File 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

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Part 1: Introduction

1. Section 293 of the *Criminal Code* is constitutionally valid when it is read down to apply to exploitative polygamy. The constitutional analysis requires an assessment of whether the practice of polygamy in Canada violates the equality rights of women and girls. The evidence tendered at this Reference demonstrates that the practice of polygamy causes harm to women and girls. Thus West Coast LEAF answers the reference questions this way:

(a) Question 1: Section 293 of the Criminal Code is consistent with the *Charter* . In the alternative, any breach of *Charter* rights is justified under section 1.

(b) Question 2: Section 293 must be read down such that the prohibition applies to polygamists who exploit women and girls.

2. When read down to apply to exploitative polygamy, section 293 applies only to those polygamists who exploit women and girls and does not apply to the party being exploited. While relationships involving multiple spouses are not inherently exploitative, polygamy as it is predominantly practiced is logically and actually associated with harm to women and girls and as such, compromises their right to equality.

3. We have avoided exhaustive references to the evidence and assessments of it as that has been carefully canvassed by the Attorneys General of B.C. and Canada. Rather, this submission will focus on concepts that we submit are relevant to the constitutional assessment of section 293. We address first the relationship between the principle of constitutionality and reading down as a tool to avoid constitutional infringement. Next, we turn to the role of international and comparative law in determining the constitutionality of section 293. We then turn to a discussion of the meaning of exploitation and how it can be incorporated to preserve section 293. We move to our submission that section 293 does not violate section 2(a), 7 or 15 of the *Charter.* We conclude with our alternative submission, that if a breach be found, it is nonetheless justified under section 1 of the *Charter*.

Part 2: Interpretation of section 293

i. Reading down and the principle of constitutionality

4. West Coast LEAF submits that section 293 of the *Criminal Code* should be read down to only apply in exploitative circumstances, pursuant to the principle of constitutionality.

5. The principle of constitutionality is a rule of construction that applies to all constitutional analyses[1]. The principle of constitutionality is the proposition that "if legislation is amenable to two interpretations, a court should choose the interpretation that upholds the legislation as constitutional because the courts must presume that Parliament intended to enact constitutional legislation and strive, where possible, to give effect to this intention."[2] The principle is alternately framed as a presumption[3].

6. In *Bedford v. Canada (Attorney General)* [4], the applicants sought a declaration that certain prostitution related *Criminal Code* offences were unconstitutional and of no force and effect. Himel J. summarized the general approach to *Charter* analysis and said this:

> It is well-established that courts are to take a generous, purposive and contextual approach to *Charter* interpretation. [citations omitted]
>
> *In Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), (2000)*, 49 O.R. (3d) 662, [2000] O.J. No. 2535 (S.C.J.), affd (2002), 57 O.R. (3d) 511, [2002] O.J. No. 61 (C.A.), affd [2004] 1 S.C.R. 76, [2004] S.C.J. No. 6, 2004 SCC 4, McCombs J. summarized the general approach to constitutional analysis, at paras. 37-39 (S.C.J.):
>
>> Constitutional analysis must proceed with the legislative purpose in mind and in its broader social and political context: *R. v. Mills*, [1999] 3 S.C.R. 668 at 714-15, 139 C.C.C. (3d) 321. Courts must presume that Parliament intended to act constitutionally, and give effect to this intention where possible: *Slaight Communications Inc.*

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[1] *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at para.25 **[JBA tab 17]**.

[2] Lamer. C.J. dissenting in part in *R. v. Mills*, [1999] S.C.J. No. 68 at para.56.

[3] *Husky Oil Operations Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [1995] 3 S.C.R. 453 at para.81.

[4] *(Attorney General)*, 2010 ONSC 4264 at paras.214-5.

> *v. Davidson*, [1989] 1 S.C.R. 1038 at 1078; *R. v. Mills*, supra, at 711.
>
> It is irrelevant that [the impugned provision] of the *Criminal Code* was in place long before the *Charter of Rights and Freedoms*. Parliament has chosen to leave it intact. If possible, therefore, the section must be construed so that it meets constitutional criteria.
>
> The specific constitutional questions raised by this case should be considered with the history and purpose of the legislation in mind. Further, the issues should be viewed in the light of the expert evidence gathered by the parties, and in the current social, political and legal context.

7. "Reading down" is a tool of constitutional interpretation whereby the Court gives a statute a narrow interpretation in order to avoid a constitutional infringement that might otherwise arise on the face of the law. Reading down thereby relies on the principle of constitutionality for its operation.

8. Insofar as there is no requirement for the Court to hold that a provision is unconstitutional before reading it down, it may be misleading to characterize "reading down" as a remedy. Reading down does not require a holding of invalidity and is a mandatory technique of interpretation rather than one of judicial amendment, which is distinct from the remedy of reading in[5].

9. The principle of constitutionality is equally applicable in the *Charter* and federalism contexts. In the context of cases concerning the division of powers between governments, the principle can be used to support the upholding of a law that has been enacted by one level of government. In the *Charter* context, this principle does not necessarily accord the government with greater leeway to legislate; rather, the practice of reading down legislation in accordance with the principle of constitutionality may be used to uphold individual rights against the state[6]. In other words, the principle of constitutionality in the *Charter* context supports two key constitutional goals: an appropriate jurisdictional divide between the judicial and legislative branches and the upholding of individual rights. In determining the appropriate remedy or interpretive tool,

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[5] Hogg, Peter. Constitutional Law of Canada, 1998. Scarborough: Carswell Thomson Professional Publishing, 1998, at section 37.1(b)).
[6] Hogg, Peter. S.35.5.

the Supreme Court of Canada in *Schachter* noted that "respect for the role of the legislature and the purposes of the *Charter* are the twin guiding principles"[7].

10. The principle is a "policy of restraint" that reflects judicial respect for parliamentary supremacy and the appropriate division of powers[8]. In certain circumstances, reading down is the constitutional principle that constitutes the least intrusion into the role of the legislature, and it is only in these cases that reading down should be applied[9].

11. Where such requirements are met, the Court's legislative interpretation may deviate from the plain meaning or clear intent of the legislation[10]. In *Ontario v. Canadian Pacific Ltd.*, Lamer C.J. noted in dissent that:

> In my view, therefore, the presumption of constitutionality can sometimes serve to rebut the presumption that the legislature intended that effect be given to the "plain meaning" of its enactments [...] As I stated in [*Schachter*] (at p. 715), "respect for the role of the legislature and the purposes of the *Charter* are the twin guiding principles" when crafting a remedy under s. 52; in my view, they also provide guidance when interpreting legislation in light of the presumption of constitutionality. In this latter context, the former principle imposes a requirement that any alternative interpretation adopted in preference to the "plain meaning" must itself be one that is reasonably supported by the terms of the legislation. As I observed in *Schachter* at pp. 708-9:
>
>> Where the choice of means is unequivocal, to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain.
>
> Thus, merely invoking the presumption of constitutionality does not give a court complete freedom to depart from the terms of a statute employed by the legislature. Rather, the presumption is simply a factor that on some occasions tips the scales in favour of one interpretation over another construction that, in the absence of this consideration, would appear to be the most strongly supported by the rules of statutory construction. If the terms of the legislation are so unequivocal that no real alternative interpretation exists, respect for legislative

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[7] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at para.77
[8] *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at para.70.
[9] *Baron v. Canada,* [1993] 1 S.C.R. 416 at para.56 (dealing with the constitutionality of certain search and seizure provisions of the *Income Tax Act*); *R. v. Grant,* [1993] 3 S.C.R. 223 at para.37 (dealing with section 10 of the *Narcotic Control Act* which authorized warrantless searches in certain circumstance).
[10] *Baron* at para.56.

> intent requires that the court adopt this meaning, even if this means that the legislation will be struck down as unconstitutional[11].

12. That said, Parliament should not be attributed with an intention it did not have[12], and reading down cannot amount to a judicial rewriting of the legislation[13]. The presumption of constitutionality can be rebutted by a preponderance of evidence of the invalid purpose of the legislation[14]. The courts can look to both purpose and effects in this assessment:

> Where the effects of the impugned legislation are contrary to the invalid purpose alleged by the *Charter* claimant, a court should weigh the evidence carefully before concluding that the purpose is indeed invalid. In light of the presumption of constitutionality, it is fitting for a court to look for the existence of any such beneficial effects before ruling that the purpose of a law is contrary to the *Charter*. [15]

The principle of constitutionality applies where both competing interpretations are reasonably open to the Court[16].

13. Reading down is warranted only where:

(a) (i) the legislative objective is self-evident, and reading down would constitute a lesser intrusion on that objective than striking down the legislation;

(b) (ii) the means chosen by the legislature is not so unequivocal that reading down would unacceptably intrude into the legislative sphere; and

(c) (iii) reading down would not impact on budgetary decisions to such an extent that it would change the nature of the legislation at issue[17].

14. West Coast LEAF submits that section 293 is reasonably open to the interpretation that it criminalizes polygamy insofar as the practice of polygamy exploits women and girls. This interpretation finds the appropriate balance between deference to Parliament and the fulfillment of individual rights. When read down section 293

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[11] *Ontario v. Canadian Pacific Ltd,* [1995] 2 S.C.R. 1031 at para.15.**[JBA tab 21]**
[12] *Osborne* at para.70.
[13] *R. v. Heywood,* [1994] 3 S.C.R. 761 at para.71. **[JBA tab 26]**
[14] Cory and Iacobucci JJ in dissent in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 at para.76.
[15] Dissent in *Delisle* at para.102
[16] *Law Society of British Columbia v. Mangat,* [2001] 3 S.C.R. 113 at para.66.
[17] *R v. Heywood*, [1994] 3 S.C.R. 761 at para.72, citing *Schachter.* **[JBA tab 26]**

protects individual rights rather than overriding them by limiting its potential infringement of the religious rights of polygamists at the same time as fulfilling the equality rights of women and girls in exploitative polygamous relationships.

15. When section 293 is read down, it does not capture polyamory, as defined at paragraphs 13 and 14 of the "Opening Statements on Breach" by the Canadian Polyamory Advocacy Association ("CPAA"). Rather, CPAA defines polyamory as relationships based on a practice of equality and self-realization[18]. The law does not prohibit one from having multiple spouses per se; rather, it prohibits the exploitative practice of polygamy.

