exist and s. 293 criminalizes it. Moreover, not all polygyny is premised upon gender inequality; polyamorous relationships that are "polygynous" are strenuously gender equal, for instance. The fact is that s. 293 is simply not confined to relationships that could be said to involve gender inequality.

(f) Creating a pool of unmarried men: The AGBC has developed in this reference the novel argument that polygyny harms society by creating a pool of unmarried men ("lost boys"), who then cause more crime, as well as the earlier sexualization of girls by seeking unattached girls as mates. Whatever the merits of this argument (which are discussed at length below), s. 293 simply is not confined to polygyny. To the contrary, s. 293 also criminalizes polyandry and all-male homosexual polygamy, both of which would *decrease* the pool of unmarried men.

(g) "lost boys": Another charge against polygamy is that it creates "lost boys" – men who are forced out of a community because they are undesired competitors

for women within the community. As discussed further below, there is essentially no evidence of lost boys in this reference, but in any event, s. 293 again is not limited to situations that might be thought to cause that alleged harm: s. 293 is not confined to instances where polygamy is practiced within defined communities out of which boys could be forced. Rather, polygamy is criminalized in any setting. No matter that a particular polygamous relationship arises in the context of Independent fundamentalist Mormonism or polyamory; it is criminal.

283. What this discussion demonstrates is that s. 293 is not aimed at criminalizing *harmful* polygamous relationships; it seeks to criminalize *all* polygamous relationships, no matter that they entail no harm and are deemed to be important and beneficial by their participants. Section 293 also criminalizes all *parties* to a polygamous relationship, regardless of their individual circumstances. It criminalizes men and women alike, regardless of whether the polygamous relationship is polygynous, polyandrous or homosexual. It also, more generally, criminalizes all parties to a polygamous relationship no matter their conduct in that relationship: supportive and caring partners are criminalized, consenting adults are criminalized, vulnerable minors are criminalized, victims of abuse and exploitation are criminalized, and, of course, abusers and exploiters are criminalized. While *sentencing* for polygamy may be affected by which of these descriptions applies to the accused, the question of *criminal guilt* does not: all of them are criminals and all are worthy of condemnation.

284. Section 293 is an exceptionally blunt and sweeping condemnation of all polygamy, without the slightest sensitivity to the actual circumstances of a particular polygamous relationship or a particular participant within that relationship. Section 293 is perhaps the clearest example within the *Criminal Code* of stereotyping and prejudice: it declares that *all* polygamy is bad and *all* polygamists are worthy of condemnation. Further, s. 293 makes this declaration with respect to a central feature of the private and intimate lives of participants in polygamy. There can be no serious question that s. 293 discriminates against them on a matter that goes to the core of their human dignity.

(iii) Section 293 Is Inconsistent with Canada's Treatment of Intimate Relations

285. A third hallmark of s. 293's substantive discrimination is that it treats polygamy in a manner that is wholly out of step with the law's approach to other private, intimate relations between consenting adults. As will be set out further below, the law has generally not punished adultery, despite the enormous costs it can entail. Nor does the law prohibit group sex or "swinging" when conducted in private. At a broad level, Canadian society increasingly views sex as a private matter, to be interfered with only when there is abuse. Canadian society has also recognized an increasing diversity in conjugal relationships. Against these developments, the continued penal prohibition of polygamy is highly anachronistic.

286. It is a notorious fact that many common law and married spouses cheat on one another. American studies report that anywhere from 20 to 75 percent of adults have committed adultery.[258] It is also notorious that the effects of adultery can be dire. As Don-David Lusterman, a clinical psychologist in private practice, observes, "[t]he discovery of marital infidelity often imposes trauma that extends far beyond its effects on the discovered and the discovered party", including the couple's children.[259] At bottom, infidelity is a *lie*. Dr. Lusterman writes:[260]

> Infidelity occurs when one partner in a relationshiop continues to believe that the agreement to be faithful is still in force, while the other partner is secrectly violating it. It is the element of secrecy that many find so devastating. Affairs and womanizing share at lesat one common dynamic: They are invariably protected by persistent lying.

287. Human experience tells us that infidelity is also a common cause of divorce, the effects of which can last through generations, as discussed further below. Yet despite the potentially enormous costs of adultery, and despite the fact that it represents a broken promise to the adulter's conjugal partner, adultery has (except for a brief period in New

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[258] Luca Affidavit #1, Exhibit "B" Tab 8, p. 642 (Emens, E., "Just Monogamy?" in Shanley, M.L., *Just Marriage* (Oxford: OUP, 2004) at p. 80), Reference Exhibit 76.

[259] Luca Affidavit #1, Exhibit "F" Tab 7, p. 1141 (Lusterman, D., "Helping Children and Adults Cope with Parental Infidelity", J Clin Psychol/In Session 61: 1439-1451, 2005 at p. 1140), Reference Exhibit 76.

[260] Luca Affidavit #1, Exhibit "F" Tab 7, p. 1140 (Lusterman, D., "Helping Children and Adults Cope with Parental Infidelity", J Clin Psychol/In Session 61: 1439-1451, 2005 at p. 1139), Reference Exhibit 76.

Brunswick) never been a crime in Canada. The result of this state of the law is that it is lawful for a person to break a promise of fidelity to his conjugal partner and have sex with an unlimited number of sexual partners, but it is *criminal* for three consenting adults to consent to forming a polygamous relationship together.

288. In a similar vein, the Supreme Court of Canada has found that it is not criminal to engage in consensual "swinging" or group sex, if conducted in private: *R. v. Labaye*, [2005] 3 S.C.R. 728, 2005 SCC 80. Again, it is lawful for more than two people to have sex together at the same time, but it is *criminal* for them to form a conjugal union.

289. The *Labaye* decision is yet another milestone in Canada's march out of the bedrooms of the nation, which commenced with the state's decriminalization of sodomy in 1969. Since then, a provision restricting anal sex to persons over the age of 18 has been struck down on the basis that it unjustifiably infringes s. 7 (arbitrariness) and s. 15: *R. v. C.M.* (1992), 75 C.C.C. (3d) 556 (Ont. Gen. Div.) (on s. 7 grounds); (1995), 23 O.R. (3d) 629 (C.A.) (on s. 15 grounds).

290. Perhaps the largest legal and social change, however, has come with the state's treatment of conjugal relationships and its acknowledgement that it is a matter of private choice between the participants. In 1985, Parliament introduced no-fault divorce, in which mere breakdown of the marriage – evidenced by a one-year separation – is adequate grounds for divorce. With that change in the law, Parliament removed the state's role in determining whether a marriage should be dissolved, leaving it up to the parties themselves. Concurrently, the provinces began to recognize common law relationships through a vast variety of statutes, with the largest being the extension of spousal support upon separation through family relations statutes.[261]

291. The effects of these changes have been dramatic. 33% of marriages in Canada (and 40% of marriages in BC) end in divorce.[262] Further, whereas in 1981 marriages constituted 94% of all conjugal relationships, in 2006 marriages accounted for only 82% of

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[261] On this point, see *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83 per L'Heureux-Dube J. (dissenting) at paras 158-161.

