IN THE HIGH COURT OF THE DOMINION OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

PERRY ET AL

Appellants

- and -

CANADA (ATTORNEY GENERAL)

Respondent

FACTUM OF THE RESPONDENT
CANADA (ATTORNEY GENERAL)

COUNSEL FOR THE RESPONDENT

Team #

PART I – STATEMENT OF THE FACTS

A. Overview

1. Section 15 of the *Charter* does not protect every personal choice – especially not harmful ones. Our *Charter* was not enacted to fulfill citizens' every desire; it was enacted to promote and protect their fundamental rights. We cannot stretch the *Charter* beyond its natural limits to accommodate personal preferences that are incompatible with the values of Canadians.

2. Our equality provisions aspire to eliminate prejudice and stereotypes. The *Civil Marriage Act* has precisely the same goal: to combat the prejudice and stereotypes perpetuated in polygamous unions. The *Act* strives to guard against the various economic, physical, and psychological harms experienced by women and children in these relationships.

3. The government has carefully crafted the *Act* to address these harms. The provision achieves the appropriate balance; its benefits to vulnerable groups outweigh the burden on those excluded. Polygamy is demonstrably harmful to women and children. The government must alleviate this harm.

B. Background facts

(1) The *Civil Marriage Act*

4. Section 2 of the *Civil Marriage Act* ("the *Act*") defines civil marriage in Canada as "the lawful union of two persons to the exclusion of all others". The Appellants brought an application challenging this provision.

Civil Marriage Act, SC 2005, c 33, s 2.

(2) The Appellants

5. John Hudson, Julie Perry, and Mona Sherwood have lived together in a polygamous relationship for fifteen years. The Appellants have three children: Sam is Julie and John's biological child, and Kayla and Molly are Mona and John's biological children. The children view both Julie and Mona as their mothers. The Appellants live together as a family. They share parenting and household duties, own their home jointly, share finances, and provide for each other in their wills.

Wilson Moot Official Problem at 1, 3 [*Official Problem*].

6. The Appellants have a loving and stable relationship, and the children are well-adjusted and behaved. However, this is not typical of polygamous unions.

Official Problem, *supra* para 5 at 3, 6.

(3) Substantial evidence demonstrates polygamy's harm to women and children

7. Recent studies reveal that polygamy corresponds with severe harm to women and children. Women in polygamous relationships suffer from increased stress and mental health illness; feelings of neglect, loneliness, and low self-esteem; and deprivation of autonomy. These women are often stereotyped into reproductive and domestic roles, and lack independent access to wealth and assets.

Official Problem, *supra* para 5 at 4-5.

8. Polygamists and their children face economic deprivation, inadequate health care and nutrition, and higher levels of dysfunction than monogamous families.

Official Problem, *supra* para 5 at 5.

9. Children of polygamous relationships are disadvantaged as compared to children of monogamous relationships. Children with polygamous parents suffer from lower levels of self-esteem, lower academic achievement, and lower education levels.

Official Problem, supra para 5 at 5.

C. Procedural history

10. The Appellants brought an application challenging s. 2 of the *Civil Marriage Act.*

11. The trial judge, Dakana J., found that s. 2 of the *Act* violates the Appellants' equality rights. However, this violation of s. 15(1) was justified under s. 1 of the *Charter*. Dakana J. held that the harms posed by polygamy justify the government's response.

Official Problem, supra para 5 at 1-2.

12. The Ontario Court of Appeal upheld Dakana J.'s decision. Writing for the majority, Shahmoradi J.A. affirmed that the impugned provision violates s. 15(1) but was similarly saved by s. 1 of the *Charter*. The Court held that the law is a measured, rational, and proportionate response to the harms of polygamy.

Official Problem, supra para 5 at 7.

PART II – STATEMENT OF POINTS IN ISSUE

(1) Does s. 2 of the *Civil Marriage Act* infringe the applicants' right to equality under s. 15(1) of the *Charter*?

(2) If the answer to (1) is yes, is the infringement reasonable and demonstrably justified in a free and democratic society?