16. In this case, all the requirements for reading down have been met pursuant to the *Heywood* Test: (a) reading down is the appropriate constitutional tool because it constitutes a lesser intrusion on the objective of parliament than striking down the legislation; (b) the choice of means used by the legislature is not so unequivocal that reading down would unacceptably intrude into the legislative sphere; and (c) there is no evidence that such an interpretation would have a significant impact on budgetary decisions.

17. In interpreting section 293, the Court must be guided by the principle of constitutionality in order to preserve the proper division of powers and respect for the purposes of the *Charter*. The Court must select an interpretation that is constitutionally valid where such an interpretation, as here, is reasonably open to the Court.

ii. Impact of international and comparative law

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[18] CPAA "Opening Statement on Breach", paras. 13 and 14:

> 13 "Polyamory" is the practice of having emotionally intimate, sexual relationships within groups of three or more people, where at least one person in the group has more than one emotionally intimate, sexual relationship at a time and where all members of the group formally or informally adopt these principles:
>
> a) men and women have equal rights in establishing the configurations of the groups; no gender has privileges with respect to intimate relationships that the other gender lacks; and
>
> b) no sexual orientation is regarded as superior to any other.
>
> 14 Conjugal polyamory refers to polyamorous relationships where three or more of the parties in the relationship live in the same household.

18. The Attorney General of Canada writes an extensive submission about the increasing global trend to criminalize the practices of polygamy because of the harms associated with it, especially the harms to women's dignity and equality. West Coast LEAF agrees with the AGC that the international perspective is relevant to the Court's consideration of the constitutionality of section 293.

19. International law prohibits exploitative polygamy and this prohibition is relevant in two respects. First, domestic law should be interpreted in light of international law principles. Second, as a leader in the area of international human rights law, Canada should not be seen to lead the way in decriminalizing this activity which the international community has found to be contrary to women's equality.

20. Technically, international treaties are not part of Canadian law until they have been implemented by statute. Nevertheless, the values manifested in international human rights law help inform the contextual approach to statutory interpretation and judicial review[19]. In addition, international human rights law is a "critical influence" on defining the scope of *Charter* rights[20].

21. Canada is a signatory to numerous international conventions directed towards the elimination of discrimination against women, the promotion of the equality rights of women, and the protection of children. While these international treaties do not explicitly cite a prohibition against "polygamy" or "polygyny" [21] per se, their provisions speak to equality in marriage and have been increasingly interpreted to ban polygamy. Canada is obligated to take all appropriate measures in a positive way to implement these conventions. [22] Of significance here are these international conventions:

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[19] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras.69-70. See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at para. 23,**[JBA tab 48]** *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 750 and 790-91; *R. v. Zundel*, [1992] 2 S.C.R. 731 at para. 160; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-70; *U.S.A. v. Burns*, [2001] 1 S.C.R. 283 at para. 88; *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paras. 175-180 **[JBA tab 37]**; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 46; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 at para. 69; *Victoria (City) v. Adams*, 2009 BCCA 563 at para. 35; *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 at para.90 **[JBA tab 9]**.

[20] *Baker* at para.70.

[21] Testimony of Dr. Rebecca Cook, Day 16, 6.01.11, p. 51 (30-36).

[22] Testimony of Dr. Rebecca Cook, Day 16, 6.01.11, p. 32 (2-14), p. 43(9-19),

(a) the Convention on the *Elimination of all forms of Discrimination Against Women (CEDAW)*;

(b) the *International Covenant on Civil and Political Rights (ICCPR)*;

22. As described in the testimony of Dr. Cook, if Canada failed to enact a prohibition against exploitative polygamy, that failure would constitute non-compliance with Article 2[23] in combination with Article 16[24] of *CEDAW* as elaborated through General Recommendation 21[25], as well as non-compliance with Article 5[26]. Significantly,

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[23] Article 2
States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

[24] Article 16
1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
(a) The same right to enter into marriage;
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) The same rights and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

[25] Ibid., p. 42-43 (40-47, 1-8)

[26] Article 5

Canada has not exempted itself from these international treaties or the general comments by making "reservations" to CEDAW[27].

23. Both the CEDAW Committee (the UN committee of experts charged with enforcement of the *CEDAW*) and the Human Rights Committee (the UN committee of experts charged with enforcement of the *ICCPR*) have issued General Comments calling for the prohibition of polygamy on the basis that it offends the dignity of women and, thus, violates women's equality.

24. The Human Rights Committee states in General Recommendation 28:

> (5) Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. [...] States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. States parties should furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardize, or may jeopardize, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors.
>
> ...
>
> (24) It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist[28].

25. The CEDAW Committee states at General Recommendation 21:

> (14) States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with

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States Parties shall take all appropriate measures:
(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

[27] Testimony of Dr. Rebecca Cook, Day 16, 6.01.11, p. 44-45 (47, 1-15).

[28] HRC General Comment No. 28 at paras. 5 and 24 [emphasis added]: http://www.unhchr.ch/tbs/doc.nsf/0/13b02776122d4838802568b900360e80. Article 3 of the ICCPR reads: "The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention. [29]

...

(18) Harmful traditional practices, such as female genital mutilation, polygamy, as well as marital rape, may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases. [30]

26. General Comments which interpret the treaties and cite polygamy as a discriminatory practice do not have the force of the rule of law. However, those comments transcend mere "guidance": they help determine the content and scope of a treaty article. [31] They become binding as they are used and, thus, have the force of law over time. [32] It is respectfully submitted that they cannot be ignored when considering the constitutionality of the prohibition against polygamy in this case. Significantly, these interpretative comments noting the discriminatory practice of polygamy reflect consistent international trends and provide evidence of international customary law. Again, Canada is bound by the treaties and has a positive obligation to take all appropriate measures to implement the provisions of the treaties. [33]

27. The harms associated with polygyny are reflected in international human rights law, including customary international law. Dr. Cook testified that, "the general conclusion with respect to state practice in *opinion juris* is....the dominant practice that is now common among states is to prohibit polygyny either by criminal or family law

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[29] CEDAW General Recommendation No.21 at para.14 [emphasis added]: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. See also General Comment No.27 at para.28. Article 5(a) of the CEDAW reads: State Parties shall take all appropriate measures...[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

[30] CEDAW General Recommendation No. 24 at para.18 [emphasis added]: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24

[31] Ibid., p. 22 (3-6).

[32] Testimony of Dr. Rebecca Cook, Day 16, 6.01.11, p. 20(2-31,), 22(16-20).

[33] Testimony of Dr. Rebecca Cook, Day 16, 6.01.11, p. 20(2-31).

provisions". [34] It should be noted that a majority of states in the world prohibit polygyny through criminal prohibitions of polygyny or bigamy. [35]

28. Evidence of dominant state practice, particularly among comparable Western democracies, provides a yardstick by which to measure Canadian law. In *United States of America v. Burns,* the unanimous Court relied on evidence of international trends in the context of the death penalty[36]. The Court wrote:

> The existence of an international trend against the death penalty is useful in testing our values against those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own. The United States (or those parts of it that have retained the death penalty) is the exception, although of course it is an important exception. Third, the trend to abolition in the democracies, particularly the Western democracies, mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada.

29. Of note, numerous states have prohibited exploitative polygamy in recent years, including:

(a) In Benin, the Constitutional Court determined that polygyny was outlawed on the basis that such a prohibition was consistent with its constitution and, in particular, its constitutional guarantee of equality of men and women.[37]

(b) The Australia Law Reform Commission refused to recommend the recognition of the legal status of polygyny in 1992 because it offended women's rights.[38]

(c) Polygyny has been outlawed in France, Turkey, and Tunisia (amongst other states).[39]

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[34] Testimony of Dr. Rebecca cook, Day 16, 6.01.11, p. 12 (29-38).
[35] Ibid., p. 26 (25-32)
[36] *United States of America v. Burns*, [2001] 1 S.C.R. 283 at para.92; see also para.128.
[37] Cook, Day 16, p. 26 (35-45); Exh. 42, Cook Affidavit, filed 16.07.10, para. 76 ; *Décision DCC 02-144*, Benin Constitutional Court (23 December 2002)
[38] Cook, Day 16, p. 27 (12-19), p. 38 (32-46); Exh. 42, Cook Affidavit, filed 16.07.10, paras. 81, 82, 83,; cited in Cook: Australian Law Reform Commission, *Multiculturalism and the Law*, Final Paper - ALRC 57 (Sydney: Australian Law Reform Commission, 1992)

(d) In Mauritius, the decision of *Bhewa v. The Government of Mauritius* upheld the prohibition on polygamy, applying the ICCPR.[40]

(e) In Indonesia, the decision of *M Insa, S.H.,* Decision Number 12/PUU-V/2007, (The Constitutional Court of the Republic of Indonesia) (2007) held that the judicial and spousal permission requirements for polygyny were reasonable and constitutional limits on freedom of religion.[41]

(f) In the United States, several decisions deal with related matters:

(i) In *State of Utah v. Green*, a bigamy conviction was upheld despite a freedom of religion claim;[42]

(ii) In *Bronson v. Swenson*, the refusal to grant a marriage license was permitted, despite a free exercise claim;[43]

(iii) In *State of Utah v. Holm* a bigamy conviction was upheld against a free exercise claims.[44]

30. West Coast LEAF argues that such trends create international customary law[45] —all of which prohibit the practice of polygamy, either wholly or insofar as such practice is exploitative. Regardless of the extent of the prohibition, the concern of international law and comparative jurisdictions is with ensuring that women's equality is not compromised by the practice of polygamy. Should Canada not take positive steps to ensure the prohibition of exploitative polygamy, it would be acting contrary to this significant trend in international human rights law. The domestic legalization of polygamy or the absence of laws which prohibit exploitative polygamy is contrary to international law, as revealed by both the Conventions to which Canada is a signatory and international trends amounting to customary international law.

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[39] Cook, Day 16., p. 27-28 (21-47, 1-9; Exh. 42 Cook Affidavit, filed 16.07.10, paras. 75, 77, 78, 79, 80, 84, 90

[40] Cook, Day 16, p. 28 (17-24); Exh. 42, Cook Affidavit, filed 16.07.10, para. 217; cited in Cook: Law Reports of the Commonwealth [1991] LRC (Const) at 309.