[262] Wu Affidavit #2, para 26, Reference Exhibit 72.

such relationships; seen from the other end, the percentage of conjugal relationships that are common law has grown from 6% in 1981 to 18% in 2006.[263]

292. With the increases in divorce and common law relationships, the incidence of serial monogamy has also grown. Professor Wu explains the phenomenon this way:[264]

> In general, most Canadians form one union, whether legal or common-law marriage, in their life times. About two-thirds of Canadian men and women have a single co-residential union in their lives (see Table 5). About 15 percent have two unions and 4 percent have three or more unions. However, age patterns reveal that serial unions are on the rise, and growing numbers of Canadians have unions with multiple (more than one) partners/spouses across the life course. As Figure 5 shows, over 20 percent of the 40-49 and 50-59 age groups have formed at least two distinct unions. Compared to Canadians 60+, a higher prevalence of those aged 40-49 and 50-59 have had either 2 unions or 3 unions. Figure 5 suggests that having multiple partnerships is becoming a more common experience and that "one spouse for life" is outmoded.

293. Along with the increase in serial monogamy, of course, comes an increase in parents conceiving children with different partners. It has never been a crime to conceive children out of wedlock, but since the introduction of no-fault divorce there are many more *half*-siblings than before. All of us know of many cases where spouses or partners with one or more children have separated, and one or both spouses have formed subsequent conjugal relationships and had children. Despite the fact that such an arrangement necessary divides the attention of a child's biological parent, society does not condemn this practice but rather deems it to be an acceptable outcome.

294. There is also a greater incidence of *step*-parents, *step*-children and *step*-siblings. Professor Wu states 8% of Canadian men have lived with a step-child at some point in their lives.[265] Professor Shackelford testified that "[r]esidence with a stepfather or a male parent substitute is one of the best predictors of child neglect, abuse and filicide (the killing of a child by a parent or parent substitute)",[266] which evidence was unchallenged (and indeed appears to be entirely accepted) by the AGBC. Despite the seriously heightened risks of this arrangement, society again condones the practice of step-fathers

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[263] Wu Affidavit #1, Exhibit "B", p. 5, Reference Exhibit 61.
[264] Wu Affidavit #1, Exhibit "B", p. pp. 18-19; emphasis added, Reference Exhibit 61.
[265] Wu Affidavit #2, para 40, Reference Exhibit 72.
[266] Shackelford Affidavit, para 7, Reference Exhibit 75.

living with step-children and, of course, allows for adoption of children by non-relatives. Indeed, the notion of *criminalizing* this behaviour would be regarded as ludicrous by any Canadian.

295. Putting all of this together, the law deems the following activities to be entirely acceptable:

(a) Promising fidelity to a conjugal partner, but breaking that promise by secretly having sex with other people.

(b) Promising fidelity to a conjugal partner, but breaking that promise by secretly having a more lasting adulterous relationship with another person – so long as it is only an affair, and not another conjugal relationship.

(c) Having sex with any number of partners.

(d) Having sex with any number of partners at the same time (that is, group sex).

(e) Marrying, divorcing, marrying again, divorcing again, etc. The same applies for common law relationships.

(f) Procreating with any number of partners, and any number of times.

(g) Raising a child by more than two parents through a combination of biological and step parents.

(h) Adopting biologically unrelated children.

(i) *Not* raising one's own child (such as where the child is raised entirely by the other biological parent after separation).

296. By contrast, the law *criminalizes* any three or more adults who openly, honourably and consensually form a conjugal union. The law allows a man to cheat on his wife and carry on affairs with other persons and sire children with other women, but it criminalizes him and his wife if *together* they enter into an open and consensual conjugal relationship

with another person. The law says, essentially, that one may engage in *sexual* and *secretive* polygamy, but not *open* and *committed* polygamy; it is acceptable to carry on an extra-marital affair so long as you keep it hidden and unacknowledged, but you are a criminal as soon as you commit to that relationship alongside your original conjugal union.

297. Section 293 is utterly inconsistent with Canadian society's modern approach to intimate relationships and its continuation in the *Criminal Code* constitutes blatant and outrageous discrimination against polygamists. The evidence in this reference demonstrates how that discrimination is felt. Angela Campbell reports hearing the following from her interviewees in Bountiful:[267]

> 140. During conversations with participants about their perception of Canada's criminalization of polygamy, several also noted their perception of an inconsistency between this legal approach to plural marriage and ongoing practices tolerated by law, such as adultery. The following comments, each from a different participant, reflect a perceived incongruity between on one hand, legal and possible social acceptance of plural *sexual* partners, and on the other, a firm juridical rejection and sanctioning of multiple, simultaneous *conjugal* relationships:
>
> - You know, even polygamists aren't the only ones, so how could you ever say that polygamy is illegal with the way this world is? Women have affairs all the time; men have affairs all the time. So I don't think that polygamy should be legal, I feel like it should be decriminalized.
>
> - My biggest fear isn't that they'll take my kids away from me, but they'll put my husband in jail for polygamy because he's married to more than one wife. Well he's not really. I'm not even married to him, not legally: I can't be. He can't claim me, he can't claim my children. [...] All he did is just break the same rule as every other man in the world that has no [legal] relationship with their [sic] [...] wife. If so, can they put him in jail for that? He's the same as all those other guys except he takes care of me. He takes care of the kids.
>
> - [Y]ou could say, [...] every guy in the whole nation is living in polygamy, because you hear all the time about people taking on other wives and stuff like that. Is that, different? The only difference is, I know about it, in my opinion.

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[267] Campbell Affidavit #2, Reference Exhibit 64.

- I don't feel I'm breaking any laws. Because you go out in the world and there's ladies sleeping all around with whoever and the men aren't caring for their kids. And here I have children with this man, [....] and it's no different than ladies out there going around sleeping with whoever they want.

- If a man out of our religion decided to have another relationship, would have a one-night stand, no one would care. I know that. I was in town about a year ago, where I met a friend who told of her daughter, not associated with the FLDS, who has three children, by three different fathers. She and her children are being supported by the government through social services. And that would not be acceptable among our people. But if that were *us* they would have a royal fit!

- [W]omen everywhere choose harmful situations. Like women in abusive situations? [They] go back nine times out of 10. [...] We know why they go back. We choose to put ourselves in situations and the law can't change that, the law can't tell me I can't go back to an abusive situation. And that's how polygamy is; like, the law can't tell me who I can and can't sleep with. Because adultery is viewed as negative but there's no criminal [results]. You couldn't prosecute me for adultery. So that's, I guess that's kind of how I view polygamy except I view it in the light of this is a situation that I agreed to and I know who my husband is sleeping with, you know, and I've agreed to that. So if you're going to prosecute polygamy, well, prosecute adultery.