PART III – SUBMISSIONS

A. The federal government does not have the authority to extend marriage to polygamy

13. The federal government's powers are constitutionally fixed. The power to define marriage derives from s. 91(26) of the *Constitution Act, 1867*.

> The Constitution Act, 1982, s 91(26), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

14. This does not mean that the definition of marriage is frozen. The Constitution is a living tree capable of growth over time to reflect "new social, political, and historical realities." In *Reference Re Same-Sex Marriage*, the Supreme Court recognized that the federal government's legislative authority had grown by that time to reflect a new social reality: widespread acceptance of same-sex relationships.

> Edwards v Canada (Attorney General), [1930] AC 124 at 136 (PC) [Edwards].
> *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 [*Reference Re Same-Sex Marriage*].

15. However, this living tree cannot grow beyond its "natural limits". In the same-sex marriage reference, the Court rejected the argument that same-sex marriage fell outside these natural limits. It conceded, however, that this argument could have succeeded if its proponents identifed "an objective core of meaning which defines what is 'natural' in relation to marriage."

> *Edwards, supra* para 14 at 136.
> *Reference Re Same-Sex Marriage, supra* para 14 at para 27.

16. The objective core of meaning stems from society's views of marriage. Marriage is fundamentally a social institution, reflective of society's belief in the

value of conjugal relationships. The Court in *Halpern v Canada* recognized this principle, stating, "Through this institution, society publicly recognizes expressions of love and commitment between individuals granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires, and aspirations that underlie loving, committed conjugal relationships."

> *Halpern v Canada (Attorney General)* (2003), 65 OR (3d) 161 at para 5, 225 DLR (4th) 529 (CA).

17. Canadian society does not condone polygamous marriages. An overwhelming majority of Canadians disapprove of it. Previous applications of the living tree doctrine occurred when society had come to realize the capacity of women as persons, and the equality of same-sex couples. Polygamy is not an equivalent social reality.

> *Official Problem, supra* para 5 at 4.
> *Edwards*, supra para 14
> *Halpern, supra* para 16.

18. Nor is polygamy acceptable to the world community. In fact, a growing international consensus recognizes polygamy as "inadmissible discrimination" that should be abolished wherever it exists.

> *General Comment No 28: Equality Rights Between Men and Women* (Article 3), UNHRC (2000).

19. In this case, the Court should not stretch the Constitution far beyond what Canadians are prepared to accept. It is a living tree growing alongside Canadian society, not far ahead of it.

B. Section 2 of the *Civil Marriage Act* does not infringe the Appellants' equality rights under s. 15(1)

20. Section 15(1) of the *Charter* states:

> Every 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.
>
> *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15 [*Charter*].

21. In *Andrews v Law Society of British Columbia* and *Law v Canada*, the Supreme Court of Canada identified the purpose of s. 15 as the promotion of substantive equality. With this purpose in mind, the Court articulated a two-step framework for addressing s. 15(1) claims in *R v Kapp*:

> (1) Does the law create a distinction on the basis of an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?
>
> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 163-171, 56 DLR (4th) 1 [*Andrews*].
> *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 at paras 40-51, 156 DLR (4th) 385 [*Law*].
> *R v Kapp,* 2008 SCC 41 at paras 16-17, [2008] 2 SCR 483 [*Kapp*].

22. Section 2 of the *Act* does not create distinction on the basis of a ground. In any case, such a distinction would not perpetuate prejudice or stereotyping. The law does not infringe the Appellants' equality rights under s. 15.

(1) The law does not create a distinction on the basis of an enumerated or analogous ground

23. The Appellants contend that their polygamous orientation constitutes an analogous ground in its own right, or falls within the established analogous ground of marital status. They further submit that the law draws distinctions based on the enumerated grounds of religion and sex. These assertions are incorrect.