[41] Exh, 42, Cook Affidavit, filed 16.07.10, p. 91; *M. Insa, S.H.*, Decision Number 12/PUU-V/2007 at paras. 4.1-4.3..

[42] Exh. 42, Cook Affidavit, filed 16.07.10, p. 92, citing *State of Utah v. Green*, 2004 UT 76

[43] Exh. 42, Cook Affidavit, filed 16.07.10, p . *92* citing *Bronson v. Swensen,* 2005 U.S. Dist. LEXIS 2374 (D. Utah 15 February, 2005)

[44] Cook Affidavit, filed 16.07.10, p. 92 citing *State of Utah v. Holm* 2006 UT 31.

[45] Ibid., p. 13 (22-34)

iii. Meaning of exploitation

31. The practice of polygamy violates women's fundamental rights to autonomy and equality and, as practiced in communities like Bountiful, is directly connected with the abuse and exploitation of women. Determining whether polygamist conduct constitutes exploitation and is hence criminal depends on an assessment of the totality of the circumstances presented. This assessment is guided by two fundamental notions of criminal law interpretation: (1) consideration of the underlying purpose of a particular criminal law and (2) recognition of the familiarity of the concept of exploitation in criminal law jurisprudence.

32. We discuss the purpose of criminal law more fully in the section 7 *Charter* analysis below. However, the purpose of a particular criminal law is also relevant when considering the concept of exploitive polygamy. Even in the non-constitutional context when addressing interpretation of the *Criminal Code* provisions, the court may consider the underlying purpose of the criminal law in a general sense. In *R v. Hinchey*[46], Justice L'Heureux-Dube examined the proper interpretation of section 121(1)(c) [corruption of government official]. In interpreting section 121, she looked first at the proper scope of the criminal law as considered by both academics and jurists. Justice L'Heureux-Dube cited Mewett & Manning on Criminal Law (3rd ed. 1994), at pp. 16-17, and explained:

> . . . the essence of criminal law is its public nature. A crime is, in fact, not a wrong against the actual person harmed, if there is one -- the victim as he may be called (although it may also and coincidentally be a civil wrong against him) -- but a wrong against the community as a whole. The prevention -- or lessening, since total prevention is not possible -- of crime cannot be left to an individual's choice but is the responsibility of any member of the community and, in particular, those who represent the state -- the police or the prosecuting authorities. [Emphasis added]

33. Justice L'Heureux-Dube's remarks in *Hinchey* were made in the non-constitutional context as the *Charter* was not engaged. However, the significance of the

[46] *R v. Hinchey,* [1996] S.C.J. 121

public nature of criminal law is not diminished when considering the proper interpretation of a particular criminal law in the constitutional context. [47]

34. Justice Sopinka also recognized the impact of certain crimes on the community as a whole when considering the obscenity provisions in Butler:

> 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 section 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[48]. [emphasis added]

35. The purpose of criminal law, while aimed at wrongs to society as a whole, is rooted in harm rather than morality. The degree of harm required to attract criminal sanction is addressed in *R. v. Butler*:

> The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. [49] [emphasis added]

36. The harm analysis is further elaborated upon in *R v. Labaye*. Only behaviour that violates fundamental values, such as autonomy, equality, liberty and human dignity, as reflected in the Constitution or similar fundamental law will amount to harm that

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[47] *R v. Malmo-Levine* at para. 77 **[JBA tab 31]**
[48] *R v. Butler, supra*, at para. 85 **[JBA tab 24]**
[49] *R. v. Butler* at para.59.**[JBA tab 24]**

incurs criminal sanction.[50] The Court elaborated on the role of constitutional values in understanding the nature of harm and the role of criminal law in preventing such harm:

> The first step is to generically describe the type of harm targeted by the concept of indecent conduct under the *Criminal Code*. In *Butler* at p. 485 and *Little Sisters at* para. 59, this was described [page742] as "conduct which society formally recognizes as incompatible with its proper functioning".
>
> Two general requirements emerge from this description of the harm required for criminal indecency. First, the words "formally recognize" suggest that the harm must be grounded in norms which our society has recognized in its Constitution or similar fundamental laws. This means that the inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its laws and institutions, has recognized as essential to its proper functioning. Second, the harm must be serious in degree. It must not only detract from proper societal functioning, but must be *incompatible* with it.
>
> ...
>
> Reference to the fundamental values of our Constitution and similar fundamental laws also eliminates types of conduct that do not constitute a harm in the required sense. Bad taste does not suffice: Towne Cinema, at p. 507. Moral views, even if strongly held, do not suffice. Similarly, the fact that most members of the community might disapprove of the conduct does not suffice: Butler, at p. 492. In each case, more is required to establish the necessary harm for criminal indecency. [51]

37. Thus the underlying purpose of a particular criminal law is relevant to its interpretation. Prohibition of the practice of polygamy is analogous to prohibitions on obscenity. Both concern activities that are not inherently harmful, but are harmful when practiced in an exploitative manner. While the prohibitions may be both rooted in Victorian morality, both have evolved into state regulation of harmful conduct. Both activities (that is, pornography and the practice of having multiple simultaneous spouses), generally speaking, contain a spectrum spanning from healthy human sexuality to exploitative power relationships, and the criminal law plays an important role in prohibiting exploitative forms of that activity.

38. Section 293 serves the public interest by protecting individuals from real and probable harm. Society as a whole has an interest in condemning such harmful

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[50] *R. v. Labaye,* [2005] 3 S.C.R. 728 at paras.33 and 35. **[JBA tab 29]**
[51] *R. v. Labaye* at paras.28 to 30 and 37. **[JBA tab 29]**

consequences as flow from polygamy, as well as in maintaining a law that has at its heart the promotion of *Charter* rights and values. Women are devalued in society when the criminal law fails to protect their rights to equality and safety; such infringements compromise the human dignity of the victims of polygamous relationships, the women of Bountiful and Canadian women and girls more generally.

39. The second notion relevant to an assessment of whether polygamous conduct is exploitative and hence criminal requires a description of the meaning of exploitation and its incorporation into criminal law jurisprudence. Exploitation is used as an express element in some *Criminal Code* provisions, such as section 153 [sexual exploitation] and section 163 [obscenity]. Although not an explicit element of the offence, exploitation appears in the caselaw concerning section 212 [living on the avails of prostitution]. [52] We examine these three examples[53] to demonstrate the familiarity that the concept of exploitation has in criminal law and the role of exploitation in assessing whether certain polygamous conduct is criminal.

40. First, section 153, entitled "sexual exploitation" is a criminal offence used to protect young persons (defined as being 16 or 17 years old) from exploitation by someone in a position of trust or authority. The offence is predicated on either the accused being in a position of trust toward the young person, the young person being in a relationship of dependence with the accused or the accused being in a relationship with a young person that is exploitative of the young person. Section 153(1.2) sets out a list of situations wherein "a judge may infer that a person is in a relationship with a young person that is exploitative of that young person from the nature and circumstances of the relationship, including: (a) the age of the young person; (b) the age difference between the person and the young person; (c) the evolution of the relationship; and (d) the degree of control or influence by the person over the young person."

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[52] Living on the avails of prostitution: Section 212(1)(j); *R v. Grilo* [1991] O.J. No. 413

[53] Exploitation is used in other provisions of the Criminal Code. See for example section 279.01 [human trafficking provisions] stating: "For the purpose of section 279.01 and 279.03, a person exploits another person if they

(a) cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service; or

(b) cause them, by means of deception of the use or threat of force or of any other form of coercion, to have an organ or tissue remove."

41. Section 153 provides useful guidance in the polygamy context by specifying characteristics of a relationship that could constitute exploitation.

42. A second example of the criminal law's use of exploitation is found in section 163(8) [obscenity] where certain material is deemed to be obscene if "a dominant characteristic of [it] is the undue exploitation of sex." As established in *Butler* and *Little Sisters*, pornography can be both an important expression of female sexuality and an oppressive and violent expression against women's physical and psychological integrity.[54] In a society based on the fundamental principle of equality, Canadian criminal law has an important role in drawing the line between what is exploitation and what is freedom in both of these circumstances. Determining what is harmful or exploitative must be based on a contextual analysis of the available evidence, not on morality or majoritarian standards[55].

43. This analysis assists in assessing exploitation in the polygamy context by focusing on whether the conduct in question has a detrimental impact on the persons involved or the community as a whole.

44. A third example of the use of exploitation in criminal law is found in the judicial interpretation of the *Criminal Code* offence of living on the avails of prostitution. Although not expressly written into the section, the trier of fact is nonetheless required to consider exploitation in determining whether the charged relationship is parasitic and thus criminal. [56] In *R v. Grilo*, supra, the Ontario Court of Appeal dealt with the issue as

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[54] *Little Sisters* at para.48

[55] It is important to avoid the criticisms that befell the jurisprudence following *Butler* that the harm test is just morality dressed up in different garb. As noted in *Little Sisters* at para.59:

> It may serve repeating that the national community standard relates to harm not taste, and is restricted, per Sopinka J., at p. 485, to "conduct which society formally recognizes as incompatible with its proper functioning". The test is therefore not only concerned with harm, but harm that rises to the level of being incompatible with the proper functioning of Canadian society. The Canadian Civil Liberties Association (CCLA) argues that "for gays and lesbians erotica and other material with sexual content is not harmful and is in fact a key element of the quest for self-fulfilment" (factum, at para. 14). So described, the CCLA has defined the material safely outside the Butler paradigm. Butler placed harmful expression -- not sexual expression -- at the margin of s. 2(b).

[56] Section 212 (1)(j) provides:

(1) Every one who

(j) lives wholly or in part on the avails of prostitution of another person,

to what extent a person may derive benefits from living with a prostitute before that person can be said to be living on the avails. Justice Arbour, for the court, adopted, as an essential element of the offence, the requirement of a parasitic relationship and stated that the relationship is parasitic when there is an element of exploitation present.[57]

45. With respect to section 293, the intent of the legislation is the prevention of harm, an intent which protects the equality rights of women and girls, as will be discussed in more detail under the section 1 analysis below. The evidence shows that the underlying intent of section 293 was to prevent harm in much the same way as the pornography provisions did in Butler. The practice of having multiple partners can be an expression of diverse forms of family and sexuality that respects the individual agency of each member of the union or it can be a means to control women's sexual, reproductive and economic freedom. The assessment of the impugned relationship can be fairly undertaken by considering whether there exists an element of exploitation thereby moving the conduct from legitimate to criminal.

