

**UNTYING THE KNOT: FEMINIST EXPERT EVIDENCE IN THE  
“REMARKABLE” POLYGAMY REFERENCE DECISION**

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## Abstract

Following the arrests of Winston Blackmore and James Oler of Bountiful, British Columbia in 2009 polygamy has captured the attention of media, the legal system, and the general population of Canada. Overwhelmingly, the central discourse surrounding polygamy in the media has tended to be one of secrecy, forbidden religious practices, and oppression; this discourse of polygamy as harmful was substantiated by Chief Justice Bauman in the *Reference re: Section 293 of the Criminal Code of Canada*, referred to in this thesis as the Polygamy Reference. Conversely, feminist research on the topic of polygamy in Canada, conducted through myriad methodologies, challenges the claim that polygamy is inherently harmful.

This thesis seeks to analyze the ways in which polygamy is addressed in the Polygamy Reference and the treatment of feminist qualitative research opposing criminalization of polygamy in the decision. The study examines the research question: In what ways does the Polygamy Reference integrate or dismiss qualitative feminist research in sustaining its central claim that polygamy is inherently harmful?

Secondary research questions included: If this feminist research was not integrated in the Polygamy Reference, whose research was favored? What discourses and methods does Chief Justice Bauman draw upon to sustain the claim that polygamy is inherently harmful? By utilizing a feminist post-structural lens, and applying a critical discourse analysis and thematic coding to the Reference, this thesis argues that the Polygamy Reference marginalizes particular feminist research as one way to sustain its claim that polygamy is inherently harmful.

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This thesis has served as pedagogy for my own practice of social activism. When I first came to feminism, I understood feminist activism to largely include protests, street parades, and public speaking; this thesis has shifted my opinion on this topic. In fact, the act of writing as an inherently political process has, I believe, served as a form of activism in my own life. Therefore, it is important for me to acknowledge the feminist writing and activism that inspired this study; the contributions of feminist scholars on the topic of polygamy in Canada in the form of activism have given me courage to go forward to be, as suggested by Ghandi, the change I wish to see in the world.

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## Introduction

Although polygamy<sup>1</sup> is often viewed as the antithesis to monogamy, the legal parameters surrounding both polygamy and monogamy are demonstrative of the state's role within the private sphere in Canada. While polygamy embodies a criminal offense that has, of late, been referred to as a barbaric cultural practice, monogamy is representative of normative marriage.<sup>2</sup> Further, while monogamy is often seen as an indicator of responsible citizenship, particular discourses of polygamy as harmful have surfaced in Canada over the past ten years, buoyed by the media, that characterize polygamy as profoundly religious and inherently oppressive to women and children. The dichotomous relationship between polygamy and monogamy was most recently echoed in the *Reference re: Section 293 of the Criminal Code of Canada*, hereafter referred to as the Polygamy Reference, in which a clear binary is constructed: monogamy as conducive to gender equality, safety, and liberal democratic principles, and polygamy posited as a cultural or religious practice that is inherently harmful. In this duality, not only are multiple forms of polygamy erased, but also polygamy and monogamy are represented as oppositional; therefore, discussions of polygamy are fundamentally linked to discussions of monogamy. The creation of this duality is essential to the role of the state in regulating the lives of the general population, which Foucault refers to as *biopower*, and raises important questions for feminists about how the state polices the marital choices of women. In this thesis, I argue that the judiciary, which acts as an arm of the state, has assumed powers that have been broadly extended in the Polygamy Reference and that have embodied a paternalistic voice primarily intent on maintaining the illusion of

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<sup>1</sup> Polygamy is an umbrella term intended to capture both polygyny (one man with multiple spouses) and polyandry (one woman with multiple spouses).

<sup>2</sup> Christian monogamy is outlined and defined by Bailey and Kaufman (2010).

‘saving’ women from polygamous relationships while practically functioning as a method to uphold monogamy as normative. While the Polygamy Reference specifically focuses on the marital practice of plural spouses, a conceptually-related web also emerges surrounding a nexus of issues such as culture, religion, citizenship, and gender. This conceptual web has been a focus of research for feminist scholars long before questions of polygamy arose in the 21<sup>st</sup> century.

### **Thesis Overview**

The Introduction of this thesis begins with a broad overview of the Polygamy Reference decision and presents a literature review of Canadian research on polygamy, with specific attention paid to feminist scholarly contributions. The Introduction also includes the research question and thesis statement that guides this thesis.

Chapter One describes the legislative history in Canada that buoyed Chief Justice’s position that polygamy (read, polygyny) is inherently harmful. This Chapter will clearly identify the fundamental actors involved in the Polygamy Reference and illustrate how this decision came to fruition. Then, in Chapter Two, the conceptual framework of Foucauldian power and knowledge that underpins the document’s analysis will be described; additionally, a feminist critical discourse analysis will be discussed as it pertains to analysis of the Polygamy Reference. In Chapter Three, the Polygamy Reference will be analyzed specific to answering the central research question and its secondary components and sub questions. Lastly, Chapter Four will synthesize findings and outline further research that may be conducted on this topic.



### **A Brief Overview of Contemporary Discourses of Polygamy in Canada<sup>3</sup>**

Polygamy largely did not surface within public consciousness in Canada until after 2008, when James Oler and Winston Blackmore of the Fundamentalist Church of Latter Day Saints (FLDS) in Bountiful, British Columbia were first arrested for practicing polygyny. Since then, the Canadian media has been quick to capitalize upon the hysteria surrounding polygyny in Canada, exemplified by numerous television shows including The Learning Channel's (TLC) *My Five Wives*, *Breaking the Faith*, and *Escaping Polygamy*, A Lifetime movie titled *My Trip to Bountiful*, and a similar film titled *Bountiful's Lost Boys* as well as numerous books, including *The Witness Wore Red*. Polygamy is synonymous with polygyny in all of these examples, and is generally depicted within these media sources as a religious cult<sup>4</sup> that indoctrinates women and children into compliance with polygynous marriages. Therefore, a monolithic discourse of polygamy has become extant throughout Canada, one that specifically surrounds polygyny in Bountiful but that also endures as a general ideology to justify imperative monogamy as the only marital practice through which gender equality can be realized and achieved. In fact, the presumption of gender equality as characteristic of heterosexual, monogamous marriage, antithetical to harm, is a central thread that may be traced throughout the Polygamy Reference.<sup>5</sup>

The Polygamy Reference came to fruition almost a century after the Canadian nation state made a concerted effort to eradicate polygamy in Canada, though underground polygamy endured during this time. However, while polygamy occurring in

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<sup>3</sup> Discourses associated with the Polygamy Reference will be further examined in Chapter Two.

<sup>4</sup> Polygamy as a cult is explicitly defined and outlined in Musser, R. (2013) *The witness wore red*. New York, NY: Grand Central Publishing.

<sup>5</sup> See, for example, paragraph 214 in the Polygamy Reference, which states that, "monogamy was better for women, as it was naturally designed to respect gender equality."

Bountiful since the 1950s was an open secret for many, no polygamy-related charges were laid against any individuals from Bountiful in the 20<sup>th</sup> century. In fact, prior to the arrests of James Oler and Winston Blackmore in 2009, the last person in Canada to be charged with polygamy-related offenses was an Aboriginal man in 1898. As will be illustrated, this lack of legal action was likely prompted by specific sections in the Canadian Charter of Rights and Freedoms that guarantee particular social protections to Canadian citizens. Yet, as public attention on polygyny that was being practiced in Bountiful swelled in the 1990s, judicial review of section 293 of the Criminal Code in the form of a reference decision was required to establish the legal parameters of polygamy in Canada. While the Polygamy Reference does just this, it also comprises an underlying and implicit narrative that situates polygamy, and specifically polygyny, in diametric opposition to monogamy; thus presenting a particular narrative of the experiences of women in each marital form.

### **Contemporary Canadian Legal Research on Polygamy: The Literature**

The topic of polygamous marriages was not broadly researched in Canada prior to 2004. However, over the past ten years, some scholarly research examining polygamy in Canada has surfaced, largely in response to criminal investigations of James Oler and Winston Blackmore. Academic literature on polygamy in Canada is a discursive field that includes a breadth of perspectives and multiple research findings. In order to identify the direction of this thesis, the literature review that follows will outline the current field of research on the topic of polygamy in Canada; in doing so, a gap in contemporary research is illustrated in which this thesis is situated.

Early research on the topic of polygamy in Canada includes a series of four reports

published by Status of Women Canada in 2005 that showcases examples of the then-recent research conducted on the topic, and that largely addressed polygyny rather than polyandry. General trends among all policy reports included discussions on the potential harm to women and children involved in polygamous relationships or families, arriving at a general consensus that polygamy should not be fully legalized in Canada. However, authors of such reports differed in terms of their overarching arguments regarding the extent to which polygamy should remain criminalized and, consequently, policy recommendations differed regarding the practice of polygamy.

One report, entitled *Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada* authored by Bailey and Kaufman (2010), offers a comprehensive set of policy recommendations aimed at enabling those who wish to exit polygamous and, specifically, polygynous relationships. While this report notes that polygyny may be potentially harmful to women and children, the authors assert that policy makers in Canada should consider leniency in allowing immigrants who practice polygamy to enter Canada. This stance is fostered by what Bailey and Kaufman (ibid.) refer to as the *two-pronged test* in relation to *lex loci celebrationis*.<sup>6</sup> Further, this report suggests that accepting those immigrants in valid foreign polygamous relationships need not be viewed as endorsement of the practice itself, rather as a way to support such families remaining as an intact unit. The authors contend that separation of families through current Canadian immigration policies poses more potential harm to women and children than practices of polygamy. In their summary, Bailey and Kaufman (2010) argue for some decriminalization of polygamy in Canada, provided that this decriminalization

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<sup>6</sup> Bailey discusses this further in a book she co-authored with Amy Kaufman, entitled *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy*. p. 143.

occurs in conjunction with clear criminal sanctions to limit the potential for harm for women and children in polygynous families (p. 167).

Nicolas Bala (2009) opposes Bailey and Kaufman's (2010) arguments for limited decriminalization of polygamy in Canada. Bala authored a second policy report and has elsewhere (2010) published research on the topic. His report contends that not only is polygyny inherently harmful to women and children, it imposes tremendous fiscal hardships upon the state. Bala points to the reliance of polygynous families on welfare and, in particular, the likelihood that polygynous families will result in numerous children who will also be dependent upon the state. Interestingly, Bala makes no reference to the current lack of programs and benefits available to those in hidden polygynous relationships or families, a point raised by some feminist scholars; indeed, it is true that the criminalization of polygamy in Canada often forces such families into hiding for fear of persecution, with no exit or outreach programs available. However, Bala remains exceptionally concerned with fiscal impositions on the state, and notes that the provincially-funded local school in Bountiful may currently be indoctrinating children about patriarchal values. In this way, Bala seems to be suggesting that polygynous families in Canada not only impose unreasonable fiscal costs on the state, but social ones as well. The relationships envisioned by Bala between indoctrination, polygamy, and patriarchy result in a *de facto* conclusion that Section 293 is necessary to protect women and children from experiencing harm in polygamous families.

Similarly, Stephen Kent (2006) echoes the sentiment that women and children in polygynous families require protection from harm. He discusses human rights violations in the form of child marriages that, he argues, have historically occurred in Bountiful and

in Short Creek/Colorado City, Arizona. Notably, Kent assumes that Bountiful and Short Creek are contextually and practically identical; inasmuch as he has little practical research experience within the community of Bountiful, he assumes, based on statistical data, that the occurrence of child marriage in both locations are identical. This problematic assumption is highlighted in his discussion of the legal and fiscal costs that polygyny imposes on the state; however, he offers only American examples in this cost-risk discussion (p. 20). Further, Kent relies on assertions made by secondary sources regarding forced child marriages as tenets of what he calls Mormon “subcultures” and absents recent research conducted in Bountiful.

Both Bala’s and Kent’s premise that polygyny is a deeply patriarchal institution is problematized by the research of Angela Campbell (2005), who authored a third policy report on the status of polygamy in Canada. Campbell is the only scholar to conduct qualitative interviews with women in Bountiful, when she was invited there to observe a polygynous wedding (Campbell 2014).

Despite her extensive and unprecedented research on Canadian polygyny, Campbell recommends that further research is required, not just on polygyny but on polygamy as a whole. For Campbell, research on polygamy in Canada must be conducted with attention to context, as she argues that polygamy may be practiced in unique ways elsewhere in the world, particularly in the United States. For example, Campbell (2014) notes that, “Although a considerable amount is known about marriage rites in early and conventional Mormonism, the literature on social practices in contemporary fundamentalist groups is sparse” (p. 27). Although not included in the Status of Women Canada reports, scholars such as Horn and Ward (2004) similarly suggest that the

criminality of polygamy is used to police how the standpoints of women form common knowledge (and, subsequently, power and discourse) that is contrary to mainstream ideas concerning marriage; as such, the voices of women who participate in plural marriages may be appropriated and even negated. Therefore, the rights and autonomy of women and children in polygamous relationships in a Canadian-specific context require further examination and understanding before legislated criminalization of the practice occurs. Indeed, many feminist scholars, including Bailey and Kaufman (2010), suggest that polygamy should not be criminalized solely based on the premise that it is not monogamy.

As Campbell's research illustrates, it appears that marriages in Bountiful are nuanced and complicated---far more so than the crude and superficial portrayals of other narratives. Her findings highlight that polygynous relationships in Bountiful are fluid, with only six or seven men with plural wives, while the rest of the community chooses monogamous family forms. For example, Campbell (2014) notes that, "Regardless of the rationale, polygamy would seem to be a minority practice in Bountiful, even though the community attracts profound public and political interest because of it" (p. 31). In Campbell's findings, most participants highlighted experiences that served as counter narratives to negative portrayals of polygyny.

Similarly, critical race scholar Margaret Denike (2010) argues that the lived experiences of many women in Canadian history and in contemporary Canadian society "do not resemble the (Christian) ideal of conjugal monogamy that has been enforced and institutionalized as the norm" (p. 142). Instead, she suggests that Mormon people who

choose to practice polygamy in Canada have been racially othered,<sup>7</sup> and that limiting the types of marriage recognized by the Canadian state serves to naturalize racial difference and racial hierarchy. This is evidence, she argues, that marriage in Canada is not a marker of “fundamental cultural difference” (p. 142) and that the demonization of polygyny in Canada has only been accomplished through a concentrated and focused effort by the Canadian state to eradicate the practice.

Religious and gender scholar Lori Beaman also discusses the importance of contextualizing and locating the experiences of women in polygamous family structures. Like Campbell, Beaman (2004) is critical of the portrayal of polygamy as inherently harmful. While she offers little prescriptive discussion relative to the decriminalization of polygamy, she argues that current justifications for the status quo are based on false presuppositions: namely, that negative portrayals of polygamy are often taken as self-evident and uncontested. Despite these negative portrayals of polygamy in both the media and within the Polygamy Reference, Beaman points out that, “few social scientific data about polygamous marriage in North America definitively point to harm” (Beaman, 2014, p. 2). Instead, she suggests that criminalizing polygamy serves a broader social function: to defend the institution of monogamy. Indeed, her insights about the curious language of state protection of women (that is, protection from polygyny) and the subsequent erasure of the agency of women prompts questions such as: How does the state replicate patriarchy in its refusal to listen to women’s voices? What is the nature of harm suffered

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<sup>7</sup> ‘Othering’ in this context is defined by Denike (2010), who draws on the work of Ertman (2010) to note that, “polygamy was treated as an extraordinary aberration among white people, as something that was that abhorrent to the “civilized” world, though it was accepted as “natural” to other races (referred to variously Asian, African, Mongolian, Oriental, or Indian). In this way, Denike draws on non “white people” as the conceptual other, a premise she argues is problematized by the tendency of FLDS “white people” to practice polygamy, and subsequently, disrupt common assumptions about what characterizes other races (p. 855).

by women as a result of the state's approach? Indeed, state-based paternalism and the silencing of particular women's voices and experiences are presented as centrally problematic throughout this thesis.

Gillian Calder (2014) posits similar arguments through her contention that there is nothing inherently wrong with polygamy.<sup>8</sup> Her interest in research of non-monogamies stems from "a deep seated concern about the ways in which the law 'others' those who practice non-monogamy (p. 216). For Calder, monogamous marriage as a central tenet of the state, or the "essence of marriage" as "the exclusion of all others" (p. 220), characterizes Canada's enduring definition of marriage formalized in common law that "focuses almost exclusively on exclusivity" (p. 221). While Calder is not necessarily a proponent of legalized polygamy in Canada, she effectively highlights the inextricable relationship between polygamy and monogamy in a Canadian-specific context, and argues that opposition to polygamy largely functions to uphold monogamy.

While Calder is critical of Canada as a secular, benevolent, multicultural state, similar queries are starkly omitted in a fourth Status of Women policy report (2005) authored by the Alberta Civil Liberties Research Centre (ACLRC). This report supports the criminalization of polygamy in Canada as an instrument to protect individual autonomy and free rights under the Canadian Charter of Rights and Freedoms. However, the report does not address the possibility that women might enter polygynous marriages by free choice. The report notes that agency and autonomy of women and children in polygynous marriages may be compromised because they are often dependent on men within their community or on fiscal provisions by the state, with no legal protections

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<sup>8</sup> Calder does not rely on a polygyny-specific perspective and, instead, focuses on non-monogamies. Thus, I do not specify the term *polygyny* in this section.



against poverty and little-to-no relief from abuse. Like Bala (2009), this report identifies polygyny as a patriarchal family structure that inherently oppresses women and children. The report further notes that the issue of polygamy in Canada is legally complex as communal rights may interfere with individual rights and agency. This is particularly apparent insofar as the report largely ignores freedom of religion as a collective right protected in the Canadian Charter of Rights and Freedoms. Indeed, the authors do not appear to consider the possibility of anyone entering into polygamous marriages by choice and, therefore, their perspective rests on neoliberal foundations of free choice, which they suppose women in polygynous families do not have.