(a) Polygamous orientation cannot constitute an analogous ground

24. In 1982, Canadians enshrined in s. 15(1) a list of enumerated grounds. This list encompassed the qualities that, at the time, Canadians agreed were unacceptable bases of distinction: race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability. The list of grounds was not exclusive. We left room for the list to grow along with society, as Canadians come to see other characteristics in the same light.

Charter, *supra* para 20, s 15(1).

25. The list can only grow within its natural limits. Not just any choice will receive s. 15 protection. New grounds can be recognized as unacceptable bases of distinction only if they bear an analogy to the enumerated grounds. The Supreme Court in *Corbiere* attempted to define that which makes the enumerated grounds so important: they are each a deeply personal characteristic that is unchangeable, or changeable only at unacceptable cost to personal identity.

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at 219, 173 DLR (4th) 1.

26. *Corbiere*'s definition sets a high threshold. In the time since the Charter's enactment, the Supreme Court has only recognized four additional characteristics as worthy of protection under s. 15: citizenship, marital status, sexual orientation, and the off-reserve status of Aboriginal band members. Meanwhile, the Court has determined that some rather significant characteristics do not deserve the equality guarantee; it refused to recognize employment status and place of residence as analogous grounds.

Andrews, supra para 21.
Egan v Canada, [1995] 2 SCR 513 at 184, 124 DLR (4th) 609 [*Egan*].
Miron v Trudel, [1995] 2 SCR 418, 23 OR (3d) 160 [*Miron* cited to OR]
Corbiere, supra para 25.
Delisle v Canada (Deputy Attorney General), [1999] 2 SCR 989, 176 DLR (4th) 513.
R v Turpin, [1989] 1 SCR 1296, 69 CR (3d) 97.

27. We cannot stretch the *Charter* beyond its natural limits to protect preferences that – while important – do not parallel the agreed-upon list of deeply personal qualities. In *R v Malmo-Levine*, the Supreme Court recognized the absurd result of such a notion by rejecting an argument that an inclination to use marijuana is comparable to the enumerated grounds. Justices Gonthier and Binnie, writing for the majority, stated that "it would trivialize this list to say that 'pot' smoking is analogous to gender or religion as a 'deeply personal characteristic that is unchangeable or changeable only at unacceptable personal costs'"; a taste for marijuana is merely a "lifestyle choice".

R v Malmo-Levine; *R v Caine*, 2003 SCC 74 at paras 184-185, [2003] 3 SCR 571 [*Malmo-Levine*].

28. Moreover, 96% of Canadians disapprove of the choice to live in a polygamous relationship. To uphold an argument to protect such a choice on the basis of s. 15 "would simply be to create a parody of a noble purpose".

Corbiere, supra para 25 at 219.
Malmo-Levine, supra para 27 at para 185.
Egan, supra para 26 at 528.
Official Problem, supra para 5 at 4.
Malmo-Levine, supra para 27 at para 185.

(b) Polygamous orientation does not fall within the ambit of marital status

29. Marital status cannot be interpreted so broadly as to capture polygamous orientation. Various provincial human rights statutes provide that marital status encompasses "the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage". The Supreme Court recognized marital status as an analogous ground in *Miron v Trudel.*

Human Rights Code, RSO 1990, c H19, s 10(1) [*Ontario Human Rights Code*].
Alberta Human Rights Act RSA 2000, c A-25.5, s 44(1).
Human Rights Act, RSPEI 1988, c H-12 s. 2(h.2).
Miron, supra para 26.

30. To date, courts and legislatures have limited marital status to monogamous relationships. In *Miron,* McLachlin J. described marital status with reference to living "with the *mate* of one's choice". The provincial human rights statutes use such language as "living with *a person* in a conjugal relationship" and "*two persons* living in the same household", which can only indicate monogamy.

Miron, supra para 26 at 497.
Ontario Human Rights Code, supra para 29, s 10(1).
Human Rights Act, RSNS 1989, c 214, s 3(i).

31. Even a broad and purposive interpretation of marital status reveals no basis for expanding the ground to include polygamous orientation. Marital status addresses the *formal classification* of a relationship, not its composition. This is evidenced by *Miron*, which addressed a violation of the rights of common-law couples with an aim to prevent discrimination against those who chose not to have their relationship recognized as a civil marriage.

