



No. S-097767
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

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

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

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

**REPLY SUBMISSIONS OF THE ATTORNEY GENERAL
OF BRITISH COLUMBIA**

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I. Overview of These Reply Submissions

1. The Attorney General of British Columbia disagrees with much of what is said in the closing submissions of the Amicus and the other Challengers. By and large, these disagreements were anticipated in the Attorney’s main Closing Submissions and will be explored in the Attorney’s oral submissions to the Court.

2. These written reply submissions focus on two aspects of the Amicus’s argument that are new in the sense that they are issues not previously identified by the challengers: First, that “consent” is a principle of fundamental justice under section 7 of the *Charter*, and second, that “polygamy” is an analogous ground for the purposes of section 15.

3. The Attorney will then reply to certain assertions made by the Amicus in order to demonstrate serious difficulties with his treatment of evidence and argument. Many examples could be given (and will be explored in oral submissions), but for purposes of this written reply just two matters are

highlighted: the Amicus's new criticism of the expert psychology evidence, and his use of, and attack upon, a supposed position of the Attorneys General regarding the celebration of birthdays among polygamists.

II. "Consent" is Not a Principle of Fundamental Justice

4. The test to establish a new principle of fundamental justice for section 7 purposes was held in *Malmo-Levine* (at para. 113) to consist of the following:

the proposed new principle has to be a "legal principle" (as distinct from a purely moral or ethical principle);

there must be "a significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate"; and

it must be capable of being "identified with sufficient precision to yield a manageable standard."

5. Even if "consent" satisfied the requirement of being a "legal principle" that was "sufficiently precise", it certainly cannot be said to be the subject of "a significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate". One or two obliquely-relevant decisions and a short passage in a textbook fall short of establishing "a significant societal consensus" of the kind required.

6. In its rejection of the "harm principle" as a principle of fundamental justice for section 7 purposes, the majority in *Malmo-Levine* observed that there are activities that are legitimately prohibited even though undertaken by fully consenting adults:

118 A duel fought by consenting adults is an example of a crime where the victim is no less culpable than the perpetrator, and there is no harm that is

not consented to, but the prohibition (s. 71 of the *Code*) is nevertheless integral to our ideas of civilized society. See also *R. v. Jobidon*, [1991] 2 S.C.R. 714. Similarly, in *R. v. F. (R.P.)* (1996), 105 C.C.C. (3d) 435, the Nova Scotia Court of Appeal upheld the prohibition of incest under s. 155 of the *Criminal Code* despite a *Charter* challenge by five consenting adults. In none of these instances of consenting adults does the criminal law conform to Mill's expression of the harm principle that "[o]ver himself, over his own body and mind, the individual is sovereign", as referenced earlier at para. 106.

7. Note that, in his discussion of the relevant case law in his Submissions, the Amicus makes no reference to the incest decisions (such as *R. v. F. (R.P.)*, endorsed by the Supreme Court of Canada in the passage above). These cases – dealing with consensual, adult incest – are clearly the most analogous to the case at bar.

8. And in *Malmo-Levine* at para. 124-5, speaking of "harm to self" (the ultimate example of consensual crime), the majority wrote:

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

9. If there is "no consensus" that laws prohibiting a person from consensual self-harm, there can be no consensus that laws prohibiting consensual harm by others are violative of fundamental justice. If nothing else, *Jobidon* makes this perfectly clear.

10. The Amicus relies at para. 360 on the writing of Professor Stuart for the proposition that "If there was consent the conduct was always lawful. The requirement of lack of consent is part of any *actus reus*" [emphasis is the Amicus's]. But it is clear from a reading of these sentences in their (non-

underlined) context that this applies only to crimes “[w]here consent of a victim does absolve an accused” [emphasis added]. Professor Stuart’s writings cannot be stretched to suggest that consent must, or even should, be part of the *actus reus* of any crime, nor can the excerpts of Gonthier and Sopinka JJ. in *Jobidon*, which both describe a regime where some criminal laws are premised on lack of consent, and some are not. Indeed in *Jobidon*, consent to a fistfight was found to be *no* defence to assault causing bodily harm, and interestingly this was because the activity involved had no “social utility” but carried social costs.

11. This brings us to the final flaw in the “consent principle” argument: To the extent that it is a legal principle at all, it can only apply to those offences where the harm or risk that is the subject of the consent is to the direct, consenting, “victim”.

