Docket: 2008-101(IT)G

BETWEEN:

WINSTON BLACKMORE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on January 23, 24, 25, 26, 30, 31,
February 1, 2, 6, 7, 8, 9, 10, 27, 28, 29, March 1, 2 and
May 2, 3, 4, 2012 at Vancouver, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	David R. Davies Natasha S. Reid
Counsel for the Respondent:	Lynn M. Burch David Everett Selena Sit Zachary Froese

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JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2000, 2001, 2002, 2003, 2004 and 2006 taxation years are dismissed, in accordance with the attached Reasons for Judgment.

The parties shall have sixty days from the date of my reasons to submit written submissions on costs, if they cannot otherwise reach an agreement on this matter.

Signed at Summerside, Prince Edward Island, this 21st day of August 2013.

"Diane Campbell"

Campbell J.

TABLE OF CONTENTS

Citation: 2013 TCC 264
Date: 20130821
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REASONS FOR JUDGMENT

Campbell J.

INTRODUCTION AND OVERVIEW

[1] All appeals that come before me in this Court have something in common: they all have their own unique issue or set of issues that need resolving. That is the reason they are before this Court. Each appeal will have its own novel history in finding its way to this Court. The difference, between these present appeals and other appeals, is that the Appellant, Winston Blackmore, and the community of Bountiful bring with them a lengthy history involving media attention from newspaper to television coverage.

[2] Although there have been many controversies and much media attention surrounding the Appellant, the community of Bountiful, and their practice of polygamy, those debates have no bearing on the ultimate decision I must make in respect to the tax status of the Appellant and his followers in Bountiful.

[3] These appeals address the question of who is liable to pay the tax assessed against the Appellant: is it the Appellant himself or the members of the Bountiful community? The answer to this question depends on the application of a relatively self-contained and obscure provision which, until these appeals, was unknown to

many tax practitioners. This is the first time that this Court, or any Canadian court, has considered section 143 of the *Income Tax Act* (the "*Act*").

[4] The outcome of these appeals is entirely dependent upon whether the Appellant and the community of Bountiful can bring themselves within section 143. Although the Appellant was audited and reassessed pursuant to subsection 15(1), paragraph 6(1)(*a*) and section 5 of the *Act* to add additional income of approximately $1.8 million, he objected to the reassessments on the basis that section 143 ought to apply. So how would section 143 apply to lessen or erase the Appellant's tax liability?

[5] Section 143 is located in Division F of Part I of the *Act*, which is titled "Special Rules Applicable in Certain Circumstances". It affords separate tax treatment to those communal religious organizations that can bring their community within the statutory definition of "congregation" contained in subsection 143(4). The term "congregation" is employed in the opening words of the provision:

> **143(1) Communal organizations.** Where a congregation, or one or more business agencies of the congregation, carries on one or more businesses for purposes that include supporting or sustaining the congregation's members or the members of any other congregation, the following rules apply:
>
> […]

"Business Agency" is also a defined term and, if it is a corporation that carries on business within the community on behalf of the members, the congregation must own the capital stock of the corporation throughout a calendar year. The Appellant's argument is that he meets all four tests of the definition of "congregation" and that the shares of J.R. Blackmore & Sons Ltd. (the "Company") held in the names of the Appellant, Kevin, Guy and Richard Blackmore, were beneficially owned on behalf of the members of the congregation.

[6] If the Appellant's position is correct, and section 143 applies, it will have far-reaching implications for not only the Appellant, but also the members of Bountiful. The provision will operate to deem the existence of an *inter vivos* trust which would be superimposed upon the community. This means that, for tax purposes, all of the assets and property of the congregation, or of any business agency of the congregation, are deemed to be the assets and property of the deemed trust. Consequently, any income from property or business activities of the congregation will be deemed to be the income of the deemed trust. Since business agencies of the congregation are deemed to have acted as agents of the deemed trust in all

congregational matters, their income from business activities will also be deemed to be income of the trust.

[7] Subsection 143(2) then permits a qualifying congregation to make an election to have its income allocated among the members of the congregation. The election, to make a deemed distribution of the income of the congregation among its members, means that the income will be taxed in the hands of its members. Of course, if the income were to be left in the deemed trust, it would be subject to tax at the highest marginal rate applicable to individual taxpayers but, where it can be allocated equally among community members, those individual taxpayers will be subject to their personal graduated tax rates and exemptions.

[8] If section 143 applies in these appeals, the Appellant's tax burden would be shifted to the members of Bountiful. The Company, in that instance, would be viewed as an agent of the community or an extension of the congregation, holding its assets, property and income for the benefit of the entire congregation and its members. Allocation of income across the qualifying membership in a community recognizes the lack of personal ownership of property and assets, which would be in accordance with the intent and purpose of section 143, and would eliminate any potential for double taxation that would occur with assessments pursuant to subsections 15(1) and 6(1) of the *Act*.

[9] For the Appellant's argument to be successful, the community of Bountiful must meet the exhaustive definition of "congregation" contained in subsection 143(4) of the *Act*. This Court must first establish the parameters of each of the four facets of the definition. Whether the community of Bountiful meets each test requires findings of fact as to how it operated in the years under appeal, as well as an examination of the history and doctrines of Mormonism, an area that this Court would ordinarily not be analyzing. In this respect, expert testimony was essential. As one would expect in debating matters of religious doctrine, some of the expert testimony was inconclusive, while not all experts agreed in respect to portions of the issues in question.

[10] This is an unusual tax case in this Court, not only in the facts, but also in the religious implications, the unique application of this provision and the potential tax treatment that applies to the community that qualifies as a "congregation."

THE APPELLANT'S PERSONAL INCOME TAX FILINGS AND THE REASSESSMENTS

[11] The Appellant reported total income in each of the years under appeal as follows:

Taxation Year	Description of Income	Amount Reported
2000	Employment income from J.R. Blackmore & Sons Ltd. Business income Total	$15,915 5,000 $20,915
2001	Employment income from J.R. Blackmore & Sons Ltd. Business income Total	$26,578 5,000 $31,578*
2002	Employment income from J.R. Blackmore & Sons Ltd. Interest Dividend income from J.R. Blackmore & Sons Ltd. Total	$30,424 66 14,000 $44,490
2003	Employment income from J.R. Blackmore & Sons Ltd. Employment income from Bountiful Elementary Total	$18,677.50 1,000 $19,677.50
2004	Employment income from J.R. Blackmore & Sons Ltd. Interest Total	$16,194 64 $16,258
2006	Employment income from Kootenay Preservers Ltd. Interest Total	$39,000 53 $39,053
* $31,578 is the amount of reported taxable income for the 2001 taxation year (para 39 of the Further Further Amended Notice of Appeal and admitted by the Respondent at para 1 of the Reply to the Further Further Amended Notice of Appeal). The Respondent, however, quoted this amount as $31,363 at para 32(h) of the Reply.		

[12] As a result of a Canada Revenue Agency ("CRA") employer compliance audit of the Company, the Appellant was reassessed and the following total amounts were added to the Appellant's income:

Summary of Reassessments					
	Subsection 15(1)		**Section 5**	**Paragraph 6(1)(*a*)**	
2000	$277,395	*			
2001	$527,751	*			
2002	$235,537	*	$25,468		
2003	$174,111	*	$40,953	$241,527	
Summary of Reassessments					
	Subsection 15(1)		**Section 5**	**Paragraph 6(1)(*a*)**	
2004	$153,681			$179,945	

2006	nil		nil	nil	Assessed as filed
Totals	$1,368,475		$66,421	$421,472	
* these amounts were assessed a gross negligence penalty under subsection 163(2) of the *Act* and section 34 of the B.C. *Income Tax Act*.					

[13] Gross negligence penalties, on the amounts assessed pursuant to subsection 15(1) of the *Act*, were also added, in respect to the 2000, 2001, 2002 and 2003 taxation years.

THE LEGISLATIVE HISTORY OF SECTION 143

[14] Section 143 of the *Act* was enacted in response to litigation by some Hutterite colonies and to the eventual Federal Court of Appeal decision in *Wipf v Canada*, [1975] FC 162 (FCA), respecting this litigation. Bill C-11 of the 30th Parliament, 3rd session, 26 Elizabeth II, 1977, repealed the then section 143, which dealt with steam and energy corporations, and replaced it with the current section that addresses "communal organizations". The new provision is applicable to 1977 and subsequent taxation years and taxed communities that could come within this provision by superimposing a deemed trust over the communities' activities and providing an option whereby a community could elect how income would be attributed to its members.

[15] In *Wipf v The Queen*, 73 DTC 5558 (FCTD), the litigation concerning the Hutterites arose when some of those colonies refused to be bound by an agreement that other Hutterite colonies had reached with the government of Canada respecting how such colonies would be taxed. After those colonies (all members of the Darius-Leut Hutterian communities), that were in disagreement, challenged their assessments, the Tax Review Board, in 1972, affirmed the assessments issued by the Minister of National Revenue (the "Minister") in regard to their earned income. That decision was appealed to the Federal Court – Trial Division in 1973. The Federal Court held that the total profits from a colony's business activities should be apportioned in equal shares among its members, notwithstanding that they had assigned or deposited their share with the colony's leadership as its trustee or their corporation. The Court concluded that the members earned income through the colony's farming activities, despite evidence adduced that no colony members had any income, property of any type or money from government sources. In reaching its

conclusion, the Federal Court – Trial Division referred to numerous articles contained in the Constitution of the colony's incorporation provisions.

[16] The Appellants, at the Federal Court – Trial Division in *Wipf*, at paragraph 16, argued that "… the individual members of each colony because of their renunciation of private property and the right to compensation for their labours had no earnings, and, therefore, no taxable income," in contrast to other Hutterite colonies that had reached an agreement with government on how they would be taxed.

[17] The Federal Trial Court's decision was appealed and reversed by the Federal Court of Appeal in favour of the Hutterite plaintiffs. It was argued that, since any distribution of profits was on a needs basis, not a specified percentage, and not on a *per capita* basis, members earned no income. The Court held that neither the colony's farming activities, nor the profits, belonged to the individual members but were attributable to the trustee or the corporation of each colony, as the case may be. Thurlow J.A., at paragraph 7, was of the opinion that the profits of the business operations of a community were not the property of any particular member at any point in their relationship with their community. Ryan J.A. and Smith D.J.A. were of the view that the charter of the incorporated communities and the memorandum of the unincorporated communities governed the various support benefits of the members that could be considered as income in respect of services rendered (paras 19-20). The Court ordered the Minister to reassess on the basis that the members' income was either the value of the subsistence they received from the trustees of the communities or that the members had no taxable income. Unfortunately, the practicalities of determining the value to be assigned to such benefits were not addressed.

[18] On appeal to the Supreme Court of Canada, the government's appeal was dismissed from the bench in two lines delivered by Chief Justice Laskin: "We do not need to hear you Mr. Matheson. We agree with the judgment of the Federal Court of Appeal and this appeal is, accordingly, dismissed with costs." ([1976] SCJ No. 125).

[19] As a result of this line of cases and the method of property ownership utilized by Hutterites, Parliament introduced the new section 143 in 1977 to address the issue of taxation of communal religious organizations. Support for this can be found in the debates and proceedings in both the House of Commons and the Senate. While the House of Commons Committee of the Whole and the Standing Committee on Finance, Trade and Economic Affairs was silent on Bill C-11's treatment of the Hutterites, the Senate Standing Committee on Banking, Trade and Commerce heard

evidence which directly addressed the treatment of Hutterites (30th Parliament, 3rd session, No. 2 (November 9, 1977)).

[20] Additional evidence, demonstrating that this provision was enacted to address the special circumstances of the Hutterites, can be found in the Senate Committee's address from counsel for the Lehrerleut Hutterian Brethren on the Hutterites' way of life (30th Parliament, 3rd session, No. 9 (November 30, 1977)). It is interesting to note that the opinion expressed by counsel, as well as the Advisor to the Committee, was that the new legislation was crafted to target only the Hutterites, although the wording of the provision might also allow Amish to benefit in certain circumstances. Further evidence, that it was drafted to address taxation of the Hutterite communities, can be found in statements of the then Minister of Finance, The Honourable Jean Chrétien, in addressing questions put to him, that Hutterite communities were required to be on time in filing elections and paying taxes under the new section 143 if they wished to benefit from its income allocation scheme (30th Parliament, 3rd session, No. 12 (November 30, 1977)).

[21] There have been several amendments to section 143 of the *Act* since its enactment. In 2000, the definition of "congregation" was modified and structured (c.19, subsection 41) to incorporate all characteristics ascribed to the term "congregation" to the definition contained in subsection 143(4). Previously, that part of the four-pronged test presently referred to as "(*b*) that adheres to the practices and beliefs of, and operates according to the principles of, the religious organization of which it is a constituent part," was originally the sole characteristic of the term "congregation." The 2000 amendment placed it as the second of the present four elements to the definition of "congregation" in subsection 143(4). The other amendments made since 1994 do not affect the application of the section as it applies to the present appeals.

PRELIMINARY AND PRIMARY ISSUES

[22] The primary issue is whether the community of Bountiful meets the definition of "congregation" pursuant to subsection 143(4) of the *Act*, namely, whether the members of the community:

(a) live and work together;

(b) adhere to the practices and beliefs of and operate according to the principles of the religious organization of which it is a constituent part;

(c) do not permit any of the members to own any property in their own right; and

(d) require the members to devote their working lives to the activities of the congregation.

[23] The final issue is whether the Appellant is liable for gross negligence penalties pursuant to subsection 163(2) of the *Act* in respect to the 2000 through 2003 taxation years.

[24] There are two preliminary matters that must be addressed before I begin an analysis of section 143 of the *Act* and, in particular, a determination of the meaning of "congregation" pursuant to subsection 143(4). First, how the statutory interpretive principles are to be applied to section 143 and second, the scope of judicial notice to be accorded the jurisprudence and textbooks relating to the Hutterites, comprise the two preliminary issues.

A. Statutory Interpretation

[25] Counsel for the Appellant argued for a liberal interpretation of section 143. Counsel for the Respondent, in contrast, argued that a more restrictive reading of the provision should be applied by this Court because of its legislative history and the Parliamentary intention in enacting section 143 in light of the *Wipf* decisions concerning Hutterite communities.

[26] Counsel for the Appellant correctly structured his submissions by adopting the current approach taken by the Supreme Court of Canada decision in *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, [2005] 2 SCR 601, and initially set out in *Markevich v Canada*, 2003 SCC 9, [2003] 1 SCR 94. Generally, that approach is a combination of a textual, contextual and purposive analysis of a provision, with the words of the provision read in their entire context and in their grammatical and ordinary meaning harmoniously with the scheme and object of the *Act* as a whole and the intention of Parliament (E.A. Driedger, *Construction of Statutes*, 2nd ed. 1983 and *Markevich*, at p. 87).

[27] However, if the "… words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. …"

(*Canada Trustco*, para 10), allowing taxpayers to rely on the clear meaning of a provision where applicable.

[28] The Supreme Court of Canada in *Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 SCR 715, elaborated upon these interpretive principles and stated, at paragraph 23:

> The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622. Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.

[29] In other words, if the text of a provision is clear and precise, a textual interpretation governs and that is the end of the matter. If it is not clear and precise, in that more than one reasonable interpretation could emerge, then one must resort to a unified approach encompassing context and purpose in order to ascertain the meaning.

[30] The definition of “congregation” involves a four-pronged test, subject to the requirement that all of the four elements of the test must be met for section 143 to be applicable. The word “congregation” is immediately followed by the word “means” as opposed to the word “includes,” indicating that Parliament intended the definition to be an exhaustive one. Counsel for the Respondent rightly pointed out that Parliament has ascribed a definition to the term “congregation” in subsection 143(4) which is distinct, not only from its ordinary meaning but also, from the undefined meaning given to it elsewhere in the *Act*. Therefore, the definition in subsection 143(4) is clearly specific to that provision.

[31] Counsel for the Respondent submitted that the definition of “congregation” does not permit more than one reasonable interpretation and that, even if there is ambiguity, explicit or latent, the Hutterite colonies should be considered the “gold standard” against which any other “congregation” must be compared. Therefore, contextual and purposive analysis would not reveal any ambiguities.

[32] I disagree with this submission. Although I do agree that the enactment of section 143 is directly and historically related to Hutterite colonies and the *Wipf* decisions, concerning those colonies, nowhere in the provision does the word "Hutterite" appear. If Parliament had intended that group to be the "gold standard," it would have said so. While the Hutterites may be considered as an example of a group falling within this provision, the text of section 143 of the *Act* potentially applies to any religious group that can qualify as a "congregation."

[33] The very wording of this provision contemplates its application to other communal groups that can bring themselves within the ambit of the four-pronged test. The words used in each of these four elements are neither clear nor precise. In fact, this was evident in the submissions from both the Appellant and Respondent respecting the first element of the test: do the members live and work together. If the preceding four words (which I have emphasized) are clear and self-explanatory, it should have been an easy task for both parties, or one of them, to commence submissions with a precise definition and then explain how the facts supported their position. Neither party did that. Where wording is unclear, it will be essential to look to context and purpose for guidance. None of the elements of the definition of "congregation" are clear and unequivocal and it will be imperative, therefore, that when I discuss each of the elements of this test, I apply a textual, contextual and purposive approach in my analysis. In this vein, I must consider what I can use in establishing 'context' in these appeals, particularly as it relates to legislative record and Parliamentary history connected to section 143 and the line of Hutterite cases that led to the enactment.

[34] Prior to the 1990's, the Courts have generally hesitated in using Parliamentary history, such as Hansard, advisory reports, or debates. Since then, however, numerous Supreme Court of Canada decisions have cited Parliamentary history in its reasons. Despite this, the Court has been cautionary in its use of such material:

> … Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. …
>
> (*R. v Morgentaler*, [1993] 3 SCR 463, at p. 484)

[35] Pierre-André Côté in *The Interpretation of Legislation in Canada*, (4th ed., Carswell, 2011), at pp. 465-466, summarizes this view as follows:

> Approaching the question from the perspective of weight rather than admissibility, a choice unanimously approved by doctrine, side-steps the often sterile

> debate on admissibility and enables the courts to access information that allows them to render more enlightened decisions, while preserving their right to determine the weight to be given to such information. While the door is open, the judge should prudently hold on to the doorknob.

In addition, according to Pierre-André Côté, at page 579, judicial interpretation can be considered when dealing with legislative context:

> **Paragraph 1: Judicial interpretation as context**
>
> The courts assume the legislature to have been aware of judicial decisions made prior to the statute's enactment. Such decisions can thus be deemed part of the context of the legislation, and therefore relevant to its interpretation.
>
> Imagine an area which has never been the subject of legislation, but which has been dealt with in one or more court decisions. If the legislature subsequently uses a term to which the courts have given a precise meaning in a particular context, it is deemed to have been aware of the meaning and to have had no intention of changing it:
>
> > When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense.
> > (FN: *Per* Lord Loreburn, *North British Railway v. Budhill Coal & Sandstone*, [1910] A.C. 116, 127, a passage cited by Pigeon J. in *Howarth v. National Parole Board*, [1976] 1 S.C.R. 453, 473.)
>
> More generally, judicial decisions can explain the purpose of legislative intervention and, as such, constitute an important element of the context. A legislative modification can be considered to be an expression of the intent to set aside a judicial interpretation, to consecrate it legislatively, or to legislate as to its consequences. … (Certain footnotes omitted.)

[36] Consequently, it would be appropriate to consider the judicial decisions in respect to those Hutterite cases as they pertain to the enactment of section 143 and as part of the legislative context. This leads me to the second preliminary matter respecting the parameters of judicial notice and to what extent this Court can take notice of certain findings of fact from those decisions.

B. Judicial Notice

[37] Judicial notice is an important issue because its application has the potential of sidestepping the usual requirements of proof in a court of law, with the result that the rules of admissibility may be lowered. If a fact is accorded judicial notice, then it will not be subjected to the usual burden of proof or, ultimately, to cross-examination.

[38] "Judicial notice" has been defined as follows:

> **19.13** Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party. The practice of taking judicial notice of facts is justified. It expedites the process of the courts, creates uniformity in decision-making and keeps the courts receptive to societal change. Furthermore, the tacit judicial notice that surely occurs in every hearing is indispensable to the normal reasoning process. (Emphasis added.)
>
> (Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, Butterworths, 3rd ed.)

[39] One of the two criteria cited in the foregoing passage must be met in order for a fact to be given judicial notice. These are commonly referred to as the "Morgan criteria" (E.M. Morgan in "Judicial Notice" (1943-1944), 57 *Harv. L. Rev.* 269). It is a narrow approach to judicial notice but one that has been affirmed by the Supreme Court of Canada in two decisions: *R v Find*, 2001 SCC 32, [2001] 1 SCR 863 and *R v Spence*, 2005 SCC 71, [2005] 3 SCR 458.