298. Professor Martha Bailey and Amy J. Kaufman, who have written a substantial Canadian analysis of polygamy, agree:[268]

> If we were to define polygamy as one man who has multiple family units, clearly many Western men would fall under the label. However, if a man has children with two different women, even if it is while he is married to one of them, no crime has occurred. The crime of polygamy seems to apply only when a man has multiple family units where he calls more than one of the women his wife and purports to go through a ceremony with more than one. Like the prohibition of adultery (never a crime in Canada since Confederation and no longer a crime in many states), the criminalization of polygamy seems to be morality-based, and from a time when our laws were infused by a Christian understanding of close personal relationships.

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[268] Isbister Affidavit #1, Exhibit "C" Tab 2 (*Polygamy in the Monogamous World: Multicultural Challenges For Western Law and Policy* (Santa Barbara: Praeger, 2010) pp. 159-160), Reference Exhibit 13.

299. These analyses are plainly correct. If a person is a monogamist who *acts* polygamously, the law is unperturbed. But if another person acts polygamously and acknowledges his or her actions *as a polygamist*, then the law deems that person to be a criminal. Counsel for the FLDS has described s. 293 as "a crime of status", and that is entirely correct. *The law does not prohibit polygamous activities, but s. 293 criminalizes the status of being a polygamist.* There can be no clearer example of discrimination.

(iv) Section 293 Amounts to Discrimination on the Basis of Marital Status

300. For the reasons set out above, the Amicus submits that s. 293 constitutes blatant and serious discrimination on the basis of marital status. The provision criminalizes persons simply for choosing a conjugal form other than monogamy – without any reference whatsoever to any harm flowing to any of the participants. This is substantive discrimination even from the most cursory review of the provision. But when examined in light of the historical disadvantages visited upon polygamists, the provision's total lack of sensitivity to the particular circumstances of specific relationships and participants in those relationships, and the modern approach the law as a whole takes to intimate relationships, it is obvious that s. 293 is discrimination of the deepest and most blatant kind.

301. It is important as well to keep in mind what these legal points mean to participants in polygamy. Throughout the reference, the Amicus was struck by the repeated evidence – from both sides of the case – of children of fundamentalist Mormon polygamist families being anxious not to reveal who their parents were. Almost every one of the AGBC's witnesses from fundamentalist Mormonism testified about the anxiety they felt as children when they knew they had to keep the nature of the family secret or their father could be sent to jail. Out of fear of a discirminatory provision, they learned to lie to their friends and teachers, and hide their true family from society. In a very real sense, the law required them to deny themselves to the world.

302. In the Amicus' submission, s. 293's discrimination can be seen in the manner in which the Attorneys have defended the law – they have been driven by the breadth of s.

293 to cast *all* polygamy (or, at least, formalized polygyny) as bad in order to try to uphold the law.

303. In this regard, the Attorneys General have refused to acknowledge, in any meaningful sense, the existence of polygamous relationships that are *not* harmful to their participants or society and should not be criminalized. The AGBC, for instance, does not address in any substantive way the fact that s. 293 criminalizes polygynous polyamorists, as well as independent fundamentalist Mormons like Alina Darger. Instead, the evidence led by the Attorneys General has focused almost entirely on the FLDS, other than that of their experts, who also focused on polygamy in Africa and the Middle East. The Attorneys have taken this approach, of course, because the present-day FLDS appears to be an unhealthy, cult-like organization ruled by a despot, Warren Jeffs, and thus is more consistent with their portrait of polygamy as engendering tyranny. As described by the AGBC, there is only one kind of polygamous society, and it is an evil one:

> This is what we know about polygamy, both in theory and practice: A polygamous society consumes its young. It arms itself with instruments of abuse, and shields itself behind institutions of secrecy, insularity, and control. It depresses every known indicator of women's equality. It is anti-democratic, anti-egalitarian, anti-liberal, and antithetical to the proper functioning of any modern rights-based society.[269]

304. With respect, that is an outrageous stereotype. Not every polygamous society is the FLDS. Other polygamous groups and individuals do not fit that portrait. The fact that the FLDS is but one polygamous community, and that other polygamous groups and individuals do not share its characteristics, is unacknowledged by the AGBC, because it is incompatible with its justification of s. 293.

305. The same is true with the AGBC's rejoinder to the critique that the "pool of unmarried men" theory commodifies women. At para. 424 of his Closing, the AGBC raised what he calls "the irony of this position", elaborating in parentheses: "on the evidence, is it not the polygamists who appear to be 'trading' in women and girls?" The AGBC here takes a charge that could only seriously be levelled at FLDS leaders and indiscriminately hurls it against *all* polygamists. That kind of stereotyping is what s. 293

[269] AGBC's Closing, p. 5, para. 6.

engenders. By banning all polygamous relationships and criminalizing all polygamists, s. 293 necessarily requires for its justification that *all* polygamy be harmful and *all* polygamists be malicious. That such is plainly not the case is a central aspect of s. 293's discrimination.

306. Section 293 also encourages a second kind of prejudice against polygamists, which again can be seen in the Attorneys' defence of the provision. Throughout this Reference, the Attorneys have mounted an array of criticisms of polygamists, many of which fall drastically short of any criminal harm. Criticisms of these kinds include (among many others) the accusations that:

(a) Polygamy means that a father's attention is divided between his children. This attack is launched against polygamy regardless of the facts that (1) the existence of children from a polygamous relationship is not an element of the crime, and (2) parental attention is very commonly divided in mainstream monogamous society as a result of divorce (not only as a result of serial monogamy and blended families, but even just as a result of joint custody).

(b) Birthdays are not celebrated in polygamous families. This charge was put forward by a number of the AGBC's witnesses, in response to counsel's questioning, and was put to some of the FLDS witnesses by counsel for the Attorneys. The Amicus has never heard that celebrating birthdays is mandatory in Canadian society, but in any event, the evidence clearly shows that other polygamists, including fundamentalist Mormons like Alina Darger, do celebrate their children's birthdays.

(c) Polygamy deemphasizes romantic love. Professor Grossbard made this charge in oral testimony and in her report. In the latter, she suggested that this deemphasis of love "is likely to hurt women more than men, as women typically place more emphasis on romantic love in their revealed consumption preferences in democratic societies offering a variety of books and movies. For example, most

readers of Harlequin romance novels are women."[270] That the Defenders are raising such an absurd defence of a criminal ban on polygamy speaks volumes.

307. Perhaps the clearest example of the Defenders' prejudiced attacks on polygamists, however, is the AGBC's cross-examination of the FLDS' Witness No. 2.[271] Among other things, counsel for the AGBC asked her about education in Bountiful. She began by asking whether anyone from Bountiful had gone on to become any of a variety of professions – police officer, firefighter, certified general accountant, engineer, architect, lawyer, and so on, one after the other, for a total of 26 professions. Then she shifted to colleges and universities, asking whether anyone from Bountiful had attended any of 13 colleges and universities, one after the other.