46. In this Reference, there was an overwhelming body of evidence establishing harm to women and girls and such evidence is fully described by the Attorney General of B.C. in his Closing Submission. Most compelling perhaps was the testimony of Dr. Beall when he was describing the psychological condition of those he treated at the Utah trauma centre. He struggled with an apt description of a "condition" that was

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> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[57] Arbour J.A. explained:

> The parasitic aspect of the relationship contains, in my view, an element of exploitation which is essential to the concept of living on the avails of prostitution. For example, when a prostitute financially supports a disabled parent or dependent child, she clearly provides an unreciprocated benefit to the recipient. However, in light of her legal or moral obligations towards her parent or child, the recipient does not commit an offence by accepting that support. The prostitute does not give money to the dependent parent or child because she is a prostitute but because, like everybody else, she has personal needs and obligations. The true parasite whom section 212(l)(j) seeks to punish is someone the prostitute is not otherwise legally or morally obliged to support. Being a prostitute is not an offence, nor is marrying or living with a prostitute. A person may choose to marry or live with a prostitute without incurring criminal responsibility as a result of the financial benefits likely to be derived from the pooling of resources and the sharing of expenses or other benefits which would normally accrue to all persons in similar situations.

common to those he treated and stated that the best way to describe it was "there is a climate and that climate is made up of a sense of danger that one is not safe. [58]"

47. We conclude this section by stating this. The determination of whether a particular polygamous relationship is exploitative will depend on a contextual analysis of all of the circumstances. A trial judge need not identify an exhaustive list of behaviour or conduct that constitutes exploitation. Indeed, determining whether the impugned conduct constitutes criminal polygamy would be difficult in the absence of a factual context. Here, Justice La Forest's statements in *R v. Audet* provide guidance:

> It will be up to the trial judge to determine, on the basis of all the factual circumstances relevant to the characterization of the relationship between a young person and an accused, whether the accused was in a position of trust or authority towards the young person. . . One of the difficulties that will undoubtedly arise in some cases concerns the determination of the times when the position or relationship in question begins and ends. It would be inappropriate to try to set out an exhaustive list of the factors to be considered by the trier of fact. The age difference between the accused and the young person, the evolution of their relationship and above all the status of the accused in relation to the young person will of course be relevant in many cases.[59] [Emphasis added]

48. The following is a non-exhaustive list of factors. The existence of one, some or all may tend to establish exploitative polygamy:

(a) Whether the community practices polygyny and not polyandry, as such a community creates inherent inequality by allowing husbands to take multiple wives but not wives to take multiple husbands. [60]

(b) Whether the age of marriageable females has been pushed down in the community to address the shortage of available females. [61]

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[58] Dr. Beall, December 2, 2010 (Day 8), p.43: 44-46

[59] [1996] 2 S.C.R. 171 at para.38. Section 153 criminalizes the sexual exploitation of a young person and has as an essential element that the offender be in a position of trust or authority towards a young person . . . or who is in a relationship with a young person that is exploitative of the young person.

[60] The evidence of Dr. Cook was particularly persuasive here where she described how asymmetry and patriarchal structure offends women's dignity and right to equality: Day 16, p. 12: 10-18; p. 17: 3-20.

[61] As referenced below, many witnesses testified that the demand for brides in polygamists communities drove down the age of the brides: Dr. Cook, Day 16, p. 24: 12-14; Dr. McDermott, Day 13 and 14, p. 49 – 53, 66-67; Witness No. 2; Witness No. 4.

(c) Whether there exists a wide age difference between the husband and wife as this results in power differential between a husband and wife and impacts on her ability to consent to marriage and sex.[62]

(d) Whether the female is a "young person" as defined in the *Criminal Code* at the time of marriage, as children under 16 years of age are not able to consent to sex except with their peers and are not able to consent to marriage at all. [63]

(e) Whether the marriage structure at issue concentrates the power in the household in the central male figure for decision-making, sexual control and economic power. [64]

(f) A consideration of the age of the wife at the time of first pregnancy as polygamy is connected to a mandatory requirement for women to have intercourse and produce children for their husband. In these circumstances, a woman's autonomy and reproductive freedom is curtailed.

(g) A consideration of the duration of the courtship or whether the union was an assignment based on short notice thereby severely restricting a woman's choice in the decision to marry and reproduce.

(h) Whether the female is economically dependent on the male and therefore economically vulnerable during the union and upon dissolution of the union.

(i) Whether the community is insular with little or non-existent access to alternative belief systems thereby disenabling women to make an informed choice about marriage as predominantly polygynous communities have a "need to provide an ever-increasing supply of willing younger girls [and that] requires mechanisms of indoctrination and normalization. [65]"

(j) Whether polygamy is institutionalized thereby fostering "structured sexual grooming" or "conditions of control" as described by Dr. Beall. [66]

(k) Whether the husband is in a position of authority or trust to the wife.

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[62] Also relevant to this factor of exploitation is the evidence of older husbands being more likely to exert control over their younger wives and this can foster a culture of obedience and subservience to the husband: Dr. Cook, Day 16, p. 11-13, 23;

[63] Section 150.1 of the *Criminal Code*; *Marriage Act*, R.S.B.C. 1996, C 282, ss. 28 and 29.

[64] Particularly relevant here was the evidence about a heightened risk that women will experience diminished reproductive control because of the need to comply with patriarchal structures and pressure within the community: Dr. Beall, Day 8

[65] AGBC Closing submission para. 169. See also Dr. Beall's testimony about adolescent cognitive development and how adolescents from the FLDS community are emotionally unprepared to give known consent but are, rather, a passive participant; December 2, 2010 (Day 8), p. 23: 16-18

[66] Dr. Beall, Day 8, p 24: 3; p. 33: 21-22

49. The above factors are not intended to be an exhaustive list of conduct that constitutes exploitation. A constitutional application of section 293 requires the trier of fact to consider the totality of the circumstances in determining whether the existence of none, one or some of these factors sufficiently establish exploitation and thus move a polygamous union from legitimate to criminal.

Part 3: Harms Associated With Polygamy

50. This Constitutional Reference is unique. The parties have endeavored to provide the Court with a wide range of expert and substantive evidence. That evidence is replete with the harms associated with polygamy, as practiced in most jurisdictions in the world. While the Challengers offer the more benign evidence of their witnesses, that picture of wholesome polygamy cannot stand. It is contradicted by the overwhelming evidence of civilians and experts alike. Clearly, caution must be exercised in examining the cross cultural evidence, and all evidence of harms must be examined within the applicable social and regional contexts. Nonetheless, the human experience of women and children in polygamous families presents certain similarities.[67]

51. Before turning to West Coast LEAF's consideration of the specific *Charter* provisions, we turn briefly to a discussion of harms associated with polygamy. It is respectfully submitted that evidence of harms is relevant at both the breach and section 1 stage of the analysis. The Attorneys of BC and Canada have provided a fulsome overview of the evidence of harm received during the Reference. The intention here is to compliment and highlight aspects of the evidence relevant to West Coast LEAF's position.

52. The asymmetry of polygamist (polyganist) unions, in which one man has multiple wives or women but not the reverse, offends women's dignity and right to equality.[68]

53. The unequal roles in polygamy are based on gender. It results in a skewed perception of gender roles and stereotypes.[69] This imbalance of gender roles becomes

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[67] Exh. 152, "Opinion-Polygamy and the Rights of Women", Status of Women Québec Report, December 2010 ("The Québec Report"), p. 2

[68] Dr. Cook, Day 16, p. 12(10-18); p. 17(3-20); Carolyn Jessop, Day 20, p. 54(3-38);

internalized in women and girls, as well as their children.[70] The imbalance has an impact on the self-esteem and self-perception of women and girls, reducing their ability to fully consider their choices in decision-making.[71]

54. The patriarchal structure of households permits the husband to exercise increased control over women and girls: physically, sexually, emotionally, and financially.[72]

55. Authoritarian male figures exercise rigid control in the community over women and girls.[73] A premium is placed on compliance with the norms and customs of the community. Such control makes rigid demands for obedience to male authority figures and the customs they deem important.[74] Geographic isolation, social isolation and insularity permit this control, facilitating the indoctrination of polygamist beliefs at home[75], in the community[76], at schools[77], and in religious instruction.[78] This exercise of control has been described by some as creating a "cult" or "cult-like" environment in which polygamy is mandatory for the elevation of the male authority figures.[79]

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[69] Jorjina Bennett, Day 17, p. 53(17-44), p. 64(17-19); Sara Hammon, Day 10, p. 68(35-42); Brent Jeffs, Day 15, p. 72(26-31); Teresa Wall, Day 10, p. 29(39-47);
[70] Dr. Cook, Day 16, p. 25(6-11) ; Dr. Henrich, Day 11, p. 26-27.
[71] Dr. Cook, Day 16, p. 18(4-21); pps. 19-20(31-47, 1)
[72] Paula Barrett, Day 17, p. 43(23-34), p. 44(30-33); Don Fischer, Day 21, p. 15(7-16; Carolyn Jessop, Day 20, p. 10(4-6, 40-43); Carolyn Jessop, Day 20, p. 30(23-28), p. 35(32-36); Kathleen Mackert, Day 10, p. 102(35-39); Mary Mackert, Day 19, p. 13(33-47), p. 14(29-30), p. 19(26-32)p.35(9-25); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p.192 (start l. 16); Teresa Wall, Day 10 (15);
[73] Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p. 15(start l. 13), p. 18(start l. 7)
[74] Brent Jeffs, Day 15, p. 70 (29-35), p. 71(10-13); Carolyn Jessop, Day 20, p. 4(7-12), p. 14(1-2), p. 17(30-35), p. 37(41-47); Howard Mackert, Day 14, p. 68 (13-26, 31-32), p. 70(2-9);
[75] Jorjina Bennett, Day 17, p. 58(14-25); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p. 165
[76] Richard Reams, Day 17, p. 15(10-16), p. 17(32-36);
[77] Jorjina Bennett, Day 17, p. 76(15-47); Carolyn Jessop, Day 20, p. 13(21-25);
[78] Howard Mackert, Day 14, p.88(20-27, 36-44), p. 89(9-13, 28-39); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p.191 (start l. 3)
[79] Brent Jeffs, Day 15, p. 77-78(24-22); Howard Mackert, Day 14, p. 90-91(1-47, 1-8); Teresa Wall, Day 10, p. 56(9-36); Exh. 152, the Québec Report, p. 25: "The Functioning of a Cult-like". Exh. 13, Brandeis Brief, "Life In Bountiful", Personal History-Three, p. 4348, 4349: "...people were controlled. The sad thing is that most people don't even realize this is happening....The leaders of the group used our ignorance to their advantage..."Exh. 13, Brandeis Brief, "Life in Bountiful", Personal History-Five, p. 4360: "Slowly, I started to face the fact that my faith and life had been in the grip of a cult"[79];