[40] Binnie J., on behalf of the Court in *Spence*, at paragraph 60, stated that "… the permissible scope of judicial notice should vary according to the nature of the issue under consideration" (quoting Professor Kenneth Culp Davis, *Administrative Law Treatise* (2nd ed. 1980) vol. 3, at p. 139). He elaborated on this principle at paras 61-63:

> 61 To put it another way, the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria. Thus in *Find*, the Court's consideration of alleged juror bias arising out of the repellant nature of the offences against the accused did not relate to the issue of guilt or innocence, and was not "adjudicative" fact in that sense, but nevertheless the Court insisted on compliance with the Morgan criteria because of the centrality of the issue, which was hotly disputed, to the disposition of the appeal. While some learned commentators seek to limit the Morgan criteria to adjudicative fact (see, e.g., Paciocco and Stuesser, at p. 286; McCormick, at p. 316), I believe the Court's decision in *Find* takes a firmer line. I believe a review of our jurisprudence suggests that the Court will start with the Morgan criteria, whatever may be the type of "fact" that is sought to be judicially noticed. The Morgan criteria represent the gold

> standard and, if satisfied, the "fact" will be judicially noticed, and that is the end of the matter.
>
> 62 If the Morgan criteria are *not* satisfied, and the fact is "adjudicative" in nature, the fact will *not* be judicially recognized, and that too is the end of the matter.
>
> 63 It is when dealing with social facts and legislative facts that the Morgan criteria, while relevant, are not necessarily conclusive. There are levels of notoriety and indisputability. Some legislative "facts" are necessarily laced with supposition, prediction, presumption, perception and wishful thinking. Outside the realm of adjudicative fact, the limits of judicial notice are inevitably somewhat elastic. Still, the Morgan criteria will have great weight when the legislative fact or social fact approaches the dispositive issue. …

[41] In these passages from *Spence*, the Supreme Court of Canada drew a distinction between three kinds of facts:

(a) adjudicative facts, that is, facts relating to the matter being litigated;

(b) legislative facts, that is, those facts relating to legislative or judicial policy; and

(c) social facts, that is, those facts relating to the fact-finding process that constitute the evidence that is defined as social science research used to construct the contextual background in resolution of the issue.

[42] How the courts apply the Morgan criteria to these three different categories of fact will ultimately depend on how close the facts are to the centre of the issue to be resolved: "… the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria." (*Spence*, at para 61). As noted by the Court, at paragraph 63 of *Spence*, when dealing with legislative and social facts, the application of the Morgan criteria will not be necessarily conclusive. A court can be more elastic and less rigid when drawing upon social and legislative facts. In summary, when considering such facts, a court must keep in mind several key questions:

(a) how close is a "fact" to the dispositive issue;

(b) would a reasonable person accept such a "fact" for the particular purpose for which it is to be used; and

(c) what is the potential reliability of the "fact," which increases relative to the closeness of that fact to the disposition of the matter.

[43] Respondent Counsel requested that I take judicial notice of facts from Hutterite cases that led to the enactment of section 143, as well as the recent British Columbia reference case, *Reference re: Criminal Code of Canada (B.C.)*, 2011 BCSC 1588, [2011] BCJ No. 2211, commonly referred to as the "B.C. Polygamy Reference Case". The Appellant agreed with the Respondent's Submissions regarding the doctrine of judicial notice for gleaning facts from other court decisions (Transcript, pp. 3340-3342). In addition, the Respondent sought to rely upon excerpts from two books: *The Hutterites in North America*, (Rod A. Janzen and Max Stanton, Johns Hopkins University Press, Baltimore, 2010) and *The Secret Lives of Saints: Child Brides and Lost Boys in Canada's Polygamous Mormon Sect* (Daphne Bramham, Random House Canada, Toronto, 2008). The Appellant submits that any facts from the excerpts of these books were not introduced as evidence in the present appeals and that, since the excerpts do not meet the strict Morgan criteria, they cannot be introduced in oral submissions to bolster the Respondent's position. In particular, Appellant Counsel objected to this Court placing reliance on the text, *The Secret Lives of Saints*, whose author had been present throughout a majority of the court proceedings in these appeals as a member of the media.

[44] Appellant Counsel referred this Court to the Prince Edward Island Superior Court decision in *Holland v Prince Edward Island Regional Administrative Unit No. 4 School Board*, [1986] PEIJ No. 41, with respect to comments made in that decision on the admissibility and evidentiary value of textbook evidence and scientific treatises. At page 35 of that decision, the Court stated:

> … While doubtless deserving of great weight among the practitioners of the discipline which concerns itself with such matters, the same reliance cannot be placed upon them for probative purposes before the Court.

Appellant Counsel pointed out that the P.E.I. reference decision relied upon a 1914 decision, *Rex v Anderson* (1914), 5 WWR 1052 (Alta SC). At page 36, reliance was placed upon the following quote from the reasons in *Anderson*:

> … The opinion of an eminent author may be, and in many cases is, as a matter of fact entitled to more weight than that of the sworn witness, but the fact is that if his opinion is put in in (*sic*) the form of a treatise <u>there is no opportunity of questioning and ascertaining whether any expression might be subject to any qualification respecting a particular case</u>. A witness would not be qualified as an expert if his opinions were gained wholly from the opinions of others, …

(Emphasis added)

[45] I turn now to the application of these principles to the Hutterite cases, including the more recent B.C. Polygamy Reference Case, the Hutterite textbooks and finally the text, *The Secret Lives of Saints*.

[46] The Hutterite cases and, in particular, those referred to as the *Wipf* decisions, are part of the contextual background relating to the enactment of section 143. Because the four elements of the test in the definition of "congregation" are anything but clear and unambiguous, in interpreting and applying this provision, reference to the legislative context is imperative. Respondent Counsel referred the Court to Parliamentary debates, in both the House of Commons and the Senate, in which direct references were made to Hutterite communities in discussions on the enactment of section 143 (Respondent's Written Submissions, p. 84, paras 414-416). Appellant Counsel has also acknowledged that the section was drafted in response to the litigation by the Hutterite communities (Appellant's Written Submissions, para 43) and agreed that this Court could take judicial notice of findings of fact from these decisions.

[47] The *Wipf* decisions may be helpful in characterizing the type of communities that Parliament had in mind that could qualify as "congregations" pursuant to section 143. Although I agree with Appellant Counsel's submissions that formality of documentation in respect to congregations is not an essential requirement of this section, it is interesting to note that the clauses of the Memorandum of Association referred to in the *Wipf* decisions are almost identical to those cited in a United States court case dealing with the taxation of Hutterite colonies that were part of an incorporated church in South Dakota (*Hofer v United States*, 64 Ct. Cl. 672 (1928)). This is an indicator of the notoriousness of certain facts of Hutterite lifestyle, such as the practice of communal living, their attitude toward property ownership and the level of devotion that is expected of members (*Wipf*, at para 10).

[48] I am more cautious in my approach to fully endorsing an application of judicial notice to the B.C. Polygamy Reference Case. Respondent Counsel pointed out that the reasons of Bauman J. in that decision contain a history of Bountiful (Respondent's Written Submissions, p. 93, para 449). It was also submitted that, when a fact forms part of the "contextual milieu", the strict test in *Spence* need not be applied (Respondent's Written Submissions, p. 141, para 630). Generally, this Court may take judicial notice of many facts relating to Bountiful, especially if they are of a more general nature. However, there are obvious risks in taking notice of facts that

may have been contested during the hearing in another case. Although I am dealing with the same community as Bauman J. dealt with in the B.C. Polygamy Reference Case, there are entirely different questions under consideration in the appeals before me and the resulting fact-finding process will necessarily be different in that it will take into account the particular facts as they relate to the particular issues before me. In addition, there may be ample testimony from witnesses that were before me in respect to particular contested matters, without the necessity of resorting to evidence given by witnesses in the B.C. Polygamy Reference Case. These were two separate cases, with two separate judicial hearings and their own distinct issues. Consequently, I conclude that this Court may take judicial notice of the B.C. Polygamy Reference Case for general background facts, if necessary, but only if those facts are non-controversial. An example of this would be the history of Bountiful.

[49] However, where the Appellant raised concerns over facts that could be considered controversial, I do not intend, nor do I think it is necessary, to rely on facts from the B.C. Polygamy Reference Case. For example, Respondent Counsel relied on findings of fact from that case which were, according to the Respondent, irreconcilable with the notion of a community whose members lived and worked together. A polygamous community like Bountiful could never qualify under section 143, the Respondent argued, because it could never sustain itself as a community. In this respect, the Respondent referenced findings of fact from the B.C. Polygamy Reference Case respecting "trafficking of girls" and the "lost boys" phenomenon. Appellant Counsel questioned the methods employed in the B.C. Polygamy Reference Case to arrive at the conclusions of trafficking of girls across the border and also pointed out that no evidence was presented to this Court concerning the "lost boys" phenomenon. Whether the issues are relevant or, as the Appellant contends, irrelevant, to whether the community lived and worked together, I do not intend to place reliance on such findings of fact from the B.C. Polygamy Reference Case except where they are clearly general in nature and non-controversial.

[50] The third source which Respondent Counsel asked this Court to consider was the Hutterite textbook, *The Hutterites in North America*, particularly where it describes how the Hutterite communities operated and then, as the "gold standard" community, how that contrasts with the community of Bountiful. Appellant Counsel argued that the facts presented in this textbook were untested and that they did not meet the Morgan criteria for judicial notice. Notwithstanding the Appellant's argument opposing the Respondent's use of excerpts from this text, in its own submissions, Appellant Counsel referred to excerpts from *Hutterite Society* (Hostetler, John A., Johns Hopkins University Press, 1974, 1997, p. 198), a textbook

which depicts Hutterite lifestyle and their attitude toward property (Appellant's Written Submissions, para 43, FN 19 and para 104, FN 44).

[51] In deciding whether to strictly apply the Morgan criteria to those textbook excerpts, as Appellant Counsel suggested, it must be remembered that the issues before me are in respect to the community of Bountiful and not a Hutterite community. Therefore, since these "social facts" are not dispositive of the issues, in my view the criteria need not be applied strictly. However, both Appellant and Respondent Counsel agreed that section 143 was enacted in response to the *Wipf* decisions concerning the Hutterite communities. Consequently, the bar to having the excerpts be judicially noticed remains higher than for other social facts that could be judicially noticed. According to Binnie J., "… the Morgan criteria will have great weight when the legislative fact or social fact approaches the dispositive issue." (*Spence*, at para 63). Clearly, the manner in which Hutterites conduct their lives is not so notorious or generally accepted that it would be readily verifiable.

[52] In fact, this is consistent with my ruling on the limits I placed on the expert testimony of Dr. Cragun as a result of his *voire dire*. Even with extensive reading on the Hutterite communities, visiting a Hutterian colony and meeting with Dr. John Friesen, an expert on Hutterites, Dr. Cragun admitted to only a "working knowledge" of Hutterites (Transcript, Examination in Chief of Dr. Cragun, p. 1624). As such, the manner in which the Hutterites conduct themselves could not be considered as "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy."

[53] I do not intend to take judicial notice of excerpts from this textbook because it contains facts too close to the dispositive issues and it does not meet the test set out by the Supreme Court of Canada in *Spence*. In addition, reference to this text may not be necessary because resort may be had in respect to the general and non-controversial facts of Hutterite life from the jurisprudence referred to, and to the factual information contained in the Articles of Incorporation of the Hutterite Church, as discussed in the *Wipf* decisions.

[54] Although Bauman J. referenced Daphne Bramham's text, *The Secret Lives of Saints*, in the B.C. Polygamy Reference Case, which adds weight to the fact that it could be judicially noticed, I have concluded that the social facts from this book could be central to the issues in the appeals before me. Therefore, the Morgan criteria should be applied strictly and neither of the tests is met. For example, this Court should rely on facts presented in evidence respecting the physical location of the

community members in determining whether they live and work together rather than "facts" from texts submitted only during oral submissions by Counsel.

C. Summary of Preliminary Issues

[55] The approach to be taken in an analysis of the issues under section 143 of the *Act* requires a textual, contextual and purposive interpretation. While the Hutterites are not the "gold standard" for this provision, they are an example of a group that Parliament had in mind when the provision was enacted. Therefore, it will be appropriate, where necessary, to consider the judicial decisions in the *Wipf* jurisprudence as those pertain to the enactment of section 143, together with legislative background and content. The B.C. Polygamy Reference Case will also be used where those reasons provide potentially useful background facts. Such reliance can only occur where the facts are general in nature and non-controversial.

[56] This Court cannot take judicial notice of excerpts from either of the texts on Hutterites or Bountiful because they contain facts too close to the dispositive issues in these appeals, necessitating that the Morgan criteria be strictly applied with the result that neither test is met.

THE EVIDENCE

[57] Unlike the majority of tax cases, the primary issues do not involve questions of tax at all but, instead, focus on religious doctrines, principles, beliefs, and practices, particularly as they relate to the broad tradition of Mormonism, episcopal polity and apostolic succession. Many terms, such as "The Priesthood Work", "United Effort Plan" or "United Effort Plan Trust", "Law of Consecration" and "Tithing" were either completely new to me or I had no working knowledge of them. It was essential that the testimony of the experts be capable of providing assistance to this Court in a complex and specialized area in order to properly understand the evidence being presented and the issues to be decided.

A. The Witnesses

[58] Nine witnesses, including three experts, testified over a four-week period. The lay witnesses included Winston Blackmore, Estanislao "Stan" Oziewicz, Journalist with the *Globe and Mail*, and individuals who either resided or had resided in Bountiful. All three experts were subjected to extensive one-to-two day *voir dires*. I

restricted all of the experts, to a greater or lesser degree, and set well-defined parameters to be followed in providing their evidence. (The oral reasons which I delivered following each *voire dire* will be published and accompany the within reasons to assist in understanding how and why I confined their testimony, particularly as their evidence related to Bountiful.)

[59] I limited the Appellant's expert, Dr. William John Walsh, to testimony in respect to the broader and underlying doctrines, history and principles of the Mormon faith. He was not permitted to give evidence concerning the community of Bountiful. The Respondent's first expert, Dr. Ryan Cragun, specializes in the sociology of religion, with a particular emphasis on Mormonism, including Mormon fundamentalism. I accepted Dr. Cragun's expert testimony as it related to his specialities: the sociology of religion, Mormonism, its history, doctrine, beliefs, practices and principles and, specifically, to his expertise in the FLDS and LDS branches of the Mormon faith. He was not permitted to give expert evidence on Hutterites or their faith, nor on the community of Bountiful. The Respondent's second expert witness, Dr. Randall Balmer, was permitted to give expert testimony as it related to his professed speciality of American religious history, with specialised knowledge in polity, as it related to Mormon religious organizations, traditions, history, beliefs and principles.

B. The Bountiful Site: Layout and History

[60] The community of Bountiful is made up of several physical localities, with the main site being in Lister, British Columbia. Bountiful does not exist on a map and it is really the colloquial name given primarily to Lister. It is located in the south-eastern part of British Columbia, adjacent to the United States border. The Bountiful site was settled in the mid-1940s by the Appellant's father's nephew, Harold Blackmore. Eventually, the Appellant's father, Raymond Blackmore, became leader of the community.

[61] According to the Appellant's evidence, there were also a number of other properties, where members resided, in Yahk, Canyon, Creston and Cranbrook. Corporate worksites in British Columbia and Alberta, although not physically located within the Bountiful site, were also considered by the Appellant to be part of the community of Bountiful.

[62] In 2000, Lister was comprised of several legal lots plus a cemetery (Transcript, Examination in Chief of Winston Blackmore, p. 70). Three lots were registered in the name of the Bountiful Elementary/Secondary School Society, three lots (including

the cemetery lot, the Appellant's parents' 210 acres and Harold Blackmore's original 80 acre parcel) in the name of the United Effort Plan Trust (the "UEP Trust"), one in Guy Blackmore's name and one lot in the name of the Appellant and one of his sisters (Transcript, Examination in Chief of Winston Blackmore, pp. 70-71 and 80-84). The Appellant described Bountiful proper as containing approximately 750 to 800 acres in total. There are about 55 houses located within the main site, about 50 of those on UEP Trust lands as of the year 2000 (Transcript, Examination in Chief of Winston Blackmore, pp. 88 and 144). Numerous other parcels of property, however, were owned by the Company, the Appellant or other members of the community in such areas as Yahk, Canyon and Kitchener, all within 50 kilometres of each other. The Appellant testified that zoning and density population regulations prompted growth in these other areas.

[63] The community owned 5 or 6 homes on a 45 acre parcel in Canyon, located adjacent to Lister. Although originally in the name of Dalmon Oler, it was transferred to the Bountiful Elementary/Secondary School Society to avoid bank foreclosure against Mr. Oler and his business.

[64] Property was initially purchased in Yahk because the Company had started logging operations in that area in the 1980s. Eventually, two adjacent parcels, 15 kilometres from Lister, were purchased for residential use by Guy and Kevin Blackmore using Company funds.

[65] Property in Kitchener, used initially by the Company as an equipment repair centre, was used temporarily by Kevin Blackmore for a residence.

[66] In addition, the Company owned or leased property, throughout north-eastern British Columbia and into Alberta, for work crews working on the corporate logging operations, as well as their families who also resided there periodically.

[67] At various times, the Appellant owned properties in Lister, Creston, Ryan Station, Kitchener and Trail, together with properties in Alberta located at Crowsnest Pass, Calgary and Coleman. A house was located on each of the properties in Calgary and Coleman. Some of these properties were subject to mortgages. Some were held jointly with other community members and, through the years, some have been transferred or sold.

[68] The property in Cranbrook was acquired in July, 1990 and has been encumbered by two mortgages. In 2005, this property was transferred to the Appellant's first and only wife recognized by law, Jane Blackmore, as part of a

division and equalization of assets pursuant to the terms of a separation and divorce settlement between them. It is interesting to note that their separation agreement contained no reference to any interest that this property may have been subjected to in respect to trust considerations in respect to the United Effort Plan ("UEP"), the UEP Trust, J.R. Blackmore Trust or Blackmore Trust. In fact, none of the properties, which were either mortgaged, transferred or sold during the years under appeal, contained any disclosure respecting the existence of any trust arrangements on behalf of the community members in regard to any community entity such as the UEP or UEP Trust. This was also true for lands which the Company owned.

C. Religion: Mormonism, the LDS and the FLDS Churches

[69] The Appellant was excommunicated from the mainstream Church (LDS) because he and his followers continued polygamy - the practice of plural marriages - which was relinquished by the mainstream Church in 1890.

[70] The Appellant became Bishop of the community in 1984 and named the community 'Bountiful'. Although his father had also been excommunicated, the Appellant was baptized as a member of the mainstream Church because his father had continued to follow the original teachings of Joseph Smith Jr., the founding prophet. Smith had his "first vision" in New York in 1820 and, in 1823, Mormons believe that he had a further revelation informing him of the existence of "golden plates". In 1827, Smith was permitted to dig up these tablets and, eventually, they were translated into the *Book of Mormon*, which was first published in 1830. The Church of Christ was organized around this event and eventually, in 1838, the name was changed to the Church of Jesus Christ of Latter-day Saints (LDS). In 1832, he was confirmed in his role within the Church as "President of the Office of the High Priesthood". While imprisoned, Smith was murdered by a mob that stormed the jail in Illinois in 1844. After his death, it was unclear which of several potential successors would succeed as next head of the Church. The majority followed Brigham Young as the next head of the LDS. However, a number of groups claimed prophetic authority after Smith's death, including Strangites, who followed James Strang, the Church of Christ and the Reorganized Church of Jesus Christ of Latter Day Saints, known today as the Community of Christ, whose founders included Smith's widow and her son.

[71] The only individual that can receive revelations in respect of the Church is its President (Dr. Balmer's Expert Report, paras 4-8).

[72] As Dr. Balmer's Expert Report notes, at paragraph 9, "The investment of revelatory authority in the office of president of the Church of Jesus Christ of Latter-day Saints is significant…". He notes, at paragraphs 10 to 12, that most Christian religious groups are organized into one of three forms of 'polity' or organization:

(a) congregational polity, where authority is vested in the local congregation;

(b) presbyterian polity, which is a form of representative government where local congregations elect representatives; and

(c) episcopal polity, where bishops govern.

[73] At paragraph 13, Dr. Balmer explains episcopal authority, within which the LDS falls, in the following manner:

> 13. *Episcopal* polity is government by bishops, a principle that rests on the notion of apostolic succession. In the Roman Catholic Church, for example, the pope derives his authority from centuries of apostolic succession dating to St. Peter, the first bishop of Rome and one of Jesus' apostles. In episcopal polity, authority devolves from one bishop to another by virtue of apostolic succession. …

[74] Mormons are thus organized as episcopal and governed by bishops and their authority must derive from an unbroken line of apostolic succession tracing itself back to Joseph Smith, the founding prophet.

[75] Tension with non-Mormons existed due to their insularity and their practice of plural marriages. After Joseph Smith was killed, and facing outside pressure and mounting legal issues over the practice of polygamy, a Manifesto was proclaimed in 1890 which outlawed plural marriages.

[76] In Salt Lake City, Utah, at a general conference on October 6, 1890, Wilford Woodruff, the then fourth President of and prophet of the LDS Church, issued the Woodruff Manifesto, which prohibited the practice of polygamy or plural marriage within the LDS Church. A second Manifesto, in 1904, stipulated that those persisting in the practice would be excommunicated. Those members that continued the practice of polygamy, subsequent to these Manifestos, broke away from the LDS Church in 1935 over the LDS Church's disavowal of this practice. Under the leadership of Leroy S. Johnson, they eventually became known as "The Work" or "The Priesthood Work" and eventually, as it is now referred to, the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS). The FLDS Church has

approximately 10,000 members. They congregated primarily in Hilldale, Utah and Colorado City, Arizona, as well as Bountiful, British Columbia. There are other groups as well within the Mormon fundamentalists, such as the Apostolic United Brethren (the Allred Group) and the Latter Day Church of Christ (the Kingston Group). Independent groups of Mormon fundamentalists exist as well, which are not associated with any organized group.

[77] According to Dr. Balmer, the FLDS Church is without apostolic legitimacy because the split from the mainstream LDS Church severed the line of succession dating back to Joseph Smith, the founding prophet. The Appellant, however, in cross-examination, testified that he does not believe that his line of authority is corrupted in any way because of the split or that other groups' claims to a line of authority is any more valid than his claim. He also testified that he remained a member of the Church of Jesus Christ of Latter-Day Saints, as it was founded by Joseph Smith Jr., but not a member of the LDS Church (Transcript, Cross-examination of Winston Blackmore, pp. 488 and 502-503).

[78] In 1991, under its then President, Rulon Jeffs, the FLDS Church was incorporated. Rulon Jeffs was President of the Church until 2002 and, during that period, the Appellant reported to him as his "priesthood head." On May 29, 2002, the Appellant, who had been a Trustee of the UEP Trust, was removed as a Trustee and, on June 2, 2002, he was also removed as Bishop of Bountiful. The Appellant stated that he believed Rulon Jeffs was being manipulated during this time by his son, Warren Jeffs, although it was Warren Jeffs who actually excommunicated the Appellant in 2003.