308. With respect, this cross-examination was demeaning to the witness. Not only does it show a troubling lack of sensitivity for cultural difference; it also reveals a disturbing reasoning behind the Attorneys' defence of the law: these polygamists do not share our urban, middle-class, professional values, and therefore there must be something wrong with polygamy. Because the Attorneys see polygamy as the root of everything, any critique they can mount against polygamists is a critique of polygamy. Moreover, for the Attorneys, any critique of polygamists is valid, regardless of whether it could ever be considered a matter for criminal sanction in any other context.

309. This is the kind of reasoning that a broad stereotypical law such as s. 293 sets in motion. Such a law precludes any distinctions among polygamy and polygamists, and by outlawing all polygamists the law validates them as a target for any variety of critical attacks. That kind of reasoning is precisely what s. 15 is intended to prohibit laws from employing and perpetuating.

D. Section 2(d): Association

310. Section 293 also infringes the fundamental guarantee of freedom of association, which is contained in s. 2(d) of the *Charter*.

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[270] Expert Report of Shoshanna Grossbard at para. C(g), Reference Exhibit 48.
[271] Reference Proceedings Transcript – Day 26, beginning at p. 44 l. 9.

311. The heart of the s. 2(d) claim is that s. 293 prohibits more than two individuals from *associating* with one another in a conjugal union. As seen above, the criminal law does not prohibit a whole range of activities that can be characterized as polygamous, such as:

(a) Serial monogamy, through divorce and remarriage (*de facto* polgyny, as it is sometimes called from an evolutionary psychology perspective[272]);

(b) Having sex or affairs with any number of partners while in a conjugal union with an unknowing and unconsenting partner (that is, adultery);

(c) Having sex with many partners at the same time;

(d) Having children with more than one partner, whether as a result of conjugal unions, one night stands or even group sex; and

(e) Raising children by more than two adults, such as through blended families, including where one or more adults are unrelated to the children.

312. Yet, while the law is entirely tolerant of these behaviours, s. 293 *criminalizes* three adults from agreeing to form a conjugal union together. Section 293 prohibits their *association* together as a conjugal union. While polygamous *activities* are not prohibited, s. 293 criminalizes polygamous *groupings*.

313. Take the hypothetical Steve, who is married to Sally and who cheats on his wife with Susan. When Sally is out of town on business, Steve stays with Susan. They have sex, they share dinner, they talk. They have carried on this parallel relationship for years. One year they stop using birth control and Susan gets pregnant. She raises the child on her own, although Steve provides financial support and visits when Sally is out of town.

314. According to the law, this state of affairs is entirely lawful.

315. Now take the case of Diane, David and Denise. Diane and David are happily married and are friends with Denise. After spending time with Denise, David finds he has

fallen in love with her. Instead of carrying out an affair in secret, he comes forward to his wife with his feelings for Denise. After discussion, Diane and David decide together to ask Denise to join their conjugal union. She agrees, and later moves in with Diane and David. The three of them regard themselves as a conjugal unit and as a family, and they commit to staying together and treating each other as such.

316. Section 293(1) prohibits the relationship between Diane, David and Denise and renders all of them criminals.

317. What these two hypotheticals illustrate is that the law entirely condones *secretive, unacknowledged polygamy*, but bans *open and declared polygamy*. Again, the law accepts polygamous activities, but it criminalizes polygamous groupings. It is the *association* as a polygamous conjugal *unit* that the law prohibits.

318. The point can be seen in the *Labrie* and *Tolhurst* decisions. As is attributed to Dorion C.J. in the report of the *Labrie* case, "[i]t was apparent from the statute that there must be some form of contract between the parties, which they might suppose to be binding on them, but which the law was intended to prohibit." What is the content of that impugned contract? It is, of course, *to associate in a conjugal union*. As the court stated in *Tolhurst* of the polygamy prohibition, "Parliament had no intention in this section of the Code of dealing with the question of adultery." Quite right: the law entirely condones adultery. What the law prohibits is adulterers *associating* together as a conjugal unit.

319. In the Amicus' submission, s. 293 squarely targets the *associational* aspect of polygamy, and in so doing violates s. 2(d).

320. The Attorneys General argue that s. 293 does not infringe upon freedom of association by pointing to a short line of authority suggesting that s. 2(d) of the *Charter* does not protect intimate or family relationships, and they suggest this is dispositive of the issue. They say that to hold otherwise would be to stretch the protection of freedom of association beyond what was reasonably intended.

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[272] See Isbister Affidavit #1, Exhibit "B" Tab 106, pp. 4069-4077 (Wright, Robert, The Moral Animal: Why We Are the Way We Are: The New Science of Evolutionary Psychology (New York: Vintage, 1994) at 33-107 at pp. 96-104), Reference Exhibit 13.

321. The Amicus has the following responses to this position, which are developed under the subheadings below:

(a) First, there is contrary Canadian authority of high repute asserting that freedom of association does extend to intimate relationships, the family, and the right to marry. Comparative law, particularly to the United States, also supports this proposition.

(b) Second, the Supreme Court of Canada has, in recent years, significantly expanded the ambit of s. 2(d). While this has been in the context of labour relations, the Court's reasoning suggests that freedom of association has wider bounds than the early years of Charter interpretation suggested.

(c) Third, considerations of modern *Charter* interpretation, including s. 293's context and the other values underlying the *Charter*, all support inclusion of intimate, personal relationships, like those of a polygamous union, within the scope of s. 2(d).

(1) Canadian and Comparative Law on Freedom of Association and Intimate Relationships

322. There is unquestionably previous Canadian authority in the lower courts suggesting that the freedom of association protected by s. 2(d) does not extend to certain intimate, inter-personal relationships or activities. For example, in the context of a prosecution of the incest offence under the *Criminal Code,* our Court of Appeal, in *R. v. M.S.* (1996), 111 C.C.C. (3d) 467, 84 B.C.A.C. 104, held at para 23 that s. 2(d) "addresses social not sexual intercourse". In reaching this conclusion, Donald J.A. quoted from the Ontario Court of Appeal's decision in *Catholic Children's Aid Society of Metropolitan Toronto v. S.(T.)* (1989), 69 O.R. (2d) 189, where it was held that s. 2(d) did not protect associations among family members.[273] More recently, in *Mussani v. College of Physicians & Surgeons* (2003), 226 D.L.R. (4th) 511, 172 O.A.C. 1, the Ontario Divisional Court held that freedom of association did not extend to a sexual relationship between a physician and his patient, the Court adding a gloss, at para 169, that, "[i]n

order to enjoy the guarantee of freedom of association, the association in question must advance some social value deserving constitutional protection". A doctor having sex with a patient under his care was appropriately held not to meet this standard.

