

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

**OPENING STATEMENT OF THE ATTORNEY GENERAL
OF BRITISH COLUMBIA**

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I. Introduction

A. Overview of the Reference

1. On October 22, 2009, British Columbia's Lieutenant Governor in Council referred two questions to the B.C. Supreme Court for hearing and consideration pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, s. 1. Both questions concern s. 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?
- 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?

2. Section 293 reads:

Polygamy

293. (1) Every one who

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

(i) any form of polygamy, or

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

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.

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

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

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

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

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

Answer: Section 293 does not require proof that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence. These may, of course, be factors in determining an appropriate sentence. A person who knowingly enters into or continues a criminally polygamous relationship (defined as formal or informal polygyny), or agrees or consents to do so, or who assists certain processes purporting to sanction such a relationship, is guilty of the offence.

In the alternative, if the ban described above is not consistent with the *Charter*, then s. 293 may be read and construed so as to apply when the polygamy or conjugal union in question involves a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence.

C. The Central Issues: Harm, Purpose, Interpretation

4. The participants arguing that s. 293 is unconstitutional (referred to in this Opening Statement as “the Challengers”¹) urge the Court to make Canada the only Western nation to decriminalize polygamy.

5. The Amicus’s argument is the most fully articulated, and it comes down to this: Section 293 “is based on presumed, stereotypical” views of polygamy as “barbarous”;² it is an overbroad and clumsy law founded solely on puritanical Christian prejudices that were, at least in origin, punitive, racist,³ and imperialist,⁴ and a law that remains “demeaning” to the practitioners of polygamy. The Amicus lists a number of harms or hardships that he says are associated with criminalization (including “offending the dignity of women”)⁵. However, none of the Challengers acknowledges that there are any harms caused by polygamy itself.

6. But that is the one question that overwhelms all others in this Reference, and it is simply put: is polygamy harmful? If it does not cause harm, then its prohibition is not justified and the Challengers must prevail.

7. Harm is relevant at the point of asking whether there is any *Charter* breach at all, because an activity that harms the fundamental rights of others may not fall within s. 2’s religious protections. And when weighing arbitrariness, overbreadth or gross disproportionality in a s. 7 analysis, the Court will ask, ‘How much harmful behaviour is captured by the law? How much harmless behaviour is caught?’

8. The *types* of harms here are also important: the Attorney General asserts that vulnerable groups are protected by s. 293, including women and girls. As such, s. 28 of

¹ The Amicus and the Interested Persons Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS), the B.C. Civil Liberties Association (BCCLA), the Canadian Association for Free Expression (CAFE), and the Canadian Polyamory Advocacy Association (CPAA).

² Amicus’s Opening Statement, para. 55.

³ *Ibid.*, para. 18.

⁴ *Ibid.*, paras. 23, 45, 60.

⁵ *Ibid.*, para. 29.

the *Charter* must weigh in the equation.⁶ Under s. 28, no other provision of the *Charter*—including s. 15—can be used to advance a right where doing so discriminates against women.

9. And of course, if there is a breach found, harm is relevant to s. 1 and *Oakes*. That is to say, if there *is* harm, or the reasoned apprehension of harm, then there is a pressing and substantial concern under the first branch of the *Oakes* test. If the harm can be causally linked to polygamy, then there is a rational connection between the activity and its prohibition. And if there is sufficient harm shown from polygamy, then the salutary effects of the law will be seen to outweigh the deleterious, and proportionality is made out. What remains then is minimal impairment: can the harm of polygamy be addressed through less intrusive means, without prohibition, and if so, how?

10. The main task facing this Court will be assessing and weighing evidence respecting harm: the harm of polygamy versus the harm of prohibition.

11. But even if polygamy *is* proven harmful, and therefore even if s. 293 is, on balance, beneficial, the Court still must determine the provision's true objective, because if it was enacted predominantly for a religious or discriminatory purpose, as the Amicus asserts, then it is bad and should be struck down.

12. If the Court, having assessed the harms and approved the purpose, concludes that *some* criminal prohibition on polygamy is justified, then it must ask the further question: is this the *right* law? Is it tailored with sufficient care? Is it minimally impairing? Is it overbroad, arbitrary, disproportionate? These are all different ways of asking the same question in a particular context, and the context is this: how much deference is due Parliament? In *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 90, Bastarache J. held for the majority that, when weighing the deference that should be accorded to Parliament, the Court should consider:

⁶ That section reads: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

...the vulnerability of the group which the legislator seeks to protect..., that group's own subjective fears and apprehension of harm..., and the inability to measure scientifically a particular harm in question, or the efficaciousness of a remedy[.]

13. There are of course other considerations at play in weighing the implications of declaring s. 293 invalid. Doing so would affect laws regarding marriage, divorce and immigration; it would have consequences for Canada's international obligations, by which this country is committed to promoting and supporting the international consensus away from polygamous practices.

14. But perhaps most significantly, the Court would be tampering with a fundamental pillar of the Canadian, indeed Western democratic, way of life. It is not enough in defending a law to simply say that it is deeply entrenched in our culture and sense of public and private obligations. But nor are these things irrelevant, and courts have recognized a particular deference due in that narrow class of cases dealing with matters of fundamental moral conduct. Age of sexual consent and marriage, incest and consanguinity laws are examples of issues that "go to the heart of a society's code of sexual morality and are...properly left for resolution to Parliament".⁷

II. The Harms of Polygamy

A. The Attorney's Expert Evidence

15. The Attorney's lead expert is Dr. Joseph Henrich from the University of British Columbia. Dr. Henrich holds the Tier-1 Canada Research Chair in Culture and Cognition. He is a world renowned anthropologist, and holds tenure in both Economics and Psychology.

16. Dr. Walter Scheidel is the Chair of the Classics Department at Stanford University. Dr. Scheidel traces the origins of what he calls socially-imposed universal monogamy (SIUM) from its roots in the early democracies of Ancient Greece through to modern times. Dr. Scheidel's work, like that of Dr. Henrich and Dr. Witte, a witness of the federal Attorney General, demonstrates that the imposition of monogamy has been

⁷ *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R. 906 at 930-31.

inextricably entwined with the growth and success of the Western democratic way of life and the development of a rights-based culture, to the point where some theorists suggest that one would not be possible without the other. Harvard evolutionary psychologist Stephen Pinker has observed that in recent centuries "egalitarianism and monogamy go together as naturally as despotism and polygyny".⁸

17. Thus the Amicus's narrative of the prevalence of polygamy historically and cross-culturally (at paras. 6-16 of his Opening Statement) is correct but unhelpful. It is true that the overwhelming majority of the hundreds of cultures documented in the anthropological record were polygamous (that is to say, were partially-polygynous, with some men having multiple wives and most men having one). The narrative is used by the Amicus to buttress his ensuing theme that (in the face of this prevalence) s. 293 must be viewed as simply an expression of anachronistic Christian prejudice. This entirely misses the point that the valuing of women's equality in society is as recent and localized a phenomenon as the practice of polygyny has been longstanding and widespread.

18. Dr. Henrich's work meticulously documents what might be apparent to anyone upon reflection. In a society with equal numbers of men and women, polygamy creates two obvious types of pressure: First, the need to recruit more women into the marriage market (as both polygamous and monogamous wives) drives down into adolescence the age at which girls are targeted for marriage (and increases the age disparity between husbands and wives). And a second, corresponding pressure is created to prevent some men from acquiring wives. If this cannot be accomplished through expulsion, warfare or other means, society is faced with a gender imbalance that becomes harmful in itself, confirmed by recent trends in India and China, where various forms of gender-selection have led to societies with more young men than young women. Reliable data from those countries show that even relatively small excesses in the proportion of men lead to striking increases in criminality and other social problems.

19. The competition of a polygynous society will also, in this theory, increase men's tendencies to control the reproductive capacity of women, leading to rigid, patriarchal

⁸ Stephen Pinker, *How the Mind Works* (New York: W.W. Norton & Co., 1997) at 478.

social systems; similarly, the need to provide an ever-increasing supply of willing younger girls will require mechanisms of indoctrination and normalization.

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

21. The only assumption necessarily underlying the demonstrable harms of polygamy is that it will manifest, more often than not, as polygyny rather than polyandry. And of course it overwhelmingly does. All of the established religious forms of polygamy are polygynous. Polyandry remains "vanishingly rare" and usually a temporary adaptation to environmental stresses or opportunities. Evolutionary psychology provides the obvious answer as to why: the genetic prospects of a man are increased by multiple partners in a way that those of a woman are simply not; our behavioral tendencies have evolved accordingly. Thus, throughout the anthropological record, partial polygyny is the rule, universal monogamy the exception, and polyandry the statistical aberration.

