No. S-097767
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

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

AND IN THE MATTER OF

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

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

CLOSING SUBMISSIONS OF THE FUNDAMENTALIST CHURCH OF THE LATTER-DAY SAINTS AND JAMES OLER

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INDEX

A. OVERVIEW

1. On 22 October 2009, the Lieutenant Governor in Council of British Columbia referred two questions to the Supreme Court of British Columbia for hearing and consideration pursuant to the *Constitutional Question* Act, R.S.B.C. 1996, c.68, section 1. Both questions concern section 293 of the *Criminal Code*, the criminal prohibition against polygamy:

    a. Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

    ANSWER: In answer to the first Reference question, it is the submission of the FLDS that section 293, properly interpreted, is inconsistent with the *Charter*. In particular, section 293 infringes upon the rights of members of the FLDS as enshrined in sections 2(a), 2(d), and 7 of the *Charter*.

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

    ANSWER: In answer to the second Reference question, the offences detailed in section 293 require the Crown to prove that the accused made an agreement with two or more persons to enter into a relationship bearing some of the indicia of a marital relationship and enduring for some period of time. Section 293 does not require that the polygamy or conjugal union in question involve a minor, or occur in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence.

B: INTRODUCTION

2. The FLDS is a small religious community located adjacent to Creston, British Columbia. It is part of the larger FLDS church present in various states in the United States of America. There are roughly 500 members of the FLDS resident in Canada and 10,000 in the United States.

3. The FLDS is a church that falls within the umbrella of Mormonism, the latter being a term which describes the Christian religious, cultural, and institutional tradition associated with the Church of Jesus Christ of Latter-Day Saints, which was established by the Joseph Smith on April 6, 1830.[1]

4. A Mormon is someone who believes that Joseph Smith was a Prophet and Seer of the Lord, and who also believes that the Book of Mormon is the word of God.[2]

5. A fundamental component of the FLDS religion is the principle of celestial (or plural) marriage, which, as William John Walsh states:

> Celestial marriage is an essential FLDS religious principle and not simply a domestic concern. It is viewed as God's commandment. Unless the faithful participate in it, they cannot enter into the fullness of glory in the kingdom of heaven in the afterlife. Thus, for believers in the principle, plural marriage is essential to personal and family salvation.[3]

6. This fundamentalist Mormon belief in celestial marriage is not unique to the FLDS. There are by several estimates 50,000 fundamentalist Mormons living in Canada and the United States who accept as a core religious belief that the practice of celestial marriage is essential to personal and family salvation.[4]

7. The FLDS has adopted practices that are unique, and thereby differentiate it not only from the LDS Church but also from other fundamentalist Mormons. These unique practices, which include common ownership of property and assignment in marriage

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[1] Affidavit #1 of William John Walsh, sworn June 7, 2010, para 7.
[2] *Ibid*, para 8.
[3] *Ibid.*, para 14.
[4] John Walsh, Transcript Day 15 (January 5, 2011), p. 35, at lines 5 – 12. Mr. Walsh also states that of the 50,000, approximately 10,000 are in the FLDS.

by the Prophet as practiced in a closed, isolated religious community ground virtually all of the harms alleged by the Attorneys in this reference.

8. Those alleged harms, which include marriage of girls below the age of consent are to the discredit of those responsible. But those harms are not to the discredit of every member of this religious faith and they are not an inevitable consequence of plural marriage. Stereotyping the behaviour of a few to condemn the many is no longer a recognized form of analysis but, it is submitted, that is precisely the approach of the Attorneys in this reference in their defence of a plainly overbroad, unconstitutional law which is addressed to behaviour unrelated to the harms.

9. The FLDS does not seek to justify communal ownership of property or assignment in marriage or the excommunication of those in disfavour. Nor does it seek to defend child abuse, spousal abuse or any other criminal behaviour. In this reference it seeks only to defend plural marriage as practiced by its members, the vast majority of whom live their lives peaceably and in compliance with all of Canada's laws, excepting section 293 of the Criminal Code.

C. THE SECOND QUESTION: DEFINITION OF THE OFFENCE

10. The second question 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?"

11. This question directs the court to define the actus reus and mens rea of S293. It is submitted that this question must be answered first as it is not possible to assess constitutional validity until it is known what acts are prohibited by the statute.

PRINCIPLES OF STATUTORY INTERPRETATION

12. The modern approach to statutory interpretation involves a consideration of the grammatical and ordinary meaning of the words used in the Act and the context in which they are found.

13. In *Canada Trustco Mortgage Co. v. Canada*, the Supreme Court of Canada states:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, 1999 CanLII 639 (S.C.C.), [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.[5]

[5] [2005] 2 S.C.R. 601 [***Trustco***], at para. 10.

14. Section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, provides that:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

WORDING OF SECTION 293

15. Section 293 of the *Criminal Code* provides as follows:

> Polygamy
>
> 293 (1) Every one who
>
> (a) practises or enters into or in any manner agrees or consents to practice or enter into
>
> (i) any form of polygamy, or
>
> (ii) any kind of conjugal union with more than one person at the same time,
>
> whether or not it is by law recognized as a binding form of marriage, or
>
> (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
>
> Evidence in case of polygamy
>
> (2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

INTERPRETATION OF SECTION 293

Section 293(a)(i): Prohibits Polygamy

16. This subsection expressly prohibits "any form of polygamy". As a result, "every one who practices or enters into or in any manner agrees or consents to practice or enter into any form of polygamy" is guilty of an indictable offence. However, "polygamy" is not defined anywhere in the *Criminal Code*. A review of various dictionary definitions demonstrates that "polygamy" is consistently defined as having "multiple spouses".

17. The *Oxford English Dictionary* defines "polygamy" as:

> Marriage with several, or more than one, at once; plurality of spouses; the practice or custom according to which one man has several wives (distinctively called *polygyny*), or one woman several husbands (*polyandry*), at the same time. Most commonly used of the former.[6]

18. The *Canadian Oxford Dictionary* defines "polygamy" as:

> 1. having more than one wife or husband at the same time. 2. having more than one mate.[7]

19. *Jowitt's Dictionary of English Law* defines polygamy as:

> Many marriage; plurality of wives or husbands. It is prohibited by the Christian relation, but permitted by some others.[8]

20. *Black's Law Dictionary* defines "polygamy" as:

> 1. The state or practice of having more than one spouse simultaneously. – Also termed *simultaneous polygamy; plural marriage.* 2. *Hist.* The fact or practice of having more than one spouse during one's lifetime, though never simultaneously.[9]

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[6] *Oxford English Dictionary*, 2nd ed, [***OED***], "polygamy".
[7] *Canadian Oxford Dictionary*, 2nd ed., [***Canadian Oxford***] "polygamy".
[8] *Jowitt's Dictionary of English Law*, 2nd ed., [***Jowitt's***], "polygamy".
[9] *Black's Law Dictionary*, 9th ed [***Black's***], "polygamy"

21. In *Ali v Canada (Minister of Citizenship and Immigration)*[10], Rothstein J. held that polygamy, as referenced in section 293(1), "...does not depend upon where the spouses reside or whether there is a cohabitation in both marriages at the same location...On its face, the practice of polygamy is having more than one spouse at the same time. Here the applicant has two wives. The three of them want to live in Canada. They all applied at the same time. I do not see that any other active step is required."[11]

22. The puzzling question arising from the language of section 293 is whether there is any distinction between polygamy as referenced in S293(1)(a)(i) and a conjugal union as referenced in S293(1)(a)(ii). An obvious possible distinction, and one drawn by the Attorney General of Canada, is that polygamy refers to the lawful marriage of three or more persons in another jurisdiction that permits such marriages. A conjugal union therefore captures other relationships under the guise of marriage, whether or not such marriages were lawful in the jurisdiction where they were formed. Since, however, having legally married multiple spouses at the same time is prohibited in Canada by the bigamy provisions of the Criminal Code (section 290), it appears that the distinction between polygamy and conjugal union is superficial. Since neither polygamy nor conjugal union contemplates "lawful" marriage within Canada, the FLDS submits that, in substance, the prohibition of polygamy and of multiple conjugal unions captures the same behaviour. But the question remains. What is the behaviour that is prohibited?

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[10] 1998 CanLII 8816 [*Ali*].

[11] *Ali*., at paras 12 and 13. The question Rothstein J. considered in *Ali* was:
"whether or not, given the fact that the applicants applied separately but at the same time, and that they were going to live in Canada, the second wife in a separate province, the mere fact of the existence of polygamous marriages and legal marriages of the male applicant, to two different spouses, constitutes reasonable grounds to believe that the parties would be practicing polygamy in Canada pursuant to section 293 of the Criminal Code, or does there have to be some active step taken once in Canada by the husband and/or either of the two wives, recognizing or referable to the offending marriage before the offence of polygamy can be made out.

Section 293(a)(ii): Prohibits multiple conjugal unions

23. Section 293(1)(a)(ii) prohibits "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".

24. Definitions of "conjugal union" provide that it is concerned with marriage. For example, *Black's* refers to "conjugal union"[12] as "see marriage", while the *OED* defines "conjugal"[13] as "Of or pertaining to marriage, matrimonial".