323. Against this grain are two significant judgments from outside of British Columbia. In *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590, Kerans J.A. of the Alberta Court of Appeal commented as follows regarding the scope of s. 2(d) of the *Charter*:[274]

> [T]he preamble commands us to search for and acknowledge traditional Canadian "socio-ethical convictions", and that the special status given to the freedom of association in Canada reflects our tradition about the importance for a free and democratic society of non-governmental organization. In my view, the freedom includes the freedom to associate with others in exercise of Charter-protected rights and also those other rights which – in Canada – are thought so fundamental as not to need formal expression: to marry, for example, or to establish a home and family, pursue an education, or gain a livelihood.

324. Mr. Justice Keran's description of freedom of association was quoted with approval in the second significant judgment, that of Chief Justice Dickson, dissenting with Wilson J., in *Reference re: Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para. 51. Dickson C.J., like Kerans J.A., interpreted freedom of association largely and liberally. He rejected restricting it, for instance, to associational activity in furtherance of the other freedoms that s. 2 protects or to activity of a purely political nature.[275] The Chief Justice also rejected limiting the freedom to the collective pursuit of purely individual activities.[276] Instead, he emphasized that "[f]reedom of association is protected in s. 2(d) under the rubric of 'fundamental' freedoms. ... the 'fundamental' nature of freedom of association relates to the central importance to the individual of his or her interaction with fellow human beings".[277]

325. In reaching these conclusions regarding the restricted, "constitutive approach" to s. 2(d) in *Alberta Reference*, Dickson C.J. made the following comments at para 85, which are noteworthy for present purposes (emphasis added):

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[273] See pp. 203-204.
[274] See para. 41; emphasis added. Appeal to the Supreme Court of Canada dismissed, [1989] 1 S.C.R. 591.
[275] See paras. 88-89.
[276] See para 93.

> The essentially formal nature of the constitutive approach to freedom of association is equally apparent when one considers other types of associational activity in our society. While the constitutive approach might find a possible violation of s. 2(d) in a legislative enactment which prohibited marriage for certain classes of people, it would hold inoffensive an enactment which precluded the same people from engaging in the activities integral to a marriage such as cohabiting and raising children together. If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.

326. It is apparent from these comments, that the Chief Justice favoured an interpretation of freedom of association that included intimate, personal relationships as well as their associated activities. In fact, while the Chief Justice argued that s. 2(d) protection should be extended to the activities pursued by an association (cohabiting and raising children), he found it axiomatic that the association itself (marriage for certain classes of people) would be protected. While he was there speaking in dissent, as will be expanded upon below, his position on the *Alberta Reference* (along with the rest of the so-called "Labour Trilogy"[278]) would later come to be adopted by the Supreme Court as a whole.

327. The BC Supreme Court recognized the significance of these two judgments in *EGALE Canada Inc. v. Canada (Attorney General)* (2001), 95 B.C.L.R. (3d) 122, 2001 BCSC 1365 at paras. 135-136. Weighing Justice Kerans' words, as approved by Chief Justice Dickson, against the decisions reached in *R. v. M.S.* and *Catholic Children's Aid Society*, the Court accepted that "it may be an overstatement to say that the fundamental freedom of association may never be relevant in the context of marriage". And, while it concluded that freedom of association was not infringed by an exclusively heterosexual definition of marriage, the Court did so, notably, on the basis that permanent relationships between same-sex couples were not *prohibited* by the then accepted legal nature of marriage;[279] the implication is that the distinction between the *prohibition* of an associational activity as opposed to *under-inclusion* in government-sponsored benefits

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[277] See para 90, emphasis added.
[278] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 and *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27.
[279] See *Egale, supra*, para 139.

would be relevant for determining whether s. 2(d) applies. *EGALE* was overturned on appeal,[280] but the Court of Appeal declined to address whether excluding same-sex couples from the legal definition of marriage infringed upon freedom of association and expressly stated that it neither accepted nor rejected the trial judge's conclusion in this regard.[281]

328. U.S. constitutional law also provides persuasive authority for including intimate or familial relationships within the protection of freedom of association. The Bill of Rights does not itself include an express right or freedom of association, but it is by now well accepted that such a right is implicit in the U.S. Constitution. The sources of the right are identified in the expert report of Jonathan Turley at para 136:

> In the United States, while clearly protected under the First Amendment, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

329. The Supreme Court of the United States has, despite the lack of a textual anchor, broadly interpreted the freedom of association implicit in the U.S. Constitution. As Professor Turley notes, it has included not only associations in furtherance of activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion – but also those associations that advance the individual and personal liberty at the heart of the Fourteenth Amendment.[282] The U.S. Supreme Court has made it clear that this second aspect of freedom of association includes "choices to enter into and maintain certain intimate human relationships". In his

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[280] See *Barbeau v. British Columbia (Attorney General)* (2003), 13 B.C.L.R. (4th) 1, 2003 BCCA 251.
[281] See the Reasons for Judgment of Prowse J.A. at para 100.
[282] The first clause reads, in part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

opinion for the Court in *Roberts v. United States Jaycees*, 468 U.S. 618, 104 S.Ct. 3244 (1984), Justice Brennan described this aspect of freedom of association as follows:[283]

> The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

330. The *Roberts* Court identified the family as the touchstone of this "personal liberty" branch of freedom of association:[284]

> The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family – marriage; childbirth; the raising and education of children; and cohabitation with one's relatives. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

331. Like the due process clause of the Fourteenth Amendment, the *Charter* recognizes the right, under s. 7, to "a degree of autonomy in making decisions of fundamental personal importance ... without interference from the state".[285] Because it is now

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[283] See S.Ct. p. 3250; emphasis added, internal citations omitted.
[284] *Roberts, supra.*; internal citations omitted.
[285] Morgentaler at p. 166, per Wilson J. Quoted with approval in Malmo-Levine at para 85, per Binnie J. for the majority. See also *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66, where it was stated that the s. 7 liberty interest "includes 'the right to an irreducible sphere of personal autonomy

established that any given right or freedom in the *Charter* is to be interpreted in accordance with the values underlying the balance of the *Charter*'s rights and freedoms (a point which is elaborated on below), it follows that s. 2(d) should be given the same broad interpretation as the corresponding freedom of association in U.S. constitutional law. That is, it should be interpreted to include the intimate and personal relationships that underpin polygamous unions.

(2) The Supreme Court of Canada's Expanded Interpretation of s. 2(d)

332. The Supreme Court of Canada's more recent s. 2(d) decisions demonstrate a marked departure from the restricted scope placed on freedom of association in earlier cases, most notably the Labour Trilogy (including *Reference re: Public Service Employee Relations Act (Alberta)*, discussed above) and *P.I.P.S.C. v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367. The substantive determination reached in those decisions was that freedom of association did not extend to protect a right to collective bargaining. In the *Health Services* decision, the Supreme Court of Canada changed its position on that issue and recognized that such a right is properly within the scope of s. 2(d). In doing so, it has liberalized and expanded its interpretation of freedom of association itself.