22. Can we take the leap from the experiences of foreign societies, and suppose that such harms might be visited here if polygamy were more widespread? We don't need to of course; the law requires only that the harm be *reasonably apprehended*, not proved.

23. The Amicus's own expert Professor Todd Shackelford concedes that "Professor Henrich has ably summarized various negative correlates and apparent consequences associated with polygamous... relationships".⁹ Professor Shackelford can only offer in response that "negative correlates and apparent consequences can be seen in any kind of mating or marriage relationship." He then describes harms that befall women and children in monogamous marriages.

24. In his reply report addressed to Dr. Shackelford's assertions, Dr. Henrich uses the principles and data gathered by Dr. Shackelford from his research in monogamous

⁹ Shackelford Affidavit #1, para. 5.

households (such as the observation that domestic violence is overwhelmingly more common among non-related cohabitants, and that male violence against women becomes worse as the age disparity between husbands and wives increases) and applies them comparatively in polygamous households. Dr. Henrich concludes that, on the Amicus's own evidence, intra-familial violence, abuse, child mortality, neglect, stress levels, and sexual jealousy will be at least as bad, and in fact almost certainly worse, in polygynous families and societies as contrasted with monogamously marrying families and societies. Professor Henrich then confirms these predictions with ethnographic observations from North American and other polygamous communities.

25. But in this Reference we need not rely on the "reasonably apprehended harm": we have proof in Bountiful and other fundamentalist Mormon communities. If the Attorney's theory of polygamy's social harms were correct, we would expect to see in those places a history of child brides and/or the trafficking of girls to satisfy polygamy's increased demand. We would expect some mechanism for dealing with the unmarriageable men. Either they will remain as an unstable and antisocial force, or they will be absent. We would expect to see systems of education and indoctrination, formal and informal, marked by demands for a rigid obedience to authority.

B. Evidence Regarding Bountiful and the FLDS

26. A significant part of the evidence in this case originates from the fundamentalist Mormon communities of Bountiful and its American sister-towns. Although fundamentalist Mormons appear to number only a thousand in Canada (with only a subset of this population actively practicing polygamy) they, through the evidence of the FLDS and the Amicus as well as historically, have presented the most sustained and serious challenge to the polygamy law.

27. The FLDS is an insular, socially and geographically isolated group that practices polygamy. Its rules and norms are, by mainstream Canadian standards, inequalitarian and patriarchal.

28. Direct evidence from Bountiful, presented by the Attorney and also by the Amicus and the FLDS itself, presents a consistently worrisome narrative of child brides,¹⁰ teen pregnancy, and men and boys who are, by accident or design, driven out of the community.¹¹ But the vexing question is whether, and to what extent, we can tease causation from correlation. If these harms, once proven, were simply coincident quirks of an isolated, singular little religious community, they could provide no support for criminalization of the practice across society.

29. But they are not. The harms documented at Bountiful are the perfectly predictable, indeed the inevitable, consequences of a polygamous society. In this sense, Bountiful and the greater FLDS are important metaphors for polygamy generally. So we need to look at Bountiful, not simply because it provides the proof of theory, but also because it shows the inadequacy of theory alone in assessing harms. It is one thing to hear an expert witness explain why polygyny tends to drive down the average age of marriage in societies from Africa to Asia. It is another to see it happening in the British Columbia interior. Bountiful gives us a glimpse of polygamy in practice.

30. The Court will hear from the Challengers that, if there are problems at Bountiful, they are problems arising from the insular, rigid, patriarchal, inegalitarian and isolated community. They will even suggest that criminalization itself causes, or at least exacerbates, these inclinations. They will say we don't need to worry about harmful polygamy taking root elsewhere in Canada because it only arises in this kind of environment, and how many Bountifuls can there be? But this misses the point.

31. As a matter of logic, science, and as a historical fact, one conclusion clearly emerges: Bountiful did not create polygamy, *polygamy created Bountiful*.

¹⁰ Angela Campbell, the law professor put forward as an expert witness by the Amicus, relates a conversation with a woman who reports that all but one of her 25 sisters was married before the age of 18. At least two of the FLDS's own witnesses were child brides, and it is expected that they will describe still more. Keep in mind that the average age of marriage in Canada for women is 29, and has been consistently high for all of our history. Indeed, in Western society as a whole it has never fallen below the low 20s, even in mediaeval times.

¹¹ The FLDS's own census at Bountiful shows the dearth of male teens and adults. Adult women outnumber men 104 to 79. Among 16- and 17-year-olds, girls outnumber boys by almost three to one. The FLDS denies that men and boys are "expelled". Where have they gone?

C. Polygamy in Other Contexts

32. Numerically speaking, the threat presented by polygamy does not arise from the spread of fundamentalist Mormonism, but rather in immigrant populations, including immigrants from Muslim countries and African cultures where polygamy is either legally or culturally condoned.

33. There is before the Court considerable evidence regarding polygamy in Islam and its North American immigrant populations. The basic facts are sufficiently uncontroversial that no witnesses have been called by either side to give direct evidence or be cross-examined. The evidence indicates that the problems associated with polygamy persist within those communities too, compounded by the harsh social, linguistic, and economic barriers faced by immigrant populations.

34. The evidence also suggests that polygamy is beginning to take root in Canada's Muslim community, particularly among immigrants, aided by the uncertainty over the status of s. 293.

35. Yet the Challengers all urge the Court to make Canada the sole Western nation to decriminalize polygamy. The reasonably apprehended result would be an influx of polygamous families who are presently barred from the country in addition to the practice's domestic growth.

36. The lesson of France is instructive. That country introduced a family reunification policy permitting immigration by members of polygamous families in order to spur immigration in response to postwar labour shortages. A review of the literature reveals the catastrophic consequences as the numbers of polygamists in France swelled to hundreds of thousands. The research indicated that the situation for polygamist immigrants in France was dire indeed: often worse, in fact, than in their home countries. The French government reversed direction in 1993, but the damage was already done and the harms persist almost two decades later. The French example suggests that decriminalization of polygamy should be approached with great caution.

III. The History and Purpose of Section 293

A. The Attorney's Characterization of Purpose

37. Section 293's purpose is to deter and punish behavior that is seen as harmful to women and children of polygamous unions, harmful to others through the pressures it creates for the recruitment of girls and the exclusion of boys, denigrating to women's equality generally, and injurious to peace, order and good government.

38. Section 293 and its precedent provisions have also served a number of secondary purposes, such as: providing a basis for selective immigration (so as to avoid the harms alluded to above); avoiding difficulties associated with succession, divorce and remarriage, and benefit distribution in non-monogamous unions; and harmonizing with other nations Canada's approach toward polygamy's harms.

B. Is the Purpose of Section 293 Religious?

(1) The "Religious Origin" Argument

39. The Amicus asserts that the law has not only an unconstitutional effect but also an unconstitutional purpose. He suggests that the law emanated from simple religious prejudice, further tainted with improper political and even racist ambitions. The Amicus traces the law to American roots, and in particular the legislation passed by Congress between 1862 and 1887 which he says "sought to demote Mormons from full civic membership to punish them for (1) political treason... and (2) race treason."¹² The Amicus writes:

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

40. The argument is appealing, not least because the original 1890 version of the law did explicitly refer to polygamy in terms of the Mormon practice. Rejecting s. 293 as a vestige of Victorian-era Puritanism is also tempting, as proof of society's progressive

¹² Amicus's Opening Statement, paras. 17-18.

advancement since. This inclination is apparent in the work of the handful of avowedly progressive scholars who have become apologists for polygamy, such as the Amicus's principal expert, Professor Campbell. Nowhere in Professor Campbell's extensive writing on polygamy does she appear to acknowledge that there is *any* harm inherent in the practice; she appears to take it as a given that the law originated from irrational prejudice and should be judged on that basis.

41. But, as a matter of both history and law, that explanation is incorrect.

(2) The Origins of Section 293

42. As a historical question, the evidence will show that the U.S. Congress's ban on polygamy in Utah simply extended a prohibition that already existed in all the United States and other territories, a point emphasized in Professor Hamilton's reply affidavit to the expert legal opinion of Mr. Turley. While the American laws' passage and content (and that of the subsequent Canadian iteration) were given urgency by the particular challenges posed by Mormon polygamy, that is beside the constitutional point.