Choice and agency for women in polygamous relationships are also discussed by Walia (2006), who compiled a report for the Women's Legal Education and Action Fund (LEAF) describing how the Canadian nation-state engenders polygamous immigrants. As one example, Walia suggests that because plural wives are not offered rights and protections similar to monogamous wives, they are far more likely to become impoverished and destitute if separated from their husbands. However, this argument constructs a precarious link between socio-economic agency and equality as naturalized within monogamous marriage. To illustrate, Beaman (2014) problematizes the theory that women in polygamous marriages all have limited agency by reasoning that, "If polygamy is inherently harmful, the logical conclusion is that women would never freely choose it. They must be coerced, or have false consciousness, or be unable to exercise agency due to their socialization" (p. 10). While Walia is elsewhere (2015) critical of Canada's image as a benevolent state and argues that state-based targeting of religion is a form of neo-racism, LEAF publicly supports the judge's decision in the Polygamy Reference, an

important point of contention that will be addressed in Chapter 3.

Despite substantial literature on the topic of polygamy in Canada, there has thus far been little published in the way of feminist analyses of the Polygamy Reference. While Calder (2014) briefly mentions the decision in the epilogue of her and Beaman's book, she does so only to say that while she agrees with Chief Justice Bauman's findings, she disagrees with his reasoning. Indeed, I echo her sentiment that the rationale in the Polygamy Reference is problematic, hence the proposal of this thesis that analyzes this thinking from a particular feminist perspective.

### **Impetus for this Thesis**

I take issue with many of the presuppositions in the Polygamy Reference about acceptable behavior for women in Canada and the extent to which this behavior should be controlled by the state. Chief Justice Bauman's framework not only confirms Christian monogamy as the only acceptable marital practice in Canada, it also imposes a particular interpretation that assumes inherent harm to women and children in polygamous families. Thus, while the Polygamy Reference is about 'saving' women from harm, a problematic framework in and of itself, the document contains a multitude of presuppositions about universal experiences, witness oral testimonies, and shortcomings of qualitative research. These assumptions and arguments require problematizing; I do so in Chapter 4.

Through a preliminary examination of the Polygamy Reference, it became clear that while the document presents the argument that polygamy should remain criminalized in order to 'save' women and children from harm, the practical result of the decision is the normative maintenance of monogamy. As a feminist scholar, this argument was difficult for me to understand, not only in relation to the neoliberal, supposedly-

multicultural environment that characterizes the Canadian nation-state,(Hiebert, Collins & Spoonley 2003), but also because I was aware of nuanced feminist literature in Canada that was not in full agreement with the portrait of polygamy painted by Chief Justice Bauman. Further, I found it odd that the credibility of Angela Campbell, a legal feminist scholar who has carefully researched women residing in Bountiful, was not only extensively questioned but was patently discounted in the case proceedings and decision. While anthropologists, historians, psychologists, and political scholars are heavily cited and written into the very decision itself, some feminist voices---particularly those who had already conducted research on polygamy---are curiously absent or marginalized by comparison and, perhaps more importantly, the voices of women from Bountiful are rendered silent.

### **Research Statement**

The exclusion of some feminist voices from the Polygamy Reference is of central relevance to this thesis. When first researching polygamy in Canada from a feminist perspective, I began considering this thesis in terms of the intersections of feminism, law, and polygamy. When I arrived at the data source that is the Polygamy Reference, it became apparent that the feminist research I had become familiar with was not a central thread woven throughout the decision. Simply put, I sought to locate and identify the voices representing feminist research in the decision.

This thesis seeks to analyze the ways in which polygamy is addressed in the Polygamy Reference and the treatment of feminist qualitative research opposing criminalization of polygamy in the decision. The study examines the research question: In what ways does the Polygamy Reference integrate or dismiss qualitative feminist research

in sustaining its central claim that polygamy is inherently harmful? Secondary research questions included: If this feminist research was not integrated in the Polygamy Reference, whose research was favored? What discourses and methods does Chief Justice Bauman draw upon to sustain the claim that polygamy is inherently harmful?

In this thesis, I apply a Foucauldian lens of power relationships and a feminist critical discourse analysis to demonstrate how the Polygamy Reference marginalizes particular feminist research in order to sustain its claim that polygamy is inherently harmful. This marginalization, in turn, gives voice to particular research from which Chief Justice Bauman draws his decision.

In answering these research questions, it is not my intention to cast judgment on the practice of polygamy; indeed, my own politics of location is informed by ontological approaches that acknowledge the importance of questioning or challenging the existence of the categorical normative. Therefore, I deliberately avoided advocating for, or against, the continued criminalization of polygamy in Canada. Instead, I seek to contribute to a broader, gendered discourse associated with the practice of polygamy (as the antithesis to monogamy) in Canada as explained in the Polygamy Reference, thereby unpacking state-centered relations of power that regulate the institution of marriage.

### **Language and Terms**

In order to proceed with my discussion, I will first define contested or contentious terms as they occur throughout this thesis. This is necessary to provide a clear understanding of how I interpret these terms, as well as to provide linkages to my analysis, where my use of these terms differs from text in the Polygamy Reference. In particular, I focus on two central terms: polygamy and feminism.

## **Polygamy**

There is often confusion surrounding the term polygamy, which is often conflated with polygyny and, sometimes, bigamy, particularly within the scope of the media in North America, which often relies on American interpretations of the terms. Polygamy (both elsewhere and in the Polygamy Reference) is considered an umbrella term that encapsulates all forms of plural marriage, including the existence of one husband with several---often women---partners (polygyny) and also the existence of one wife with multiple---often male---partners (polyandry). While I acknowledge that this definition presumes heteronormativity, which is inherently problematic, plural marriages that involve same-sex relationships are more often referred to as polysexuality. Polygamy, as I use it in the context of this thesis, is similar in nature to polyamory, though in the Polygamy Reference case decision the latter is described as being connected to “sex positivity”, which the judge describes as a principle that “puts a high value on sexual relations, some even viewing sex as sacred” (para. 433). In fact, this is not a commonly accepted definition of sex-positivity, a term coined by third wave feminists to support an elimination of shame associated with various kinds of sexual activities that have historically been suppressed by state-based institutions, including women having multiple sexual partners in a lifetime, people with disabilities engaging in sex, and homosexuality.<sup>9</sup> In this way, sex-positivity is less about placing a high value on sexual relations; rather, it is about removing stigma that is frequently attached to particular sexual relations. The Polygamy Reference also cites from a disposition from Mr. Wagner, who couples

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<sup>9</sup> In particular, see feminist activist Laci Green and her discussion on sex-positivity, or sex-plus. <https://www.youtube.com/user/lacigreen>

polyamory with Wicca, and considers polyamory to be a “feminist-influenced religion” (para. 462).

In Canada, both polygamy and bigamy are criminalized and, though both offenses involve non-monogamies, there is a slightly different legal interpretation of each. Bigamy involves the practical action of marrying a second spouse while simultaneously married to another spouse; in this way, bigamy is more about the criminalization of the actual marital structures or action of taking more than one spouse.<sup>10</sup> Polygamy, on the other hand, is more commonly associated with the practice of living with plural spouses; it is less about the marriage itself and more about the accompanying lifestyle. While polygamy is often characterized by some sort of ceremony or rite of passage that joins two spouses into a marital agreement, Bailey and Kaufman (2010) also discuss plural wives, whom they describe as polygamous spouses living in countries that do not legally recognize polygamous marriages; that is, plural wives, though they may exist in common-law arrangements, are not legally bound to their spouses. Indeed, as Canada does not allow polygamous marriages, all second, third, and subsequent spouses are, by Bailey and Kaufman’s definition, plural (wives).

For the purposes of this thesis, I will not rely on the term polygamy to indicate polygyny or polyandry, as the Polygamy Reference does. I argue that not only does this conflation erase instances of polyandry and other plural marriages; it is an incorrect interpretation of polygamy to assume it to be always, or naturally, indicative of polygyny. To do so serves to exclude multiple non-monogamies, including kinship systems arising

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<sup>10</sup> Note that this is a Canadian-specific legal interpretation of bigamy, as the offense of bigamy is different in countries such as the United States.

from polyandry, and also maintains an inaccurate assumption that polygamy is defined vis-à-vis relations with men, thereby maintaining a male-centric system.

Furthermore, I am curious about Chief Justice Bauman's refusal to specify polygyny when it is indicated or warranted. Various 'poly' systems are outlined in the decision and I will consider, for purposes of analysis in Chapter 3, the effect of interspersing polygamy and polygyny in the Polygamy Reference. Therefore, I have indicated the term polygamy only if used it as an umbrella term for multiple spouses, or to describe the law in Canada that forbids polygamy, and will otherwise use more accurate terms such as polygyny or polyandry.

### **Feminism**

Feminism is also a contested term, though one I frequently use. Indeed, the idea of confining feminism to a single definition that incorporates intricacies of the construct appears daunting. In fact, it may be a task that should not be attempted, particularly as I subscribe to a post-structuralist school of thought. Furthermore, there are several individuals and groups who give testimony in the Polygamy Reference who identify as feminist or feminist organizations, yet whose research or platforms do not mirror my own interpretation of feminism. While at its core, feminism is concerned with addressing and ending unequal power relations between genders that have historically posited men as superior to women, feminism is now far more complex and interpretative depending on individual locations. Acknowledging complex understandings of feminism is particularly crucial to this thesis, as the topic of polygamy is both discursive and divisive within the feminist community. Feminists assume varied understandings of the advantages and limitations of decriminalizing polygamy. Yet, the complexities of feminist research about

polygamy in Canada are sometimes subsumed and diluted into a singular discourse; namely, one that relies on the presupposition that all feminists are in favor of decriminalizing the practice, as evidenced by media headlines such as an article from Maclean's in 2014 titled *Feminists Call for Decriminalization of Polygamy*. Such contentions are not only overgeneralized and overly simplistic, they also contribute to a perceived homogenization of feminist research on this topic. Indeed, though I tend to side with the field of feminist research that is less critical of polygamy, or at least with those scholars who take issue with the presupposition that polygamy is inherently harmful, for purposes of this thesis I bracket this opinion and expose feminist arguments regarding the topic of polygamy that circulate within the Polygamy Reference.

Lastly, for purposes of this thesis, I have researched all those individuals and groups called as witnesses in the Polygamy Reference case, and key-word searched for the terms *feminism* and *gender* within their research, publications, and websites. As a result, I found two groups and three individuals who identify as feminist or are concerned with women and gender issues that provided evidence for the ACBC/AGC, and six such individuals who provided evidence for the *Amicus Curiae*. Though I have reservations about the self-classification of some individuals, particularly the classification of REAL Women of Canada,<sup>11</sup> who are dedicated to promoting “the equality, advancement, and well being of women,” it is not the intention of this thesis to vet who counts as feminist, or whose pursuits for gender equality are more relevant or useful. Rather, this thesis aims to examine these differences and demonstrate the abundance of feminist perspectives on polygamy in Canada.

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<sup>11</sup> Refer to their website at <http://www.realwomenofcanada.ca/contact-us/>



## CHAPTER ONE: LEGISLATIVE HISTORY AND THE POLYGAMY REFERENCE

We were pressed to ask about the harms not only of polygamous family forms but also of the dominant model of monogamy that we find so staunchly defended in so many discussions about polygamy.

Lori Beaman, 2014, *Is Polygamy Inherently Harmful?*

There is neither a singular discourse of polygamy in Canada nor a cohesive body of literature that either supports or condemns its practice. In fact, while polygamy was recently referred to as a “barbaric cultural practice”<sup>12</sup> by the then-Conservative federal government of Canada, references to polygamy as barbaric and uncivilized have circulated in British and Canadian law for centuries. Prior to unraveling claims, assumptions, and narratives rooted in the Polygamy Reference, it is necessary to trace the often-problematic meta-history of marriage and marital discourses and, more specifically, historical discourses surrounding monogamous marriage. While accounts of polygamy in the Canadian context are invariably linked to themes of gender, power, and the nature of their relationships to monogamous marriage, without understanding why monogamy is upheld as the only acceptable form of marriage in Canada, it is not possible to understand why polygamy has come to be scrutinized and rejected by policy makers.

This pedagogy of normative monogamy, both historical and contemporary in context, situates the notion of what Sarah Carter (2008) refers to as *imperative monogamy* and informs the first section of this chapter. Next, a comparative analysis of contemporary academic literature in Canada relevant to polygamy is offered, with particular emphasis on feminist and gender scholars. It is this discussion of polygamy

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<sup>12</sup> See Bill S-7 and the Government of Canada website: <http://news.gc.ca/web/article-en.do?nid=900349>

within a discursive field that illustrates varied counter-narratives to negative popular discourses of polygamy in Canadian media, including the assertion that women in polygamous relationships will inevitably experience harm.

### **Contextual Historical Analyses and ‘Us versus Them’**

In order to understand the judicial reasoning in the Polygamy Reference that gives rise to particular legal conclusions, it is necessary to first understand the foundational roots that have contributed to the formation of narratives within the decision. It is my hope that this information will illuminate key discourses and language that are drawn on in contemporary legal decisions, and comes to fruition in legal practice.

Earliest written law is largely thought to have evolved from accepted oral practices of a custom, or from unwritten habits based on popular social thought. Practical and enforced written law first surfaced in what anthropologist Maine (1917) identified as “the era of Codes” (p. 7), notably including the Twelve Tables of Rome. Maine credits early written law in this form to oligarchical monopolies, considered at the time to be distinguished from “ruling religious aristocracies” characteristic of “the East” (p. 7). He advocates Roman jurisprudence of this era to be superior to early Eastern law due to its longevity, as well as to its tendency to progress over time. Indeed, the construction of a binary between the East and the West, particularly in relation to “civilized society,”<sup>13</sup> is central to understanding the evolution of monogamous and polygamous families. As noted by Beaman (2014), “polygamy has become an important marker that distinguishes the uncivilized *them* from the civilized us” (author’s emphasis, p. 2).

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<sup>13</sup> Reference case paragraph 299, where this language is used to describe Mormon polygamists as “unfit to participate in civilized society and politics.”

However, comparative marital practices during the second century may not have been as different as some European legal history suggests. While Goody contributes to a problematic meta-narrative of marital history, he also seeks to highlight problematic constructions of ‘East/West’ or ‘Us/Them’ narratives and binaries. In particular, Goody notes (1983),

At first sight the difference between the polygyny typical of the Arabs and the monogamy which characterizes Europe is very striking. But partly because of the influence of the devolution of property on conjugal ties, the difference in marital relations between the two areas, while significant, is less than the dramatic contrast between monogamy and polygyny would suggest. (p. 27)<sup>14</sup>

Dowries in monogamous marriages are not as dated as some might expect. In fact, dowries in monogamous marriages remained common practice in Europe well into the nineteenth and, in some places, the twentieth century. For example, Yalom (2001) notes that in Sweden in 1874 women were finally granted some control over their own private property, particularly if they had sizeable dowries (p. 264). In fact, a Smithsonian article notes that American wives were often traded to British Lords in England for large dowries in the early twentieth century. Therefore, the commodification of women in monogamous marriage was clearly alive and well in Europe, further emphasized by the fact that women were not considered legal persons in many Western countries until well into the twentieth century. As one example, the British Privy Council did not grant legal personhood to Canadian women until 1929, and some feminist scholars such as Barak-Erez (2012) argue that the real shift in American case law to recognize women as persons

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<sup>14</sup> Indeed, a monolithic reference to “the Arabs” is inescapably problematic; however, the point is relevant to modern characterizations of marriage.

did not occur until as late as the 1970s (p. 85). Indeed, this pattern of women being treated as property was predicted by Maine in 1861, who notes that “Ancient law subordinates the woman to her blood-relations, while a prime phenomena of modern jurisprudence has been her subordination to her husband” (p. 92).

In terms of contemporary research, scholars such as Razack (2004) have noted that, in the post 9/11 era, some feminists and policy makers in Western societies have taken it as their moral duty to save ‘imperiled’ Muslim women in their (assumed) inherently oppressed positions from oppressive and tyrannical Muslim men. Indeed, the origins of this polarizing positioning, questioned by both Yegenoglu (1998) and Razack (2004), largely continues to inform present Canadian law. This is illustrated in the Polygamy Reference, (see paras. 160 & 163) in which Western Christianity is credited with creating socially imposed monogamy, the ‘rise of the West’, and the subsequent rise to democracy and gender equality.

### **Monogamous Wives and British Law**

While some aspects of early marital laws were characterized by a problematic binary constructed between West and East, Roman law and subsequent British law came to reflect Christian values, of which monogamous marriage was one. A central theme in the Polygamy Reference---the sustention of monogamous marriage as a tenet of civilized and democratic societies--- is not so different from legal discourses of marriage in eighteenth century Britain.

However, the claim that monogamy is, and has historically been, conducive to gender equality is problematic. A specific example of this disenfranchisement imposed on monogamous wives is evident in Sir William Blackstone’s 1753 *Commentaries of the*

*Laws of England*, which formed the basis for common law in the 19<sup>th</sup> century in England.