12. The “consent principle” can have no application to offences designed to also protect *indirect* victims of the harm or broader social interests. In such cases, the consent of the participants in the criminal activity is irrelevant. Incest is, again, perhaps the most analogous example, but there are many others. The consent of all of the participants in the creation of a degrading and dehumanizing video is not a defence to an obscenity charge, nor is the consent of all those exposed to it. The consent by – or even the participation of – a French Canadian person in the creation of a statement that promotes hatred against French Canadians is still subject to prosecution.¹ The informed consent of marijuana users was immaterial to section 7 in *Malmo-Levine*. Gambling laws are to the same effect, and so on.

13. This distinction makes perfect sense: in cases of indirect harm, such as many of the harms arising from polygamy, the victims are not offered the option of consent because they are not present at the scene of the crime. If there is a “consent principle” with respect to indirect, or social, harm, it is surely this: that

¹ *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).

society as a whole may provide *its* consent to such harm by not criminalizing the cause of the harm. But it must be the citizens who determine which socially-harmful activity they will tolerate in the interest of liberty, and which they will not. This cannot be simply left up to the people who believe they will benefit from the crime, and this is why in such cases the courts exhibit the highest degree of deference to Parliament.

III. "Polygamy" is Not an Analogous Ground

A. The Amicus's Argument

14. The Amicus says that "the characteristic of being polygamous" must be recognized as an analogous ground under the *Charter's* section 15.² The Amicus acknowledges that in order to establish this argument, he must show that "polygamists" have the indicia of analogous grounds: not only that polygamous relationships are central to polygamists' identities (a qualification that has never in itself supported a constitutional equality right), but also that (a) polygamists are a historically disadvantaged group, and (b) that the characteristic of being polygamous is "immutable".

15. These latter two indicia are, in the case of polygamy, absent.

B. Polygamists are Not a Historically Disadvantaged Group

16. The Amicus suggests that polygamists are a "historically disadvantaged group". Keep in mind, this is in the section where the Amicus argues that polygamy *per se* ("the characteristic of being polygamous") is an analogous ground. So the question is not whether, for instance "Fundamentalist Mormons

² In truth the progression from treating polygamy as an enumerated ground to an analogous one is unclear. It begins with a defence of polygamy as an *enumerated* ground under the heading of "Marital Status" at para. 251, but by para. 254 appears to have fully morphed.

and Aboriginal persons" are historically disadvantaged, but whether *polygamists* within those groups are.

17. Most of the evidence is to the contrary. The anthropological record shows that every polygamous society is *partially* polygamous, with a polygamous "overclass" but with the great majority of the married population being monogamous. This is as true of the FLDS as it is in the cross-cultural experience, with witness after witness describing (as Dr. Beall put it) a "caste system", with polygamy as a privilege of wealth and status. In the FLDS, both male and female polygamists may enter the highest levels of heaven; their monogamous or single co-religionists (male or female) cannot. Winston Blackmore, the wealthy third-generation businessman and leader of his side of the Bountiful "Split", has at least 25 wives; James Oler, the Bishop of the Warren Jeffs side, has five (no one on the Jeffs side of Bountiful has more than Oler). Jeffs himself is supposed to have over 80. Cross-culturally, the message is the same. Polygamy is for the relatively privileged and powerful men in a polygynous society; the disadvantaged have one spouse, or none. As the Amicus's witness Dr. Shackelford put it (agreeing with the writings of Steven Pinker and Laura Betzig), polygamy is only available to those men who can afford its costs, and for women (assuming it is purely consensual) it is available to those who consider it to be advantageous compared to the available alternatives. Although, in the Attorney's view, women in polygynous relationships *are* disadvantaged (for instance through an increased relative risk of mental health problems), the Amicus denies that such disadvantages exist or, if they do exist, that they are caused by polygamy *per se*. So such burdens are not what the Amicus asserts as the historical disadvantage suffered by "polygamists" as *such*.

18. The only disadvantage identified as visited on polygamists *as such* is made at para. 256, where the Amicus says that this is so because polygamy is criminal and polygamists suffer other legal impairments, such as never having

their unions legally recognized. Of course this would mean that everyone inclined to a behaviour that has been historically criminalized (gambling, barfights, incest, bestiality, murder) or otherwise legally burdened is a member of a “historically disadvantaged” group simply because the law frowns upon the activity. The argument chases its own tail.