43. The expert historians in this case, Drs. Scheidel and Witte, demonstrate unequivocally that bars against polygamy trace their origins to ancient Greece and Rome. Socially-imposed universal monogamy, as Dr. Scheidel calls it, has been a common thread of Western societies since. No expert from the Challengers, and indeed nothing in the rich literature on the subject, has cast doubt on the essentials of this narrative. At times, of course, monogamy was enforced through ecclesiastical mechanisms; at others it has relied on the secular force of the state. Always it has been based on deep-seated cultural norms and rules of social conduct. But to fix its origin as an imposition of religious conformity—particularly Christian conformity—is to ignore the deeper history of the prohibition.

44. In the 18th century, Blackstone identified polygamy as a capital crime that was included in Britain's anti-bigamy legislation, dating from 1604. At the time, Blackstone recognized that the prohibition was inherited, not only from Roman law, but also from the custom of England's Saxon ancestors. It would appear that, although Canada had re-enacted an anti-bigamy law upon confederation that was almost identical to the English,

there remained some question whether it applied to the polygamy practiced by the incoming Mormons, and by Indians and Muslims. *An Act respecting offences relating to the Law of Marriage*, including what is now s. 293 of the *Criminal Code*, was Parliament's response.

45. It is also a mistaken view of the events surrounding the enactment of s. 293 to regard the provision as an outburst of Christian imperialism directed at the Mormon faith as such. The legislative record does not support that the law was "targeted" at Mormonism in the sense that Parliament was motivated by animus towards the Mormon religion or culture at large. While it is clear that the impetus for the 1890 legislation was the recent arrival of avowedly polygamist Mormon settlers in Alberta—along with recognition that the existing bigamy offence would be inadequate to capture the Mormon form of spiritual marriage—nevertheless the legislative record confirms that the majority of amendments were targeted at polygamy itself, whether practiced by "Indians", "Mohammedans", or Mormons. There was originally a separate provision that forbade "[w]hat among the persons commonly called Mormons is known as spiritual or plural marriage." But this provision was repealed in 1954, presumably because it was obvious that Mormon polygyny was already captured by the general prohibition against "polygamy" or "conjugal union with more than one person at the same time".

46. When the first iteration of the polygamy offence was introduced into the Senate in February 1890, the section included a proviso that it would not apply to "...any Indian belonging to a tribe or band among whom polygamy is not contrary to law, nor to any person not a subject of Her Majesty, and not resident in Canada." To this, one senator commented, "I think that is a very dangerous exception to make, because it may have the effect of exempting the very class to whom the Bill is intended to apply", prompting the bill's proponent to reply that the exception would be struck out.¹³

47. Two years before, a number of leaders of the Mormon immigrants had petitioned the Canadian government to permit polygamy, invoking as precedent the practice of Muslims elsewhere in the Empire. They argued:

¹³ Hon. Mr. Dickey and Hon. Mr. MacDonald (B.C.), *Debates of the Senate* (February 25, 1890) at 142

The comparatively few who need to seek rest and peace in Canada would not be a drop in the bucket compared with the millions of people who are protected in their faith and practice plural marriage under the Government of Great Britain.¹⁴

48. The Mormons were "firmly but politely" told that they were welcome to come to Canada, but not to practice polygamy here. At the committee stage of the polygamy law's consideration, Sir John A. Macdonald recounted the episode, and explained the government's position, as follows:¹⁵

Mr. Card and some others came to Ottawa. Some of them are British subjects by birth, one or two are Canadians by birth, and others were born in the United States. They said they wished to settle in Canada. They were informed what our law was, and they were told explicitly and distinctly that we were aware that the great cause of the antipathy towards them in the United States was the practice of polygamy, and they must understand that the people of Canada would be as firmly opposed to that practice as the people of the United States were. They said they were aware of that, but they wanted shelter from what they considered oppression. They were told—told by myself—that in any case where the practice was proved they would be prosecuted and punished with the utmost rigor of the law. They said they were quite willing to submit to the law. They attempted, of course, to argue their case, and they discussed the doctrines of Mormonism generally with me. I said to them: You must understand that there must be no mistake about it; there will be no leniency, there will be no looking over this practice, but as regards your general belief, that is a matter between yourselves and your conscience. We are glad to have you in this country so long as you obey the laws, we are glad to have respectable people. Her Majesty has a good many subjects who are Mohammedans, and if they came here we would be obliged to receive them; but whether they are Mohammedans or Mormons, when they come here they must obey the laws of Canada. I told them this, and they professed a sincere desire—I have no reason to doubt their sincerity—to submit themselves to the laws of Canada for the sake of the rest and equity that they thought they would get, instead of being surrounded by a turbulent crowd who were oppressing them in every way.

[Emphasis added]

49. In the Senate, the leader of the house, Senator John Caldwell Abbott, indicated that the new provision was "...mainly devoted to the prevention of an evil which seems likely to encroach upon us, that of Mormon polygamy, and it is devoted largely to provisions against that practice."¹⁶ Again, however, following this acknowledgement of the impetus for the new provision, Senator Abbott clarified that the purpose of the law was of broader reach, transcending the Mormon religion and culture:

¹⁴ Jessie L. Embry, "Exiles for the Principle: LDS Polygamy in Canada" (Fall 1985) 18:3 Dialogue: A Journal of Mormon Thought 108-116 at 109.

¹⁵ *House of Commons Debates* (April 10, 1890) at 3180.

¹⁶ Hon. Mr. Abbott, *Debates of the Senate* (April 25, 1890) at 583

Of course the Bill is not directed against any particular religion or sect or Mormon more than anybody else; it is directed against polygamists. In so far as Mormons are polygamists of course it attaches to them.¹⁷

[Emphasis added]

50. Members of both houses expressed their objection to polygamy in terms of strong moral condemnation, but it was directed at the *practice*, not the *religion*, describing polygamy as a “canker”,¹⁸ an “abominable practice... [engaged in] under the pretence of religion”,¹⁹ an “abuse,”²⁰ “what may become a serious moral and national ulcer”,²¹ a “pernicious habit”,²² an “abomination”,²³ “evil”,²⁴ and a “nefarious practice”.²⁵

51. Although there is no express reference to women’s equality in the legislative record, broader consideration of historical context reveals that concern for the well-being of women and children was a strong component of anti-polygamy sentiment in the late 1800s.²⁶ Modern historians—including the Amicus’s expert witnesses—have identified less palatable mores of the era as having contributed to the condemnation of polygamy: Puritanism, Victorian prudishness, racism, a monogamous ideal that was itself oppressive to women in imposing rigid gender stereotypes. This does not alter, however, that the historical record evidences a core preoccupation with polygamy as oppressive and harmful to women.

52. Indeed, even in the late 1800s, even when the protection of vulnerable persons was not a well-advanced area of law, the proponents of anti-polygamy codification invoked the harms of polygamy, including the threat it presented to the status of women, rather than relying on biblical or ecclesiastical authority. A contemporary American cartoon illustrates the criticism of polygamy as entailing the enslavement and denigration of plural wives:

¹⁷ Hon. Mr. Abbott, *Debates of the Senate* (April 25, 1890) at 585

¹⁸ Hon. Mr. MacDonald (B.C.), *Debates of the Senate* (February 20, 1890) at 112

¹⁹ Mr. Blake, *Debates of the House of Commons* (April 10, 1890) at 3175

²⁰ Mr. Blake, *Debates of the House of Commons* (April 10, 1890) at 3176

²¹ Mr. Mulock, *Debates of the House of Commons* (April 10, 1890) at 3177

²² Mr. McMullen, *Debates of the House of Commons* (April 10, 1890) at 3178

²³ Mr. McMullen, *Debates of the House of Commons* (April 10, 1890) at 3178

²⁴ Mr. Mulock, *Debates of the House of Commons* (April 10, 1890) at 3181; Hon. Mr. Abbott, *Debates of the Senate* (April 25, 1890) at 583

²⁵ Hon. Mr. Power, *Debates of the Senate* (April 25, 1890) at 584

²⁶ See Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002) and Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008)



53. One of the most influential figures in the anti-polygamy movement in the United States was Brigham Young's estranged wife, Ann Eliza Young. A historian's account describes her impact:

In the summer of 1873, one of Young's wives apostasized, sued him for divorce, and undertook one of the most spectacularly successful lecture tours of the nineteenth century. Ann Eliza Young, billed as 'The Rebel of the Harem,'

described her courtship, marriage, and eventual separation from Young in excruciating detail. She also claimed that the superficial harmony of Young's households masked what was in fact a systematic torture of women, riven by jealousies, violence, and deception. The publicity surrounding the suit, and Ann Eliza Young's unflinching and personal attack on the president and prophet, attracted large audiences and press attention. In the spring of 1874, her tour took her to Washington, where President Grant and his wife as well as numerous congressmen went to hear her speak.²⁷

54. In the final chapter of her broadly popular 1876 memoir, *Wife No. 19, or the Story of a Life in Bondage, Being a Complete Exposé of Mormonism, and Revealing the Sorrows, Sacrifices and Sufferings of Women in Polygamy*, Young described her moral objection to polygamy precisely in terms of equality of the sexes:

All this while I was gaining knowledge of the domestic customs and relations of the "Gentiles." At nearly every place that I visited I was entertained in some private family, and my eyes were constantly being opened to the enormities of the wicked system from which I had escaped.

