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The Most Comprehensive Judicial Record Ever Produced: The Polygamy Reference

BJ Wray

Keith Reimer

Craig Cameron

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**THE MOST COMPREHENSIVE JUDICIAL RECORD EVER
PRODUCED: THE *POLYGAMY REFERENCE***

*BJ Wray
Keith Reimer
Craig Cameron**

ABSTRACT

In the fall of 2010 and the spring of 2011, the Chief Justice of the Supreme Court of British Columbia presided over an unprecedented proceeding in Canadian legal history—a “reference” hearing conducted at the trial court level into the constitutionality of Canada’s criminal prohibition of polygamy. The authors are legal counsel at the Department of Justice and were part of the legal team that successfully defended the constitutionality of the prohibition on behalf of the Attorney General of Canada.

This Essay discusses various aspects of the litigation, including the uniqueness of the proceeding, the voluminous evidentiary record it generated, the positions taken by the primary participants, and the Chief Justice’s decision. The record before the Chief Justice provided an unparalleled overview of the impact of polygamy on individuals, communities, and nation-states and led to his ultimate conclusion that polygamy, as a marital institution, is inherently harmful.

* BJ Wray, Keith Reimer, and Craig Cameron are legal counsel in the federal Department of Justice in Vancouver, British Columbia. They were part of the legal team representing the Attorney General of Canada in the *Polygamy Reference*. The views and opinions expressed in this Essay are those of the authors alone and do not reflect the views or positions of the Attorney General of Canada or the Government of Canada.

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INTRODUCTION

Canada's statutory prohibition on polygamy has been around for over 100 years. It originated primarily in response to concerns that the existing prohibition on bigamy was not sufficient to capture nonlegal plural marriages.¹ A conviction for bigamy required an attempt to enter into two or more legal marriages, and some forms of plural marriages, such as Mormon "spiritual" marriages, were conducted in private ceremonies and were thought to be technically exempt from the prohibition on bigamy.² In order to ensure that these marriages would be caught by the criminal law, Section 293, which prohibits multiple marriages, whether sanctioned by civil, religious, customary, or other means, was added to the Criminal Code of Canada in 1892.³

In the years following the enshrinement of the Charter of Rights and Freedoms into the Canadian Constitution in 1982,⁴ questions arose as to the Charter compliance of the Criminal Code's prohibition on polygamy. Various levels of government, as well as civil libertarians and some religious organizations, wondered if the prohibition may offend the Charter's guarantees of religious freedom and life, liberty, and security of the person. It was thought that the prohibition was inappropriately based on a Christian worldview that privileged monogamous marriage and excluded other forms of consensual, loving relationships. Canada's growing acceptance of different forms of relationships, including the legalization of same-sex marriage in 2005, further called into question the constitutionality of the prohibition on polygamy as many wondered how Canada could justify criminal sanctions on some forms of nonnormative relationships but not others.

Given the existence of a large community of Fundamentalist Latter-day Saints (FLDS) in Bountiful, British Columbia, the province of British Columbia had a particular interest in the constitutionality of the polygamy offense. After many years of legal opinions from government lawyers, as well as outside counsel, the provincial government decided to obtain an opinion from the Supreme Court of British Columbia (BCSC) on the constitutionality of Section 293. On October 22, 2009, the Lieutenant Governor in Council of British Columbia asked the BCSC to conduct a hearing into the

¹ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 142, 854–877 (Can.) [hereinafter *Polygamy Reference*].

² *Id.* paras. 855–856.

³ *Id.* para. 1015.

⁴ *Id.* para. 1.

constitutionality of the Criminal Code's prohibition on polygamy in *Reference re: Section 293 of the Criminal Code of Canada* (the *Polygamy Reference*).⁵

We were part of the legal team representing the Attorney General of Canada (AGC) during the hearing of the *Polygamy Reference* in the fall of 2010 and spring of 2011. Along with the Attorney General of British Columbia (AGBC), we defended the constitutionality of the prohibition. The Chief Justice of BCSC was appointed to hear the reference proceeding and he, in turn, appointed an Amicus Curiae to argue that the prohibition was unconstitutional. In addition to these three primary participants, the Chief Justice permitted eleven advocacy organizations to intervene in the proceedings. These organizations represented a wide spectrum of ideological and constitutional perspectives that included civil libertarians, polyamorists, feminists, conservative religious groups, and children's advocates. The breadth of the evidence submitted in the proceeding was extraordinary and led the Chief Justice to remark that his decision was based on "the most comprehensive judicial record on the subject ever produced."⁶

In Canada, the federal government is constitutionally responsible for determining the content of the Criminal Code, but the provinces are generally responsible for prosecuting Criminal Code offenses. The AGC and the AGBC worked together during the *Polygamy Reference* to ensure that we did not duplicate our evidence gathering efforts and that our arguments were, to the extent possible, complementary. We determined very early on that success in this case would turn on whether we could establish that polygamy was an inherently harmful practice. The AGC took on the task of gathering evidence and presenting argument on the historical reasons for the prohibition on polygamy in Western democracies as well as the present-day harms associated with polygamy around the world. The AGBC focused on the harms of polygamy to individual participants, and gathered evidence from numerous former members of polygamous communities in North America, including those affiliated with the FLDS in Canada and the United States. We believed it would be important to provide the court with both "hard" evidence that would ground the harms of polygamy in statistical and historical data, as well as "soft" evidence that would show how these harms impacted the hearts, minds, and bodies of individual participants.

⁵ *See id.*

⁶ *Id.* para. 6.

Ultimately, the Chief Justice held that the criminal prohibition on polygamy was constitutional.⁷ He found that while the prohibition offends both the freedom of religion of identifiable groups and the liberty interests of children between the ages of twelve and seventeen who were married into polygamy, the prohibition was demonstrably justified in a free and democratic society, save in its application to the latter group.⁸ This justification was grounded in the evidence of the harms of polygamy submitted by the Attorneys General.

In Part I, this Essay provides a brief overview of the nature of reference proceedings in Canada and, in particular, the features that made the *Polygamy Reference* unique in Canadian judicial history. In Part II, we then set out the competing interpretations of Section 293 of the Criminal Code that were offered by the Amicus and the Attorneys General because determining the scope of the prohibition on polygamy was the necessary first step in the Chief Justice's constitutional analysis. We also provide an overview of the key evidence and central arguments put forward by the Amicus and the AGC, especially with respect to the prohibition's impact on the Charter guarantees of freedom of religion and life, liberty, and security of the person. Finally, in Part III, we summarize the Chief Justice's assessment of the Charter issues and the evidentiary findings that ground his conclusions.