C. Polygamy is Not an Immutable Characteristic

19. While it may occasionally be true, as the Amicus asserts, that “[o]ur hearts are not governed by our heads”, there is no evidence that a predisposition toward the *form* of polygamous marriage is anything more than how the expert psychologists in this case have described it: an advantageous strategy that is available to those with the resources and inclination to pursue it, those who can, as the Amicus’s expert Dr. Shackelford put it, “afford the costs” (social as well as economic) that it entails.

20. Indeed Dr. Shackelford, a psychologist who has extensively studied human multi-partner mating behaviour (he is the only expert to have published original peer-reviewed material in the area), predicted that individuals’ decisions to adopt polygamy (if the practice were decriminalized) would be, at least in significant part, determined by a desire to imitate the behaviour of other, more socially prominent, polygamists. This view seems difficult to reconcile with the Amicus’s notion of immutability.

21. No doubt some people find multiple partners of various descriptions to be, for them, “the natural order of things” (Amicus’s Submissions, para. 262); the anthropological record and evolutionary psychology, in fact, support that it *is* natural for individuals to choose polygamy over monogamy where conditions make it advantageous. The same might be said of coercive sex, theft, even homicide. We do not ban these crimes because no-one is inclined to their commission; we ban them in part because some, at least, *are*. And we ban them

even if that inclination is passionate and overwhelming, governed, as the Amicus would say, by the heart and not the head.

22. In the end, the Amicus's "immutability" argument is reduced to a single assertion, articulated at para. 265:

[E]very polygamous relationship that a participant does not wish to leave is truly *immutable* for the purposes of s. 15: it is of such importance to the participants that they would suffer the law's disadvantages rather than give it up. Indeed, polygamists in Canada continue to practice polygamy despite the criminal ban precisely because their polygamous relationships are of such importance to them.

23. This is a revealing definition of "immutability", and entirely unsupportable. If it were truly the test – that any behaviour that a person would pursue in the face of criminal prohibition is immutable for section 15 purposes – then a propensity to violence is similarly an analogous ground, as would be inveterate racism, as indeed would be a willingness to risk prosecution for *any* criminal activity. Conscious, deliberate criminality would be proof of immutability; recidivism of discrimination. An equality breach would be found simply on the basis of the state maintaining a prohibition in the face of defiance.

24. It is revealing that, elsewhere in his Closing Submissions, the Amicus suggests that the federal government *may* justifiably discriminate against polygamists *as such*. In his response to the Attorney's suggestion that Canada might become a target for polygamist immigration should s. 293 be struck or repealed, the Amicus assures at para. 583:

[I]t is well within Parliament's constitutional authority to amend [immigration legislation] so as to make polygamy a distinct and express ground of inadmissibility.

25. This is a remarkable position to take, because it can only be premised on the idea that polygamy is of sufficient concern that the prevention of its spread

can be justified under section 1. The Amicus is only able to explain this apparent inconsistency on the basis that “non-citizens do not have an unqualified right to enter or remain in the country”. He does not recognize that prospective immigrants to Canada *do* possess all their section 15 rights, as against one another. That is, any discrimination among them on an enumerated or analogous ground must be justified.³ If polygamy is harmless or if immigration presents no threat to its spread, what possible justification would the federal government have to discriminate against polygamists? The Amicus does not explore this question further.

IV. The Amicus’s Descriptions of Evidence and Argument

A. The Misuse of Wright and Pinker and the New Attack on Evolutionary Psychology

26. Social science evidence, in the form of Brandeis Brief materials, enjoy a limited use in constitutional cases to establish the social context, including the historical context, in which legislation is enacted. They have not been, and could not be, used to counter direct evidence given in the Reference unless the materials have been put to a witness under oath.

27. There has been considerable evidence given in this case in the field of psychology, in particular by leading experts in the field of evolutionary psychology, Dr. Henrich and Dr. Shackelford.

28. Dr. Henrich submitted two expert reports and testified at some length regarding the evolutionary origins of human mating strategies, including polygamy. He was briefly cross-examined by the Amicus and by counsel for the BCCLA. Neither asked any questions regarding the underpinnings of

³ See for instance *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, where unjustifiable gender-based discrimination was found in provisions giving preferential treatment to children of Canadian fathers over mothers when applying for citizenship.

polygamous behaviour as expressed in evolutionary psychology. Neither put to Dr. Henrich any competing hypotheses either directly or by asking for his views on literature that might be contrary to his conclusions. The evolutionary psychology aspect of the evidence of Dr. Henrich went into the record entirely unchallenged. Similarly, Dr. Shackelford, another eminently qualified psychologist, was not questioned by any of the Challengers on the evidence he gave regarding the evolutionary origins or innateness of polygamous behaviour.