25. The few case authorities dealing with section 293 provide that a conjugal union requires more than mere cohabitation between the parties. An adulterous relationship does not constitute a conjugal union. Rather, it is a "...form of contract between the parties, which they might suppose to be binding on them".[14]

26. In *R v. Tolhurst; Wright*[15], the Ontario Court of Appeal considered section 310(b) of the *Criminal Code*[16], and held that the section did not criminalize adultery. The Court emphasised that the words "any kind of conjugal union":

> predicates some form of union under the guise of marriage and were not intended to apply to adultery even where one or both of the persons are married at the time they are living together.[17]

27. In *R v Eastman*, Sedgewick J., in an *obiter* statement, refers to section 310(b) and states that:

> I only remark here that the section seems to apply only in the case of some sort of contract to live together, and not to a living together of one person with a married person of the opposite sex without any such contract.[18]

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[12] *Black's*, "conjugal union".
[13] *OED*, "conjugal".
[14] *R v Labrie* (1891) QB 211, [***Labrie***].
[15] (1937), 68 CCC 319, [***Tolhurst***].
[16] *Criminal Code,* R.S.C. 1927, c. 36. Section 310(b) made it an offence for a person "...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."
[17] *Tolhurst*, p. 320.
[18] [1932] OJ No. 236 (Ont. CA), [***Eastman***], at para.19.

28. A conjugal union, therefore, arises upon the making of an agreement between more than two people, in which those persons agree to live under the guise of marriage.

29. The offence is made out upon the making of an agreement by more than two persons to treat themselves as bound together in a marital like relationship. The accused must have agreed to treat this agreement as binding upon their conscience for some period of time.

30. In *M v H,* Cory and Iacobucci JJ., for the majority of the Supreme Court of Canada, define the indicia of a marital-like relationship to include a variety of circumstances:

> *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. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".[19]
>
> [emphasis added]

31. The courts have been unable to provide an all encompassing list of the indicia of marriage. In the context of "marriage-like relationship" as defined in the Estate *Administration Act*, the British Columbia Court of Appeal said this:

> It is understandable that the presence or absence of any particular factor cannot be determinative of whether a relationship is marriage-like. This is because equally there is no checklist of characteristics that will invariably be found in all marriages. In this regard I respectfully agree with the following from the judgment of Ryan-Froslie J. in ***Yakiwchuk v. Oaks***, 2003 SKQB 124:
>
> > [10] Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property - in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects

[19] [1999] 2 SCR 3., [*M v* H], at para. 59.

> of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important - for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their "spouse" by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some "spouses" do everything together - others do nothing together. Some "spouses" vacation together and some spend their holidays apart. Some "spouses" have children - others do not. It is this variation in the way human beings structure their relationships that make the determination of when a "spousal relationship" exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of "public" declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to "be together". Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people "ease into" situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist.[20]
>
> [emphasis in original]

32. A holistic approach to the indicia of a marriage like relationship, as described above, is not appropriate to the interpretation of a criminal statute. The criminal law requires precision so that an accused may know the nature of the behaviour that is prohibited. It is submitted that the offence created by section 293 cannot be defined by reference to the indicia of marriage alone.

33. It is the submission of the FLDS that the *actus reus* of the offence created in section 293 is the making of the agreement between more than two people to form or engage in a relationship having some or all of the indicia of marriage, excluding the fact or intent to engage in sexual relations, and to treat that relationship as binding on their conscience and enduring for some period of time. The *mens rea* is the

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[20] *Austin v Goerz*, 2007 BCCA 586, [***Austin***], at para. 58.

specific intent to make the agreement. The question of whether this agreement is sanctioned by foreign law (polygamy, as defined by Canada) or undertaken in Canada without sanction of law (conjugal union) is irrelevant.

34. Section 293 therefore creates, uniquely, a crime of status. It is not an offence to undertake individually or collectively any of the indicia of marriage such as living together, having sexual relations, bearing children, sharing expenses or supporting one another. The offence is only committed if persons performing some, or all of these indicia of marriage have also agreed to treat their relationship as binding on their conscience and enduring for some period of time. The sisters who live together and support one another in every way, having agreed to treat their relationship as enduring are captured by the prohibition in the same way that members of the FLDS, having entered a celestial marriage are captured.

35. The FLDS submits that this is the only permissible interpretation of section 293(1)(a) considering the grammatical and ordinary sense of the words, read harmoniously with the scheme of the Act.

Section 293(b)

36. This subsection expressly prohibits anyone from celebrating, assisting or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii).

The Additional Criteria

37. Section 293 does not require the prohibited agreement to involve a minor, occur in the context of dependence, exploitation, abuse of authority, gross imbalance of power or undue influence. All of those matters, if proven, would vitiate consent to the agreement to enter into the conjugal union. Without consent there is no agreement, and without an agreement there is no *actus reus* and no breach of section 293.

RESPONSE TO THE AGBC AND AGC INTERPRETATIONS

AGBC Interpretation

38. In its opening position filed in February 2010, the AGBC provided the following interpretation of section 293:

> Section 293 prohibits marriages or marriage-like relationships involving more than two persons that purport to be (a) sanctioned by an authority having power or influence over the participants and (b) binding on any of the participants.

39. In it's opening statement the proposed interpretation changed. It was then defined as follows;

> 61. The Attorney General says that "polygamy" in section 293(1)(a)(i) of the *Criminal Code*, purposively and realistically interpreted means:
>
> > a polygynous marriage that purports to be (a) sanctioned by some authority and (b) binding on any of its participants.
>
> 62. Subsection 293(1)(a)(ii), which has since 1890 forbidden a "conjugal union" with more than one person, is a reiteration and expansion of the principal prohibition that was designed and serves as an anti-circumvention measure. It refers to a polygynous marriage-like union even if this union has become formalized through recognized ceremony or celebration.

40. Finally, the interpretation offered by the AGBC in its closing has changed again and now reads as follows:

> 100. ...it is apparent that a multi-partner relationship does not become criminal unless it has the trappings of a duplicative marriage. What constitutes "duplicative marriage" need not be exhaustively defined in advance, but it means at least that multiparty conjugality would attract the criminal prohibition when it is or purports to be a marriage, including when it is or purports to be a pairing sanctioned by some authority and binding on its participants. In this formulation, "authority" would be some mechanism of influence, usually religious, legal, or cultural, that imposes some external consequences on decisions to enter into or remain in the relationship.
>
> ...
>
> 106. ...Subsection 293(1)(a)(ii), which has since 1890 forbidden a "conjugal union" with more than one person, is a reiteration and expansion of the principal prohibition that was designed and serves as an anti-circumvention measure. It

refers to a polygamous marriage-like union even if it cannot be proven to have been formalized through recognized ceremony or celebration that would have made it either a 'form of polygamy" under subsection 11(5)(a) (now subsection 293(1)(a)(i)) or "what among the persons commonly called Mormons is known as spiritual or plural marriage" under then subsection 11(5)(c).

41. At para. 122 of its closing submissions, the AGBC submits that "...this Court may interpret 'polygamy' to mean 'polygyny'".

42. The FLDS submits that the Court should not interpret polygamy as "polygyny". This interpretation is at odds with the words of the statute, being "any form of polygamy" and is inconsistent with the grammatical and ordinary meaning of the word. Parliament did not define the term narrowly or limit its applicability to men having more than one wife, otherwise, the words "any form of" are meaningless. Parliament clearly intended to capture polygamy in all its forms, not just the form to which the AGBC attributes harm.

43. In its final definition the AGBC has retreated from the assertion that the offence is made out only if the relationships are "sanctioned by an authority and binding on the participants". The proffered definition now only provides that "duplicative marriage" **including** marriage "sanctioned by an authority and binding on the participants" is prohibited. But what is duplicative marriage? The AGBC declines to offer a comprehensive definition but states that it is present when "it is or purports to be a marriage". Obviously, a relationship cannot "purport" to be anything. The proposed definition must mean that that parties to the relationship purport to treat it as a marriage or marriage like relationship. If that is so, then the AGBC must be submitting that the actus reus of the offence created by section 293 is the subjective intent or belief of the accused. With respect, that simply cannot be correct. Section 293 must define behaviour that is prohibited, not belief or intent that is prohibited.

44. The AGBC adopts the concept of "duplicative marriage" from the Utah case of *State of Utah v Holm*,[21] in which the Supreme Court of Utah held that "...the legislative purpose of the bigamy statute was to prevent 'all the indicia of marriage repeated

[21], 2006 UT 31, [***Holm***].

more than once'."[22] This definition is of limited assistance in this reference as the "indicial of marriage" were not defined with precision by the court. In any event, section 293 expressly excludes at least one of the key indicia of marriage as defined by the Supreme Court of Canada, being the fact or intent to engage in sexual relations.

45. It is submitted that "duplicative marriage" leads inexorably to the definition offered by the FLDS, being an agreement by more than two persons to enter into a marital like relationship, and to treat it as binding on their conscience and enduring for some period of time.