I. THE UNIQUENESS OF THE PROCEEDINGS

Reference proceedings in Canada are not an everyday occurrence. The federal government, through the Governor in Council, may refer important questions of law or fact to the Supreme Court of Canada for hearing and consideration.⁹ Each of Canada's provinces have also enacted legislation that permits the provincial government to refer questions to the Court of Appeal of that province and, in British Columbia and Manitoba, the province may refer the questions either to the trial court (which in British Columbia is the BCSC) or to the appellate court of the province.¹⁰ The legislation in British Columbia

⁷ *Id.* para. 1359.

⁸ *Id.* para. 15.

⁹ Supreme Court Act, R.S.C., 1985, c. S-26, s. 53 (Can.).

¹⁰ In British Columbia, Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 8 governs reference questions. Section 1 permits the Lieutenant Governor in Council to refer any matter to the Court of Appeal or to the Supreme Court of the province. *Id.* s. 1. In Manitoba, the Constitutional Questions Act, C.C.S.M., c. C180 governs reference questions. Section 1 permits the Lieutenant Governor in Council to refer any matter to the Court of Appeal or to the Court of Queen's Bench in the province. *Id.* s. 1.

mandates that the AGC be given notice of such references and allowed to participate in the proceedings as of right.¹¹

A decision rendered by a court on a reference question is considered to be an advisory opinion to the government, and, historically, the reference procedure has been used to provide opinions on constitutional questions.¹² Until the *Polygamy Reference*, no reference had ever been heard by a lower court in Canada.¹³ As such, this was the first time that the fact-finding role of the lower court and all of the evidentiary procedures that accompany that role could be utilized in providing the advisory opinion.¹⁴ When references are heard at the appellate level, there are very limited options for introducing facts and, as the Chief Justice noted, “[t]his limits the ability of participants to rigorously challenge their reliability.”¹⁵

These issues were avoided by initiating the *Polygamy Reference* in the BCSC rather than in the Court of Appeal. The evidentiary record was voluminous and included *viva voce* and written testimony from expert and lay witnesses, cross-examinations of these witnesses, video affidavits, academic studies and commentary, as well as popular culture materials on polygamy, including documentaries, news reports, books, and talk shows.¹⁶

There were over ninety expert reports and affidavits, including affidavits from individuals in polygamous relationships, and twenty-two affiants and experts were examined and cross-examined during the hearing phase of the proceeding.¹⁷ The experts were drawn from a wide range of academic “disciplines including anthropology, psychology, sociology, law, economics, family demography, history and theology,” and much of the research of their research was interdisciplinary and cross-cultural.¹⁸

The lay witnesses included current members of the FLDS community in Bountiful, British Columbia, who gave “both written and *viva voce* [evidence], under cover of anonymity,” as well as former members of the FLDS who testified in open court.¹⁹ Other lay witnesses “described their involvement with

¹¹ R.S.B.C. 1996, c. 68, s. 3.

¹² 1 PETER HOGG, CONSTITUTIONAL LAW OF CANADA § 8.6, at 8-15 (5th ed. 2007).

¹³ *Polygamy Reference*, 2011 BCSC 1588, para. 26.

¹⁴ *See id.*

¹⁵ *Id.* para. 53.

¹⁶ *Id.* paras. 28–32.

¹⁷ *Id.* paras. 28–30.

¹⁸ *Id.* para. 29.

¹⁹ *Id.* paras. 30–31.

polyamory” and other types of nonmonogamous relationships.²⁰ Needless to say, this was not the type of record that could be created in a reference initiated in a Court of Appeal.

Another unique feature of the *Polygamy Reference* was the way in which public access to the proceedings was facilitated. The Canadian Broadcasting Corporation provided a live webcast of the closing arguments in the *Polygamy Reference*, which was a new experience for all of us involved in the hearing.²¹ While the Supreme Court of Canada regularly televises its proceedings, it is relatively rare for a provincial court, especially a trial court, to do so.²² The *Polygamy Reference* also received widespread media attention in Canada, and, at least in the early days of the hearing, the large public gallery in the courtroom was filled with interested spectators. Public access to the evidence and arguments was further facilitated by one of the intervener organizations, the Canadian Polyamory Advocacy Association, which posted all of the publically filed material on its website.²³ The court itself set aside space next to the courtroom where it placed hardcopies of all of the filed material so that members of the public could make use of this “library.”

All of these features made the *Polygamy Reference* a one-of-a-kind proceeding in Canadian judicial history. As the Chief Justice noted, all of the participants embraced the opportunity to create an evidentiary record that was “remarkable not only for its size, but also for the breadth and diversity of its contents. Indeed, it is no exaggeration to say that the record embodies the bulk of contemporary academic research into polygamy.”²⁴ All of the participants also embraced the opportunity to put forward comprehensive and complex written submissions on the constitutionality (or lack thereof) of the prohibition. The submissions of the Amicus were over 300 pages long, and the submissions of the AGC and AGBC were each over 150 pages. Added to these submissions were the facts of each of the interveners. Given the extensive evidentiary record and the numerous legal issues raised in the *Polygamy Reference*, it is no wonder that the Chief Justice’s reasons for judgment were nearly 350 pages long.

²⁰ *Id.* para. 30.

²¹ *Id.* paras. 35, 38.

²² *See id.* para. 40.

²³ *Id.* para. 38.

²⁴ *Id.* para. 27.

II. COMPETING INTERPRETATIONS OF THE POLYGAMY PROVISION

In order to determine the constitutionality of the prohibition on polygamy, the Chief Justice had to first consider the meaning of Section 293 of the Criminal Code. How to properly interpret the ambit of Section 293 was a central question in the *Polygamy Reference*. The Chief Justice's analysis of the constitutionality of the prohibition could only be undertaken once the scope of the prohibition was delineated because he had to determine which types of relationships were covered by Section 293. The broader the scope of the prohibition, the harder it would be to defend against arguments that the prohibition was overly broad in that it captured all forms of nonmonogamous relationships. Section 293 states:

- (1) Every one who
 - (a) practises or enters into or in any manner agrees or consents to practise or enter into
 - (i) any form of polygamy, or
 - (ii) any kind of conjugal union with more than one person at the same time,
whether or not it is by law recognized as a binding form of marriage, or
 - (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),
is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.²⁵

The AGC, the AGBC, and the Amicus each offered different interpretations of Section 293, especially with respect to the meaning of “conjugal union” in Section 293(1)(a)(ii). Generally, the Attorneys General argued for a narrower interpretation of Section 293 that focused exclusively on multiple marriages,²⁶ while the Amicus argued that the prohibition extended to multiple nonmarital, cohabitation-based relationships.²⁷ The case made by the Attorneys General with respect to the harms associated with polygamy was inherently linked to a narrower interpretation of Section 293. That is, the evidence of harms submitted by the Attorneys General considered only the harms that stemmed from multiple marriages, not the potential harms that may arise in other types of relationships.²⁸ The interpretation of Section 293 was a critical factor in

²⁵ *Id.* para. 17.

²⁶ *Id.* paras. 932–935.