> *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 155-156, 55 AR 291.
> *Miron, supra* para 26 at 497.

32. The provincial human rights statutes further demonstrate that the term is only concerned with how the state classifies a relationship – whether it is formally recognized, formally dissolved, or terminated due to death.

33. There would be no room for the recognized ground of sexual orientation if marital status was stretched to include polygamous orientation. Formal classification is not concerned with whether a relationship is with a partner of the same or opposite gender, exclusive or open, or monogamous or polygamous.

(c) The law does not create a distinction on the basis of religion

34. The Appellants allege that the definition of marriage in the *Act* violates their equality rights because the definition coincides with the Christian tradition of monogamy. This assertion is a fallacy.

35. The Supreme Court in *Edwards Books and Art Ltd v The Queen* addressed similarly flawed logic in the context of legislation requiring some businesses to close on Sundays. The Court reasoned that the law, which was consistent with Christian religious practices, did not prefer Christianity over other religions –

the correspondence was merely coincidental. The same logic informs that Canada's definition of civil marriage does not create a distinction on the basis of religion – the correspondence is merely coincidental.

> *Edwards Books and Art Ltd v The Queen*, [1986] 2 SCR 713 at 760, 35 DLR (4th) 1.

(d) Any distinction on the basis of sex does not amount to discrimination

36. The Appellants assert that s. 2 of the *Act* creates a distinction on the basis of sex because it perpetuates stereotypes. They have conflated the two distinct steps laid out in *Kapp*. In doing so, the Appellants have failed to satisfy their burden to prove a s. 15(1) violation under the established framework.

37. To accept the Appellants re-framing of the approach to s. 15 would dramatically depart from well-settled law. But even under their dubious proposal, the Appellants' claim on the basis of sex fails. Section 2 does not perpetuate stereotypes; it does not create the distinction the Appellants allege, and it does not amount to discrimination.

38. The law does not draw any of the distinctions the Appellants allege. Even if a distinction is found, it does not constitute discrimination under the second stage of the *Kapp* framework.

(2) The law does not perpetuate prejudice or stereotyping

39. Any distinction created by s. 2 of the *Act* lacks a discriminatory impact, and thus fails to satisfy the second criteria of the *Kapp* framework. A distinction is discriminatory if it perpetuates prejudice or disadvantage on the basis of a

ground, or if it is based on stereotypes that do not correspond with the claimant group's actual circumstances and characteristics.

Kapp, *supra* para 21 at para 18.

40. The focus of the entire *Kapp* inquiry is the protection of substantive equality. It is often necessary to make distinctions in order to achieve this. Writing for the majority in *Andrews*, McIntyre J. stated: "It is, of course, obvious that legislatures may – and to govern effectively – must treat different individuals and groups in different ways".

Andrews, *supra* para 21 at 168.

41. The inquiry as to whether a distinction amounts to discrimination focuses on factors that identify the perpetuation of prejudice and stereotyping. Some of these factors were identified in *Law v Canada*: whether the law has an ameliorative purpose or effect; correspondence between the distinction and the claimant group's reality; and the nature of the interest affected. Ultimately, we must answer the larger question of whether the law creates "substantive inequality".

Kapp, *supra* para 21 at para 23.
Law, *supra* para 21 at paras 63-75, 84.

42. No matter which grounds, if any, are the basis of a distinction created by s. 2 of the *Act*, the distinction does not perpetuate disadvantage through stereotyping and prejudice, and thus does not amount to discrimination.

(a) The restriction of marriage to two-person unions aims to further substantive equality by ameliorating stereotyping and prejudice to women

43. Section 2 of the *Act* furthers substantive equality by preventing stereotyping and prejudice against women in polygamous relationships. The ameliorative aim and effect of the *Act* are relevant in determining whether discrimination is present; a law is less likely to be discriminatory when it corresponds with the purpose of s. 15. Section 2 accords with the goals of s. 15 as they are explained by Sopinka J. in *Eaton v Brant County Board of Education*: "the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage".