[79] On succeeding his father as President of the FLDS Church, Warren Jeffs appointed Jim Oler as Bishop of Bountiful. The Appellant was officially excommunicated in 2003 and declared apostate ("someone … who abandoned the foundation principles of the Mormon faith." - Transcript, Cross-examination of Winston Blackmore, p. 502) by the FLDS Church for refusing to acknowledge Warren Jeffs as President and prophet of the FLDS Church.

D. Community Composition, Beliefs and Practices

[80] In 2002, Bountiful split into 2 groups, each consisting of approximately 450 individuals. One group followed the teachings of Warren Jeffs, based out of Utah. That group followed James Oler as Bishop and head of Bountiful. The remaining group followed the Appellant, who had installed Duane Palmer as the community's Bishop after the split. This split pitted family members against one another and, as I

understood from the evidence of the Appellant and other witnesses, that rift still exists today, with one group not associating or speaking with the other.

[81] Prior to the split in 2002, the Appellant had approximately 20 plural wives. He testified that 8 or 9 of these wives left him and the community at the time of the split. The Appellant's plural or "celestial" wives, together with his approximately 67 children (the Appellant was unsure of the total number – Transcript, Cross-examination of Winston Blackmore, p. 324), lived in a cluster of homes consisting of 7 or 8 buildings within Bountiful. One of those buildings contained a laundry, apartment, large industrial kitchen and dining area capable of seating 175 to 200 people (Transcript, Examination in Chief of Winston Blackmore, p. 211). The Appellant stated that this kitchen was open to the members of Bountiful for their use. Another building consisted of a 6-bedroom residence that originally belonged to the Appellant's father. However, the Appellant did not reside with any of his plural wives and families in the years under appeal. Instead, he resided, along with his mother, in a basement apartment unit within a duplex in Bountiful. The upstairs apartment was occupied by one of his plural wives.

[82] Many of the males in Bountiful, as well as a few of the women, worked for the Company. Wages were paid by determining the needs and basic necessities of particular groups of people within the community.

[83] According to the evidence of Marjorie Johnson, Marlene Palmer and Miriam Oler, a central principle of their faith was the concept of "priesthood head," stemming from the priesthood authority traced directly back to the founding prophet, Joseph Smith Jr. Since priesthood authority passes only through male lines (with one exception which Dr. Cragun noted as being the Community of Christ which allowed women to receive priesthood in the 1970s - Transcript, Examination in Chief of Dr. Cragun, p. 2080), these witnesses acknowledged either their father, or once they became one of many plural wives, their husband as their "priesthood head". Once male members reached 12 years of age, provided they were deemed worthy, they would be allowed to receive the priesthood. There are two types of priesthood, Aaronic Priesthood and Melchizedek Priesthood, both terms drawn from passages in the Old Testament. Aaronic Priesthood stems from Aaron, the brother of Moses, and the priestly duties in respect to his lineage. Mormons believe that Melchizedek was the high priest to Abraham (Transcript, Examination in Chief of Dr. Cragun, pp. 2082-83).

[84] There are different levels or ranks within both priesthoods. The Aaronic Priesthood is the lower of the two priesthoods and, if a male transitions through all

the ranks, he will go on to the Melchizedek Priesthood, where the highest level is that of Apostle. It is from the rank of the Apostles that a prophet or President of the Church is chosen. When Dr. Cragun was asked whether the foregoing schemata existed in the FLDS Church as well as the LDS Church, he testified that it depended on the time period. However, he stated that the FLDS Church uses the Aaronic Priesthood and parts of the Melchizedek Priesthood (Transcript, Examination in Chief of Dr. Cragun, pp. 2083-2084).

[85] The Appellant stated that 12-year-old males could become deacons within the Aaronic Priesthood, graduate to teachers at age 14 and to priests at age 16. The Appellant was baptized and ordained an Aaronic priest at 16 years of age and, soon after, an elder. Eventually, in 1984, he was ordained a High Priest and Bishop of Bountiful by Leroy S. Johnson, then President of The Priesthood Work.

[86] Some of the members were educated outside the community and, when they returned, they offered their services freely to the members, but sometimes they would also work outside Bountiful for wages. The Appellant cited the example of his first wife, Jane Blackmore, who was trained as a midwife/nurse and worked within and outside Bountiful. Until the house and property in Calgary was sold, it was used to provide a residence to several members who were pursuing studies in Calgary.

[87] Bountiful, like many communities, held a variety of social events, including rodeos, hockey games and barbeques. Unlike other communities, however, a number of practices were unique to Bountiful. Tithing, one of the early practices of the Mormon Church, was practiced and administered by the Appellant. This practice of tithing, along with the "Law of Consecration," are part of a larger religious program called the "United Order," meaning that all members live in such a way that a community has all things in common. The Law of Consecration requires the consecration of time, talents and property to the church. The experts disagreed, however, on the extent to which the Law of Consecration exists as an actual practice among Mormons. The ideal of members living together was referred to as the United Effort Plan while the vehicle to obtain that objective was referred to as the United Effort Plan Trust, the land-holding entity.

[88] Originally, if individuals wished to join the United Order or, as the Appellant referred to it, the Order of Zion (Transcript, Examination in Chief of Winston Blackmore, p. 124), they were required to transfer all their property to the Church and were given back only enough to meet their needs. In addition, they were expected to contribute at least 10 per cent of their income back to the community. In lieu of tithing, some members contributed labour (Transcript, Examination in Chief

of Marlene Palmer, p. 1349). According to the Appellant's evidence, the funds from this practice were used to pay for such items as funeral expenses for members or to cover medical emergencies that might necessitate travel to a hospital facility. Miriam Oler testified that there was no obligation that she or her partner consecrate property to the UEP Trust, but that she was required to "tithe" 10 per cent of her income (Transcript, Examination in Chief of Miriam Oler, p. 2829).

[89] The community also engaged in "famine calls", another event unique to Bountiful, where, for a period of 3 months, the members were called upon to rely on their stored and canned food supplies or to just simply live on less and to contribute as much cash as they were able. The Appellant would forward it on to Rulon Jeffs, the President of the FLDS Church. He also described these as "cash calls". Famine calls were also promoted as a means of raising money for community projects or to pay property taxes. However, according to the evidence of Miriam Oler, one such call arose in order to build a community storehouse, but it was never built (Transcript, Examination in Chief of Miriam Oler, p. 2842). It does not appear from the evidence that any accounting for the funds was given to the members or that records were kept in respect to the tithing practice or the famine/cash calls.

E. UEP Trust

[90] The UEP Trust was established on November 9, 1942 in Utah. Its primary purpose, according to Exhibit R-5, was for charitable and philanthropic objects. To accomplish those goals, the Trust could engage in legitimate business ventures (Exhibit R-5, p. 4). To this end, Trustees were permitted to hold legal title to all property with the power to manage, dispose and otherwise control that property (Exhibit R-5, p. 3). The Trust also had the authority to fix salaries and other compensatory matters and the power to declare dividends (Exhibit R-5, pp. 5 and 6).

[91] The Appellant was made a Trustee on February 25, 1986. On November 3, 1988, an Amended and Restated Declaration of Trust of the UEP Trust was created which proclaimed that additional property had been added, with more expected to come, to the Trust and to the Trustees as "consecrations" (Exhibit R-5, p. 2). As a result of the split within the community over Warren Jeff's leadership in 2002, the Appellant was removed as a Trustee of the UEP Trust. In 2005, a Utah district court concluded that all of the Trustees would be removed as they had committed a breach of trust in protecting and segregating the trust assets. The court appointed a special fiduciary, Bruce Wisan (Exhibit R-5, pp. 2 to 9).

[92] During the years under appeal, three parcels of land in Lister were held by the Trustees of the UEP Trust. These lands had been acquired in 1987. Until his removal in 2002, the Appellant would have been one of these Trustees. When the court appointed the special fiduciary, all of the property held by the UEP Trust, including the three parcels in Lister, was removed and transferred from the Trust to the special fiduciary. The documentation referred to the UEP Trust as holding the beneficial ownership of the property (Exhibit R-4 and R-5). According to the evidence of Marlene Palmer and Miriam Oler, no discussion of UEP Trust property ever occurred between the Appellant and the members, nor did they ever see documentation or records concerning these Trust properties.

[93] On cross-examination, when the Appellant was asked if he had ever consecrated any property to the Trust, he stated that, "Any property that has been in my name, I have held for the United Effort Plan Trust." When asked to clarify, he agreed that neither he nor the Company had ever actually signed over ownership of any real property to the Trust (Transcript, Cross-examination of Winston Blackmore, p. 574).

F. J.R. Blackmore & Sons Ltd.

[94] The Company was incorporated on May 14, 1980. The shareholders were David Kevin Blackmore, Richard Blackmore, Richard Guy Blackmore and the Appellant. Winston Blackmore was able to sign cheques solely on behalf of the Company, but otherwise cheques required the signatures of two of the shareholders (Transcript, Cross-examination of Winston Blackmore, pp. 428-430).

[95] During the relevant period, the Company conducted a variety of activities at different locations. Those included:

(a) logging operations in Ryan Station in Yahk, Fernie, Canmore, Coleman and Grassy (where 2000 acres were logged), all in Alberta;

(b) post treatment, peeling and fencepost manufacturing in plants at Sparwood, Caven Creek, Lumberton, Cranbrook (where a major pressure-treating site for fence posts was located) and, in Alberta, at Sundre (where a major processing site for the company's post wood was located) and, in Idaho, at Bonner's Ferry; and

(c) farming activities on land leased from the Lower Kootenay First Nation at Creston Flats.

The major repair site for engines, transmissions and other parts and equipment was located at Kitchener, British Columbia. Logging operations were also conducted in Windermere, Radium, Findlay Lavington and Canal Flats, all in British Columbia (Transcript, Examination in Chief of Winston Blackmore, pp. 44-45 and 157-178). Because many of these worksites were located at a distance from Bountiful, housing for workers was established. Some sites contained a house, trailer, camps or rental units. The Sundre, Alberta site, for example, contained a house, trailers and rental housing to accommodate the mill workers (Transcript, Examination in Chief of Winston Blackmore, p. 158 and Examination in Chief of Ken Oler, pp. 954-989). Since Sundre is located 550 to 570 kilometres from Lister, or approximately 6.5 to 7.5 hours' drive, it was essential to maintain these accommodations. The 20 to 25 workers at Sundre might be able to return to Lister once every second week (Transcript, Cross-examination of Winston Blackmore, pp. 453-459, Examination in Chief of Ken Oler, pp. 956-957 and Cross-examination of Ken Oler, pp. 1006-1007). Marlene Palmer testified that she cooked at the Lumberton camp, which was approximately 100 kilometres from Lister. At both Kitchener and Caven Creek, houses were maintained at each site or in close proximity.

[96] In the years under appeal, 55 to 60 individuals were employed by the Company and these numbers increased by 30 to 40 more during summer periods. The majority of employees came from within the community, although a few outside workers were employed. The Company also hired school children during summers to perform a variety of tasks. Children, 12 to 14 years old, counted posts for bundles, hauled post bundles, greased machinery, drove tractors, participated in cattle roundups and brandings and oversaw grain augers, loader practice and skidder clean-up (Transcript, Cross-examination of Winston Blackmore, pp. 422-424). The older children, 15 to 17 years old, operated the heavier equipment.

[97] The amount of wages paid to the Company's employees was established by the Appellant (Transcript, Examination in Chief of Ken Oler, p. 959). Both Marlene Palmer and Marjorie Johnson worked in the Company office and earned biweekly income between $500 and $700. Marlene Palmer's salary increased until, in 2006, she was earning $700 biweekly. Miriam Oler testified that, when her partner, Chance Quinton, started working for the Company, he was single and he received cheques of $1,100 monthly which he signed back to the Appellant in exchange for $80 to $100 per month (Transcript, Examination in Chief of Miriam Oler, pp. 2787-2788). However, when he and Ms. Oler became a couple, his wages increased and he was retaining all of his wages for his personal use (Cross-examination of Miriam Oler, pp. 2906-2907). The children earned about $2 per hour because they would sign their

paycheques to the Appellant who would return smaller amounts to them in cash (Transcript, Cross-examination of Winston Blackmore, pp. 426 and 431-433).

[98] During the years under appeal, the Company had an outside accounting firm complete its returns and assist in preparation of financial statements, bank balancing and GST calculations. These outside accountants visited the corporate office at least twice monthly. Until 2005, Marlene Palmer was responsible for the day-to-day bookkeeping activities.

[99] The Company owned a number of properties, both before and during the years under appeal, and acquired properties in Kitchener, Cranbrook and Creston between 1996 and 2002. In 1996, property was purchased in Kitchener for $110,000; in 1997, a property at Lumberton Road in Cranbrook for $117,600 and subsequently mortgaged in the amount of $1.4 million; in 1998, two properties at Lumberton Road in Cranbrook for $610,000 and $8,000, with one property later mortgaged for $650,000; and, in 1998, property purchased in Creston (Exhibits R-4 and R-5). The Appellant and several others acted as guarantors on the mortgages. The Lumberton Road properties were transferred in 2006 for the purchase price of $900,000 (Exhibit R-6).

[100] The Company also maintained a United States bank account located at Bonner's Ferry (Transcript, Examination in Chief of Winston Blackmore, p. 281) and owned personal property, including a 1973 Cessna aircraft which was purchased for $165,000 (Exhibit R-4). In several years, director's resolutions were passed in which dividends were issued to shareholders, including the Appellant.

[101] The Company filed a notice of intention to make a proposal in bankruptcy in 2005. However, in its statement listing assets and liabilities plus creditors, it made no reference to any type of trust arrangement, including any reference to the UEP Trust, that would affect any of its property or holdings.

G. Other Companies

[102] Other companies also operated within Bountiful, some of them in the context of providing support for the Company's operations. When the Company went through bankruptcy after the 2002 split, members formed other companies to take over the operations and activities formerly conducted by the Company. The Company's assets were dispersed as much as possible to these new companies and to community members.

H. Personal Property

[103] Several witnesses testified that there was no prohibition against members owning personal property in their own names and dealing with it as they saw fit. They could have separate bank accounts, own vehicles (for example, Marjorie Johnson testified that she purchased a minivan in 2003 and owned it for three years (Transcript, Examination in Chief of Marjorie Johnson, pp. 1092 and 1097)), pursue business interests with their own incorporated companies and own the usual household furnishings. Some had credit cards, lines of credit, bank loans and there was some lending of money between members with terms of repayment.

COURT'S ANALYSIS: THE MEANING OF "CONGREGATION"

Introduction and Preliminary Remarks

[104] Can Bountiful be considered the type of communal religious organization which Parliament had in mind when section 143 was enacted? The answer to this question is dependant upon whether it meets all of the tests of the statutory definition of the term "congregation" set out in subsection 143(4):

> *"congregation"* -- "congregation" means a community, society or body of individuals, whether or not incorporated,
>
> (*a*) the members of which live and work together,
>
> (*b*) that adheres to the practices and beliefs of, and operates according to the principles of, the religious organization of which it is a constituent part,
>
> (*c*) that does not permit any of its members to own any property in their own right, and
>
> (*d*) that requires its members to devote their working lives to the activities of the congregation;
>
> (Emphasis added)

If Bountiful meets this definition, its members, as well as the Appellant, may avail themselves of the special tax treatment provided in this provision.

[105] If, as the Appellant argues, Bountiful meets all four of the above tests (*a*) through (*d*), the assessed tax liability may be effectively shifted from the Appellant

and distributed among the members of Bountiful by the imposition of a deemed trust. The community of Bountiful could elect a deemed distribution of its income for tax purposes on an annual basis to and among the members. The Respondent's position is that Bountiful does not meet any of the four tests of the definition of "congregation" and, consequently, the personal assessment of the Appellant should be upheld.

[106] In analyzing each test, I will apply the conclusions I reached under the "Preliminary and Primary Issues" section, that is: (1) interpreting the statutory provision according to a textual, contextual and purposive approach; and (2) where necessary, judicial notice and utilization of the jurisprudence contained in the Hutterite cases and the B.C. Polygamy Reference Case.

[107] While the wording utilized in subsection 143(4) is of a general nature and without prior interpretation by this Court or any other, it is nonetheless strict in that it contains language which is both exhaustive (use of the word "means") and conjunctive (use of the word "and"). Because all four tests of subsection 143(4) must be met by a community for it to receive this special form of tax treatment, it implies that Parliament had a particular form of "congregation" in mind when the provision was enacted.

[108] The definition of "congregation" in subsection 143(4) uses non-technical language. The correct interpretative approach in dealing with this provision is a unified textual, contextual and purposive approach. The preamble, to the listing of the four elements of the definition, contains the following wording:

> "congregation" means a community, society or body of individuals, whether or not incorporated, … (Emphasis added)

By using the word "means" as opposed to the word "includes," Parliament has indicated that the definition is meant to be exhaustive or, in other words, that it contains the entire meaning within the scope of the words. It is also clear from the preamble that, while it may be helpful, articles of incorporation are not an essential precondition for a community, society or body of individuals to bring itself within the parameters of section 143. The term "congregation" has been assigned a specific definition for the purposes of section 143 in contrast to the ordinary meaning assigned to it in everyday usage and the definition generally ascribed to it in jurisprudence for the purposes of paragraph 8(1)(*c*) of the *Act*.

[109] The Federal Court of Appeal in *Small and McRae v MNR* (also referred to as *Zylstra Estate v MNR*), 97 DTC 5124, held that the view taken by the trial court judge in defining the parameters of "congregation" for the purposes of paragraph 8(1)(*c*) was too restrictive. Bowman J. (as he was then) commented in *Kraft v The Queen*, 99 DTC 693, at paragraph 36, that the trial court's view of "congregation" for the purpose of paragraph 8(1)(*c*) in *Zylstra* was unduly limiting

> … in that it fails to recognize the variety of ways in which people may come together to worship God, or the disparity in belief, background and motivation that may exist among the members of the heterogeneous group that may make up an assemblage which the term 'congregation' encompasses. …

For the purposes of paragraph 8(1)(*c*), Canada Revenue Agency Bulletin IT-141R (Consolidated), has also broadly interpreted the term "congregation":

> **15.** A "congregation" is not defined by any particular church structure, by territorial boundaries nor by the number of people gathered in one place. It is an assemblage or gathering of persons to whom a minister provides spiritual counseling, advice, illumination and inspiration. A group of students assembled for academic instruction is not a congregation. Persons who meet the status test do not need to be in charge of a single, fixed congregation. They can serve multiple congregations. Congregations can be of a diverse and fluid makeup and require neither voluntary attendance nor homogeneity of religious belief. Chaplains in hospitals, jails, the armed forces and other such organizations are generally considered to minister to congregations.

A. Live and Work Together

Do the members of the community of Bountiful live and work together?

1. The Appellant's Submissions

[110] Appellant Counsel suggested that:

> … Parliament drew a connection between the social and familial aspects of congregants' lives and their livelihoods and their membership in the congregation. In short, Parliament denoted a community in which group identity is completely integrated into the lives and livelihoods of community members.
>
> (Appellant's Written Submissions, para 39, bullet 2).

Appellant Counsel submitted that Bountiful forms a "coherent, identifiable group" that "treats insiders very differently from outsiders" and that members are "bound together by their religion" which "is the core of the identity of community members." (Appellant's Written Submissions, para 58).

[111] Appellant Counsel reviewed the evidence from the perspective of: (a) socialization, friendships, residences and worship; (b) marriage and familial relationships; (c) education; and (d) livelihood.

[112] There is an inward focus with respect to socialization with limited outside contact.

> … [M]embers situate their residences among properties held by members of the group; [and] even where residences are physically located away from the main community site, socialization continues to occur within the group to the exclusion of outsiders; …
>
> (Appellant's Written Submissions, para 109(a)).

[113] Marriages occur by placement between church members, the majority of which are polygamous in nature. This forms "… the basic unit for administration of property within the group." (Appellant's Written Submissions, para 109(b)).

[114] Bountiful educates its members within its own education facilities, except where professional designations require outside schooling.

[115] Concerning the distribution of homes, members lived in family units, were told when and where to move and would frequently trade residences.

[116] Permanent residences were as close to the main site as zoning permitted. Temporary residences were situate at Company work locations in south-eastern British Columbia or just over the border in Alberta. Regardless of whether or not a permanent or temporary residence was located on the main site, the critical criterion for members remained participation in the Church. Community members socialized, worshipped and interacted with other members to the exclusion of non-members wherever their residences happened to be physically located (Appellant's Written Submissions, para 160).

[117] Appellant Counsel cited other instances that were indicative of communal living such as: (a) community food storage; (b) Sunday meals held at the "Kitchen

House"; (c) some communal property, for example, milk was given to members whenever it was available; and (d) organization of social events for members without interaction with outsiders.

[118] With respect to how the community worked together, members donated time and labour to community projects and participated in "work days" which were held on Saturdays.

[119] The Company, until its bankruptcy, was the main community employer with operations primarily in forestry and agriculture.

2. The Appellant's Position

[120] According to Appellant Counsel, community members share and trade properties and are insular in nature based on how they socialize with each other, educate their own members, familial living arrangements at the direction of the Church head, placement marriages, livelihood through community employers and worship to the exclusion of outsiders. Community and Church membership are fully integrated and, consequently, the Appellant submitted that the members meet the first test of subsection 143(4) in that they live and work together.

3. The Respondent's Submissions

[121] The Respondent's argument is that not all members of Bountiful live and work together in close proximity because they reside in a number of communities and worksites scattered throughout British Columbia, Alberta and the United States. The Company engaged in logging operations in various locations, some sites being up to 550 to 570 kilometres from the main site in Lister.

