

An Affront to Human Dignity*
**An examination of the treatment of polygamy in modern, multicultural
Canada**

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Introduction: Canada in the World Means Polygamy in Canada

Multiculturalism in Canada is a thorny issue. Nothing illustrates the battle between legal rigidity and equitable principles of fairness better than the law's response to family practices currently supported in other jurisdictions but actively discouraged in Canada, such as polygamy. Polygamy is currently illegal in Canada and is punishable by up to five years imprisonment¹, and even if it were not, it would not be recognized in any Canadian jurisdiction as a valid form of marriage.² The reform of Canadian law to accommodate multicultural principles regarding marriage, whether they represent Islamic, Christian, or non-religious traditions, is needed. In this paper, I will argue that the need for increased flexibility and reform can be seen from an analysis of the law's approach to existing polygamous marriage (where Canadian citizens have already entered into a polygamous marriage, either in Canada or abroad), by exploring the several federal and provincial laws forbidding solemnization of any polygamous marriage, through a critique of recognition of foreign polygamous marriages under Canadian Private International Law, and through Canadian immigration rules respecting persons in a polygamous marriage. I will then discuss potential solutions to the issues currently facing Canadian law, as well as the pitfalls of these solutions which must also be avoided. I conclude that Canada's place in the globalized forum demands a more sensitive and comprehensive approach to the reality of polygamy: as former Supreme Court of Canada Justice La Forest wrote in *Morguard Investments Ltd. v. de Savoye* [1990] 3 S.C.R. 1077, "we correctly speak of a world community even in the face of

¹ Polygamy, which is not defined in the *Criminal Code*, is criminalized regardless of the form of the marriage or marriage proceeding. The broad wording of section 293, which criminalizes polygamy, could be interpreted to include cohabiting relationships where marriage is not contemplated. The section reads:

293 (1) Every one who

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

(i) any form of polygamy, or

(ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage or,

(b) celebrates, assists, or is party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph a(i) or a(ii),

is guilty of an indictable [the more serious class of crimes in Canada] offence and liable to imprisonment for a term not exceeding five years.

² See, for example, Canada's *Civil Marriage Act*, S.C. 2005, c. 33, section 2 of which reads: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others"

decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative.”³ Canada must adapt to changing social, cultural and religious demographics by acknowledging change, not ignoring it.

A Brief Discussion of the Many Meanings of ‘Polygamy’

Before embarking on a discussion of polygamy, it is important to discuss the meaning of the term. While many commentators are focussing on the ongoing proceedings in the British Columbia Supreme Court regarding the constitutionality of prosecuting specific instances of Mormon polygamy in Bountiful, British Columbia, this paper attempts to deal with “polygamy” as a concept, viewing the Bountiful examples of polygamy as simply one form and one instance (not necessarily determinative of polygamy in any feature) of the practice of polygamy. In this paper, I use “polygamy” to mean both “polygyny” (marriage between one man and multiple women) and “polyandry” (marriage between one woman and multiple men). While the discussion of reforms and directions for legal reform of polygamous marriage will discuss both homosexual polygamy and situations created by allowing both polyandry and polygyny, these topics will not be a central focus of the paper-thus, the term polygamy will generally be used in its historical and social context. Although some cultures do practice polyandry (such as groups in Tibet, Sri Lanka, and North American aboriginal communities,⁴) and polyandry thus has the potential to become an issue for Canada, the majority of polygamous unions encountered and advocated for in Canada are of a polygynistic nature, the form of polygamy adopted by Islamic and Christian groups. Finally, literature speaks of both “potentially” and “actually” polygamous marriages. An actually polygamous marriage is one in which one of the parties is married to multiple partners, while a “potentially” polygamous marriage is defined as one where one spouse has the ability to legally

³ *Morguard, supra*, at para. 34.

⁴ See, for example, Alan Trevithick, “On a Panhuman Preference for Monandry: is Polyandry an Exception?” (1997) *Journal of Comparative Family Studies*, 28:3 pp. 153-183.

marry a third partner, notwithstanding that no third party is present or contemplated at the time of the marriage. Thus, assuming polygamy was legally recognized in Canada, every monogamous marriage would still be “potentially polygamous.”

*Freedom of Conscience and Religion? Polygamous Canadian Citizens*⁵

One concern for Canadian law must be citizens who have already entered into a polygamous marriage and live in a polygamous family structure. Canadians in polygamous marriages do enjoy some protections under various private law schemes such as the *Family Law Act* of Ontario, where section 1(2) includes in Ontario’s definition of spouse those who were married in “a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid” (this notably excludes polygamous marriages contracted in Canada, the United States of America, and much of Western Europe), and section 29 expands support obligations to all conjugal cohabiting relationships of more than 3 years in duration (which would favourably apply to many otherwise invalid polygamous marriages). However, polygamously-married individuals still risk being marginalized based on their culture and faith, considering that the protection is not complete, and the law generally treats their expression of commitment as a legal nullity. Being detected as a person practicing polygamy can have wide-ranging implications for familial relations, including custody and support rights, relations with the State (which still criminalizes polygamy, and may place barriers on immigration status for polygamist families) and can also cause sanction from religious leaders distancing themselves from polygamy. As Campbell notes, “given that polygamy remains criminalized in Canada, families that engage in this practice often do so clandestinely and inconspicuously. To remain shielded from public awareness and scrutiny, a polygamous family would have to minimize its contact with the ‘outside’ world and

⁵ Guaranteed in the constitutional document the *Canadian Charter of Rights and Freedoms* (“the Charter”), section 2(a)

attempt to conceal its marital and family relationships.”⁶ This forced “minimization” threatens the freedom and rights of people in polygamous marriages, and is reminiscent of the debate on criminalizing prostitution-related activities which labels certain individuals with an “outlaw” status. The words of Justice Susan Himel of the Ontario Superior Court, writing on the subject of the criminalization of prostitution activities, are relevant to the discussion of people in polygamous relationships who face violence, wish to institute legal procedures to end the relationship, or otherwise need the support or protection of the State: “[p]rostitutes are faced with deciding between their liberty and their security of the person...the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of...violence.”⁷ To buy peace with the American government, the Church of Jesus Christ of Latter Day Saints (the “Mormon” Church) eliminated polygamy as an institution. Islamic polygamists in Canada could face similar repudiation by their religious community if discovered. History illustrates similar concessions to majority pressure: “Mormons were not necessarily the only religion to be persecuted into rejecting polygyny. Polygyny was only forbidden by Judaism starting in the Middle Ages, and by rabbinic authorities living in Christian countries. Jews living under Muslim rule, on the other hand, did not reach the same legal result, suggesting the influence of pressure by the Church.”⁸ The majority opinion of Canadian society, which favours monogamy, is now expressed in how Canadian criminal law similarly pressures religious authorities of all cultural backgrounds into at least outwardly condemning polygamy, which has the potential to have serious implications for freedom of religion, as well as the emotional well-being of polygamous individuals rejected by “their” faith.