I had felt its misery; I had known the abject wretchedness of the condition to which it reduced women, but I did not fully realize the extent of its depravity, the depths of the woes in which it plunged women, until I saw the contrasted lives of monogamic wives.

I had seen women neglected, or, worse than that, cruelly wronged, every attribute of womanhood outraged and insulted. I now saw other women, holding the same relation, cared for tenderly, cherished, protected, loved, and honoured. I had been taught to believe that my sex was inferior to the other; that the curse pronounced upon the race in the Garden of Eden was woman's curse alone, and that it was to man that she must look for salvation. No road lay open for her to the throne of grace; no gate of eternal life swinging wide to the knockings of her weary hands; no loving Father listened to the wails of sorrow and supplication wrung by a worse than death-agony from her broken heart. Heaven was inaccessible to her, except as she might win it through some man's will. I found, to my surprise, that woman was made the companion and not the subject of man. She was the sharer alike of his joys and his sorrows. Morally, she was a free agent. Her husband's God was her God as well, and she could seek Him for herself, asking no mortal intercession. Motherhood took on a new sacredness, and the fatherly care and tenderness, brooding over a family, strengthening and defending it, seemed sadly sweet to me, used as I was to see children ignored by their fathers.

55. That is a brief introduction to the history of the prohibition. The Attorney has lingered in this part in more detail than elsewhere because the question of legislative purpose is a plainly pivotal factual issue in this case. But as a matter of law, even if the

²⁷ Gordon, *supra*, at 112.

Amicus were correct, and s. 293 *had* been originally framed as partially or even mainly a religious imperative, its constitutionality would be unaffected.

(3) The Legal Significance of Religious Origin

56. It is true that if a law had been enacted with no other purpose than to enforce religious practice, it is bad law.²⁸ But that principle does not extend to prohibit laws that have otherwise valid purposes, simply on the basis that they were earlier (or even originally) argued or articulated in religious terms.

57. An objection similar to the Amicus's "religious origin" argument was raised by the defendant to an incest prosecution in *R. v. M.S.*, [1996] B.C.J. No. 2302 (C.A.). The incest laws follow the same Anglo-Canadian history as the polygamy laws. Originally part of ecclesiastical law, the laws disappeared from the books between the 17th and 19th centuries, to re-emerge in Canada through codification in 1892 in more or less their present form.²⁹ Considering the implications of the asserted "religious origin" of the incest prohibition, Donald J.A. in *M.S.* said:

54 [The Appellant] notes that in England incest was a matter for the ecclesiastical courts until this century thereby confirming the religious nature of the offence. He cites the decision in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 as authority for the proposition that our courts are concerned with justice not morals. He puts the argument this way:

Canada is a multi-cultural society and does not hold any particular religious beliefs in special regard. The incest statute, being divine law, is an impermissible basis for state legislation.

55 I think this argument is utterly specious. The criminal law fundamentally deals with right and wrong. The Criminal Code gives expression to our society's moral principles. Section 155 seeks to prevent the harm to individuals and to the community caused by incest. The fact that the offence is rooted in a moral principle developed within a religious tradition cannot support a claim for interference with the freedom to believe or not to believe under the Charter.

58. The challenger in *M.S.* was not, of course, asserting that incest was a religious practice, but the religious freedom argument was the same. He was arguing, in effect,

²⁸ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

²⁹ The history of the incest law is well canvassed by the Nova Scotia Court of Appeal in *R. v. F. (R.P.)* (1996), 105 C.C.C. (3d) 435, and by Southin J., concurring, in *M.S.*

that his own beliefs about incest differed from the state's, and if the state's position was a religious one, he had a right to be free from its imposition.

C. Has the Purpose Impermissibly "Shifted"?

59. Canadian courts have rejected the "shifting purpose doctrine", and have held that a law's constitutionality must be judged with reference to its original objective, not any purpose that can be ascribed, *ex post*, to justify it.³⁰ However, in *R. v. Butler*, [1992] 1 S.C.R. 452 the Court confirmed that laws premised on ideas of morality and social harm could withstand scrutiny notwithstanding that the content of these notions had changed over time. Sopinka J. wrote at para. 85:

I do not agree that to identify the objective of the impugned legislation as the prevention of harm to society, one must resort to the "shifting purpose" doctrine. First, the notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society. Second, and more importantly, I am of the view that with the enactment of s. 163, Parliament explicitly sought to address the harms which are linked to certain types of obscene materials. The prohibition of such materials was based on a belief that they had a detrimental impact on individuals exposed to them and consequently on society as a whole. Our understanding of the harms caused by these materials has developed considerably since that time; however this does not detract from the fact that the purpose of this legislation remains, as it was in 1959, the protection of society from harms caused by the exposure to obscene materials. ...

60. The Amicus's argument implies that the Attorney's support for s. 293, premised heavily, as it is, on the demonstrable harms associated with polygamy, reflects a "shifting purpose" from the original religious roots of the law. The Attorney contests such a characterization. The purpose of the law has always been to enforce a moral standard for "the protection of society from harms associated" with polygamy. It has always been expressly premised on the belief that polygamy, like obscenity in *Butler*, "had a detrimental impact" on persons involved, particularly women, and "on society as a whole." It is true that our understanding of the harms associated with polygamy have become more nuanced in recent years, and indeed in the course of developing the evidence presented in this Reference. It is also true that our understanding of the nature of women's rights and interests has evolved since 1890. We would expect such evolution in thought and understanding with respect to almost any law, including the

³⁰ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

incest prohibition which originated centuries, perhaps millennia, before we understood the full genetic implications of intrafamily sexual relationships or the psychology of relationships of dependence.

IV. The Interpretation of Section 293

A. The Definition of Criminal Polygamy

61. The Attorney General says that “polygamy” in s. 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 not become formalized through recognized ceremony or celebration.

63. Subsection 293(1)(a)(ii) prevents *de facto* polygamy even when it lacks (or at least cannot be proven to have) the formal trappings of “officially” endorsed marriage that would have made it either a “form of polygamy” under s. 11(5)(a) (now s. 293(1)(a)(i)) or “what among the persons commonly called Mormons is known as spiritual or plural marriage” under then s. 11(5)(c). In the Parliamentary debate of 1890, it was noted:

[I]t is right to observe that the difficulties which the United States has had to contend with in respect to the Mormons of Utah since the Brigham Young dispensation are serious and growing; and that from time to time earnest efforts have been made to overcome what seems to be an almost insuperable difficulty, owing to the extraordinary solidarity of these people and their determination to persist in and to conceal all legal evidence, at any rate, of their practices.³¹

³¹ Mr. Blake, *Debates of the House of Commons* (April 10, 1890) at 3174.

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

Simple cohabitation, therefore, in conformity to the Mormon custom is one of the rules by which Mormon marriage shall be recognized.³²

This is followed by the following statement:

Sometimes they have witnesses, sometimes not; if they think any trouble may arise from a marriage, or that a woman is inclined to be a little perverse, they have no witnesses, neither do they give marriage certificates, and if occasion requires it, and it is to shield any of their polygamous brethren from being found out, they will positively swear that they did not perform any marriage at all, so that the women in this church have but a very poor outlook for being considered honorable wives.³³

B. “Polygamy” in Section 293 Means “Polygyny”

65. Some of the Challengers’ overbreadth arguments are premised on an inflated interpretation of s. 293: they say that because polygamy, in a biological and anthropological sense, includes both polygyny and polyandry, and because today the ideas of a “conjugal union” and “marriage” apply also to same-sex couples, then the prohibition in s. 293 of “any form of polygamy” sweeps in relationships that are completely unrelated to any harms that might be associated with polygyny.