²⁷ *Id.* para. 906.

²⁸ *See id.* para. 931.

determining the constitutionality of the prohibition because if the court decided that the wording of the provision was broad enough to include “informal” polygamous relationships, there would be a greater chance that the AGC’s substantive defense of the prohibition would fall short.

The AGC’s interpretation of Section 293 was grounded in the traditionally accepted definition of “polygamy,” as well as the history of the prohibition in Canada. The AGC argued that polygamy has always been linked to marriage.²⁹ For example, the *Oxford English Dictionary* defines polygamy as involving multiple marriages: “The practice or custom of having more than one spouse at the same time.”³⁰ The etymology of polygamy further demonstrates that the term has always meant multiple marriages.³¹ In Canada, the criminal prohibition of polygamy was first introduced in 1890 in a bill to amend “An Act Respecting Offences Relating to the Law of Marriage.”³² The current prohibition on polygamy remains in the Criminal Code in Section 293, titled “Offences Against Conjugal Rights.”³³ All of the offenses found in this section of the Criminal Code, which include polygamy and bigamy, are related to marriage.³⁴

Given this linguistic and legislative history, the AGC argued that, properly interpreted, Section 293 prohibits practicing or entering into multiple marriages, whether they are sanctioned by civil, religious, or other means.³⁵ The prohibition, according to the AGC, included both polygyny and polyandry.³⁶ The AGC also asserted that, given the history of the prohibition, the phrase “conjugal union” in Section 293 is intended to capture all nonlegal multiple marriages, including Mormon celestial marriage, rather than mere cohabitation.³⁷ In doing so, the AGC distinguished a “conjugal union” from a “conjugal relationship.” The AGC asserted that a “conjugal union is a

²⁹ *Id.* para. 932.

³⁰ *Polygamy*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/147146?redirectedFrom=polygamy#eid> (last visited May 17, 2015) (subscription needed for access).

³¹ *See id.*

³² *See Polygamy Reference*, 2011 BCSC 1588, para. 860.

³³ *Id.* para. 932.

³⁴ *See id.*

³⁵ *See id.* para. 936.

³⁶ *Id.* para. 944. “Polygamy” is an umbrella terms that refers to having more than one spouse at the same time. It includes “polygyny” (a male having multiples wives) and “polyandry” (a female having multiple husbands). *Id.* para. 135. In the *Polygamy Reference*, nearly all of the witnesses used “polygamy” to mean “polygyny.” *Id.* para. 137. The same usage is generally followed in this Essay. However, when appropriate, we use the terminology specifically used by each witness and participant.

³⁷ *Id.* paras. 936–937, 939.

long-standing legal concept used to describe a marriage, whether valid under civil law, valid only in religious law or existing only in the view of the parties and the communities to which they belong.”³⁸ A conjugal relationship, in contrast, is a term that has recently acquired a legal meaning that did not exist at the time of the introduction of the polygamy offense.³⁹ A conjugal relationship is now most commonly applied to a common law relationship or to an unmarried, cohabitation-based relationship.⁴⁰

The AGBC also focused on the “marriage” requirement and argued that the prohibition was not directed at multi-partner relationships unless such a relationship had the trappings of what the AGBC called “a duplicative marriage.”⁴¹ According to the AGBC’s interpretation, multiparty conjugality would attract the criminal prohibition when it is or purports to be a marriage, including when it is or purports to be a pairing sanctioned by some authority and binding on its participants.⁴² In this formulation, “authority” would be some mechanism of influence, usually religious, legal, or cultural, that imposes some external consequences on decisions to enter into or remain in the relationship.

The Amicus rejected the narrow interpretations offered by the Attorneys General and, instead, put forward a much more expansive interpretation of Section 293 that extended beyond marital relationships. He argued that Section 293 “criminalize[d] all conjugality other than monogamy, regardless of gender arrangement, the manner in which the union was formed, or its benefit to the participants.”⁴³ The Amicus submitted that the prohibition also “criminalize[d] all participants in the union, alleged wrongdoers and victims alike.”⁴⁴ He also argued that the term polygamy encompassed same-sex polygamy, polyandry, and polygyny.⁴⁵

The Amicus imported the modern day understanding of conjugal relationship into his interpretation of conjugal union. He argued that a conjugal union must be interpreted as a “marriage-like relationship” similar to a

³⁸ *Id.* para. 937.

³⁹ *Id.* paras. 939–940.

⁴⁰ *See id.* para. 941.

⁴¹ *Id.* para. 953.

⁴² *Id.*

⁴³ *Id.* para. 906.

⁴⁴ *Id.*

⁴⁵ *Id.* para. 907.

conjugal relationship.⁴⁶ Conjugal union, therefore, was broad enough to encompass not only formal marriages but also common law relationships.⁴⁷ The word “conjugal,” according to the Amicus, described the substance of a relationship, rather than its legal form; conjugal speaks to a relationship between persons that is committed, interdependent, and of some permanence.⁴⁸ The Amicus asserted that Parliament’s intention was to ban all polygamous forms of conjugality, regardless of how that conjugal relationship was formed.⁴⁹

A. The Chief Justice’s Interpretation of the Polygamy Provision

The Chief Justice did not accept the Amicus’s broad interpretation of Section 293 and, instead, largely accepted the AGC’s interpretation.⁵⁰ He rejected the Amicus’s contention that the prohibition extended to conjugal relationships or common law cohabitation.⁵¹ Instead, the Chief Justice held that the focus of the provision was on multiple marriages, which he described as “pair-bonding relationships sanctioned by civil, religious or other means.”⁵² He accepted that both polygamy and conjugal union referred to marriage rather than other non-sanctioned forms of relationships: “Section 293, from its first iteration, has been viewed as creating an offence relating to the law of marriage.”⁵³ He concluded that “[t]he offence is not directed at multi-party, unmarried relationships or common law cohabitation, but is directed at both polygyny and polyandry. It is also directed at multi-party same sex marriages.”⁵⁴ The practical effect of the Chief Justice’s interpretation was that it drew a bright line between formalized polygamous marriages and informal, multiparty cohabitation relationships, such as those presented by the Canadian Polyamoury Advocacy Association.

The Chief Justice’s interpretation of the scope and purpose of Section 293 was grounded in the long history of the prohibition on polygamy in Western democratic states. The evidence submitted by the AGC on this history demonstrated that these states, including Canada, were concerned with

⁴⁶ *Id.* para. 1011.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* para. 973.

⁵⁰ *Id.* paras. 974, 977.

⁵¹ *Id.* para. 984.

⁵² *Id.* para. 987.

⁵³ *Id.* para. 999.