333. This expansive interpretation can be seen developing in *Dunmore*, where a majority of the Court, *per* Bastarache J., approved Chief Justice Dickson's dissenting judgment in *Reference re: Public Service Employee Relations Act (Alberta)*. In particular, reliance was put on the Chief Justice's point that under s. 2(d) some associational activities would be protected by s. 2(d) even where "no analogy involving individuals can be found ... or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights".[286] This helped the Court distil the purpose of s. 2(d) to "a single inquiry: has the state precluded activity <u>because</u> of its associational nature".[287]

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wherein individuals may make inherently private choices free from state interference'". See also *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80.

[286] See *Dunmore* at para 16.

[287] *Ibid*; emphasis in original.

334. The significance of *Dunmore* was noted in a leading text[288] where the decision was described as being "couched in language that signals an undeniable shift in the discourse of the Supreme Court with regard to section 2(d) and collective activity".[289] *Dunmore* was extended to its natural conclusion in *Health Services*, where the Supreme Court overruled the Labour Trilogy and the reasoning in the *Alberta Reference* and *P.I.P.S.C.* McLachlin C.J. and Lebel J. noted, in particular, that those latter decisions adopted a "decontextualized approach to defining the scope of freedom of association in contrast to the purposive approach taken to other *Charter* guarantees".[290] After pointing out that, "[t]he language of s. 2(d) is cast in broad terms and devoid of limitations",[291] the Court implemented a purposive, contextual interpretation of s. 2(d). It relied on the treatment of freedom of association in international law and the other values underlying the *Charter* to determine that s. 2(d) included the process of collective bargaining within its sphere of protection.

335. While *Dunmore* and *Health Services* are concerned specifically with labour relations, they are nonetheless significant for the purpose of this Reference proceeding. For one thing, the fact that they overruled the determination and reasoning in the *Alberta Reference* calls into question the decisions of the BC and Ontario Courts of Appeal in *R. v. M.S* and *Catholic Children's Aid Society*. Both decisions relied on the majority judgment in the *Alberta Reference* to conclude that freedom of association did not extend to intimate or family relationships.

336. Perhaps more importantly, *Dunmore* and *Health Services* signal a shift to a contextual and purposive interpretation of s. 2(d) that allows for a wider ambit of associations within its protection. For example, prior to these decisions, marriage or family relationships could fairly have been excluded on the basis that they did not involve a collective pursuit of *individual* activities or goals. They are the types of associational activity noted by Dickson C.J. in the *Alberta Reference* and Bastarache J. in *Dunmore* that have no direct analogue to individual pursuits. Tarnapolsky J.A. in fact relied on this

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[288] Beaudoin and Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham: LexisNexis, 2005).
[289] *Ibid.*, p. 356
[290] *Health Services*, para. 30.

limitation to reach his conclusion for the Ontario Court of Appeal in *Catholic Children's Aid Society*. He cited the *Alberta Reference* in holding that, "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, as it is merely because they are members of a family".[292] That logic is no longer valid in light of *Dunmore* and *Health Services*. Tarnopolsky J.A. was, it seems, prescient in also recognizing that "the evolution of the scope of the freedom" would not be "limited by what has traditionally been considered to be within that scope".[293]

(3) Application of the Contextual Approach to s. 293

337. Section 293 of the *Criminal Code* effectively prohibits particular forms of committed, intimate relationships. Further, it criminalizes the formation of non-traditional family units. The protection of such relationships within s. 2(d) is warranted by the *Charter*'s underlying values and would be consistent with Canada's obligations under international law.

338. In *Health Services*, at paras 80-81, McLachlin C.J. and Lebel J. described the important influence of *Charter* values in determining whether freedom of association protects particular activities:

> The *Charter*, including s. 2(*d*) itself, should be interpreted in a way that maintains its underlying values and its internal coherence. As Lamer J. stated in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 365:
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> > Our constitutional *Charter* must be construed as a system where "Every component contributes to the meaning as a whole, and the whole gives meaning to its parts" (P. A. Côté writing about statutory interpretation in *The Interpretation of Legislation in Canada* (1984), at p. 236). The courts must interpret each section of the *Charter* in relation to the others (see, for example, *R. v. Carson* (1983), 20 M.V.R. 54 (Ont. C.A.); *R. v. Konechny*, [1984] 2 W.W.R. 481 (B.C.C.A.); *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 (C.A.); *R. v. Antoine*, *supra*).
>
> (See also *Big M Drug Mart*, at p. 344; and *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83, at para. 63.)

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[291] *Ibid.*, para. 39.
[292] *Catholic Children's Aid Society*, p. 204; internal citation omitted.
[293] *Ibid.*, p. 203.

> Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the *Charter*: *R. v. Zundel*, [1992] 2 S.C.R. 731; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 100; *R. v. Oakes*, [1986] 1 S.C.R. 103.

339. As noted above, including intimate or family relationships within the protection of s. 2(d) would be consistent with the value of liberty enshrined in s. 7 of the *Charter*. It is on the basis of personal liberty that the U.S. Supreme Court concluded that such relationships are worthy of protection under the freedom of association protected by the U.S. Constitution. For similar reasons, expanding the *Charter*'s protection of freedom of association would also enhance the values of human dignity and respect for the autonomy of the person. Justice Brennan's words in *Roberts* are equally applicable to these values and worth repeating: "individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity". Being able to choose how and with whom one forms intimate relationships is essential to a person's dignity and autonomy. A law, like s. 293, which criminalizes the formation of particular intimate relationships is contrary to these *Charter* values. Freedom of association is the means through which they can be protected.

340. Expanding freedom of association in this manner would also add to the *Charter*'s internal coherence and consistency. The other notable freedoms protected by s. 2 – freedom of religion and of expression – have developed along similar arcs. Like the limitation on s. 2(d) for intimate relationships, these freedoms were initially interpreted as being subject to their own internal limitations independent from s. 1. Over time, however, considering such limitations in interpreting the scope of freedom of expression and freedom of religion was abandoned in favour of using the more flexible balancing analysis established for s. 1 by the *Oakes* test.[294] Dispensing with the internal limitation on s. 2(d) that precludes intimate, personal relationships from protection and instead allowing the real analysis to take place under s. 1 would bring the interpretive approach for s. 2(d) into parallel with the approach taken for the other s. 2 freedoms.[295]

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[294] See *R. v. Keegstra*, [1990] 3 S.C.R. 697; *B. (R.) v. Children's Aid Society*, [1995] 1 S.C.R. 315.
[295] see Beaudoin and Mendes, *supra*, at p. 358.

341. For all of these reasons, the Amicus respectfully submits that s. 293 interferes with polygamists' freedom of association under s. 2(d) of the *Charter*.

E. Section 7: Liberty

342. Section 7 of the Charter states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The Amicus says that s. 293 breaches the right to liberty in a manner that does not accord with the principles of fundamental justice.