66. The Attorney’s position is that neither s. 293(1)(a)(i) nor s. 293(1)(a)(ii) of the *Criminal Code* prohibition applies to polyandry or same-sex multipartner unions.

67. The familiar rule of statutory interpretation is that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”

68. In its ordinary sense, “polygamy” is used to mean only “polygyny”.³⁴ In the present Reference, it is instructive that virtually every witness, including every expert

³² Ibid.

³³ Ibid.

³⁴ It is not the only instance of common—and even legislative—usage diverging from precise meaning. Provincial legislation permits the euthanization of an “animal in distress” without

who is not explicitly also discussing polyandry (and therefore must be careful of too general a term), uses "polygamy" to mean "polygyny" exclusively. The words "any form of" do not add polyandry or same sex conjugal unions into the definition, but rather ensure that all *forms* of polygamous marriage with which the legislators were explicitly concerned (explicitly if not exclusively Mormon, "Mohammedan", and "Indian" forms of marriage) were captured.

69. Interpreting "polygamy" as "polygyny" is in harmony with the context, scheme, object and intentions underlying s. 293. All indications from the legislative record and surrounding historical context are that the term "polygamy" in 1890 was understood and discussed purely with reference to polygyny; the latter sub-term was never used,³⁵ and the term "polyandry" had apparently been coined for use by biologists only a few years before. Indeed, if there was a record or account of even a single polyandrous relationship in late 1800s Canada, the Attorney is unaware of it. Nor is there any reason to believe that the expansion of the prohibition in s. 293(1)(a)(ii) was ever intended to embrace anything but polygynous conjugality that was not explicitly linked to a form of marriage. The scheme and purpose of the Act were clearly limited to addressing harms attributed to polygyny, consistent with the evidence of harm presented to the Court in the Reference.

70. It is arguable that Parliament could not criminalize polyandry and same-sex multi-partner conjugality even if it wished to. Polyandry does carry some risk of harms that might be associated with it, but evidence for these is speculative and weak.³⁶ It is, without doubt, unrelated to the most serious harms asserted by the Attorney General in

specifying (unlike federal legislation) that "animal" should be read to exclude human beings: *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372.

³⁵ The Attorney has searched through the legislative and historical record for any indication that any nineteenth-century lawmaker ever used the term "polygamy" to mean anything but "polygyny", or that the prohibitions in s. 293 were ever intended to apply to polyandrous or other non-polygynous relationships. None of the Challengers asserting its inclusion in furtherance of their "overbreadth" argument have pointed to a single letter, speech, article or other piece of evidence to indicate that polyandry or same-sex groupings were of the least concern to lawmakers in 1890. No expert has opined otherwise.

³⁶ Dr. Shackelford, the Amicus's expert, reports accurately that domestic violence is most prevalent among persons who live together but are unrelated, and that men, particularly sexually jealous men, are the most violent members of the household. This suggests that polyandrous relationships would be more violence prone than either monogamous or, perhaps, even polygynous relationships. But this is simply speculation and likely, given the rarity of polyandrous relationships, not susceptible to study or proof.

connection with polygyny. Moreover, all accounts indicate that polyandry is “vanishingly rare” and usually a temporary response to particular environmental or economic conditions.³⁷ There is nothing in the record indicating the prevalence of same-sex multipartner groupings, but these too are related to any harms of polygamy only in the most tenuous way. But for present purposes, these distinctions are irrelevant, because as a matter of interpretation, s. 293 does not capture non-polygynous marriage or conjugality.

71. Although unusual in the modern era, gender-referential crimes are not unknown. In *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R. 906, there was a claim that the *Criminal Code* discriminated against men who would have sexual intercourse with girls under 14 because women are not prohibited from having sexual intercourse with boys under 14. Wilson J. (for the majority) rejected this argument, stating at 930-31:

...In my view, it is not this Court's role under s. 15(1) of the Charter to decide whether a female who chooses to have intercourse with a boy under fourteen merits the same societal disapprobation as a male who has intercourse with a girl under fourteen. These issues go to the heart of a society's code of sexual morality and are, in my view, properly left for resolution to Parliament.

The appellants also submit that s. 146(1) of the Code discriminates against males because males under the age of fourteen are denied the same protection as s. 146(1) affords to females under the age of fourteen. Only a young female can obtain the conviction of her seducer under this provision. Once again, however, I think it important to bear in mind that the legislature has chosen to punish a male who engages in a form of penetration to which only a male and a female can be parties. The legislature has concluded that sodomy or buggery are forms of penetration that should be dealt with separately: see, for example, s. 155 of the Code. Once again we are faced with distinctions aimed at biologically different acts that go to the heart of society's morality and involve considerations of policy. They are, in my view, best left to the legislature. [Emphasis added]

³⁷ The CPAA's survey evidence, however unscientific, supports the expectations of evolutionary psychology in that polyandry is outnumbered by polygyny almost three to one, even among the survey participants who are avowedly committed to egalitarian principles. As for its temporary nature, the Attorney observes that none of the relationships in the CPAA's evidence has endured for longer than three years, an interesting if obviously inconclusive fact that is also consistent with the experts' expectations.

V. The Attorney's Position on the Asserted Breaches

A. Section 2(a): Freedom of Conscience and Religion

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

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

...[A]t the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

74. The evidence indicates that it is possible to observe any religion in which polygamy is accepted or encouraged without actually practicing polygamy, although some, including some fundamentalist Mormons, do appear to believe that there are advantages in the afterlife to those who practice, as opposed to simply espousing, the principle. The Attorney therefore accepts that some people practice polygamy in accord with deeply-held religious views.³⁸

³⁸ The nature of the religious challenge presented by the CPAA is not quite clear. On the one hand the group seems to suggest that "conjugal polyamory" is a deeply held matter of conscience and therefore deserving of s. 2(a) protection as such. In other passages, the group suggests that it is a desire to formalize polyamorous relationships through religious ceremony that permits its members to invoke freedom of religion. Even assuming both to be true, the arguments would add no further dimension to the s. 2(a) arguments advanced by the other Challengers.

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

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

[Emphasis added]

76. This is consistent with the Court's s. 2(a) jurisprudence from *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 onwards, confirming that "religious freedoms were nonetheless subject to limitations when they disproportionately collided with other significant public rights and interests" and that other jurisdictions too have generally recognized that "the invocation of freedom of religion does not, by itself, grant immunity from the need to weigh the assertion against competing values or harm."³⁹

77. Where the "competing values" are themselves protected *Charter* rights, it is appropriate to weigh them in the balance at the s. 2(a), rather than the s. 1 stage.⁴⁰ This is especially so in light of the overriding presence of s. 28. So even where polygamy can be said to rise to the level of a fundamental tenet for *Charter* purposes, and assuming that the infringement is non-trivial, the Attorney does not concede a breach of s. 2(a) because the practice is inherently harmful and infringes on the fundamental rights of others.

³⁹ *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, 2007 SCC 54 at paras. 72-73; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6, at para. 26.

⁴⁰ *Multani*, *supra*, at paras. 28-29.

78. However, the Attorney says that whichever analytical route is taken, in this case the outcome must be that religious freedom should yield to the more substantial interests at stake.

B. Section 2(b): Freedom of Expression

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

80. The assertion is difficult to comprehend. Any non-secret breach in the face of a law is, on some level, an expressive act, at least it is an expression of defiance to the law. This does not elevate every flagrant crime to the level of protected speech. If s. 293 is otherwise valid law, freedom of expression could not be used to permit its breach. As such, the invocation of s. 2(b) cannot add anything to the freedom of conscience and religion arguments advanced under s. 2(a).

C. Section 2(d): Freedom of Association

81. The question of freedom of choice in sexual partners as a protected form of association was an argument considered and rejected by the B.C. Court of Appeal in the “adult consensual incest” case of *R. v. M.S., supra*. In that case, the Court invoked the Ontario Court of Appeal’s decision in *Catholic Children’s Aid Society of Metropolitan Toronto v. S.(T.)* (1989), 69 O.R. (2d) 189 for the proposition that the protection in s. 2(d) was clearly designed to protect association with persons beyond the primary family unit.

