



No. S-097767
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1986, c. 68

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF s. 293 OF THE *CRIMINAL CODE OF CANADA*, R.S.C. 1985, c. C-46

CLOSING SUBMISSIONS OF THE INTERVENER

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I. INTRODUCTION

1. In 2004, the Supreme Court of Canada directly answered the first question in this Reference. The Supreme Court of Canada said "we conclude that s. 1 of the *Proposed Act*, which defines marriage as the union of two persons, is consistent with the *Canadian Charter of Rights and Freedoms*." *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698 at paragraph 5.
2. It follows that it is constitutional for Parliament to provide that polygamy is contrary to section 293 of the *Criminal Code of Canada* under all circumstances.

II. QUESTIONS PRESENTED

3. **Question 1:** Is s. 293 of the *Criminal Code* of Canada consistent with the *Canadian Charter of Rights and Freedoms* ("*Charter*")? If not, in what particular or particulars and to what extent?
4. **Question 2:** What are the necessary elements of the offence in s. 293 of the *Criminal Code of Canada* ("*Criminal Code*")? Without limiting this question, does s. 293 require that the polygamy or conjugal union in question involve a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power or undue influence?

III. BRIEF ANSWERS

A. Question 1

5. Section 293 of the *Criminal Code* is consistent with the *Charter*. It safeguards the values and principles of the *Charter* by protecting the rights and freedoms of children, women and

society from harms associated with polygamy. Far from restricting *Charter* rights, section 293 of the *Criminal Code*:

- a. promotes the freedom to associate under section 2 of the *Charter*,
 - b. protects the right to life, liberty and security of the person under section 7 of the *Charter*, and
 - c. preserves the guarantee of equality found in section 15 of the *Charter*.
6. All forms of polygamy are prohibited by section 293 of the *Criminal Code*. For good public policy reasons, statutory and common law unions should be treated similarly. See *Kerr v. Baranow*, [2011] S.C.J. No. 10 at paragraphs 61-62, 84-85; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at paragraph 75.
7. Polygamy in all of its forms is harmful or potentially harmful. In particular, this Court has heard evidence establishing that:
- a. polygamy is abusive of women and men of all ages and limits both their freedom and their exercise of free will;
 - b. polygamy is abusive of children by depriving them of a stable and secure home and because it can often lead to childhood delinquency and suicide;
 - c. polygamy is socially and economically harmful to women and children and to society as a whole; and
 - d. polygamy deprives the public of the social and economic predictability associated with the current definition of marriage as the conjugal union of two individuals.

8. Expert testimony, including the expert opinion of our witnesses, demonstrates in a clear and convincing way that polygamy causes the kind of harms that Parliament is entitled to, and expected to, prohibit.
9. The presence of a religious freedom claim does not alter the analysis for the purposes of this Reference. The purpose of section 293 of the *Criminal Code* is consistent with the *Charter*.

B. Question 2

10. The elements of the offence are defined in section 293 and do not require that the polygamy or conjugal union in question involve a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power or undue influence. These aggravating features are appropriate considerations for Crown counsel at charge approval and for a judge upon sentencing.
11. The religious freedom arguments of the *amicus curiae* and certain interveners do not apply to the questions before the Court in this Reference. Individual arguments in favour of extraordinary exceptions to the general rule against polygamy may only be judged where charges have been filed and religious liberty arguments have been advanced.

IV. DISCUSSION

12. There are three independent reasons why this Court should answer the first Reference question posed in the affirmative:
 - a. the Supreme Court of Canada has already answered the question with an unequivocal yes;
 - b. one part of the Constitution cannot be utilized to make of no effect another part of the Constitution; and

- c. once it has been determined that it is reasonable to conclude that harm exists, the Court ought to defer to the decision of Parliament.

13. Section 293 of the *Criminal Code* is constitutionally sound if this Court accepts any one of these three propositions. This intervener takes the position that all three are correct.