Blackstone explains that,

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs everything. (p. 442)

Most notable in this passage is the language concerning protection and ownership: women subject to British law at that time were considered property of their husbands. That is, women's legal existence was suspended in marriage and their husbands owned their physical person as well as their personal and real property; a clear denial of many individual freedoms and autonomies that unmarried women enjoyed. Accordingly, monogamous marriages were not conducive to gender equality and such arrangements enforced patriarchal paternalism that was echoed in social and common law legal systems.

Westermarck (1891) posited a position similar to Blackstone. He centers his discussion of marriage as rooted in property; for example, he notes that marriage is an economic institution in which it is the husband's duty to provide for his wife and children and, in return, it is their duty to work for him (presumably in the domestic sphere). In particular, Westermarck argued that marriage rests not only on an economic foundation, but is also strongly based on biology so that human males come to be with human females for sexual gratification and for other benefits of companionship. Because of his biological presuppositions explaining marriage, Westermarck is often known as one of the first

*Darwinist sociologists*, and has been criticized for erasing the diverse and complicated experiences of women and marriage and relying on essentialist notions of women.

Reliance on essentialist notions of women and a universally positive experience of monogamy, such as that proposed by Westermarck, is an important element in how Chief Justice Bauman is able to sustain the claim that polygamy is inherently harmful to women will be illustrated when I address Expert witness testimonies. The contextual discussion of a meta-history of marital law explained by scholars such as Blackstone and Westermarck illuminates a foundational legal discourse; one that endures to date, and continues to permeate first year law classrooms and legal decisions alike. Thus, the endurance of principles found in meta- historical legal narratives, while for some purposes ought to be forgotten, must continue to be addressed as they continue to inform legal thought, and thus, the legal positionality of women.

In addition to a history of monogamous wives being treated as commodities, there is parallel documentation of monogamous wives being abused and disenfranchised in monogamous marriages; an erasure of the latter is also instrumental in sustaining the argument that polygamy is inherently harmful to women. For example, Caroline Norton, writing in 19<sup>th</sup> century Britain (1854), noted the disenfranchised position of monogamous wives who were granted divorce (even in abusive marriages), and their additional difficulties in obtaining custody of children. Her experiences are in contradiction to the Polygamy Reference, which notes that, “Monogamy may foster the emergence of democratic governance and female equality” (para. 167).

Moreover, the claim that monogamy promotes the spread of gender equality is problematic, particularly in the context of Canadian history. For example, while

polygamy was all but eliminated from practice in western Canada by the early 1900s, the Dominion Lands Act remained in effect until 1930 in the prairie provinces, mandating that only men were qualified to own property to erect a homestead. More recently, lack of legal gender equality in monogamous marriage has been demonstrated in *Murdoch v. Murdoch* (1973), whereby Albertan Irene Murdoch sought a share in the profitable family farm upon her divorce. The original trial judge found that she was not entitled to any claim to the estate, as she had performed the “work done by any ranch wife” (p. 425). This case was then heard by the Supreme Court of Canada in 1975 (1975 1 SCR 423), which found that “her contribution was not more than any other wife,” and therefore she had no claim to any interest in the estate, a clear erasure of the labor performed by Mrs. Murdoch in her estate, as well as the domestic labor that all monogamous wives perform. Indeed, the claim that monogamy is conducive to gender equality raises issues relative to both labor and property rights, and gives rise to important questions surrounding the creation of a monogamy/equality versus polygamy/harm binary.

### **Polygamy in the Legal Landscape in Canada**

Marital systems and family composition are key tenets of Canada’s colonial history and are central to White national fantasy (Razack, 2004). The explicit definition of marriage in Britain and its colonies was outlined in *Hyde v. Hyde and Woodmansee* (1866 [LR 1P&D 130]), tried in London. This case is particularly significant, as it has often been cited as providing the legal definition of marriage. Furthermore, this case clearly exemplifies long-standing British precedent that aims to criminalize Fundamentalist Latter Day Saints (FLDS) polygamy. Mrs. and Mr. Hyde (an English convert to Mormonism) married in a Mormon community in Utah that commonly practiced

polygamy. Mr. Hyde later left the community, returned to England, and rejected his previous Mormon faith. Members of his community thus excommunicated him and declared his wife free to marry again, so she took a husband named Mr. Woodmansee, also from Utah. When Mr. Hyde sought a divorce from Mrs. Hyde in England, Lord Penzance oversaw the case and determined that the original marriage between Mrs. And Mr. Hyde was not to be recognized by the English courts, even for the purposes of granting a divorce. In his decision, Lord Penzance noted that it would be “extraordinary” if polygamy were to be “treated as a good marriage,” and that plural wives were often treated as “slaves” (pgs. 134 and 132). Therefore, marriage came to be “understood in Christiandom as the voluntary union for life of one man and one woman, to the exclusion of all others.”<sup>15</sup> This may be one of the earliest examples of English courts not only refusing to recognize non-monogamies, but also of unequivocally rejecting FLDS religious practices; similar discourses circulate, and permeate, the 2011 Polygamy Reference. But marriage is one and the same thing substantially all the Christian world over; it inevitably exists as monogamy. By and large, the entirety of Canadian marital law assumes this. Thus, it is important to observe that the Canadian state regards marriage as an institutional identity, and disallows frameworks found in other countries where the legal status of plural wives is recognized. According to Fiske, this cannot be put on any rational ground, except upon the holding that’ infidel’ marriage is said to be something different from the Christian form of marriage, and upon the holding that Christian marriage is the same everywhere, despite Canadian claims to recognize *lexi loci* celebrations (J. Fiske, personal communication, October 4, 2016).

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<sup>15</sup> This language was also used to criminalize or prohibit same-sex marriage in Canada until 2005.



Within the Canadian state, judicial responses to Aboriginal marriage laws have been more nuanced, though they have often upheld imperial law. The propensity for Canadian judicial language to label bigamy as a barbaric cultural practice was demonstrated in *Connolly v. Woolrich* (1867), whereby Cree polygamy and marital rites arose “under infidel laws and usages of barbarians” (p.6). *Connolly v. Woolrich* originated from conflicting claims to an estate; a wealthy white man named William Connolly had married a Cree wife named Suzanne according to Cree marital practices in Cree territory, then later left her and their children and married his own wealthy white cousin, named Julia. After he passed away, both the children of the Cree wife and those of his white wife made claims to his substantial estate. Justice Monk ruled that the status of husband and wife conferred by Cree custom gave rise to community of property between William and Suzanne, in accordance with the law of the domicile of origin of William, namely the law of Quebec. As a result, the plaintiff (Suzanne’s son named John) was entitled to his proportionate share of half of the property of William.

However, according to Backhouse (1991), Justice Monk refused to recognize plural spouses and accepted only the man’s first marriage as legitimate, thereby ruling the second marriage to be nullified due to the prohibition of plural spouses. While some may consider this ruling a victory for upholding Aboriginal customary law in Canada, it is worth considering the motivation behind this decision. The judge was willing to recognize Aboriginal marital customary law in a singular interpretation, but only in order to uphold the prohibition of bigamy, and subsequently, polygamy. This is most evident in his observation that polygamy “does not in any way come up for consideration except insofar as it is an infidel and unchristian abuse of foreign law occurring in isolated cases”

(p.69). Indeed, it is this criteria of interpretation of legitimate and illegitimate marriages that I take issue with. Furthermore, this prohibition of polygamy was intertwined with particular descriptive language surrounding polygamy and the social context of Rat River, notably, “barbaric,” “customary,” “peculiar to civilization,” and “infidel law” (Backhouse 1991).

Of particular relevance to the *Connolly v. Woolrich* case is the concept of a doctrine of repugnancy. The principles of law, polygamy, and repugnancy are raised in *Connolly v. Woolrich* in the following capacity: counsel for the defendant argued “...polygamy is one of the incidents or privileges of barbarian life, and that law in regard to marriage which sanctions such anti-Christian usage, cannot be regarded as a foreign law deserving of recognition by this Court” (p. 7). Further, repugnancy implicitly arises on page 6 of the decision, whereby the judge notes the defendant’s contention that: “*lexi loci contractus* determines the validity of marriages solemnized in Christian countries” (p.6), and explicitly arises on page 19: “laws... be reasonable, and not contrary or repugnant, but as near as may be agreeable to the laws, statutes or customs of this our land.” Also in *Connolly v. Woolrich*, the defendant’s lawyer implicitly draws upon the doctrine of repugnancy to argue the common law was in place at the time of Connolly’s first marriage. The defendant also draws on discourses of polygamy as “barbarous and pagan” in arguing that since the Cree permitted polygamy and other non-Christian marital practices, the courts could not rule Connolly’s marriage to Suzanne was legitimate (p.68). This position is summarized and dismissed by the judge, who rejects, “as a very strange pretention” the argument that if polygamy is permitted, all marriages, monogamous or not, are invalid, and the marriage laws and practices cannot be recognized under the

principle of *lex loci* (p. 68). He accepts the marriage as valid: though he deemed it a “foreign marriage” because it “obtain[ed] within the territories and possessions of the Crown of England he could not disregard it (p. 76). In this way, while the case itself rejects the relevancy of the doctrine of repugnancy, it is the language used by the defense lawyer, that is likewise taken up the judge, that become manifested as legal discourse surrounding the topic of polygamy.

As a domestic enactment of a colonial government, a doctrine of repugnancy arises when a colonial law<sup>16</sup> and an imperial law collide; it involves conflicts of rule of law. More often than not, the colonial law is nullified, and imperial law upheld. Asch and Zlotkin (1997) describe this as “the extinguishment policy,” (p. 218) of Aboriginal land title and property that could occur both through legislation explicitly intended to override Aboriginal customary law as well as by common law decisions. However, Aboriginal customary law remains in place unless it violates the repugnancy rule and, hence, Connolly’s marriage was considered legitimate under common law.

The Colonial Laws Validity Act (1865) addressed the doctrine of repugnancy in imperial statutes, stating that,

No colonial law shall be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant of some of the provisions of some such Act of Parliament, order, or regulation as aforesaid. (as cited in Clark, 1990, p. 71)

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<sup>16</sup> According to Slattery (1983), one branch of colonial law is “the legal principles concerning aboriginal peoples” which also includes “rules concerning the status of native peoples living under the Crown’s protection, and the position of their lands, customary laws, and political institutions” (p. 737).

*Connolly v. Woolrich*, according to Sanders (1975), ought not to stand as a precedent for customary marriages since the case in question took place prior to imposition of Imperial law on the Cree (p, 661). Nonetheless as he notes, the case was taken up as a governing decision in the administration of estates and wills until the mid-twentieth century; furthermore, it was later evoked in the 1993 BC Court of Appeal in *Casimel and Casimel v. ICBC*, which upheld customary adoption laws.

While Sanders notes *Connolly v. Woolrich* reappears as a precedent well into the mid-twentieth century to uphold customary family law, so too does the descriptive language used by Woolrich's defense lawyer to describe polygamy. For example, such terms that implicate polygamy as barbarous and pagan reappear in the twenty-first century, as I will illustrate in Chapter 3.

In *Calder v. AG for British Columbia* (1973), the court acknowledged for the first time that Aboriginal land title existed prior to colonization. This case arose from the Nisga'a claim that Aboriginal land titles had never been lawfully extinguished in particular areas. In the Supreme Court's leading decision, Judge Judson writes that, "In the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga tribe might have had, when by legislation, it opened up such lands for settlement..." (as cited in Hogg, 2009, p. 634). It is here that Clark (1990) identifies a clear differentiation between repugnancy and constitutional oversight; the leading decision noted that, "no express imperial law prohibited the colonial government from acting in a manner inconsistent with Indian rights, therefore the colonial government could do whatever it wanted" (Clark, 1990, p. 72).

A state-enforced prohibition on polygamy in Aboriginal customary law is also illustrated in the case of *R. v. Nan-E-Quis-A-Ka* (1889), in which a judge considered whether or not a woman named Maggie was a competent witness to testify against her husband. Maggie was married through Aboriginal customary law to a man accused of a crime and, under English common law, not permitted to testify against her spouse. In this case, Justice Wetmore found that Aboriginal customary law may be upheld, but only if the marriage was (1) by mutual consent, and (2) monogamous. Therefore---as in *Connolly v. Woolrich*---Aboriginal customary law was upheld, at least for the time being, provided the marriage was monogamous. Finally, in *Queen v. Bear's Shin Bone* (1899), a Kainai man was charged under the Criminal Code with practicing polygamy for taking two wives. These marriages were understood as proper, given customary Kainai marriage law permits polygamy. However, in the one-paragraph case decision, a British judge found that this Kainai customary law violated the polygamy prohibition introduced in the Criminal Code in 1890 and was, therefore, subject to criminal prosecution. The *Bear's Shin Bone* case marked a departure from previous cases such as *Connolly v. Woolrich* that had permitted Aboriginal customary law (though disallowed polygamy), and clearly exemplified the Canadian state's refusal to recognize Aboriginal customary law for the purposes of polygamy.

*Bear's Shin Bone* is also contextually significant. The case was tried in Southern Alberta, an area that is geographically located as one where FLDS immigrants from Utah first settled. The case also occurred at a time when the Canadian government was making a concerted effort to eliminate polygamy in Canada. Indeed, the case judgment is an important indicator that the Canadian courts would refuse to recognize both Aboriginal

and FLDS polygamous marriages, and that law officials were willing to prosecute those suspected of engaging in the practice. In this way, *Bear's Shin Bone* was not just about prosecuting a single individual suspected of practicing polygamy, but also served as a deterrent to continued polygamy in Canada. In particular, the arrival of Charles O. Card in 1887, accompanied by members of the Fundamentalist Church of Latter Day Saints in Southern Alberta and their settlement immediately adjacent to the Kainai reservation, introduced multiple complications to the implementation of institutional monogamy in the area. As Carter (2008) points out, "There was concern that Mormons would encourage the Treaty 7 groups to continue to practice polygamy, and there was also likely the opposite effect, that the Mormons would learn that polygamy was in fact permitted in Canada" (note 3, p. 222). The *de facto* practice of polygamy, despite *de jure* criminalization of the practice, was brought to fruition in the *Bear's Shin Bone* case, thus reinforcing the prohibition of polygamy in Canada. Not only does *Bear's Shin Bone* establish legal precedent in Canada that criminalizes polygamy, it illustrates a state-based investment in eliminating both Mormon and Aboriginal polygamy.

Lori Beaman outlines the construction of anti-polygamy legislation in Canada. According to Beaman (2004), by the time Mormon immigrants began to arrive in Canada in the late 1880s, the British North America Act called for a centralized government regulation of marriage, but the Consolidation Act of 1869 reaffirmed British statutes that criminalized polygamy with a conviction sentence of imprisonment of two to five years. Beaman also notes that polygamy was a particular topic of concern in the 1890 parliamentary debates regarding the Criminal Code. In particular, parliament looked to discourage the formation of polygamous communities, which parliament perceived would

“threaten” Canadian society (Beaman, 2004, p. 24).<sup>17</sup> Consequently, the first iteration of what has now come to be known as section 293 of the Criminal Code was originally drafted in 1906 as section 310, though this original version cites the criminalization of Mormon “spiritual or plural marriage.”

Carter’s (2008) interpretation of the racist undertones in the *Bear’s Shin Bone* case have been well cited and expanded upon in other research, yet there may be further possible reasons that polygamy was tried in the courts. By the 1890s when *Bear’s Shin Bone* was finally brought to trial, rural communities in Southern Alberta (and Cardston in particular) had witnessed a tremendous influx of Mormon settlers from Utah whose religious influences called for polygamous marriages. As noted by Embry (1987), since Mormon settlers had already been denied the right to engage in polygamous marriages from Sir John A. MacDonald himself, it is possible that charges were brought against *Bear’s Shin Bone* as an example that the Canadian state was ‘cleaning up the polygamy problem’ on Canadian reserves, messaging that any continuation of polygamous marriages or family forms by Indigenous or Mormon people in Canada would not be tolerated.

What were some repercussions of *Bear’s Shin Bone*? Due to concerted efforts by the Department of Indian Affairs until 1903, polygamy was apparently eradicated in Southern Alberta in the early 20<sup>th</sup> century on both Aboriginal reserves and within Mormon communities such as Cardston (Bailey & Kaufman, 2010).<sup>18</sup> However, in 1946,

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<sup>17</sup> The language in these discussions is informative in regards to Parliament’s attitude towards polygamy. Beaman cites one Member of Parliament as commenting that, “We are here trying to prevent what may become a serious moral and national ulcer” (Beaman, 2004, p. 24).

<sup>18</sup>. While Bailey and Kaufman argue that polygamy was largely eradicated from Southern Alberta at this time, personal communication with Dr. J. Fiske suggests that polygamy was simply forced underground and, in fact, the practice endured for several decades thereafter.

Harold Blackmore, a convert to Mormonism in southern Alberta, was shunned from the church in Cardston and moved his family to Lister, British Columbia. This community, later renamed Bountiful in 1984, represents the focal point of the Polygamy Reference; the Blackmore family would become infamous in Canada for its continued public participation in polygamy.