82. Here, the Amicus’s argument is somewhat different. He says that the law permits multi-partner sexual activity, but not “polygamous groupings” and so violates the freedom of association. Other of the Challengers appear to take similar positions.

83. Naturally extended, on this argument Parliament would be permitted to criminalize sexual intercourse between a man and a 12-year-old girl, but it could not prevent him from marrying her. Incest laws would not violate s. 2(d), but consanguinity laws would. These analogies are not an aside: a reason that the polygamy law focuses

on marriage and conjugality even if the underlying problem is sexual conjugality is that, without the cooperation of the victim, sex usually cannot be proven.

84. But there is an important observation to be made about the freedom of association argument here. The Amicus's concession that the polygamy law does not capture, for instance, group sex seems to undermine his argument that it is representative of irrational fear and Christian prejudices. If it were simple prudishness motivating the ban, then why should it not include orgies, which would have been no less an affront to Victorian sensibilities? In the Attorney's view it is because there are harms associated with polygynous *marriage* that simply do not arise from non-conjugal (simultaneous or serial) multi-partner sex. It is, in other words, the conjugality, the nature of the establishment of simultaneous multiple pair bonds, acknowledged internally and presented to the community as a committed marriage-like arrangement, that is the heart of the problem.

85. So it is true (and, given the nature of the harm, perfectly legitimate) to define the crime in s. 293 in terms of a *relationship* instead of in terms of an *act*. But this fact alone surely does not trigger s. 2(d). To hold otherwise would be to stretch the protections for association far beyond anything possibly conceived by the framers of the *Charter*.

D. Section 7: Fundamental Justice

(1) The Role of Harm in Analysis of Fundamental Justice

86. The Attorney accepts that s. 293 engages s. 7 of the *Charter* because it permits imprisonment.⁴¹ The question then turns to fundamental justice, and, most particularly, to the questions of arbitrariness, overbreadth, and disproportionality. The determination of this question, while not identical, will rely on the same harm arguments as those advanced under s. 1.

⁴¹ The BCCLA posits a broader s. 7 right that is not conditional on the availability of imprisonment. However, because of the penal nature of s. 293, the issue is moot: there is no dispute here that s. 7 is implicated by the polygamy prohibition. Whether it would still be implicated if there were no imprisonment available is an interesting but presently irrelevant consideration.

87. The gist of the Challengers' s. 7 argument appears to be that, even if it were permissible to ban polygamy involving children or coercion, it is a violation of the principles of fundamental justice to criminalize consensual, adult polygamy where there is no harm in the relationship itself.

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

89. Similarly, the Supreme Court of Canada, in *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, rejected the idea that fundamental justice necessarily requires an element of harm to be present, either in an individual case or in society generally. However, it is clear that no claim for breach of fundamental justice could succeed where harm from the prohibited activity *is* demonstrated beyond *de minimis*, as it is here. Gonthier and Binnie JJ. wrote for the majority at para. 133:

We do not agree with Prowse J.A. that harm must be shown to the court's satisfaction to be "serious" and "substantial" before Parliament can impose a prohibition. Once it is demonstrated, as it has been here, that the harm is not *de minimis*, or in the words of Braidwood J.A., the harm is "not [in]significant or trivial", the precise weighing and calculation of the nature and extent of the harm is Parliament's job. ... The relevant constitutional control is not micromanagement but the general principle that the parliamentary response must not be grossly disproportionate to the state interest sought to be protected[.]
[Emphasis added].

(2) Arbitrariness

90. All of the arguments of the Challengers advanced with respect to arbitrariness are simply re-articulations of his assertions that polygamy, *per se*, causes no harm, or at least that it does not "universally" do so. The Attorney reiterates that he need not demonstrate that harmless polygamy cannot occur. If this Court finds that controlling polygamy does indeed reduce harms (social harms and harms to some participants) or the risks of such harms, the arbitrariness argument must fail.

(3) Overbreadth – The Challenge of the Polyamorists

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

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

93. But the most significant problem with "hiving off" or excluding "polyamory" from the *Criminal Code's* prohibition of "polygamy" is that the distinction is not capable of definition for identification and enforcement purposes. There have been many defining distinctions suggested between the two terms: the degree of consent, the "loving nature" of polyamorous relationships, the "honesty" of the participants, their assertedly "egalitarian" design or absence of patriarchal trappings. But how is an immigration officer, for instance, to assess an application by a polygynous family on such bases? Similarly, if the Court were to recognize a "good" polygamy versus a "bad" polygamy based on a checklist of factors, it could not be long before practitioners of "bad" polygamy learned to adopt the trappings of the "good".

94. Consider the idea of polyamory urged by the CPAA at para. 13 of its Opening Statement, where the defining characteristic is said to be that "all members of the group formally or informally adopt" principles of equality between genders and among sexual orientations. If the criminal law can legitimately address polygamy at all, how could its application truly depend on an assessment of the degree to which participants have "adopted" certain laudable "principles"? Could a "polyamorous" relationship become

criminal polygamy simply because one member of such a grouping decides that he or she no longer believes in principles of equality? Could a criminally-polygamous individual escape s. 293 simply by “formally adopting” a commitment to such principles?

95. The Amicus’s witnesses from the “Principle Voices” movement in the United States further illustrate the definitional problem. In many ways they resemble polyamorists as the CPAA defines the term; in other features, such as their strong invocation of religious authority and varying degrees of patriarchal inegalitarianism, they might more closely resemble the FLDS model. It is not unreasonable to think that any proposed characteristic supposedly separating “polygamy” from “polyamory” might come or go over time in such a relationship. The criminal law should not leave persons in doubt as to the status of their behaviour, particularly if the application of the law might affect the purely innocent children brought into such relationships.

96. A useful analogy might be drawn with longstanding laws defining an age of consent to sexual intercourse or marriage. Parliament may conclude that most 16-year-olds are capable of meaningful consent, and most 15-year-olds are not. The resulting law criminalizes relationships with 15-year-olds who might be, in fact, capable of consent, and it legitimizes some relationships with 16-year-olds who might not be. The criminal law must sometimes draw lines that are, overall, rational and reducing harm, even though their application in a particular case might be more less distant from the greater objectives being served. Resulting problems of proportionality in individual cases will be dealt with when assessing what is the appropriate *penalty*, a separate process with its own constitutional component.

97. If the Attorney General is wrong, and the law *cannot* constitutionally address itself to anything but the “core” polygamy described in s. 293(1)(a)(i), the solution is to declare only 293(1)(a)(ii) invalid and leave the balance of the provision intact.

(4) Overbreadth – The Issue of Gender Neutrality

98. If polygamy is interpreted to include only polygyny, and if it is justified, at least in part, on the basis that its objective is to protect women, can it still sanction prosecution of both husbands and wives? Several of the Challengers point to the law’s application to

all participants in a polygamous relationship as proof of clumsy over-reach. Could a law designed at least in part to protect the wives in polygamous marriages legitimately criminalize their own participation?

99. The answer must be yes. The Challengers' objection is based on the false premise that the sole objective of s. 293 is the protection of the wives themselves, and the assumption that, in every case, their only role is that of victim. The Attorney says that the risks and harms caused by polygamy, to the participants, to children, and to society at large, occur regardless of the individual circumstances of the participants. While in many, perhaps most, cases, the wives themselves will suffer harm, this harm is not the sole source of, or justification for, the prohibition. Again, this reasoning is paralleled in the incest laws, which although intended to protect children against, *inter alia*, exploitation by parents, criminalizes both parties to an incestuous union.

(5) Disproportionality

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

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

The requirement of proportionality in sentencing undermines rather than advances the appellants' argument. There is no need to turn to the *Charter* for relief against an unfit sentence. If imprisonment is not a fit sentence in a particular case it will not be imposed, and if imposed, it will be reversed on appeal.

There is no plausible threat, express or implied, to imprison accused persons — including vulnerable ones — for whom imprisonment is not a fit sentence.

[Emphasis added]

102. Similarly here, there is no plausible threat of imprisonment for “simple” polygamy—that is, polygamy without some direct harm to the participants or others, such as children; such a sentence would be unfit and indeed unconstitutionally disproportionate. Experience and logic both suggest that a polygamy investigation could never even result in charges without some serious aggravating factors.⁴²

103. So the Attorney General need not defend s. 293 in its harshest possible application to the most innocent conceivably-captured behaviour. It need only defend the proportionality of the law in its mildest application. That is, is it unconstitutional for the least-harmful types of criminal polygamy to result in a conviction and criminal record? The Attorney says that, in light of the demonstrable harms of polygamy at large, the answer is yes.