343. Section 293 deprives practitioners and celebrants of polygamy by posing a threat of imprisonment. Furthermore, by banning polygamy, s. 293 deprives them of the freedom to make fundamentally and inherently personal choices with respect to their intimate relationships, and so implicates basic choices going to the core of what it means to enjoy individual dignity and independence. Both the threat of imprisonment and the curtailment of a fundamentally personal choice constitute deprivations of liberty for the purposes of s. 7: *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571. In that case, Binnie J. explained as follows with respect to how the right to liberty includes a sphere of autonomy in inherently private decision-making:

> In *Morgentaler*, *supra*, Wilson J. suggested that liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance", "without interference from the state" (p. 166). Liberty accordingly means more than freedom from physical restraint. It includes "the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference": *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80. This is true only to the extent that such matters "can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence": *Godbout*, *supra*, at para. 66. See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 54; *Buhlers v. British Columbia (Superintendent of Motor Vehicles)* (1999), 170 D.L.R. (4th) 344 (B.C.C.A.), at para. 109; *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 (C.A.).

344. In *Malmo-Levine*, the Court determined that the prohibition against the possession of marijuana did not engage the liberty interest, except insofar as imprisonment stood as a possible sentence upon conviction. Binnie J., writing for the majority, concluded:

> In our view, with respect, Malmo-Levine's desire to build a lifestyle around the recreational use of marihuana does not attract *Charter* protection. There is no free-standing constitutional right to smoke "pot" for recreational purposes.

345. Plainly the conclusion must be different in respect of forming consensual, adult conjugal unions with individuals of one's choosing. An individual's conjugal relations are of the utmost personal importance and are central to individual dignity and self-identity. Indeed, there are unlikely to many activities *more* inherently private and personal. As noted above, the U.S. Supreme Court in *Roberts v. United States Jaycees* observed that "individuals draw much of their emotional enrichment from close ties with others". Chief Justice Brennan continued for the Court:[296]

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

346. The Amicus respectfully submits that it is clear that the liberty interest under s. 7 includes the right to make choices as to one's conjugal relations, including the right to enter into a polygamous conjugal union. The critical question is whether the restriction of that right through s. 293's prohibition of polygamous conjugal unions accords with the principles of fundamental justice. The Amicus says it does not.

347. Three of the principles of fundamental justice engaged in this case are arbitrariness, overbreadth and gross disproportionality.

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[296] *Roberts, supra,* S.Ct. p. 3250.

348. The *principle of arbitrariness* requires a law to be rationally related to its objective. In *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, McLachlin C.J. and Major J. (with Bastarache J. concurring) stated at paras. 130-131:

> A law is arbitrary where 'it bears no relation to, or is inconsistent with, the objective that lies behind [it]'. To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: *Rodriguez*, at pp. 594-95.
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> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.

349. The *principle of overbreadth* requires that a law only trench on the rights to life, liberty or security of the person so much as is necessary to achieve its purpose. Overbreadth was explained as follows in *R. v. Heywood*, [1994] 3 S.C.R. 761 by Cory J. for the majority of the Supreme Court at pp. 792-94:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.
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> ...
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> In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator. It is true that s. 7 of the *Charter* has a wide scope. This was stressed by Lamer J. (as he then was) in *Re B.C. Motor Vehicles Act*, *supra*, at p. 502. There he observed:

> Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice.
>
> However, before it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

350. The *principle of gross disproportionality* was described in *Malmo-Levine* at p. 653by Binnie J. for the majority of the Court: "In other words, if the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused by marihuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*." As the court stated in *Bedford v. Canada*, 2010 ONSC 4264 at para. 412, which concerned the constitutional challenge to the prostitution laws, "a gross disproportionality analysis proceeds by first determining whether the impugned law pursues a legitimate state interest, and then by considering the gravity of the alleged *Charter* infringement in relation to the state interest pursued."

351. As can be seens from this discussion, these principles of fundamental justice mirror much of the analysis conducted under s. 1. In particular, arbitrariness parallels the pressing and substantial objective and rational connection stages of the *Oakes* test, while overbreadth encompasses minimal impairment and gross disproportionality relates to the overall balancing step. The Amicus will rely on his arguments under these stages of the *Oakes* test in respect of the analysis of these principles of fundamental justice. In addition, the BCCLA has fully set out the analysis of gross disproportionality in its Closing, and the Amicus supports its submissions in those respects.

352. The Amicus will, however, address another principle of fundamental justice at this stage, which is the principle that consent is a defence to criminal responsibility.

353. Consent is one of the central organizing principles of much of Anglo-Canadian criminal law. As Glanville Williams put it in describing the importance of consent, "anything may be done to a person if he consents to it, whether it is done for his benefit or not. Just as we can decide what we do not want done to us, so we can decide what we

do."[297] It is this principle that allows surgery, rough sporting events, and borrowing property, among other activities, to take place without criminal consequences arising.

354. Section 293 of the *Criminal Code* stands in marked contrast to this principle. It prohibits an activity – marriage or the formation of committed relationships among multiple partners – even where it is consented to by all involved. As the evidence in this Reference has shown, there are exceptions. Where, for example, a person enters into a polygamous union through mental or physical coercion, consent would be vitiated. This is true to the form of the larger criminal law as well. Exceptions to the general effect of consent are found in statute and at common law. They are, however, limited and apply in extreme circumstances. Murder, which cannot be consented to pursuant to s. 14 of the *Criminal Code*, is a prominent example.

355. The consent principle is of specific significance to this Reference proceeding under the s. 7 analysis. There is authority in both case law and academic commentary supporting its inclusion as a principle of fundamental justice. Section 293, which can cause deprivation of liberty on the basis of consensual behaviour, violates this principle and so, for this reason as well, breaches s. 7.

(1) Consent as a Principle of Fundamental Justice

356. The principles of fundamental justice identified in s. 7 of the *Charter* are legal principles on which there is some consensus that they are vital or fundamental to society's notion of how the justice system ought fairly to operate.[298]

357. The consent principle in criminal law fits within this definition. As described below, there is good authority to support its inclusion as a principle of fundamental justice.

358. Though not a *Charter* decision, in *R. v. Jobidon*, [1991] 2 S.C.R. 714, the Supreme Court of Canada entered into a thorough analysis of the principle of consent. The issue for the Court was whether a consensual fist-fight resulting in the death of one of its participants constituted the offence of assault despite the consent of the victim. In

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[297] See *Textbook of Criminal Law*, 2nd ed. (London: Stevens & Sons, 1983) at p. 549.

determining this point, both Gonthier J., for the majority, and Sopinka J., in separate reasons (concurred in by Stevenson J.), recognized the central importance of consent to the criminal law in general. Gonthier J. commented as follows in this regard at para 28 (emphasis added):

> As a constituent element of numerous crimes, a common assault was any act in which one person intentionally caused another to apprehend immediate and unlawful violence. ... The traditional common law definition always assumed that absence of consent was a required element of the offence. As a general rule, an essential feature of assault is that it takes place against the victim's will. Thus, in most circumstances, it provided a valid defence to the accused. This makes sense when one acknowledges that the genuine consent of a complainant has traditionally been a defence to almost all forms of criminal responsibility. (*Russell on Crime* (12th ed. 1964), vol. 1, at p. 678, and D. Stuart, *Canadian Criminal Law: A Treatise* (2nde ed. 1987), at pp. 469-70).