29. Now, in his Closing Submissions beginning at page 156, the Amicus engages in an extended criticism-by-proxy of Dr. Henrich. For six full pages of his argument, and then sporadically throughout the remainder, the Amicus attacks the conclusions of Dr. Henrich by citing articles, books, and newspaper commentary which he seems to believe cast doubt on Dr. Henrich's sworn expert evidence.

30. For instance, the Amicus seizes on and extrapolates upon an early book on evolutionary psychology, *The Moral Animal* by the American journalist and philosopher Robert Wright. The Amicus is disdainful of Wright's work, saying that he is "not what would be considered a feminist scholar".

31. The Amicus initially justifies his focus on Wright by saying that "evolutionary psychology... is the field in which both Mr. Wright and Dr. Henrich operate". In a similar way, the Amicus incorporates the work of Harvard professor Steven Pinker and his Pulitzer-shortlisted book *How the Mind Works*, and in so doing says that Pinker's opinion, like that of Wright, "mirrors" Dr. Henrich's views.

32. So far, all this might be dismissed as an attempt to construct a "straw man" – to roll Pinker and Wright in with Dr. Henrich so a criticism of one becomes a criticism of all. But the Amicus goes further, returning repeatedly to his criticisms of Wright and Pinker until finally, by paragraph 646, he has blended

them entirely, declaring that "Robert Wright and Steven Pinker... informed Professor Henrich's work".⁴

33. In fact, no work of Pinker or Wright appears among the 112 sources that "informed" Dr. Henrich's two expert reports. Dr. Henrich did not cite, or in any way rely on, *nor even mention*, Steven Pinker in his reports or in his oral testimony. As for Robert Wright, the only mention Dr. Henrich made of him was to say under cross-examination by Mr. Macintosh that he had once had a conversation with counsel in which Wright's 1994 book *The Moral Animal* was "talked about".⁵ The Amicus did not put any of Pinker's or Wright's writings to Dr. Henrich in order to ask him which he accepted, and which he did not. Had he done so, he might well have been quite surprised. Instead, for several pages under the heading of "Dr. Henrich" and the sub-heading "Pop Culture Analysis", the Amicus quotes extensively from Wright and Pinker, alternately excoriating them (and attributing their views to Dr. Henrich), but occasionally also faulting Dr. Henrich for *not* adopting each element of Wright's 1994 work, as if, as an evolutionary psychologist, he must.

34. Unlike the Brandeis material relied on by the Amicus now, Dr. Pinker's writings *were* introduced into evidence through an expert: the Amicus's expert psychologist Dr. Shackelford,⁶ who said he "deeply" respects Dr. Pinker's work, which he has cited in his own peer-reviewed articles. Dr. Shackelford explicitly endorsed lengthy passages of *How the Mind Works* (including the very passage cited by the Amicus at para. 394 as somehow objectionable) as the best

⁴ Amicus's Closing Submissions, para. 646.

⁵ Transcript, Day 11, p. 76, ll. 11-15. The discussion concerned Wright's theory that an effect of polygamy in a society would be increased antisocial behaviour by unmarried men, which was also a feature of Dr. Henrich's analysis.

⁶ Both books had been included in the Brandeis Brief materials compiled by the Attorney General in the first evidence exchange, and in fact the Amicus makes repeated reference to this inclusion (see for instance paras. 390, 394) as if it meant that the Attorney General endorsed every statement in every article or book included. Of course that is not the case, and the Attorney's Brandeis materials contain numerous articles that diametrically oppose the Attorney's position.

description of polygamy as an evolved human behaviour for the "intelligent layperson" of which he was aware.⁷

35. The Amicus, after Dr. Shackelford's testimony (which completely corroborated Dr. Henrich's summary of evolved human mating strategies), now seeks to discredit the entire field of evolutionary psychology at his para. 392, referring to it as "a very new field" "strongly criticized", and one that "has come under heavy assault" in some articles he has found.⁸:

Evolutionary psychology, the field in which both Mr. Wright and Dr. Henrich operate, is "a very new field" that has been strongly criticized by feminists, criticized for relying on assumptions drawn from the study of primates (or only certain primates potentially not as reflective as others of human behaviour), criticized for relying on a theory of parental investment which departs from the experience of human foraging societies (where food was shared widely, for example, not simply with biological children), criticized for disregarding the costs entailed in seeking multiple mates, and criticized for not taking into account social norms, competing (non-reproductive) values and the capacity for higher order reasoning. Further, as one commentator has noted, facets of human behaviour emphasized by evolutionary psychologists for other purposes, such as jealousy, would seem to offset at a practical level any male ability to accumulate mates; lost in this narrative, even on evolutionary psychology terms, would be the concept of jealousy by one spouse as a barrier to permitting the accumulation of additional spouses by the other.

36. This is an odd afterthought, given that the Amicus qualified Dr. Shackelford as "an expert in evolutionary psychology"⁹ the area he now claims is frail and wrought with controversy.

⁷ Transcript Day 13, p. 32, ll. 5-16.

⁸ The Amicus's main attack on evolutionary psychology as a field is contained in a single sentence describing 5 criticisms (para. 392). It is impossible to check the sources involved, because these supposed criticisms are not individually footnoted, but rather a single footnote is provided for all. There is good reason to doubt the helpfulness of this footnote, as one book cited as criticism of the field, the very recent *Sex at Dawn: the Prehistoric Origins of Modern Sexuality* is, (as the title suggests), is itself a work of evolutionary psychology (albeit one that reaches somewhat novel conclusions about human sexuality).

⁹ Transcript Day 13, p.6, ll. 22-26.

37. But the main point is this: None of the criticisms described here was put to Drs. Shackelford or Henrich. Indeed, the Amicus made repeated admiring references to Dr. Shackelford's prominent status as a leading (in fact pioneering) evolutionary psychologist, and his publications in the field, when taking him through his impressive resumé. The principles of evolutionary psychology underlie all of Dr. Shackelford's work on domestic violence in monogamous relationships upon which the Amicus continues to rely. They, like Dr. Henrich's psychological evidence, went into the record unchallenged.

38. The Attorney respectfully submits that, on subjects where expert evidence or other sworn testimony has been given on contentious, centrally-relevant adjudicative facts, that evidence cannot be appropriately countered through reliance on Brandeis Brief material unless that material has been put to a witness under examination or cross-examination, particularly where the party in question had every opportunity to do so.¹⁰ All of the *ex post* criticisms of the evidence of Drs. Shackelford and Henrich, premised on published but untested and unaccepted literature should be ignored by this Court.

B. The Attorneys' Supposed Birthday "Attack"

39. The treatment of Pinker, Wright, and evolutionary psychology generally is just one example of the Amicus's liberal approach to dealing with the *evidence* in the Reference. With respect to his characterizations of the Attorney's *arguments*, these at times become very strained.

40. A good example of this is the 'birthday attack' that the Amicus attributes to the Attorneys. He writes that the "Attorneys have mounted... accusations that... [b]irthdays are not celebrated in polygamous families..." He then goes on to retort that he "has never heard that celebrating birthdays is mandatory in

¹⁰ All the Brandeis Brief materials were put in evidence prior to Dr. Henrich's testimony, almost all by the Amicus. Nor was the Amicus pressed for time in his cross-examination: Mr. Macintosh finished his cross-examination with a full day to spare.

Canadian society.” He concludes with the assertion that some “polygamists... do celebrate their children’s birthdays”.¹¹ This is all in service of showing the “prejudice” suffered by polygamists at the hands of the Attorneys, who are said to be exposed as “employing and perpetuating” “this kind of reasoning”. By paragraph 309 of the Amicus’s Submissions, the Attorneys’ ‘birthday attack’ has become an example of “the kind of reasoning” that “section 293 sets in motion”, because the provision “validates [polygamists] as a target for any variety of critical attacks”.

41. A dearth of birthday revelry has never been a polygamy-related harm alleged by the Attorney or by Canada justifying criminalization. Such deprivation is never mentioned in the opening statements or the closing submissions of either Attorney, nor did it feature in the earlier *Statement of Position*. It is possible that some polygamists do not celebrate birthdays for whatever reason (many monogamists do not either, of course). It is of no moment to this Reference.