Canada's Interpretation

46. Canada has offered an interpretation of section 293 that differs, quite substantially, from the AGBC, and Canada has narrowed its definition considerably from its opening statement. Canada originally defined polygamy and conjugal union as follows:

> (1) Polygamy
>
> 31. Sub-paragraph s.293(1)(a)(i) prohibits being in multiple marriages at the same time that [they] are legally valid under the law where the marriages were celebrated. Accordingly, the offence is made out where a person:
>
> > i. is married to more than one person at the same time where the marriages are valid according to the law of the place where they are celebrated; or
> >
> > ii. is married to a person, knowing that the person is legally married to a third person where the marriages are valid according to the law of the place where each marriage was celebrated.
>
> (2) Conjugal Union with More than One Person
>
> 32. Sub-paragraph s. 293(1)(a)(ii) prohibits being in multiple conjugal unions or marriage-like relationships at the same time. For the purposes of this sub-paragraph, conjugal union should be interpreted to mean a form of marriage-like

[22] *Holm*, at para. 26.

relationship that is not legally valid, which is sanctioned by a rite, ceremony, contract or consent that purports to create a union between the parties.

33. A conjugal union necessarily incorporates an element of formality. A conjugal union comes into being only through a formal marriage-like ceremony and every marriage-like ceremony produces such a union: see *R v Tolhurst*.

34. A conjugal union is created in a moment by the marriage-like ceremony. The marriage-like ceremony must both purport to create and purport to sanction the conjugal union, thereby binding the participants together.

35. A conjugal union can only be entered into by consent if that consent is specifically to enter into a conjugal union rather than mere consent to cohabit.

47. Canada's definition of section 293(1)(a)(i) in its closing submissions is as follows:

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

48. Canada defines section 293(1)(a)(ii) as follows:

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

49. Canada also states, at para. 227, that, "In a conjugal union, again like in any marriage, the couple are bound together from the moment of the ceremony and it is at that moment that both parties enter the institution of marriage".

50. With respect, Canada's proposed interpretation that "any kind of conjugal union" requires some form of formal ceremony or sanctioning event cannot be correct. As the ceremony or sanctioning event cannot be the lawful formalization of marriage

(bigamy) such a definition creates three fatal flaws. Firstly, it introduces a level of imprecision and vagueness to the definition such that an accused could never know precisely what kind of "ceremony" or "sanctioning event" would criminalize an otherwise lawful relationship. Secondly, it imports into the definition the behaviour and intent of third parties to the offence thereby rendering the question of guilt of an accused dependent upon something or someone other than the actions and intent of the accused. Thirdly, the proof of a method by which the relationship was entered into is expressly excluded by section 293(2).

D. THE FIRST QUESTION: THE CHARTER OF RIGHTS AND FREEDOMS

51. The first question asks whether section 293 of the *Criminal Code of Canada* is consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

52. The FLDS submits that the purpose or effect of section 293 infringes various *Charter* rights and freedoms of the members of the FLDS, namely: section 7 (liberty), section 2(a) (freedom of religion) and section 2(d) (freedom of association).

SECTION 7: Section 293 offends the principles of fundamental justice

53. Section 7 of the *Charter* states that: "Everyone has the liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The FLDS submits that section 293 offends section 7 of the *Charter* and the principles of fundamental justice, in that it is overbroad, arbitrary and grossly disproportionate.

54. A section 7 analysis engages a three part test. First, the court must identify the section 7 interest properly at stake; secondly the court must identify the applicable principles of fundamental justice and thirdly the court must determine whether the deprivation of the section 7 interest identified is in accordance with the principles of fundamental justice.[23]

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[23] *R v Malmo-Levine*, [2003] 3 SCR 571, [***Malmo-Levine***], at para 83.

55. For members of the FLDS, the section 7 interest that is at stake is liberty. In *Malmo-Levine*, Gonthier and Binnie JJ., for the majority, discuss the meaning of liberty under section 7:

> [85] In *Morgentaler, supra*, Wilson J. suggested that liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance", "without interference from the state" (p.166). Liberty accordingly means more than freedom from physical restraint. It includes "the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference": *Godbout V Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80. This is true only to the extent that such matters "can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence": *Godbout, supra*, at para. 66. See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 54; *Buhlers v. British Columbia (Superintendent of Motor Vehicles)* (1999), 170 D.L.R. (4th) 344 (B.C.C.A.), at para. 109; *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 (C.A.).

56. The availability of imprisonment for an offence is sufficient to trigger section 7 scrutiny.[24]

57. Imprisonment is available for the offence under section 293. Additionally, section 293 affects the ability of individuals to make private choices about whom they enter into relationships with, and in what terms. In this way the state interferes with the private choices of individuals.

58. The principles of fundamental justice are to be found in the basic tenets of the legal system,[25] which include that laws must not be overbroad, arbitrary or grossly disproportionate.

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[24] *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, [***Re BC Motor Vehicle Act***].
[25] *Re B.C. Motor Vehicle Act.*

Overbreadth

59. It is the submission of the FLDS that section 293 is overbroad in that the law is not necessary to achieve the State's legitimate interests. The FLDS submits that the purpose of section 293 is the protection of the Christian belief in monogamous marriage. It is clear that such an object does not now constitute a legitimate interest of the state. The Attorneys, however, assert that the legitimate state interest engaged by section 293 is the protection of women, children and society.

60. In *R v Heywood*, Cory J., for the majority, states:

> Overbreadth and vagueness are different concepts, but are sometimes related in particular cases. As the Ontario Court of Appeal observed in *R. v. Zundel*, (1987), 58 O.R. (2d) 129, at pp. 157-58, cited with approval by Gonthier J. in *R. v. Nova Scotia Pharmaceutical Society*, *supra*, the meaning of a law may be unambiguous and thus the law will not be vague; however, it may still be overly broad. Where a law is vague, it may also be overly broad, to the extent that the ambit of its application is difficult to define. Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective.
>
> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.
>
> Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual.[26]

61. If the State's objective was to protect the interests of women, children and society then the means employed by the State in section 293 are broader than necessary to achieve those valid objectives.

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[26] [1994] 3 SCR 761, [***Heywood***], paras. 48 – 50.

62. Section 293 prohibits the making of an agreement to treat as enduring a relationship, the indicia of which are otherwise perfectly lawful. If the object of Section 293 were to protect the interests of women, children and society then one would expect a prohibition of harmful behaviour, not prohibition of an agreement to treat the consequences of such behaviour in a particular manner. Such a prohibition is overbroad.

63. Further, section 293 prohibits all forms of a polygamy and multiple conjugal unions although, by definition, they are entered into freely by consenting adults.

64. As a consequence of their deeply held faith, adult members of the FLDS chose to enter into and remain in plural marriages. For example, Witness no. 4 states, with respect to marriage, that "I felt grateful for the privilege to be married and I knew I had a choice to choose whether to move on in life or not."[27] The evidence of Witness no. 3 was that she would have a choice with respect to marriage,[28] and states that she would "...never marry someone I did not want to marry"[29].

65. The Attorneys have led evidence of those formerly in the FLDS who were compelled into marriage, or excluded from their communities or directed to marry when under the age of consent. All of these are pressing social concerns and legitimately the subject of the criminal law. Parliament could, if it chose, enact laws defining the minimum age of marriage or outlawing arranged or compelled marriages. These focused laws would address the harms identified by the Attorneys without also criminalizing consensual, adult intimate relationships.

66. The FLDS submits that Parliament, even if it is found to have enacted section 293 for a legitimate purpose, has imposed a law far broader than is necessary to achieve those objectives, and the law therefore infringes section 7.

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[27] Affidavit of Witness no. 4, sworn October 15, 2010, at para. 4.
[28] Witness No. 3, Transcript Day 27 (January 26, 2011), p.56, lines 1-25.
[29] Witness No. 3, Transcript Day 27 (January 26, 2011), p. 33, line 32.

Arbitrary

67. The FLDS submits that section 293 is arbitrary in that there is no real connection between the law and the purpose the law is said to serve.

68. A law is arbitrary if it lacks a real connection on the facts to the purpose the law is said to serve. In *Chaoulli v Quebec,* McLachlin C.J. and Major J, for the majority, state that:

> [129] It is a well-recognized principle of fundamental justice that laws should not be arbitrary: see, e.g., *Malmo-Levine*, at para. 135; *Rodriguez*, at p. 594. The state is not entitled to arbitrarily limit its citizens' rights to life, liberty and security of the person.
>
> [130] 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.
>
> [131] 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.[30]

69. The law is said to serve the purpose of protecting women and children from harm or the reasonable apprehension of harm but it criminalizes both if they participate in a plural marriage. That is, with respect, the very definition of arbitrary.

70. With respect to the harms alleged to be suffered by the children of polygamous parents, there is no differentiation on the evidence of those alleged harms from those suffered by children of abusive monogamous or serially monogamous or single parents, all of which are perfectly lawful relationships. Section 293 addresses the agreed consequences of a particular intimate relationship, not the harms that may result from any intimate relationship. This is arbitrary.

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[30] [2005] 1 SCR 791, [***Chaoulli***], paras. 129 – 131.

71. Finally, the Attorneys assert that section 293 addresses the harms to society from the pool of unmarried men who must, they say, result from widespread polygamy. The FLDS submits that this concern is illusory. If Parliament was truly concerned with the pool of unmarried men then laws addressed to the half million single men from monogamous families in Canada might be expected. But this law, which has not been prosecuted since 1937, does not criminalize the behaviour of multiple, simultaneous conjugal relationships such as would be seen in serial monogamy but rather only the agreement of the participants to treat it as enduring. If the offence is defined as suggested by the Attorneys then it is addressed only to the tiny community of Bountiful. In either event, it is arbitrary.