The RCMP first investigated the Blackmore family in 1991 and, despite the ‘open secret’ in surrounding communities that Bountiful was a polygamous community, took nearly 18 years to lay formal charges. This hesitance was likely due to concerns held by prosecuting officials that polygamy, as a religious practice, was protected under Section 2 of the Canadian Charter of Rights and Freedoms (1984) that guarantees fundamental freedoms to all Canadian citizens---including freedom of religion, belief, and association. If polygamy related charges were brought forward and the courts found Section 293 of the Criminal Code to be unconstitutional the entire section could be struck, opening the gateway for decriminalized polygamy in Canada. Indeed, when the same-sex marriage debate was being held in Canada during the latter 20<sup>th</sup> century, one rationale for continued criminalization of same-sex marriage was the fear that permitting same-sex marriages would sanction other ‘bizarre’ marital practices, including polygamy. Referring to polygamy as bizarre has resurfaced in several Canadian contexts, echoing the legal precedent of *Connolly v. Woolrich* previously discussed and references made in the Canadian media such as the Vancouver Sun.<sup>19</sup> Furthermore, discourses regarding polygamy found in these historical court cases reappear in the Polygamy Reference decision and, thus, are relevant not only for the purposes of analysis but also for

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<sup>19</sup> <http://www.canada.com/vancouver/features/polygamy/story.html?id=4d7cd9a6-1c56-40d9-811b-185b9e5515c6>



illustrating the legal context that Expert Witnesses were required to navigate when providing evidence to Chief Justice Bauman.

**Data Source: The Polygamy Reference**

Despite the legal criminalization of polygamy in Canada for over a century, Bailey and Kaufman (2010) note that the arrests of James Oler and Winston Blackmore in 2009 marked the first time in nearly one hundred years that anyone in Canada had been charged with polygamy and, in fact, the arrests of these two men was an undertaking nearly two decades in the making. As early as 1991, James Oler and Winston Blackmore were investigated for polygamy-related offenses, as both men were involved in openly polygamous relationships in their community of Bountiful: a small town in the southeast corner of British Columbia comprising approximately 1,000 residents, most of whom identify as Fundamentalist Church of Latter Day Saints (FLDS) members. Although it was an open secret to people in surrounding communities that each man had multiple wives, no criminal charges had been brought forward. This legal inactivity may have stemmed from a central presupposition of police and prosecutors in the area; it was possible that charging Oler and Blackmore with polygamy would result in a constitutional challenge to section 293 of the Criminal Code, creating the potential for the entire section to be struck down.

The ongoing criminalization of polygamy in Canada and the guarantee of freedom of religion in the Canadian Charter of Rights and Freedoms are often seen to be in conflict with one another. As noted by the Alberta Civil Liberties Association (ACLA) (2005), disallowing individuals from practicing polygamy in Canada may be seen as an infringement of religious rights. As noted by Baines (2012), the Polygamy Reference provokes the “issue of a “competing rights case,” rather than a “rights versus values case”

(p. 458). Baines describes competing rights cases as those that “...arise in conflicts that involve “religious, ethnic, and cultural diversity” (p. 459). In the case of the Polygamy Reference, the competing rights are religious freedoms and gender equality as they relate to protecting women from the experience of harm. For example, the ACLA notes that

It seems to be highly likely that, in the case of polygamy, a conflict between gender equality and freedom of religion could not be resolved under a Charter s. 2(a) analysis. Because polygamy as a practice is harmful and offends the Charter right to gender equality, anything short of prohibition is untenable. Thus, the court will be required to balance the two competing rights under Charter s. 1.

While this narrative of conflicting rights is an important component of the Polygamy Reference decision (which eventually noted that the criminalization of polygamy was indeed an infringement on religious freedoms), it also contributes to a perpetuation of the discourse that polygamy is an inherently religious or cultural practice. Although this thesis rejects the proposal that religious and cultural practices are synonymous, this language is embedded in the Polygamy Reference and will be discussed further in an upcoming section. The positioning of polygamy as inherently cultural or religious ultimately posits monogamy (as the antithesis to polygamy) as a normative value that transcends culture or religion. Indeed, the delay in charging Oler and Blackmore with polygamy was characterized by a hesitation on the part of prosecutors in British Columbia to criminally try polygamy until the courts had determined the constitutionality of section 293. Whatever the hesitation, the charges laid against Oler and Blackmore in 2009 were dismissed,<sup>20</sup> which prompted the Attorney General of British Columbia (2011)

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<sup>20</sup> The charges were thrown out by the BC Supreme Court due to an overly aggressive approach by the Attorney General of British Columbia in pursuing a prosecution. Full source and timeline

to seek a judicial advisory opinion from the British Columbia Supreme Court respecting the constitutionality of section 293.

References are the result of instances when provincial and federal governments turn to the courts for advice or clarification regarding the constitutionality of an existing or draft law. Most often, this advice is needed to interpret whether the particular law infringes upon a Charter right and, if so, whether this infringement is justified under section 1 of the Canadian Charter, as I discuss below. In other words, the government seeks the Court's opinion by asking a direct question, the results of which can have significant results. In this way, the Canadian Constitution has come to be known as a *living tree* doctrine in which laws change over time to reflect social shifts (Edwards v. AG Canada. 1930).

To reflect such changes, references in Canada have, on occasion, dealt with contentious issues. For example, *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)* (the Prostitution Reference, 1990) and the *Reference re the Succession of Quebec* 1998 were both tried by the Supreme Court of Canada; though, as will be pointed out, the Polygamy Reference did not reach this higher court. According to Huffman and Saathoff (1990), the procedure for reference questions issued in Canada typically contains issues of constitutionality as outlined in section 1 of the Constitutional Questions Act, RSBC (1996). According to Hogg (2009),

A provincial government has no power to direct a reference to the Supreme Court of Canada. However, each of the ten provinces has enacted legislation permitting the provincial government to direct a reference to the provincial court of appeal. Each

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at <http://news.nationalpost.com/news/canada/b-c-supreme-court-rules-polygamy-law-is-constitutional>

provincial law is broadly framed, allowing the constitutionality of federal laws as well as provincial laws to be referred, as well as non-constitutional questions. (pp. 258-259)

Specific to the Polygamy Reference, the British Columbia provincial government directed the following two questions to the British Columbia Supreme Court: 1) Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent? and 2) What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involve a minor, or occur in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

However, while the provincial government directed a question to a provincial court, the question itself concerned the constitutionality of a federal law. Hogg (2009) notes that,

A provincial reference will secure an advisory opinion from the provincial court of appeal. However, when the provincial court of appeal has rendered an opinion on a reference (as opposed to an actual case), there is an appeal as of right to the Supreme Court of Canada. (p. 259)

It is here that the Polygamy Reference is considered unique; the case was referred to the trial level rather than the British Columbia Court of Appeal which, according to Gerald Chipeur of Miller and Thomson Law Firm (2009), marked the first time a reference

question was directed to the trial courts from the executive branch of government.<sup>21</sup> They argue that the Polygamy Reference was directed to the trial level for two reasons:

1) First, the decision of one of the previous prosecutors to refuse to lay polygamy charges was based upon the view that the law was unconstitutional and this view would not be contradicted without a full review of the relevant facts and law, 2) Second, a full review necessarily focuses almost entirely upon Charter section one evidence and this requires the kind of expert and victim testimony best considered and addressed by a trial judge. (p. 2)

Accordingly, the Polygamy Reference decision is notable in ways additional to that articulated by Chief Justice Bauman. It appears that he considers the Polygamy Reference to be remarkable in terms of its length and high caliber of evidence; the decision is also distinct in terms of its origins and the events contributing to its execution. There are also structural limitations surrounding reference cases that impact which witnesses can be heard, and in what context they may provide evidence. That is, in the Polygamy Reference, the burden rested upon the AGBC and AGC to demonstrate, and provide witnesses to prove, that section 1 of the Charter justified any other Charter infringements. Therefore, if the AGBC and AGC suspected that Chief Justice Bauman would find Charter infringements, they would likely seek to introduce testimony from witnesses who would provide evidence that justified these Charter infringements. In fact, extensive testimony from the AGBC and AGC about the inevitable harms of polygamy is evident, thereby providing section 1 Charter justification to other charter infringements.

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<sup>21</sup> In British Columbia, the reference procedure is outlined in the Constitutional Question Act, 1997.

The Polygamy Reference addressed “a question by the Lieutenant Governor In Council Set Out in Order In Council No. 533... concerning the Constitutionality of s. 293 of the *Criminal Code of Canada*” (see the introduction of the case). Section 293, as outlined in paragraph 852 of the Polygamy Reference, reads as follows:

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

2. Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or upon the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

The government followed general practice for reference decisions in Canada by appointing an *Amicus Curiae*, or friend of the Court, who was responsible for representing the position in favor of striking down section 293 of the Criminal Code. The

*Amicus Curiae* was headed by lawyer George MacIntosh, QC and comprised other Interested Persons, including the Civil Liberties Association, the Canadian Association for Free Expression, the Polyamory Advocacy Association, and the FLDS. Funding for the *Amicus Curiae* is a somewhat controversial point, as it is a publicly funded entity that, according to Miller and Thompson, was granted financial support from the Government of British Columbia. This is a point of contest that deserves critical examination, as the *Amicus Curiae* is known both as a friend of the court and is funded by the very government they oppose in this case; circumstances that seem to constitute clear conflict of interest. This point is further exemplified in the Polygamy Reference because Winston Blackmore, a person heavily invested in opposing the criminalization of polygamy in Canada, was denied funding and party status from the government to participate in the trial. Thus, of those granted party status for the Polygamy Reference trial, all were “publically funded” (para. 18), while Winston Blackmore was financially unable to participate with Party Status.

Despite the exclusion of Winston Blackmore, the *Amicus Curiae* advanced a position that was adversarial to the AGBC and AGC: namely, that section 293 of the Criminal Code was unconstitutional and in clear violation of several Charter sections. Primarily, the *Amicus Curiae* argued that section 293 was a violation of section 2(a) of the Canadian Charter of Rights and Freedoms that guarantees freedom of conscious and religion such that, “Everyone has the following fundamental freedoms: (a) freedom of conscious and religion.” The *Amicus Curiae* argument that section 293 of the Criminal Code was in violation of section 2(a) of the Charter was twofold. Firstly, *Amicus* argued that the criminalization of polygamy in Canada was a result of ill-will towards Mormons

and Aboriginal people (para. 1053). Secondly, the religious purpose of section 293 was to mandate monogamy as “intrinsically rooted in the dominant religion of the day, mainstream Christianity” (para. 1055). The *Amicus Curiae* also argued that section 293 was an infringement on Charter sections 2(b), specifying “freedom of expression,” and 2(d) that protects “freedom of association,” that prohibits two or more individuals from associating with one another in a conjugal union (para. 1108). The *Amicus Curiae* further argued that there was an infringement of section 15 that guarantees equality rights. Lastly, the challengers, including the *Amicus Curiae*, argued that the potential for imprisonment for practicing polygamy was sufficient to trigger a Charter section 7 inquiry guaranteeing liberty and security of a person.<sup>22</sup>

In opposition to *Amicus Curiae* interpretations, the Attorney General of British Columbia (2011) and the Attorney General of Canada (2006) advocated that Section 293 was constitutionally sound. Craig E. Jones and Deborah J. Strachan, whose argument was advanced by a central theme of the inherent harmfulness of polygamy, represented the AGBC and ACG. In fact, their position is summarized in paragraph 2 of the Polygamy Reference, which states that, “the case against polygamy is all about harm.” However, this interpretation noted by Chief Justice Bauman in the Polygamy Reference is

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<sup>22</sup> Charter section 7 that guarantees “life, liberty and security of a person” is also contextually relevant to what the Alberta Civil Liberties Research Centre calls “the harm principle” (p. 14). The harm principle is summed up as:

- 1) nobody should be subject to the whim of political and legal authority acting without the sanction of law;
- 2) everyone, including government officials, elected representatives and a country’s political executive is subject to and equal before the law; and
- 3) citizens need certainty about the law so they can freely live within the limits set by law (Tamanaha, 2004, pp. 34-35).

The third point is especially relevant for this discussion. The Polygamy Reference enforced the certainty of the criminalization, and thus, citizens of Canada, including Bountiful “can freely live within the limits set by law.”



somewhat different than that advanced by the lead lawyers for the ACBC/AGC. For example, following the Polygamy Reference, Jones (2012) published a memoir of the trial in which he notes that he believed the trial to largely represent a clash of Western cultures and “more advanced societies” versus “Mormons and Muslims who would see the rights revolution reversed in favor of patriarchal despotism” (p. 348). Indeed, Jones’ creation of a binary demonstrates essentialist language and understandings of polygamy in Mormon and Muslim traditions.<sup>23</sup>

### **Chief Justice Bauman’s Decision**

Chief Justice Bauman found that section 293 of the Criminal Code did infringe on two Charter sections: sections 2(a) and 7. Section 2(a) was found to be infringed upon in terms of limiting freedom of religion. The notion of polygamous marriage as a religious act was represented in the testimony of Witness No. 4, who described her marriage as a religious assignment. Therefore, Chief Justice Bauman found a *prima facie* violation of section 2(a) of the Charter that, under the heading of Fundamental Freedoms, guarantees “freedom of conscious and religion.” Section 7 was also found to be infringed upon, although minimally so in terms of over breadth; that is, the Charter was deemed to go “further than necessary in pursuit of the legislative objective” (para. 1199), but only in relation to the potential criminalization of young people ages 12 to 17 who are in “illegal unions.”

While Chief Justice Bauman found a section 2(a) Charter violation, he rejected the *Amicus Curiae’s* reasoning for this violation that problematized colonial legal order. Instead, Chief Justice Bauman identified a section 2(a) violation based on the fact that

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<sup>23</sup> These will be examined further in Chapter 3.

polygamy may be considered a sincerely held religious belief (para. 1093), thereby ignoring the justification put forward by *Amicus Curiae*.

Similarly, Chief Justice Bauman's construction of the Charter section 7 infraction is curious. While *Amicus* argues that section 7 has been violated, he again rejects their line of reasoning for this infringement. Chief Justice Bauman finds the section 7 Charter violation rests on its over breadth in criminalizing youth. However, the propensity for youth to be unfairly exposed to, or forced to participate in, polygamy is an argument put forward not by *Amicus*, but by the lay witnesses provided by the AGBC (para. 31). In fact, Chief Justice Bauman accepts their qualitative evidence in the form of oral testimonies and video affidavits.

If two Charter sections were found to be infringed upon, how then was the criminalization of polygamy in section 293 upheld in the Polygamy Reference? Following his findings of these two infringements, Chief Justice Bauman performed the *Oakes* test (known as the reasonable limits clause) to determine whether these infringements were justified under Section 1 of the Canadian Charter. Section 1 of the Charter states that, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In this way, while section 1 guarantees Charter rights, it makes clear that they are not absolutes and are subject to limitations. However, the criteria for meeting limitations of Charter rights is extraordinarily high, described by Chief Justice Dickson in *Oakes* as a "stringent standard of justification" before limitations on a Charter right may be accepted. (*R v. Oakes* 1986).

It is here that the *Oakes* test becomes relevant. The *Oakes* test was first established in *R. v. Oakes* (1986) to determine what, if any, infringements on rights in a "free and

democratic society” could be justified. According to Hogg (2009), these very words are most relevant, as “only the values of a free and democratic society would suffice to limit the guaranteed rights” (p. 821). Thus, as noted in *Slaight Communications v. Davidson* (1989), “The underlying values of a free and democratic society both guarantee the rights in the Charter and, in appropriate circumstances, justify limitations upon those rights.”

The process of the Oakes test, as noted in paragraph 1273, is as follows:

- a) Is the purpose for which the limit is imposed pressing and substantial?
- b) Are the means by which the goal is furthered proportionate?
  - i. Is the limit rationally connected to the purpose?
  - ii. Does the limit minimally impair the *Charter* right?
  - iii. Is the law proportionate in its effect?

Chief Justice Bauman found that, while sections 2(a) and 7 of the Charter were infringed upon by section 293 of the Criminal Code, section 293 was saved by section 1 of the Charter as a result of his belief that the avoidance of harms associated with polygamy “is an objective that is pressing and substantial,” in relation to both the infringement of section 7 (para.1331) and section 2(a) (para.1354). He also found that there was a “rational connection between the criminal prohibition of polygamy and Parliament’s pressing and substantial objective” (para.1334), which was the prevention of harm. Finally, he found that the prohibition of polygamy “minimally impairs religious freedom” (para.1341) and, accordingly, for “s. 293 to be proportional in its effects” (para.1345). Therefore, Chief Justice Bauman argued that criteria for the Oakes test were met and, therefore, the infringements of Charter rights by section 293 of the Criminal Code were justified. In terms of competition between these rights, Chief

Justice Bauman found the prevention of harm, specifically to women, to be a reasonable limit to justify infringements on freedom of religion stated in section 2(a), and somewhat overbroad in terms of criminalizing minors stated in section 7.

To date, Canadian courts have largely reconciled conflicting Charter rights cases by requiring “a balance to be achieved that fully respects the importance of both sets of rights.” Thus, the Alberta Civil Liberties Association (2005) suggests that the Charter does not create a hierarchy of rights. They note that, “The general principle is stated in *Dagenais v. Canadian Broadcasting Corp* where the Supreme Court of Canada held that the Charter does not create a hierarchy of rights.” The intention of the *Dagenais* case was to avoid the privileging of one right over another. However, while the ACLA argues that the Charter should be read as a holistic document rather than a hierarchy of rights, the preamble in the Charter would seem to contradict this: “Canada is founded upon principles that recognize the supremacy of God and the rule of law.” In this way, sustaining “the supremacy of God” cannot go unrecognized as a core value of the Charter.

### **The Aftermath**

Following Chief Justice Bauman’s ruling, it was left to the discretion of the *Amicus Curiae* whether or not to appeal the decision. They did not, and their inaction clearly messages the lack of motivation of the government-appointed *Amicus Curiae* to fully challenge the criminalization of polygamy in Canada. In fact, the Polygamy Reference marked the first time that the losing side in a reference case did not file an appeal from a trial decision.