56. The ability to consent to polygamist practices, as well as the choice to continue or quit polygamous practices is greatly impacted by the control exercised by authoritative male figures; community pressures; and economic, social, and ideological constraints.[80]

57. Women and girls become used as "commodities" or resources[81], in which marrying girls and women are tools for social advancement and resource distribution. Women may be re-assigned to other husbands; children may be re-assigned to other families. Non-compliant women and children may be re-assigned to other husbands or families as punishment. [82]

58. Placement marriages designated by men, thereby denying women the choice of when and who to marry.[83] This creates a sexual aristocracy, in which male leaders and authority figures enjoy or feel entitled to the increased status and sexual access derived from placement marriages.

59. The phenomenon of child brides requires or encourages girls (under the age of 18) to enter unions.[84] The age of brides is driven down by the decreasing pool of

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Exh. 152, the Québec Report, p. 29: "Raised within the realm of the cult of polygamy and with no contacts with the outside world, these young women can only think through the prism of values transmitted through education and preaching, that predispose them to live in total self-sacrifice. According to the principles of polygamy, women must merely serve their husbands and have many children in order to please God and honor their community."

[80] Exh. 152, the Québec Report, p. 75. Also, at p. 75: "Experience clearly shows us that women rarely have the choice to refuse a polygamous husband or to prevent their husband from marrying other women"; Jorjina Bennett, Day 17, p. 60(18-24); Don Fischer, Day 21, p. 20(11-46), p. 22(2-43); Sara Hammon, Day 10, p.77-78(43-47, 1-9); Brent Jeffs, Day 15, p. 73(18-26), p. 77(14-15); Carolyn Jessop, Day 20, p. 5(36-38), p. 51(5-46); Ruth Lane, Day 15, p. 97-98(45-11); Mary Mackert, Day 19, p. 15(1-7);

[81] Don Fischer, Day 21, p. 25(17-36); Carolyn Jessop, Day 20, p. 55(39-44); Howard Mackert, Day 14, p.82(13-22); Kathleen Mackert, Day 10, p. 110(1-3);

[82] Don Fischer, Day 21, p. 17(4-18); Teresa Wall, Day 10, p. 25(30-33); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p. 168 (start l. 7); Teresa Wall, Day 10, p. 25-26(30-24), p. 39(5-11, 29-31), p. 40(28-29), p. 49(15-23);

[83] Sara Hammon, Day 10, p. 69(15-27); Kathleen Mackert, Day 10, p. 90(22-27), p. 99(30-31); Rowena Mackert, Day 10, p. 10(25-38); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p.47 (start l. 24), p. 50(start l. 18), p. 164(start l. 10); Richard Ream, Day 17, p. 11(22-35); Teresa Wall, Day10, p. 42(16—35)

[84] Jorjina Bennett, Day 17, p. 72(7-17); Carolyn Jessop, Day 20, p. 24(5-14); Howard Mackert, Day 14, p.73(24-39); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p. 184 (start l. 1)

marriageable women.[85] Girls who are under 16 years of age are not permitted to marry in BC, absent a court order.[86] This marriage placement usually occurs with the acquiescence or encouragement of parents.[87] More often than not, the men are strangers and the girls are given little time to meet and know the men before marriage.

60. As a result of the youthful age of brides, there is an increasing age difference between the youthful bride and the older husband.[88] This creates an unequal power difference in the relationship, where control is more easily exercised by the older male husband over the youthful bride.[89]

61. Given the importance placed on procreation in polygamist unions[90], women face diminished reproductive choices, which reduce their ability to choose when and how frequently to give birth.[91] This directly affects the reproductive health of women, the increased risk of mortality of women in childbirth, and the increased risk of infant mortality.[92]

62. Placement marriages also encourage and result in the early sexualization of young girls. Young girls are faced with increased sexual activity with their husbands.[93] This is particularly disturbing for girls aged 16 years and under, whom are unable to legally consent to sex unless with peers.[94] Such activity can be considered child abuse. Accordingly, this sexualization of young girls increases the occurrence of youth / teen pregnancy. Youthful child birth presents greater risks to the mother's health, as well as the child's health.[95]

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[85] Sara Hammon, Day 10, p. 75(19-29), p. 80(13-38), p. 81(24-39); Dr. Cook, Day 16, p. 25(12-14). ; Dr. Henrich, Day 11, p. ; Dr. McDermott, Day 13 & 14, p. 49-53, 66-67
[86] *Criminal Code, s. 150.1; Marriage Act*, R.S.B.C. 1996, C. 282, ss, 28 and 29.
[87] Mary Mackert, Day 19, p. 8(25-29); p. 31(6-26), ;
[88] Sara Hammon, Day 10, p. 76(38-47); Carolyn Jessop, Day 20, p. 18(6-47), p. 22(6-13); Teresa Wall, Day 10, p. 24-25(42-28);
[89] Carolyn Jessop, Day 20, p. 18(6-47), p. 20(12-14, 26-33), p. 23(20-26); Dr. Henrich, Day 11, pps. 49, 50, 51, 52, 53, 66, 67; Dr. Cook, Day 16, pps. 11-13, 23
[90] Don Fischer, Day 21, p. 25(17-36); Kathleen Mackert, Day 10, p. 89(4-14), p.91(24-39), p. 92(1-5) ;
[91] Jorjina Bennett, Day 17, p. 56(4-10); Howard Mackert, Day 14, p. 65(42-45); Teresa Wall, Day 10, p. 30(115-17); Dr. Beall, Day 8,
[92] Paula Barrett, Day 17, p. 44(38-41); Carolyn Jessop, Day 20, p. 28(8-16); p. 30(7-13);
[93] Howard Mackert, Day 14, p. 61(10-15, 23-29);
[94] *Criminal Code, s. 150.1; Marriage Act*, R.S.B.C. 1996, C. 282, ss, 28 and 29.
[95] Dr. Cook, Day 16, Day 16, 25;

63. The loss of choice of women regarding the accumulation of new wives further exacerbates feelings of female powerlessness. Women lose further control over their households, economic well-being, and emotional well-being.[96]

64. Competition and rivalries between women in polygamist unions can affect the physical, emotional and economic health of families.[97]

65. Women and children face negative reactions if they decide to leave their polygamist unions.[98] They can be ostracized from their community.[99] Because property and income rights may be designated to the husband or the community, women commonly experience economic difficulties[100], as well problems with child custody and access.[101] Polygamist women are usually not well equipped to deal with living outside of their polygamist community.

66. Many women and children describe the physical abuse of women and children, particularly in households with non-related family members.[102] Much of this abuse is rooted in the power and control exercised by the male household figure over their spouses and children[103].

67. Many women describe experiences of sexual abuse, as adults and as children.[104] This cannot be dismissed as personal deviations, not caused by polygamist unions.

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[96] Paula Barrett, Day 17, p. 39(17-33), p. 40(38-44); Jorjina Bennett, Day 17, p. 61(14-20), p. 62(15-47);
[97] Paula Barrett, Day 17, p. 41(21-28), p. 42(32-41), 51(40-47), 52(32-45); Jorjina Bennett, Day 17, p. 67(1-6); Sara Hammon, Day 10, p. 72(22-27); Ruth Lane, Day 15, p. 96(20-22); Howard Mackert, Day 14, p.66(29-36); Mary Mackert, Day 19, p. 6(12-31), 16(13-18, 29-40); Rowena Mackert, Day 10, p. 15(5-17); Teresa Wall, Day 10, p. 38(30-32);
[98] Jorjina Bennett, Day 17, p. 73(39-47); Carolyn Jessop, Day 17, p. 16(7-47); Mary Mackert, Day 19(28-47);
[99] Jorjina Bennett, Day 17, p. 67(19-35); Don Fischer, Day 21, p. 23(29-47);
[100] Paula Barrett, Day 17, p., 49-50(37-47, 1-3, 21-27); Sara Hammon, Day 10, p. 78(10-26), p. 76(31-47); Howard Mackert, Day 14,p. 52(5-10); Dr. Cook, Day 16, p. 24

[101] Jorjina Bennett, Day 17, p. 67(36-47), 70(41-44); Carolyn Jessop, Day 20, p. 39(36-39), p. 41(40-47); Mary Mackert, Day 19, p. 24(2-8); Rowena Mackert, Day 10, p.. 12(11-22, 20-44)
[102] Paula Barrett, Day 17, p. 42(16-26),); Jorjina Bennett, Day 17, p. 62(40-47), p. 63(5-10, 20-30); Sara Hammon, Day 10, p. 72(22-27); Brent Jeffs, Day 15, p. 65(19-40); Carolyn Jessop, Day 20, p. 48(13-35); Dr. Henrich, Day 11, p. ; Dr. Shackleford, Day 15; Dr. Beall, Day 8, p. ; Dr. Campbell, Affid. #2, paras. 46 & 48.
[103] Don Fischer, Day 21, p. 14(19-24); Carolyn Jessop, Day 20, p. 11(21-30);
[104] Paula Barrett, Day 17, p. 42(42-46); Sara Hammon, Day 10, p. 76(4-10), p. 85(10-22); Kathleen Mackert, Day 10, p. 87-33); Mary Macket, Day19, p. 4(40-47); Rowena Mackert, Day 10, p. 6(13-44); Dr.

Again, the power and control exercised by men over women and girls in polygamist unions creates an environment conducive to sexual abuse.