⁵⁴ *Id.* para. 1037.

detering and punishing multiparty marital structures, not multiparty cohabitation.⁵⁵ The Chief Justice also noted that Parliament was concerned with the “long-standing recognition, in the Western legal and philosophical tradition, of the harms associated” with multiple marriages and that Section 293 was intended to address the harms of polygamy to women, children, society, and, most importantly, the institution of monogamous marriage.⁵⁶ The Chief Justice held that “the harms said to be associated with polygamy directly threaten the benefits felt to be associated with the institution of monogamous marriage – felt to be so associated since the advent of socially imposed universal monogamy in Greco-Roman society.”⁵⁷ Importantly, the Chief Justice viewed the prohibition’s prevention of a wide range of harms and protection of monogamous marriage as “two sides of the same coin.”⁵⁸ The prohibition predated Christianity and could not, therefore, be dismissed as an archaic imposition of Christian morality.⁵⁹ Instead, the Chief Justice accepted that the protection of monogamous marriage was intimately linked to the prevention of a whole host of harms, including harm to the democratic state itself.⁶⁰

Significantly, in the context of his assessment of the proper interpretation of Section 293, the Chief Justice also addressed Canada’s rather recent recognition of same-sex marriage.⁶¹ The Chief Justice was alive to “[t]he alarmist view expressed by some that the recognition of the legitimacy of same-sex marriage will lead to the legitimization of polygamy.”⁶² The evidence submitted by the AGC with respect to the history of the prohibition of polygamy assuaged these alarmist views. This evidence established the preeminent place of the institution of monogamous marriage in Western culture and the Chief Justice noted that Canadians have come to accept same-sex marriage as part of that institution: “That is so, in part, because committed same-sex relationships celebrate all the values we seek to preserve and advance in monogamous marriage,”⁶³ and there was no persuasive evidence that same-sex marriage created the same harms as polygamous

⁵⁵ *Id.* para. 931.

⁵⁶ *Id.* paras. 879–882.

⁵⁷ *Id.* para. 883.

⁵⁸ *Id.* para. 885.

⁵⁹ *Id.* paras. 482–484.

⁶⁰ *See id.* para. 1257.

⁶¹ Same-sex marriage has been legal across Canada since 2005 when the Federal Government enacted the Civil Marriage Act, S.C. 2005, c. 33 (Can.).

⁶² *Polygamy Reference*, 2011 BCSC 1588, para. 1042.

⁶³ *Id.* para. 1041.

marriages.⁶⁴ He cited a well-known legal academic, Maura Strassberg, for the proposition that “the doctrinal underpinnings of monogamous same-sex marriage are indistinguishable from those of heterosexual marriage as revised to conform to modern norms of gender equality.”⁶⁵ Same-sex marriage, then, was not the precursor to the recognition of polygamous marriages but, instead, the acceptance of same-sex marriage has reaffirmed the prominence of monogamous marriage. The Chief Justice concluded that the state most definitely has a place in “the bedrooms of the Nation” when a critical institution, such as monogamous marriage, is threatened by a practice that is “inevitably associated with serious harms.”⁶⁶

B. The Amicus’s Arguments Against the Prohibition

All legislation in Canada must be consistent with the protections on individual rights and freedoms that are enshrined in the Charter of Rights and Freedoms. As noted above, while the Charter is a relatively recent addition to the Canadian constitution, legislation that was enacted prior to the Charter, such as Section 293 of the Criminal Code, must still comply with the protections set out in the Charter. The Amicus and his allied interveners argued that numerous provisions of the Charter were infringed by the prohibition on polygamy, but their primary arguments were directed at the prohibition’s violation of the Charter’s guarantees of freedom of religion, expression, and association; liberty and security of the person; and equality.⁶⁷

The Amicus began by arguing that the prohibition on polygamy was “the product of religious animus” because it targeted Mormons and sought to curtail Aboriginal polygamy in the name of promoting Christian monogamy.⁶⁸ In enacting the prohibition, the federal government impermissibly imposed a particular religious stance on all Canadians.⁶⁹ The Amicus further argued that the prevention of harm was not one of the original purposes of the prohibition and that the Chief Justice should reject any attempt by the Attorney General to newly ascribe the prevention of harm as one of the purposes of Section 293.⁷⁰ The Amicus asserted that the effect of the prohibition was to criminalize

⁶⁴ See *id.* paras. 883–885.

⁶⁵ *Id.* para. 1042.

⁶⁶ *Id.* (internal quotation mark omitted).

⁶⁷ See *id.* para. 1047.

⁶⁸ *Id.* paras. 1053–1054.

⁶⁹ *Id.* para. 1054.

⁷⁰ See *id.* para. 1055.

religious beliefs and practices, as well as to subject adherents of certain religions to penal sanction.⁷¹ For some members of these faiths, such as fundamentalist Mormons, Muslims, and Wiccans, the practice of polygamy is intimately connected to their religious beliefs, and the Amicus argued that Section 293 interfered with the ability of these individuals to act in accordance with their beliefs.⁷²

To support his freedom of religion arguments, the Amicus submitted expert evidence on the role of polygamy within various religious cultures, including Islam and fundamentalist Mormonism.⁷³ The Amicus also filed expert reports from several legal scholars who outlined the history of the legal regulation of Mormon polygamy, as well as international perspectives on the criminalization of polygamy.⁷⁴ These experts opined that the prohibition on polygamy stemmed from the fear of Mormonism and was also linked to racism because polygamy in nineteenth-century America was viewed “as natural for people of colour but unnatural for white Americans.”⁷⁵ The evidence of these experts was supplemented by the evidence of several lay witnesses from the FLDS community in Bountiful, British Columbia, who testified to their personal experiences of living in polygamous marriages.⁷⁶ The Amicus also submitted an expert report on the changing patterns of conjugal relationships in Canada to support his position that, while marriage remains the core social institution in Canada, it has weakened over time as more and more households have chosen not to enter into formal marriages.⁷⁷

The Amicus’s primary witness with respect to the lack of harms in polygamous relationships was Professor Angela Campbell, the director of the Institute of Comparative Law at McGill University’s Faculty of Law in Montreal.⁷⁸ She addressed the “interface between the practice of polygamy and the legal prohibition against polygamy, with emphasis on the polygamous community in Bountiful, BC.”⁷⁹ Professor Campbell “caution[ed] against the acceptance at face value of what may be stereotypical portrayals of life in

⁷¹ *Id.* para. 1062.

⁷² *Id.*

⁷³ *See id.* paras. 241, 256.

⁷⁴ *Id.* para. 256.

⁷⁵ *Id.* paras. 297–299.

⁷⁶ *See id.* para. 104.

⁷⁷ *See id.* para. 470.

⁷⁸ *Id.* para. 77.