[122] The Respondent summarized its position in the following manner:

> The Act is practical and not spiritual or theoretical. For the fisc, "living together" requires cohabitation in the same place at the same time. "Working together" requires working on common projects at the same place at the same time. …
>
> (Respondent's Written Submissions, para 463)

[123] Relying on the Hutterites as the "gold standard", the Respondent reviewed how Hutterite communities operate. Hutterite colonies typically consist of approximately 100 individuals. All colonies belong to one of three Hutterite branches

or leuts and all leuts are part of the Hutterian Brethren Church. When colonies become larger than 100 members, to operate effectively, they break away from the "mother" colony to form a "daughter" colony. Each colony lives together within defined boundaries and works together in a largely agricultural setting to support their colony (*Wipf* at paras 2-3). Ritchie J. made the following comments in *Hofer v Hofer*, [1970] SCR 958 at 969, (cited in *Hutterian Brethren Church of Wilson v The Queen*, 79 DTC 5474, at para 20):

> I am satisfied … that the hutterite religious faith and doctrine permeates the whole existence of the members of any Hutterite Colony and in this regard I adopt the language which the learned trial judge employed in the course of his reasons for judgment where he said:
>
> > To a Hutterian the whole life is the Church. The colony is a congregation of people in spiritual brotherhood. The tangible evidence of this spiritual community is the secondary or material community around them. They are not farming just to be farming – it is the type of livelihood that allows the greatest assurance of independence from the surrounding world. The minister is the spiritual and temporal head of the community.

[124] The Respondent provided numerous examples of community members who did not work together as required by subsection 143(4):

(a) some members received training and eventually worked outside Bountiful;

(b) some community members operated various businesses which provided services to both members and non-community members and if the business was incorporated, the shares were not subject to any trust arrangements in respect to other community members; and

(c) the Company employed some individuals from outside the community.

4. <u>The Respondent's Position</u>

[125] The Respondent constructed the meaning of "living and working together" based on legislative context and intent. Emphasis was placed on the inclusion and placement of the conjunction "and" between the words "live" and "work," suggesting a link between these two concepts that would not exist in non-communal organizations.

[126] Counsel for the Respondent summed up its argument as follows:

> … People who reside in different homes, different towns, different provinces and even different countries don't "live together" even if they share family ties and beliefs. People who work in different towns, different provinces and even different countries don't "work together" even if they share family ties and beliefs.

(Respondent's Written Submissions, para 463)

5. Analysis

[127] The first element of the definition of "congregation" ("the members of which [must] live and work together") is short and, at first reading, appears on its face to lend itself readily to a straightforward interpretation. However, that is not the case.

[128] The three fundamental words in this element of the definition are "live", "work" and "together". The word "and" is used by Parliament to unite the two verbs "live" and "work" so that members of a congregation must engage in both aspects to qualify. One without the other will not suffice for the purposes of this test.

[129] The ordinary meaning of "live", when used as a verb, is defined in *The Oxford English Dictionary*, http://www.oed.com, as:

> **8. a.** To make one's home, have one's abode, dwell, reside. Usu. with adverb phrase indicating the place or other inhabitants. Also (*colloq.*) in extended use of things: to be situated, to have their place.

[130] The ordinary meaning of "work", when used as a verb, is defined in *Webster's Ninth New Collegiate Dictionary*, 1985 as:

> **1.** activity in which one exerts strength or faculties to do or perform something:
> **a:** sustained physical or mental effort to overcome obstacles and achieve an objective or result
> **b:** the labor, task, or duty that is one's accustomed means of livelihood
> **c:** a specific task, duty, function, or assignment often being a part or phase of some larger activity

[131] The word "together", when used as an adverb, as it is in this section, is defined also in *Webster's* as:

> **1. a:** in or into one place, mass, collection, or group
> **b:** in a body: as a group

> **2. a:** in or into contact
> **b:** in or into association or relationship
> …
> **4. a:** by combined action
> **5. a:** with each other
> **b:** as a unit

[132] Similarly, *The Oxford English Dictionary*, Second edition, Volume XVIII Thro-Unelucidated, Clarendon Press, Oxford, 1989, defines "together" as:

> **1. a.** Into one gathering, company, mass or body
> …
> **2. a.** In one assembly, company, or body; in one place
> **b.** Of two persons or things: In each other's company; in union or contact
> **3.** In reference to a single thing.
> **a.** With union or combination of parts or elements; into or in a condition of unity; so as to form a connected whole.
> …
> **4.** At the same time, at once, simultaneously. (Usually connoting 'in combination or association').
> **5.** Without intermission, continuously, consecutively, uninterruptedly, 'running', 'on end'. (In reference to time, less commonly to space).
> **6.** In concert or co-operation; with unity of action; unitedly; conjointly.

[133] Although the word "together", when used as an adverb, may have numerous meanings, generally as it would relate, in the ordinary generic sense, to section 143, the following phrases might be used to describe Parliament's use of the word "together":

- in contact with each other
- in proximity
- in each other's company
- assembled in one place
- at one time
- in or by combined action or effort
- in one place, mass, collection or group

The word "together" implies that the actions of "live" and "work" are completed by a combined action in each other's company, in one place at the same time.

[134] When used as an adverb, as it is in paragraph 143(4)(*a*), it is meant to qualify the meaning of the two verbs "live" and "work", that is, it is meant to provide

information about or answer questions in respect to the manner, place, time, frequency and other circumstances surrounding the activity, or activities in the case of this provision, which are denoted by employment of the verbs.

[135] According to the dictionary definitions, the word "together" qualifies or describes the circumstances of the verb "live" by denoting that members are to "reside, dwell or cohabit" or "make their home or dwelling in a particular place" in "one place" or "assembled in one place," "in each other's company" and "in contact with each other." The word "together," in describing the verb "work," denotes members that "do labour" or "are employed as a means of earning a livelihood" or are "exerting themselves physically or mentally in order to do, make, or accomplish something" and, again, referring to doing such tasks "together," that is, "in one place" or "assembled in one place," "in each other's company" and "in contact with each other."

[136] Based on a textual reading of the requirement to live and work together and taking into account the ordinary and plain meaning of the words "live," "work" and "together," Parliament intended that members of a congregation would live and work in one place, at the same time. The ordinary meaning implies that members are together most, if not all, of the time. When they are not working together, they are living together. Thus, "assembled in one place," "in each other's company" and "at one time" would be applicable in the context of section 143. The use of the words "and" plus "together" dictates that members must live and work in close physical proximity within a defined area that has easily identifiable boundaries.

[137] Paragraph 143(4)(*a*) is indirectly related to the wording contained in paragraph 143(4)(*d*), since members are required by virtue of paragraph 143(4)(*d*) "to devote their working lives to the activities of the congregation." It follows that they must be attached to the land or closely tied to a particular place as a consequence of those activities. The requirement of devotion to activities implies a geographical limit to the potential geographical spread of members. Consequently, the land, on which they live and work together, must necessarily be adjacent, contiguous or at a minimum readily and easily accessible to members in order for those members to realistically be able to devote their working lives to the activities of the congregation, as required pursuant to paragraph 143(4)(*d*).

[138] Since "live and work together" means that members are together most, if not all, of the time, the standard that members must meet to qualify under paragraph 143(4)(*a*) is high. If the interpretation is widened to any degree, then it runs the risk of being reduced to the general notion of "operating in an integrated manner" or

"living communally," which, by the very nature of its wording, Parliament clearly did not intend. If, hypothetically, members, or some of them, work at a distance from where they live, that distance must be short enough that they are not prevented on a daily, ongoing basis from devoting their working lives to the activities of the congregation.

[139] Finally, with respect to a textual approach, there is no specific reference to Hutterites anywhere in the provision, as I noted in the "Preliminary and Primary Issues" section. The Respondent repeatedly referred to the Hutterites as the "gold standard" for applying section 143. Any religious group, including a Hutterite colony, that meets the definition of "congregation" in this section, may bring itself within section 143. However, Hutterite colonies may be examined and compared in respect to details on their structure, how they expand, how they function and how much they document in their articles of incorporation because judicial notice of jurisprudence on these colonies may be utilized.

[140] The Hutterites are an essential part of the legislative history of section 143. The manner, in which Hutterite colonies operate, makes them separate from the broader society and, as such, they receive, as a group, the unique tax treatment afforded under section 143. In this context, it is reasonable to rely on and draw from the existing jurisprudence as a basis of comparing Bountiful members to Hutterite colonies in respect to "living and working together." Hutterite groups do not operate under normal rules of private property. The business agencies of the congregation must have an objective of supporting or sustaining the community. Paragraph 143(4)(*a*) imports, by its very wording, that the very nature of a congregation shall be self-supporting and self-sustaining and suggests that it was Parliament's underlying purpose in enacting this provision. Arguably, the more "together" a community actually is, the more self-sustaining it can be.

[141] The Hutterite colonies illustrate the concepts of independence and self-sufficiency, as they are inwardly focussed, living together in a bounded space, but when their numbers grow and expand, generally to a maximum of 100 members, the colonies spread outward and new colonies form. They do so in a modular way. The new colonies will continue, like the mother colonies, to be inwardly focussed, operate independently from the outside world, live communally within defined boundaries, shun individualism and private property ownership and work together in a largely agricultural setting to support their colony (*Wipf*, at paras 2-3).

[142] Based on the interpretation I have given to paragraph 143(4)(*a*), the most immediate and striking observation is how far-flung the residences of Bountiful,

whether permanent or temporary, are located. Although the main site of Lister, together with several other areas, Canyon and Yahk, as well as Kitchener for a short period of time, constituted the locations for the primary residences of members, they were still up to 50 kilometres apart. The evidence supported that some members also lived in the community of Cranbrook (Exhibit R-4, Tab 6 and Exhibit R-5, Tab 94). Alan Oler attended church in Bountiful but lived in Arrow Creek, a 10 to 15 minute drive from Bountiful (Transcript, Examination in Chief of Miriam Oler, pp. 2854-2855). Beyond the cluster of homes, schools, barns and trailers located at Lister, members resided in various sites in British Columbia and Alberta, some up to several hundred kilometres away from the main site. Based on these facts, not all of the members of Bountiful "live together."

[143] Nor can it be said that the members work together. The worksites were widely distributed over areas in British Columbia and Alberta, as well as Bonner's Ferry in Idaho. One of the Appellant's wives, Ruth Lane, commuted regularly from Bountiful to Bonner's Ferry in the United States, where she was employed by the Company. In many instances, the distances were too great for members to commute on a daily or any other type of regular basis. The evidence was that some were in closer proximity and individuals could return to Bountiful proper every weekend but some members, due to distance, could not return except every second weekend. It was also clear from the evidence that some family members would accompany the work crews to remote logging work locations and reside there in residences provided by the Company. In these instances, the workers and their families would be "living and working" at many different locations far removed from Bountiful itself.

[144] The Appellant, in fact, encouraged community members to work outside of the community, which is in direct contradiction to the requirement of paragraph 143(4)(*a*). According to the evidence of Stan Oziewicz, who visited Bountiful and published an article in the *Globe and Mail* newspaper in December of 2002, the Appellant told him at that time that members were "… encouraged to live and work off Church property and about half of them do." (Transcript, Examination in Chief of Stan Oziewicz, p. 1202). In other instances, some of the female members worked in hospitals outside Bountiful as nurses and midwives. The Appellant encouraged boys in Bountiful to obtain Alberta residency in order to secure their trucking licenses at the age of 18 (Transcript, Examination in Chief of Marlene Palmer, p. 1341). Some of the members lived in Calgary, Alberta for periods of time attending university, while Ken Oler testified that he worked in Creston for his father's tractor dealership until he was 25 years old (Transcript, Cross-examination of Ken Oler, pp. 1013-1015). David Oler worked for a number of dairy farms in the Creston Valley. Some members had their own incorporated companies that provided services and products,

not only for members, but for non-community members. There was no restriction placed on these practices.

[145] The only conclusion to draw from the evidence of the witnesses was that the members did not work together because not all members worked exclusively within the context of the community. The facts support my conclusion that there was no intention for the community to be living and working together in close proximity on a continual basis in accordance with the legislative intent of this provision. In addition, although less relevant to my conclusion, the fact that companies in Bountiful freely provided services and products outside the community indicates that the boundaries between the community and the outside world were fluid. Along with being spatially fragmented, there is apparent widespread business engagement with the outside world. This goes against the underlying principle that capital and income are communal. Although a community might, out of necessity, have some minor dealings with outsiders and still meet my definition of "live and work together," the extent of the practice in Bountiful removes the community further from the parameters I have placed on paragraph 143(4)(*a*).

[146] Although I do not accept Respondent Counsel's argument that Hutterite colonies are the "gold standard," the legislative history and the jurisprudence leading up to the enactment of section 143 have a foundational basis grounded in Hutterian lifestyle. This is the only community that we know Parliament had in mind when the provision was enacted. Looking at the information provided generally in the caselaw respecting Hutterites, it is undisputed that the members in Bountiful do not live and work together in the same manner that Hutterites do. Hutterites live and work in geographically defined areas and in close proximity in accordance with the definitions of "live," "work" and "together" which I have ascribed to them. This is accomplished to a large extent by division of the colonies, where each new colony mirrors the mother colony. Hutterites focus their attention on agriculture as a livelihood for community members, as this no doubt contributes to the colony retaining its homogenous quality and independence from the outside world. They live communally in barrack-type establishments.

> … Their physical needs such as for clothing, food, shelter, medical and dental attention, equipment, tools and all other necessities were provided by the colony through its officers or trustees. …
>
> (*Wipf* (FCTD), at p. 5562).

The evidence supports that Bountiful does have some components of communality. However, overall, it does not resemble the rigid structure typical of Hutterite colonies. Bountiful members live in a number of locations across provinces and into the United States and not in a singularly-defined and closed geographical location as Hutterites do. Members may work and live occasionally with their families in remote worksites while members of Hutterite colonies work "together" primarily at farming activities.

[147] While my use of Hutterite structure is based on factual background from other jurisprudence and is meant to serve as an example of the type of community Parliament intended in enacting section 143, it should be noted that the Respondent did not provide any admissible expert evidence with respect to Hutterite communities. While Dr. Cragun made reference to Hutterite communities in his Expert Report, I concluded that he was not qualified to give expert testimony on that particular subject matter with respect to "… the lifestyle of Hutterite colonies or of Bountiful or to draw comparisons between them" (Transcript, *voir dire* decision on Dr. Cragun, p. 1945).

[148] The community did not work together on a consistent basis. Bountiful members were engaged in a variety of business activities and, while many members were employed by the Company, others operated independent businesses. To support the position that the community worked together, the Appellant pointed to the example of "work days" held on Saturdays, when the members were not otherwise employed and were available to donate their time and labour to community projects. There were also other instances of members donating time and labour to community projects when required. While work days may be indicative of a practice in Bountiful for members to "work together" at particular times, it is insufficient to conclude, in light of all of the evidence to the contrary, that the community worked together as contemplated by paragraph 143(4)(*a*), that is, working together in close proximity and on a continual and consistent basis.

[149] Evidence, provided by the Appellant, respecting family configurations, that is, how members configured their living arrangements as well as how the community organized around goods, are not determinative factors and will be less relevant to whether Bountiful meets the definition of "congregation," that is, being in close proximity within a defined area. There were numerous examples throughout the evidence of family configurations within Bountiful: the Appellant's personal living arrangements of residing with his mother and not any of his plural wives; Miriam Oler did not regularly reside with her father, Dalmon Oler, who visited that family one night per week; and Marjorie Johnson, one of the Appellant's plural wives, who

never lived with the Appellant. However, there is nothing in subsection 143(4) that would indicate precisely how community members might be expected to arrange their living situation or what type of family configuration might be required to comply with the provision.

[150] In addition, although communal production and consumption of food are likely consequences of living and working together, it is not an explicit requirement of paragraph 143(4)(*a*). Many examples of this were provided throughout the evidence: most households had their own kitchens; the Appellant's large house had its own kitchen facilities which members occasionally used, particularly for Sunday dinner; famine calls were promoted as a means of raising funds; some members had their own personal gardens; some crops were sold abroad; and beef cattle were sold commercially. Bountiful members ate together in the Kitchen House on Sundays after church services, but the evidence supported that most residences had their own kitchens and their own food storage the majority of the time. Again, while not determinative on its own, such facts support my finding that the community did not "live together."

[151] Aside from a comparative analysis between life on the ground in Bountiful and the Hutterite colonies, based on a textual, contextual and purposive approach and the attributes which I have concluded are necessary to defining "live and work together," Bountiful cannot be characterized as the type of coherent, identifiable group that Parliament had in mind to receive this specialized type of tax treatment. Although it is bound together by its religion and is a community that is both patriarchal, hierarchal and functions communally in many facets, Bountiful falls short of the test contained in paragraph 143(4)(*a*) because it is unable to bring itself within the "live and work together" framework which Parliament intended this provision to take. Bountiful appears to be socially integrated and insular in nature but members do not live and work together in the manner in which I have defined these words. It is my conclusion that this test is meant to be applied strictly and in accordance with my interpretation, which is both narrow and confined. Bountiful is too dispersed and fragmented to qualify as one of the specific types of community that Parliament envisioned in enacting section 143, which the Hutterite example confirms.

[152] Before leaving this section, I want to briefly address several points which both the Respondent and the Appellant made in submissions. The Appellant approached his analysis of communality in Bountiful by reference to a framework that does not emanate from the legislative text. This framework of "socialization, familial relationships, education and livelihood" does not originate from any pertinent doctrinal source either. The Appellant focussed on what might be construed as the

purported spirit or purpose of the requirement to "live and work together" which, from the Appellant's perspective, appears to be "live and work together in an integrated way" rather than "live and work together." "Live and work together" implies that members are together at all times both in respect to living and working. It implies a high standard and it is, in fact, a very high one for communities to meet for the purposes of coming within this provision.

[153] However, that does not mean that it is an impossible standard to meet and, because of the special tax treatment that can be afforded such a community that meets it, the interpretation to be applied must be narrow and well defined. If the standard is widened so that a community like Bountiful, where its members are spread out geographically in respect to both the living and working aspect, then arguably the meaning of "live and work together" would be reduced to a more general notion of "operating in an integrated way or fashion" or "living communally." Such an interpretation would allow a geographical spread, like that of Bountiful, which goes directly against the intent of Parliament and the plain and ordinary meaning of the requirement to "live and work together," which I have concluded should be assigned to it.

[154] In respect to the Respondent's submissions on the parameters of the meaning of "live and work together," the suggestion that "[p]eople who reside in different homes, different towns, different provinces and even different countries don't "live together"" (Respondent's Written Submissions, para 463) is unreasonable and too narrow. While living in different countries, provinces and towns will be fatal to meeting this requirement, living in different homes, according to the meaning I have assigned to "live" and "work together" should not and will not be fatal.

[155] My second comment is in respect to the Respondent's reliance on the two phenomena associated with polygamous communities: "lost boys" and "trafficked girls." While such phenomena may be indicative of the potential for such communities to be unstable, they do not address the issue of "living and working together." Rather, these two phenomena deal more specifically with the issue of community composition, namely, who is in and who is out in terms of members. More importantly, there was very little evidence given at the hearing respecting these two phenomena. The only reference was in respect to Marlene Palmer's son, Clayton, who was banished from the community as a teenager by the Appellant (Transcript, Cross-examination of Marlene Palmer, p. 1520). The Respondent referred to the "lost boys" phenomenon in argument only and cited the B.C. Polygamy Reference Case and Daphne Bramham's book, *The Secret Lives of Saints*. There was no evidence in respect to trafficking of girls provided at the hearing and the Respondent again relied

on expert evidence given in the B.C. Polygamy Reference Case. Consequently, I rejected any reference or reliance on these two phenomena in my approach and analysis to paragraph 143(4)(*a*).

B. Adherence to Practices and Beliefs

Does the community of Bountiful adhere to the practices and beliefs of and operate according to the principles of the religious organization of which it is a constituent part?

[156] An analysis of this second part of the test is largely dependant upon the boundaries that I define in respect to the meaning and scope of the term "religious organization." Such a framework lays the foundation in which this Court must determine, firstly, to which religious organization the community of Bountiful forms a constituent part in respect to both the pre and post 2002 split of the community and, secondly, whether the community adheres to the practices, beliefs and principles of that religious organization.

[157] Unlike my analysis of the first element, (*a*), of subsection 143(4), this second component will incorporate, to a greater extent, the evidence of the experts. However, although none of the experts were permitted to testify on life in Bountiful, briefly again I confined the testimony of each expert to the following:

(a) Dr. John Walsh, the Appellant's expert witness, was permitted to give testimony on the history, principles and doctrine of Mormonism, but not on daily life in Bountiful;

(b) Dr. Ryan Thomas Cragun, the Respondent's first expert witness, was permitted to give testimony on the LDS and FLDS Church branches and particular concepts such as consecration and tithing. He was not permitted to give evidence on Hutterites; and

(c) Dr. Randall Balmer, the Respondent's second expert witness, was permitted to give testimony on "polity," the history of Mormonism and Mormon religious organization and fundamentalist groups.

1. The Appellant's Submissions

[158] Appellant Counsel's approach to the term "religious organization" is that it imposes few requirements and should be liberally interpreted. According to the Appellant, the community of Bountiful meets the second component of the definition set out in paragraph 143(4)(*b*) because, pre the 2002 split, it is a part of Mormonism and the FLDS Church, also known as The Priesthood Work. After the 2002 split, Bountiful may be a part of three possible religious organizations: Mormonism, the FDLS Church, or the community of Bountiful itself, as led by the Appellant and including the other religious groups that viewed Mr. Blackmore as their spiritual leader (Appellant's Written Submissions, para 84).

Pre-Split period, January 1, 2000 to November, 2002

[159] Although Appellant Counsel proposed two possibilities in respect to religious organizations that Bountiful could be a part of, Mormonism and the FLDS Church, they were described as "… alternatives but they are not mutually exclusive … There's overlap between them." (Transcript, Appellant's Oral Submissions, p. 3027).