E. Section 15(1): Equality

(1) Religious Discrimination

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

54. Section 293 breaches section 15(1) for many of the same reasons as it breaches section 2(a). The provision draws a distinction between religious practices which the state deems to be acceptable (monogamous marriage) and those that are subject to criminal sanction (polygamous marriage). Even if not prosecuted, religious practitioners of polygamy are stigmatized by the law and treated as less worth of respect and concern.

⁴² There is no account in the history of Canada of a person being imprisoned for simply entering into or continuing a polygamous relationship. In the only modern example of a prosecution, Messrs. Blackmore and Oler were charged after having allegedly engaged in a pattern of taking vulnerable and dependent members of their congregation, including children, as “celestial brides”. The women involved were not charged, and nor were any other persons who participated in arranging or solemnizing the “marriages” even though their actions would have fallen within the purview of s. 293.

55. Section 293 is based on an assumption that polygamy is a practice uniformly associated with harm; essentially, that it is "barbarous". The law is based entirely on presumed, stereotypical characteristics, is not responsive to the actual characteristics of the particular polygamous relationships, and has the effect of demeaning the dignity of practitioners of polygamy.

105. A person alleging a discriminatory effect must first identify the group with which they wish to be compared, and show some disadvantage in the comparison. Only then can it be measured whether there is a discriminatory effect. Nowhere in its opening statement on *Charter* breach does the Amicus identify such a comparator group. Instead, the discrimination alleged is solely defined with respect to a religious *practice* (not a religion as such). It is of course true that the state recognizes, and in various ways encourages, monogamous marriages across society, but without regard to religion. It is also true that the state outlaws polygamy, also regardless of whether it is founded on religious tradition, cultural beliefs or simple preference of the participants.

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

107. The Amicus says that because the state has criminalized a practice that, for some, is religious, and because it does not criminalize a practice (monogamous marriage) that is, for some others, also religious, it is engaging in religious discrimination. As such the s. 15 argument adds absolutely nothing to the s. 2(a) argument, and the question of infringement of religious belief must be analyzed through that section. "Practitioners of polygamy", in other words, is not an analogous ground for s. 15 purposes.

108. Any religious-based differential treatment that results from s. 293 corresponds to very real differences between those who practice polygamy and those who practice monogamy. In *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, McLachlin C.J. held (for the majority), at para. 108:

Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(a). There is no breach of s. 15(1).

109. And finally on this point, it must be reiterated that the religious traditions of polygamy are themselves discriminatory. Those who practice polygamy for religious reasons engage in a practice in which the inequality of the participants inheres in the very nature of their relationship; that is, they embrace only polygyny, institutionalizing the very kind of distinction (determining, based on religious notions, whom one may marry) that the Amicus elsewhere attributes to Parliament and decries as unfair. There is little policy reason for protecting such inherently discriminatory practices within the *Charter*, and as noted earlier s. 28 of the *Charter* should operate to bar the invocation of equality or religious rights in a way that discriminates against women.

(2) Discrimination on the Basis of Marital Status

110. Section 293 cannot be said to violate s. 15(1) on the basis of marital status either. The Supreme Court of Canada may have accepted that marital status is an analogous ground for the purposes of s. 15. However, it has not provided an exhaustive definition of marital status for such purposes, and the Attorney General will argue that the term should not be understood to include marital arrangements that are (otherwise legitimately) prohibited by the *Criminal Code*.

111. To interpret marital status as embracing any decision regarding whom to marry would mean that virtually all laws to do with marriage—age-of-consent, consanguinity, bigamy, and so on—would *prima facie* violate the *Charter*. With respect to polygamy, the argument would require that the government not only permit polygamous marriage, but give its practitioners fully equal status to monogamous couples in all areas of law where it could not justify discrimination under *Oakes*.

112. This returns us to the point that being a “practitioner of polygamy” cannot be an analogous ground for s. 15 purposes, even if such persons suffer discrimination as a result of their behaviour. If it were, then perpetrators of *any* crime could claim to be a discrete and insular minority for equality purposes, an obviously absurd result. In the end, like religious equality, the marital status argument adds nothing to the s. 7 and s. 2(a) arguments elsewhere advanced. If s. 293 is not arbitrary, overbroad, or unconstitutionally disproportionate, if it is not an unjustified infringement of conscience or religion, then its enforcement cannot be discriminatory simply because it punishes only those who are breaking the law.⁴³

VI. Justification Under Section 1

A. Overview

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

B. “Prescribed by Law”

114. Section 293 is a limit “prescribed by law”; it is a piece of legislation passed by Parliament in accordance with the federal constitutional authority. The Challengers do not say that the law is unconstitutionally vague under s. 7, so they likely will concede that it is prescribed by law both formally and sufficiently for the purposes of s. 1. The question therefore turns to whether it can be demonstrably justified, using the *Oakes* test.

⁴³ The CPAA’s s. 15 argument is not developed beyond that made by the Amicus and amounts to the same thing: that, at least in the case of *polygynous* polyamory, the law is discriminating against polyamorists on the basis that they practice polygamy. But, for the reasons articulated here, such is not an enumerated or analogous ground. The fact that some types of polyamory, such as polyandry and multiple-partner same-sex unions, fall clearly outside the scope of s. 293 is demonstration that the distinction is based on the harm of polygyny, and is emphatically not a prejudice toward non-monogamous conjugality *per se*.

C. The Application of Oakes

(1) Pressing and Substantial Concern and Rational Connection

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

116. Harm has a particularly important role in the context of the criminal law. To justify criminalization, the Attorney General must show the “reasonable apprehension” of a harm that is “not insignificant or trivial”, and once that is done, “the precise weighing and calculation of the nature and extent of the harm is Parliament’s job.”⁴⁴ In the case of polygamy, this requirement is met and far exceeded.

(2) Polygamy’s Harm in the Context of Oakes

117. The evidence in this reference is that there are four categories of harm that arise from polygamy, which, taken together, are significant and substantial: harms to the moral fabric and democratic essence of society; harms to the value of equality and to the vital interests of vulnerable groups; harms to society generally through polygamy’s impact on the sexualization of young girls and the increased incidence of antisocial behaviour and crime; and harms to many of the participants in polygamous relationships and their children.

Harm to Moral Values

118. The Supreme Court has said that “morality” is a proper subject for the criminal law. It is open to Parliament to legislate “on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society”.⁴⁵ The Court in *Malmo-Levine* noted that this does not justify

⁴⁴ *Malmo-Levine* at para. 133.

⁴⁵ *Malmo-Levine* at para. 116, citing *R. v. Butler*, [1992] 1 S.C.R. 452 at 498

codification of “mere ‘conventional standards of propriety’ but must be understood as referring to *societal values beyond the simply prurient or prudish* [emphasis added]”.⁴⁶

119. The Attorney accepts that, if harm to “conventional standards of propriety” were all that supporters of s. 293 could invoke, justification for the polygamy ban would be tenuous. The Challengers’ arguments seem largely premised on the belief that the prohibition against polygamy is, as a societal value, “simply prurient and prudish”. The evidence in this case demonstrates that this is not the case. But even so, the fact that socially-imposed monogamy is so deeply imbedded in the moral fabric of our society cannot be dismissed lightly. The courts’ deference to Parliament on matters of morality, while certainly not absolute, reflects an understanding that strong moral codes may evolve for an important reason, even if it is imperfectly understood at any given time.

Harms to the Value of Equality and the Protection of Vulnerable Groups

120. Equality has been found to be one of the fundamental values of Canadian society,⁴⁷ it is enshrined in ss. 15 and 28 of the *Charter*, and its protection is beyond “simply prurient or prudish” concern. The more important the institution, the more important it is that we honour the right to equality within that institution. Marriage is an institution sufficiently fundamental to Canadian life that it was the subject of careful constitutional assignment in 1867. It is certainly true that our ideas of what marriage is and should be has changed over time, but the centrality of the dyadic human pair bond remains a defining characteristic of Canadian culture.

121. Section 293 protects women and children from commodification and consequential exploitation. A criminal law may be justified without proving direct harm if it protects vulnerable groups, such as racial minorities,⁴⁸ women⁴⁹ or children⁵⁰. This law

⁴⁶ *Malmo-Levine* at para. 77, citing *R. v. Butler*, [1992] 1 S.C.R. 452 at 498; *R. v. Murdock* (2003), 11 C.R. (6th) 43 (Ont. C.A.) at para. 32.