⁷⁹ *Id.* para. 82 (internal quotation mark omitted).

polygamous communities.”⁸⁰ She traveled to Bountiful and interviewed twenty-two women who belonged to that FLDS community.⁸¹ Based on these interviews, she opined that the criminalization of polygamy has had negative effects on Bountiful’s residents, including psychological and emotional stress related to the fear of prosecution.⁸² She also testified that the women and children of Bountiful have been stigmatized and stereotyped by those outside the FLDS community.⁸³ According to Professor Campbell, the real lives of these women were not characterized by harms or abuses, but, instead, these women exhibited personal agency and freely chose to enter into polygamous marriage because of their strong religious beliefs.⁸⁴

The crux of the Amicus’s Charter argument was that the blanket ban on polygamy criminalized all polygamous relationships, whether or not those relationships were harmful to the individuals involved or harmful to society in general.⁸⁵ The law was, therefore, overly broad because it captured “good” polygamy, as well as “bad” polygamy.⁸⁶ The Amicus did not dispute that harms can and do arise in polygamous relationships. He acknowledged that the court heard significant evidence of harmful, exploitative practices within the context of polygamy in the FLDS community, including evidence on underage sex, child trafficking, and forced marriage.⁸⁷ However, the Amicus contended that the correct response to the existence of these harms was to prosecute the wrongdoers and accomplices for inflicting these particular harms.⁸⁸ Polygamy, according to the Amicus, was “not harmful in and of itself,” and this was evidenced by the fact that “consensual and harmless adult polygamous unions exist.”⁸⁹ Additionally, the Amicus argued that harms may arise in any marriage and that the harms found in polygamous marriages were certainly not unique to those types of relationships.⁹⁰

The Amicus suggested that, instead of Section 293, other Criminal Code offenses already in place should be used to target conduct that is demonstrably

⁸⁰ *Id.* para. 747.

⁸¹ *See id.* para. 748.

⁸² Affidavit #1 of Angela Campbell at para. 59, *Polygamy Reference*, 2011 BCSC 1588 (No. S-097767), available at <http://www.vancouversun.com/pdf/polygamy/angelacampbell.pdf>.

⁸³ *See Polygamy Reference*, 2011 BCSC 1588, para. 747.

⁸⁴ *See id.* paras. 1311–1312.

⁸⁵ *See id.* para. 906.

⁸⁶ *See id.* para. 1143.

⁸⁷ *See id.* paras. 1296–1298.

⁸⁸ *Id.* para. 1145.

⁸⁹ *Id.* para. 1181 (internal quotation mark omitted).

⁹⁰ *Id.* para. 1152.

harmful, such as trafficking persons, forcible confinement, assault, sexual assault, and so forth.⁹¹ The Amicus argued that since laws against these offenses already exist, rather than criminalize polygamy, these laws could and should be used to deter and punish harmful conduct in polygamous relationships.⁹² There was, therefore, no need to ban all forms of polygamous relationships when laws on the books already prohibit any “bad” conduct that may arise in such relationships.⁹³ The evidence proffered by the Attorneys General did not, in the Amicus’s opinion, demonstrate that polygamy itself was harmful.⁹⁴ Rather, the harms are more accurately characterized as arising out of particular relationships or communities, and these harms can be dealt with through other provisions of the Criminal Code.

The Amicus also argued that if the objective of Section 293 was “the protection of women and children from harm,” then the prohibition’s criminalization of the women and children who participate in polygamous marriages was arbitrary.⁹⁵ Additionally, the Amicus noted that the harms “alleged to be suffered by children of polygamous marriages are the same as those suffered by children of abusive monogamous parents,” yet the prohibition only criminalizes polygamy.⁹⁶ This, too, was arbitrary.⁹⁷

Finally, the Amicus alleged that the blanket prohibition on polygamy was not only unnecessary, arbitrary, and overbroad; it was discriminatory.⁹⁸ The polygamy prohibition, according to the Amicus, branded all polygamists as criminals, regardless of whether their relationships harmed anyone.⁹⁹ The Amicus argued that such a discriminatory approach may have been acceptable in the 1890s, but it was certainly not today.¹⁰⁰ The Amicus submitted that in outlawing all consensual polygamous relationships, regardless of whether they can be tied to any concrete harm, Section 293 undermines the religion of fundamentalist Mormons, Muslims, and Wiccans, who believe that polygamy can be caring, supportive, and beneficial; the practice of which provides a link

⁹¹ *Id.* para. 1144.

⁹² *See id.* paras. 1144–1145.

⁹³ *See id.* para. 1145.

⁹⁴ *See id.* paras. 769–770.

⁹⁵ *Id.* para. 1151.

⁹⁶ *Id.* para. 1152.

⁹⁷ *Id.*

⁹⁸ *See id.* para. 1229.

⁹⁹ *Id.* para. 1143.

¹⁰⁰ *See id.* para. 1252. Polygamy was first criminalized in 1890. *Id.* para. 357.

to the divine.¹⁰¹ The Amicus further argued that polygamists have historically suffered disadvantage, and Section 293 perpetuates that disadvantage and exacerbates it by criminalizing a religious belief that is profoundly important to those practicing polygamy.¹⁰² The criminalization of polygamy is thus contrary to Canadian society's modern approach of treating intimate, conjugal relationships as a matter of privacy and personal choice.¹⁰³

C. The Arguments in Favor of the Prohibition

The Attorneys General and their allied interveners argued that the prohibition on polygamy was constitutional because it was aimed at the numerous harms associated with the practice. The AGC, in particular, argued that Parliament is entitled to impose a criminal prohibition on a particular practice if there is a reasonable apprehension that it poses a risk of harm.¹⁰⁴ Once it has been demonstrated that the harm is not insignificant or trivial, Parliament is entitled to deference in calculating the nature and extent of the harm and crafting an appropriate response.¹⁰⁵ The AGC asserted that the evidence before the court demonstrated that polygamy has been consistently prohibited in Western democracies because polygamy results in “significant and substantial harms to individuals, particularly women and children, and to society at large.”¹⁰⁶ The AGC explained that these harms include physical and sexual abuse; sexual and reproductive health harms; psychological and emotional harms; physical health harms, including increased mortality; economic deprivation; lower levels of education; decreased levels of political rights and civil liberties; commodification and objectification of women; and increased discrimination.¹⁰⁷

The AGC argued that Section 293 of the Criminal Code is the modern Canadian iteration of a consistent prohibition against polygamy that stretches back through Western history to before the rise of Christianity.¹⁰⁸ In order to establish the pre-Christian, historical reasons for the prohibition on polygamy and the early recognition of its harms in Western democracies, the AGC submitted the expert report of Professor John Witte, Jr., a law professor and

¹⁰¹ See *id.* para. 1062.

¹⁰² *Id.* para. 1249.

¹⁰³ *Id.* paras. 1251–1252.

¹⁰⁴ *Id.* paras. 128–129.

¹⁰⁵ See *id.* para. 1302.

¹⁰⁶ *Id.* para. 129.

¹⁰⁷ *Id.* para. 782.

¹⁰⁸ See *id.* para. 187.