> *Law, supra* para 21 at paras 72-73.
> *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at 272, 1 OR (3d) 574.

44. Section 2 strives to ameliorate the conditions of women by discouraging harmful polygamous relationships. Substantial evidence accepted by the trial judge demonstrates the dangers posed to women in polygamous relationships, including frequent stereotyping into reproductive and service roles, unequal sharing of material and emotional attention, and increased mental health illness.

> *Official Problem supra* para 5 at 4.

45. The Appellants are asking the government to turn a blind eye to the harmful stereotyping and inequality that exists in polygamous relationships in order to attain formal equality for polygamists on tenuous terms. The distinction created by s. 2 of the *Act* attempts to curb stereotyping and prejudice to women

in polygamous relationships. The distinction furthers substantive equality, and thus corresponds with the goal of s. 15; it should not be found to be discriminatory.

(b) The alleged distinction on the basis of sex corresponds to the group's actual circumstances

46. The Appellants contend that s. 2 of the *Act* creates a distinction on the basis of sex because its purpose perpetuates stereotypes. This is not the case. The *Act*'s objective is not based upon stereotypes, but rather upon evidence.

47. Courts look to whether a distinction corresponds to the characteristics of a group when determining if the distinction is discriminatory. A law that accommodates the actual needs, capacities, and circumstances of a group is not likely to be discriminatory.

> *Law, supra* para 21 at paras 69-71.
> *Halpern, supra* para 16 at para 88.

48. Section 2 of the *Act* addresses women's actual needs and circumstances; it is not based on stereotypes as the Appellants suggest. Extensive evidence accepted by the trial judge reveals the serious harms polygamous relationships pose to women. The evidence demonstrates that polygamous relationships do not accord with women's circumstances. The government's refusal to recognize polygamous unions as marriages corresponds to women's realities by discouraging behavior that is demonstrably harmful to their interests. In doing so, the law advances the objective of s. 15. Section 2 of the *Civil Marriage Act* does not hinder substantive equality – it advances it.

(c) The alleged distinction on the basis of polygamous orientation does not affect a sufficiently significant interest to constitute discrimination

49. If polygamous orientation is found to be an analogous ground, the distinction drawn by the provision is not discriminatory. *Law* instructs courts to consider the consequences of a distinction in order to determine if it perpetuates prejudice. The Supreme Court stated that the more severe the consequences to the affected group, the more likely the distinction will be discriminatory.

Law, *supra* para 21 at para 74.

50. The consequences to the Appellants of being unable to marry multiple partners are negligible. The benefits sought by the Appellants cannot and would not be achieved through legal recognition of their polygamous union. If the law were amended to correspond with their request, they would see little, if any, practical difference in their lives.

51. The Appellants seek recognition of their relationship and the benefits of marriage for their family. Their claim assumes that the government provides benefits to married persons that they cannot access. This is mistaken.

Official Problem, supra para 5 at 1.

52. The Appellants own their property jointly, and have made provisions for each other in their wills. Courts have granted spousal support to former polygamous spouses upon the termination of a relationship. Consequently, the legal framework available to married couples does not materially exclude the Appellants.

Official Problem, *supra* para 5 at 1, 3.
Basi v Dhaliwal, 1992 CarswellBC 1259, [1992] WDFL 1255 [*Basi*].

53. The Appellants claim a particular interest in obtaining benefits for their children. Civil marriage, however, does not bestow parental rights. Default parentage in Canada is based on biology, not marital status. Ontario already has a regime that allows the Appellants to seek parental rights over their non-biological children. Although they are aware of this regime, the Appellants have chosen not to pursue the mechanism at this time.

> *Official Problem, supra* para 5 at 1.
> *Children's Law Reform Act*, RSO 1990 c c-12, s 1, s 12(1).
> *AA v BB*, 2007 ONCA 2, 83 OR (3d) 561.