Grossly Disproportionate

72. Whether a law is disproportionate requires the Court to determine: (1) whether a law pursues a legitimate state interest; and, if it does, (2) whether the law is grossly disproportionate to the state interest.

73. In *Malmo-Levine*, Gonthier and Binnie J.J., discuss gross disproportionality, and state:

> [169] As stated, the proportionality argument made by the appellants is broader than the mere disproportionality of penalty. They are correct to point out that interaction by an accused with the criminal justice system brings with it a number of consequences, not least among them the possibility of a criminal record. We agree that the proportionality principle of fundamental justice recognized in *Burns* and *Suresh* is not exhausted by its manifestation in s. 12. The content of s. 7 is not limited to the sum of ss. 8 to 14 of the *Charter*. See, for instance, *R. v. Hebert*, [1990] 2 S.C.R. 151; *Thomson Newspapers*, *supra*. We thus accept that the principle against gross disproportionality under s. 7 is broader than the requirements of s. 12 and is not limited to a consideration of the penalty attaching to conviction. Nevertheless the standard under s. 7, as under s. 12, remains one of *gross* disproportionality. In other words, if the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused by marihuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*.
>
> [emphasis added]

74. If section 293 pursues legitimate State interests, namely the protection of women, children and the protection of social harmony then it is submitted that the law is grossly disproportionate to those State interests. By imposing criminal penalties upon those participating in plural marriage within a closed religious community section 293 exacerbates the very harms the Attorney's seek to address. It is clear on the evidence of Carolyn Jessop, Brenda Jensen and Truman Oler that the prohibition of polygamy ensures insularity and fear of authority thereby reducing the ability of those within the community to report legitimate abuses of women or children. FLDS witnesses themselves, for example, Witness No. 3, states in her affidavit that:

> [13] The fact that polygamy is a criminal offence affects my life in many ways. As a child, I heard the stories of previous raids and persecution against members of my faith, and I was scared that I too would have to face that someday. I was also so worried that my father would have to go to jail because he married my mother – a worry I still face. As an adult, I have endured many comments and slurs when I go out into the wider community.
>
> [14] I do feel that the criminalization of polygamy causes me and all FLDS with whom I associate in Canada to be very cautious in our dealings with the government, police, and other members of society. I perceive that our community and our school, is under constant scrutiny because of our beliefs, one of which is the practice of polygamy. As a result, I feel that I am marginalized within Canadian society because of my religious faith and practices.[31]

75. Witness No. 2, states in her affidavit that:

> [10] The law prohibiting polygamy has created many negative impacts on my community: I don't feel I could go to a marriage counsellor if I wanted help because of the "illegalness" of polygamy. I work outside the community. I feel I have to keep my life secret from every co-worker that is not of my faith and every government official. My children feel like if they say the wrong thing to a dentist or doctor their father could go to jail.[32]

76. Alina Darger, an independent fundamentalist Mormon testified that while she was growing up in a polygamous family she did not want to call the police because,

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[31] Affidavit #1 of Witness No. 3, sworn October 15, 2010, at paras. 13 and 14.
[32] Affidavit #1 of Witness No. 2, sworn October 15, 2010, at para. 10.

"...maybe they would come to my house and see that my dad was a polygamist and then we might have problems from there".[33]

77. The law has, in fact, the effect of marginalizing the members of the FLDS in the wider community.

78. The availability of imprisonment for those members of the FLDS who have not committed any other offence other than being in a polygamous marriage is not only grossly disproportionate to the State objectives but directly contrary to those objectives.

SECTION 2(a): Section 293 infringes the FLDS Freedom of Religion

79. Section 2(a) of the *Charter* states that "[e]veryone has...freedom of conscience and religion". The FLDS submits that the effect of section 293 is to interfere with and substantially infringe on a long and established religious belief of members of the FLDS, namely the religious belief in celestial (plural) marriage.

80. In *R v. Big M Drug Mart*, Dickson J., provides the following definition of freedom of religion:

> 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.[34]

81. In *Alberta v Hutterian Brethren of Wilson Colony*, McLachlin C.J., for the majority, summarizes the test with respect to freedom of religion:

> [32] An infringement of s.2(a) of the *Charter* will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial: *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551, and *Multani*. "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct.[35]

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[33] Alina Darger, draft transcript, Transcript Day 24 (January 19, 2011), p.67, lines 31-33.
[34] *R v Big M Drug Mart*, [1985] 1 SCR 295, [***Big M Drug Mart***], para. 94.
[35] [2009] SCR 567, [***Hutterian***].

82. As William John Walsh states in his affidavit, "...celestial marriage is an essential FLDS religious principle".[36]

83. In his oral testimony, Mr. Walsh discusses the role of celestial marriage in the FLDS:

> A For the FLDS they view civil marriage as a contractual system of relationships sponsored by some type of government. Normally there are some type of rights, responsibilities, privileges established by the government that is sanctioning the civil marriage. And for them celestial marriage is something different.
>
> In the FLDS theology there is a heavenly family linked in family chains that starts at God and goes through all the generations of Adam and Eve to the current generation. It also includes pre-mortal spirits that have not yet been born. And the purpose of celestial marriage is basically to find a way to bond every person in the faith community into that family chain, because by being part of the family chain they are enabled to inherent the highest degree of glory in the kingdom of heaven and the after life.
>
> And so celestial marriage gives them a place within the chain and it also gives them an opportunity to practice certain things that would enable them then to inherit heaven in the afterlife.
>
> Q Does the covenant of marriage – celestial marriage that is, always imply a sexual relationship within the FLDS?
>
> A No, it doesn't.[37]

84. The evidence from Witness No. 3, Witness No. 4 and Alina Darger demonstrates that plural marriage is an essential aspect of their Mormon faith.

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[36] Affidavit #1 of William John Walsh, sworn June 7, 2010, para. 14.
[37] John Walsh, Transcript Day 15 (January 5, 2011) p. 36, lines 5 – 31.

85. Witness No. 4, provides in her affidavit that:

> I believe that before we came to earth we made covenants with someone in heaven to be partners (man and wife). When we come to earth our channel with the heavens and Heavenly Father is our Prophet, he is the one who talks with Heavenly Father and receives revelation concerning who we belong to according to covenants made prior to our coming to earth. When we enter in to the Marriage covenant we are sealed as man and wife for time and all eternity. I feel that this is the true and living church this is the one that truly teaches the correct doctrine and because I believe this way I believe the prophet has the right and the connection with the heavens to direct whom I am to marry.[38]

86. Witness No. 4 testified that:

> Q Could you explain to His Lordship, please, your understanding of the covenant in marriage in the FLDS?
>
> A I believe that a man and wife are sealed together for time and all eternity.
>
> Q And what, if any, role does plural marriage play in that covenant?
>
> A Plural marriage -- celestial and plural marriage is something that I have to enter and abide to gain my highest degree in the celestial kingdom.[39]

87. Witness No. 3, another member of the FLDS community in Bountiful, British Columbia, states in her affidavit:

> [8] The FLDS marriage covenant is something I strongly believe and accept. To begin with, I would never have been born without it. I have grown up in a plural family and want the same for my own children someday. As well, I have personally studied the history of the events surrounding the establishment of plural marriage as an integral part of our religion. I have taken special interest in the lives of many of the first plural wives (Eliza R. Snow, Lucy Walker, etc.) and have been impressed b their stories of how they gained their testimonies of "the principle".
>
> [9] In my own life, I plan on living the FLDS marriage covenant for several reasons. In the first place, I believe that the principle was established on earth by God Himself as it is established in the heavens. I believe that God speaks to our prophet. Therefore, I believe that it is my loving Heavenly Father who

[38] Affidavit #1 of Witness No. 4, sworn October 15, 2010, at para. 5.
[39] Witness No. 4, Transcript Day 27 (January 26, 2011), p.1, lines 39 – 47; p. 2, line 1

> determines who will be the right person for me to marry. And although I may not know this man personally, I do know that the is a person of high moral standards and has been recommended by his father and his bishop.[40]

88. Witness No. 3 also states in her oral testimony as follows:

> 10 Q Now, I'm moving on to a new subject area now and
> 11 that is about the marriage covenant. I understand
> 12 that you believe in the marriage covenant of your
> 13 faith?
> 14 A I do.[41]
>
> ...[Following transcript page]
>
> 14 Q Now, I -- you believe also that in order to get to
> 15 the highest level of the celestial kingdom of
> 16 heaven that you must live plural marriage?
> 17 A Yes, I do.
> 18 Q And you yourself aspire to get to the highest
> 19 level of the celestial kingdom of heaven?
> 20 A Yes, I would.[42]

89. Alina Darger, a practicing Mormon from Utah, states:

> I prayed and studied scripture before deciding plural marriage was the right choice. I knew living a polygamous lifestyle could be hard and took a lot of selflessness and sacrifice. I believe strongly in the principle of plural marriage as an essential of my faith.[43]

90. A core element of the Fundamentalist Mormon religion is that celestial marriage is necessary to enter the highest level of the celestial kingdom of heaven. There can be no doubt that Witness No. 3 and Witness No. 4 were sincere in their belief that plural marriage is necessary to obtain the highest level of the celestial kingdom. This belief is shared by Alina Darger who testified that plural marriage is essential to her faith. This belief in plural marriage and its practice has a clear nexus with the Mormon religion. Therefore, the freedom of religion is engaged.