[160] Dr. Walsh's view was that Mormonism is a religious organization, within which subgroups exist, and that Bountiful was a part of Mormonism during the pre-2002 split period. Members of the community were organized as Mormons because they believed that Joseph Smith Jr. was a prophet of the Lord and that the Book of Mormon was the word of God (Dr. Walsh's Expert Report, p. 7, para 5).

[161] Appellant Counsel also relied on Dr. Balmer's comments to support this view. He described Mormonism as "… a larger, more generic entity." (Transcript, Cross-examination of Dr. Balmer, p. 2717). Counsel argued, therefore, that Bountiful was part of "the broad stroke" religious organization of Mormonism (Transcript, Appellant's Oral Submissions, p. 3034).

[162] The second proposed possibility, for which Bountiful could be a constituent part, is the FLDS Church. This group had been a part of the mainstream Mormon Church but, because this group continued their practice of polygamy after it had been outlawed by the mainstream Mormons, they were excommunicated.

[163] Dr. Walsh is of the view that Bountiful has a close tie historically with the FLDS Church because of their belief in Joseph Smith's teachings and their practice of polygamy and communal living (Dr. Walsh's Expert Report, p. 15, para 24).

[164] Although Dr. Balmer did not directly address the pre-split period and despite his testimony that the Appellant had severed his ties with the FLDS Church,

Appellant Counsel pointed out that Dr. Balmer's testimony was to the effect that the FLDS Church was a religious organization to which Bountiful could be a part. (Transcript, Examination in Chief of Dr. Balmer, pp. 2601-2602). Appellant Counsel argued that Dr. Cragun's testimony also supported a conclusion that the FLDS Church was a religious organization, of which Bountiful could be a part.

Post-Split, November 2002 onwards

[165] After the leadership crisis in Bountiful and the split in 2002, with some members following the teachings of Warren Jeffs and the remaining members following the spiritual leadership of the Appellant, Counsel suggested three possible religious organizations for which that segment of Bountiful, led by the Appellant, could be a constituent part:

(a) Mormonism;

(b) the FLDS; or

(c) a religious organization led by the Appellant, including other religious groups who viewed the Appellant as their spiritual head.

[166] Appellant Counsel applied the same argument here to support that Bountiful was a constituent part of the religious organization, Mormonism, as he had in recommending it as a viable choice in the pre-split period. The members remained followers of the early teachings of Joseph Smith, the prophet, practicing both polygamy and communal living and continued to identify themselves as Mormons within the larger framework of Mormonism.

[167] As the second alternative option, Appellant Counsel suggested that the community of Bountiful continued to be part of the religious organization, the FLDS Church, after the community split, even though Warren Jeffs purported to excommunicate the Appellant from the FLDS Church in February, 2003. The Appellant, as leader of Bountiful, continued the early Priesthood Work begun in the 1930s and the teachings of Joseph Smith Jr., even though Warren Jeffs appropriated the name FLDS. The Appellant also continued as leader of some of the FLDS branches in the United States.

[168] Appellant Counsel compared the period of leadership upheaval in 2002 to the period following the death of Joseph Smith in 1844, where several claimants asserted

leadership claims. Appellant Counsel argued that similarly both the Appellant and Warren Jeffs claimed to be leaders of the true continuation of the FLDS Church.

[169] Counsel relied on Dr. Balmer's testimony, respecting the legitimacy of competing leadership claims within an organization governed by apostolic succession, to support this argument. Consequently, according to the expert testimony, there may be multiple legitimate claimants to succession within a religious organization. The Appellant had a legitimate claim of succession upon the death of Rulon Jeffs, as one of only a handful of individuals that had been ordained as a high priest within the FLDS Church.

> Thus, in the same way that Brigham Young, James Strang and others claimed the right to succeed Joseph Smith, both Winston Blackmore and Rulon (*sic* – should be Warren) Jeffs claimed the right to succeed Rulon Jeffs. Dr. Balmer recognized the legitimacy of such claims in the context of an organization governed by apostolic succession, and that all had legitimate claims to be part of the organization. …
>
> (Appellant's Written Submissions, para 94)

[170] The third alternative possibility, according to the Appellant's submissions, is that Bountiful, along with other groups in the United States, comprise a religious organization, of which they are constituent parts, with Winston Blackmore as their spiritual leader.

2. <u>The Appellant's Position</u>

[171] The community of Bountiful is a constituent part of Mormonism, the FLDS or the community of Bountiful itself, together with several groups in the United States who follow the spiritual leadership of the Appellant. Any of these choices are possible because the term "religious organization" as defined in the *Act* has no particular requirements, other than needing,

> "an organization … that adheres to beliefs … that include a belief in the existence of a supreme being." [Further], [i]t is the belief in the existence of a supreme being that makes the organization in question a *religious* organization. Beyond that, the definition … imposes no requirements, other than it be an organization.
>
> (Appellant's Written Submissions, para 63).
>
> …the requirement that a communal organization be a religious communal organization, is simply intended to ensure that the groups to which section 143

> applies are *bona fide* in their commitment to a communal lifestyle and have some degree of permanence.

(Appellant's Written Submissions, para 51).

3. The Respondent's Submissions

[172] The Respondent rejected the Appellant's three proposed possibilities respecting religious organizations to which Bountiful might be a constituent part, both before and after the 2002 split, because none of them meet the definition of "religious organization," contained in the *Act*.

[173] The Respondent concentrated on the various components of the wording in paragraph 143(4)(*b*), relying primarily on the Expert Reports and testimony of Dr. Cragun and Dr. Balmer.

[174] According to Dr. Cragun, there were only four possible "religious organizations" that Bountiful could be a part of:

> 1. The Church of Jesus Christ of Latter-day Saints ("LDS Church") based in Salt Lake City, Utah, U.S.A.
> 2. The Fundamentalist Church of Jesus Christ of Latter-day Saints ("FLDS Church") based in Colorado City, Arizona.
> 3. The broad tradition of "Mormonism."
> 4. Independent Mormon fundamentalists.

(Dr. Cragun's Expert Report, p. 10, para 21)

[175] The Respondent submitted that, based on the evidence, Bountiful belongs in Dr. Cragun's fourth category – independent Mormon fundamentalist group - comprised of the Appellant's extended polygamous family. According to Dr. Cragun's testimony, there are two types of independent Mormon groups, those that practice polygamy (fundamentalists) and those which do not. Those that practice polygamy,

> … are typically individual families. Some may be in communication with or even, on occasion, visit with some of the organized groups above. Others may not. The primary characteristic that distinguishes independent Mormon fundamentalists from the organized Mormon fundamentalists is that they do not share a belief in the same authority structure as the organized groups.

(Dr. Cragun's Expert Report, p. 19, para 50).

[176] According to the Respondent, Bountiful cannot be part of the first category on Dr. Cragun's list, the LDS Church, because that church disavowed the practice of polygamy in 1890. In addition, the Appellant did not claim to be a part of the LDS Church and he acknowledged that his forefathers had been excommunicated from the LDS Church because they continued to practice polygamy.

[177] The Respondent argued that Bountiful is not a part of the FLDS Church either, especially after the community split in 2002. Dr. Cragun noted that the community split resulted from a dispute pertaining to leadership within the church involving the identity of the true prophet. Those members of Bountiful who followed the Appellant's leadership did not accept Warren Jeffs as the prophet of the FLDS Church. As Dr. Cragun noted:

> … Disagreement over who is the prophet or who has the authority to be the prophet is a major disagreement. …
>
> (Dr. Cragun's Expert Report, pp. 13-14, para 32).

[178] The Respondent relied on Dr. Balmer's Expert Report and evidence to argue that, prior to the 2002 split, the FLDS Church was "without apostolic legitimacy." Mormonism is defined by episcopal polity, that is, it is governed by bishops. As Dr. Balmer noted, "… authority derives from a line of apostolic succession that … extends in an unbroken line back to Joseph Smith Jr., whom Mormons believe to be the "latter-day" prophet." (Dr. Balmer's Expert Report, p. 10, para 19). The Appellant claims his line of authority back to Joseph Smith Jr. through Leroy S. Johnson. However, when Johnson broke away from the LDS Church over the issue of polygamy, that line of priestly authority was ruptured (Respondent's Written Submissions, para 547).

[179] The Respondent relied on Dr. Balmer's Expert Report to support its position that the FLDS is a splinter group that cannot claim apostolic succession authority, either pre or post the split in 2002, due to their continued practice of polygamy (Respondent's Written Submissions, paras 553-554). This disrupted the line of authority after the First and Second Manifestos which disavowed polygamy. According to Dr. Balmer, therefore, the FLDS Church is without apostolic legitimacy, making the Appellant twice removed from any claim to authority, because first, his alleged ordination came from a splinter group, the FLDS, and second, he was excommunicated from the FLDS in 2002 (Dr. Balmer's Expert Report, p. 13, para 26 and p. 17, para 42).

[180] While some groups - most notably, the Strangites (which held a letter suggesting Smith had designated James Strang as his successor), the Church of Christ and the Reorganized Church of Jesus Christ of Latter Day Saints (known as the Community of Christ, whose founders included Joseph Smith's widow and her son) – may be able to claim direct apostolic authority (or direct mandate or direct connection, as Dr. Balmer referred to it in his testimony - Transcript, Examination in Chief of Dr. Balmer, p. 2596) directly to Joseph Smith Jr., the Appellant is unable to make a similar claim to a direct line of succession.

[181] With respect to the third category in Dr. Cragun's list, the Respondent submitted that, since Mormonism is a religious tradition and not a religious organization, Bountiful cannot claim to be a constituent part of Mormonism.

[182] Noting that the Appellant's testimony was not consistent in respect to which religious organization he claims Bountiful to be a part of, the Respondent submitted that Bountiful, at best, could be part of the fourth category in Dr. Cragun's list, independent Mormon fundamentalists.

4. The Respondent's Position

[183] Bountiful was potentially a part of the FLDS Church prior to the 2002 split. However, relying on Dr. Balmer's expert testimony, FLDS is not a religious organization and the definition in paragraph 143(4)(*b*) is therefore not met. Nor can Bountiful be part of the LDS Church because that church disavowed polygamy, which Bountiful members still practice, and finally, it is not part of Mormonism because that is a tradition, not a religious organization. At best, Bountiful may be a community of independent Mormon fundamentalists, consisting of the Appellant and his extended family, but it is not a "constituent part" of any religious organization as contemplated by the *Act*.

[184] The Respondent reviewed various definitions that can be applied to "organization," emphasizing that a religious organization is considered "the whole" and must be "… comprised of more than one community, each of which meets the definition of "congregation"." (Respondent's Written Submissions, para 525). The term "constituent part" used in paragraph 143(4)(*b*) implies that "… a stand alone community cannot meet the definition of congregation [because] a community cannot be a constituent part of itself." (Respondent's Written Submissions, para 526).

5. Analysis

[185] This component of the test requires an interpretation of the type of religious groups that Parliament envisioned coming within the parameters of section 143 when it was enacted. The scope of the term "religious organization," from the perspective of a textual, contextual and purposive approach, must also be reviewed.

[186] In order to structure my analysis "from the ground up," I will focus first on the text found in subsection 143(4)(*b*). I believe there are six questions, structured in the following manner, that need to be addressed in order to reach a conclusion as to whether Bountiful is a constituent part of a religious organization:

(a) What is an organization?

(b) What is a religious organization?

(c) What is the meaning of "constituent part" in this context?

(d) What religious organization might the community of Bountiful be a constituent part of?

(e) What are the practices, beliefs and principles of that religious organization?

(f) Does the community of Bountiful adhere to those practices and beliefs and do they operate by the principles of that religious organization?

[187] The term "religious organization" is defined in the *Act* as:

> "*religious organization*" - "religious organization" means an organization, other than a registered charity, of which a congregation is a constituent part, that adheres to beliefs, evidenced by the religious and philosophical tenets of the organization, that include a belief in the existence of a supreme being.

The definition includes the following characteristics:

(a) it is an organization, other than a registered charity;

(b) the congregation is a constituent part of the organization;

(c) the organization adheres to beliefs, evidenced by the religious and philosophical tenets of the organization; and

(d) those beliefs must include a belief in the existence of a supreme being.

The Respondent conceded that the members of Bountiful share "a belief in the existence of a supreme being" (Respondent's Written Submissions, para 519). However, the first criterion of the definition of "religious organization" requires that the community of Bountiful be identified as an "organization."

[188] Both the Appellant and the Respondent suggested dictionary definitions of "organization" as the term is not defined in the *Act*. The Appellant's proposed definitions are particularly relevant:

(a) *Oxford English Dictionary*: a systematic arrangement for a definite purpose; and

(b) *Black's Law Dictionary*: a body of persons (such as a union or corporation) formed for a common purpose.

(Appellant's Written Submissions, para 65)

[189] Dr. Walsh relied on the dictionary meaning of "organization" when discussing this term.

[190] Dr. Cragun defined "organization" in sociological terms as follows: "… a collective of people who identify with one another and who work together for a common purpose." (Dr. Cragun's Expert Report, p. 9, para 18, citing Scott, W. Richard. 2004. "Reflections on a Half-Century of Organizational Sociology." *Annual Review of Sociology* 30(1):1-21.)

[191] In his direct testimony, Dr. Cragun made the following remarks concerning "organizations," pointing out the distinction between religious traditions and religious organizations:

> … So sociologists, as we approach the idea of an organization, we're looking for a group of people with a sense of identity and coherence. They feel like they belong together, right? They have some sense of connection. There's a structure to it, right, so organizations have a sense of structure, and that typically includes some notion of who belongs and who doesn't belong. So you can have relatively clear boundaries as to who is a member of the organization and who is not a member of the

> organization. And of course they're together for a reason, whatever that reason may be. So they've got some shared goal or interest towards which they're working.
>
> A religious organization, then, would be an organization based on that sociological definition, that includes some component of the supernatural, some belief towards the supernatural that would generally be shared by the members of that organization, right? So we would have the Mormon tradition, which would refer to the collective beliefs and those ideas, and then under that tradition, that umbrella of Mormonism, we would have specific religious organizations. (Emphasis added.)

(Transcript, Examination in Chief of Dr. Cragun, pp. 1953-1954).

[192] Dr. Balmer used the term "organization" in the sense of "polity" or governance:

> First, it says something about the polity (organization) of the Latter-day Saints. Most Christian groups are organized into one of three forms of polity: *congregational, presbyterian,* and *episcopal*. (I have intentionally rendered these in the lower case; although it is tempting to identify each with the denominations that use the names, the words – and the polities to which they refer – are more generic.)

(Dr. Balmer's Expert Report, p. 7, para 10)

> *Congregational* polity vests authority in the local congregation. …

(Dr. Balmer's Expert Report, p. 7, para 11)

> *Presbyterian* polity is a form of representative government, when the local congregation elects representatives. …

(Dr. Balmer's Expert Report, p. 8, para 12)

> *Episcopal* polity is government by bishops, a principle that rests on the notion of apostolic succession. …

(Dr. Balmer's Expert Report, p. 8, para 13)

[193] When asked in direct examination what he meant by "religious organization," Dr. Balmer made the following comments, in which he also references religious tradition:

> A I would take religious organization to be the institutional embodiment of a particular group of people who would fit under the larger rubric of a religious tradition.
>
> Q And what do you mean by "institutional embodiment"?
>
> A This would be how they are organized or the polity of that particular group, how it understands itself in terms of organization and governance.
>
> (Transcript, Examination in Chief of Dr. Balmer, p. 2586)

[194] When used in a judicial or legislative context, the word "organization" is generally preceded by a qualifier that alludes to an entity's purpose. In the context of the *Act*, aside from religious organizations, there are "charitable organizations," which devote substantially all of their resources to the charitable activities and purposes which they conduct (paragraph 149.1(1)(*a*) of the *Act*). I could not locate any judicial commentary on the word "organization" as it is used in the context of charities. Outside the *Act*, there are numerous examples, such as "criminal organization," used in the *Criminal Code*, R.S.C. 1985, c C-46, or the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which speaks of "organized criminality." In dealing with this last quoted Act, O'Reilly J. of the Federal Court, Trial Division, in *Thanaratnam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 349, at paragraph 31, describes "… some characteristics of an organization …" as "… identity, leadership, a loose hierarchy and a basic organizational structure …".

[195] The meaning of "organization," therefore, will be highly dependent upon the context within which it is to be employed.

[196] In addition to the general dictionary definitions of "organization" and the expert interpretations, although neither party offered a comprehensive definition of the phrase "constituent part," I consider this component, "that a congregation be a constituent part of a religious organization," to be an essential aspect of the definition.

[197] The word "constituent" is used as an adjective in the text of paragraph 143(4)(*b*). *The Concise Oxford Dictionary of Current English* (8th edition, 1992, Clarendon Press-Oxford) defines "constituent" as follows:

> composing or helping to make up a whole.

[198] The *Oxford English Dictionary* (2nd edition, 1989, Clarendon Press-Oxford) contains the following definitions:

> **1.** That constitutes or makes a thing what it is; formative, essential; characteristic, distinctive.
> **2.** That jointly constitute, compose, or make up. Of a single element: That goes to compose or make up; component.
> …

[199] If a congregation is a "part" which makes up a whole, or simply "goes to compose or make up" a religious organization, this implies that there will be other "parts." From a textual perspective, on a plain reading, there will be other congregations that are also "constituent parts" of the religious organization. However, is it possible to have only one congregation that is a constituent part of a broader organization? For example, if Hutterite congregations disbanded, except for one that belonged to the Hutterian Brethren Church, would not that sole remaining congregation still qualify as a constituent part of the broader religious organization? Although this is potentially one interpretation, it is less compelling in light of the reality of the Hutterite example, which precipitated the enactment of the provision. Consequently, in determining which religious organization Bountiful is or was a constituent part of, I adopt the view that there will be other congregations which form part of the greater whole.

[200] Although not the "gold standard," the Hutterites provide a clear illustration of how this provision can and should be applied: there are multiple Hutterite colonies, all of which "make up" or "comprise" the greater whole, the Hutterian Brethren Church. While the Hutterian Brethren Church is an incorporated body, section 143 does not explicitly require incorporation of religious organizations. Realistically, however, it may be difficult for a religious organization that is unincorporated to meet the criteria of this provision. It certainly raises the bar in respect to evidentiary hurdles that must be overcome. Without precise articles of incorporation or memorandum of association, identifying the relevant religious organization, there must be a broader inquiry into the nature and circumstances of a community seeking to qualify under the umbrella of section 143. Essentially then, such an inquiry must determine the religious and philosophical tenets of the organization, that is part of the greater religious tradition, the community's practices, beliefs and principles and whether those correspond and complement the religious and philosophical tenets of the religious organization of which the community is purportedly a constituent part.

[201] I believe there are five possibilities, based on the parties' submissions, for which the community of Bountiful may belong:

(a) The Church of Jesus Christ of Latter-day Saints or "Mormonism" generally;

(b) the LDS Church;

(c) the FLDS Church, both pre and post the 2002 split;

(d) the FLDS Church pre the 2002 split and an independent group of Mormon fundamentalists post the 2002 split; or

(e) an independent group of Mormon fundamentalists who are not a constituent part of a religious organization.

[202] After reviewing all of the evidence that was before me, I have concluded that members of the community of Bountiful are not members of any religious organization but are a group of independent Mormon fundamentalists. I will address each of the five possibilities in the order that I listed them:

The Church of Jesus Christ of Latter-day Saints or "Mormonism" generally

[203] Dr. Walsh contends that "The Church of Jesus Christ of Latter-day Saints" has a broader religious meaning as opposed to its colloquial association to the Salt Lake City, Utah church – the mainstream LDS Church. Dr. Walsh's position is that:

> …congregations and sub-organizations that fall under the umbrella of The Church of Jesus Christ of Latter-day Saints claim either exclusive use of this term for themselves, or seek to deny the usage of this term to specific groups. A prime example is the LDS Church. […] Essentially, disagreements about the use of The Church of Jesus Christ of Latter-day Saints to describe a religious organization, sub-organization or congregation is a fight over who is in favour with God and who is not; who has legitimate priesthood authority and who does not; …
>
> (Dr. Walsh's Expert Report, pp. 6-7, para 3).

Consequently, Dr. Walsh believes that The Church of Jesus Christ of Latter-day Saints is a religious organization that is distinct from the mainstream LDS Church and encompasses "… all those organizations that believe they are legitimate successors to the priesthood authority of Joseph Smith …" (Dr. Walsh's Expert

Report, p. 5, para 1). Therefore, Dr. Walsh contends that Bountiful is part of the religious organization known as Mormonism.

[204] Both Dr. Cragun and Dr. Balmer disagreed with Dr. Walsh's conclusions. Dr. Cragun's expert opinion is that "Mormonism" is not a parent religious organization, as Dr. Walsh suggests, but that it is a religious "tradition" under which religions can be included. Dr. Cragun disagrees with Dr. Walsh's opinion that there is an organization called "The Church of Jesus Christ of Latter-day Saints" that is separate from the mainstream LDS Church. Dr. Cragun contends that Dr. Walsh's position is misleading and incorrect. Dr. Cragun pointed out that Dr. Walsh contradicted his own position, which he advanced in his Expert Report and testimony, in two prior sworn affidavits of March 3, 2010 and June 7, 2010 (Exhibit R-6, Tab 127 and Exhibit R-6, Tab 128, respectively). In those affidavits, Dr. Walsh describes Mormonism as a term encompassing the Christian religious, cultural and institutional traditions associated with the LDS Church, established by Joseph Smith Jr. on April 6, 1830. According to Dr. Cragun, this description, contained in Dr. Walsh's prior affidavits, as opposed to his statements in the Expert Report before me, is an accurate statement of Mormonism being a religious tradition as opposed to a religious organization.