68. The failure to report physical and sexual abuse in polygamist communities is marked. Communities discourage such reporting, not seeking to draw the unwelcome of outsiders to the goings on in polygamist communities.[105] De-criminalization would not change this phenomenon. The need to conform, maintain community or religious status, and not offend male authority figures places the community members under greater pressure to informally deal with such issues (or, not to deal with such issues at all).

69. Women and children experience psychological and emotional problems as a result of living in polygamist unions.[106]

70. Impaired child development may occur for many reasons: skewed perception and internalization of gender roles and stereotypes; inability to obtain sufficient emotional and physical attention from fathers (or, in some cases, mothers)[107].

71. Women and girls moved across state borders, usually illicitly and surreptitiously in order to fill the demand for more brides.[108]

Part 4: Breaches

72. West Coast LEAF submits that section 293 does not breach *Charter* provisions and, in particular, does not breach sections 2, 7 or 15. The state has an obligation to uphold *Charter* equality, one of the fundamental values of Canadian society. To that end, section 293 provides important protection for the security and equality interests of women and girls.

Henrich, Day 11, p. ; Dr. Shackleford, Day 15; Dr. Beall, Day 8, p. ; Dr. Campbell, Affid. #2, paras. 46 & 48.

[105] Rowena Mackert, Day 10, p. 10(39-43), p. 11(6-20), p.

[106] Jorjina Bennett, Day 17 , p. 65-66(37-47,1); Sara Hammon, Day 10, p. 76(4-10), p. 83(9-19); Carolyn Jessop, Day 20, p. 25(4-11, 39-46); Kathleen Mackert, Day 10,p. 103(7-12), p. 104(6-17); Rowena Mackert, Day 10, p. 16(24-30,p. 17 (18-23); Dr. Beall, Day 8, p. ; Dr. Cook, Day 16, p. 23

[107] Sara Hammon, Day 10, p. 67(7-46), p. 76(4-10), p. 84(1-19); Brent Jeffs, Day 15, p. 76-77(45-13), p. 80 (18-38); Ruth Lane, Day 15, p. 92(42-45); Howard Mackert, Day 14, p. 55 (16-22), p. 58(11-14, 41); Kathleen Mackert, Day 10, p.93 (10-30); Mary Mackert, Day 19, p. 3(23-47); Dr. Beall, Day 8, p. 23: 16-18; Dr. Henrich, Day 11, p. ; Dr. Cook, Day 16, p. 25

[108] Evidence of Texas authourities, excerpts of Warren Jeffs' records; Teresa Wall, Day10, p. 40(15-23);

i. Section 2(a): Freedom of Religion

73. The protection for religious rights as found in section 2(a) does not go so far as to protect all activity done in the name of religion. West Coast LEAF submits that section 2(a) is not infringed by section 293 because the scope of the freedom of religion is limited where the impugned law prevents harmful activity and that is particularly so with respect to the overwhelming body of evidence of harm demonstrated in this Reference. Section 2(a) protects one's right to freedom of religion but it does not protect a "right" to exploit other people.

74. Evidence of the harms of polygamy is relevant at this stage of the analysis. Freedom of religion is not an absolute right; while beliefs are broadly protected, the manifestation of those beliefs into practice may be limited where it comes into conflict with the exercise of other rights, as described by Dickson J. in *R. v. Big M Drug Mart*:

> Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> ...
>
> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. [109] [emphasis added]

75. There is a distinction to be drawn between the protection afforded to religious beliefs and practices, the former being subject to more extensive *Charter* protections[110]. The Ontario Court of Appeal recently summarized the breadth of the freedom of religion protection contained in section 2(a) as follows:

> Supreme Court of Canada jurisprudence takes a broad and expansive approach to religious freedom: *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at

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[109] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at paras.95 and 123.**[TAB 23]** See also *Bruker v. Markowitz*, [2007] 3 S.C.R. 607 at paras.72-75.**[TAB 9]**

[110] *British Columbia College of Teachers v. Trinity Western University et al.*, [2001] 1 S.C.R. 772 at para.36. **[TAB 50]**

> para. 62. The protection afforded to religious freedom reaches both religious beliefs and conduct that is motivated by or manifests those beliefs. The protection afforded to religious belief is, however, considerably broader than the protection afforded to conduct manifesting that belief: *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, at para. 30. [111] [emphasis added]

76. The religious freedom protections contained in section 2(a) do not protect the "right" of polygamists to engage in exploitative polygamist relationships. This is particularly so in light of section 28 of the *Charter* which reads:

> Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

77. Polygamy in the context of Bountiful is an equality-harming manifestation of a religious practice, and therefore falls outside the protections afforded by section 2(a) of the *Charter*.

78. Moreover, in order to fall within the scope of section 2(a), religious beliefs must be genuinely held. While the Court cannot engage in theological debates into the validity of a particular belief or manifestation of a belief, the Court is required to inquire into the sincerity of religious belief[112]. Sincerity implies honesty, good faith and an absence of fictitiousness or capriciousness[113].

79. It is within the Court's mandate then to inquire into whether the rights holder has a genuinely held belief or whether that belief is the subject of coercion or manipulation. A belief may not be genuine where it is formed in an exploitative environment. Moreover, sincerity may be insufficient where objective circumstances show that the rights bearer was subject to exploitation in the development of that belief. The evidence shows that polygamy lends itself to exploitation, and that many women and girls are subject to extreme pressures to ensure their compliance with religious norms. Dr. Beall clearly spoke of the pervasive indoctrination and "climate of danger" which shrouded

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[111] *R. v. N.S.*, 2010 ONCA 670 at para.61.

[112] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para.51. **[TAB 49]**

[113] *Amselem* at paras.51-52.

some of his patients, who were subject to a tight network of control.[114] Many personal witnesses attested to similar circumstances while in polygamist communities.[115]

80. It is important in this respect to note that the rights holders before this Court in this Reference are not only those who practice polygamy as a matter of free and unencumbered choice, but also those who may be subject to the coercive force of a religious leadership that subscribes to authoritarian rule and entrenched patriarchy. The evidence and impact of this power imbalance is detailed above under the heading "Control and Lack of Choice".

81. The above submission is made with full regard to the *Multani* [116] decision and is not inconsistent with it. In *Multani*, the Court stated that the reconciliation of rights occurs at section 1 rather than within the section 2(a) analysis[117]. The weighing of the section 2(a) rights of exploitative polygamist husbands against the section 15(1) equality rights of women and girls occurs may very well occur at the section 1 stage. However, before the Court moves to section 1, it is respectfully submitted that the Court must still examine the genuineness of religious belief and determine whether the impugned conduct falls within the purpose of section 2(a), particularly in light of in section 28. It simply cannot be that the practice of polygamy and all of its demonstrated harms to women and girls should be capable of protection under the guise of religion.

ii. Sections 2(b) and (d): Freedoms of Expression and Association

82. West Coast LEAF adopts the submissions of the Attorney General of BC in regard to sections 2(b) and (d), and submits that section 293 does not infringe the *Charter* protection for freedoms of expression and association.

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[114] Dr. Beall, Day 8, p. 11

[115] Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p. 15(start l. 13), p. 18(start l. 7); Brent Jeffs, Day 15, p. 70 (29-35), p. 71(10-13); Carolyn Jessop, Day 20, p. 4(7-12), p. 14(1-2), p. 17(30-35), p. 37(41-47); Howard Mackert, Day 14, p. 68 (13-26, 31-32), p. 70(2-9); Jorjina Bennett, Day 17, p. 58(14-25); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p. 165 ; Richard Reams, Day 17, p. 15(10-16), p. 17(32-36); Jorjina Bennett, Day 17, p. 76(15-47); Carolyn Jessop, Day 20, p. 13(21-25); Howard Mackert, Day 14, p.88(20-27, 36-44), p. 89(9-13, 28-39); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p.191 (start l. 3)

[116] Multani v. Commission scolaire Marguerite-Bourgeoys [2006] 1 S.C.R. 256 at paras. 26 – 28 **[JBA tab 19]**

[117] *Multani* at para.30.

iii. Section 7: Liberty and Security of the Person

83. The Challengers have argued that the polygamy provision infringes the rights to liberty and security of the person protected by section 7 of the *Charter*. Section 7 of the *Charter* provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

84. In stage one of the section 7 analysis, this Court must ask whether a state deprivation has breached an individual's right to life, liberty or security of the person. The availability of imprisonment for a section 293 conviction is sufficient to trigger section 7 scrutiny. [118]

85. In his opening statement, the Amicus argued that section 293 infringed security of the person rights in addition to infringing liberty interests. Section 293, he argued, deprives polygamists of the "freedom to make fundamentally and inherently personal choices with respect to their intimate relationships, and so implicates basic choices going to the core of what it means to enjoy individual dignity and independence." West Coast LEAF disagrees. Section 7 does not protect the "freedom" to exploit another person, regardless of whether that exploitation occurs in the context of an intimate relationship. Therefore, when section 293 is read down to apply to exploitative relationships, polygamists are not deprived of any constitutionally protected freedom to make fundamental and inherently personal choices with respect to their intimate relationships.

86. While the state has no place in the bedrooms of the nation simply to regulate the sexual activities of consenting adults, the state does have a role in ensuring that women are safe within the confines of intimate relationships; to say otherwise is to seal off a significant area of women's experience from *Charter* protection. It is a perversion of the intent of the *Charter* to use the rights contained therein to create a safe space for men to exploit women.

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[118] *R v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571 at para.89 **[JBA tab 31]** wherein Justices Gonthier and Binnie, writing for the majority, stated that the risk of being sent to jail engages the appellants' liberty interests.

87. Contrary to the Amicus' submissions in regard to the relevance of section 7 rights to this Reference, West Coast LEAF submits that section 7 should be interpreted to protect the substantive rights of women through upholding section 293. In that regard, the exploitative practice of polygamy violates the security of the person by infringing "personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress.[119]" In light of section 28 of the *Charter*, section 7 cannot be applied to the rights of people in polygamous relationships without looking at the very different ways in which the section 7 rights of a husband and his wives may be engaged.