54. At trial, Dakana J. found that the Appellants can only name one partner for tax and insurance purposes, and thus cannot claim all benefits available to married couples. This does not, however, amount to significant differential treatment. The tax benefits provided solely to married couples are relatively inconsequential. Furthermore, if the Appellants wish to receive equal access to tax deductions, they can challenge specific provisions of the *Income Tax Act*, rather than pushing for a sweeping social change. Any consequences of differential treatment by third-party insurers do not attract *Charter* protection, which is only concerned with government action.

> *Official Problem, supra* para 5 at 3.
> Kathleen A Lahey, *The Impacts of Relationship Recognition on Lesbian Women in Canada: Still Separate and Only Somewhat "Equivalent"* (Ottawa: Status of women Canada, 2001) at 23-24.
> *Andrews, supra* para 21 at 164.

55. Finally, the societal recognition the Appellants desire is not a benefit the government can provide. Although they may feel uncomfortable presenting themselves as polygamists, s. 15 only concerns state action; it does not provide

for equality between individuals in a general or abstract sense. The government cannot impose values on the 96% of Canadians disapprove of polygamy. The Appellants seek acceptance from others; the government cannot give this to them.

> *Andrews, supra* para 21 at 163-164.
> *Official Problem, supra* para 5 at 4.

56. The *Civil Marriage Act* does not have a discriminatory impact and should not be held to violate s. 15(1) of the *Charter*. The ameliorative purpose and effect of the law, the correspondence between the law's treatment of women and their actual interests, and the relative insignificance of the legal consequences to polygamists demonstrate that s. 2 of the *Act* does not perpetuate prejudice or stereotypes – it strives to do just the opposite.

C. Any infringement of the Appellants' equality rights is justified under section 1 of the *Charter*

57. Section 1 of the *Charter* states:

> 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.

> *Charter, supra* para 20, s 1.

58. Section 2 of the *Act* can be demonstrably justified because it meets the criteria set out in *R v Oakes*:

(1) the objective sought by the impugned measure is pressing and substantial;

(2) the ends and the means are rationally connected;

(3) the chosen measure minimally impairs the right in question; and

(4) the deleterious effects of the measure are proportionate to its salutary effects

R v Oakes, [1986] 1 SCR 103, at para 70, 26 DLR (4th) 200 [*Oakes*].

(1) The objectives of the law are pressing and substantial

59. The first step of *Oakes* considers whether the objective of an exclusion is "sufficiently important to justify overriding a *Charter* right".

60. The government intended to achieve two objectives by enacting s. 2. First, the provision aimed to safeguard the equality rights of same-sex couples by codifying an expanded definition of civil marriage. Second, the government sought to protect both women and children from the harms arising in polygamous relationships by excluding these relationships from the definition. It is the second set of objectives which are relevant to the present appeal.

61. In *R v Butler*, the court recognized that the objective of protecting women from harm is pressing and substantial. Dakana J. found as fact that polygamous relationships threaten women's socio-economic status and physical and psychological health. She found that polygamy can lead stereotyping, loss of autonomy, economic deprivation, and low levels of personal identity amongst women. Section 2 aims to protect women from these harms by discouraging the formation of polygamous relationships.

R v Butler, [1992] 1 SCR 452 at 88, 89 DLR (4th) 449.
Official Problem, *supra* para 5 at 5.

62. International treaties highlight the importance of the government's objective. Canada is a signatory to *International Convention on Civil and Political Rights* ("ICCPR") and the *Convention to Eliminate All Forms of Discrimination*

Against Women ("CEDAW"). The UN Human Rights Committee, which supervises the implementation of the ICCPR, articulated the link between deterring polygamy and promoting women's interests: "Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist." There is no doubt that the government must act to alleviate polygamy's harm to women.

> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (accession by Canada 19 May 1976).
> *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (accession by Canada 10 December 1981).
> *General Comment No 28: Equality Rights Between Men and Women* (Article 3), UNHRC (2000) at para 24.