Director of the Center for the Study of Law and Religion at Emory University.¹⁰⁹ Professor Witte was qualified as an expert in legal history, marriage and historical family law, and religious freedom.¹¹⁰ We asked Professor Witte to provide an overview of Western teaching regarding monogamy and polygamy throughout the watershed periods of Western history, from ancient Greece and Rome, through the biblical and early Christian era, the Middle Ages, the Protestant Reformation, the Enlightenment, and the common law era.¹¹¹

Professor Witte testified that Greek and Roman philosophers and jurists condemned the practice of polygamy because it undermined human dignity and equality.¹¹² In contrast, monogamous marriage was extolled because it fostered democratic values.¹¹³ Professor Witte noted that “it has never been seriously claimed that monogamous marriage is a uniformly positive experience for everyone;” however, “in general . . . monogamous marriage is said to bring essential private goods to the couple and their children, and important public goods to society and the state.”¹¹⁴ In other words, monogamy was not simply the product of moral or religious precepts as the Amicus suggested.¹¹⁵ Professor Witte further opined that Western lawmakers have consistently identified the practice of polygamy with harms to individuals, particularly women and children, and to society.¹¹⁶ Professor Witte’s evidence was corroborated by other experts who testified in the *Polygamy Reference*, including witnesses put forward by the Amicus.¹¹⁷

The AGC also submitted evidence with respect to the current status of polygamy around the world and Canada’s obligations regarding polygamy under international human rights law.¹¹⁸ In particular, we asked Dr. Rebecca Cook, Chair of International Human Rights Law at the University of Toronto, Faculty of Law,¹¹⁹ to provide an expert report that addressed four issues: (1) a literature review of the harms of polygamy, especially as viewed through the

¹⁰⁹ *Id.* para. 168.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See id.* para. 217.

¹¹³ *See id.* para. 190.

¹¹⁴ *Id.* para. 228.

¹¹⁵ *See id.* para. 1053.

¹¹⁶ *See id.* paras. 186, 216.

¹¹⁷ *See, e.g., id.* paras. 536, 595, 600, 602.

¹¹⁸ *Id.* paras. 794–799.

¹¹⁹ *Id.* para. 561.

perspective of international human rights law;¹²⁰ (2) state practice and case law on polygamy in comparative Western democracies;¹²¹ (3) the treatment of polygamy in international human rights law;¹²² and (4) Canada's specific obligations with respect to polygamy under various treaties and conventions to which Canada is a signatory.¹²³

Dr. Cook testified that the global trend is to criminalize the practice of polygamy because of the recognized harms associated with it, especially the harms to women's dignity and equality.¹²⁴ Where polygamy is not prohibited, the trend is to restrict its practices.¹²⁵ Dr. Cook also noted that international treaty bodies, such as the Committee on the Elimination of Discrimination Against Women and the Human Rights Committee, have consistently condemned the practice of polygamy.¹²⁶ The Human Rights Committee has expressly called for polygamy to "be abolished wherever it continues to exist."¹²⁷ Dr. Cook also opined that there is a strong consensus under international human rights law that states are obligated "to take 'all appropriate measures' to eliminate polygamy" as a form of discrimination against women.¹²⁸ States, according to Dr. Cook, are also obligated to eliminate polygamy in order to ensure equality in marriage and family law, women's rights regarding their health and security, and the protection of children and young people.¹²⁹

The AGC also provided the court with an original research project conducted specifically for the *Polygamy Reference*. We asked Dr. Rose McDermott, a Professor of Political Science at Brown University, to conduct a statistical analysis of the impact of polygamy on women's equality, children, and the nation-state.¹³⁰ We knew that while the anecdotal evidence of individuals involved in polygamous marriages would provide invaluable insight into particular instances of the harms of polygamy, a quantitative study, such as Dr. McDermott's, was needed in order to offer a comprehensive

¹²⁰ *Id.* para. 602.

¹²¹ *Id.* para. 845.

¹²² *Id.* paras. 836–838.

¹²³ *Id.* paras. 801, 804.

¹²⁴ *Id.* paras. 806, 841.

¹²⁵ *Id.* para. 841.

¹²⁶ *Id.* paras. 806, 813.

¹²⁷ *Id.* paras. 818, 1280.

¹²⁸ *Id.* para. 809.

¹²⁹ *See id.* para. 603.

¹³⁰ *Id.* paras. 580, 609–610.

overview of the inherent connections between polygamy and a whole host of negative outcomes.

Dr. McDermott conducted a statistical analysis of the consequences of polygamy using data from 171 countries around the world.¹³¹ Her study demonstrated that wherever the rates of polygamy increased, there was a corresponding increase in a wide range of negative consequences, not only for the individuals involved in polygamous marriages but for society in general.¹³² Dr. McDermott's study was cross-cultural, cross-national, and used data from three sources: the WomanStats Project Database, the Stockholm International Peace Research Institute, and Freedom House.¹³³ Her study included data from every country in the world with a population over 200,000.¹³⁴ That amounted to 171 countries, which is nearly 90% of the countries in the world.¹³⁵ Based on her knowledge of existing literature on the impacts of polygyny, Dr. McDermott chose thirteen dependent variables to study, including life expectancy, birth rates, sex trafficking, domestic violence, and political and civil liberties.¹³⁶ Dr. McDermott controlled for variables that might directly cause the outcomes she examined, and, in particular, she controlled for the effects of gross domestic product.¹³⁷

Dr. McDermott's study found that the harmful consequences of polygamy included increased levels of physical and sexual abuse against women, increased rates of maternal mortality, shortened female life expectancy, lower levels of education for girls and boys, lower levels of equality for women, higher levels of discrimination against women, increased rates of female genital mutilation, increased rates of trafficking in women, decreased levels of political and civil liberties, and increased spending on defense.¹³⁸ Dr. McDermott found a significant correlation between an increase in polygamy and these harms; therefore, one could infer a causal connection.¹³⁹

¹³¹ *Id.* paras. 613–614.

¹³² *See id.* para. 622.

¹³³ *Id.* paras. 613, 615.

¹³⁴ *Id.* para. 613.

¹³⁵ *Id.* para. 614. At present count, there are 193 member-states in the United Nations; the 171 countries in Dr. McDermott's study represent approximately 88.6% of 193 member-states. *United Nations Member States: Growth in United Nations Membership, 1945–Present*, UNITED NATIONS, <http://www.un.org/en/members/growth.shtml> (last visited May 17, 2015).

¹³⁶ *Id.* paras. 616–617.

¹³⁷ *Id.* para. 618.

¹³⁸ *Id.* para. 622.

¹³⁹ *See id.* paras. 638–639.