⁴⁷ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

⁴⁸ *R. v. Keegstra*, [1995] 2 S.C.R. 381, the Supreme Court upheld the hate speech provision in the *Criminal Code* under s. 1 because of the potential that it could increase attacks on minorities.

⁴⁹ In *R. v. Butler*, [1992] 1 S.C.R. 452 the Court wrote at p. 497 that “legislation proscribing obscenity is a valid objective which justifies some encroachment on the right to freedom of expression” because of the impact of the exploitation of women and children, depicted in publications and films, which can in certain circumstances, lead to “abject and servile victimization”.

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

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

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

Social Harm from "Externalities" of Polygamy

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

125. These externalities are important because they have been until now completely ignored in the legal analysis. Apologists for decriminalization of polygamy typically base their views on the harms associated with criminalization weighed only against the harms to polygamist families themselves, and suggest, not without some logic, that criminalization is only justifiable in harmful polygamous relationships (and by extension that only the harm should be criminalized, not the relationship itself). This argument collapses completely if it is accepted that polygamy, like marijuana use in *Malmo-Levine*,

⁵⁰ In *R. v. Sharpe*, [2001] 1 S.C.R. 45, the Court upheld the prohibition on the possession of child pornography (even where the possession of the material was not directly related to any quantifiable harm), noting that the prevention of harm by reducing the market for child pornography justified the limit on freedom of expression.

carries with it social harms regardless of its immediate effect on the participants and their families.

Direct Harms to the Participants

126. Polygamy is associated with a number of harms to members of polygamous families, such as exploitation and oppression of wives and girls, negative mental health outcomes for wives, reduced educational attainment for children, reduced opportunities for adolescent boys, and so forth. Polygamous marriages may also create significant problems for support of children both during a polygamous marriage and upon its dissolution.

127. A number of expert witnesses have provided evidence of the harms suffered by the participants in polygamous relationships and their children. Dr. Henrich briefly canvasses some of the literature on this point in his original report. Dr. Beall, a Utah clinical psychologist who has spent decades working with victims of polygamous societies in the United States provides the benefit of his experience treating persons who have left polygamous Mormon communities in the United States, whom he refers to as "polygamy survivors". Dena Hassouneh, an expert on trauma in marginalized populations, summarizes the literature and her study on the impacts of polygamy in Muslim populations. Dr. Susan Stickevers, an expert put forward by Stop Polygamy in Canada, speaks to her experience treating women of Muslim polygamous relationships in New York.

128. Of course, the Challengers assert that there may be some *advantages* inherent to the polygamous form of family. Accounts of cooperative childcare are a frequent feature of the affidavits, and there is the thread of an argument that simultaneous multi-marriage may be preferential to serial divorce and remarriage, particularly for children. But each time these claims are examined, they appear less lustrous. Perhaps surprisingly, polygamous marriages are less stable than monogamous ones, and divorce is more frequent, not less. The Amicus's expert Dr. Shackelford asserts that the potential for intrafamily violence is increased in stepfamilies (because we are biologically more inclined to look after our genetic relatives), without acknowledging the implications of this in polygamy, where almost every family contains genetically-unrelated (and thus more vulnerable) children.

129. Then, of course, there are the personal experiences of those who have lived in polygamous relationships. The Attorney has gathered affidavits from a number of former members of fundamentalist Mormon communities as exemplary of the problems that can be associated with the practice.

130. The FLDS puts forward firsthand accounts of persons who report happier experiences in these same communities and, while the completeness of some of this testimony might, in the circumstances, be questioned, the Attorney accepts that some or even most residents of these communities may judge their own lives to be equal to, or even superior to, others'. Similarly, the Amicus presents a number of affiants who practice polygamy as a religious precept but outside the communal settings of the FLDS or similar groups. These persons too report that polygamy is, on balance, a positive element of their lives.

131. The Attorney's argument does not rely on proof that the negative experiences of wives and children of polygamy are present in every case, and the Attorney concedes there can be purely consensual, adult polygamy that involves no discernible harm to the participants (and presumably confers some advantages upon them). But the harms do exist, and the possibility that the vulnerable persons will suffer harm from an activity even if many or most do not is sufficient to permit Parliament to invoke the criminal law power.

132. This point must be emphasized, because it goes to the heart of the case advanced by the Amicus and also those of the BCCLA, CPAA, and CAFE: The absence of harm in any particular case is not in any way determinative of the constitutional question. The Supreme Court has already ruled that the criminal law can legitimately prohibit consensual conduct that is harmless to the participants themselves (and may even be beneficial), on the basis of broader social harm. The Court in *Malmo-Levine* cited dueling and incest laws as examples. Indeed, the dissenting justices in *R. v. Labaye*, [2005] 3 S.C.R. 728 would have gone further, and listed "child pornography,

incest, polygamy and bestiality” as activities that are legitimately prohibited even “regardless of whether or not they cause social harm.”⁵¹

(3) Minimal Impairment

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

134. For a law to be justified under *Oakes*, it must be carefully tailored to achieve its objective and minimally impairing of the rights at issue, given the harm being addressed.

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

136. There are straightforward answers to this argument. First, it is analogous to that advanced in *R. v. Sharpe*, [2001] 1 S.C.R. 45 with respect to simple possession of child pornography. The accused said, if the problem is the exploitation of children in the manufacturing of child pornography, then it is addressed through laws against that activity, and the ‘market reduction’ targeted by the law against simple possession was unnecessary. McLachlin J. rejected the idea, writing at para. 93:

...[A]n effective measure should not be discounted simply because Parliament already has other measures in place. It may provide additional protection or reinforce existing protections. Parliament may combat an evil by enacting a number of different and complementary measures directed to different aspects of the targeted problem: see, e.g., *R. v. Whyte*, [1988] 2 S.C.R. 3. Here the evidence amply establishes that criminalizing the possession of child pornography not only provides additional protection against child exploitation -- exploitation associated with the production of child pornography for the market generated by possession and the availability of material for arousal, attitudinal change and grooming -- but also reinforces the laws criminalizing the production and distribution of child pornography.

⁵¹ *R. v. Labaye*, [2005] 3 S.C.R. 728 at para. 109.

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

138. The Bishop of the FLDS, James Oler, declares in his affidavit that in all "instances where members of the community have been suspected of criminal offences... reports have been made to the police."⁵² To the contrary, the Attorney expects the evidence of both experts and lay witnesses to establish that, at Bountiful as elsewhere (and perhaps even to a greater degree), crimes against women and children are under-reported, uninvestigated, and almost never prosecuted.

139. Thus, permitting an activity (polygamy) that will increase harm (including criminal harm) against children or women cannot be supported on the basis that the harm can be adequately addressed through enforcement of other laws. It simply cannot.

VII. Conclusion

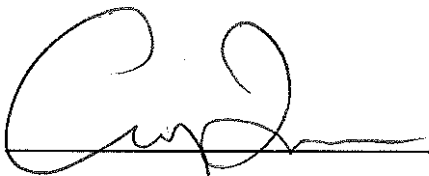
140. The academic nature of much of the evidence and argument in this case might tend to be disarming. The Attorney has introduced some evidence to give visceral availability to the harms that can be suffered by participants in polygamous relationships, but it is impossible to see or touch the much greater social harms. No firsthand testimony of the impact on women's equality or children's wellbeing could be gathered, except through the microcosmic example of Bountiful and the FLDS. Similarly, if it is true that a more polygamous society will lead to an increase in criminal activity, it is impossible for the Attorney to bring forward the victims that s. 293's repeal might cause.

⁵² James Oler Affidavit #3, para. 14.

141. So it is important to be alert, as the evidence in this case unfolds, to the fact that real lives will be impacted, directly and indirectly, by the decision of this Court in this Reference. But this case will not have its greatest impact on the relatively privileged lives most Canadians enjoy. If s. 293 is declared invalid, and particularly if no law could constitutionally address the harms of polygamy, the weight of the decision will be borne disproportionately by members of some of the most vulnerable groups in our society: immigrants, women, and, most especially, children.

142. If it is upheld, then this Court will confirm our right, as a people through our elected representatives, to impose some fundamental codes of moral behaviour for the protection of the vulnerable, and to promote and advance our highest aspirations of equality and social justice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of November, 2010.

A handwritten signature in black ink, appearing to read 'Craig E. Jones', written over a horizontal line.

CRAIG E. JONES
Counsel for the Attorney General of British Columbia