91. Once freedom of religion is engaged, then it must be determined whether the interference with the religious belief is more than trivial or insubstantial. The effect of

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[40] Affidavit #1 of Witness No. 3, sworn October 15, 2010, at paras. 8 and 9.
[41] Witness No. 3, Transcript Day 27 (January 26, 2011), p.51, lines 10 – 14.
[42] Witness No. 3, Transcript Day 27 (January 26, 2011), p. p.52, lines 14 – 20.
[43] Affidavit #1 of Alina Darger, sworn March 16, 2011, at para. 11.

section 293 is to interfere with a core element of the religious beliefs of members of the FLDS.

92. The Courts have, however, limited the right of individuals to rely on freedom of religion if practices resulting from those beliefs harm others. In *Syndicat Northcrest*, Iacobucci J. provides a limit on the freedom of religion that:

> [62] Freedom of religion, as outlined above, quite appropriately reflects a broad and expansive approach to religious freedom under both the Quebec *Charter* and the Canadian *Charter* and should not be prematurely narrowly construed. However, our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.[44]

93. While the freedom of religion is not absolute, it is the submission of the FLDS that polygamy in and of itself does not cause harm to, or interfere with, the rights of others. Furthermore, the fundamentalist Mormon doctrine does not espouse or justify the abuse of women or children. Those are the crimes of man, not of practice based on religious belief.

[44] *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [***Syndicat***], at para. 62.

SECTION 2(d): Section 293 infringes the FLDS Freedom of Association

94. Section 2(d) of the *Charter* states that "[e]veryone has...freedom of association". The FLDS submits that polygamous family relationships, which are expressly prohibited by under section 293, should be protected by freedom of association.

95. While freedom of association has tended to focus in the labour context, "[t]he language of s. 2(d) is cast in broad terms and devoid of limitations".[45] The purpose of the freedom of association is to ensure that various goals may be pursued in common as well as individually.[46] In *Public Service Employees Relations Act,* McIntyre J., considers freedom of association to be "...one of the most fundamental rights in a free society. The freedom to mingle, live and work with others gives meaning and value to the lives of individuals and makes organized society possible".[47]

96. In *Reference re Public Service Employees Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act,* Le Dain J., discusses the meaning of freedom of association, and states:

> [142] In considering the meaning that must be given to freedom of association in s. 2(*d*) of the *Charter* it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

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[45] *Health Services and Support – Facilities Subsector Bargaining Assn v BC*, [2007] 2 SCR 391 [***Health Services***], at para. 39

[46] *Reference re Public Service Employees Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act*, [1987] 1 SCR 313, [***Public Service Employees Relations Act***], per McIntyre J, at para. 173.

[47] *Public Service Employees Relations Act,* per McIntyre J, at para 148.

97. There have been dicta which state that family relationships are protected by the freedom of association. In *Black v Law Society of Alberta*, Kerans J.A. states:

> In my view, the freedom [of association] includes the freedom to associate with others in exercise of Charter-protected rights and also those other rights which – in Canada- are though so fundamental as not to need formal expression: to marry, for example, or to establish a home and a family, pursue an education, or gain a livelihood.[48]

98. In *Public Service Employee Relations Act*, Dickson J., dissenting, states:

> [81] The essentially formal nature of a constitutive approach[49] 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.
>
> ...
>
> [86] Freedom of Association is protected in s. 2(*d*) under the rubric of "fundamental" freedoms. In my view, the "fundamental" nature of freedom of association relates to the central importance to the individual of his or her interaction with fellow human beings. The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends.[50]
>
> [emphasis added]

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[48] [1986] 3 WWR 590 (Alta. CA), **[*Black v Law Society*]**, at p. 612.

[49] Dickson J. considered the constitutive approach at para. 71: "At one extreme is a purely constitutive definition whereby freedom of association entails only a freedom to belong to or form an association. On this view, the constitutional guarantee does not extend beyond protecting the individual's status as a member of an association. It would not protect his or her associational actions."

[50] *Public Service Employee Relations Act,* at para. 86.

99. In *EGALE Canada Inc. v. Canada (Attorney General)* the issue arose whether the marriage law of Canada offended section 2(d) by denying same-sex couples the freedom of association through marriage. Pitfield J. states that:

> [138] While it may be an overstatement to say that the fundamental freedom of association may never be relevant in the context of marriage, I conclude it is not relevant in the context of Parliament's ongoing recognition of marriage as an opposite-sex relationship.
>
> [139] Permanent relationships between gays and lesbians are not prohibited by anything that Parliament or the provinces have, or have not, done with respect to the legal nature of marriage. Indeed, legislative progress in many provinces confirms that gay and lesbian relationships are a recognized and generally accepted aspect of today's society. The fact that such relationships do not have the approbation of the state so as to give rise to the rights and obligations that immediately result upon marriage does not amount to a denial of the fundamental freedom of association.[51]
>
> [emphasis added]

100. Canada submits that family relationships are not protected by freedom of association, and relies on the Ontario Court of Appeal decision in *Catholic Children's Aid Society of Metropolitan Toronto* v. *S.(T.)*,[52] which held that family relationships are not protected by the freedom of association. In *Catholic,* the Ontario Court of Appeal referred to the judgment of Kerans J.A. in reaching its decision. However, this decision should be read in light *EGALE*, which left open the question of freedom of association and its application in the context of marriage, and the Supreme Court of Canada decision in *Health Services,* which held that freedom of association is "...devoid of limitations" (emphasis added).

101. In addition, the cases which have held that family relationships are not protected under the freedom of association were not dealing with family relationships that were specifically prohibited by an Act of Parliament. At the outset, therefore, there is a distinguishing feature between those cases and between members of the FLDS who are in polygamous marriages. The right of individuals in polygamous marriages are specifically prohibited and denied the right to create a family relationship. Since

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[51] 2001 BCSC 1365, [***EGALE***], at paras. 138 – 139.
[52] (1989), 69 O.R. (2d) 189, [***Catholic***].

polygamous marriages and "any kind of conjugal union with more than one person at the same time" are prohibited by section 293, the freedom of association becomes relevant as members of the FLDS are prohibited from establishing a family – a right Kerans J.A. considered "fundamental".

102. The effect of section 293, therefore, is to prohibit the formation of polygamous relationships, and thus deprives members of the FLDS from associating with one another as a family and from associating with one another in the pursuit of their religious beliefs. The activity or goal that the members of the FLDS are pursing in common, through plural marriage, is to establish a family and thus being able to enter the highest level in the celestial kingdom.

103. Section 293 also affects the rights of members of the FLDS to associate with family members, and this affects way men and women live in the FLDS. In particular, the law prevents individuals from living together in manner that each of them otherwise freely consents to live. The criminal law provision does not prohibit the behaviour of cohabiting with more than one person, or having sex with more than one person, or having children with more than one person or loving more than one person. For members of the FLDS the effect of section 293 is to prohibit their ability to contract with other individuals so as to settle upon the consequences that they agree should flow from such otherwise lawful behaviours.

104. It is submitted that section 293 deprives the members of the FLDS of their freedom to associate.

SECTION 1: The limits on the Charter rights are not justified under Section 1

105. Section 1 of the *Charter* provides that the rights and freedoms set out in the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. To establish whether a limit is reasonable and demonstrably justified in a free and democratic society, the party seeking to uphold the law has the onus, on the balance of probabilities, of proving that:

a. the limit is prescribed by law;

b. the objective is pressing and substantial;

c. the limit is rationally connected to the objective;

d. the law impairs the rights as little as possible (it minimally impairs the right); and

e. the law is proportionate in that the salutary effects of the measure outweigh its deleterious effects.[53]

The Limit is Prescribed by Law

106. Section 293 of the *Criminal Code* was enacted by Parliament, and as such it is a prescribed by law.

The Objective is Not Pressing or Substantial

107. In order to constitute a justifiable limit to a right or a freedom, the objective of the impugned measure must advance concerns that are pressing and substantial in a free and democratic society.

[53] *R v Oakes*, [1986] 1 SCR 103, [***Oakes***].

108. In *R v Zundel*, McLachlin J. (as she then was), for the majority, states that:

> ...In determining the objective of a legislative measure for the purposes of s. 1, the Court must look at the intention of Parliament when the section was enacted or amended. It cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision: see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 334, in which this Court rejected the U.S. doctrine of shifting purposes. Although the application and interpretation of objectives may vary over time (see, e.g., *Butler*, *supra*, *per* Sopinka J., at pp. 494-96), new and altogether different purposes should not be invented.
>
> ...If the simple identification of the (content-free) goal of protecting the public from harm constitutes a "pressing and substantial" objective, virtually any law will meet the first part of the onus imposed upon the Crown under s. 1. I cannot believe that the framers of the *Charter* intended s. 1 to be applied in such a manner. Justification under s. 1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the *Charter*'s guarantees.[54]
>
> [emphasis added]

109. The FLDS submits that the purpose of section 293, as it was originally enacted in 1892, was to protect the Christian belief in monogamous marriage. The law made specific reference to and was targeted at Mormons because of their belief in plural marriage. By prohibiting polygamy, Parliament intended to deter Mormons from practising their religion in Canada. Those were, it is submitted, the specific purposes for which the law was enacted. Even though the law was amended in 1954 to remove the specific reference to Mormons, the original intention, that is, to protect the Christian belief in monogamous marriage by banning polygamy and multiple conjugal unions, was not disavowed but rather retained.