⁶ Angela Campbell, “How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis” in Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2005). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1360230 at 6.

⁷ *Bedford v. Canada*, 2010 Ont. S.C. 4264 at para. 362.

⁸ Shayna M. Sigman, “Everything Lawyers Know About Polygamy is Wrong” (2006) 16:3 Cornell J.L. & Pub. Pol’y 101 at 160.

The ontological impact of daily having to deny one's beliefs cannot be over-emphasized. Polygamously-married Canadians have no recourse under the law to live their chosen life openly, a situation analogous to the historical treatment of homosexuals in Canada. Hennigar correctly concludes that "the fate of polygamy in court is in no way wed (pardon the pun) to that of same-sex marriage,"⁹ but concedes: "same-sex marriage cases illustrated that marriage, as a state-defined and supported institution, is subject to judicial review under the *Charter*, and that the definition cannot be grounded in mainstream Judeo-Christian religious doctrine or morality."¹⁰ Recognizing religion as important in a modern multicultural society does not undermine secular law, and equality should not mean forcing all people to think and act identically. Indeed, both a model which resists State interaction with private ordering (such as religion) or a model which requires the State to affirm religious freedom both militate in favour of the recognition of polygamy, rather than heavy-handed attempts to suppress it. Both polygamy and same-sex marriage pose no threat to secular society, individual autonomy, or equality rights, in Canada or America. David Chambers analyses the similarities and concludes: "can I myself distinguish the case for same-sex marriage from the case for polygamy?...I am uncertain...if there were a move to legalize plural marriages, I would encourage the state to permit them unless they genuinely posed significant harms."¹¹ In the absence of enumerating these "harms" at a theoretical level (and not simply in cherry-picked individual abusive examples from areas such as Bountiful, British Columbia), it can be inferred that Chambers views these causes as analogous: "we who advocate for changes in the laws of marriage to open it up to gay people need to work to become as understanding of the needs of others as we are asking others to be of us."¹²

⁹ Matthew Hennigar, "The Unlikely Union of Same-Sex Marriage, Polygamy and the Charter in Court", (2007) 16:2 Const. Forum Const. 89 at 98.

¹⁰ *Ibid.*

¹¹ David L. Chambers, "Polygamy and Same Sex Marriage", (1997) 26 Hofstra L. Rev. 53 at 81-82.

¹² *Ibid.* at 83.

Charter protections under section 2, which provide for, *inter alia*, freedom of conscience, freedom of speech and freedom of association, may be available to, if not legalise polygamy, at least strike down double-standards for polygamous individuals. Currently, the British Columbia Supreme Court is hearing a case on whether the criminalization of polygamy *ab initio* is constitutional---there are strong arguments that it is not. As was remarked in the seminal case *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, “one of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint...freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.”¹³ Moreover, “in addition to raising the issues of religious freedom and the equality rights of religious minorities, polygamy may present a clash between multiculturalism---recognized in section 27 of the *Charter*---and Canadian criminal law, as well as sexual equality as enshrined in sections 15 and 28 of the *Charter*.”¹⁴ This quotation illustrates the multiplicity of *Charter* rights engaged by the current prohibition of polygamy. This point is strongly made in *R. v. Big M Drug Mart, supra*: “the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice...freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.”¹⁵ Those in Canada who are married polygamously are not “truly free.” The major objection with discriminatory laws against polygamously-married Canadians being saved by section 1 of the *Charter of Rights and Freedoms* is made by Campbell: “it is difficult to draw a single, clear conclusion as to whether life in a

¹³ *Big M Drug Mart, supra*, at para. 95.

¹⁴ Hennigar, *supra* note 9 at 90.

¹⁵ *Big M Drug Mart, supra*, at paras. 94-95.

polygamous marriage is harmful to women. Whether women suffer or benefit from plural marriage actually seems to be the improper query through which to investigate the consequences of polygamy for women, since it is far too general...an array of factors might give rise to substantial diversity within the experiences of women in polygamy.”¹⁶ Therefore, lack of recognition or assistance for, not to mention criminalization of polygamy, would not meet the “minimal impairment” test under section 1 of the *Charter*.

This argument is not to imply that polygamous marriages are somehow never abusive, discriminatory, or objectively harmful. However, there are several key questions which can be asked of a critique which centres on these abuses. First, regarding “forced” or “underaged” marriages, an insightful question is what makes a polygamous forced or underage marriage any less objectionable than a forced or underage monogamous marriage? True, the crime may be one of magnitude, but a single count of rape is as theoretically objectionable as multiple rapes: there is no reason why non-abusive polygamous marriages should be tarred with the same brush. Secondly, there is an argument that polygamy is not actually allowable by any recognized religion-this argument entails Qu’ranic (“the Qu’ran expressly states that polygamy results in injustice”¹⁷) and Biblical analysis which the law surely cannot engage in, as polygamy is, whether on an accurate reading of primary texts or not, practiced in much of the Islamic world and by some Christian groups. Finally, and more importantly, the argument could be advanced (and sometimes is¹⁸) that polygamy is inherently a power imbalance which should not occur with the sanction of the State. This argument disallows personal autonomy and private ordering: if a person is free to live in a committed long-term

¹⁶ Campbell, *supra* note 6 at 21.

¹⁷ Azizah Yahia al-Hibri, “Muslim Women’s Rights in the Global Village: Challenges and Opportunities” (2000-2001) 15 J.L. & Religion 37 at 59.