A. The Supreme Court of Canada has Answered the Question Presented

14. In *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698, the Supreme Court of Canada was asked by the Governor General in Council whether a law defining marriage as "the union of two persons" was consistent with the *Charter*. The Supreme Court answered the question without reservation and said that such a law "is consistent with the *Canadian Charter of Rights and Freedoms*".

15. The Supreme Court of Canada created no exception for personal choice to the contrary. There is no caveat for polygamous families.

16. There is no logical argument to exclude polygamy from the unequivocal conclusion of the Supreme Court of Canada. Parliament is acting consistent with the *Charter* when it enacts laws limiting the definition of marriage to the union of two persons.

B. No Conflict between the *Charter* and Section 91(26) of the *Constitution Act, 1867*

17. Section 293 of the *Criminal Code* is part of the definition of marriage for the purposes of section 91(26) of the *Constitution Act, 1867*. Parliament has enacted a number of civil laws addressing the capacity to marry, including a law defining marriage as the union of two persons (*Civil Marriage Act*, S.C. 2005, c. 33; *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46, *Federal Law-Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4). However, within these laws, no provision is made to punish those who do not respect Canada's marriage laws. Instead, the consequences of disregarding these civil marriage laws are set out in the

Criminal Code. Section 293 makes it a crime to directly or indirectly disregard the rule set forth in the *Civil Marriage Act*.

18. Some before the Court in the present Reference have argued that notwithstanding the opinion of the Supreme Court of Canada in *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698, the *Charter* requires a modification or limitation on Parliament's power to define marriage. They have suggested that sections 2, 7 and 15 of the *Charter* now require Parliament and the Courts to accept a definition of marriage established by each individual, based upon the personal independent view and choice of that person.
19. Supreme Court of Canada jurisprudence does not allow such an approach to constitutional interpretation. In *Reference re Bill 30, an Act to amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148 at 1197, paragraph 63, Justice Wilson wrote that "[i]t was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution..." In *Bill 30 Reference*, the provision at issue was the power to make laws in relation to "Education" and "a System of Separate or Dissident Schools" under section 93 of the *Constitution Act, 1867*. The appellants argued that if Ontario granted funding to Catholic schools, then Ontario must also grant funding to the schools of other religious groups. Justice Wilson denied that sections 2 and 15 of the *Charter* had such an impact on the interpretation and application of section 93 of the *Constitution Act, 1867*.
20. In this Reference, the same analysis protects the decision of Parliament under section 91(26) of the *Constitution Act, 1867*. Like Ontario in *Reference re Bill 30, an Act to amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148, Parliament chose to expand the benefits of the law. Parliament has expanded the definition of marriage and determined that same sex couples have the capacity to marry.
21. Under section 91(26) of the *Constitution Act, 1867*, Parliament has the power to make the choice to expand the definition of marriage. However, as in *Reference re Bill 30, an Act to*

amend the Education Act (Ontario), [1987] 1 S.C.R. 1148, sections 2, 7 and 15 of the *Charter* cannot be used to force a limitation on Parliament's authority to determine who has the capacity to marry.

22. Parliament has been quite clear on the question. A married person does not have the capacity to marry more than one person at the same time.

23. Pursuant to legislation on the subject of marriage and Supreme Court of Canada authorities relating thereto, marriage is not available at the whim of the citizen. In *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, at paragraphs 55 to 63, the Supreme Court of Canada held that an individual may not claim to be married unless that individual chooses to go through the process set forth under federal and provincial laws. That choice has consequences. One of the consequences is that other marriage opportunities are closed off, so long as one is married.

24. This Court considered *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 in *Picketts v. Hall Estate*, [2007] B.C.J. No. 167 at paragraph 90, in its decision to deny the treatment of the plaintiff as a wife, when she clearly was not married to the testator at his death. The *Picketts* case highlights one of the issues that will arise if multiple spouses are allowed. While the harm caused by polygamy is important to the analysis of the Reference questions, the legitimate concerns of Parliament about the potential for social and economic chaos caused by multiple marriages should not be forgotten.