110. Until the enactment of the *Civil Marriage Act*, R.S.C. 2005, c. 33, the common law definition of marriage, as articulated in *Hyde v Hyde*, was as follows:

> What, then, is the nature of this institution as understood in Christendom? Its incidents may 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

[54] *R v Zundel*, [1992] 2 SCR 731, [***Zundel***].

> 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.[55]
>
> [emphasis added]

20. Halsbury's *Laws of England*,[56] emphasizes the premise that the law regards marriage as being the voluntary union of one man and one woman to the exclusion of all others. It provides, "No union will be recognised which is founded on principles which are in conflict with those generally recognised in Christendom. Hence, no marriage will be recognised as valid in England if contracted in a country where polygamy is lawful, and where the marriage does not exclude the possibility of additional wives at a subsequent date."[57] In reference to the principle stated in Halsbury's, footnote (c) at p. 253 provides that:

> "No Christian country would recognize polygamy or incestuous marriages," *per* Lord Campbell, L.C., in *Brook v Brook* (1861), 9 H.L. Cas 193, at p.209.

111. Blackstone's *Commentaries on the Laws of England*, also provides that polygamy is "...condemned by the law of the new testament, and the policy of all prudent states, especially in these northern climates."[58]

112. Therefore, a sharp distinction was drawn between Christendom and polygamy: the latter being considered offensive to Christendom and the Christian belief in monogamous marriage. As such, in enacting the polygamy law, Parliament was concerned about plural marriage practiced by Mormons, Muslims[59] and Aboriginals[60].

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[55] (1866), L.R. 1 P. & D. 130, as referred to in *Reference re Same-Sex Marriage*, [2004] 3 SCR 698.
[56] Halsbury's *Laws of England*, 1st ed., **[*Halsbury's*]**.
[57] *Ibid.*, at p. 253.
[58] Book 1, at p. 436.
[59] Debates of the House of Commons, 4th Session, 6th Parliament (April 10, 1890), at p. 3180, per Sir John A. MacDonald: "...but whether they are Mohammedans or Mormons, when they come here they must obey the laws of Canada".
[60] Debates of the Senate, 4th Session, 6th Parliament (February 4-5, 1890), at p.142. In the *Offences Against the Law of Marriage Bill*, there was an exception for Aboriginals: "4. This section shall not apply to any Indian belonging to a tribe or band among whom polygamy is not contrary to law, nor to any person not a subject of Her Majesty and not resident in Canada." The exception was removed.

113. A review of the external context in which the polygamy provision was enacted, namely the Hansard debates, demonstrates that the intention and purpose of the legislation was to keep the Mormon religion out of Canada. While Hansard may play a limited role in the interpretation of legislation, it may be admitted as relevant to both the background and purpose of the legislation.[61]

114. The following are excerpts from the Parliamentary Debates of the House of Commons, on April 10, 1890:

> Mr. Blake: "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 in Utah since the Brigham Young dispensation are serious and growing...But I think it well, also, to say that the question is, in more respects than this, a serious one, and that it calls upon us for some very strong expression of sentiment in discouragement of the settlement of Mormons with these peculiar views and notions in our midst"[62];
>
> [emphasis added]
>
> Mr. Blake: "I am not suggesting at this moment that we cannot do more than, by the most careful and comprehensive legislation, provide machinery for the discontinuance or the prevention of these abominable practices which we know these people engage in under the pretence of religion"[63];
>
> [emphasis added]
>
> Mr. Blake: "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"[64];
>
> [emphasis added]

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[61] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, [***Rizzo***], at para 35.
[62] Debates of the House of Commons, 4th Session, 6th Parliament (April 10, 1890), at p. 3173.
[63] Debates of the House of Commons, 4th Session, 6th Parliament (April 10, 1890), at p. 3175
[64] Debates of the House of Commons, 4th Session, 6th Parliament (April 10, 1890), at p. 3176.

Mr. Mulock: "But we are here trying to prevent what may become a serious moral and national ulcer"[65];

Mr. McMullen: "I am afraid, however, that if they get a settlement in the North-West, they will continue secretly to practice those abominations which 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"[66]; and

Mr. Mitchell: "It is admitted that they are first-rate settlers, that they are industrious and frugal; and all we should do is to see that they obey the laws which compel them to live as other people do in a Christian community, to let them know that they will have to carry out what they have professed, and to conform to the laws of the land in which they are living"[67].

[emphasis added]

115. The following are excerpts from the Senate Debates April 25, 1890:

The Honourable Mr. Power: "I am glad that the government have undertaken to deal with the practice of polygamy. It is understood that some Mormons have settled in our North-West Territories, and the probabilities are that if the Government and Parliament of Canada did not take some steps to indicate that they did not propose to allow those people to continue to indulge in their nefarious practice in this country, we might are long have a wholesale exodus from the United States"[68];

The Honourable Mr. Power: "The letter is very long; it gives a vivid picture of the state of things in Utah and a clear idea of the dangers which might arise if those people were allowed to multiply, and to live in the way that they wish to live:

> ...They are neither Republicans or Democrats, nor do they in any way enter into the feelings which animate other people in a national sense. They are merely Mormons. They never can become loyal to any system of Government nor affiliate with any other people"[69];

The Honourable Mr. MacDonald: "Mormons who come into this country and continue to live as Mormons, and are convicted of the practice are punished accordingly"[70].

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[65] Debates of the House of Commons, 4th Session, 6th Parliament (April 10, 1890), at p. 3177
[66] Debates of the House of Commons, 4th Session, 6th Parliament (April 10, 1890), at p. 3178.
[67] Debates of the House of Commons, 4th Session, 6th Parliament (April 10, 1890), at p. 3179.
[68] Debates of the Senate, 4th Session, 6th Parliament (April 25, 1890), at p. 584.
[69] Debates of the Senate, 4th Session, 6th Parliament (April 25, 1890), at p. 584 - 585.
[70] Debates of the Senate, 4th Session, 6th Parliament (April 25, 1890), at p. 585.

116. What emerges from the Parliamentary debates in the House of Commons and the Senate is a belief that the Mormons and the Mormon religion were a potential problem. The focus is clearly on the religious practices of the Mormons, which were viewed as "abominable practices". There are also direct references in the debates to the belief that the Mormons were a threat to the state, in that they could not be loyal to the state itself.

117. Both the AGBC and Canada have, however, argued that the purpose of section 293 was to prevent harms to women, children and to society. For example, Canada submits that:

> [410] ...Canada also agrees with BC that while there may have been a "moral" tone in some of the individual comments of politicians at the time, when one considers the overall tenor of the Parliamentary debates as well as the broader historical context, the purpose of the provision was plainly the prevention of harm both to individuals, particularly women and children, and to society that flowed from the practice of polygamy.
>
> [411] The evidence of Professor Witte shows that throughout two millennia of Western history, the basis for the polygamy prohibition, which pre-dates Christianity, was the protection of individuals, especially women and children, and society.

118. However, it is difficult to see how such broad statements can be attributed to the intention of Parliament in enacting the polygamy laws. Throughout Hansard there is no indication, reference, mention or discussion in the debates that the members of the House of Commons and the Senate were concerned about Mormons or polygamy constituting harm or being potentially harmful to women or children. At the time the polygamy provision was being considered by Parliament, laws were being discussed that had as their objective the protection of women and children. For example, there were provisions for "...unlawful and carnal knowledge and abuse of a girl under the age of 13"[71], and the crime of incest[72]. Parliament therefore had, in 1890, a clear idea of harms that could be inflicted on women and children, and they were making specific provisions for those harms. There was no mention in the

[71] Debates of the House of Commons, 4th Session, 6th Parliament (April 10, 1890), at p. 3161.
[72] Debates of the House of Commons, 4th Session, 6th Parliament (April 10, 1890), at p. 3162.

debates of the House or Commons or the Senate that polygamy was viewed as a source of harms to women or children, or that polygamy was to be prohibited in order to protect women and children. The submission Parliament had, as its intention, the objective of preventing harms to women and children is groundless.

119. Furthermore, the effect of the polygamy provision is to ban and prohibit all forms of polygamy or multiple conjugal unions, even those entered into freely and by consent of the participants. If Parliament intended to protect women and children it would not have drafted a prohibition that criminalizes the alleged victims. Section 293 imposes criminal liability, at least on women who participate in polygamous marriage.

120. It is submitted that, section 293 has no specific purpose beyond protecting the belief in monogamous marriage. The enactment of the polygamy prohibition was not concerned with any other harms alleged by Canada or the AGBC to be associated with polygamy. The Attorney's arguments to the contrary violate the "shifting purpose doctrine". In the context of contemporary Canadian values, the purpose of the Christian belief in monogamous marriage cannot be considered a pressing or substantial objective.

The Limit is Not Rationally Connected to the Objective

121. Section 293 must be rationally connected to the objective, in that "...the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations."[73] The Crown must demonstrate that the law is likely to confer a benefit or is "rationally connected" to Parliament's objective.[74]

[73] *Oakes*, at p. 139.
[74] *R v Sharpe*, [2001] 1 SCR 45, [***Sharpe***], at para 84.