63. In *R v Sharpe*, the Supreme Court acknowledged the objective of protecting children is pressing and substantial. Polygamy poses several harms to children, including inadequate health care and nutrition, low academic achievement, and low self-esteem. Section 2 seeks to minimize these threats by discouraging the creation of polygamous families.

> *R v Sharpe*, 2001 SCC 2 at para 82, [2001] 1 SCR 45.
> *Official Problem*, *supra* para 5 at 5.

64. The *Convention on the Rights of the Child* illustrates the significance of the government's objective to protect children. Article 3(1) articulates the Convention's overriding message:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The international community has recognized the importance of promoting the well-being of children. It is a pressing and substantial objective.

> *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (accession by Canada 13 December 1991), Article 3(1).

65. Canada and the international community share the conviction that promoting women and children's well-being is a pressing and substantial objective.

(2) The exclusion of polygamous unions is rationally connected to the objective

66. The second step of *Oakes* requires that the government's chosen means logically connect to the objective of the law. The impugned measure must not be arbitrary, unfair, or based on irrational considerations.

> *Oakes, supra* para 58 at para 70.

67. The government only meets its burden when evidence and reason suggest the measure will advance the objective. The government need not, however, prove the law will in fact attain its goal. After all, "if legislation designed to further the public good were required to await proof positive that the benefits would in fact be realized, few laws would be passed and the public interest would suffer."

> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 85, [2009] 2 SCR 567.

68. It is reasonable to assert that non-recognition of polygamous marriage will discourage individuals from entering polygamous relationships. It sends the message to society that polygamy is harmful, and reinforces society's belief that the characteristics of polygamous relationships run contrary to Canadian values.

Non-recognition also removes any legal incentive to enter polygamous relationships.

69. The government's decision to not extend civil marriage to polygamous unions also deters the immigration of polygamists to Canada, who will be reluctant to move to a country that does not recognize their union.

70. Discouraging the existence of polygamous relationships will prevent their associated harms. In this way, the measure is rationally connected to the objectives of protecting women and children.

(3) The law minimally impairs the Appellants' equality rights

71. The third stage of the *Oakes* test states that a *Charter* violation will be upheld only if it impairs a right as little as reasonably possible. Courts will not, however, strike down a measure simply because they can conceive of a slightly less impairing alternative. This measure falls with the "range of reasonable alternatives" available to the government to address the harms of polygamy.

> *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160, 127 DLR (4th) 1.

72. Governments will be granted deference when legislation is intended to protect a vulnerable group. In *Irwin Toy Ltd v Quebec,* the court explained that "as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function." Section 2 embodies this principle: it seeks to protect vulnerable groups from an institution that is offensive to Canadian social mores. The measure merits high deference.

Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927 at para 79, 58 DLR (4th) 577 [*Irwin Toy*].

73. The Appellants' alternative proposal to address the harms of polygamy is wholly inadequate to achieve the government's objective. The Appellants' suggestion of recognizing polygamy on a case-by-case basis fails to contemplate women's lack of autonomy within polygamous relationships. It is impossible for any outside observer to determine whether consent in this situation is genuine. Judicial discretion is thus an unsuitable mechanism to safeguard women's interests. The Appellants point to legal systems that employ this approach, but fail to prove that such measures are actually successful.

74. Non-recognition is the least-impairing measure that adequately addresses the harms polygamy causes to women and children.

(4) The salutary effects of the law outweigh its deleterious effects

75. The final stage of the *Oakes* test considers the effects of the measure. A law will survive when its benefits outweigh its negative consequences. Section 2 passes the proportionality step of the *Oakes* inquiry, and is saved by s. 1 of the *Charter*.

Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 at 889, 20 OR (3d) 816.

(a) Salutary Effects

76. The measure has significant salutary effects on women and children. Section 2 minimizes the demonstrated psychological, economic, and physical harms often present in polygamous unions. It safeguards women from stereotyping, increased mental health illness, and the loss of their autonomy. The existing definition of marriage further protects children from alienation, low

levels of education, and low self-esteem. The salutary benefits to these two vulnerable groups are obvious.