[205] Dr. Cragun, at paragraph 43 of his Expert Report, describes the "Mormon" tradition as,

> … a loose set of beliefs and practices that a group of religious organizations have in common. […] A "religious organization" can be part of a "religious tradition" or a "family of religions," but a "religious tradition" cannot be a "religious organization."

[206] Dr. Cragun concludes, at paragraph 44 of his Expert Report, that any claim that Mormonism is a "religious organization," as Dr. Walsh contends in his Expert Report,

> … intentionally conflates a "religious tradition" with a "religious organization." In my opinion such a claim is disingenuous and unsustainable.

[207] Dr. Balmer also disagreed with the position taken by Dr. Walsh that a religious organization called The Church of Jesus Christ of Latter-day Saints has a separate and distinct existence apart from the LDS Church. He stated, at paragraph 37 of his Expert Report, that if Dr. Walsh meant instead to refer to "the Mormon Church" or "Mormonism" as the religious organization to which Bountiful was a part:

> … To make such a case, and given the episcopal polity of the Church of Jesus Christ of Latter-day Saints, you would have to be able to demonstrate an unbroken line of apostolic authority extending back to Joseph Smith Jr. Because of its persistent practice of polygamy, which was forbidden by Wilford Woodruff, the LDS prophet, in 1890, the FLDS cannot do so. Nor can Mr. Blackmore credibly make any such claim, both because of his "ordination" through the FLDS (which is *not* the Church of Jesus Christ of Latter-day Saints) and because he no longer has any standing in the FLDS. Therefore, even if we acknowledged the apostolic legitimacy of the FLDS Church – a status emphatically denied by the Church of Jesus Christ of Latter-day Saints – Mr. Blackmore is twice removed from apostolic legitimacy.

[208] I accept the testimony of both Dr. Cragun and Dr. Balmer and I conclude that Mormonism is not a religious organization but that it is a religious tradition in much the same way as we understand Christianity to be a religious tradition. This is in accordance with the testimony of both of these experts. It would also appear that this is the widely-held view of most scholars in this field. I also believe Dr. Walsh's position, as presented in his Expert Report and in his testimony, to be suspect in light of the contrary viewpoint he adopted in prior affidavits sworn in 2010. I reject Dr. Walsh's position which is, at best, incorrect and, at worst, misleading to this Court. He clearly substituted the correct term "the religious tradition of Mormonism" in his affidavits for the incorrect term "The Church of Jesus Christ of Latter-day Saints" in his Expert Report and in his testimony before me in these appeals.

[209] The purpose of the provision, which requires that a congregation be a constituent part of a religious organization, is to ensure that it applies to groups that are clearly part of a wider and well-established organization that shares a common purpose. Even if I did have any evidence to support a finding that "Mormonism" is a religious organization, as opposed to a tradition, it would lead to an interpretation of this provision which would be overly broad and contrary to Parliament's intent. Such a finding would permit the umbrella of Mormonism to potentially shelter a diverse array of groups and individuals, all adhering to different but not shared beliefs based on divergent religious and philosophical tenets. Some groups practice polygamy, while others do not. Such different practices arguably make these groups radically different from one another, nullifying the possibility that they belong to the same religious organization. Such groups do not share the requisite "common purpose" or "common interests," whatever those happen to be.

[210] Consequently, I conclude that Bountiful is not a part of the The Church of Jesus Christ of Latter-day Saints, as Dr. Walsh incorrectly used that term and related it to Mormonism generally, because neither are religious organizations and, in fact,

Mormonism is a religious tradition, following the definition given to it by Dr. Cragun.

The LDS Church

[211] I cannot accept that Bountiful is a part of the mainstream LDS Church either and, most importantly, the Appellant has never claimed that Bountiful was a part of the LDS Church. My conclusion is based on the following:

(i) There was a split within the LDS Church with the issuance of the Woodruff Manifesto in 1890 which disavowed the practice of polygamy. This led to the split between the LDS Church and Mormon fundamentalists, who continued the practice of polygamy, with the LDS Church excommunicating members who continued the practice. Dr. Cragun noted that the LDS Church today continues to disavow any connection to Mormon fundamentalists or groups that continue to practise polygamy, as Bountiful does.

(ii) The beliefs and principles of the LDS Church do not require its members to live and work together or to devote their working lives to the activities of their community or prohibit the members from owning property (Dr. Cragun's Expert Report, p. 12, para 28). This is in direct opposition to the requirements of the *Act* and what the Appellant is claiming.

[212] The Appellant never claimed that he is part of the Church of Jesus Christ of Latter Day Saints, either generic Mormonism or the LDS Church. At paragraph 3 of his Further, Further Amended Notice of Appeal, he stated that he belongs to the FLDS Church but not to the FLDS Church that Warren Jeffs leads. After the 2002 split, he referred to his group as a "subset" of the group pre-2002 split. While he referred to having associations with other like-minded communes in the United States, he did not adduce evidence respecting the particulars of these groups and whether they might meet the definition of "congregation" so that Bountiful could be considered a constituent part of a religious organization comprised of such congregations.

The FLDS Church, both pre and post the 2002 split; and/or the FLDS Church pre the 2002 split and an independent group of Mormon fundamentalists post the 2002 split

[213] Is Bountiful a member of the FLDS Church before and/or after the split of the community in 2002? This split in Bountiful occurred over a disagreement as to whether Warren Jeffs was the prophet of the FLDS Church. The Appellant was excommunicated from the FLDS Church in mid-2002. About equal numbers followed the Appellant, while the remaining members of Bountiful followed Warren Jeffs, who appointed a leader for his followers in the community. As pointed out by Dr. Cragun in his Expert Report, at paragraph 32,

> … Disagreement over who is the prophet or who has the authority to be the prophet is a major disagreement. […] As the Bountiful group no longer shared a key belief with the other members of the FLDS Church they could not be a constituent part of the FLDS Church after 2002.

[214] In indicating the serious nature and consequences of excommunication and apostasy in the Mormon tradition, Dr. Cragun, at paragraph 33, stated that "… [m]embers who are excommunicated are considered to be completely cut off from the religious organization from which they were excommunicated." Consequently, it would be difficult to conclude that the portion of Bountiful led by the Appellant was a constituent part of the FLDS Church after the 2002 split, even if the Church is a religious organization, because the Appellant's group no longer shared a basic belief that other members of the FLDS Church retained: that Warren Jeffs was the succeeding and legitimate prophet and priesthood head of the FLDS Church.

[215] Dr. Cragun's view of Bountiful, in respect to the intact community pre the 2002 split, seems to be that it was part of a religious organization or at least a larger religious group, which is the FLDS Church (Dr. Cragun's Expert Report, para 30). However, Dr. Balmer's view, from an historical perspective, questioned the very legitimacy of the FLDS Church. Since Mormonism is episcopal in polity, that is, governed by bishops, the line of priesthood authority is very important and any disagreement respecting the legitimate authority of the prophet amounts to a major disagreement.

[216] Dr. Balmer's opinion is that the Appellant is "twice removed" from the LDS Church because the line of priesthood authority was twice ruptured in respect to the Appellant's claims: first, by Leroy S. Johnson, founder of the FLDS Church and then second, when the Appellant was excommunicated from the FLDS Church in 2002. Since episcopal polity requires an unbroken line of authority or succession, Bountiful, both pre and post the 2002 split, can make no legitimate claim to such succession. To conclude otherwise would ignore the foundational belief of apostolic succession. Without that, the Appellant cannot stake a claim to an unbroken line of

apostolic succession in a religious organization, when it is governed by the principle of episcopal polity.

[217] Dr. Balmer also disagreed with Dr. Walsh's position on the notion of self-identification of members of Bountiful with members of the LDS Church. Dr. Balmer's opinion is that consistency of beliefs and styles of worship would be insufficient to establish affiliation. As Dr. Balmer succinctly pointed out at paragraph 28:

> … The typical response to such a claim is that just as sleeping in a garage doesn't make you an automobile, so too merely having someone assert that she or he is a Mormon – or a Catholic or a Presbyterian or a Chevrolet – doesn't make it so.

[218] There are divergent opinions between Dr. Cragun and Dr. Balmer on the status of the membership of Bountiful in the FLDS Church prior to the 2002 split. However, it is important to note that each of them approaches that issue from a different perspective (Dr. Cragun's being a sociological perspective and Dr. Balmer's being an historical perspective).

[219] Neither Dr. Cragun nor Dr. Balmer was entirely clear in his Expert Report or his testimony as to whether the FLDS Church is a religious organization or not. Neither made a definitive statement. Dr. Cragun, at paragraph 30 of his Expert Report, states that the FLDS Church is a "religious group" prior to the excommunication of Winston Blackmore in 2002, but that it would not meet the definition of "religious organization" as outlined in the *Act*. However, I limited Dr. Cragun from giving testimony on his interpretation of section 143. At the conclusion of paragraph 30, he summarizes his view but couches his language such that it remains ambiguous:

> … it is doubtful that even prior to 2002 the individuals living in Bountiful were a "constituent part" or a "religious organization," since the FLDS Church is unlikely to meet the criteria of a "religious organization."

Then, at paragraph 41 of his Expert Report, he mentions, almost as an aside, that the FLDS would, in fact, meet the criteria of "religious organization" while Mormonism would not. This contradicts his statements at paragraph 30. Contrary to the Appellant's contention, that Dr. Cragun's testimony supported a conclusion that the FLDS Church is a religious organization, Dr. Cragun suggested that it was "<u>similar to</u> the religious organization" described in the *Act* but that it did not meet the definition in the *Act* as it was not organized in the same fashion as Hutterite colonies (Dr. Cragun's Expert Report, para 30, emphasis added).

[220] Dr. Balmer is also nebulous in his Expert Report and testimony when he discusses this issue. He makes it clear, however, that this area is a contentious, or at least uncertain, one among scholars.

[221] Neither expert directly provided the Court with what I consider a concise and unambiguous statement on this issue and I surmise that it may be, in part, because it is shrouded with the issue of polygamy, which is the proverbial "elephant in the room" that no one wants to confront.

[222] Dr. Balmer's Expert Report and testimony give the clear impression, however, that the FLDS Church would not qualify as a legitimate religious organization because the line of apostolic succession was broken due to the group's continued practice of polygamy. Throughout his Expert Report, he never refers to the FLDS as a "religious organization" but, instead, as a "splinter group."

[223] To determine the status of Bountiful prior to the 2002 split, it is essential to ascertain whether or not the FLDS Church is a religious organization pursuant to subsection 143(4). For the purposes of the *Act*, I do not believe that the FLDS Church can qualify as a religious organization. If I adopt the broader interpretation that the Appellant gives to "religious organization," then it would be possible for me to conclude that the FLDS Church is, in fact, a religious organization for which Bountiful is a constituent part. The Appellant's proposed definition of "religious organization" would identify it as an organization where its members believe in a supreme being (Appellant's Written Submissions, para 63). However, such an interpretation ignores other key elements of the definition, namely, that there must be "constituent parts" to the organization, as well as an adherence to particular identifiable beliefs. If "constituent part" were to be interpreted loosely to mean simply "connected to," then perhaps the FLDS Church could still qualify as a religious organization. However, based on the interpretation which I believe should be applied to "constituent part," I reject the Appellant's proposed looser interpretation because it is not in line with what I believe Parliament intended, namely, that there should be other congregations that are components or "constituent parts" of a greater whole, the religious organization.

[224] Dr. Cragun testified as to the serious consequences that result from excommunication. Dr. Balmer's opinion was that, when Leroy S. Johnson broke from the LDS Church over the practice of polygamy, he ruptured the line of priestly authority resulting in the FLDS Church being an illegitimate apostolic entity. This is

in line with Dr. Cragun's comments on the seriousness of excommunication. Dr. Balmer, at paragraph 25 of his Expert Report, notes that:

> According to the official doctrine and the repeated pronouncements of the Church of Jesus Christ of Latter-day Saints, therefore, anyone involved in polygamous unions in (*sic*) *not* a member of the Church of Jesus Christ of Latter-day Saints.

Such a radical departure from the mainstream church, as occurred with the FLDS Church, would support a conclusion that it lacks legitimacy as a religious organization, because essentially, in simplistic terms, the group that refers to itself as the FLDS no longer adheres to the beliefs and principles of the mainstream religious organization.

[225] Is it possible, then, for the FLDS Church to be a "re-constituted religious organization" with its own beliefs to which its members adhere? I think not because there must be much more than a mere name to a group that "self-identifies" as a religious organization. There must be a common purpose and some broader sense of an identifiable, collective group making up the larger qualifying organization. On the evidence, the FLDS appears to be a loose association of divergent groups, rather than the structured religious organization envisioned in the *Act*. For the FLDS Church to qualify as a religious organization as defined in the *Act*, these divergent groups would need to meet the criteria of "congregations" and, based on the evidence, they do not.

[226] Even if I determined that the FLDS Church is a religious organization, another damaging argument against concluding that Bountiful could be a part of the FLDS Church is that I have very little evidence to support that Bountiful members themselves strongly identified with the FLDS Church as a religious organization. Although some of the lay witnesses identified themselves and the community as members and part of the FLDS Church pre the 2002 split, the Appellant made multiple statements and attempts to disassociate himself and Bountiful from the FLDS Church, noting that he had nothing in common with them and had not signed a membership form when the Church was "officially organized" in 1991 (Transcript, Examination in Chief of Winston Blackmore, p. 134). The Appellant described his group as "… fundamentalists, like every group under the name FLDS is radically different one from the other because they take their authority from whoever happens to be in charge of the particular group." (Respondent's Read-ins, Examination for Discovery of Winston Blackmore, March 11, 2010, Questions and Answers 821-822, p. 148). This echoes other statements made by the Appellant concerning the fragmented nature of the FLDS as a group and the independence of the subgroups

which might identify with the FLDS. This negates any adherence to common practices, beliefs and principles of a religious organization.

Summary of Conclusions on the Application of Paragraph 143(4)(*b*)

[227] In summary, a textual, contextual and purposive reading of section 143 suggests that Parliament intended this provision to apply to established, definable religious organizations with an underlying common purpose. Based on the expert evidence, Mormonism is not a religious organization, to which Bountiful could be a part, because Mormonism is a tradition.

[228] The community of Bountiful cannot be a part of the religious organization, the mainstream LDS Church because the members do not follow the beliefs of the LDS Church. They practice polygamy which the LDS Church has disavowed.

[229] I would characterize the FLDS Church as an off-shoot group that identifies as Mormons and whose members practice polygamy. Yet it is precisely that practice that distinguishes them as a group that also disqualifies them from classifying as members of the mainstream Mormon religious organization, namely the LDS Church. In addition, the Appellant's comments, respecting the separate nature of his group and other such groups, negate the theory that they might form a group or systemic arrangement bound together by a common purpose or goal, as canvassed in the definitions of "organization" in the within reasons.

[230] Where experts have difficulty agreeing on the precise boundaries of the FLDS Church as a "religious organization," and where Dr. Cragun seems to contradict himself, based on the evidence as a whole and the Appellant's statements on his membership in the FLDS Church, I prefer to follow Dr. Balmer's view that the FLDS Church is not a religious organization because the lines of priesthood authority have been broken. I, therefore, conclude that the FLDS Church does not meet the definition intended by Parliament in subsection 143(4) of the *Act*. At most, the community of Bountiful consists of an independent group of fundamentalist Mormons who cannot bring themselves within the parameters I have established for this part of the definition of "congregation."

C. Ownership of Property

Does the community of Bountiful prohibit any of its members from owning any property in their own right?

[231] To satisfy this component of the definition of "congregation," the evidence must support a finding that a prohibition exists in Bountiful against members owning any property in their own right. My conclusion is that the text of this third prong of the definition is clearer and less ambiguous than the other three. Although the Appellant suggested an innovative interpretation pertaining to "beneficial ownership," that approach is not compelling as it would require this Court to read far more into this component of the definition than is apparent on its face.

1. The Appellant's Submissions

[232] The Appellant provided no factual basis for how Bountiful prohibits its members from owning property in their own right. Instead, Appellant Counsel suggested an interpretation of paragraph 143(4)(*c*) that supports the community's particular set of property norms and then relies on those facts to support that particular interpretation.

[233] According to Appellant Counsel, the members of Bountiful were prohibited from owning property in their own right because:

> (a) the majority of members did not hold title to real property;
>
> (b) title to real property was allocated in whatever way was advantageous to the community and concentrated in the hands of a few at the top of the religious hierarchy;
>
> (c) title to personal property was more widely distributed, but subject to the condition that use of both real and personal property was at the pleasure of church leaders;
>
> (d) risk was distributed across the community as a whole; and
>
> (e) control over property was situated within church leadership.
>
> (Appellant's Written Submissions, para 240)

[234] Appellant Counsel does not believe Parliament intended ownership "in their own right" to denote "legal ownership" but, instead, that Parliament intended it to

mean "beneficial ownership" that does not include all of the incidents of ownership, being possession, use, risk and control.

[235] According to Appellant Counsel, the evidence demonstrates that the congregants' rights in respect to property do not include complete rights of possession, use, risk and control. The interpretation of paragraph 143(4)(*c*) must be given enough scope to accommodate different community property practices, as even the rule against private property ownership in Hutterite colonies is relative and contextual, rather than absolute (Appellant's Written Submissions, para 104).

[236] Members of Bountiful do not treat property according to "normal" capitalist behavioural norms but, instead, their relationship to property is governed by doctrinal principles which have been interpreted by fundamentalist Mormons as communitarian in nature (Appellant's Written Submissions, para 111).

[237] The practice of both "consecration" and "tithing" are part of a larger religious mission or principle called the "United Order," meaning members live in such a way that a community can share all things in common and equally (Transcript, Examination in Chief of Winston Blackmore, pp. 139-140). According to the Appellant, these practices amount to communal property practices that comply with paragraph 143(4)(*c*). The United Order is generally understood to be the goal, while the Law of Consecration is the means of achieving that goal. Doctrinally, Bountiful members were required to consecrate all of their time, talents and property to the church. Although there was no specific directive for members to convey all of their property to a particular entity, it was imperative that they consecrate their life and property to the United Effort Plan in the sense that this Plan is the underlying idea or concept of communal living for the UEP Trust (Appellant's Written Submissions, para 242).

[238] Appellant Counsel argued that the totality of the evidence supports the existence of the Law of Consecration in Bountiful. In this regard, Dr. Walsh emphasized the importance of "stewardship" for Mormons, that is, the doctrine that requires each member to use every possession they have for the good of the community and to share with less fortunate members.

[239] The community practices that support this communal approach to property ownership include the following: tithing and the UEP Trust, both mechanisms used to achieve the United Order; distribution of homes among members at the direction of church leaders; and famine calls.

[240] Examples of other behaviours that exemplified a communal approach to property included:

- Members engaged in organized but unpaid "work days" for various community projects.

- The Company paid wages and benefits on a needs basis rather than time worked, tasks completed, or minimum wage standard.

- Some of the 95 vehicles owned by the Company were used by both employees and non-employees of the Company. Credit cards in the name of the Appellant were given to Company employees to purchase fuel and parts but then paid for by the Company.

- No savings or RRSPs were kept or required, given the lifestyle of the community.

- The Appellant felt that he did not have control over lands in his name and that, if directed to do so by the church president in the pre-split period, he would have transferred the lands to the UEP Trust.

- Land title and transfer documents merely show that members held legal title and, from time to time, transferred that legal title.

- When members received directions in respect to their property, they would comply with those directions and do as requested.

2. The Appellant's Position

[241] In his submissions, Appellant Counsel suggested that Parliament had used "… an intentionally nebulous concept that allows for some flexibility …" with respect to the wording in paragraph 143(4)(*c*) (Transcript, Appellant's Oral Submissions, p. 3016). Since many of the terms contained in section 143 have no technical meaning, the provision should be liberally interpreted. Parliament chose to describe the operative ownership rules within a congregation in the negative and by a descriptor, "in their own right," that has no single, precise or technical meaning in the context of tax or property law.

[242] Within the context of tax law, the most relevant types of ownership are legal and beneficial ownership. It is beneficial ownership, with its attendant four core incidents of possession, use, risk and control, that usually determines tax consequences (Appellant's Written Submissions, paras 99 and 100). Where members of a community do not possess all four incidents of beneficial ownership, they do not have ownership "in their own right" (Transcript, Appellant's Oral Submissions, p. 3053).

[243] Other than not engaging in ordinary capitalist property practices, the provision does not impose any other requirements. Control over assets was exercised for the benefit of the community and, as a matter of doctrine, members were required to consecrate their time, talents and property to the church (Transcript, Appellant's Oral Submissions, p. 3078) in order to achieve the utopian good of the United Order. The Appellant suggested that the subjective religious belief of Bountiful members, to do all things for the good of the community and to be ready to give up possession, the use and the control of an asset when requested by a religious leader, is sufficient to meet the test set out in paragraph 143(4)(*c*). Therefore, Bountiful members were religiously and doctrinally prohibited from owning property in their own right (Transcript, Appellant's Oral Submissions, pp. 3079 and 3082).

3. The Respondent's Submissions

[244] According to the Respondent, there is no evidence of any prohibition against members owning property in their own right in either the practices of the community itself or in the doctrines and practices of either the LDS or FLDS Churches. The UEP Trust does not own all of the real property in Bountiful. There are many examples of private property ownership among members, such as financial obligations, personal bank accounts, bank loans, trailers, vehicles, insurance, wages and personal possessions.

[245] The Respondent pointed out that members of Bountiful were not prohibited from owning property, such as vehicles or bank accounts. No documentation existed to support that any property, registered in members' names personally, was being held on behalf of the UEP Trust.

[246] The Respondent pointed to the property owned by community members and actions taken with respect to that property to support its position that private ownership of property was permitted in Bountiful.

4. The Respondent's Position

[247] The Respondent relied on the broad definition of "property," contained in subsection 248(1) of the *Act*, and applied it to interpret this provision.