122. In *Hutterian*, McLachlin C.J., for the majority, states:

> [48] ...To establish rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, at para. 153. The rational connection requirement aimed at preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.[75]

123. The FLDS submits that there is no rational connection between the infringement on the rights of the FLDS and the objective of the polygamy law when it was enacted, that is to protect the Christian belief in monogamous marriage. The polygamy prohibition is thus based on an irrational consideration.

124. If, however, the objectives of section 293 are to prevent the harms as alleged by the AGBC and Canada, then they must show that polygamy causes harm or the reasoned apprehension of harm, and the polygamy prohibition is rationally connected to those objectives. Both the AGBC and Canada argue that the harms caused by polygamy include abuses to women and children, education, equality, and anti-social behaviour caused by "lost boys".

125. From the perspective of the FLDS, the question that must be answered in considering whether the law is rationally connected to the objectives alleged by the AGBC and Canada, is:

> What are the harms, or the reasoned apprehension of harms, that are caused by polygamy as practiced by the FLDS.

126. It is submitted that from the evidence presented as the Reference, it is clear that polygamy, as practiced by the FLDS, is not the source of harms or the reasoned apprehension of harms. Polygamy does not cause harm *per se*; rather, in the context of the FLDS, the harms arise from the misuse of authority.

127. One need only make reference to the evidence of Alina Darger to see that this is so. Ms. Darger is an independent fundamentalist Mormon living in a suburb of Salt

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[75] *Hutterian*, at para. 48.

Lake City. She is not a member of the FLDS and does not ascribe to their beliefs in assignment in marriage or the role of the Prophet. As she described in her evidence when she grew up she lived in a plural family and loved the experience.[76] Nor has Alina Darger experienced any of the abuses identified by Carolyn Jessop and Brenda Jensen. Ms. Darger lives in an open environment where she and her children are exposed to the mainstream of society in every way. As a consequence, Ms. Darger and her children are at no more risk of the abuses identified by the Attorneys then anyone else in Salt Lake City.

128. All of the direct evidence of harms alleged by the Attorneys comes from former members of the FLDS and closely related affiliates and no other polygamist groups. Substantially all of the evidence concerning abuses of women, children, the lack of education and the problem of the lost boys was adduced from former members of the FLDS. The evidence of harms they provide relate to the practices of certain members of the FLDS. They are not a necessary or definitive aspect of polygamy or even of fundamentalist Mormon polygamy.

129. Carolyn Jessop provides examples of problems and abuses arising out of certain aspects of FLDS practices that are contingent on the particular "revelations" of leaders but that are not rooted in any particular Mormon doctrine. These include: the role of obedience in the community;[77] the prophet arranging marriages;[78] lack of choice for women;[79] education not being considered important for girls;[80] use of violence towards women and children for control;[81] marriage of teenagers under the age of 18 to older men;[82] lack of choice in procreation;[83] the inequality in FLDS families;[84] and the exclusion of young boys from the community.[85]

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[76] Alina Darger, draft transcript, Transcript Day 24 (January 19, 2011), p.53, lines 45 – 47.
[77] Carolyn Jessop, Transcript Day 20 (January 12, 2011), p. 4, lines 4 – 17;
[78] Carolyn Jessop, Transcript Day 20 (January 12, 2011), p.6, lines 2 – 13.
[79] Carolyn Jessop, Transcript Day 20 (January 12, 2011), p.6, lines 14 – 19.
[80] Carolyn Jessop, Transcript Day 20 (January 12, 2011), p. 8, lines 10 – 29.
[81] Carolyn Jessop, Transcript Day 20 (January 12, 2011), p.11, lines 12 – 30.
[82] Carolyn Jessop, Transcript Day 20 (January 12, 2011), p.24, lines 3 – 7.
[83] Carolyn Jessop, Transcript Day 20 (January 12, 2011), p.27, lines 34 – 47.
[84] Carolyn Jessop, Transcript Day 20 (January 12, 2011), p.55, lines 22 – 28.
[85] Carolyn Jessop, Transcript Day 20 (January 12, 2011), p. 56, lines 20 – 31.

130. Brenda Jensen discusses many similar themes in her evidence, which relate solely to the practices of the FLDS from 30 years ago. She discusses assigned marriages and says that she would have "...no right to make a choice of my own or to have a desire or to look forward to marrying someone who I cared about and who cared back for me. I was to be assigned."[86] In addition, Brenda Jensen discusses violence against children because of the need to obey "...whatever the lord wanted you to do or whatever the priesthood wanted you to do";[87] the potential of being excommunicated if a person failed to obey;[88] terrible emotional abuse;[89] never being allowed to have an education;[90] and she concludes her testimony by explaining that she thinks polygamy is harmful:

> Q And you mentioned there you would want her to research all of the harms. Do you think that polygamy is harmful?
>
> A I think polygamy is harmful on every level. It's been my experience being a polygamist child that is no comfort in polygamy, especially emotionally. There is no comfort in being classed automatically because of your gender. There is segregation in -- males hold the priesthood therefore they rule. Women are placed at whatever level, whether their capacities are far above that or not, wherever that male or the priesthood want them to be. They're thought of as an object. Emotionally it is extremely destructive because there's no affirmation for you. You yourself. That you exist. That you're a valid part of the world and you're a valid individual, or you could be something, become something of yourself in your own right. And you're never taught -- you're never taught to love yourself. You're never taught to respect yourself. You're never taught to stand up for yourself. You're taught to be a victim. You're taught obedience and you're taught that no matter what it is you have to suffer

[86] Brenda Jensen, Transcript Day 22 (January 17, 2011), p.5, lines 37 – 44.
[87] Brenda Jensen, Transcript Day 22 (January 17, 2011), p.9, lines 34 – 47; p.10, lines 1- 6; p.14, lines 29 – 31.
[88] Brenda Jensen, Transcript Day 22 (January 17, 2011), p.14, lines 26 – 27.
[89] Brenda Jensen, Transcript Day 22 (January 17, 2011), p.14, lines 46 – 47; p. 15, lines 1 – 13.
[90] Brenda Jensen, Transcript Day 22 (January 17, 2011), p. 25, lines 9 – 26.

19 through it for the glory of God. It's -- it's
20 your duty.[91]

[emphasis added]

131. Truman Oler also testified as to his own experience respecting marriage;[92] education;[93]and free choice.

132. Yet the focus of these witnesses is on the structure of the FLDS, and their relationship with particular people within the church. The harms they identify are not caused by polygamy, rather they result from the actions of individuals. These beliefs are unique to the FLDS religion as it has been practiced at certain times and are unrelated to the practice of fundamentalist Mormon polygamy. It is instructive that both Ms. Jessop and Ms. Jensen agreed that the prohibition on polygamy exacerbated the harms within the FLDS. A proposition with which the FLDS witnesses also agree.

133. While the abuses suffered by these witnesses are no doubt real, they do not tell the entire story, even of the FLDS experience at all times and they certainly do not condemn the practice of plural marriage. The anonymous witnesses, who are the members of the FLDS in Bountiful, have not experienced the harms and abuses that the AGBC and Canada submit are caused by polygamy. The evidence of Witnesses 2, 3 and 4 confirm that Mormon plural marriage can be lived in a manner that is neither abusive to women or to children and that satisfies their deeply held religious convictions.

134. The children of Bountiful are not denied an education. For example, witness number 4 has completed high school, and is in her third year of college studying for Business Administration.[94] Witness No. 3 has also completed high school and is studying education in the Southern University of Utah.[95] These witnesses have

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[91] Brenda Jensen, Transcript Day 22 (January 17, 2011), p.27, lines 42 – 47; 28, lines 1 – 20.
[92] Truman Oler, Transcript Day 23 (January 18, 2011), p.8, lines 1 – 3.;
[93] Truman Oler, Transcript Day 23 (January 18, 2011, p. 14, lines 23 – 39; Affidavit #1 of Truman Oler sworn July 9, 2010, at paragraph 8.
[94] Witness No. 4, Transcript Day 27 (January 26, 2011), p. 2, lines 36 – 42.
[95] Witness No. 3, Transcript Day 27 (January 26, 2011), p. 38, lines 1 – 8.

experienced life outside Bountiful but they have made the choice to continue to live their lives in accord with their deeply held belief that plural marriage offers both temporal rewards and the promise of eternal salvation.

135. Even Brenda Jensen acknowledges that polygamy outside of the FLDS can be successful:

> Q Ms. Jensen, after your father left Short Creek he continued to live polygamy, didn't he?
>
> A Yes, he did. The three of them stayed together.
> Q And in your view did it work for him?
>
> A By the time my father and mother left Colorado City they had become friends and companions and a foundation for each other. They would have -- and on top of that they were sisters. There were sisters involved. They felt strongly obligated to each other and they loved each other. So for the remainder of their life they were very supportive together, offering us a foundation -- us, their children, a source to go to.[96]

136. What differentiates the experiences of Alina Darger, Mary Batchelor and witnesses 2, 3 and 4 from those of Carolyn Jessop, Brenda Jensen and Truman Oler? It is not polygamy as they were all raised in polygamous, fundamentalist Mormon households.