359. Sopinka J. had these comments at para 141 (emphasis added):

> It is a well-accepted principle of the criminal law that the absence of consent is an essential ingredient of the *actus reus*. Thus it is not theft to steal if the owner consents and consensual intercourse is not sexual assault. In D. Stuart, *Canadian Criminal Law: A Treatise* (2nd ed. 1987), the author states (at p. 469):
>
> > The general principle, to which there are exceptions, that the true consent of the victim is always a defence to criminal responsibility is a fundamental principle of the criminal law.

360. Professor Don Stuart, in the most recent version of his text[299] distinguishes consent from other positive defences to criminal liability:[300]

> Where consent of a victim does absolve an accused the defence is conceptually different from justifications or excuses since the latter operate to exonerate otherwise illegal conduct. If there was consent the conduct was always lawful. The requirement of lack of consent is part of any *actus reus*. In the case of some offences such as assault and sexual assault the requirement is explicit. It is implicit in the case of other offences. It has been consistently held that the persuasive onus of proof beyond reasonable doubt as to lack of consent remains on the Crown.

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[298] See *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74.

[299] See *supra*, 5th ed. (Scarborough: Thomson Carswell, 2007).

[300] See pp. 587-588; emphasis added.

361. These considerations led Professor Stuart to reiterate the conclusion reached in his earlier text, cited with approval by Sopinka J. in *Jobidon*, that consent is a fundamental principle and should be recognized as such. He states that "[t]here would seem to be a positive advantage and no danger in the recognition that the defence of lack of consent is a general principle".[301]

362. The principle of consent was further judicially recognized and applied as a principle of fundamental justice in *R. v. C.M.* (1992), 75 C.C.C. (3d) 556 (Ont. Gen. Div.). At issue was s. 159 of the *Criminal Code*, which prohibits anal intercourse except by consenting persons aged 18 and older and by married persons of any age. Because the statutory age of consent for other sexual intercourse was then 14 years of age, the prohibition effectively removed the ability to consent to anal intercourse for persons aged 14-18. In considering whether this accorded with the principles of fundamental justice under s. 7, Corbett J. commented that "[c]onsent of the victim is a vital element in determining what constitutes crime" (see p. 562). She cited both the majority and minority judgments in *Jobidon* to support this proposition and concluded that:[302]

> Even if one holds the view that criminalizing certain private acts reflects a perception that the act is inherently immoral, it is difficult to conclude that the consensual anal intercourse engaged in by the accused and the complainant evokes the moral outrage of the community. I can find no inherent moral wrong in consensual anal intercourse amongst or with persons aged 14 to 18. Denying the defence of consent ... infringes the accused's right to liberty in violation of the principles of fundamental justice.

363. This decision was upheld on appeal to the Ontario Court of Appeal, but on the alternative grounds that s. 159 violated s. 15 of the *Charter* (see (1995), 98 C.C.C. (3d) 481, 82 O.A.C. 68). Neither the majority judgment of Goodman and Catzman JJ.A., nor the concurring reasons of Abella J.A. (as she then was) took issue with the trial judge's holding regarding s. 7, however.

(2) Principled Exceptions to Consent

364. As noted above, consent is not all-encompassing; there are exceptions to its application. One such category, though not really a true "exception" at all, is where there

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[301] *Jobidon*, *supra*, p. 588.

is not a genuine consent to the particular act in issue. This can occur where the consent is induced by coercion, in the form of fear or force, or by misrepresentation or fraud.[303] An example of this category can be found in the *Criminal Code*'s prohibition against assault, which under s. 265(3) provides that:

> ... no consent is obtained where the complainant submits or does not resist by reason of
>
> (a) the application of force to the complainant or to a person other than the complainant;
>
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (c) fraud; or
>
> (d) the exercise of authority.

365. The other broad category, more aptly described as an "exception", is where policy considerations vitiate even genuine consent to certain activities. Section 14 of the *Criminal Code* is the most prominent example. It provides that:

> No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any given person by whom death may be inflicted on the person by whom consent is given.

366. The provision in s. 150.1(1) that consent is no defence to the sexual assault prohibitions where the complainant is under the age of 16 years is another example.

367. While a convincing argument can be made that, in light of the codification of Canadian criminal law, delineating such exceptions to the consent principle should be left to the exclusive providence of Parliament,[304] there are also judge-made exceptions. *Jobidon* provides an example. There the majority concluded that an exception to consent should be recognized in the situation of a fist-fight between adults that was intended to

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[302] See p. 566-567.
[303] See Stuart, *Criminal Law*, 5th ed., *supra* at pp. 597-604.
[304] See e.g. Stuart, *supra* at p. 607; *Jobidon, supra*, at paras. 144-145 *per* Sopinka J.

and in fact caused serious bodily harm.[305] In allowing this exception, the majority recognized that "[t]he law's willingness to vitiate consent on policy grounds is significantly limited" and that only in the "unique situation" involved in the case was it appropriate to limit the consent principle.[306] Justice Gonthier also undertook an exhaustive review of the history of the common law of assault in both England and Canada (that offence of course pre-dates the inception of the *Criminal Code*) and of the relevant policy considerations involved before recognizing the exception.

(3) Application to s. 293

368. The prohibition against polygamy, like the prohibition against anal intercourse considered in *R. v. C.M.*, criminalizes private activity to which the participants have consented. Not only does s. 293 not recognize any ability to consent as a defence, the act of consenting is, itself, impliedly made an element of the offence.

369. Furthermore, s. 293 makes no effort to differentiate between situations in which a person or persons might be coerced by fear or force or otherwise unduly influenced to enter a polygamous union from those in which the consent is genuine and those involved are free and willing participants. There is no policy justification or compelling societal interest that could outweigh the loss of individual liberty that is involved in prohibiting such private, consensual activity. Agreeing to a conjugal or marital relationship with multiple adult partners is not inherently harmful, unlike consenting to death or to serious bodily injury. There is no apparent or legitimate reason to recognize an exception to the consent principle in the circumstances of s. 293.

370. For this reason, as well as for reasons of arbitrariness, overbreadth and disproportionality as reflected in the s. 1 analysis, the Amicus says that s. 293 breaches s. 7 of the *Charter*.

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[305] See also *R. v. Paice*, [2005] 1 S.C.R. 339, 2005 SCC 22 at paras. 10-12, clarifying the limits of the exception established in *Jobidon*.

[306] See para. 124.