Dr. McDermott's statistical analysis was particularly significant for the AGC's defense of the polygamy prohibition because her study allowed us to assert that there are certain harms that inhere in polygamy itself. The existing literature on polygamy was limited by the scope of prior investigations because they were typically confined to a particular country or particular group.¹⁴⁰ This literature, on its own, could not provide evidence of the universality of these harms or whether these harms could be generalized to a wider population. On the other hand, the harms enumerated in Dr. McDermott's study were not linked to the specific national, cultural, or religious context in which polygamy occurred, nor were they linked to the types of individuals involved in the relationships.¹⁴¹ Instead, Dr. McDermott's analysis demonstrated that the harms arose wherever polygamy occurred.¹⁴²

The AGC argued that these inherent, structural harms were precisely what Section 293 of the Criminal Code aimed to prevent.¹⁴³ The prohibition on polygamy was intended to "promote[] human dignity" and reflect "the values and principles essential to a free and democratic society," including "a commitment to social justice and equality."¹⁴⁴ With respect to the primary Charter claims, the AGC argued that Section 293 is consistent with the fundamental freedoms protected by the Charter, including freedom of religion, because freedom of religion does not protect a person's right to engage in religiously motivated practices that harm others and interfere with their Charter rights.¹⁴⁵ The evidence demonstrated that the practice of polygamy was harmful to women and children and interfered with their Charter right to be free from physical, psychological, economic, and social harms.¹⁴⁶

The AGC also argued that the polygamy prohibition is consistent with the principles of fundamental justice under Section 7 of the Charter because the prohibition is consistent with the state's interest in preventing harm, and any measure less than a criminal prohibition would be inadequate to prevent the harms associated with polygamy.¹⁴⁷ The AGC asserted that the evidence clearly established that all polygamous marriages expose the participants, their children, families, and communities, up to and including the state level, to the

¹⁴⁰ *See id.* para. 641.

¹⁴¹ *Id.* para. 624.

¹⁴² *Id.*

¹⁴³ *Id.* paras. 943–945.

¹⁴⁴ *Id.* para. 1257.

¹⁴⁵ *See id.* paras. 130, 833, 1079.

¹⁴⁶ *Id.* para. 1080.

¹⁴⁷ *Id.* paras. 1157, 1165.

risk of significant harms.¹⁴⁸ Criminalizing polygamy was thus necessary in order to mitigate these harms.¹⁴⁹ “The fact that Parliament [can and] has addressed some of the harms associated with polygamy through the enactment of other criminal prohibitions does not” mean that it may not also “prohibit the practice itself.”¹⁵⁰ In any event, a narrower prohibition that does not criminalize the practice of polygamy itself would be ineffective in responding to the harms because the risk of harm is present in every polygamous marriage, and the harmful effects of polygamy extend well beyond the immediate participants.¹⁵¹

Finally, we argued that Section 293 does not violate the right to equality enshrined in Section 15 of the Charter because the prohibition does not draw any distinctions on the basis of “impermissible stereotypes that undermine human dignity.”¹⁵² To the contrary, the prohibition “promotes . . . dignity and the values and principles essential to a free and democratic society.”¹⁵³ The evidence, from the AGC’s perspective, strongly demonstrated that the longstanding understanding that polygamy is harmful is not based on prejudice or stereotyping but on the fact that, objectively, polygamy is inherently linked to harms.¹⁵⁴ The prohibition, from the AGC’s perspective, “corresponds to the serious harms that are associated with [the practice of] polygamy in a manner that promotes the very interests that underpin” the right to equality.¹⁵⁵

The AGBC’s arguments were similarly focused on the harms of polygamy and the ways in which those harms justified the continued prohibition of the practice. It is beyond the scope of this paper to provide a comprehensive overview of the AGBC’s arguments and evidence in the *Polygamy Reference*, but, in a nutshell, the AGBC’s arguments were more specifically grounded in the evidence of “on the ground” harms offered by their lay witnesses.¹⁵⁶ While the AGBC also tendered expert witnesses who opined on the social harms engendered by polygamy, the AGBC’s primary focus was on the impact of polygamy on its participants, especially those within the FLDS in North

¹⁴⁸ *Id.* para. 1148.

¹⁴⁹ *Id.* para. 1154.

¹⁵⁰ *Id.* para. 1165.

¹⁵¹ *Id.* paras. 1148, 1165.

¹⁵² *Id.* para. 1247.

¹⁵³ *Id.* para. 1257.

¹⁵⁴ *Id.* para. 1255.

¹⁵⁵ *Id.* para. 1256.

¹⁵⁶ *See id.* paras. 492, 667.

America.¹⁵⁷ The testimony of these various lay witnesses described the everyday living conditions of these individuals and the long-term consequences that growing up in a polygamous community has had on their physical, psychological, and social well-being.¹⁵⁸ Their testimony was, at times, difficult to listen to because of their graphic descriptions of the violence and manipulation they encountered in these communities and relationships.¹⁵⁹ Undoubtedly, the compelling nature of their testimony played a significant role in giving a human face to the often more abstract harms described in the literature on polygamy and by the various experts who testified in the *Polygamy Reference*.

III. THE CHIEF JUSTICE'S DECISION

The Chief Justice released his comprehensive Reasons for Judgment on November 23, 2011. The Chief Justice rejected the majority of the Amicus's arguments and found that not only had the Attorneys General "demonstrated a reasoned apprehension of harm . . . they ha[d] demonstrated 'concrete evidence' of harm" that justified the criminal prohibition on polygamy.¹⁶⁰ The Chief Justice did accept the Amicus's submissions with respect to freedom of religion and held that Section 293 violated the religious liberty of members of certain faith groups.¹⁶¹ However, he went on to conclude that the inherent nature of the harms of polygamy permitted the government to prohibit this practice.¹⁶² The Chief Justice noted that Parliament is entitled to some deference because "[t]his is a complex social issue. Parliament is better positioned than the Court to choose among a range of alternatives to address the harms."¹⁶³

It was also common ground between all the participants that the prohibition engaged the liberty interests of polygamists because these individuals could face jail time if convicted.¹⁶⁴ Once again, polygamy's connection to such pervasive, demonstrable harms was, for the Chief Justice, sufficient to establish that this infringement of the liberty interests of polygamists was in

¹⁵⁷ *Id.* paras. 666–691, 702–708.

¹⁵⁸ *See, e.g., id.* paras. 666–667.

¹⁵⁹ *See, e.g., id.* para. 667.

¹⁶⁰ *Id.* para. 1044.

¹⁶¹ *Id.* para. 1098.

¹⁶² *Id.* para. 1182.

¹⁶³ *Id.* para. 1342.