C. The Courts Should Defer to Parliament's Opinion on Harm

25. Quite apart from section 91(26) of the *Constitution Act, 1867*, Parliament has the power to prohibit polygamy under its criminal law power found in section 91(27).

26. Over the last four months, this Court has received evidence on the question of whether polygamy is harmful. The focus has been on the question of whether the criminal law power

can be utilized consistent with the *Charter* to ban polygamy. As this Court considers the evidence, it is important to keep the testimony, the research and the expert reports in context. As noted by this Court in *The Queen v. Krawczyk*, [2009] B.C.J. No. 1474 at paragraphs 23 to 26, the right to freedom of expression in section 2(b) of the *Charter* does not relieve an individual of culpability for actions deemed criminal by Parliament.

27. The Christian Legal Fellowship called Dr. Shoshana Grossbard to provide an expert opinion regarding the effect of polygamy on society. Her evidence was not specific to any particular polygamous situation, such as in Bountiful. Her approach is consistent with the general ambit of the questions in this Reference. Her opinion was that there is ample social science evidence that polygamy causes harm to women, to children and to society as a whole. Affidavit of Dr. Shoshana Grossbard, Exhibit "B" at page 6.

28. Dr. Grossbard summarized her evidence in these words:

"In the cultures and societies worldwide that have embraced it, polygamy is associated with undesirable economic, societal, physical, psychological and emotional factors related to women's well-being."

Affidavit of Dr. Shoshana Grossbard, Exhibit "B" at page 5.

29. The other expert retained by the Christian Legal Fellowship, Timothy Dunfield, gave unchallenged testimony by way of affidavit that harm from polygamy is not limited to women and young girls. It was his expert opinion that polygamy has a detrimental impact on the so-called "lost boys" excluded from their families in many polygamous communities. He said that the harm includes substance abuse, juvenile delinquency and suicide on the part of the "lost boys". Affidavit of Timothy Dunfield, Exhibit "B".

30. The Christian Legal Fellowship submits that, on the basis of the evidence of Shoshana Grossbard and Timothy Dunfield, there is ample reason for the Parliament of Canada to prohibit polygamy under the *Criminal Code*. Nevertheless, this Court need not agree with

Parliament's assessment of harm in order to uphold the *Criminal Code* prohibition on polygamy.

31. Instead, this Court need only answer the question of whether there is evidence that could lead the Parliament of Canada to conclude that polygamy is harmful to one or more Canadians.
32. If the Court is satisfied that there is such evidence, then the Court must defer to Parliament the ultimate social policy decision of whether polygamy is a crime.
33. Deference to Parliament does not ignore the *Charter*; rather, it recognizes the important roles assigned to the legislatures and the Courts under the *Constitution Act, 1867*. Any other approach to the *Criminal Code* would in effect amount to a repeal of the *Criminal Code* and its replacement with a new set of common law crimes based upon a judicial common law interpretation of the provisions of the *Charter*.
34. Under Supreme Court of Canada jurisprudence, Parliament's policy setting role is to be preserved after 1982 through the recognition of a margin of appreciation to be respected by the Courts. See *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571 at paragraphs 177-178 (as recently cited in *Bedford v. Canada (Attorney General)*, [2010] O.J. No. 4057 at paragraph 383):

This Court has exercised caution in accepting arguments about the alleged ineffectiveness of legal measures: see *Reference re Firearms Act (Can.)*, *supra*, where the Court held that '[t]he efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis' (para. 57). While somewhat different considerations come into play under a *Charter* analysis, it remains important that some deference be accorded to Parliament in assessing the utility of its chosen responses to perceived social ills.

Questions about which types of measures and associated sanctions are best able to deter conduct that Parliament considers undesirable is a matter of legitimate ongoing debate. The so-called 'ineffectiveness' is simply another way of characterizing the refusal of people in the appellants' position to comply with the law. It is difficult to see how that refusal can be elevated to a constitutional argument against validity based on the invocation of fundamental principles of

justice. Indeed, it would be inconsistent with the rule of law to allow compliance with a criminal prohibition to be determined by each individual's personal discretion and taste.

