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British Columbia Supreme Court Releases Reference Decision on Polygamy – One Alberta Connection

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Cases commented on:

Reference re: Criminal Code, s. 293, 2010 BCSC 1588

In 2005, Brian Seaman, Melissa Luhtanen and I, on behalf of the Alberta Civil Liberties Research Centre (ACLRC), were engaged by Status of Women Canada to research and comment on specific issues with regard to *Criminal Code* section 293 (anti-polygamy provision). Our conclusions may have been surprising to some people because it appeared that we erred on the side of equality at the expense of civil liberties. However, the recent British Columbia Supreme Court (BCSC) decision, at least temporarily, as it may be overruled on appeal, seems to have vindicated our position. Looking at the list of intervenors (11 of them) and the length of the judgment itself, it seems that the Court dealt with the issues in a comprehensive manner.

The BCSC's judgment is over 1300 paragraphs long. It is indeed rare for a constitutional reference by an Attorney General to apply to the BCSC, as these types of cases usually go to the appellate court rather than the trial court. Because the reference was before the trial court, there were many witnesses and a great deal of evidence for Chief Justice Baumann to wade through. Chief Justice Baumann had to spend a fair bit of time addressing the rules pertaining to the admission and weight of the evidence. Also, because both the federal Attorney General and the British Columbia Attorney General argued that the polygamy prohibition is constitutional, the court appointed an *Amicus Curiae* ("friend of the court") to argue that the polygamy provision is unconstitutional. Finally, although the reference questions did not address the appropriate constitutional remedy, Chief Justice Baumann hypothesized an appropriate one. This is discussed later in the paper.

The case considered section 293 of the *Criminal Code*, RSC 1985 c C-46, which reads:

> 293(1) Every one who
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> (a) practises or enters into or in any manner agrees or consents to practise or enter into
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> (i) any form of polygamy, or
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> (ii) any kind of conjugal union with more than one person at the same time,
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> whether or not it is by law recognized as a binding form of marriage; or
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> (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),
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> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

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

The BCSC was asked to address these two reference questions (para 16):

a) Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?
b) What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

It is important to note that ACLRC's research task in its paper for the Status of Women was not to address the same issues, and in fact we may have concluded quite differently than the court, should we have addressed them in our research. Our research questions were:

1. The issue of polygamy causes a clash between religious freedom and gender equality rights. Using a legal analysis, what has the caselaw found regarding conflicting rights, under the *Charter*, in issues such as polygamy?

2. How does the non-prosecution of polygamy sections in the *Criminal Code* hinder the protection of women's and children's legal and equality rights?

3. What are the social and legal implications of legalized polygamy?

In addition, we were asked to restrict our discussion to polygamy as practiced in Bountiful, British Columbia.

Following is the executive summary of our paper (*Separate and Unequal: The Women and Children of Polygamy* Ottawa: Status of Women Canada, 2005):

"According to section 293 of the *Criminal Code of Canada*, it is illegal for people to practice polygamy, which is a type of matrimonial or conjugal union involving multiple spouses. Under s. 293, not only is any form of polygamy illegal but any type of polygamous union that *purports* to result from a rite of polygamy is illegal. However, there is a community of polygamists in British Columbia called Bountiful which, to date, the authorities in British Columbia have refrained from prosecuting. The apparent rationale for this non-prosecution has been a belief that s. 293 would not withstand a challenge under the freedom of religion provision, section 2(a), of the *Canadian Charter of Rights and Freedoms*.

This paper analyzes whether the anti-polygamy provision in the *Code* impinges on freedom of religion and whether there are significant enough harms resulting from polygamy's practice that would justify a limitation to freedom of religion. The paper is divided into two major sections. Part One addresses the historical and current practice of polygamy. The fundamental principles

that underlay this paper's analysis are also identified; i.e. democracy, rule of law and the prevention of harm.

The historical reality of polygamy throughout large parts of the non-Christian world is addressed in Part One. Rather than being a historical anomaly, polygamy represented an important social institution throughout much of the world in the pre-industrial age. However, it is difficult to reconcile many aspects of this social institution with the contemporary liberal model of a rights-based society premised on the normative values of individual freedom of choice, formal equality and rule of law. These normative values not only inform the social and political culture of modern Canada; they have also been embedded in the *Charter*. As such, these values are part of Canada's constitution and therefore are part of the supreme source of law in the land.