[248] The Respondent also made the following observations respecting this provision:

> … the Act does not require that members of the subject community **actually** own no property in their own right. The Act only requires that the community does not permit it. Second, the language "does not permit" used by Parliament is strong. The private ownership of property must actually be prohibited, not merely discouraged or something less than outright prohibition.
>
> (Respondent's Written Submissions, p. 97, para 467)

[249] It was the Respondent's position that there is no evidence of any prohibition against private ownership in either the LDS or the FLDS Church or their doctrines and practices and there is no requirement that members consecrate all their property to the UEP Trust or the church. Rather, members of Bountiful are expected to tithe 10 per cent of their income to the community. As well, the UEP Trust accounts for only some of the property ownership in Bountiful.

5. Analysis

[250] The wording of paragraph 143(4)(*c*) is the most straightforward of the four components of the definition of "congregation":

> … "congregation" means a community, society or body of individuals, whether or not incorporated,
>
> […]
>
> (*c*) that does not permit any of its members to own any property in their own right, and
>
> […] (Emphasis added)

[251] Even if the Appellant had produced sufficient evidence to establish compliance with the other three components of the definition of "congregation," based on the evidence before me, he could not bring himself and the community of Bountiful within the ambit of this third component because there was no prohibition by the community against members owning property.

[252] The plain language contained, for the most part, in paragraph 143(4)(*c*) requires that the community itself, in some tangible form, prohibits or "does not permit" property ownership by its members. It is evidence of a prohibition by the community that is required because the wording in (*c*) does not require that members actually do not own property.

[253] While the meaning of "in their own right" may not be immediately obvious, the intention of Parliament is otherwise straightforward: a congregation envisioned by paragraph 143(4)(*c*) must have a prohibition against members owning property. In fact, the test is a strict one for a congregation to satisfy. The prohibition by a community does not permit any members to own any property. Anything less than an absolute prohibition will not comply with the wording in (*c*). Without otherwise relying on the Hutterite example, as the Respondent suggested, the clear and obvious text of this third criterion requires cogent evidence that concretely establishes a practice or doctrine within a community that unequivocally "does not permit" or "prohibits" the members from owning any property.

[254] The strictness of this test suggests a straightforward meaning to the word "property," contained in paragraph 143(4)(*c*), such as the definition suggested by the Respondent and contained in subsection 248(1) of the *Act*. This definition, absent a contrary indication, is meant to apply throughout the *Act*. Since there is no contrary intention contained in subsection 143(4), it is this definition that should apply. It is a broad and encompassing definition which includes "… property of any kind whatever whether real or personal or corporeal or incorporeal." It makes no distinction between "beneficial ownership" and bare "legal title", as the Appellant suggested.

[255] The Appellant's contention that the phrase "in their own right" equates to "beneficial ownership" has no basis in either the *Act* or the provision itself. Further, there is absolutely nothing to indicate that Parliament had "beneficial ownership" in mind when it employed the words "in their own right." It must be assumed that Parliament used the words or phrases that it intended to use and, if it intended that beneficial ownership could be easily substituted in place of "in their own right," it would have so stated, or, at the very least, used the phrases in the alternative in paragraph 143(4)(*c*).

[256] I see no logical connection between these two phrases "beneficial ownership" and "in their own right." The Appellant's argument was that, because members are always subject to directives by Winston Blackmore in respect to their property,

including being requested to move residences and to divest themselves of their property if so directed, then they cannot be beneficial owners, as they do not enjoy all of the four common incidents of such ownership: possession, use, risk and control. Because they do not have the full incidents of beneficial ownership, they are essentially prohibited as members of Bountiful from owning property "in their own right" (where "beneficial ownership" equates to "in their own right").

[257] The Appellant made the link by relying on two Tax Court of Canada cases which, in the Appellant's submissions, used the phrase "in their own right":

> … ambiguously to denote actions taken in respect of property for the sole benefit of the actor or actions taken by one person in their sole discretion and without consideration for the position of other persons, as well as to differentiate 'normal' ownership within the mainstream economy from ownership of on-reserve property.
>
> (Appellant's Written Submissions, para 98)

[258] The jurisprudence respecting "beneficial ownership," upon which the Appellant is relying, relates to disputes over the meaning of "beneficial owner" in the context of the application of International Tax Treaties (see *Carter v The Queen*, 99 DTC 585 (TCC) and *Akiwenzie v The Queen*, 2003 TCC 68, 2003 DTC 235). In those cases, the phrase "beneficial owner" was referenced as it appeared in a particular tax convention. Further, all of this jurisprudence, as well as other jurisprudence cited by the Appellant, originated in the period subsequent to the enactment of section 143 (*Williams v The Queen*, 2005 TCC 558; *Prévost Car Inc v The Queen*, 2008 TCC 231; and *Velcro Canada Inc v The Queen*, 2012 TCC 57).

[259] The Appellant is asking that this Court make a giant leap with respect to this third criterion by substituting the words "beneficial ownership" for "in their own right" and then attributing a meaning to the term "beneficial ownership" through unrelated jurisprudence. Such an interpretation would unjustifiably broaden the wording of paragraph 143(4)(*c*) and attribute a different meaning to the term "property." This is beyond the intent of Parliament in enacting this provision.

[260] It is clear that other judicial uses of the phrase "in their own right" have not ascribed any particular or technical meaning to it. The phrase appears to indicate, in a general sense, the share of ownership of an asset:

(a) in *Agricultural Credit Corp of Saskatchewan v Haryett*, [1995] SJ No. 611 (QB), the Court referred to the sale of lands whether owned in their own right or as joint tenants;

(b) in *Condominium Plan Number CDE 13442 v Adler, Furman & Associates Ltd*, [1983] AJ No. 290 (QB), the Court stated that the Appellants became registered owners of the said lands in their own right; and

(c) in *C.H. v M.H.*, 1997 ABCA 263 (CanLII), the Court, in summing up the claim of M.H., stated that certain legal entities were capable of holding property in their own names and in their own right.

[261] In interpreting the phrase "in their own right," Martin, J.A. in *Re Immigration Act and Munshi Singh*, 1914, 6 WWR 1347 (BCCA), noted, at paragraph 45, that the words "possess in (his) own right" means "… nothing more nor less than his own money."

[262] There is no judicial or legislative source that would support this Court substituting the term "beneficial ownership" for "in their own right." The plain and ordinary wording of paragraph 143(4)(*c*) does not permit a reconstruction of the meaning of property as suggested by the Appellant. The phrase "does not permit" is clear statutory language which contains an absolute and unequivocal statement. It becomes even more "absolute and unequivocal" by the use of the word "any" before the words "of its members" and the word "property." There is no judicial or legislative support for interpreting "in their own right" in any way other than in the general sense of "on their own account."

[263] The next question is whether, within the boundaries of the statutory interpretation which I have just outlined, the community of Bountiful "prohibits" or "does not permit" its members from owning any property? Such an absolute prohibition must be clearly established in the evidence, either by way of documentary evidence, such as articles of incorporation referencing the prohibition, or through the practices, doctrine and principles existing on the ground in Bountiful.

[264] The Appellant suggested that the evidence that established this prohibition consisted of: the community's practice of exchanging or swapping residences; the practice of tithing; the famine calls; and members following directives from religious leaders respecting their property. The inference from this evidence, according to the Appellant, was that property was normally held for the benefit of the community of Bountiful. However, such an inference fails to meet the language of "does not

permit" contained in paragraph 143(4)(*c*). An "inference" is insufficient and the evidence contains nothing to support a finding that there was an actual prohibition by the community against its members owning any property. Further, there is no evidence to support that such a broader prohibition exists in either the mainstream LDS Church or the FLDS Church, even if I had concluded that Bountiful was a constituent part of these organizations, pursuant to paragraph 143(4)(*b*).

[265] While Parliament did not include a specific requirement that a congregation be incorporated, the prohibition must otherwise be clearly evident and discernable from religious doctrine and practices within the community where no articles of incorporation, containing such a prohibition, exist. The Hutterite example demonstrates how a plain reading of "does not permit" is expressly manifested in Articles of Incorporation. This prohibition against members of Hutterite colonies owning property is referenced in the *Wipf* decisions. The Hutterian practice of community of goods, coupled with the prohibition, is explicitly contained in their Articles of Incorporation. It is logical to assume, therefore, that Parliament had an explicit prohibition in mind when it enacted section 143. The community of Bountiful does not have Articles of Incorporation, but the prohibition by the community requires that it be, at the very least, easily evident in the religious doctrine and community practices. Even the Articles of Incorporation for the Company contain no express prohibition against members of Bountiful owning property or that corporate assets are impressed with a trust arrangement on behalf of the members. Nor is there any prohibition contained in either the 1942 Declaration of Trust or the 1998 Amended and Restated Declaration of the UEP. In the 1942 Declaration of Trust document, only the current trustees, not community members generally, were to be considered beneficiaries of the consecrated trust property. The 1998 Amended and Restated Declaration anticipates further consecrations of property to the Trust but contains no stipulation that members were subject to a prohibition against owning property in their own right. When members consecrated property to the Trust, they did not always become beneficiaries of the Trust, even though they might be continuing to live on the consecrated land.

[266] Comparing property ownership in Bountiful to that of Hutterite colonies provides context to subsection 143(4). In Bountiful, not all real property was conveyed to the UEP Trust. Real property was registered in the names of the Appellant, the Company, in some members of the Appellant's family and in the UEP Trust. The evidence indicated that Bountiful members owned various personal property, such as bank accounts, lines of credit, GICs, vehicles, trailers and credit cards. They had financial obligations to banks respecting their property. They obtained and paid for their own insurance. Ken Oler gave evidence that he deposited

his earnings into personal accounts, but that no one in the community gave him directives on how he had to deal with these monies. Marlene Palmer testified that she had a personal line of credit, credit cards, vehicles and, at one point, she had a 50 per cent interest in real property located on the Pitt River Road. Miriam Oler also stated that she owned similar assets. The evidence supported that the members owned their personal property outright and that, in most instances, the Appellant did not give directives to the members respecting those items.

[267] Between 1988 and 2001, the Appellant, either alone or with other individuals, acquired property locally in Bountiful and as far away as Creston, Kitchener and Calgary. Some of these properties were mortgaged. Some were sold. There was no evidence submitted that these transactions were subject to any type of trust arrangements on behalf of the members of Bountiful. In addition, the Appellant's divorce settlement from his first and only legal wife and the transfer of real property to her contained no evidence of any trust imposed on the Appellant's assets. Nor was there any evidence of trust arrangements in respect to the property held by the Company. There were no minutes or documentation that any shareholders held property in trust for the benefit of community members. There was no documentation that the Company acted as an agent on behalf of the community. The Company owned property in its own name, obtained mortgage financing and transferred properties. When the Company filed a notice of intention to make a proposal in bankruptcy, the documentation contained no references to UEP, UEP Trust, the J.R. Blackmore Trust or the Blackmore Trust.

[268] The Appellant never advised banks or lenders that he or the Company held property as trustees for the community (Transcript, Cross-examination of Winston Blackmore, pp. 595-596). Aside from the Company accountants, the Appellant did not account for funds that the Company expensed. Neither Marlene Palmer nor Miriam Oler were aware of or saw any records that the Appellant kept concerning property being held in trust for the community of Bountiful (Transcript, Examination in Chief of Marlene Palmer, p. 1284 and Examination in Chief of Miriam Oler, p. 2826). Neither the Appellant nor the Company have ever transferred property to the UEP Trust (Transcript, Cross-examination of Winston Blackmore, pp. 574-575). There is no mandatory requirement to consecrate property nor is there a prohibition of ownership of property contained in the Book of Mormon, the Doctrine and Covenants or The Pearl of Great Price (Respondent's Written Submissions, para 239).

[269] If one returns to the definition of property contained in subsection 248(1), it includes property "of any kind" whether real or personal. The evidence is replete

with examples of members owning property. In fact, the very examples of tithing and famine calls, that the Appellant cites to support an alleged prohibition against property ownership in Bountiful, support the opposite conclusion. If the practice is one of community of goods and prohibition against members owning assets, then it would be logical that practices such as tithing and famine calls would not be required. Nothing would remain for members to tithe 10 per cent of their income or contribute to famine calls if their goods were consecrated to the community in accordance with an express community prohibition against property ownership by members. Even without making a comparison to Hutterite colonies, the evidence overwhelmingly points to a lack of the type of prohibition contained in the language of paragraph 143(4)(*c*).

[270] Neither is there any express prohibition in the religious doctrine and principles of the LDS and FLDS Churches.

[271] Dr. Walsh explained that consecrating all of one's property meant making it available if and when it was called for by church leaders (Transcript, Examination in Chief of John Walsh, p. 890) but that it did not necessarily mean that property would be legally conveyed to the church.

[272] However, as Dr. Cragun pointed out at paragraph 60 of his Expert Report, efforts to fully enact the Law of Consecration were, in practical terms, problematic for communities to implement. Although not successful, according to Dr. Cragun, it remains a component of Mormonism, but not a practice that members of the LDS Church follow today. Instead, the current practice of tithing, where members are required to donate 10 per cent of their annual income to the religion, rather than consecrating all their property, is followed by members.

[273] Dr. Walsh testified that the LDS Church does not allow its members to own property separate and apart from the purpose and activities of the community. Dr. Cragun criticized this statement because he testified there is no such prohibition in Mormon belief and doctrine or in the original teachings of Joseph Smith Jr. Dr. Cragun also criticized Dr. Walsh's statement that all Mormons are required to consecrate everything they have to the Kingdom of God. Since the Law of Consecration was never adopted by the majority of members of the LDS Church, it was never, therefore, in full effect.

[274] According to Dr. Cragun, the Law of Consecration has been implemented differently in the FLDS Church. In 1942, the FLDS Church attempted to live the Law of Consecration by creating the UEP Trust. It acted as a holding company for

administering real property that was contributed to the Trust by some members. The UEP Trust and the FLDS Church are separate entities, with the Trust being administered by a Board of Trustees. According to Dr. Cragun, "… [i]ndividual members of the FLDS Church have no say in how the UEP is administered," (Dr. Cragun's Expert Report, para 66) and members were not required to deed all their property to the Trust.

[275] I have reviewed the Expert Reports and testimony of Dr. Cragun and Dr. Walsh and I accept Dr. Cragun's over that of Dr. Walsh. Dr. Cragun's critique of Dr. Walsh's statements was thorough. His statements were fully supported through footnoted scholarly articles and references. Many of Dr. Walsh's assertions were not similarly supported. Dr. Cragun testified as to the history of the Law of Consecration within the LDS Church and concluded that the law has been effectively suspended as a practice of the mainstream church. There is no explicit prohibition or statement to that effect in Mormon doctrine, scripture or early teachings preventing private property ownership. Although the Law of Consecration has been implemented differently in the FLDS Church, neither the 1942 Declaration of Trust nor the 1998 Amended and Restated Declaration of Trust contain an explicit or implied prohibition against private ownership of property by its members.

[276] When considering paragraph 143(4)(*c*) in a purposive manner, it appears that the prohibition against private property ownership is part of the "raison d'être" of this provision. That is, it is meant to provide exceptional blanket coverage in respect to tax treatment of particular groups that can bring its members within this section. One of the primary reasons, that members of such groups would not be taxed in the same manner as other taxpayers in the country, is that they do not operate pursuant to the ordinary and usual rules of private property ownership. If, however, individuals are free to obtain and sell or otherwise dispose of property, whether real or personal, then it is logical that they would be and expect to be taxed in the same manner as other Canadian taxpayers. Allowing a group, that does not explicitly prohibit private ownership of property of any kind, to benefit from the application of section 143 would be contrary to, and in direct contravention of, the purpose for which this section was enacted.

[277] In summary, the facts do establish that Bountiful has developed its own unique relationship to property ownership. It encompasses a set of practices that are in opposition to what we think of as being in sync with ordinary capitalist norms. The members of Bountiful have permitted Winston Blackmore to provide directives respecting where they reside and the manner in which some of their personal resources are to be utilized within the community. However, this unique relationship

to their property does not satisfy the strict test of paragraph 143(4)(*c*). The language in paragraph 143(4)(*c*) requires an explicit prohibition contained in either articles of incorporation, religious doctrine or practices, rather than an implicit prohibition gained entirely through a fact-based inquiry. This is in line with the principles of statutory interpretation and administrative efficiency.

[278] The community of Bountiful exhibits a "communal" approach to some aspects of their property, but it is not "communal" in the sense envisioned by the *Act* and, specifically, this provision; that is, Bountiful does not explicitly prohibit private ownership of property by all of its members, in either its practices or in its religious doctrine and principles or in any existing articles of incorporation.

D. Devotion of Working Lives to Activities of the Congregation

Does the community of Bountiful require its members to devote their working lives to the activities of the congregation?

1. The Appellant's Submissions

[279] According to Appellant Counsel, religious doctrine required members of Bountiful, both pre and post the 2002 split, to devote their working lives to the activities of the community. Community custom and the evidence of the lay witnesses supported the Appellant's position that members were required to pursue a livelihood within the community's social and business structures. In practice, this religious doctrine was supported because the Company was the main employer of members of the community; the children were groomed from an early age to participate in the community's labour force; the expectation for members, including children, was to devote their time and labour to work on community projects, particularly on community work days; and the wage structure utilized by the Company.

[280] Appellant Counsel suggested that paragraph 143(4)(*d*) is satisfied because of two key characteristics that distinguish fundamentalist Mormons from mainstream Mormons: first, the practice of polygamy and, second, community members live communally. The Appellant relied on Dr. Walsh's testimony that communal living is prevalent among fundamentalist Mormons because they adhere strictly to the teachings of Joseph Smith Jr. This included the practice of polygamy, which is conducive to communal living (Appellant's Written Submissions, para 218; Exhibit

A-9, para 21). Dr. Walsh expressed this same view in the B.C. Polygamy Reference Case (Exhibit R-6, Tab 129, p. 31).

[281] The Company was the main employer in Bountiful and most male members worked for the Company. The Appellant described the Company as the "business arm of our church" (Transcript, Examination in Chief of Winston Blackmore, p 31) and Ken Oler described the Company as the "church company" that

> … provided employment for the community … and to help doing whatever it needed to provide infrastructure and things for the community.
>
> (Transcript, Examination in Chief of Ken Oler, p. 939).

[282] The Appellant also testified that the workers for the Company were "everybody from the community" (Transcript, Examination in Chief of Winston Blackmore, p. 69).

[283] Other companies also operated within Bountiful, some of them in the context of providing support for the Company's operations.

2. The Appellant's Position

[284] The Company was the primary community employer. There were exceptions to this, such as employing outsiders, members working for outside employers and providing products and services to outsiders, but they were infrequent occurrences. Although the Respondent placed emphasis on these exceptions to support its position, Appellant Counsel argued that this reliance was inappropriately placed because of the Respondent's comparison of the community of Bountiful to the Hutterite communities.

3. The Respondent's Submissions

[285] The Respondent emphasized that paragraph 143(4)(*d*) contains the word "requires," which means members of Bountiful must be required to support the activities of the community. It will not satisfy this fourth element of the definition of "congregation" if the members felt morally compelled to work to support community activities but were not actually required to do so. As well, members of Bountiful were able to and encouraged to engage in economic activities outside the community.

4. The Respondent's Position

[286] The evidence does not support a conclusion that there was a requirement of devotion to community activities within Bountiful. In fact, the evidence supports that members were encouraged to seek work elsewhere.

[287] In addition, Bountiful does not meet the Hutterite standard of commitment to the community. The Respondent cited Article 40 of the *Act to Incorporate the Hutterian Brethren Church* as illustrating the sort of requirement that section 143 envisions:

> Each and every member of a congregation or community shall give and devote all his or her time, labor, services, earnings and energies to that congregation or community, and the purposes for which it is formed, freely, voluntarily and without compensation or reward of any kind whatsoever, other than herein expressed.
>
> (Respondent's Written Submissions, p. 108, para 505; also cited in *Wipf*)

[288] Further, Hutterite communities are agrarian. In *The Budget Plan 1999*, Finance Minister Martin stated: "Hutterite colonies carry on farming and other related businesses in Western Canada as "communal organizations."" (*The Budget Plan 1999*, Tabled in the House of Commons February 16, 1999, p. 202, cited in Respondent's Written Submissions, para 507).

5. Analysis

[289] The analysis of this fourth part of the definition of "congregation" and its application to the facts is more straightforward than the preceding three parts of the definition, particularly in light of the approach taken in the analysis of these first three parts.

[290] The evidence adduced at the hearing was not fully supportive of the position of either the Appellant or the Respondent. My conclusion will be largely dependant upon whether I apply a restrictive or more liberal interpretation to paragraph 143(4)(*d*). On the evidence, it is possible to find that there was a "general expectation" of devotion of members' working lives to the activities of the community. Whether that general expectation translates into a "requirement" as contemplated by the wording contained in paragraph 143(4)(*d*) is dependant upon how strictly this particular criterion is interpreted and applied. While either interpretation is reasonable, a restrictive interpretive approach is in keeping with the

narrower approach which I adopted in my analysis of the first three components, (*a*) through (*c*), of the definition of "congregation."

[291] While the Respondent looked at the meaning of the word "require" in its ordinary sense: "to lay down as an imperative, to demand or insist on, to instruct or command" (Respondent's Written Submissions, para 504, citing *The Oxford Pocket Dictionary*, 7th ed., Clarendon Press, Oxford, 1985), there are actually several words within (*d*) that may be interpreted in a number of ways: "devote," "working lives," and "activities of the congregation." However, the word "requires" will be the most determinative.