35. This does not prevent the Court from intervening in circumstances where an individual or group of individuals are able to establish that their *Charter* rights have been violated in a manner that cannot be justified in a free and democratic society. It does, however, prevent a Court from disallowing a provision of the *Criminal Code* simply because the social, political, religious, ideological or economic opinions of a Court differ from those of Parliament.
36. In order to conclude that there is a facial violation of the *Charter* by a *Criminal Code* provision, this Court must be satisfied that there is no circumstance under which Parliament could reasonably conclude that polygamous activity is harmful to one or more Canadians. Under Supreme Court of Canada jurisprudence, criminal law is properly aimed at "some evil or injurious or undesirable effect upon the public." See *Reference re: Dairy Industry Act (Canada) S. 5(a)*, [1949] S.C.R. 1, at page 49.

D. Freedom of Religion

37. The Christian Legal Fellowship has intervened in this Reference for two reasons. First, to provide the Court with evidence and legal argument on the primary issue of whether section 293 is constitutional on its face. Second, to provide argument in favour of a generous reading of the guarantee of freedom of religion under section 2(a) of the *Charter*.
38. We will leave the detailed *Oakes* analysis to the Attorney General of British Columbia and to the Attorney General of Canada and focus our attention on the most important questions that must be addressed by this Court under section 1 of the *Charter*.
39. First, what is the standard for interference with the freedom of religion of a citizen? The standard must be that only actual or real apprehension of harm can justify the infringement of freedom of religion guaranteed in section 2(a) of the *Charter*.

40. Second, do freedom of religion concerns arise in this Reference? The answer is, definitively, no. Section 293 of the *Criminal Code* on its face does not in purpose or effect infringe upon religious freedom. See *The Queen. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. The purpose of this Reference is not to inquire into the religious beliefs of the inhabitants of Bountiful. Their religious practices can have no impact on the constitutionality of a *Criminal Code* provision of general application. It would be premature for this Court to consider how section 293 should be applied to any specific person in Canada. Furthermore, it is unnecessary to do so to answer the questions in this Reference.

V. CONCLUSION

41. This Court need not and should not speculate. Instead, this Court should uphold the law on its face and allow for the possibility that in the future a person may be able to establish in a court of criminal jurisdiction that in their circumstances the restrictions against polygamy are not justifiable in a free and democratic society.

42. This should be the approach of a Court anytime that a Reference is presented for adjudication. In the absence of a constitutionally impermissible purpose, the law should be upheld. In the event that a court in the future determines that the effect of the law on a particular person is not justified under section 1, a constitutional exception can be made.

43. The example of the Supreme Court of Canada in *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698, is instructive. The Court did not answer the fourth question, which was whether the opposite-sex requirement for marriage for civil purposes in section 5 of the *Federal Law-Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, is consistent with the *Charter*, as the answers to the first three made the answer to the fourth unnecessary.

44. Similarly, in this Reference, this Court is not asked to answer the question of what would happen in the case of an individual polygamist before the Court in the future. The Lieutenant

Governor in Council has not put the individual circumstances of any person before the Court. It is the law that is in question, not the activities of any particular person or group of persons.

45. While the Bountiful polygamous community was front and centre throughout the hearing of the Reference, the questions presented do not mention Bountiful or any person associated with that community. This Reference is not about Bountiful or any individual polygamist. It is about whether the prohibition of polygamy in section 293 is consistent with the *Charter*.

46. The answer must be that section 293 is consistent with the *Charter*. In enacting section 293, Parliament has acted constitutionally in defining marriage as a union between two persons and in prohibiting acts that contravene such a definition.

47. Through section 293 Parliament achieves: (1) the protection of women, children, men and society in general; (2) the sustenance of a free and democratic society; and (3) the prevention of abuse of the *Charter*. Section 293 embodies Parliament's attempt to protect Canadian society from the harms associated with polygamy. Section 293 promotes and protects the freedoms of association and equality in the *Charter* while maintaining the definition of marriage set out by Parliament as the union between two persons to the exclusion of all others.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of March, 2011.



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