Indeed, there may be procedural consequences in not filing an appeal that have yet to surface in Canadian law; for example, Chipeaur (2009) notes that if charges are laid, the entire process must be repeated as “the accused will have the right to argue the

constitutional issue and test the Government's evidence and argument under Section 1 of the Charter as part of a defense to the charge of polygamy under the *Criminal Code*" (author's emphasis, p. 4). However, as evidenced by the Bedford case in Canada, filing appeals for reference decisions may carry other consequences. In *Bedford v. Canada* (2012), the Court of Appeal for Ontario ruled that some parameters surrounding sex work that forced the practice underground were unconstitutional. Yet, when the case reached the Supreme Court of Canada in 2013 after appeal, the court struck down all remaining prostitution laws. Thus, appealing Reference decisions to the Supreme Court of Canada may result in a different finding than was reached by the lower court. Indeed, if the *Amicus Curiae* in the Polygamy Reference were amicable to the decision reached by the judge, this is a possible motivation for not filing an appeal. With the Polygamy Reference left as is, prosecuting polygamy-related offenses in Canada could be far from an easy pursuit.

### **Summary**

Marital legal history relevant to this thesis demonstrates not only that monogamy has been historically uncondusive to gender equality, but also that the criminalization of polygamy has been previously addressed in Canadian law; most of the discussion surrounding polygamy in historical legal cases has resurfaced in the Polygamy Reference. This decision both reaffirmed and solidified the future of legal family formations in Canada as solely monogamous. As the case will not be appealed, it appears that Section 293 of the Criminal Code will stand.

What impact, if any, did feminist researchers have in shaping this case decision? A preliminary reading of this case indicates an absence of most feminist research on the

topic of polygamy in Canada; whose research, then, is given voice? In order to analyze these central research questions, the next Chapter will outline the theory and methods that will underpin my analysis, and show how power is taken up and manifested in the Polygamy Reference that silences particular voices and experiences.

## CHAPTER TWO: THEORY AND METHODS

Unfortunately, very few policy questions are conceptualized in feminist terms and yet feminists still have to respond to them.

Carol Smart, 1984, *The Ties That Bind*.

### **Introduction**

The study of legal decisions as an examination of discourse is especially pertinent to exploring intersections of gender and power that result from legislation. A critical analysis of legal decisions may involve data such as the use of particular verbal language, social interactions in the court, or any texts produced. Textual items such as word choice (for example, descriptive adjectives and points of emphasis) are given close attention. In addition, it is informative to note the inclusion of particular research data upon which the case decision is formed and, often, what research has been excluded. Indeed, as Jakubowski (1999) has argued, while judges are called on to be neutral beings, the impartiality of legal decisions that become law is far from a practical reality. One explanation for this is the implicit or explicit biases of expert testimonials upon which judges rely to make decisions.

This chapter will begin by describing the work of Chris Weedon and will describe the relevance of feminist post-structuralism to this thesis. Specifically, I will highlight the importance of language, subjectivity, and power. Following this discussion of power is an overview of the work of Michel Foucault that underpins my analysis. Although Foucault has little to say about gender in specific, his approach to understanding power and his influence on feminist post-structuralism is significant. Therefore, this section of the Chapter synthesizes post-structuralism and Foucault. Foucault's discussion of power is applied to the language surrounding the attribution of harm threaded throughout the

Polygamy Reference, which draws on harm as the central justification for the continued criminalization of polygamy. The Chapter will go on to address the methodology of critical discourse analysis (CDA) and will outline my method of coding and analysis of the content of the Polygamy Reference. Specifically, I rely upon Newman's (1997) thematic coding process.

### **Feminist Post-Structuralism, Power, and Language**

Post-structuralist theory regards language as a social practice whereby people's identities, forms of communication, and relationships are performed through spoken interactions. It has been taken up by scholars such as Jacques Derrida (1987) and Michel Foucault (1972), who conceptualize the relations between power, knowledge, and discourses. It is also based on the feminist work of Victoria Bergvall (1996), Judith Butler (1990), Bronwyn Davies (1997), Valerie Walkerdine (1990) and, especially, Chris Weedon (1996; 1999).

Of these, the research and concepts posited by Chris Weedon are perhaps most useful for the purposes of this thesis to reveal language, tone, and text that support patriarchy and the paternal arm of the law that I argue is the framework of the Polygamy Reference. The term *feminist post-structuralism* described by Weedon (1987) is a theory separate from broader post-structuralism, and that

is able to address the questions of how social power is exercised and how social relations of gender, class and race might be transformed. This implies concern with history, absent from many post-structural perspectives but central to the work of Michel Foucault. (p. 20)

Indeed, this thesis reaches to understand deeper meanings and interpretations of the



Polygamy Reference beyond what is informed by plain or simple text; post-structural analyses in this thesis aims to illuminate discourse that is not always explicitly written but that, nonetheless, remains embedded in language, tone, and construction of this decision.

In this way, post-structuralists seek to disassemble socially constructed categories in order to determine a particular world-view, or to understand positions of power (Ristock & Pennell, 1996, p. 114). Through this method of deconstruction, a post-structural analysis of law may seek to unpack the discourse of law to reveal those contexts in which legal parameters have been constituted. This is undertaken in order to understand the potential for bias, even though law claims to be based on universality.

Thus, the parallel to polygamy arises; beyond the power of the state to criminalize particular behaviors, power on a micro level must also be considered as individuals take it up in daily behavior. In the Polygamy Reference, beyond the power of the judge and state, there is also power exercised by lawyers for both sides of the case who choose those they will call as experts, and thus, who is given the power to speak. Lawyers and judges learn legal conventions and language through formal education that is not necessarily accessible to all. As most litigants lack formal training in most legal processes, lawyers themselves become important actors in the legal discourse. Informed by both legal definitions of relevance and tactical constraints, lawyers decide which topics will be addressed and via which questions these topics will be raised. Further, considering power through oppositional models of top/down, oppressor/oppressed, dominator/dominated can cause missed opportunities for intervention. For example, oftentimes women in polygamous relationships who wish to exit polygamous families or communities cannot find support to do so, due to lack of social systems and for fear that they will face polygamy-related charges for coming forward.

Analysis of language is of particular relevance to this thesis, not only in understanding the text itself, but also in attempting to identify broader themes and concepts associated with the language used in the Polygamy Reference. According to Weedon (1997), “language is the place where actual and possible forms of social organization and their likely social and political consequences are defined and contested. Yet it is also the place where our sense of ourselves, our subjectivity is constructed” (p. 21). Further, both for post-structuralists and for the purposes of this research, language according to Weedon’s definition becomes a point of contestation whereby categories (such as the category of woman or polygamy) may be challenged, not only by definition, but also in terms of challenging particular social institutions or organizations that support particular categories, understandings, and presuppositions of these categories. In this way, language becomes a site of both social and political struggle, whereby those individuals who use language become agents for change who may either perpetuate existing power hierarchies associated with language or, alternately, to challenge existing power relations (Weedon, 1987, p. 25). It is here that feminist discourse analysis becomes a useful method for questioning particular language used in particular contexts and for contesting gendered power relations, as well as the categories in which subjects are seen to belong. Further, as noted by Mills (1997), feminist discourse analysis moves away from simply viewing women as victims of male domination to identifying micro instances where power is exercised and instances where it may be resisted. In fact, this echoes feminist post-structural foundations that move away from focusing on labels of larger, essentialist categories, as do Foucauldian understandings of deconstruction.

## Post-Structuralism and Foucault

This thesis is influenced by Michel Foucault's work on power, sexuality, and social control as a larger theoretical and historical framework looking at the relations between institutions and individuals. Accordingly, I intend to understand the operations of power permeating these relations, as well as the ways through which individuals come to accept or resist them. As I will posit, Foucault's (1977) discussion in *Discipline and Punishment* on accusations of harm, and the manifestation of productive power that justifies more prisons, are themes I identify in the Polygamy Reference; in both Foucault's work and in the Polygamy Reference, the protection of certain people is centrally used to enforce the criminalization of particular people and actions as subtle techniques of punishment.

Without an understanding of Foucauldian notions of power, it is difficult to fully understand this harm, punishment, and protection. Importantly, Foucault was an important figure who explored the premise that knowledge spawns power. This is particularly relevant for the purposes of this thesis, both in terms of legal knowledge that gives power to the judge that presides over this case, but---as I intend to demonstrate--- also particular knowledge or research that gives power to cast judgment over the practice of polygamy in Canada. In fact, throughout *Discipline and Punish*, Foucault advocates against applying a linear history of activities such as justice systems or jails, or viewing the existence of these institutions as examples of enhanced social freedom or a more 'civilized' society.<sup>24</sup>

Foucault has critiqued the historical materialist notion of power that conceptualizes it as something that can be 'possessed' and 'used' by dominant individuals and groups to

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<sup>24</sup> Foucault uses the term 'civilization'; the term 'civilized' is more applicable to this thesis.

force those with less power to do what they wish, as well as something that can be ‘taken back’ by the oppressed through efforts at resistance (Mills, 2003; Peers, 2012; Tremain, 2005). Foucault perhaps best defined the concept of power later in his life when, in 1980 giving a lecture series titled *Truth and Subjectivity*, he described it as “something which circulates, or as something which only functions in the form of a chain [...] power is employed and exercised from a net-like organisation [...] individuals are the vehicle of power, not its points of application.” In other words, power is not located within particular institutions nor is it simply top-down but, in fact, “power is everywhere” and “comes from everywhere” (Foucault, 1978, p. 93). Indeed, power within the Polygamy Reference is not only top-down from the State exercised onto the judge’s ruling, but also results from the lawyers, chosen witnesses, information that is omitted and, finally, by researchers such as myself who have taken issue with the decision. Thus, even though power relations involve the State and other social institutions, it is important to recognize that these relations are “multiple; they have different forms, they can be in play in family relations, or within an institution, or an administration” (Foucault, 1988, p. 38).

Foucault (1977) has also critiqued the notion that power is always negative and repressive, suggesting that even though power can be restrictive at times, it can also be productive. This point is of particular relevance when analyzing the Polygamy Reference, as the power of the Canadian state and media effectively demonizes those in polygamous relationships in Canada and also creates universal assumptions about the harms of polygamy that are reflected in popular media representations. Thus, as Foucault (1977) argues, “power produces; it produces reality; it produces domains of objects, and rituals of truth” (p. 194). In the first volume of *History of Sexuality* (1978), for instance,

Foucault illustrates how even seemingly constraining and oppressive operations of power actually allow for new “forms of behaviour and events rather than simply curtailing freedom and constraining individuals” (Mills, 2003, p. 36). Furthermore, in *Discipline and Punish*, Foucault (1977) addresses two basic forms of *power over life* that evolved since the 17<sup>th</sup> century; the first is “centered on the body as a machine” as attempt to discipline, optimize, and integrate the human body “into systems of efficient and economic controls”; the second focused on the *species body*, particularly in regards to biological processes such as “propagation, births and mortality, the level of health, life expectancy and longevity” (p. 139). Together, the “disciplines of the body” and the “regulations of the population” formed the basis for a new form of population management that he referred to as *biopower* (Foucault, 2004). The notion of biopower is a far more preventive and pervasive form of power that permeates various systems, and that eventually extends to controlling bodies, time, and actions. Foucault has noted that, in particular, those labeled as ‘abnormal’ will “experience the full weight of close medical and welfare surveillance and regulation, that is, to be especially subject to techniques of biopower” (as cited in Thomas, 2007, p. 38).

Lastly, *I, Pierre Rivière* (1975) is particularly useful as a lens through which to analyze the Polygamy Reference. Published as a dossier, the case of Paul Rivière was clearly something that Foucault was interested in. According to Beaulieu (2016), *I, Paul Rivière* was an example of “discursive formations ‘battling’ on the basis of power/knowledge and resistance” (p. 12). However, most relevant to this thesis is the way in which Foucault understands the Rivière case to have played out in court, and the fact that the “village opinion, legal opinion and medical opinion re Rivière were sharply

divided” (ibid. p. 10). As such, Beaulieu has argued that the case of Paul Rivière was a discursive field of study, though ultimately it was particular opinions (and most relevantly, largely not the narrative of Rivière himself) that were used to cast legal judgment; in this way, Foucault himself becomes a sort of expert on this case in terms of his engagement with the material. However, as Foucault imagines power to exist within a web whereby some voices or discourses may find the power to silence others, Foucault has been criticized for silencing Rivière through not engaging in his narrative, and for not paying critical attention to powers of one discourse to silence another (Beaulieu, 2016). Thus, the issue of Foucault’s interest in this case, will be used as a parallel for analysis in Chapter 3.

### **Critical Discourse Analysis as a Methodological Frame**

For the purposes of this thesis, I employ a feminist critical discourse analysis of the Polygamy Reference to analyze this data source. In particular, Blommaert’s (2005) definition of discourse informs this aspect of the thesis. He explains that, “Discourse to me comprises all forms of meaningful semiotic human activity seen in connection with social, cultural, and historical patterns and developments of use.... What is traditionally understood as language is but one manifestation of it” (p. 3). Conversely, Mills (1997) argues that discourse is “largely defined by what it is not” and outlines an abundance of scholarly interpretations of discourse (p. 3). Indeed, while language and text are critical components of discourse that will be taken up in this study, discourse is often thought to comprise other means of communication, referred to by Blommaert (2005) as “the “action” part of “language-in-action” (p. 3). Most generally, critical discourse analysis (CDA) is concerned with power and, more specifically, power that is institutionally

reproduced and enforced. Further, as Wodak (1995) suggests, the goal of CDA is to illuminate “opaque as well as transparent structural relationships of dominance, discrimination, power and control as manifested in language” (p. 204). Some CDA scholars note that discourse is socially constructed in specific ways in specific contexts, thereby itself becoming an instrument of power. Echoing the Foucauldian definition of discourse, some CDA scholars such as Norman Fairclough (1995) have developed a political analysis of text with a systematic framework of analysis based on unearthing power relations through a linguistic analysis of text. As noted by Mills (1997), linguists such as Walsh (2001) have injected Foucault’s analysis of discourse with a political concern about the effects of discourse; for example, the way that people are positioned into roles through discursive structures, or the way certain knowledge is disqualified or minimized in contrast to authorized knowledge.

Most relevant to this thesis are the ways in which Experts (read Expert Witnesses) are presented and situated as representing particular roles as discursive entities in the Polygamy Reference, and the ways in which these Experts are disqualified or minimized in contrast to Chief Justice Bauman’s “authorized knowledge” in the form of his final decision. With this final decision comes the power of discourse and, consequently, his interpretation of polygamy creates a far more monolithic discourse about polygamy in Canada: one that conceives the practice to be intimately and inextricably tied to harm.

As noted by Fairclough (1989), “Power in discourse is to do with powerful participants controlling and constraining the contributions of non-powerful participants” (p. 46). Indeed, who has access to those resources that enable powerful participation is also relevant. That is, not everyone has access to opportunities that allow them to become

a judge and, therefore, people who obtain such qualifications come largely from a “dominant bloc” (Fairclough, 1989, p. 63). As one example, to become a judge in Canada requires 4 years of post-secondary education and an additional three-year law degree, plus an outstanding record of professional legal success, thereby creating a standard that requires particular fiscal and temporal resources not accessible to all members of society. Feminist legal scholars such as Smart (1989) refer to this as *legal imperialism*, or the specific gender, racial, and class hierarchies that are often apparent in legal structures such as judicial decisions. The law selects from among many participating voices, silencing some, transforming others, and affirming others. But an increased attention to voices, particularly those of groups who have often been excluded from, or silenced by, the legal systems provokes a new challenge: How to combat these silences?

While power is of central consideration for critical discourse scholars, so too is the interplay of texts, or the *texture* of texts. For example, Haliday and Hasan (1976) describe texture as the analysis of the form or organization of texts. For Fairclough (1989), this analysis is not solely limited to linguistic systems, but shows the ways in which texts selectively draw upon “orders of discourse” (p. 188), and the structures and frameworks of particular social practices that are then echoed in text. Thus, a specific coding analysis is necessary to illuminate these relevant aspects of texts, the method of which follows below.

### **Coding**

The research of this particular study utilized document analysis; this method involves the analysis of a singular document, whereby particular keywords, language, and omissions are noted. Document analysis, through the method of coding, aims to achieve nuanced and deeper understandings of a document that extend beyond the text itself even



as the text remains critically relevant: a central consideration of discourse analysis.

Further, the document analysis and coding in this thesis examined a hierarchy of voices or experience and aimed to comprehend particular assumptions existing within the document itself.

Analysis of the Reference draws on aspects of grounded theory, described by Strauss and Corbin (1997) as “constant comparative analysis, development of theoretical concepts and statements, as well as the usual supporting techniques of theoretical coding and memoing” (p. 1). Grounded theory is a method of gathering data that first arose with the work of Strauss and Glaser in the 1960s and employs inductive reasoning (a central tenant of unpacking legal dicta) rather than drawing upon positivist research techniques. Much like feminism has, at times, been described in terms of “waves” of activism and development, so too has grounded theory. For example, Strauss and Glaser had a practical split on how to apply grounded theory as a method, resulting in a practical split of the theory according to these two central scholars. On the one hand, Strauss, who later came to work with Juliet Corbin, focused strictly on grounded theory and its application to qualitative research, while Glaser argued that grounded theory had never been intended as a strictly-qualitative method of analysis. Indeed, while I recognize the criticisms of each “side” of this debate, the scope of this division of theory is far too broad of the purposes of this thesis. Rather, while I acknowledge that by focusing largely on the work of Strauss and Corbin in particular that I am omitting another “side” of the theory, I sought to apply grounded theory in a way that allowed me to draw theory and analysis from the data, rather than imposing beliefs on the data itself. Thus, and in conjunction with the qualitative analysis of this thesis, and the systematic coding of my data source, I rely heavily on the Strauss and

Corbin side of the divide.