88. Women's right to the security of the person is engaged, for example, when:

(a) Women are denied reproductive control;

(b) Women are exposed to increased risk of maternal mortality at childbirth;[120]

(c) Women are at risk of being re-assigned to new husbands or losing their children if non-compliant to the polygamist community's directives or their husband's control; [121]

(d) Adolescent girls are directed to marry much older men and sexually used at an early age; [122] and

(e) Women live in tightly controlled environments, surrounded by a climate of fear. [123]

89. Women's section 7 rights are relevant at this stage of the analysis. Section 7 cannot be used to protect the right of polygamous men to exploit their wives in the

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[119] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at para.136.**[JBA tab 46]**
[120] Don Fischer, Day 21, p. 25(17-36); Kathleen Mackert, Day 10, p. 89(4-14), p.91(24-39), p. 92(1-5) ; Jorjina Bennett, Day 17, p. 56(4-10); Howard Mackert, Day 14, p. 65(42-45); Teresa Wall, Day 10, p. 30(115-17);
[121] Don Fischer, Day 21, p. 17(4-18); Teresa Wall, Day 10, p. 25(30-33); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p. 168 (start l. 7); Teresa Wall, Day 10, p. 25-26(30-24), p. 39(5-11, 29-31), p. 40(28-29), p. 49(15-23);
[122] Teresa Wall, Day10, p. 42(16—35); Jorjina Bennett, Day 17, p. 72(7-17); Carolyn Jessop, Day 20, p. 24(5-14); Howard Mackert, Day 14, p.73(24-39); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p. 184 (start l. 1); Sara Hammon, Day 10, p. 75(19-29), p. 80(13-38), p. 81(24-39); [122] Sara Hammon, Day 10, p. 76(38-47); Carolyn Jessop, Day 20, p. 18(6-47), p. 22(6-13); Teresa Wall, Day 10, p. 24-25(42-28); Howard Mackert, Day 14, p. 61(10-15, 23-29); Dr. Henrich, Day 11, p. 51; Dr. Cook, Day 16, p. 25(12-14). ; Dr. McDermott, Day 13 & 14, p. 49-53, 66-67 ;
[123] Dr. Beall, Day 8, p. 11

private, intimate context of marriage; the right to security of the person does not stretch so far.

90. At the second stage of the section 7 inquiry, if the Court has found a breach of liberty or security of the person, it must then ask whether any infringement was in accordance with the principles of fundamental justice. To be in accordance with the principles of fundamental justice, the provision cannot be arbitrary or overly broad: "they must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result." [124]

91. The Amicus has argued that section 293 deprivations of liberty are not in accordance with the principles of fundamental justice, because they were enacted in pursuit of an unjust objective and are arbitrary, overbroad and grossly disproportionate. However, that argument relates only to a definition of polygamy within section 293 that is related to morality and not actual and potential harm. West Coast LEAF says that when exploitation is understood as a required element of this section, the section is neither arbitrary nor overly broad, nor grossly disproportionate.

92. The evidence shows that polygamy lends itself to exploitation and that it exacerbates sex inequality. Dr. Cook's evidence shows that polygamy is overwhelmingly practiced as polygyny – in fact, less than 1% of polygamy worldwide manifests as polyandry. [125] Dr. Henrich's evidence shows that one would expect that polygyny results in increased numbers of child brides and an ever increasing age difference between a husband and his newest wives.[126] These logically created results of polygyny create a greater potential for exploitation of young women than other forms of relationships; and the evidence of the lay witnesses in this Reference show that these expected results of polygyny manifest as subordination, exploitation and harm in their real life experiences[127].

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[124] *Rodriguez* at para.141.**[JBA tab 46]**
[125] Dr. Cook, Day 16, p. 12(10-18); p. 17(3-20)
[126] Dr. Henrich, Day 11, p.
[127] Dr. Henrich, Day 11, p. 49(23-32), p. 54-55(41-9), p. 50-51(40-1), p. 51-52(36-3); p. 53(11-16) ;Dr. Henrich, Day 11, p.

93. Other associated harms of the practice of polygamy include deprivation of the ability of women and girls to freely choose when to engage in sexual activity, when to get married, when to have children and when to end marriages. The evidence shows that these harms are manifest in the polygamous context.

94. In regard to the Amicus' argument that section 293 is arbitrary and therefore violates section 7, West Coast LEAF submits that there is a clear connection between section 293 and its objective to denounce, deter and punish behaviour that is reasonably apprehended to be harmful to women and children of polygamous unions and detrimental to their equality interests. Read down to apply only to exploitative relationships, and only to those persons perpetrating the exploitation, section 293 targets exactly the harm at which it professes to aim.

95. The question of overbreadth is also aptly dealt with by reading down. If the polygamy provision is read down to only apply in exploitative circumstances, and exploitation is applied as a standard already known and defined in criminal law, then the section fulfils its constitutional mandate to be precise and knowable.

96. Finally, the law is not grossly disproportionate to the harms it aims at. The Amicus claims that the criminalization of "profoundly personal choices" makes polygamous communities more insular, which increases harm rather than preventing it. However, there was evidence before this Court that the insularity of the community of Bountiful was directly connected to the tenets of the religion rather than fear of the criminal law[128]. West Coast LEAF adopts the argument of the Attorney General of British Columbia that it makes more sense that any fear of prosecution stems from the crimes and human harms that are associated with polygamy than fear of prosecution for polygamy itself, given the historical lack of enforcement of section 293. There is insufficient evidence that the law harms the rights or safety of those it criminalizes, while there is significant evidence that the rights of women and girls are at stake if polygamy is decriminalized.

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[128] Richard Reams, Day 17, p. 15(10-16), p. 17(32-36); Jorjina Bennett, Day 17, p. 76(15-47); Carolyn Jessop, Day 20, p. 13(21-25); Howard Mackert, Day 14, p.88(20-27, 36-44), p. 89(9-13, 28-39); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p.191 (start l. 3); Dr. Beall, Day 9, p. 22-23 (38-7), p. 25(24-29);

iv. Section 15: Right to Equality

The Amicus claims that section 293 is discriminatory on the basis of religion and family status, contrary to section 15(1). West Coast LEAF submits that section 293 does not infringe the substantive equality protections in the *Charter*. The doctrinal analysis of s.15(1) claims is most recently stated in *Withler v. Canada (Attorney General)*:

> (1) does the law create a distinction that is based on an enumerated or analogous ground? and
>
> (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[129]

97. Regardless of whether the provision satisfies the first step of the test, the equality claim against section 293 must fail at the second stage. Section 293 does not perpetuate prejudice or stereotyping, and does not undermine the human dignity of polygamists.

98. The purpose of section 15, and in fact the underlying intent of all *Charter* rights, is the protection and promotion of human dignity and the essential value of every individual. Human dignity is an abstract concept, but one that has very real implications for the equality analysis and for equality claimants:

> What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. <u>Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.</u>

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

> Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? [130] [emphasis added]

99. In *R. v. Kapp*, the Court noted the continuing importance of the concept of human dignity to the equality analysis: "There can be no doubt that human dignity is an essential value underlying the section 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity." [131]

100. There is no infringement of human dignity where the law prohibits a person from exploiting or discriminating against another person; in fact, human dignity is promoted by such a law. A narrow reading of section 293 as applied to exploitative polygamous relationships promotes women's equality and prohibits oppressive and discriminatory conduct. It therefore does not infringe upon the human dignity of polygamists, and consequently does not infringe section 15(1). Moreover, it also does not infringe upon the human dignity of polyamorists because it excludes them from the purview of the legal burden, although the law writ large may do so.

101. In *Kapp*, the Court has cautioned against using human dignity as a bar to equality claims because it was a notion that was introduced into equality law to promote the engagement of equality rather than undermine it. West Coast LEAF agrees that the concept of human dignity within the section 15 analysis should only be used to *further* the right to equality. The Supreme Court of Canada cannot have intended for this shift in focus on human dignity to apply to the Amicus' section 15(1) argument in the case at bar, where the impugned law is designed in both purpose and effect to promote equality for women and girls and to prohibit harmful and discriminatory conduct. In this case, the section 15 claim must fail on the grounds that the law does not infringe upon the human dignity of polygamists; to find otherwise would be to undermine the very purpose of section 15.

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[130] *Law* at para.53.
[131] *R. v. Kapp*, 2008 SCC 41 at para.21.**[JBA tab 28]**

102. The Amicus has argued "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." [132] The evidence at trial has shown that the law is very much rooted to the real and probable harms of the practice of polygamy in Canada and not on stereotypes. A prohibition on exploitative relationships corresponds to the actual characteristics of many of the relationships on which this Court heard evidence. The Amicus' assertion in this regard must fail.

103. The state has a positive obligation to protect equality rights; section 293 fulfills the Crown's obligations to consider the equality rights of women and girls of faith in polygamous communities and ensure that they are not exploited.

Part 5: Justification - section 1

104. In the alternative, if the Court finds that section 293 breaches sections 2, 7 or 15 of the *Charter*, West Coast LEAF submits that the breach is justified under section 1 of the *Charter*. The Amicus has repeatedly stated that this is a section 1 case. Whether the Court weighs the competing rights claims presented in this case at the breach or justification stages, the Amicus argument must fail.

105. Simply put, the state is justified in limiting the free exercise of the rights of polygamist men who exploit their wives and the women and girls in their communities.

106. In *Ross v. New Brunswick School District No.15*, the SCC elaborated upon the weighing of values at the section 1 stage, and the importance of the underlying values of the *Charter*[133]:

> In Oakes, supra, at p. 136, Dickson C.J. stated that in determining whether *Charter* rights and freedoms should be limited,
>
> > [t]he Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few,

[132] Amicus Opening on Breach at para.55.
[133] *Ross v. New Brunswick School District No.15*, [1996] 1 S.C.R. 825 at para.77. **[JBA tab 47]**

> respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

> Ultimately, any attempt to determine whether the order is a justifiable infringement of the respondent's freedom of expression and of religion must involve a weighing of these essential values and principles, namely the accommodation of a wide variety of beliefs on the one hand and respect for cultural and group identity, and faith in social institutions that enhance the participation of individuals and respect for the inherent dignity of the human person on the other.

107. At the section 1 stage, conflicting constitutional values must be understood in their factual and social context[134]. The underlying values of the *Charter*, and the defining values of section 1, are the principles of a free and democratic society, the fundamental basis of which is the inherent dignity and equality of each individual. While equality must underwrite the analysis of every *Charter* right, section 1 provides the opportunity for the Court to return to first principles, and analyze any breaches from the perspective of these underlying values.