42. The basis for the attribution of this “prejudiced attack” regarding birthdays to the Attorneys is explained by the Amicus at his paragraph 306(b):

This charge [that “Birthdays are not celebrated in polygamous families”] was put forward by a number of the AGBC’s witnesses, in response to counsel’s questioning, and was put to some of the FLDS witnesses by counsel for the Attorneys.

43. No references are given to the transcripts for this “charge... put forward by a number of the AGBC’s witnesses, in response to counsel’s questioning”, nor are there references given to the transcripts where the “charge... was put to some of the FLDS witnesses by counsel for the Attorneys”.

¹¹ Amicus’s Closing Submissions, p. 124, para. 306.

44. A search of each day's transcript for the term "birthday" demonstrates that *no* witness for the Attorneys ever "put forward" the "charge" that birthdays were not celebrated in polygamous families, either "in response to counsel's questioning" or otherwise. A number of the AGBC's witnesses¹² (and one other¹³) described the observance of birthdays in various ways in the course of their evidence in direct, though even then not in response to any birthday-related question from the Attorneys. It does not appear from the transcripts that any witness for *any* party levelled the "charge" in question.¹⁴

45. As for the second of the Amicus's assertions, that questions were put by the Attorneys to "some of the FLDS witnesses" regarding the celebration of birthdays, there appears to have been precisely one instance of anything like this: a question of Witness 4 which was one of a series used to establish that she and members of her family would be aware of one another's ages (something of obvious foundational relevance given subsequent revelations).¹⁵ That witness confirmed that birthdays were "celebrated" in her family, though she did not like to use that particular term. Again, there is no suggestion by counsel that birthdays were *not* celebrated by polygamists. The point of the question put to Witness 4 was to establish that they *are*.

¹² Paula Barrett, Transcript Day 17 pp. 42-43; Kathleen Mackert, Transcript Day 10, p. 95; Howard Mackert, Transcript Day 14 p. 87; Carolyn Jessop, Transcript Day 20, p.20.

¹³ Alina Darger, under direct examination by Mr. Wickett, Transcript, Day 24 p. 60.

¹⁴ Although Kathleen Mackert did describe fairly perfunctory celebration as an element of her austere upbringing in 1950s Short Creek (Transcript Day 10, p. 95).

¹⁵ Transcript Day 27, pp. 9-10. The question assisted in laying the foundation for subsequent inquiry regarding the age of Witness 4's sister-wife at the time of her marriage (she, it turns out, was just fifteen when married; Witness 4 was seventeen at the time), the age of her husband at relevant times, and the timing of the births of the witness's and her sister-wife's children (both were pregnant while still children). Having acknowledged that birthdays were known and celebrated (and having answered other questions establishing that members of each family knew each other's life details quite intimately), the witness would then be invited to share her knowledge of these issues. This is elementary cross-examination technique and the questioning was conducted, the Attorney submits, in a wholly respectful manner. The only other question posed regarding birthday celebrations was asked in direct by Ms. Horsman of Truman Oler (the Attorney's witness), who responded with testimony recalling "birthday breakfasts" and cake in his youth (Transcript Day 23, p. 13). To suggest that these two questions constitute an "accusation" that "birthdays are not celebrated" by polygamists is more than a stretch. At the very least, it shows that the Amicus might be seeing sinister "prejudice" in every flickering shadow.

46. It is a rudimentary, indeed trite, legal principle that counsel's questions are not evidence before the Court of anything, and surely least of all of a section 15 *Charter* breach. But the Amicus's reliance on this imagined 'birthday attack' on polygamists (we are assured by the Amicus that there are countless more unidentified but similar "attacks"¹⁶) reveals the weakness that undermines so many of his most emphatic assertions.

47. The Amicus's assertions with respect to Dr. Henrich's evidence, his use of articles to support *ex post* criticisms timorously avoided at trial, and his characterization of the Attorney's position on the celebration of birthdays all suggest that the reader should be cautious before accepting at face value statements made in his Closing Submissions, and thorough in reviewing any sources offered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th Day of March, 2011.



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¹⁶ The Amicus refers at para. 307-8 to questions of a long-time FLDS member regarding the history of higher-education attainment of Bountiful students (a clearly relevant issue) to be "prejudicial", "demeaning", "troubling", and "disturbing", further evidence of section 15 discrimination in the Amicus's view. This cross examination of witness #2 is, in the Amicus's view, "the clearest example of the Defenders' prejudiced attacks on polygamists".