Official Problem, *supra* para 5 at 5-6.

(b) Deleterious Effects

77. Section 2 produces relatively minor deleterious effects. The Appellants feel consternation that they cannot be legally married, and are hurt by stereotypes accompanying this barrier.

78. They incorrectly assert that women are harmed by exclusion from family law. In practice, trust law protects their property interests, and provinces have applied spousal support mechanisms to former polygamous relationships.

Peter v Beblow, [1993] 1 SCR 980, 101 DLR (4th) 621.
Mahoney v King, [1998] OJ No 2296 at paras 7-9.
Basi, *supra* para 52 at para 4.

(c) Balancing the salutary and deleterious effects

79. Although some deleterious effects result from the measure, the salutary effects greatly outweigh them. Section 2 of the Act effectively protects women and children, two of Canada's largest and most vulnerable groups from the harms of polygamy. The Court must bear in mind that the Appellants' experience is an exception rather than the norm; most women and children in polygamous relationships face a very different reality. If the government legitimizes polygamous relationships through marital recognition, more Canadians will be forced to confront this harsh reality.

80. Any negative effects on the Appellants pale in comparison to the importance of protecting women and children from exposure to these harms.

PART IV – ORDER SOUGHT

81. The Respondent respectfully requests an order dismissing the appeal.

The issues in this appeal should be answered as follows:

(1) Section 2 of the *Civil Marriage Act* infringes the applicants' right to equality under s. 15(1) of the *Charter*.

(2) If s. 2 is found to infringe the Appellants' equality rights, the infringement is reasonable and demonstrably justified in a free and democratic society.

All of which is respectfully submitted, this 11th day of February, 2011.

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Counsel for the Respondent

PART V – LIST OF AUTHORITIES

LEGISLATION

Alberta Human Rights Act RSA 2000, c A-25.5.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

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Civil Marriage Act, SC 2005, c 33.

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

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Human Rights Code, RSO 1990, c H19.

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AA v BB, 2007 ONCA 2, 83 OR (3d) 561.

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Andrews v Law Society of British Columbia [1989] 1 SCR 143, 56 DLR (4th) 1.

Basi v Dhaliwal, 1992 CarswellBC 1259, [1992] WDFL 1255.

Corbiere v Canada (Minister of Northern and Indian Affairs), [1999] 2 SCR 203, 173 DLR (4th) 1.

Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835, 20 OR (3d) 816.

Delisle v Canada (Deputy Attorney General), [1999] 2 SCR 989, 176 DLR (4th) 513.

Eaton v Brant County Board of Education, [1997] 1 SCR 241, 1 OR (3d) 574.

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R v Kapp, 2008 SCC 41, [2008] 2 SCR 483.

R v Malmo-Levine; *R v Caine*, 2003 SCC 74, [2003] 3 SCR 571.

R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200.

R v Sharpe, 2001 SCC 2, [2001] 1 SCR 45.

R v Turpin, [1989] 1 SCR 1296, 69 CR (3d) 97.

Reference Re Same-Sex Marriage, 2004 SCC 79, [2004] 3 SCR 79.

RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199, 127 DLR (4th) 1.

SECONDARY MATERIALS

Lahey, Kathleen A. *The Impacts of Relationship Recognition on Lesbian Women in Canada: Still Separate and Only Somewhat "Equivalent"* (Ottawa: Status of women Canada, 2001).

INTERNATIONAL MATERIALS

Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13 (accession by Canada 10 December 1981).

Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (accession by Canada 13 December 1991).

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (accession by Canada 19 May 1976).

General Comment No 28: *Equality Rights Between Men and Women* (Article 3), UNHRC (2000).

PERRY ET AL v CANADA (ATTORNEY GENERAL)

Appellants Respondent

Court File No. 123456

HIGH COURT OF THE DOMINION OF CANADA

PROCEEDING COMMENCED AT RIVERVILLE

FACTUM OF THE RESPONDENT

Team #

Counsel for the Respondent