¹⁶⁴ *Id.* para. 1130.

accordance with the principles of fundamental justice.¹⁶⁵ He held that the prohibition was not arbitrary, overbroad, or grossly disproportionate to the government's interest in preventing harm.¹⁶⁶ He also accepted the Attorneys General argument that just because Parliament has addressed, through other laws, some of the discrete harms that have been found to exist in polygamous marriages, Parliament is not prevented from criminalizing polygamy itself.¹⁶⁷ The Chief Justice also noted that these other Criminal Code offenses "do not 'occupy the field' of harms associated with polygamy as an institution."¹⁶⁸ Polygamy, the Chief Justice concluded, was "inherently harmful to the participants, to their offspring and to society generally."¹⁶⁹ He also held that "it is legitimate for Parliament to act proactively to prevent the occurrence of harm," and Parliament "is not limited to reacting once harm occurs."¹⁷⁰

In coming to this conclusion, the Chief Justice relied heavily upon the evidence of Dr. McDermott in order to establish the structural harms of polygamy.¹⁷¹ He found that her evidence supported "the reasoned view that the harms associated with the practice [of polygyny] are endemic; they are inherent."¹⁷² "This conclusion," in the Chief Justice's words, "is critical because it supports the view that the harms found in polygynous societies are not simply the product of individual misconduct; they arise inevitably out of the practice."¹⁷³

Dr. McDermott's statistical analysis not only lent credibility (and cultural transferability) to the findings of previous social science inquiries into the effects of polygamous relationships, but it also validated and lent credibility to the personal testimony of former members of the FLDS. As noted above, the AGBC had located numerous individuals in Canada and the United States who came forward and told their stories in open court.¹⁷⁴ While their evidence was extremely compelling, it could only go so far in establishing the harms of polygamy because each of these first-hand accounts of the harms were limited

¹⁶⁵ *Id.* paras. 1180–1182.

¹⁶⁶ *Id.* para. 1203. *But see id.* para. 1226 (holding that the prohibition was "overbroad with respect to its application to children between the ages of 12 and 17").

¹⁶⁷ *Id.* para. 1192.

¹⁶⁸ *Id.* para. 1194.

¹⁶⁹ *Id.* para. 1182.

¹⁷⁰ *Id.* para. 1195.

¹⁷¹ *Id.* para. 1045.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *See id.* para. 666.

by the fact that all the relationships occurred in a particular religious community. Arguably, these harms could simply have been the product of certain religious beliefs and practices rather than polygamy itself. However, the combination of the testimony of these witnesses with Dr. McDermott's original statistical analysis left no doubt in the Chief Justice's mind that harms inhere in the very structure of polygamy itself: "What is striking is the congruity we find in the dangers of polygamy found in the African and Middle Eastern based empirical studies . . . , those predicted by Dr. McDermott's work, and those found 'on the ground' and anecdotally in North America."¹⁷⁵

The Chief Justice also dismissed the Amicus's contention that the prohibition violated the Charter's equality guarantee. The Chief Justice found that "[a]ny differential treatment that flows from [Section] 293 [was] not based on stereotypes with respect to particular marital forms [or. . . particular religions."¹⁷⁶ Rather, "polygamy has been [prohibited or restricted] throughout history because of the harms . . . associated with its practice," and the Chief Justice noted that it is for this reason that Section 293 was enacted.¹⁷⁷ He even went so far as to say that "[Section] 293 promotes," rather than undermines, "the values that underlie the equality guarantee."¹⁷⁸

The Chief Justice's determination that polygamy itself, as an institution, is associated with a whole host of negative consequences was ultimately fatal to the Amicus's position.¹⁷⁹ All of the Amicus's arguments rested on the premise that, as long as the participants in polygamous marriages were responsible for the type of relationship they forged and as long as they freely and consensually entered into such marriages, the law should leave them alone.¹⁸⁰ This premise was fundamentally undermined by the statistical and anecdotal evidence that pointed to the structural harms of polygamy, as well as the evidence outlining the longstanding prohibition on polygamy in Western democracies. Once the Chief Justice accepted "that there is a reasoned apprehension that polygamy is inevitably associated with [a whole host of] harms . . . [that] inhere in the institution itself," it was also inevitable that he would find that anything short of a blanket criminal prohibition would not deter and punish these harms.¹⁸¹

¹⁷⁵ *Id.* para. 643.

¹⁷⁶ *Id.* para. 1262.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See id.* paras. 1181–1182.

¹⁸⁰ *See id.* para. 1320.

¹⁸¹ *Id.* para. 1343.

CONCLUSION: NOT THE LAST WORD?

In the years since the Chief Justice released his decision in the *Polygamy Reference*, the FLDS community in Bountiful, British Columbia has indicated that they continue their practices.¹⁸² When the *Polygamy Reference* was released, the leadership of the FLDS denounced the Chief Justice's decision and vowed to maintain their battle against the Criminal Code's prohibition.¹⁸³ Meanwhile, investigations by the Royal Canadian Mounted Police into the community in Bountiful resumed with the knowledge that the polygamy prohibition had been confirmed as constitutional.¹⁸⁴ These investigations have recently given rise to criminal charges.¹⁸⁵

In August of 2014, British Columbia's Criminal Justice Branch approved polygamy and child-related charges against several members of the community in Bountiful.¹⁸⁶ Those charged included the leaders of the FLDS sect, Winston Blackmore and James Oler.¹⁸⁷ While these prosecutions are in the very early stages, we anticipate that those who have been charged will challenge the constitutionality of Section 293 as part of their defense. Mr. Blackmore, in particular, did not participate in the *Polygamy Reference* because his application for advanced costs (which would have provided funding for him to participate) was rejected by the Chief Justice.¹⁸⁸ Now that he has been criminally charged, it is reasonable to expect that he will adduce new evidence and make novel arguments concerning the polygamy prohibition's constitutionality.

It remains to be seen how the *Polygamy Reference* will be utilized in these criminal proceedings. While technically only an advisory opinion, the Chief Justice's decision is based on an exhaustive record of evidence that will be hard to ignore in any future proceedings. The *Polygamy Reference* brought the issue of polygamy into mainstream public conversation in Canada. While it may not be the last word on this issue, the *Polygamy Reference* provides an

¹⁸² See *Bountiful Sect Members Face Polygamy, Child-Related Charges*, CBC NEWS (Aug. 14, 2014, 4:42 AM PT), <http://www.cbc.ca/news/canada/british-columbia/bountiful-sect-members-face-polygamy-child-related-charges-1.2735785>.

¹⁸³ Dirk Meissner, *Bountiful Leader Denies Polygamous Community Brainwashes, Harms*, GLOBE & MAIL (Sept. 6, 2012, 11:08 AM EDT), <http://www.theglobeandmail.com/news/british-columbia/bountiful-leader-denies-polygamous-community-brainwashes-harms/article4252216/>.

¹⁸⁴ See *Bountiful Sect Members Face Polygamy, Child-Related Charges*, *supra* note 182.

¹⁸⁵ See *id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Polygamy Reference*, 2011 BCSC 1588, para. 23 (Can.).

unparalleled overview of the impact of polygamy on individuals, communities, and the nation-state.