¹⁸ See for example Lisa M. Kelly, “Bringing International Human Rights Law Home: An Evaluation of Canada’s Family Law Treatment of Polygamy” (2007) 1:65 U.T. Fac. L. Rev. 1 at 25. Another interesting critique is found in the 1991 Mauritian case of *Bhewa v. Government of Mauritius*, where the reasoning in denying polygamous marriage for an Islamic minority concluded that Mauritian law demanded equality through: “the maintenance of monogamy, including measures designed to safeguard the family and to ensure the largest measure of non-discrimination against women, whether as wives or daughters” (page 309). The relegation of women to “wives and daughters,” that is, only given meaning by their relation to men, is highly troubling.

relationship with multiple partners in a “marriage-like” setting, why can they not formalize their living arrangement while others can? This non-criminal, non-sanctioned private ordering can even include adultery, considered a crime when polygamy was criminalized and certainly an action to which social stigma attaches. Basically, while the question of whether society has an interest in promoting or establishing monogamous marriage as the norm may still be an open question from a sociological perspective, the law clearly has no utility in forcing people to enter private ordering arrangements against their will. Canadian society has seen a gradual relaxation of the once-tight grip on the individual’s private life (from the decriminalization of adultery and homosexual activity, to an easier availability of divorce). There is no tenable reason why our societal progress should stop here.

Polygamous Marriage Celebration in Canada: Essential Human Right?

Canadians who wish to marry polygamously run afoul of civil and criminal statutes, and they are forced “underground,” without legal protection or recognition of their union. As a 2004 report for the Ontario Ministry of the Attorney General found, “[t]he Review received anecdotal evidence from a number of sources that polygamous marriages are being performed in Ontario and concern was raised about the situation of women whose spouses marry more than once.”¹⁹ Criminalization is ultimately a counterproductive and destructive legal response to a situation that calls for a measured and tolerant one. Under Canadian law, both federal and provincial, a polygamous marriage is void *ab initio*²⁰, similar to a marriage between siblings, or a marriage between human and animal. This is not only an insult to differing cultures, but also theoretically untenable, illustrated by an examination of the reasons for marriage law in Canada. The Law Reform Commission of Canada rightly found that “it is difficult in moral terms to simply condemn polygamy. Some schools of thought do not regard polygamy as contrary either to natural law or to historical divine law. Its prohibition is

¹⁹ Marian Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Ministry of the Attorney General, 2004) online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> at 23.

²⁰ See *Civil Marriage Act*, *supra* note 2, section 2

actually the result of the Gospel and ecclesiastical legislation.”²¹ The report concluded that criminalization of polygamy was unnecessary, as it did not harm the integrity of monogamy: “[l]ike adultery or concubinage, [polygamy], which does not compete with the institution of monogamous marriage, should be ignored by the criminal law.”²² The conclusion that theoretically polygamy should not be punished because it is simply private ordering is persuasive. Although Alberta Civil Liberties Research Centre argues that polygamy should be illegal because “the overall psychological harms of polygamy and the associated human rights violations experienced by women and children are not addressed by prosecuting incest and underage intercourse (sexual assault) alone,”²³ this argument both ignores the many other charges at a Crown prosecutor’s disposal (such as Uttering Threats, Forcible Confinement, Sexual Exploitation and of course, Assault, Aggravated Assault and Aggravated Sexual Assault) but implies that people living in countries where polygamy is legal are uniformly “psychologically harmed.” It is a dubious argument to assert that a majority of the Islamic world is in a constant state of psychological harm, or permits incest or sexual assault. As has already been argued, the Canadian law would not and should not turn a blind eye to crimes that occur in a polygamous relationship, just as it does not ignore crimes related to a monogamous relationship. As long as the conduct is voluntary, and can be ascertained to be voluntary, “human rights violations” should not be in the subjective eye of the beholder. To do so completely vitiates the notion of private ordering in one of the most fundamental areas of human life. The Law Commission of Canada noted that “the history of marriage regulation in Canada has...been characterized by a progressive uncoupling of religious and legal requirements, reflecting a growing emphasis on the separation of church and state in a secular and pluralistic political

²¹ Law Reform Commission of Canada. *Bigamy*, Working Paper 42. (Ottawa: Law Reform Commission of Canada, 1985) at 10.

²² *Ibid.* at 23.

²³ The Alberta Civil Liberties Research Centre, “Separate and Unequal: The Women and Children of Polygamy” in Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* online: Status of Women Canada, 2005). http://www.vancouver.sun.com/pdf/polygamy_021209.pdf at 20.

community.”²⁴ This “uncoupling,” received a major boost from the legalization of same sex marriage. Indeed, discussing “traditional” definitions of marriage, the Supreme Court of Canada wrote in 2004:

Hyde [a case which defined marriage, ‘as understood in Christendom...for this purpose [is] defined as the voluntary union for life of one man and one woman, to the exclusion of all others’] spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. The ‘frozen concepts’ reasoning [which argues that the Canadian constitutional documents have a defined and immutable meaning at the time of their promulgation] runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life. In the 1920s, for example, a controversy arose as to whether women as well as men were capable of being considered ‘qualified persons’ eligible for appointment to the Senate of Canada. Legal precedent stretching back to Roman Law was cited for the proposition that women had always been considered ‘unqualified’ for public office, and it was argued that this common understanding...should continue to govern Canadians in succeeding ages.²⁵

This reasoning is as relevant and persuasive for polygamy as it is for same sex marriage, with the nation’s highest court explicitly considering the “pluralistic” nature of Canada in the judgment. The reasoning inherent in the case, which removed some impediments to a secular and tolerant marriage law, must reach its logical conclusion, the removal of religious motivations from the secular law of relationships.

Refusing to allow polygamous marriage in Canada is not only untenable theoretically but also practically. While no law can advocate its own breach, the Canadian government is basically acknowledging that it would rather remain in ignorance of people breaking the law than to alter the law, since there is almost no (non-self-reported) manner of detecting offenders in an intact polygamous marriage, absent unusual circumstances such as Bountiful, British Columbia. The prohibition is thus similar to the prohibition on sodomy which remained in many American state

²⁴ Law Commission of Canada, *Beyond Conjugal: Recognizing and Supporting Close Personal Adult Relationships*, online: Library and Archives Canada <http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/pdf/020129_e.pdf> at 23.