In conjunction with grounded theory foundations, the Polygamy Reference was analyzed as a data source according to Neuman's (1997) thematic coding procedure. Analysis of this data was conducted according to Neuman's (1997) suggested process for qualitative data analysis, including: a) thematic conceptualization, b) open coding, c) axial coding, and d) selective coding.

### **Thematic Conceptualization**

Concept formation is an important step in data analysis, beginning during the literature review and based on ideological theoretical foundations. In the case of this thesis, feminist discourse analysts such as Smith (1993) and critical discourse analysts such as Miller and Metcalfe (1998) established a foundation for identifying major concepts regarding gendered language and embedded power hierarchies in the Polygamy Reference. These themes are also drawn from the theoretical foundations identified earlier in this Chapter, and provided the framework of thought that facilitated analysis of this Reference document. This phase of analysis reflected Miles and Huberman's (1994) suggestion that researchers begin the coding process with a tentative list of concepts to be supplemented or discarded as the actual multiphase coding begins. As a feminist researcher, I am particularly concerned with thematic conceptualization of gender and power as I begin the coding process, and look for key concepts that are either included or omitted from the Polygamy Reference.

### **Open Coding**

Open coding is typically performed during a first pass through recently collected data. In the case of this research thesis, this process involved coding the over-arching

themes in the Polygamy Reference. This primary step is crucial as an attempt to categorize a diverse mass of critical events and themes, and identify several large umbrella themes. During a second pass through the data, more specific observations were highlighted in an attempt to begin to concretize the conversational abstractions.

After performing Open Coding, the major theme that arises from the Polygamy Reference is clearly that of harm. Next, I identified ways that the concept of harm is deployed in the decision, which is both through individual people as well as through society, or what I refer to as civilization. I discarded the following themes: 1) Othering (specifically racial Othering) as a discussion of this theme would have required an examination of Critical Race and Post-Colonial theory which is beyond the scope of this thesis, 2) Religion, which I do integrate in a minor fashion into my discussion of civilization and Charter-guaranteed freedoms, and 3) Multiculturalism in Canada, which may be suitable for a further study that focuses on Critical Race, Intersectionality, and Post-Colonial theory.

### **Axial Coding**

During a subsequent pass through the collected data, connections between concepts are examined, as well as particular assumptions and hierarchies of knowledge or voice. This step was crucial to understanding the construction of discourse in the Polygamy Reference, as well as the power of voice. Thus, during this stage, I paid particular attention to what Beaulieu (1995) refers to as attitude saturation, or the permeation of particular voices or viewpoints throughout the data. Because a single author with a particular viewpoint writes the Polygamy Reference, I took into consideration the notion of attitude saturation in terms of the viewpoints of scholars to

whom Chief Justice Bauman gives authoritative voice and, consequently, space in the decision. It is the attitudes of the Experts who give evidence and whose evidence is given credence that are particularly relevant for analysis in this thesis; such attitudes are also essential to a critical discourse analysis.

Attribution, or the relationships between one term and another that enables particular words to have particular meanings, was also considered during this stage. It became clear during this phase of coding that the attribution of harm is deployed in this document through the word *polygamy*, thereby linking to the Foucauldian theory that the attribution of harm to protect society is the central justification for prisons, or in this case criminalization. Indeed, it was in this coding section in particular that I identified connections between particular Foucauldian theories previously mentioned in this Chapter, and the deployment of the term harm that serves as foundational to my analysis of this document.

### **Selective Coding**

During this final pass through data, previous coding was scanned and scrutinized with the intent of identifying selected cases that appear to consistently uphold the comparison and contrasting relationships identified during axial coding. The purpose of this overall analysis is to formulate several core generalizations about the document itself and to uncover potential linkages or thematic convergences with particular language surrounding these generalizations. For example, when describing women's experiences with polygamy, I highlighted the essentialist and universal language that surrounds this discussion in the Polygamy Reference. In particular, linkages of attribution were brought forward, including cause and effect relationships, space/place relationships, and

relationships between central themes. These relationships were particularly relevant for this thesis to fully understand the tone and treatment of the major themes in this thesis; specifically, the tone and context that surround the concept of polygamy. Following the completion of coding, it was clear that the discourse of harm in the Polygamy Reference was more prevalent than previously imagined, as will be illustrated in Chapter 3.

### **Summary**

As language, text, and discourse are of central consideration in this thesis, it seems difficult to proceed without employing paradigms proposed by post-structural theorists. Indeed, feminist theorists and critical discourse theorists alike have drawn on the work of Foucault, though it is rare that feminist post-structuralism and critical discourse analysis are intertwined in a single study that labels itself as a junction of the two (Lazar, 2005). While post-structuralism disputes the view that science can possibly reveal a single or universal truth, critical discourse analyses seek insight into discourse or truths. This chapter has shown how language, tone, and text are pertinent to a post-structural, critical discourse analysis, and how Neumann's coding method is instrumental in identifying patterns of discourse. I will draw upon these methods and methodologies in my analysis of the Polygamy Reference decision in Chapter 3.

## CHAPTER THREE: ANALYSIS

It is impossible to reduce the literature on this topic to a general, blanket statement in regard to the social aspects of polygamous life for women: polygamy is neither entirely “good” nor is it entirely “bad” for women. The social implications of plural marriage are far more intricate than this.

Angela Campbell, 2005, Polygamy in Canada

### Introduction

This chapter will argue that because Chief Justice Bauman posited the claim that polygamy is inherently harmful by marginalizing the research of particular women and academic contributors to the case, language---and the politics of language---as used in the Polygamy Reference are central to understanding how he sustained such a claim. As noted by Chris Weedon (1999), “Language does not reflect reality but gives it meaning” (p. 102). Thus, it is pertinent to examine the language that surrounds monogamy in the Polygamy Reference in order to understand how polygamy becomes its antithesis.

Essentialist language is clearly evident in historical accounts of the development of monogamy within the Polygamy Reference; paragraph 214 states, “Moreover, monogamy was better for women, as it was naturally designed to respect gender equality” while paragraph 215 explains “Finally, monogamy was better designed to promote fidelity and chastity, as it induced spouses to remain faithful to each other.” Indeed, these are just two examples of blanket statements that sustain a discourse of monogamy as a universally positive marital form, and echoes language used by Westermarck, such as “monogamy frequently co-exists with great stability of marriage. This is scarcely the case in the rudest condition of man... marriage has become more stable as the human race has advanced” (p. 571). This language marks a clear erasure of extensive feminist critiques of

monogamy and thus positions monogamy as an inherently ‘good’ institution, particularly as it is positioned in the Polygamy Reference in opposition to polygamy, which Chief Justice Bauman argues is inherently harmful.

The Polygamy Reference centrally justifies its findings and the continued criminalization of polygamy to prevent the experience of harm, deployed through the central domain of individual people, despite narratives by feminist scholars such as Angela Campbell (see, for example, 2014) and Lori Beaman (see, for example, 2014) that complicate these findings. Indeed, the paternalistic voice of the state in preventing harm to women and children is compelling in a multitude of ways, including by the erasure of particular experiences of polygamy. For example, the judge comments on the problematic aspects of *Loi Pasqua* in France and the harms that the decriminalization of polygamy brought to France as noted by Bailey and Kaufman (2010), but completely ignores their argument on the harms that some women experienced when France retroactively eliminated polygamy, including the deportation of plural wives.<sup>25</sup>

This chapter will identify the ways in which the judge was able to justify his eventual findings and the ways in which he sustains this claim of harm. Just as importantly, it will seek to locate feminist research as it was taken up by the court. In particular, I will illustrate whose evidence was heard and given credence as authoritative knowledge, and in what context.

### **The Sustention of Harm in the Polygamy Reference**

Harm is the central theme put forward by the judge in the Polygamy Reference. In order to analyze voices included and omitted from the decision, it is necessary to

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<sup>25</sup> This omission is made even more clearly by Chief Justice Bauman’s assertion that Bailey and Kaufman’s book, which highlights the problems associated with criminalizing polygamy, is one of two books from which the Brandeis Brief for the Polygamy Reference is drawn.

understand how the concept of harm is discussed and how ‘proof’ of harm is sustained. In particular, how is it possible for Chief Justice Bauman to sustain claims of harm of polygamy, while concurrently erasing harms of monogamy? He does so largely by relying heavily on the testimony of select few Experts, all of whom were called by the AGBC. In particular, evolutionary psychologist Dr. Henrich argues that monogamy has emerged as the only successful form of marriage that contributes to civilized societies. Henrich’s testimony and secondary sources, including affidavits, rely heavily on the research of fellow evolutionary psychologist Robert Wright, who stigmatizes feminism by suggesting that, “Like the communist dinosaur, feminists refuse to acknowledge the scientific truth about human nature” (Rose & Rose, 2010, p. 209). Henrich builds on Wright’s theory to contend that polygamy is genetically based, leading the judge to conclude that it could plausibly spread (chromozonally) throughout Canada if decriminalized. The spread of polygamy, the judge extrapolates, could lead to a host of other problems, from increased crime rates suggested by Henrich, to lower Gross Domestic Product noted by Bala (2005). In response, Chief Justice Bauman assumes a dual position to argue that while “culture” has evolved to constrain this unacceptable genetic predisposition for polygamy law is still necessary to contain it. This circular argument leads to the false conclusion that societies that employ the institution of monogamy are therefore able to develop more rapidly, effectively causing them to be seen as superior or more civilized societies than their less-developed, polygamous competitors. For example, as noted in paragraph 164, “SIUM (socially imposed universal monogamy) has been a contributing factor to the relative pace of western development.” In fact, this language directly mirrors Westermarck (1891) “We may thus take for granted



that civilization up to a certain part is favorable to polygyny, but it is equally certain that in its higher forms, it leads to monogamy” (p. 530).

Chief Justice Bauman relies not only on the testimony of Dr. Henrich, but also on the testimony of historian Walter Scheidel to sustain his position on harm. Much like the writings of English jurist Maine (1917), Dr. Scheidel credits socially imposed monogamy as contributing to the “rise of the west,” with monogamous societies expanding their domination over polygamous ones in part due to the more desirable monogamous marital systems. However, in employing this discourse, Chief Justice Bauman falls into the very trap cautioned by Maine in 1861: that “civilized people” will have “lofty contempt” for “barbarous” people (p. 71). Chief Justice Bauman further affirms Maine’s prediction in his reliance on evolutionary psychologists. For example, building on Henrich’s and Scheidel’s assertion that society needs to fear the rise of polygyny, Chief Justice Bauman emphasizes the danger of Canada becoming a hot-spot for immigrants wishing to practice polygamy (para. 560). This emphasis highlights the ways what Maine describes as contemptuous “civilized” people becoming disparaging to the “barbarous” others (p.72). This is accomplished by Chief Justice Bauman’s positioning of particular immigrants as undesirable and a liability for a positive social environment in Canada. To substantiate these fears, Chief Justice Bauman suggests that Canada draws many of its immigrants from Africa and the Middle East, and even the United States, which the judge estimates to have over 50,000 “fundamentalist Mormons” (para. 310). However, Statistics Canada from 2011 shows the Philippines and China as the top sources of countries for immigrants, with nearly three times the number of immigrants than any other source country (Canada 2014). Neither of these countries has been known for their propensity to

practice polygamy in the 21<sup>st</sup> century. Therefore, while Chief Justice Bauman suggests that “it requires no leap of imagination” to comprehend the likelihood that polygamous immigrants would seek refuge in Canada should polygamy be decriminalized, thus far, Immigration Canada has clearly policed and negated this trend (paras. 428, 571).

### **Who is Silenced?**

While the Polygamy Reference is saturated with the testimony of Dr. Henrich, there are clear omissions of voice. For example, none of the Experts called to give testimony are women from Bountiful themselves, nor are any Canadian immigrants who have faced challenges associated with polygamy and Canadian citizenship. Whereas Chief Justice Bauman extensively outlines putative problems with accepting immigrants practicing polygamy, he fails to consider harms arising from the dissolution of polygamous families and communities. This is discussed in paragraphs 566-570, where Chief Justice Bauman uses the example of *Loi Pasqua* in France to illustrate problems associated with the decriminalization of polygamy and, particularly, his fear that polygamy could spread. However, while this is the sole focus of discussion related to *Loi Pasqua* in the Polygamy Reference, feminist scholars who are elsewhere present in the Polygamy Reference decision are omitted, as is their testimony about the harms associated with the forced dissolution of polygamous families. For example, while Sara Carter’s evidence was utilized to describe polygamy in Aboriginal and Mormon communities in Canada in the 19<sup>th</sup> century, her research on the harms associated with these forced dissolutions and subsequent assimilation is noted but not taken up as evidence (para. 375). This is one clear illustration of privilege within legal discourse and power rooted in who is able to ask which questions of a witness; that is, Carter’s evidence

is considered authoritative knowledge in one area, yet other facets of her research that challenge the concept of harm in the Polygamy Reference are omitted from constructing the decision.

In the analysis that follows, I examine the overarching theme of *civilization* in the Polygamy Reference. As well, Harm will be discussed as it is deployed through references to polygyny and, specifically, as it occurs to women and children. These categories are undoubtedly problematic, not only in terms of conflating the experiences of people in polygamous families into neatly defined categories, but also in terms of the essentialist language that accompanies these categories. The document includes, for example, the contention that, “privately (monogamous) marriage offered mutual love, companionship to each spouse, as well as protection from sexual temptation” (para. 173). Yet, post-structuralist scholars such as Weedon (1987) warn against these types of presumption that lump people or experiences into definitive, absolute categories. Nonetheless, for the purposes of clarity, I rely upon the categories that are outlined in the Polygamy Reference despite my concern that these categories are essentialist and problematic.

### **Harm to Women**

Chief Justice Bauman thoroughly and extensively lists harms that women in polygamous families may experience<sup>26</sup> (see, for example, paras. 230, 649, 653), and uses these harms as the central justification for his decision. These harms include, but are not limited to:

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<sup>26</sup> Please note that, while I suggest these are harms that women in polygamous families may experience, the judge envisions these harms as not merely possible, but inevitable for women in polygamous families.

1. emotional, mental, and psychological harms to women, including depression, neglect, and jealousy
2. physical harm, including domestic violence, sexual abuse, and a higher propensity for female genital mutilation and sexually transmitted diseases
3. lack of gender equality with a disenfranchised position for women and polygamy as a “patriarchal fraud” (para. 214, 4), which is characterized by such features as women more likely living in poverty with “illegitimate children” (para. 584, 5)
4. undue harm to public support systems as “high rates of polygamy have negative economic effects for a country as a whole” (para. 604, 6)
5. higher rates of underage marriage, as “in some areas of India, more than half of females were married before the age of 15” (para. 532, 7)
6. women being seen as “commodities” to be controlled (para. 532, 8)
7. increased likelihood that women will be trafficked or subjected to “sex trafficking” (para. 616 h, 9)
8. women more likely to be in forced or “arranged marriages” (para. 592 b and 10)
9. women’s enfranchisement and democratic rights more likely to be compromised, as “Polygamy also institutionalizes gender inequality” (para. 13).

While this list of harms may seem extensive in and of itself, coding of this document also revealed that references to these harms are made repeatedly. For example, polygamy as an impediment to gender inequality is mentioned in various ways on four separate occasions, and may become persuasive to some readers who accept this premise as a truth

claim (paras. 230, 167, 214, & 884). Indeed, frequent reference to the claim of harm is one way that Chief Justice Bauman sustains a particular line of truth about polygamy.

It is also clear from thematic coding of this document that Chief Justice Bauman views criminalizing polygamy in Canada to be the duty of the state in order to protect women from experiencing harm. His paternalistic voice accentuates the belief that it is the duty of the Canadian state to maintain the criminalization of polygamy in Canada as a strategy to protect gender equality (para. 824), which he sees as fundamentally related to monogamy. Similar rhetoric can be found in Westermarck's (1891) work, whereby he notes: "As for European monogamy, there can be no doubt that it owes its origin chiefly to the consideration of men for the feelings of women" (p . 524). Not only is this premise of gender equality particularly ironic given the current context of gender equality in Canada (in fact, the 2014 UN Development Index lists Canada as the 25<sup>th</sup> of 155 countries in measures of gender equitability), it raises problematic language in relation to the role of the Canadian state in policing the lifestyle choices of women, under the guise of protecting women from harm. This premise somehow implies that women are likely to be duped into accepting less-desirable life situations for themselves, and that the Canadian state must consequently introduce protections, such as the continued criminalization of polygamy, to save women from these imperiled situations.

### **A Language of Harm**

While women's experience of harm is constructed and described in a multitude of problematic ways, what is most interesting are ways in which the judge constructs tone, text, and language in reference to women. For example, as noted by critical discourse analysis scholar Sara Mills (1997), small-scale linguistic choices, such as reiterating

examples of harms to women, result in the construction of particular messages in the text as a whole. Numerous iterations of particular harms to women construct a discourse that becomes the focus of the Polygamy Reference and creates the perception that the harms to women are even more extensive and expansive than the ten points noted above. These iterations range from parenting illegitimate children to high rates of sexually transmitted diseases.

### **Aggregating Categories**

Reaching beyond these iterations, Chief Justice Bauman often lumps women and children into a singular category when discussing risks associated with polygamy. While this not only problematically universalizes experiences of polygamy, it also assumes that adult women will have similar experiences to children. Weedon (1999) may argue that this is an example in which “subjectivity is constructed” because women and children become synonymous as subjects: the capability of women to make life decisions is called into question, and both must be saved by the state.