137. Finally, it must be pointed out that any of the harms that are alleged to occur in a polygamous family also occur in other family structures, whether or not such family structures exist in a closed, patriarchal religious community. It is submitted that it is not the form of marriage which is the predictor of harm but rather other unrelated factors which give rise to the risk of harm. Those behaviours are already the subject of existing laws and for those that are not, such as assigned marriage or underage marriage (as opposed to underage sexual relations), there is nothing prohibiting the enactment of valid, narrowly construed laws addressed to those harms.

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[96] Brenda Jensen, Transcript day 22 (January 17, 2011), p.27, lines 4 – 16.

138. It is submitted that the harms or reasoned apprehension of harms identified by the Attorneys are not caused by polygamy. They are caused by individuals in plural marriages, but these harms and abuses are not inherent to polygamous families, even those within the FLDS. Consequently, there is no rational connection between section 293 and the objectives alleged by AGBC and Canada.

The Law Does Not Impair the Rights As Little As Possible

139. Section 293 should impair the right no more than necessary to achieve the objective. In *RJR- MacDonald*, minimal impairment was explained as follows:

> [160] As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement: see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 S.C.R. 1123, at pp. 1196-97; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at pp. 1340-41; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, at pp. 1105-06. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.[97]

140. In *Hutterian*, McLachlin states that the test at the minimal impairment stage, "...is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner."[98]

141. However, Parliament does not have to adopt the "...least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary."[99]

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[97] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, ***[RJR – MacDonald]***, at para. 160.
[98] *Hutterian*, at para. 55.
[99] *Sharpe*, at para 96.

142. It is submitted that the outright prohibition of all forms of polygamy does not fall within the reasonable range of solutions to the identified problem, assuming that objective is the protection of women, children and society. The prohibition of monogamous marriage would not be considered within the "reasonable range of solutions" to the problems of spousal and child abuse that sometimes arise within monogamous marriage.

143. To the extent that there are unique problems associated with plural marriage, Parliament is able to craft laws to address those problems without imposing a blanket prohibition. For example, the AGC made reference to an approach adopted in other countries. At paragraph 120 of its submissions, Canada submits:

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

144. Furthermore, it is submitted that there are other more effective laws that deal with the harms that are alleged by the Attorneys to arise from polygamy. In *Sharpe*, McLachlin C.J., for the majority, summarizes the law with respect to when the harms are addressed by other laws, and states:

> It is argued that even if possession of child pornography is linked to harm to children, that harm is fully addressed by laws against the production and distribution of child pornography. Criminalizing mere possession, according to this argument, adds greatly to the limitation on free expression but adds little benefit in terms of harm prevention. The key consideration is what the impugned section seeks to achieve beyond what is already accomplished by other legislation: *R v Martineau*, [1990] 2 SCR 633. If other laws already achieve the goals, new laws limiting constitutional rights are unjustifiable. However, an effective measure should not be discounted simply because Parliament already has other measures in place. It may provide additional protection or reinforce existing protections. Parliament may combat evil by enacting a number of different and complementary measures directed to different aspects of the targeted problems: see, e.g., *R v Whyte*, [1988] 2 SCR 3.[100]

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[100] *Sharpe*, at para. 93.

145. Section 293, as defined by the FLDS, does not address itself to any of the harms identified by the Attorneys. Other laws already address or could be crafted to address those harms.

The Law is Disproportionate in its Effects

146. The final stage of the *Oakes* test is to consider whether the overall effects of the law are disproportionate to the government's objective.[101] In *Oakes*, Dickson C.J. described the proportionality analysis as follows:

> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.[102]

147. In *Hutterian*, McLachlin C.J. states:

> [77] The final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation. In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, Bastarache J. explained:
>
> > The third stage of the proportionality analysis performs a fundamentally distinct role. . . . The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account

[101] *Hutterian*, at para 73.
[102] *Oakes*, at para. 71.

> the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose. The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [Emphasis in original; para. 125.]
>
> [78] In my view, this is a case where the decisive analysis falls to be done at the final stage of *Oakes*. The first two elements of the proportionality test – rational connection and minimum impairment – are satisfied, and the matter stands to be resolved on whether the "deleterious effects of a measure on individuals or groups" outweigh the public benefit that may be gained from the measure. In cases such as this, where the demand is that the right be fully respected without compromise, the justification of the law imposing the limit will often turn on whether the deleterious effects are out of proportion to the public good achieved by the infringing measure.[103]
>
> [emphasis added]

The Salutary Effects

148. It is submitted that since there are no harms or reasoned apprehension of harms caused by the offence created by section 293 *per se*, it is submitted that the law has no salutary effects.

The Deleterious Effects

149. It is submitted that section 293 creates a number of deleterious effects on the members of the FLDS. Firstly, it prohibits them from practising a core element of their religion.

150. Secondly, the law has the perverse effect of further isolating the community from mainstream society thereby discouraging access to the social services, including police that are available to all citizens. Witness No. 2 testified that members of the FLDS are "...treated with bias and prejudice, and that affects my every-day life. If I

[103] *Hutterian*, at para. 77 - 78.

wanted to go somewhere and get any sort of counselling with mainstream society then I feel like I would not be accepted that way."[104]

151. Alina Darger also testified that as polygamy is prohibited, abuses remain hidden. She testified that, as a teenager, she felt that she could not call the police because they might "...see that my dad was a polygamist and then we might have problems from there."[105] She also testified that if plural marriage was decriminalized, it would have an impact on her life, in that it would "...help in some of the areas where people feel reluctant to come forward and get help when they need it or feel like that there will be prejudices that exist should they speak up."[106]

152. The deleterious effects outweigh any of the salutary effects the criminal prohibition is said to serve.

153. Accordingly, the FLDS submits that the limitation of rights imposed by section 293 pursuant to section 7, section 2(a) and 2(d) are not justified under section 1 of the *Charter*.

F. REMEDY – Strike Down Section 293

154. Section 52(1) of the *Constitution Act, 1982* provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force of effect.

155. It is the submission of the FLDS that section 293 is inconsistent with sections 7 (liberty), 2(a) (freedom of religion) and 2(d) (freedom of association) of the *Charter*, and is therefore of no force or effect.

156. Once the Court is confronted with a law that is in conflict with the Charter, it has a number of alternatives. As MacLachlin C.J. summarizes in *Sharpe*:

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[104] Witness No. 2, Transcript Day 26 (January 25, 2011), p. 10, lines 19 – 32..
[105] Alina Darger, draft transcript, Transcript Day 24 (January 19, 2011), p. 67, lines: 31 – 33.
[106] Alina Darger, draft transcript, Transcript Day 24 (January 19, 2011), p. 57, lines: 39 – 47.

> [114] ...the problem of peripheral unconstitutional provisions or applications of a law may be addressed by striking down the legislation, severing of the offending sections (with or without a temporary suspension of invalidity), reading down, or reading in. The Court decides on the appropriate remedy on the basis of "twin guiding principles": respect for the role of Parliament, and respect for the purposes of the *Charter*.[107]

Severance is the Appropriate Remedy

157. The FLDS submits that the only appropriate remedy in the circumstances is to sever section 293 from the *Criminal Code* and strike it down. "Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared."[108]

Severance With Temporary Validity is Not Appropriate

158. A temporary suspension of the declaration of invalidity should only be used where, "...striking down the legislation without enacting something in its place would pose a danger to the public, threaten the rule of law or where it would result in the deprivation of benefits from deserving persons without benefiting the rights claimant."[109]

159. In light of the fact that section 293 has not been prosecuted since 1937 (excepting the aborted Blackmore and Oler prosecutions) it is submitted that striking it down would not pose a danger to the public, rule of law or result in the deprivation of benefits from deserving persons, the temporary validity of section 293 is not an appropriate remedy.

Reading Down is Not Appropriate

160. Reading down is appropriate if the law bears two reasonable interpretations, one of which will offend the *Charter* and the other which will not. As a consequence of

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[107] *Sharpe*, at para. 114
[108] *Schachter v. Canada*, [1992] 2 S.C.R. 679, [1992] SCJ No. 68, [***Schachter***], at para. 26.
[109] *Ibid.*, at para. 85

the overbreadth of section 293, it is not possible to glean a constitutionally valid interpretation from the words employed. Reading down is not appropriate.

Reading In is Not Appropriate

161. In *Sharpe*, MacLachlin C.J. writes:

> [121] ...reading in will be appropriate only where (1) the legislative objective is obvious and reading in would further that objective or constitute a lesser interference with that objective than would striking down the legislation; (2) the choice of means used by the legislature to further the legislation's objective is not so unequivocal that reading in would constitute an unacceptable intrusion into the legislative domain; and (3) reading in would not require an intrusion into legislative budgetary decisions so substantial as to change the nature of the particular legislative enterprise.[110]

162. First, the legislative objectives cannot be furthered by reading into section 293 an exception providing for lack of consent, coercion or undue influence etc.., because that would not affect the purpose of the prohibition, which is to prevent multiple marriages. Reading in would not affect the characterization of the offence of polygamy.

163. Second, reading in would constitute an unacceptable intrusion into the legislative domain because, it is submitted, the offence created by section 293 is so overbroad that a constitutional provision could only be crafted by drafting an entirely new provision. The drafting of a new provision is the function of Parliament, not the court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, March 18, 2011

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the Latter-Day Saints and James Oler

[110] *Sharpe*, at para. 121.