²⁵ *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698 at para. 22.

laws under *Lawrence v. Texas*²⁶. Campbell warns: “given the risks created when families and communities submerge completely into the private realm shielded from state oversight, legislatures must not abdicate their responsibility over family relationships to community and religious authorities...while communities must enjoy freedom from unnecessary and inappropriate state scrutiny and intrusion, complete insularity might also be problematic.”²⁷ An argument for polygamy is not an argument for “complete insularity:” rather, that is the inevitable result of not allowing people to live their lives in accordance with their non-harmful religious beliefs. The Law Commission of Canada adds: “the state has a role in providing a legal framework to help people fulfill the responsibilities and rights that arise in close personal relationships. However, any involvement by the state should honour the choices that people make.”²⁸ The assertion of the Alberta Civil Liberties Research Centre that on legalization of polygamy, “not only would [criminal and family law] be in flux, but so would wills, consent to medical treatment, immigration, compensation for fatal accidents, human rights and property, among others”²⁹ is probably correct. These areas of the law would require change, but straightforward change. It is difficult to see how any modification of the law in these areas (which are subject to private ordering already) would do anything but add further affected parties akin to a monogamous marriage celebrating the birth of a new child, and decriminalizing polygamy creates none of the “chaos”³⁰ the Research Centre claims. It should be mentioned that the modification of the term “spouse” to allow for same-sex marriages evoked similar legislative changes, but these changes have stabilized and strengthened, not undermined, the civil law. In short, the Research Centre is making what is termed in law a

²⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003): A majority of the United States Supreme Court ruled that a statute criminalizing sodomy was unconstitutional. Although a victory, this advance took until 2003 to achieve, and was dissented to by Chief Justice William Rehnquist.

²⁷ Campbell, *supra* note 6 at 8.

²⁸ Law Commission of Canada, *supra* note 24 at 131.

²⁹ Alberta Civil Liberties Research Centre, *supra* note 23 at 21.

³⁰ *Ibid.*

“floodgates” argument: these arguments are rarely successful, for the obvious reason that the courts do not normally value expediency over justice.

Previously discussed in the context of existing polygamous marriages, the *Charter* should be used to allow people to marry polygamously. The wording and precedents of sections 2,7 (which guarantees life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice” and especially section 15(1), which provides that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” allow people of every religious and ethnic background to enjoy the marriage their religion permits. Although the Alberta Civil Liberties Research Centre concluded that “since the expressed concern is harm to women and children’s equality rights by the practice of polygamy, it would be very difficult to conclude that the courts will disregard this harm in favour of freedom of religion,”³¹ the corollary of that argument is that if polygamy does not harm the aforementioned equality rights, it should stand on freedom of religion. Since neither equality rights of women and children (since they are equal before and under the law, and the law should not concern itself with private ordering) nor the safety of women and children (domestic abuse is a concern for the law regardless of whether it resides in monogamous, common-law, or polygamous relationships) is directly implicated in the practice of polygamy, a *Charter* analysis should uphold the right to be free from (State-enforced religious) discrimination. Hennigar, after searching for “a liberal, harm-based objective for prohibiting polygamy”³² identifies four major objectives, but concludes that “all are somewhat problematic.”³³ Furthermore, “courts will have a difficult time upholding the ban unless they

³¹ *Ibid.*, at 49.

³² Hennigar, *supra* note 9 at 95.

³³ *Ibid.*

embrace feminist critiques of polygamy.”³⁴ Some of these critiques must necessarily ignore individual freedom of choice (instead arguing that no choice of polygamy can be valid or free, creating disturbing implications for the private ordering of families and individuals) or neo-colonially disregard the need for cultural sensitivity and tolerance of other cultures. Simply put, while feminist critiques are undoubtedly useful and may shed light on why people choose to act as they do, these critiques should not influence the choices that are ultimately available to individuals, as this is ultimately human rights law. Hennigar is succinct: “banning polygamy based on the harm it does to women represents a fairly invasive form of statist paternalism, as it denies the agency of those women *who nevertheless want to participate in plural marriage*.”³⁵

Conflict of Laws: How Canada’s Law Relates to Other National Laws on Polygamy

Private International law (also known as “conflict of laws”), that is, how Canada interprets and gives force to the decisions of other jurisdictions, is central to a discussion of polygamy in Canadian law. Because many jurisdictions³⁶ allow polygamy, Canadian law must respond to foreign law when it differs from, and comes into contact with, Canadian law. Simply, conflict of laws rules must be applied whenever Canada is asked to take notice of a foreign proceeding. This could be as innocuous as a couple choosing to hold their (monogamous) wedding in Las Vegas or Hawai’i, or as complex as Canada being asked to certify two Canadians as married even if the marriage they undertook somewhere else would not have been legal in Canada. Therefore, if three Canadian citizens were to contract a polygamous marriage in Swift’s Lilliput (assuming Lilliput’s laws allowed them to do so), Canadian conflict of laws would be triggered by a return home and claim of marriage status. Such laws were attempted to be utilized in favour of same-sex marriage (that is, a

³⁴ *Ibid.* at 89.

³⁵ *Ibid.* at 96.

³⁶ For example, Pakistan, Indonesia, and India, to name three of the world’s largest populations

marriage valid in Canada would be sought to be ratified in Texas).³⁷ These rules also offer hope for Canadian recognition of polygamy. Polygamous marriage is not constrained by borders, and biased attempts to barricade Canada behind a xenophobic law or a resort to “floodgates” arguments must give way to more reasoned principles. Just as Canadian law was instrumental in allowing homosexual unions to be recognised in other countries, Canada should respect other jurisdictions by respecting their laws in Canada.

Amy Kaufman outlines conflict of laws rules regarding marriage: “if the marriage is actually polygamous, the marriage will be recognized only for certain purposes, such as those specifically defined in Ontario's *Family Law Act*. Considering that a polygamous marriage could meet the two-pronged test [of formal validity under the *lex loci celebrationis* (the law of the jurisdiction in which the marriage took place) and essential validity (basic ability to marry, *ergo*, no sibling relationship) under the couple's domicile (roughly, the residence of the parties)], why can it not be found to be valid for *all* incidents of marriage?”³⁸ The only answer that Kaufman can give is to rely on the “public policy” power of the Courts to refuse to recognize foreign decisions (the same ground that protects people from “unconscionable” civil laws of another country, such as, for a non-existent example, a legal compulsion to commit *suttee*). Even Kaufman recognizes this as an outdated defence: “[t]he traditional answer is that polygamous marriages are deeply offensive to Canada's public policy.”³⁹ However, public policy is evolving beyond outdated “tradition,” aided by the *Charter* and human rights legislation. As Kaufman notes, “proponents of the decriminalization and recognition of polygamous marriage see [recognition of polygamous marriage] as another step in making Canada truly secular.”⁴⁰ Apart

³⁷ Martha Bailey et al., “Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada” in Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* online: http://www.vancouver.sun.com/pdf/polygamy_021209.pdf at 6.