Expert Dr. Henrich argues that if the Canadian state does not intervene to save women from polygyny, polygamy will spread to become common practice in Canada. He also makes the case that if polygyny becomes prevalent in society, women will expect to “marry up” to partner with the wealthiest men in society. This is particularly problematic in terms of assumed heteronormativity and again, the subsequent grouping of all women into a singular category. For example, this essentialist view of marriage and kinship relations is described in paragraph 555, wherein “male and female mating preferences” are described. This section, based on the testimony of Dr. Henrich, ponders whether or not “gender norms” have evolved sufficiently to shield women from the

imperiled position that Chief Justice Bauman feels they will undoubtedly face in polygamous relationships (para. 167). Akin to liberal feminist frameworks, Chief Justice Bauman posits gender norms of equality as the sole protector against women sliding into inequitable, polygamous relationships. He states that, “even though women may have acquired gender norms, they’re still going to be inclined to marry up, so to speak” (para. 555).

This quote is telling. Even as Chief Justice Bauman defends monogamy as conducive to achieving gender equality, he fails to see the contradiction of women marrying *up*. Suppose, perhaps, that this is a classist rather than a sexist argument, that the biological essentialism that Dr. Henrich relies upon holds true, and that women in polygamous communities will seek to marry the wealthiest man. If this claim is accepted, we must also examine instances of this discourse occurring in the media as it relates to monogamy. Take, for example, Kate and Pippa Middleton, who have come to be known in the United Kingdom press as the Wisteria sisters because they are “highly decorative, terribly fragrant, and with a ferocious ability to climb (Ewan, 2008).” These types of discourse circulate a particular stereotype of monogamy that one could argue is not indicative of gender equality. How then has gender equality been achieved?

Paradoxically, the declaration that women will “be inclined to marry up” in any marriage form relies on a monolithic and singular category of women and women’s experiences (a reliance taken to task by Judith Butler, 1990, Kimberle Crenshaw, 1993, and Dean Spade, 2015), it also positions this singular category as one in which women are incapable of caring for themselves. This sentiment, language, and tone are echoed in paragraph 501, wherein Chief Justice Bauman notes that polygamy “allows more females

access to high-status males.” This monolithic interpretation of the experiences of all women relies on evolutionary psychology and anthropology as proof that all women, given the choice, will form partnerships with only a few particular men. It is consistent with (and likely influenced directly by) Westermarck’s assertion that: “Monogam(ous) form is manifestly the ultimate form and any changes (in marital law) to be anticipated must be anticipated in the direction of the completion and extension of it” (p. 531).

This essentialist notion of marital choices is not consistent with feminist research on polygamy, or with post-structuralist scholars’ writings on experiences and subjectivities. Indeed, attention to particular feminist knowledges appears to have become minimized over time, as noted by Boyd and Young (2006),

a diminishing space appears to exist for feminist voices on various issues related to the family.... We argue that to the extent that feminist critiques of marriage, familial ideology, and the privatization of economic responsibilities are marginalized, conservative and heteronormative discourse of the family are reinforced (p. 2).

Boyd and Young’s perspective on the centering of heteronormative discourses is clearly illustrated in the Polygamy Reference in terms of the rudimentary, gender-essentialist categories in which all women seem to be lumped: a category that presumes heteronormativity and universally negative experiences of polygamy. For example, “Women (read, all women) in polygynous relationships are at an elevated risk of physical and psychological harm” (para 782). Thus, all women are presumed to have the same experiences of polygamy, which silences those with diverse life experiences. If, then, we rely on Foucault’s suggestion that knowledge spawns power, particular knowledges that



are omitted become relevant because, in their absence, accepted knowledges create a (false) universal narrative that has the power to silence discursive voices.

### **Harm to Children**

Though somewhat less prominent than harms to women in the case decision, harms to children in polygamous families and communities are also discussed extensively and used as justification for the continued criminalization of polygamy. Particular harms to children outlined in the Polygamy Reference include the likelihood of living in poverty, fewer and limited educational opportunities, and less engaged father-figures due to the number of children that men in polygamous families are likely to have (para. 9). For example, Chief Justice Bauman believes that children are more likely to encounter “harmful gender stereotypes” (para. 12), and asserts that girls are more likely to be married younger and have their own children earlier than the general population (para. 710). He also alleges that young women in polygamous communities are exposed to “early sexualization” that results in adolescent motherhood. Mr. Klette presents evidence of this in paragraphs 721-722 by contending that reported Bountiful mothers are, on average, younger than other mothers in British Columbia. However, *Amicus Curiae* notes that this data is not unique to Bountiful as an isolated community in British Columbia, but is, in fact, characteristic of many small communities. Indeed, much of the discussion centered on harm to children in the Polygamy Reference is framed in gender essentialist categories, whereby it is assumed that young girls inevitably have particular and universal experiences and young boys have another set of experiences.

The *Lost Boys* phenomenon describes these experiences. Adolescent boys are removed from their own, often polygamous, communities;<sup>27</sup> the judge envisions these boys or “unmarried low-status men” (paras. 506-507) as being ex-communicated or expelled from polygamous communities in order to ensure that the remaining men have a monopoly on marriage. These young men are described as more likely to fail to integrate into broader society, to display antisocial behavior, and to be prone to violence (para. 586). In fact, the judge accepts evidence in this case that monogamous marriage will empower men to become good citizens who are less likely to commit crime (paras. 508-510). In this way, monogamous (heterosexual) marriage becomes a pedagogy, whereby men receive an education on what constitutes good citizenship, and women are the instigators of this good behavior. Decriminalizing polygamy, so the judge reasons, would result in higher numbers of Lost Boys that would provoke higher levels of crime and violence in Canadian society.

### **Civilization**

The concept of civilization as the antithesis to crime and harm to society is particularly interesting, as harm in this case refers not only to harm to Canadian society, but---as we shall see--- also harm to the institution of monogamy as a tenet of Canadian society. The threat of harm to civilization in Canada is expressed in three ways: 1) crippling the potential of people to become good citizens by decreasing the likelihood that they will participate in the institution of monogamous marriage (para. 509), which the judge suggests is a foundational principle of good citizenship in Canada; 2) lowering the national Gross Domestic Product (GDP) (paras. 535, 618); and 3) the threat of the spread,

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<sup>27</sup> The Lost Boys phenomenon has been documented extensively in the media, in particular, in The Learning Channel’s (TLC’s) *Escaping the Prophet*.

or proliferation of polygamy should it be decriminalized (paras. 533-574) to the extent that polygamous families will outnumber those that are monogamous. While Expert Dr. Shackelford contests the latter point within the Polygamy Reference, it is the first point of responsible citizenship that is particularly relevant for consideration here. The argument that monogamy is a criterion of responsible citizenship and contributes to a ‘good’ society does not legally mandate that individuals participate in monogamous marriage; however, it does serve as a censoring discourse for how citizens of Canada *should* behave. It has also been attributed to heightened development of Western civilization by scholars such as Maine (1917), who note that the state’s imposition of monogamy during the period of the era of Codes and Twelve Tables of Rome quickened the pace of civilization (p. 15). In this way, not only is the legal criminalization of polygamy upheld, but it also instructs individuals on acceptable, normative activity, a precise example of what Foucault describes as *biopower*. Indeed, in *The History of Sexuality*, Foucault (1978) describes the legal implications of biopower as less about forbidding and condemning particular activities and more about normalizing particular conditions of life. As a direct example of this, the word “legitimate” is used in the Polygamy Reference in interesting ways: in the context of monogamy producing “legitimate children,” but also monogamy as a “legitimate” family form. Indeed, it is not the number of instances of such words but, rather, the context in which they arise and the truth status that is accrued them; discussion of “legitimate” family forms only arise in the Polygamy Reference decision in relation to discussions on monogamous family forms. Thus, activities associated with monogamy are normalized or seen to be legitimate, while polygamy remains criminal, illegitimate, and harmful.

Further still, it is important to recognize ties of origin between language used in the Polygamy Reference, and language from earlier case law on this topic. For example, polygamy is described by Judge Monk in *Connolly v. Woolrich* as “an anti-Christian form of marriage that cannot be regarded as legitimate” (p.9). Thus, language from centuries ago continues to resonate within an echo chamber that describes the problems associated with the topic of polygamy in Canada, and continues to resonate into contemporary legal discourse.

### **Problematizing Harm: Angela Campbell and Rose McDermott**

Repositioning the framework of harm as described by Chief Justice Bauman is the research of Angela Campbell and Lori Beaman, both of whom were called to testify by *Amicus Curiae*. Campbell, a feminist legal scholar who earned her degree at Harvard and is Associate Dean of Law at McGill University is, thus far, the only researcher in Canada to conduct academically recognized scholarly interviews with women living in the polygamous community of Bountiful. Her findings have been published extensively (2005, 2013, 2014), and her research is considered unique in the sense that she has spent time in the community of Bountiful, a privilege that has not been granted to other researchers. She has also developed close relationships with some women in the community; so much so, that she was invited to a plural marriage ceremony in Bountiful while conducting her research.

Campbell (2013) argues, both for purposes of the Polygamy Reference and elsewhere, that contrary to the research of other Experts in this decision, polygamy is not inherently harmful to women. Instead, she urges a nuanced approach to understanding polygamy; an approach that problematizes both monogamy and polygamy by suggesting

that all marriage is complex and experienced in a multitude of ways, even polygamous marriage. Campbell understands that the women she befriended and interviewed do not all wish to leave polygamous family arrangements, nor the community of Bountiful. Instead, much like choosing monogamous marriage is left up to individual preference,<sup>28</sup> polygyny in Bountiful functions largely in the same manner. She notes that,

Although (women in Bountiful) live within what many would consider a deeply patriarchal faith community and under an ongoing threat of state-imposed legal sanctions for their way of life, women in Bountiful emphatically resisted the label of "victim". They insisted upon their choice-making capacities while recognizing that the normative orders in which they operated imposed serious social and economic limits.... These discussions also underscored the damage that the state does when it criminalized contested and controversial choices in the name of protecting "vulnerable" people. (2013, p. xv)

Despite Campbell's expertise on this topic, her testimony is taken up in very different ways than the testimony of other Experts.<sup>29</sup> Primarily, and unlike any of the other Experts called to testify in this decision, Campbell's research and academic background were challenged before she was ever called upon to testify. On the first day of the evidentiary phase, both the AGBC and the Interested Person "Stop Polygamy" objected to testimony provided by Campbell, objections that were sustained by the judge and caused consideration about whether Campbell's testimony would be allowed. The judge

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<sup>28</sup> I understand that the notion of individual agency in this context may appear overly simplistic of many practical experiences; indeed, there are many social pressures and economic benefits to choosing to get married, though the institution has been critiqued by feminist scholars for decades, such as in the work of Susan Boyd (2006). In this context, I purposefully discuss marriage in these terms to draw parallels between monogamy and polygamy.

<sup>29</sup> Expert witnesses are called upon to provide opinions. As noted by O'Melia (1991), they must first be found qualified to give an opinion, and then "the factual basis upon which the expert purports to render his or her opinion must be established" (p. 8). Further, the facts upon which experts may base their opinion must be limited to facts that they have personally observed.

employed the *Mohan* analysis in the precedent set out in *Abbey* to determine the admissibility of Campbell's evidence.<sup>30</sup>

After the judge determined that Campbell fulfilled the preconditions for admissibility, he was left to consider the central challenges to Campbell's testimony: 1) the AG Canada's assertion that her official title as a "legal scholar" lacked substance to establish Campbell as an Expert (para. 84); and 2) the AG Canada's assertion that Campbell lacked "formal academic qualifications in qualitative research" (see para. 85). In keeping with the analysis of Carol Smart on disqualifying feminist knowledge, Chief Justice Bauman found that Campbell's testimony was admissible despite being fraught with advocacy, though it "may not measure up to" research performed by other scholars (para 96).

Further still in the decision, and as a means of justifying his disagreement with Campbell's findings on polygamy, Chief Justice Bauman suggested that Campbell took the word of her interviewees "at face value" (para. 757) without digging deeper into the harms that he considers inevitable in polygamous communities. In this way, what feminist research refers to as reflexivity, regarding the relationship between interviewer and interviewee<sup>31</sup> is deemed questionable, or an unethical research practice. The judge critiques Campbell's anonymity of her interviewees, suggesting that identifying her subjects would lead to more credible and informative findings. However, the importance of maintaining anonymity in qualitative interviews has been extensively researched and accepted elsewhere as an ethical and valid interviewing technique. Further, the judge

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<sup>30</sup> The *Mohan* analysis found that Expert evidence should be admitted based on four criteria: 1) it must be relevant, 2) it must be necessary to assist the trier of fact, 3) it should not trigger any exclusionary rules, and 4) it must be given by a properly qualified expert.

<sup>31</sup> This is a widely accepted cornerstone of feminist ethnographic interviewing practice called upon by scholars such as Berkhout (2013) and Sieber (1992).

himself protects the anonymity of several witnesses called to the stand (para. 703) without question or hesitation for court testimony. In this way, while Chief Justice Bauman is comfortable upholding the anonymity of witnesses on the stand in court, he is suspicious of Angela Campbell for applying the same standards to her own research interviews.

### **Assigning Judgments of ‘Worth’.**

Following the fourth stage of analytical coding, it also became clear that there is a sliding scale and a particular type of inconsistency on which the judge accepted or rejected Campbell’s testimony. For example, the judge cites her testimony on Mormon history in Canada as factual, and accepts without question her research in this capacity (para. 272). However, he does not accept her research or testimony on the lived experiences of women in Bountiful and expresses concern that Campbell has been duped by her interviewees in their positive portrayal of life there. Later still, the judge appears to use Campbell’s own testimony out of context to prove that polygamy is inherently harmful- an assertion that is a gross misappropriation of Campbell’s research. Here he notes that “Professor Campbell suggests that criminalized polygamy gives rise to insularity and that women in such communities may be more vulnerable to abuse” (para. 598). While Campbell does indeed cite several of these harms, she does so based on the criminalization of polygamy, as found in a secondary source authored by Al- Krenawi (2006) from research in France and “North and West Africa” (affidavit #2, para. 147). Importantly, the emphasis here is that women who live in a family form or community that is criminalized are more likely to be insulated in *general*, not specifically women who are in polygynous marriages. In this way, Chief Justice Bauman misappropriates

Campbell's primary research in Bountiful to prove something that has not been found within the scope of her research.

The special treatment of Campbell's testimony is also evident in direct comparison to the testimony of Dr. Henrich. Following the third round of coding, it became obvious that the tone and "utterances" that the judge used were starkly different between these two Experts. For example, in paragraphs 552-553, Dr. Henrich extrapolates from the testimony of another witness to draw conclusions about the harms associated with polygamy; the judge allows this speculation by noting that, "While Dr. Henrich's extrapolations... are somewhat speculative and unproven, I find that they tend to be supported to some extent by the other evidence in this reference" (para. 553). Conversely, the judge is concerned that Campbell accepts the experience of her interviewees "at face value" (para. 577). In this way, it seems clear that Campbell's qualitative testimony "suffers" (para. 757) from speculation or spurious reasoning.

The research and testimony of Campbell are perhaps most starkly contrasted by the research and testimony offered by Dr. Rose McDermott. Called as witness by the AGBC, McDermott is considered by the judge to be a "most impressive witness." She provides testimony arguing that polygyny is universally harmful in a number of capacities, based on eighteen variables that indicate that, "polygyny's negative effects are wide-ranging, statistically demonstrated and independently verified using alternative analytical tools" (para. 639). Dr. McDermott compares statistical data among 18 variables in 172 countries and links polygyny to 13 specific harms, concluding that "states with higher levels of polygyny spend more per capita on defense, particularly arms



expenditures” (para. 621, l), and that “differential legal treatment of women relative to men increases, to the detriment of women, in most polygynous societies” (para. 621, k).

However, her testimony is heavily criticized by the *Amicus Curiae* who notes that, while there may be commonalities in countries that have a higher rate of polygyny, it is impossible to prove causation in these instances. In fact, McDermott herself notes that her research should be characterized with the potential of a “third variable problem,” whereby any one of 18 different variables could serve as the cause and the other variables as results. Given this line of reasoning, polygyny has a statistically 1 in 18 probability as the cause of McDermott’s negative variables. However, the judge values McDermott’s findings as being of “unparalleled scope and quality” (para. 639) and, similar to his praise for Dr. Henrich’s research, he finds her evidence to be “compelling” (para. 640).

Emerging with feminist theorists such as Dorothy Smith, institutional ethnography, and Sandra Harding and Nancy Hartsock, standpoint feminism, in the late 1980s, feminists have critiqued privileging positivistic research methods and empiricism, including evolutionary psychology and particular comparative statistical data, because of their tendency to marginalize or silence the rich and diverse experiences of women. On the one hand, feminist standpoint researchers are particularly concerned with the inter-subjective nature of knowledge, and on the other hand, institutional ethnographers deconstruct the ways by which the internal processes of institutions uphold the status quo of the gendered inter-subjective production of knowledge.

Standpoint epistemology shares this critique of empiricism with radical feminist scholars, but does so by a different route. Radical feminist scholars such as Dworkin (1983) and MacKinnon (1988), are critical of ‘sexism’, and argue that the primary

purpose of law has traditionally been to reinforce male-centric social norms or standards of behavior that all members of society must adhere to and, in this way, the status quo of the relationship between power and knowledge is too often reinforced. This method of knowledge production serves to uphold patriarchy; problematically, radical feminists accept these essentialist categories of men and women, even as they attempt to deconstruct the power that is maintained by these categories.