108. The evidence shows that polygamy is predominantly practiced in a context of extreme gender inequality and that, as a practice, it feeds and exacerbates that inequality and becomes a practice of exploitation of women and girls. Any limitations on freedom of religion, religious or marital equality, or the rights to liberty and security of the person can be justified because the state is entitled to legislate to prevent the exploitation of women and children. The manner in which the practice of exploitative polygamy violates the equality and security of the person rights of women and girls is detailed above under the Breach section.

109. The Oakes test remains the standard under section 1:

> 1. Is the objective of the impugned provision pressing and substantial?

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[134] *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para.71. **[JBA tab 45]**

> 2. Are the means chosen to achieve that objective reasonable and demonstrably justified? There are three important components of this proportionality analysis:
>
> a. The measures adopted must be rationally connected to the objective;
>
> b. The measures adopted must minimally impair the right or freedom in question; and
>
> c. The salutary effects of the objective must outweigh the deleterious impact of the infringement. [135]

110. The objective of the provision, as discussed above under the heading "The Meaning of Exploitation", is the prevention of harm to women and children in polygamous relationships. Not only is this objective a valid concern for Parliament, but it is also a protected interest under the *Charter* within sections 7 and 15.

111. As stated in *Slaight Communications Inc. v. Davidson*, "...Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial section 1 objectives which may justify restrictions on those rights".[136] As detailed above, women's equality is an important principle of both constitutional and international law, and therefore composes a pressing and substantial legislative objective.

112. In fact, the Human Rights Committee has stated that protections for freedom of religion cannot be allowed to trump women's equality interests. Dr. Cook testified[137]:

> The HRC has interpreted the ICCPR as precluding states parties from relying on religious freedom to permit gender discriminatory practices. In its General Comment No.28, Equality of Rights between Men and Women, the Committee stated that "Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion." In its General Comment No.22, the HRC stated that in limiting religious practices, "States parties should proceed from the need to protect the rights guaranteed under the Convenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3, and 26." Given that the HRC has found that

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[135] *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras.69-71. **[JBA tab 36]**
[136] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at pp.1056-7. **[JBA tab 48]** See also, *R v. Keegstra*, [1990] 3 S.C.R. 697 at para.66
[137] Dr. Cook affidavit #1 at para.215.

> polygamy violates these equality provisions, it is clear from the perspective of the treaty body that the prohibition of polygyny is a reasonable limit on freedom of religion. [references omitted]

113. In the domestic context as well, equality interests have taken precedence at the balancing stage. In *Bruker v. Marcovitz*, the Supreme Court of Canada found that the right to equality outweighed freedom of religion. In that case, the husband refused to grant his wife a religious divorce, despite having agreed to provide a get (divorce) under the separation agreement. Under Jewish law, a wife cannot obtain a get unless her husband agrees to give it and without one, she remains his wife and is unable to remarry. The Court found "[t]he public interest in protecting equality rights [and] the dignity of Jewish women in their independent ability to divorce and remarry" were among the interests and values that outweighed the husband's claim to religious freedom. [138]

114. The Challengers will likely assert that since some of the harms that have emerged from the evidence fall within other existing *Criminal Code* provisions, section 293 is neither rationally connected to its objective nor minimally impairing of the infringed rights. However, it is the entire causal framework that is properly the subject of criminal sanction because it targets the problems holistically instead of in a piecemeal fashion. Exploitative polygamous relationships may give rise to a higher incidence of child sexual assault or sexual exploitation; the polygamy provision captures the institutional framework that creates the circumstances in which such other crimes may occur.

115. Moreover, this argument was conclusively dealt with in the context of section 1 in *R. v. Sharpe*, in which McLachlin C.J. stated:

> It is argued that even if possession of child pornography is linked to harm to children, that harm is fully addressed by laws against the production and distribution of child pornography. Criminalizing mere possession, according to this argument, adds greatly to the limitation on free expression but adds little benefit in terms of harm prevention. The key consideration is what the impugned section seeks to achieve beyond what is already accomplished by other legislation: R. v. Martineau, [1990] 2 S.C.R. 633. If other laws already achieve

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[138] *Bruker* at para.92.

> the goals, new laws limiting constitutional rights are unjustifiable. However, an effective measure should not be discounted simply because Parliament already has other measures in place. It may provide additional protection or reinforce existing protections. Parliament may combat 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. [139] [emphasis added]

116. Finally, the salutary effects of the polygamy provision, as enforced against exploitative polygamists, are the protection of women and girls against the extreme oppression illustrated throughout the evidence at this Reference.

117. The law must act to protect the equality and security of the person rights of women and girls. [140] The unequal roles in polygamy are based on sex and gender, and result in a skewed perception of gender roles and stereotypes.[141] This imbalance of gender roles becomes internalized in women and girls, as well as their children.[142] The imbalance has an impact on the self-esteem and self-perception of women and girls, reducing their ability to fully consider their choices in decision-making.[143] The mathematics of polygyny pushes down the age of brides and creates growing age gaps between a husband and his newest wives. The patriarchal structure of households permits the husband to exercise increased control over women and girls: physically, sexually, emotionally, and financially.[144] If the prohibition on exploitative polygamy is upheld, it will result in greater scrutiny of these types of relationships and will reduce the harms that flow from them, including physical and sexual abuse of women and children.

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[139] *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para.93 **[JBA tab 37]**
[140] Dr. Cook, Day 16, p. 12(10-18); p. 17(3-20); Carolyn Jessop, Day 20, p. 54(3-38);
[141] Jorjina Bennett, Day 17, p. 53(17-44), p. 64(17-19); Sara Hammon, Day 10, p. 68(35-42); Brent Jeffs, Day 15, p. 72(26-31); Teresa Wall, Day 10, p. 29(39-47);
[142] Dr. Cook, Day 16, p. 25(6-11) ; Dr. Henrich, Day 11, p. 26-27.
[143] Dr. Cook, Day 16, p. 18(4-21); pps. 19-20(31-47, 1)
[144] Paula Barrett, Day 17, p. 43(23-34), p. 44(30-33); Don Fischer, Day 21, p. 15(7-16; Carolyn Jessop, Day 20, p. 10(4-6, 40-43); Carolyn Jessop, Day 20, p. 30(23-28), p. 35(32-36); Kathleen Mackert, Day 10, p. 102(35-39); Mary Mackert, Day 19, p. 13(33-47), p. 14(29-30), p. 19(26-32)p.35(9-25); Exh. 20, Affidavit of Eric Nicols, Vol. 3 (Exh. R), Testimony of Rebecca Musser, p.192 (start l. 16); Teresa Wall, Day 10 (15);

118. The alleged deleterious effects of section 293 are clearly outweighed. Whether such alleged effects are those pertaining to the rights' breaches or the impacts of insularity on the community (both of which are addressed above), these potential negative impacts of the law are clearly outweighed by the pressing and substantial purpose of the legislation, namely the prevention of such harms to women and girls.

Part 6: Concluding Remarks

119. This Honourable Court was presented with a range of evidence that revealed various levels of harm flowing from the practice of polygamy. This evidence came from both experts and personal witnesses. The vast majority of the evidence revealed a stunning consistency of harmful themes. Ultimately, the universality of harmful themes cannot be ignored; they represent actual and continuing harms directly associated with the practice of polygamy. The clear existence of harmful experiences (that are either strongly correlated or logically associated with polygyny) offends the dignity of women and girls—violating their equality and security of the person rights. Experiences and theoretical estimations flowing from sound methodology assist the court in assessing the breadth and nature of the harms.

120. When considering these harms, this Honourable Court is not restricted to considering only the practice of polygamy in Canada. The evidence clearly shows a direct link between the polygamist practices in Canada and the United States. Moreover, the broader global experiences and the international and comparative law that has developed in response must also be seriously considered.

121. West Coast LEAF submits that section 293 is valid insofar as it prohibits exploitative polygamy. Reading down is the only tool of constitutional interpretation that strikes the appropriate balance between the division of powers and the upholding of individual rights, as it is applied to this section. Significantly, the application of this tool to this section gives greater fulfillment to individual rights than any other proposal before this Court by both limiting the harmful effects flowing from polygamy (thereby protecting the rights of women and girls to equality and security), and limiting the potential impact on polygamists' sections 2, 7 and 15 rights.

122. The Court has an important role to play in defining exploitative polygamy. While such an exercise may defy bright line distinctions, exploitation is a familiar concept in criminal law, and the prohibition of exploitative conduct fits well within the purpose of criminal law. The rights to equality, liberty, security and dignity are fundamental to Canadian society and the Constitution, and underlie the development of criminal law.

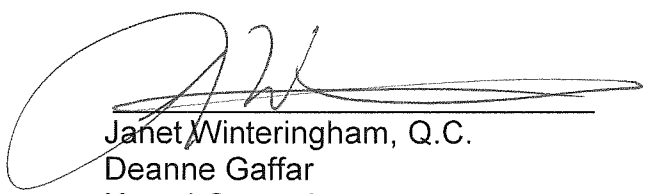
123. Any allegations that section 293 breaches sections 2, 7 or 15 of the *Charter* must fail, primarily because these *Charter* rights do not protect the right of individuals to exploit, abuse and discriminate against other individuals. It is a perversion of the very purpose of the *Charter of Rights and Freedoms* for these rights to be used to shelter such rights-abusing conduct (as has been revealed in the evidence before this Court) under the rubric of freedom. Freedom of religion cannot be allowed to trump the other significant rights claims at stake in this Reference, and any rights breaches that this Honourable Court finds are thereby justifiable under section 1.

124. The Challengers may well argue that section 293 is unnecessary and that other *Criminal Code* provisions are sufficient in dealing with physical and sexual abuse. However, this argument must fail. It is important to note that the harms associated with the practice of polygamy transcend the more obvious harms of physical and sexual abuse. These additional harms are more insidious; they strike at the heart of equality rights and the right to security of the person for women and girls.

125. In sum, West Coast LEAF submits that only exploitative polygamy is prohibited by section 293, section 293 can only be used to prosecute exploitative spouses rather than victims, and this prohibition withstands *Charter* scrutiny.

All of which is respectfully submitted,

Dated: March 4, 2011



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