³⁸ Amy Kaufman, “Polygamous Marriages in Canada” (2005) 21 Can. J. Fam. L. 315.at 331.

³⁹ *Ibid.*

⁴⁰ *Ibid.* at 332.

from the “traditional” public policy argument (which is somewhat circular in its claims that anything different is wrong), other public policy “reasons” have been advanced for the non-recognition of foreign polygamy. One of these public policy objections to recognising the validity of foreign marriages is “the argument that polygamous marriage as an institution demeans women and promotes inequality between the sexes.”⁴¹ While an institution that treats either sex (as mentioned, in the majority of Canadian cases, women) differently should not escape review, any marriage, regardless of the number of participants, can potentially empower or dis-empower women, depending on the role which is ascribed to the sexes in the relationship. Public policy should fail to stop recognition if no other conflict of law rules disallow the validity of foreign polygamous marriages. Parties to a valid foreign polygamous marriage will be injured if Canada does not recognize their ceremonies as being within the ambit of marriage. This was the basis of the recommendation: “valid foreign polygamous marriages are not fully recognized under Canadian law. Parties to such marriages, particularly women, are likely to suffer if the legal protections of marriage are not extended to them. Provinces and territories that have not already done so should amend marital property laws, spousal support laws, succession laws and related legislation to include in the definition of ‘spouse’ parties to such a marriage.”⁴² This argument is compatible with the complete recognition of foreign polygamous marriages. Although Canadian marital law is to some extent an arbitrary outcome of history, inexplicably courts do not interpret it as such: “despite their origins in religious tradition, Western courts treat these mainstream Christian-based norms as secular and universally applicable.”⁴³ Canadian courts must allow other cultures and societies to contribute to the evolution of law, as Canadian law has helped shape human rights jurisprudence in other jurisdictions.

⁴¹ *Ibid.*

⁴² Bailey et al., *supra* note 37, at 4.

⁴³ Emily L. Thompson and F. Soniya Yunus, “Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts” (2007) 25:2 *Wis. Int’l L.J.* 361 at 370.

In assessing different law, Canadian courts must not resort to reasoning that is xenophobic or Eurocentric. The foreignness of, for example, “Islamic” jurisdictions or Islamic law argued in a domestic Canadian setting has the potential to be a chilling effect on Canadian recognition. Thompson and Yunus, discussing a “Canadian” marriage contract, state: “although the [Canadian] court’s disinclination to interpret unfamiliar law or adjudicate religious matters is understandable, this reluctance strongly affects the Muslim minority population’s ability to obtain redress through the civil court system.”⁴⁴ While Thompson and Yunus are discussing domestically made marriage contracts, their conclusion that “if the legal systems expanded to include a consistent recognition of certain aspects of Islamic law, they could respond to the demands of increasingly multicultural societies while at the same time maintaining their strength and effectiveness”⁴⁵ is applicable to recognition of foreign judgments, not necessarily restricted to Islamic marriages, as well. The British Columbia Civil Liberties Association is persuasive in advocating that “it is a matter of personal autonomy for individuals to choose their preferred type of conjugal relationship. A polygamous relationship on its own can not be equated with abuse, and other laws exist to specifically prohibit spousal and child abuse.”⁴⁶ This articulation meets any public policy argument. As for the idea that a valid foreign polygamous marriage cannot be recognized because it is undefined under Canadian law, cited by Kaufman⁴⁷, the array of civil laws, such as the *Family Law Act* of Ontario, which reference polygamy disposes of that public policy objection. There is simply no valid and secular policy basis for the refusal of Canada to treat people validly married in another country as married. Canadian law, to be theoretically coherent, must recognize foreign polygamous marriages. To do otherwise makes offenders out of people simply practicing their culture in a place which accepts that culture.

⁴⁴ *Ibid.* at 380.

⁴⁵ *Ibid.*

⁴⁶ British Columbia Civil Liberties Association, “Annual General Meeting Newsletter, 2001,” online: <<http://www.bccla.org/newsletter/01annual.pdf>> at 9.

⁴⁷ Kaufman, *supra* note 38 at 330.

In assessing polygamy within a conflict of laws paradigm, one possible solution is to invoke contract law as an analogy, thus obtaining redress in a manner consistent with solutions offered to contract conflict of laws situations. Marriage law has moved away from the “marriage contract,” but phrasing foreign polygamous marriage, especially Islamic marriage (which often expressly uses a contractual document) as a contract may allow courts to recognize foreign polygamous marriages. The “nikah” agreement of an Islamic marriage, whereby the groom gives, or agrees to give on certain conditions, property to the bride, is contractual by design: “the amount of the mahr [marriage payment] varies widely as it is simply determined by the agreement of the parties, and it may be anything of value.”⁴⁸ This, contained as an incident of marriage in a foreign country, has the potential to render the discussion one of contract, not matrimonial, law. Thompson and Yunus write: “Canada’s judicial system has yet to achieve a consistent approach in adjudicating the provisions of Islamic marital contracts. Canadian courts typically treat the Islamic marriage contract as an agreement between the parties at the time of marriage...they look at the contract as distinct from the marriage itself in that they address the two questions separately.”⁴⁹ The two questions could be combined to allow greater clarity in personal ordering regarding valid foreign polygamous marriages where “Islamic” law is applied. Another analysis tellingly uses the term “contract” when describing how English law recognises foreign valid polygamous marriages: “English courts will not recognize an actually polygamous marriage unless it was validly created according to English private international law...the marriage must have been contracted between parties of full capacity and in compliance with the formal requirements of the *lex loci celebrationis*.”⁵⁰ These requirements, which allow foreign polygamous marriage to be recognised, seem more like rules for foreign contracts than foreign marriages. While the problem arises of polygamous foreign marriages which take place

⁴⁸ Tracie Rogalin Siddiqui, “Interpretation of Marriage Contracts by American Courts” (2007) 41:3 Fam. L. Q. 639.