[292] The phrase "… to devote their working lives to the activities of the congregation" implies that members of a community are entirely committed to the community. According to *The Oxford English Dictionary* (Second Edition, Vol. IV, 1989), the definition of the verb "devote" is "[t]o appropriate by, or as if by, a vow; to set apart or dedicate solemnly or formally; to consecrate." In *Webster's New World Dictionary* (Second Edition, 1984), "devote" is defined as: "to give up oneself or one's time, energy etc. to some purpose, activity or person." These dictionary definitions suggest that "devote" implies that an individual is dedicating their working life entirely to some specific purpose, akin to a formal vow. When viewed in conjunction with the first component (*a*) of subsection 143(4), that is, that members live and work together, component (*d*) indicates that the work of the community members should be devoted to the community as a unit.

[293] The fact that paragraph 143(4)(*d*) specifies "activities of the congregation" further implies that the working lives of community members are committed to the congregation on a regular, consistent and customary basis. "Activity" is defined in the *The Oxford Dictionary* (http://oxforddictionaries.com) as: "the condition in which things are happening or being done." Therefore, the working lives of members are not simply committed to the congregation in the abstract but, rather, are devoted to the pursuit of its ongoing daily activities.

[294] The placement of the word "requires" in paragraph 143(4)(*d*) implies that the "devotion" to the activities of the congregation is an obligatory condition demanded by authority. The Respondent suggested that the restrictive approach should be utilized in interpreting (*d*). This would mean that the community should have explicit requirements that community members devote their working lives to the activities of the congregation.

[295] Such a restrictive interpretation is reasonable on a plain reading of the text, as well as a broader contextual and purposive reading of section 143. A level of organization or institutionalization is implied within both the definitions of "congregation" and "religious organization," that is, a congregation adheres to particular beliefs and those beliefs are in accordance with the tenets of a religious organization, which will be composed of more than one congregation. Being a religious organization requires a common purpose shared by member congregations and that purpose would likely be located in some written form. If that written form does not exist, then something akin to it would be required in its religious doctrinal sources and evidenced in the day-to-day practices of the community members.

[296] Therefore, where this Court determined that the prohibition against property ownership must be explicit, as grounded in the text of the provision, as well as the Hutterite example suggests, then it is a matter of consistency to require that 143(4)(*d*) also be explicit. Such an interpretation is supported by the Hutterite example, where a similar requirement is contained in the Articles of Incorporation of the *Act to Incorporate the Hutterian Brethren Church*. Also, a restrictive interpretation of (*d*) is in harmony with the general policy objectives of simplicity and administrative efficiency. If the requirement in (*d*) is explicit, it will be easier to identify than a fact-based inquiry of the evidence.

[297] A restrictive approach to interpreting (*d*) will mean that Bountiful cannot satisfy the fourth component (*d*) of subsection 143(4). As noted by the Respondent, the requirement set out in (*d*) is not a facet of Mormonism, whether the reference is to the LDS Church or the FLDS Church. Dr. Cragun confirmed this in his Expert Report:

> There is no scriptural commandment in Mormonism that directs members of the community to dedicate their entire working lives to the community. …
>
> (Dr. Cragun's Expert Report, p. 28, para 73).

[298] According to Dr. Cragun, in Mormon temple ceremonies, members make a promise to dedicate "their lives" to their religion. However, he stated that this "promise" is not followed as a practice in either the LDS Church or the FLDS Church (Dr. Cragun's Expert Report, para 73). Members of Bountiful are free to work outside their community and accept wages for doing so. The evidence did not provide exact numbers or percentages of the proportion of members who were engaged by outside employers. The Appellant suggested the numbers were small and occurred only as the exception to the rule that most members worked for the

Company. However, the evidence clearly established that not all members work for the Company or other Bountiful corporations and there is no requirement to do so; that, except for the practice of tithing, wages earned are the members' personal property, not the community's; that members were encouraged to tithe 10 per cent of their personal income to the community but that this practice was an expectation only, and not an essential requirement; and that the Appellant encouraged his children to do a "good job," not for the community but "for the businesses that hire them" (Exhibit R-6, Tab 121, p. 3). These practices are in direct contrast to those of Hutterite colonies, where there is no ownership of property, no member receives individual wages and everything is shared communally.

[299] Dr. Walsh was of the view that a requirement exists for members to devote their working lives to the activities of the congregation. In support of his opinion, he stated that the fundamental tenets of the LDS Church require its members to build together a holy community, that Mormon scripture commands congregants to flee the world and gather in a place of safety and that the Law of Consecration requires members to consecrate themselves, their time and talents toward building the Kingdom of God, with their entire working lives devoted to that end (Dr. Walsh's Expert Report, pp. 4-5, para 5). Dr. Walsh cited passages from the Doctrine and Covenants of the prophet, Joseph Smith, in support of his view that the Law of Consecration is an essential Mormon doctrine and practice that anticipates that congregants will spend their entire working lives in building the congregation and global religious organization (Dr. Walsh's Expert Report, pp. 19-20, paras 37-38).

[300] While Dr. Cragun agreed with Dr. Walsh's view that the Law of Consecration is part of a temple ceremony introduced by Joseph Smith Jr., he stated that few Mormons practice or are required to live the Law of Consecration. In addition, the implementation of the Law of Consecration by the FLDS Church, using the UEP Trust vehicle, was not in accordance with the description of the law as preached by Joseph Smith Jr.

[301] In reviewing the quotes of Dr. Walsh from the Doctrine and Covenants, I remain unconvinced that those passages contain a specific requirement as envisioned in paragraph 143(4)(*d*). Those passages are not particularly clear, but they do not contain an explicit requirement that members devote their working lives to the activities of the congregation. It may be that the Law of Consecration is a Mormon equivalent to this requirement but, despite Dr. Walsh's opinion, I do not see it as being an obvious equivalent.

[302] At the beginning of my analysis on component (*d*) of subsection 143(4), I referenced two potential interpretative approaches. The second, more liberal approach, would interpret "requires" in a broader manner so that it would emphasize a "general expectation" that members devote their working lives to the activities of the congregation. This approach is in line with the Appellant's interpretation.

[303] Appellant Counsel's submissions on (*d*) were also intertwined with their submissions on whether the community members of Bountiful live and work together – paragraph 143(4)(*a*). The Appellant's submissions were collapsed, consequently, into a general interpretation of "communal organizations," rather than (*a*) and (*b*) being interpreted and applied separately.

[304] The Appellant's view, which has credence given the testimony, is that the facts supported that most members worked for the Company, or were expected to, and therefore they were required to devote their working lives as stipulated in (*d*). Further, there were multiple witnesses who confirmed that members were prepared from a young age to work for the Company. If a liberal approach to the interpretation of (*d*) is adopted, this factual evidence would be sufficient to conclude that, in practice, there was a general expectation that members devote their working lives to the activities of the congregation.

[305] If the communal practices are interpreted in this manner, it also supports a conclusion that the working lives of community members are intertwined with the activities of the Company. However, it is unclear from the evidence whether the "activities of the Company" encompasses the "activities of the congregation." The Company's operations were directed primarily, if not solely, by the Appellant, who was also one of the shareholders. There was conflicting evidence respecting the degree to which the Company was a "community company." In fact, dividends were declared and paid to shareholders, including the Appellant. The only evidence that the dividends found their way back into the community was the Appellant's evidence that they were "pumped back" into Bountiful. There was no other corroborating evidence to support the Appellant's testimony. Evidence suggested that children, who worked in the summer for the Company, were paid by cheque but then cashed it and returned most of the funds to the Appellant. Some of the evidence suggested, therefore, that, even if the members of Bountiful were expected to devote their working lives to the community, it could be argued that their efforts were contributing solely to the Company, as opposed to the "activities of the congregation," as required by (*d*).

[306] My rejection of a more liberal interpretative approach to (*d*) is in conformity with the restrictive approach I adopted in my analysis of (*a*), (*b*) and (*c*), the first three components of the definition of "congregation." For example, if component (*a*) of the definition ("living and working together") means members must live and work within close proximity, then, in accordance with that restrictive interpretative approach, component (*d*) must mean that members devote their working lives to the activities of the congregation in a more straightforward, daily, ongoing sense, as opposed to a general expectation to devote their working lives to the activities of the congregation in a more general sense.

[307] While members were, in fact, encouraged to work or obtain secondary education outside the community, there was a general expectation that, if individuals were part of the community, then one's working life would include contributing towards the activities of the community by working in the Company activities. However, the text of component (*d*) implies that such a requirement must be explicit and ongoing. The Hutterite example, as exemplified in their Articles of Incorporation and in the facts cited in the *Wipf* jurisprudence, confirms this interpretative approach.

[308] The facts in these appeals do not support the existence of an explicit requirement, by the congregation, either within the community of Bountiful itself, the LDS Church, the FLDS Church or Mormonism generally, for members to devote their working lives to the activities of the community. While two of the experts, Dr. Cragun and Dr. Walsh, disagreed on this point, I prefer Dr. Cragun's expert opinion over that of Dr. Walsh. Dr. Walsh does not identify many of the sources for his opinion and I do not agree with his analysis of the content of passages of the Doctrine and Covenants of Joseph Smith Jr.

[309] In applying the more restrictive interpretative approach to component (*d*) of subsection 143(4), and particularly to the word "requires," I conclude that the members of Bountiful are not formally required to devote their working lives to the activities of the congregation. While there may exist an informal expectation among members to generally devote their working lives, there is no explicit requirement to do so.

PENALTIES

[310] The Appellant was also assessed gross negligence penalties in the amount of $148,983 pursuant to subsection 163(2) of the *Act* in respect to the 2000, 2001, 2002 and 2003 taxation years.

[311] In contrast to the other issues in these appeals, where the Appellant bears the burden of proof, the Minister has the onus to show that the evidence supporting the application of penalties outweighs the evidence against the imposition of the penalties.

[312] Unlike section 143, there is an abundance of jurisprudence with respect to the application of gross negligence penalties levied pursuant to subsection 163(2).

[313] In *Venne v The Queen*, 84 DTC 6247, Strayer J., at page 6256, made the following comments respecting the term "gross negligence":

> … 'Gross negligence' must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not. …

[314] The application of gross negligence penalties is a question of fact. Caselaw has established a number of factors which, although not an exhaustive list, may act as guidelines in determining whether the imposition of gross negligence penalties is appropriate in the circumstances of an appeal. Some of those factors include: a taxpayer's education, background experience, apparent intelligence, magnitude of the omission in relation to the income declared and the opportunity to detect the error. In *DeCosta v the Queen*, 2005 DTC 1436, Bowman C.J. (as he was then), at paragraph 11, stated:

> … No single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence.

[315] When a taxpayer appeals penalties assessed under subsection 163(2), the Minister must show that:

(a) the Appellant made a false statement of omission in the returns; and

(b) the Appellant knew or the circumstances were such that he ought to have known about the false statement or omission and that it was not the result of a simple oversight or a misunderstanding of the law.

Because this provision is penal in nature, in applying the above test to the evidence, if a taxpayer's conduct is consistent with two reasonable explanations, one justifying penalties and one not, then the taxpayer should receive the benefit of the doubt and the penalties deleted.

[316] Both the Appellant and the Respondent relied on an "all or nothing" argument in addressing the issue of penalties. The Appellant suggested that penalties should simply "fall away" if Bountiful was successful in meeting the definition of congregation contained in subsection 143(4). The Respondent submitted that the false statement or omission consisted of the Appellant's receipt of corporate benefits, while controlling the Company's finances, when those benefits were far in excess of the income he reported. The Respondent argued that, since the Appellant had not contested the assessed tax liability but, rather, submitted that this liability should be shared by all of the members of the community, he is barred from disputing those penalties that were based on his failure to properly report the income and shareholder benefits. The Respondent also submitted that the Appellant's argument, that the income and benefits should be distributed among community members through a deemed trust provided for in section 143, does not constitute a credible explanation for the failure to properly report those amounts in his returns.

[317] The Respondent bears the burden of proof, but its adopted approach does not follow the proper application of the two-part test for penalties outlined previously. While the Respondent submitted evidence respecting the first part of the test for the application of penalties, that is, the existence of a false statement or omission in the Appellant's returns, instead of addressing the second part of the test directly, the Respondent simply and incorrectly submitted that the Appellant cannot dispute those penalties because he did not dispute the underlying assessed tax liability.

[318] While the Respondent's submissions on this issue did not explicitly mirror the legal test as I have outlined it, the Respondent did provide relevant facts that satisfy both steps (a) and (b) of the test. The evidence established that the Appellant was the directing mind of the Company, controlled the corporate finances, was the only shareholder that had sole signing authority on cheques and had control over the corporate books and records. Consequently, the Appellant knew or was in a position that he ought to have known that he was receiving benefits from the Company which were substantially in excess of the amounts of income reported in his tax returns. This demonstrates that the Appellant's involvement in, and knowledge of, the business affairs leads to a conclusion that a false statement or omission was made in his tax returns for the 2000 to 2003 taxation years, pointing to a material discrepancy between the unreported income and benefits and the income reported.

[319] Did the Appellant know that he had made false statements or omissions in his returns or do circumstances exist that would support a conclusion that he ought to have known? Although there was no direct evidence that would lead me to conclude that the Appellant knowingly made these false statements or omissions in his returns, there is abundant evidence that supports my conclusion that he ought to have known that he was misrepresenting his income. In addition, some of the evidence could lead to a conclusion that there was an apparent intention on the Appellant's part to conceal facts surrounding his income tax affairs. The Appellant was in charge of the Company operations and made the final decisions on corporate matters. The Appellant was aware that the Company was funding his personal expenses. He testified that he provided corporate credit cards to family and community members. The payments on these credit cards were made by the Company. He reviewed his tax returns before they were filed. It is reasonable to expect a certain level of fiscal competency on the Appellant's part in his capacity to properly deal with tax matters, given his position as directing mind of the Company's business endeavours and leader of the community of Bountiful. Corporate records and books were kept in a locked office cabinet and it was only the Appellant that had access to them. According to the evidence of Marlene Palmer, the Appellant would not interact with CRA officers during the audit. Also, according to her testimony, the Appellant declined to follow her suggestion that the community properly organize itself as a church organization. She attributed his refusal to not wanting to disclose information concerning amounts that he was receiving from the Company.

[320] The Appellant does not argue that he never received the unreported income and benefits from the Company but, rather, that to the extent that he did receive those amounts, he received them in his capacity as a beneficiary of the congregation and not as an employee or shareholder of the Company (Further, Further Amended Notice of Appeal, para 72). According to Appellant Counsel, when the Appellant filed his returns, he was not aware of section 143. This was specifically addressed in the Appellant's testimony:

> Q. And so when did you first learn of this provision of the *Income Tax Act*?
>
> A. I learned about it when I came to Vancouver and talked to you about my appeals.
>
> Q. So that was following the reassessments?
>
> A. Yes, it was.

> Q. So Section 143, one of its effects is to superimpose a trust. So I take it that that deemed trust, you never filed any returns on its behalf?
>
> A. No, we didn't.
>
> Q. And what about after you learned of the existence of Section 143? Did that deemed trust ever file a return after that?
>
> A. We filed -- not a return but we filed the ten-year clause of -- that we were a congregation. Well, something under that sort of thing.
>
> Q. That was an election?
>
> A. An election. We filed an election, two elections actually, I think.

(Transcript, Examination in Chief of Winston Blackmore, pp. 58-59)

If the Appellant had been filing returns on the assumption that section 143 applied to his personal circumstances, as well as to the community of Bountiful, then I might have taken a different approach to the imposition of penalties in these appeals.

[321] Appellant Counsel submitted that, if the Appellant was successful in arguing that Bountiful could fall within section 143, then income inclusions which resulted from the reassessments would "fall away" and, consequently, so would the penalties. Counsel also submitted that, since the assessments were incorrect at law, penalties should not apply, as they are "simplistic and unwarranted" (Appellant's Written Submissions, para 336). The Appellant did not raise any other defences to the imposition of penalties. The Appellant's arguments on section 143 have not been successful and this leaves him with little to offer by way of explanation for why he filed his returns as he did. For example, there was no evidence adduced respecting any attempt by the Appellant to communicate with CRA regarding his particular filing position. In *Therrien v The Queen*, [2002] 3 CTC 2141, the Appellant was found to be careless and imprudent but, because he had taken steps to verify the legitimacy of the plan he engaged in, Tardif J. held that this did not warrant the imposition of gross negligence penalties because his behaviour did not amount to gross negligence.

[322] A failure to obtain sufficient advice when a taxpayer's filing position may be precarious, or even fraudulent, will be a factor in determining the degree of a taxpayer's negligence (*Chénard v The Queen*, 2012 TCC 211, 2012 DTC 1195). At

one point in his testimony, when asked about a particular corporate dividend paid to him by the Company, the Appellant replied:

> … I always had my financials done by an accounting firm. That was on their recommendation and I don't recall what it was from.
>
> (Transcript, Examination in Chief of Winston Blackmore, p. 32)

[323] Interestingly, the converse of the Appellant's position on penalties would be that, if he were not successful in arguing that Bountiful can bring itself within section 143, the reassessed amounts would stand and so would the penalties. The Appellant had no other explanation for the discrepancies in the reported amounts and the reassessed amounts. Thus, there is "… no hypothesis that is inconsistent with that advanced by the respondent …" (*Farm Business Consultants Inc v The Queen*, 95 DTC 200, at p. 206).

[324] As the person in control of the day-to-day operations and activities of the Company from which he received the benefits, the Appellant ought to have known that false statements or omissions had been made in his returns. He knew the benefits were paid to him because he was the Company's directing mind and was the only shareholder that could sign cheques without a second shareholder co-signing. From this it can be inferred that he would have directed the payment of those amounts. He controlled the corporate books and records and the evidence suggested he was the only individual that could access them. The discrepancies in each taxation year between the amounts reported in his returns and the amounts reassessed are significant. No explanation was provided for these improper filings. Although he reported taxable income in amounts of $20,915, $31,578, $44,424 and $19,677 respectively in his 2000, 2001, 2002 and 2003 income tax returns, he was assessed shareholder benefits of $277,395, $527,751, $235,537 and $174,111 in those years respectively, as well as additional amounts of employment income of $25,467 in the 2002 taxation year, $40,953 in the 2003 taxation year pursuant to section 5 and employment benefits in the amount of $241,526 for the 2003 taxation year pursuant to paragraph 6(1)(*a*). While the Company employed an outside accountant, he/she was not a witness at the hearing, but it would appear from the evidence that the Appellant controlled the information that was supplied to the accountant. As Bowman C.J. (as he was then) stated in *DeCosta*, at paragraph 12:

> … I do not think it can be said that the appellant can nonchalantly sign his return and turn a blind eye to the omission of an amount that is almost twice as much as that which he declared. So cavalier an attitude goes beyond simple carelessness.

[325] The term "wilful blindness" has also been used to describe circumstances amounting to gross negligence. In relying on the Federal Court of Appeal decision in *Villeneuve v Canada*, 2004 FCA 20, Favreau J. in *Brochu v The Queen*, 2011 TCC 75, 2011 DTC 1149, had the following comments, at paragraph 20, respecting "wilful blindness":

> Since *Villeneuve*, the issue is no longer confined to determining whether a taxpayer was aware of the specialist's negligence and whether he or she was indifferent, but also includes cases where the taxpayer blindly trusts the person preparing the return. In this case, even though the appellant had no intentional and deliberate knowledge of Ms. Tremblay's errors, she was still wilfully blind.

The Appellant ought to have known that ignoring the astronomical magnitude of the differences between the reported income/benefits and the amount of benefits assessed, ranging from 884 per cent to 1,326 per cent, over a number of years, would attract some type of tax consequences. This is the type of "cavalier attitude" discussed in *DeCosta*. It is behaviour reflective of an indifference as to whether there is or is not compliance with the law. The Appellant headed a community and a company that had business activities in a number of locations in British Columbia, Alberta and the United States. However, even if he had no such business experience and background, I would still conclude that, due to the staggering amounts of unreported income and benefits, he was grossly negligent in ignoring these amounts over a number of years. Therefore, I must conclude that the Appellant's actions exceed simple carelessness and that he wilfully misrepresented the true state of the Company's activities so that gross negligence penalties are justified.

CONCLUSION

[326] These appeals introduced unique and novel legal and factual issues that are not normally before this Court.

[327] The issues centered around section 143 of the *Act*, which provides special tax treatment to those religious communal congregations that operate within cultural and property norms distinct from the mainstream milieu.

[328] To be eligible for this tax treatment, a community must satisfy all of the four tests set out in the definition of "congregation" established by Parliament. Any community that meets these four criteria may seek this specialized tax treatment.

[329] My conclusion is that the community of Bountiful does not meet any of the four criteria, despite some innovative and thought-provoking arguments by Appellant Counsel.

[330] Even if the Appellant had been successful in meeting the four tests, he failed to provide any indication of how the provision would be applied to Bountiful in terms of who would qualify as members of the congregation at the end of each taxation year. It becomes a question of "who is in and who is out" as a member of the community in respect to each taxation year in order to ascertain the group to which such tax treatment might apply.

[331] With respect to penalties, I conclude that the Respondent satisfied its onus and that the Appellant was grossly negligent and therefore responsible for the imposition of the assessed penalties. Being unsuccessful in the issues in these appeals, the Appellant offered little explanation in respect to why he made such massive misstatements in his income reporting in tax returns for successive years.

[332] Finally, I want to thank all Counsel for the amount of preparation they so obviously put into these appeals. Their knowledge of the unique religious concepts and principles was evident throughout their presentation of this case. I also commend each Counsel for the professional courtesy they displayed toward the Court staff, the media and each other.

[333] Lastly, I thank the media for abiding by the rules that I established at the outset of the hearing in respect to their presence within my courtroom.

[334] The appeals from the assessments made under the *Income Tax Act* for the 2000, 2001, 2002, 2003, 2004 and 2006 taxation years are dismissed.

[335] The parties shall have sixty days from the date of my reasons to submit written submissions on costs, if they cannot otherwise reach an agreement on this matter.

Signed at Summerside, Prince Edward Island, this 21st day of August 2013.

"Diane Campbell"

Campbell J.

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DATE OF JUDGMENT:	August 21, 2013

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