To further elaborate upon the harm associated with polygamy, we next examine the social and legal implications of *de facto* or full legal recognition of polygamy. The *de facto* recognition of polygamy, let alone formal legalization of the practice, would invite a situation that carries the potential for enormous challenges in terms of rewriting a whole array of laws that include how property is divided upon marital breakdown, child custody and support, and the devolution of property upon the death of a spouse.

Part Two traces the development of the concept of equality in Canada and how contemporary courts might resolve a conflict between the right to equality under the law and freedom of religion. How freedom of religion has evolved as a constitutional right in Canada is also discussed in Part Two. The evolution of the concept is traced through competing lines of judicial decisions. What emerges is a right that, although of fundamental importance, is not without limits. Canadian jurisprudence has identified three possible bases for limiting the right to freely espouse and freely practice a religion: a) where that right otherwise conflicts with another right; e.g. equality under the law, b) where a religious practice may harm an individual or pose a threat to public order, and c) where the state can demonstrate a significant societal interest in limiting the right. Part Two concludes that the anti-polygamy provision trenches on freedom of religion. However, we also note that the *Charter* s 1 analysis needs to be completed before we can say that s 293 is unconstitutional.

In Part Two, we also look at how freedom of religion might be balanced against gender equality rights. A tenable argument may be made that the *Charter* must be read in context as a whole document and that there is, therefore, no hierarchy of rights. Thus, a court faced with a challenge to s 293 under the *Charter's* freedom of religion clause would have to balance that right against the equality provisions in the *Charter* and reconcile these rights. In any event, if a court did decide that s. 293 impinged on religious freedom, it would also invariably undertake an analysis under s 1 of the *Charter* with a view to deciding whether that limit on religious freedom was justified. A probable frame of reference in a s 1 analysis would be whether the anti-polygamy provision exists to prevent harm.

Part Two looks at the implications of not prosecuting polygamy in light of the equality provision of the *Charter*, section 15(1), and addresses whether the practice of polygamy is inherently harmful from the perspective of the equality rights of women and children. We conclude that by not prosecuting s 293 of the *Code*, justice officials are in effect complicit in denying to women and children living in polygamous families their full rights as citizens. The effect of not prosecuting s 293 would seem to be, arguably, a *de facto* acceptance of polygamy by the authorities responsible for the enforcement and administration of justice.

To prosecute under s 293 would necessarily entail difficulty from an evidentiary perspective. However, not prosecuting the offence under s 293 means justice authorities are complicit in permitting some women and children in Canada to live in conditions where they are effectively being denied their full equality rights as guaranteed by the *Charter*. After carefully considering some of the complexities attendant to this issue, the authors conclude that s 293 would likely survive a *Charter* challenge, and they consequently make no recommendation for law reform."

In this paper, ACLRC did not address whether s 293 violates *Charter* s 7, although we may have concluded that it does.

After hearing all of the evidence, Chief Justice Bauman concluded that there was compelling evidence of harm in polygamy including (paras 7 to 13 and 779 to 793):

- Women in polygamist relationships are at an elevated risk of physical and psychological harm. They face higher rates of domestic violence, abuse and sexual abuse;
- Women in polygamist relationships have higher levels of depression and other mental health issues;
- Women in polygamous relationships face more severe economic hardships;
- Children in polygamous relationships experience higher infant mortality, and suffer more emotional, behavioural and physical problems. They also have lower educational achievement and are at a higher risk of physical and psychological abuse and neglect.

Chief Justice Bauman also found that polygamy is harmful to society as it engenders higher rates of poverty and institutionalizes gender inequality (para 13).

Chief Justice Baumann agreed with the ACLRC conclusion that section 293 offends *Charter* section 2(a) freedom of religion but is saved by the *Charter* section 1, as demonstrably justified in a free and democratic society. Chief Justice Bauman also concluded that section 293 violates the *Charter* section 7 liberty interests of children between 12 and 17 who are married into polygamy, and that the *Charter* section 1 does not save this violation. He ordered that section 293 be read down not to apply to prosecution of these children. Chief Justice Bauman concluded that the *Criminal Code* section 293 does not offend the *Charter* section 2(b) freedom of expression, nor section 2(d) freedom of association. Further the *Charter* section 15 is not offended as there is no religious or marital status discrimination.

The *amicus curiae* has indicated he will not be appealing the BCSC decision (see: Marc Ellison, "Polygamy Ruling Won't be Appealed" 21 December 2011 (*Toronto) Globe and Mail* (online), however, it is possible that the Attorneys General could appeal to the Supreme Court of Canada at a later date so that the decision would apply across Canada. As of this writing, there is no evidence of an appeal.