⁴⁹ Thompson and Yunus, *supra* note 43 at 377.

⁵⁰ Jorge Martin, “English Polygamy Law and the Danish Registered Partnership Act: A Case for the Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England” (1994) 27:2 Cornell Int’l L.J. 419 at 426.

without an express contract of support between the parties, marriage law could be viewed as essentially contractual (the agreement to marry) in those cases. While potentially a legal fiction, at its core marriage does constitute an agreement, and this view would provide protection and recognition to different cultures, meeting both the aims of multicultural respect and tolerance and the ability for private ordering simultaneously.

Protecting the Integrity of (Some) Relationships: Polygamy and Immigration

As a multicultural society dependent on immigration, Canada's legislative approach to the immigration of people in a polygamous marriage, or seeking to rejoin a polygamous family which has already immigrated to Canada, is in need of reform. While it may be practically possible for polygamous wives to fraudulently enter Canada as female "relatives," this discriminatory system needs reform. When sexuality and language are rightly being attacked as forming the basis for Canadian immigration policy, keeping people out of Canada for their religious or cultural beliefs should not be tolerated. Yet this occurs.⁵¹ The immigration practice of denying people in polygamous marriages entry is no different from discrimination based on religion or cultural grounds, and has no place in Canadian law. As was noted in 2001, "the objective of the family class sponsorship provisions is to recognize and protect the integrity of close personal relationships by facilitating the reunion of family members. Recognizing and promoting the integrity of ongoing interdependent relationships is an important governmental objective."⁵² The government, if it values familial relationships, should acknowledge that reunification of the family is not only important to monogamous couples. An older analysis still resonates today: "families and relationships exist, both in Canada and elsewhere in the world, which are not legally recognized. Barred from reunification by restrictive legislation, an applicant's only legal alternative may lie in what are known as 'humanitarian and compassionate' considerations...The fact that a 'humanitarian and

⁵¹ As was the case described in "An Ideal Candidate for Immigration is Denied After it is Learned He has Two Wives," National Post, (1 February 2005) A7.

⁵² Law Commission of Canada, *supra* note 24 at 44.

compassionate' immigration official may well be neither of those, or overly ethnocentric, means that there is little chance of success."⁵³ This is disgraceful. Baldassi notes: "despite some legal acknowledgment of our society's changing definition of 'family', certain types of people---usually Westernized, relatively wealthy, and emulating the ideology of the traditional nuclear family---are more able to rely on this recognition in the immigration process than are others."⁵⁴ Discrimination against people based on polygamy is no different from discrimination based on religion or culture.

Similarly, it is inhumane of Canadian law to allow only one wife to immigrate to Canada on the basis that their spouse is a Canadian citizen. While ensuring uniformity, the law is creating a Prokrustean bed to stretch individual circumstances to its blinkered view of marriage. As Rehman writes, "until complete equality is reached between men and women is reached [within contemporary Islamic States], polygamy as an institution could arguably serve to protect those women who would otherwise be condemned, discarded or abandoned in that society through the operation of divorce or nullity laws."⁵⁵ Thus, "protection" of women through anti-polygamy immigration legislation may in fact harm women who are abandoned in another jurisdiction when their husbands immigrate to Canada, or are simply not married because someone who could protect them has aspirations to immigrate to Canada. Either way, women are not protected by anti-polygamy legislation. Even if Canada were to legitimately oppose polygamy, vulnerable people would still be harmed by refusing immigration to those who practice polygamy: "Canada can support the efforts by such bodies as the United Nations to persuade countries to abolish [polygamy]. Registering our objections to polygamy by refusing to permit immigration of all parties to a valid foreign polygamous marriage, however, would most likely harm women who are parties to

⁵³ Deborah McIntosh, "Defining 'Family' --- A Comment on the Family Reunification Provisions in the Immigration Act" (1988) 3 J.L. & Soc. Pol'y 104 at 110.

⁵⁴ Cindy L. Baldassi, "DNA, Discrimination and the Definition of 'Family Class': *M.A.O. v. Canada (Minister of Citizenship and Immigration)*", (2007) 21 J.L. & Soc. Pol'y 5 at 6.

⁵⁵ Javaid Rehman, "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq" (2007) 21 Int'l J.L. Pol'y & Fam. 108 at 115.

such marriages and who are left behind.”⁵⁶ McIntosh’s recommendation should be followed: “[t]he definition of ‘family’ in the Immigration Regulations must be reformed to incorporate a more realistic, timely and global definition of the family that would allow for the sponsorship of ‘spouses’ of all descriptions...a Constitutional obligation to doing so lies in ss. 15 and 27 of the Charter of Rights and Freedoms. Canada has made a constitutional commitment in s. 27 to interpret the Charter in a spirit of ‘preserving and enhancing the multicultural heritage of Canada’.”⁵⁷

Finally, immigration policy as it currently stands, that is, discriminating against people based on their religious and cultural beliefs manifested by polygamy, is arguably against International legal principles on the integrity of the person and the family. *Not Just Numbers*, a governmental publication, includes the quotation that: “ ‘the family,’ states the United Nations’ Universal Declaration of Human Rights, ‘is the natural and fundamental unit of society and is entitled to protection by society and the State.’”⁵⁸ *Not Just Numbers* goes on to state: “the involuntary separation of individuals from those family members they hold most dear is therefore something the State should seek always to alleviate, never to exacerbate.”⁵⁹ It is an ethnocentric conceit that this involuntary separation due to law applies only to monogamous families. As Brilmayer and Starr note in their article on involuntary family separation, “polygamous families are, in short, families. They are made up of mothers and fathers---and children, who have a strong and internationally recognized interest in growing up with both of their parents.”⁶⁰ The fact that polygamous families are the natural human method of living should entitle all families, without any discrimination, to the same international protections that monogamous families enjoy. *Not Just Numbers* argues that “our

⁵⁶ Bailey *et al.*, *supra* note 37 at 16.

⁵⁷ McIntosh, *supra* note 53 at 113.

⁵⁸ Immigration Legislative Review (Canada), *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa, Ontario: Citizenship and Immigration, 1998) at 42.