### **“Sound” Methodologies and Accruing (Quantitative) Knowledge**

The judge unequivocally accepts Dr. McDermott’s and Dr. Henrich’s statistically-based, quantitative research that identifies harms associated with polygyny; conversely, the qualitative research garnered by Angela Campbell is interpreted in a much more fluid fashion, with some of her testimony accepted and unquestioned, and some treated as suspicious and unreliable. Also relevant to this thesis is the testimony provided by Dr. Lori Beaman, a sociologist and scholar of religious studies who has written extensively on the topic of polygamy in Canada.<sup>32</sup> She is the current Canada Research Chair in the Contextualization of Religion in a Diverse Canada at the University of Ottawa and the Principal Investigator of the *Religion and Diversity Thesis*, an international research program that examines the diversification of religion in various nations.

In her disposition, Beaman cautioned against the acceptance of stereotypical portrayals of polygamy as inevitably harmful, and argued that the bulk of research conducted on polygamy in North America has yielded mixed results regarding the presence of harm (para. 749). Beaman goes on to cite particular conversations she has had with women in “conservative religious groups”, and notes that many of these women

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<sup>32</sup> Beaman’s research is not always framed as solely in regards to polygyny, hence the shift in terms used in the title of this section.

insist that they are actively enfranchised in their own rights and that they feel free to exercise individual agency and decision-making in their own lives. For example, Beaman notes in para. 751 that, “One of the phrases I heard quite frequently from evangelical Christian women was ‘we’re not doormats’.” Indeed, as author of several published scholarly articles and books on the topic of polygamy, Beaman appears to be a credible source to make such assertions. However, following her testimony and in regards to the testimony of both Beaman and Campbell, Chief Justice Bauman comments, “I found the evidence of these two witnesses sincere, but frankly somewhat naïve in the context of the great weight of evidence” (para. 727). The judge cites Beaman’s lack of expertise on a report from the Texas Department of Family and Protective Services as evidence that she is not fully aware of the harms of polygamy (though this report is solely based on the Yearning for Zion Ranch in Texas); consequently, he is “wary” of her testimony due to her “downplay [of] the apparent dangers to children in FLDS communities” (para. 756). Indeed, Chief Justice Bauman’s hesitancy to accept Beaman’s testimony is supported by Smart’s (1989) theory of legal imperialism, whereby the judge has the power to determine which knowledge and voices will be considered legitimate. In this way, Chief Justice Bauman not only erases the tangible research and experiences of Beaman, he also portrays both Beaman and Campbell as, at best, unsophisticated about the dangers that he considers inevitable in polygamous families, and, at worst, morally inept for similarly dismissing these dangers. Therefore, Chief Justice Bauman is able to police the testimony and experiences of Campbell and Beaman as feminist scholars, both of whom rely on qualitative methods, and dismiss epistemologies that do not support his overall conclusion.

As the qualitative research of Campbell and Beaman seems to warrant suspicion from the judge, what then is the evidence that he relies upon to form his decision? Thematic coding yielded numerous examples of ‘sound’ or accepted methodologies, largely in the form of statistical quantitative data. For Chief Justice Bauman, this sound methodology, or valuable hegemonic capital, seems to be largely undertaken by quantitative scholars whose research yields particular findings on polygamy and most commonly associates polygamy with harm. This privilege, or voice of authority in legal decisions, has been called “legal imperialism” by Smart (1989, p. 13). Legal imperialism refers to the privilege of law whereby legal decisions are able to pass judgment on various methodologies. Indeed, this is evident in the Polygamy Reference in that the decision combines competing claims of truth from various academic disciplines bound into a single narrative whereby quantitative data emerges as the ‘winner’ for accessing and presenting truth claims, with qualitative data dismissed as somehow less truthful.

The creation of a research binary became apparent following the analysis process presented in Chapter 2. Not only did this reveal the over-use of particular Experts and the omission or marginalization of others, it also made apparent the over-use of scholars who esteem quantitative methods. This point was accentuated during the Axial Coding phase of analysis, which explored hierarchies of voice and attitude saturation. It became clear that the research of Lori Beaman and Angela Campbell--- research that I argue is marginalized in the Polygamy Reference--- is labeled as qualitative research and considered to be “sincere but naive,” while numerous other scholars, including Rose McDermott, who argue for the harms of polygamy do so through quantitative, statistical

research. As noted by Smart (1989) “In particular, I am concerned with how this knowledge disqualifies other forms, most especially feminism” (p.3).

Smart offers two insights: 1) reminding us that women’s voices are silenced in court, whether it be about rape, equal pay, etc. just as the voices of women of Bountiful were, but 2) also makes the case that outside of law, feminist researchers may find space to create discourse. In fact, on women’s experiences being heard in court, Smart predicts: “(These) account(s) may not emerge in court (indeed [they] would be silenced there), nor in the media, nor in the formulation of reformed legislation but [they] can and [do] emerge in women’s writing and feminist groups” (p. 88).

Further, I argue that particular feminists are silenced when the Polygamy Reference hyper-accentuates methodological distinctions between qualitative and quantitative data in such a way that the two are presented as polar opposites, and compete for access to a singular, universal truth that becomes inherently gendered. In the decision, Chief Justice Bauman effectively positions the two methodologies against each other in a search for a single universal Truth to support the theory that polygamy is inherently harmful to women. This is accomplished by the marginalization of particular scholars of gender and religious studies who become the ‘losers’ in this competition for truth-status and, subsequently, these methodologies come to be understood by the judge as quasi-factual and biased. This is exemplified in the testimony provided by Nicolas Bala in paragraphs 604-605:

While some of the quantitative studies have small samples or suffer from methodological limitations, there is a fairly high degree of consistency to the

results. All the reported studies find that women have worse social, psychological, or economic outcomes in polygamous marriages....

While Bala is inaccurate in this presupposition that all “the reported studies” find polygamy as a universally harmful phenomenon to women, he acknowledges that many of the quantitative studies written into the case decision are problematic in their execution. For example, the AGBC tendered the evidence of Dr. Dena Hassouneh, whose research practice has primarily focused on the “mental health impacts of trauma on women from marginalized populations” (para. 606). While she reports polygamy to be associated with mental and emotional trauma in many of her patients, this finding seems problematic, as her sample of patients come to see her only after experiencing harm in a multitude of situations.

Because of the creation of a binary between qualitative and quantitative data in the Polygamy Reference, there is also an emergence of a singular notion of Truth, one grounded in the presupposition that social norms can be uncovered and enforced through particular methodologies. This truth, as it is presented in the decision, is that polygamy is universally harmful to women and children; women who have experiences in polygamy other than harm are seen as dishonest, misinformed, or unreliable. Similarly, research findings that suggest that polygamy is not inherently harmful are positioned as false. As noted by Nicolson (1997), the search for evidence or fact positivism carries with it both ontological and epistemological assumptions: the former being that objective truth exists independently of human knowledge, and the latter being that researchers or judges can obtain “true knowledge” (p. 22). The Polygamy Reference incorporates competing truth claims from a variety of academic disciplines and a singular Truth claimed by law to

construct a distinct narrative in which the judge (as an actor of law) is able to pass judgment on academic methodologies. As Foucault (1977) notes in *I, Paul Rivière*, the silencing of particular witnesses or Experts in legal decisions is a critical point of productive power. Much like Foucault discusses the legal silencing of particular actors in the Paul Rivière case, that which becomes “knowable” in the Polygamy Reference is constructed through the evidence provided to the court and taken up by Chief Justice Bauman. Thus, the exclusion of women from Bountiful in providing testimony on their experiences represents a clear omission and signals the power of the court to include or exclude voice and knowledge.

On this point of power and the exclusion of women from Bountiful, the notion of truth or valid evidence in the Polygamy Reference is deeply gendered. Indeed, the legal framework presented by Smart (1989), who argues that law functions as an inherently patriarchal system, is apparent; all evolutionary psychologists cited in the Polygamy Reference decision are men of privilege who draw on research that is inherently essentialist and male-centered, while the lived experiences of women from Bountiful (as presented by Campbell) are not considered ‘truth,’ or are largely absent.<sup>33</sup> Indeed, the oral interviews Campbell has conducted in Bountiful are forms of narrative testimony in themselves; and though these establish the position of Angela Campbell as a researcher to speak for the women of Bountiful, neither Campbell nor the women of Bountiful are given space or opportunity to speak about positive experiences associated with polygamy. For example, in paragraph 256, Chief Justice Bauman notes that, “A number of witnesses gave evidence that bears upon Mormon polygamy...” and lists those people who will be

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<sup>33</sup> These voices are largely only articulated through the evidence of Angela Campbell, rather than first-person contributions, which marks a clear omission of voices and perspectives.

contributing on this topic; no women from Bountiful are included. This is an example of what Smart (1989) describes as “a site of struggle” (p. 88). While Smart argues that law does not “hold the key to unlock patriarchy,” she argues that women’s diverse experiences can still be taken up in feminist writings and groups outside of legal institutions (p. 88). And so it has been with the work of Campbell and Beaman, which was largely discounted in the Polygamy Reference, but has been taken up elsewhere by feminist scholars (which led directly to this thesis).

### **Summary**

In conclusion, a critical discourse analysis using Newman’s coding method reveals important information about a justification for the continued criminalization of polygamy in Canada. While the harms to women in particular are described as extensive and overwhelming, a closer analysis of this discourse of harm suggests that these are discussed in a way that not only makes them appear extensive and all-encompassing, they are also presented in a way that constructs a monolithic narrative that monogamy is less harmful than polygamy. Harm in the Polygamy Reference is also described as occurring to the Lost Boys and Canadian society as a whole. These harms are rationalized through statistical and quantitative data, while the research of qualitative feminist scholars, notably Angela Campbell and Lori Beaman, are considered quasi-factual and less authentic.

A limited acceptance of feminist qualitative research is perhaps not a new phenomenon in legal studies; indeed, Carol Smart has been discussing the marginalization of feminist legal research for more than three decades. However, the marginalization of feminist research in this capacity also concurrently erases the lived experiences of women



in Bountiful, B.C, and marks an increase in state-based control over the lives of women.

The next Chapter of this thesis, titled *Conclusions and Implications*, will address the problems of this control over the reproductive and marital choices of women.

## CHAPTER FOUR: CONCLUSIONS AND IMPLICATIONS FOR FUTURE RESEARCH

I believe that the rights of women and girls is the unfinished business of the 21<sup>st</sup> century.

Hillary Clinton, 2011

This thesis was envisioned as a means to uncover the ways in which feminist research and methodologies have been taken up by the court in the Polygamy Reference. The fusion of law, feminism, and the role of the state in the lives of women resonates as central tenets during second-wave feminism, yet the nuances of decolonization, multiculturalism, civil rights, and liberties remain as relevant today as in 2011 when the final decision was handed down. As this case was intended as a means of policing the practice of polygamy, what has changed in the past five years since the affirmation that polygamy is a criminal offense in Canada?

The answer appears to be not much. Though Winston Blackmore and four other men from Bountiful were arrested in August 2015 and formally charged with polygamy, the case has yet to be taken to trial. The media's hysteria over polygamy in North America seems to have calmed, as evidenced by cancellation of *Escaping the Prophet* on TLC, and *Big Love* on HBO. This is coupled with a new Canadian federal government that seems less interested in eliminating "barbaric cultural practices" that has resulted in, at least for the time being, a decreased paranoia about polygamy in Canada. However, occasional pieces of discourse emerge from media outlets that continue to instruct the Canadian public on what constitutes acceptable marriage in Canada, and polygamy remains firmly unacceptable in the eyes of much of this messaging. For example, on January 20<sup>th</sup> of this year, an article was published in the National Post on the benefits of

monogamous marriage, arguing that “everywhere polygamy is practiced, it creates conflict (Kay 2016).”

It becomes clear, therefore, that the issue of polygamy is as alive and provocative today as it was in 2011 when the final decision was rendered. The central aim of this thesis was to illuminate the ways in which feminist evidence was taken up in the Polygamy Reference; upon completing a textual analysis, I also came to consider which voices are given merit and who is considered to possess true or authoritative knowledge. Stemming from this analysis were critical questions raised from a feminist post-structural inspiration that considered interactions of power and discourse created within the Polygamy Reference. Perhaps most critically, this thesis has questioned the pool of knowledge and construction of a historical perspective on polygamy that allows the judge to justify the continued criminalization of polygamy in Canada.

Answers to these questions, or at least the answers this thesis yielded, were brought forward following a close textual analysis of the case decision. While Chief Justice Bauman envisioned the Polygamy Reference to embody the bulk of research on the topic of polygamy to date, this thesis does not attempt to make similar claims; indeed, this thesis has been built, and is meant to be read, with a lens that focuses on gender and that occupies one of many potential areas for research on this topic. In this way, this thesis aims to not only to contribute to feminist legal evidence that is specifically excluded from the case decision, it is meant to act as a critical perspective on this judgment and suggests some potential implications of the case decision. Thus, this thesis fills a small part of the gap of a critical analysis on this case decision, as the Polygamy Reference has been largely supported, rather than critically examined, by the bulk of Canadian society. For example, while Ashley (2014) has critically researched the case

decision in terms of the marginalization of qualitative research, his paper lacks a critical race and gender perspective. Similarly, while Beaman (2014) has written an epilogue in her book that addresses the marginalization of feminist voices in the Polygamy Reference, she does not address the schematics of qualitative and quantitative methodologies presented in the Polygamy Reference.

### **Recommendations**

Over centuries, much ink has been spilled theorizing feminisms. While strictly theoretical academic contributions to the discipline are undeniably relevant, I find myself left with a “so what?” query after reading much of feminist theory. While the three points outlined in this section by no means account for the breadth and depth of research that may stem from this thesis, they may serve as a bridge to future inquiries.

### **Made in Canada Research**

Firstly, more research on polygamy in a Canadian-specific context is necessary. This research must be conducted with the understanding that the Canadian state, by its findings in the Polygamy Reference, has demonstrated a vested interest in upholding monogamy as a central institution. This research should also be conducted with the understanding that many women, including girls, teenagers, and other marginalized genders, may have diverse and fluid experiences with polygamy, and these experiences will also be diversified based on cultural, economic, and geographic specifications.

### **Whose Voice?**

Discussion of polygamy in Canada should always be considered with foundational concepts in mind, which includes the impact of religious discrimination as neo-racism, and the silencing of women who have lived experience with polygamy in Canada. While much of the data and evidence that is presented in this case decision is drawn from global

statistics, there is little in the way of Canadian-specific experiences, apart from the research of Angela Campbell, which was ultimately dismissed. Further, and since the Polygamy Reference, a new book that incorporates experiences of Canadian women with polygamy has been published, that complicates the narrative of harm that permeates the Polygamy Reference. Much like monogamy is experienced in different and complicated ways by women on a global scale, so too is polygamy, prompting the necessity of more complete and less presumptive research about women in Canada and polygamy.

### **Whose Truth?**

One of the central issues in the Polygamy Reference is the over-reliance on particular types of data, particularly the confirmation given to Eurocentric positivist forms of data over other evidence and methodologies. While it may be beyond the scope of this thesis to weigh in on a centuries old debate about the relative value of each, Chief Justice Baumann exacerbates the binary by privileging one over the other.

While mixed method approaches are being increasingly seen as offering valid and reliable ways of investigating inquiries in social sciences (Johnson, et.al, 2007), there is still much to be done and understood in the way that truth is constructed and in the discourse that ensues about what matters and what constitutes reliable and valid research.

It is my hope that these recommendations will be considered, and contested by feminist scholars and policy-makers. Though these recommendations are but a small piece of the further research that is needed on the topic of polygamy, these recommendations are meant to be transformative in the sense that they become a gateway for further feminist qualitative research on the topic, and stimulate perspectives that are unaddressed in the Polygamy Reference. In this way, these recommendations contribute

not only to building upon the breadth of research on polygamy in Canada as suggested in the first point, but also build on the depth of research on the topic.

### **Implications and Further Research**

While this thesis has been narrowed in scope by the constraints of a Master's thesis, there exists tremendous potential for further research on this topic. Primarily, while this thesis has adopted a feminist post-structural lens, the potential for the Polygamy Reference to also be examined through various feminist frameworks, including critical race theory, would provide valuable insight into what Denike (2010) calls *The Racialization of White Man's Polygamy*. However, feminist research in Canada has already set out to dismantle biases towards polygamy. Indeed, from Sarah Carter's book *The Importance of Being Monogamous* to Sherene Razack's (1998) discussion of monogamy as a tool of white fantasy and nation-building, feminists in Canada have been far from silent on the issue of polygamy. Therefore, the fact that only two scholars were called as Experts in this case not only calls into question the all-encompassing breadth of this case decision and further establishes a clear hierarchy of who counts as an Expert.

Stemming from this omission was the challenge that this thesis presented in terms of complicating my basic understanding and use of, feminist research methods, including qualitative interviews. While further research is needed to determine if feminist qualitative data on similar topics is similarly rejected in other case decisions, the Polygamy Reference imposes a particular set of limitations on qualitative methodologies. While it is undoubtedly problematic for feminist researchers to be bullied into abandoning particular methodologies, it is worth consideration of whether doing so may allow such researchers to contribute more to this conversation, particularly in the eyes of the law.

However, there is a strong possibility that this case is less about problematic execution of qualitative methodologies, and more about the systemic marginalization of particular experiences and scholars. Indeed, as I have shown, there are strong issues also associated with the statistical data in this case that was presented as evidence or fact. In this way, it is possible that even had the data presented by Angela Campbell and Lori Beaman been based on statistical information, it would have been discounted, as their data does not necessarily support findings that would have been helpful to Chief Justice Bauman in sustaining his final verdict.

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