⁵⁹ *Ibid.*

⁶⁰ Sonja Starr and Lea Brilmayer, “Family Separation as a Violation of International Law” (2003) 21:2 Berkeley J. Int’l Law 213 at 256.

conviction is that the State owes the family not only protection, but nourishment.”⁶¹ Using either of these terms, the first of which is an international obligation, it is hard to argue that Canadian immigration law, which breaks up families, and fails to protect or nourish certain families and children is in accordance with international responsibilities not to inflict emotional distress.

Towards a More Coherent Law of Marriage: Reform and Its Implications

As these analyses have indicated, the non-recognition and active punishment of polygamy in Canada should cease immediately. However, this result creates a vacuum of legislation, similar to the striking down of all abortion laws, which will not serve those seeking to have a polygamous marriage recognized. Therefore, as with the *Civil Marriage Act*, the decriminalization of polygamy will require positive law being written, not simply the removal or rewording of antiquated laws. As was seen above in the reasoning of the *Same-Sex Marriage Reference*, the Supreme Court is unlikely to be amenable to a “separate but equal” legislative framework, which means that a legislative will require polygamous marriage to be an equal status together alongside monogamous marriage. Clearly, polygamous marriage will necessarily entail all of the qualifications that current Canadian marriage now does (such as a prohibition on incestuous, underage or forced marriage, a proviso that the parties submit to a registered and qualified authority to conduct the marriage, that the marriage be registered by the government, and that the marriage be contracted in good faith). However, there are still several areas where details which must be addressed for a scheme legalizing polygamy to be workable. The four pragmatic areas which I will discuss are the corresponding impacts on other civil schemes (alluded to by the Alberta Civil Liberties Research Centre), the consent and disclosure requirements which a polygamous marriage system would need to enact, the requirement that the marriage scheme respect prior Constitutional decisions, and finally the potential political consequences of failing to entrench polygamous rights in the Constitution.

⁶¹ Immigration Legislative Review, *supra* note 58 at 42.

First, the legal areas of Wills and Estates, Tax, and caregiver consent to medical treatment must be considered by a law legalizing polygamy. While changes are necessary, private ordering should be able to rule the day. There can be no question that spousal support, often available to a monogamous divorced spouse, would be available to a polygamously divorced spouse (the same applies to any children born to the relationship, and would apply even if the parties were not married). In terms of wills and inheritances, the law already allows for an individual *testatrix* to determine who will receive her possessions, and while there are certain restrictions placed upon provision for dependents⁶², an individual is, consistent with the privileging of private ordering, allowed to donate or disinherit otherwise at will. Any legislated amount required to go to one spouse upon the death of the other (for example, if a person did not leave a will, the so-called intestacy rules), could simply be split between two (or more spouses). While familial disputes over wealth are sometimes acrimonious, the potential acrimony does not seem likely to be amplified simply by adding several more parties. Regarding Tax law, which fluctuates yearly depending on legislative whim and policy objectives, polygamy will not cause much of a stir: the most complicated federal statute, the Income Tax Act, can clearly accommodate the level of detail needed to tax polygamous families as such, and at rates according to Parliament's desires. Consent to health may present some complications (such as where multiple spouses have different treatment plans for an incompetent or dying spouse), but legislation could easily require designation of a specified Power of Attorney for Personal Care, reinforcing the respect for private ordering and eliminating (as much as possible) contention between the parties. Briefly speaking, while civil legislation has the potential for complexity when accommodating polygamy, legislation can be made specific and precise (and privilege private ordering) and if disputes erupt, the Courts are publicly funded for the purpose of resolving messy disputes.

⁶² For example, in Ontario see Part V of the *Succession Law Reform Act*, R.S.O. 1990, c. S26

Secondly, the question of consent and disclosure with polygamous marriage arises to a somewhat larger extent than in current matrimonial law. Since all polygamy (and all bigamy) is now illegal, the law does not necessarily trouble itself on what a partner tells his or her unaware marriage partner. However, this is untenable if polygamy is legalized. Clearly, the law permitting polygamy would need to require full disclosure to all interested parties, especially (but not necessarily limited to) the participants in the marriage and any other spouses of the two participants. Failure to do so could possibly result in a person unwittingly being a party to a polygamous marriage of which they were unaware. From a theoretical perspective, the issue here is not private ordering or freedom, but the protection of parties from harmful activities of their spouses (which they cannot prevent). An unhappy party can, of course, always initiate divorce proceedings. Furthermore, since the law could not, as has historically been the case in societies allowing polygamy, limit the ability to contract multiple marriages to a specific sex or status (ensuring that one sex or status in the marriage is only one person), normally men, the situation could arise where Man A marries Woman A. Woman A then marries Man B. Man B then marries Woman B. This situation would create a potentially large and complex marital situation. However, with proper registration and disclosure requirements, the spouses will be free to privately order their life as they see fit. While such complex marriage webs would potentially create tax consequences, it must be noted that section 245 of the Income Tax Act⁶³, generally labelled the “General Anti-Avoidance” Rule, has wording potentially broad enough to defeat any conscious attempt at abusive tax avoidance through marital status manipulation.

Thirdly, the issue of homosexual polygamy arises in any contemporary discussion of Canadian recognition of polygamy. Obviously, for both Polygamous Mormonism and Islam, this is not an issue (since those religions do not endorse homosexual marriage, even monogamously, as a

⁶³ *Income Tax Act*, 1985 c. 1 (5th Supp.), section 245(2), which reads: “Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.” Moreover, the requirement of a marriage licence fee would discourage unduly frivolous marriage undertaken for financial advantage, to a certain extent.

proper existence), but by setting up a legal regime to allow polygamy, the necessity for the law to respect those wishing to enter into polygamous homosexual marriage must be respected. As prior constitutional cases have demonstrated, homosexual marriage is constitutionally protected and may be constitutionally mandated. Any attempt to limit private ordering to strictly heterosexual marriage would almost certainly fail as attempts to limit monogamous marriage to heterosexual unions failed. Canada would thus be unique in its acceptance not only of homosexual marriage (recognized by some advanced jurisdictions) or of polygamy (accepted by many Islamic nations), but of both areas of allowing non-majority marriage practices. Such trend-setting would be appropriate for the diverse multicultural society that Canada represents.

The manner in which polygamy is legalized will also have a lasting impact on how marriage laws on polygamy develop. One option is to simply allow constitutional challenges, such as the one currently underway in British Columbia, to run their course (or potentially to withdraw all resistance from a finding that the current law is in fact unconstitutional). Courts have a wide array of remedies to deal with unconstitutional statutes, from “reading in” (judicial amendment of the statute to make it compatible with the constitution), to “reading down” (severing the unconstitutional provisions of the statute, leaving the rest of the law intact), to simple declaratory relief (as seen in the recent case of Omar Khadr, a simple declaration from the Court that the impugned statute or governmental action is not consistent with the constitution). In the case of polygamy, the criminalization of polygamy could be completely struck down under section 52(1) of the Constitution Act, 1982⁶⁴, which provides that any law inconsistent with the constitution is “of no force or effect.” Regarding the thornier issue of making law regarding polygamy, a court could “read in” positive provisions to acts, federal and provincial, which regulate marriage. Another alternative is simple legislative action: the Parliament of Canada, assisted by the Senate, could pass a law similar to (or an amendment of) the *Civil Marriage Act*, and thus recognize polygamy in this manner. This would require significant

⁶⁴ *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c.11

political capital, both to put polygamy at the top of the legislative agenda, as well as to legalize something unpopular, the criminalization of which seems to have been supported over multiple generations (even multiple generations living under the *Charter*) of Canadian voters. Moreover, unlike the *Civil Marriage Act*, there would be no court decision to point to as a justification: the government would have simply taken an unpopular stand, with no compulsion from the courts or the voters. Moreover, crucially, any legalization of polygamy which was passed as a simple law at either the federal or provincial levels of government would run into two problems: first, since the constitutional jurisdiction for marriage is shared between federal and provincial levels, it is conceivable that one jurisdiction's decision to allow polygamy (for example, the federal government, which is able to legislate regarding "essential validity" of marriage) would not be honoured by the other level of government (for example, Ontario, which controls "formal validity" of marriage, could refuse to issue marriage licences and certificates on a number of grounds, frustrating the federal intent-the situation could also apply *vice versa*). A jurisdictional battle, potentially fought out over long years in the courts, would be unpalatable to all parties. Secondly, any law passed as a simple piece of legislation would be able to be repealed at the sole instance of the next legislative government. If polygamy was legalized today by the 40th Parliament, nothing prevents the 41st, 42nd or 43rd from either altering that law or repealing it altogether. While Canadian politicians seem wary of altering laws on emotional social issues (such as abortion, constitutional reform and social security, the so-called 'third rail' of North American politics), nothing would prevent a future government, aided by a mobilized anti-polygamy group, from sending polygamous Canadians back into hiding.

The solution to these two problems is simple: polygamy must be endorsed as a positive constitutional right, whereby the amendment process for laws on polygamy, while not completely impossible, will require a much clearer majority, and a significantly greater amount of effort than a simple Bill in the House of Commons. This entrenchment can be implemented in two ways, one of

which is much more difficult than the other. First, the government of Canada could attempt simply to amend the constitution, to either add polygamy as a ground under which discrimination is prohibited, or to provide greater clarity on rights already given under constitutional documents. This alternative is fraught with difficulty. Not only is the technical process for constitutional amendment onerous (it requires, as was seen in the attempt to amend the constitution pursuant to the Meech Lake Accord, the legislative ratification of at least two thirds of the provinces representing at least fifty percent of Canada's population⁶⁵), but the ensuing analysis, discussion on wording, and debate would be a great expense to bear for any advance in the law. A second, much simpler, way of proceeding is to emulate the Paul Martin government's tactic on homosexual marriage: use the inherent power of government to refer a constitutional question to the courts (for the federal government, the Reference goes directly to the Supreme Court of Canada; for the provincial governments, the Reference is directed to the provincial Court of Appeal, the highest-ranking body in the province, but that decision may be appealed to the Supreme Court of Canada). Notable References (apart from the Same Sex Reference already mentioned) have included the Court's interpretation of the *Clarity Act* (referred to as the Secession Reference) and a Reference on the patriation of the constitution itself (which resulted in the *Charter of Rights and Freedoms*). Although the Supreme Court can decline to answer a question put to it in a Reference, this has not normally been seen, and the Supreme Court has not been overly afraid of wading into matters of political sensitivity. An endorsement from the Court for the constitutional necessity of protecting polygamy would be sufficient to protect polygamous individuals in Canadian society, and would allow all Canadians, regardless of culture, social structure, or creed, to participate harmoniously in marriage, often termed a "human right."⁶⁶

⁶⁵ *Ibid.* at s. 38(1)(b)

⁶⁶ See Article 16 of the Universal Declaration of Human Rights:

(1) Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution...

Conclusion: Multicultural Canada, Polygamous Canada

Understanding and tolerance is needed when legislating in the diverse areas of the law affected by the government's so-called Judeo-Christian inspired antipathy towards polygamy. Multicultural conceptions of the family, most notably conceptions inherent in Islam and some branches of Mormonism, complicate the discussion. The social situation calls for a balanced accommodation of polygamous families by both federal and provincial civil and criminal law. In this paper, I have argued that the need for reform can be found through an examination of Canadian nationals already in polygamous marriages, Canadian nationals wishing to enter into recognized polygamous marriages within a Canadian jurisdiction, the recognition of Canada of polygamous marriages contracted by Canadian nationals in a foreign jurisdiction, and finally through an examination of the Canadian immigration rules which have the potential to disrupt polygamous families whose members wish to become Canadian citizens. I then examined the ability to create change, manifested through a decriminalization and recognition of polygamous marriage, both from a rights-based and pragmatic approach, concluding that the legalization of polygamy is necessary to alleviate an historically-imposed "tyranny of the majority." As a reflection of society, Canadian law must move forward to install private ordering as the cornerstone of Canadian society, fulfilling Pierre Elliot Trudeau's vision that the "there's no place for the State in the bedrooms of the Nation."⁶⁷ In this way, law and society will overcome the legislative challenges posed by the diversities of culture and religion, and will not hide behind outdated ideals of the "ideal" family unit. By permitting private ordering and showing respect towards different cultures, the Canadian mosaic will achieve its vibrant potential.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

⁶⁷ Comment by then-Justice Minister Trudeau on December 21, 1967. See CBC Archives: http://archives.cbc.ca/politics/rights_freedoms/clips/2671/

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