

Action No. S097767
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE CONSTITUTIONAL QUESTION ACT, R.S.B.C. 1996, 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. 553,
DATED OCTOBER 22, 2009, CONCERNING THE
CONSTITUTIONALITY OF S. 293 OF
THE CRIMINAL CODE OF CANADA, R.S.C., 1985, c. C-46

**Statement of Position of the Canadian Coalition for the Rights of Children
and the David Asper Centre for Constitutional Rights**

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**STATEMENT OF POSITION OF THE CANADIAN COALITION FOR THE RIGHTS OF
CHILDREN & DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**

I. Reference Questions

1. Section 293 of the *Criminal Code of Canada* provides as follows:

Polygamy

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

Evidence in case of polygamy

(2) Where an accused is charged with an offence
under this section, no averment or proof of the

Polygamie

293. (1) Est coupable d'un acte criminel et
passible d'un emprisonnement maximal de cinq ans
quiconque, selon le cas :
a) pratique ou contracte, ou d'une façon
quelconque accepte ou convient de pratiquer
ou de contracter :
(i) soit la polygamie sous une forme
quelconque,
(ii) soit une sorte d'union conjugale
avec plus d'une personne à la fois,
qu'elle soit ou non reconnue par la loi
comme une formalité de mariage qui lie;
b) célèbre un rite, une cérémonie, un contrat
ou un consentement tendant à sanctionner un
lien mentionné aux sous-alinéas a)(i) ou (ii),
ou y aide ou participe.

Preuve en cas de polygamie

(2) Lorsqu'un prévenu est inculpé d'une infraction
visée au présent article, il n'est pas nécessaire

method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on 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.

d'affirmer ou de prouver, dans l'acte d'accusation ou lors du procès du prévenu, le mode par lequel le lien présumé a été contracté, accepté ou convenu. Il n'est pas nécessaire non plus, au procès, de prouver que les personnes qui auraient contracté le lien ont eu, ou avaient l'intention d'avoir, des rapports sexuels.

2. The questions referred to this Honourable Court by Order-in-Council are:

1. 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?
2. 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?

II. Summary of Position

3. The Canadian Coalition on the Rights of Children (the "CCRC") and the David Asper Centre for Constitutional Rights (the "Asper Centre") say that the prohibition on polygamy under section 293 is constitutionally supportable under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). They say, in particular:

- (a) the practice of polygamy, as defined herein, occasions harm to children;
- (b) the prohibition in section 293 is consistent with, and mandated by, Canada's obligations to protect children;
- (c) practices that are exploitative of or otherwise harmful to children are not consistent with the values enunciated under the *Charter* or the *Convention on the Rights of the Child* (the "*Convention*"), which Canada has ratified, and fall outside the protection of the *Charter*; and
- (d) the prohibition is, in any event, justified under section 1 of the *Charter* as a reasonable limit that is demonstrably justified in a free and democratic society.

III. Particulars of Position: Definition of Polygamy

4. Although they acknowledge that “polygamy” may have a wider definition, the CCRC and Asper Centre focus on the sustained practice and inculcation of polygamy (primarily practised as polygyny in Canada) in a community setting.

IV. Further Particulars of Position

5. Under the *Charter* and the *Convention*, children possess the rights of freedom of religion, of security of the person and equality. They additionally have fundamental rights under these instruments including:

- (a) the right to have their best interests used as the primary consideration in all actions concerning them;
- (b) the right to such protection and care as is necessary for their well-being;
- (c) the right to be free from all forms of exploitation; and
- (d) the right to recognition of their evolving capacity as persons developing into fully responsible adults.

6. The *amicus curiae* and Interested Persons claiming an entitlement to engage in polygamy have variously raised: the “fundamental freedoms” of religion, expression and association; liberty and security of the person; and the equality guarantee under the *Charter* in this proceeding.

7. The CCRC and Asper Centre say that those rights do not and cannot encompass the right to engage in practices that are harmful to children. Practices that are exploitative of or otherwise harmful to children are not consistent with the values enunciated under the *Charter* or the *Convention*, and do not engage protection under sections 2, 7 or 15 of the *Charter*. These Interested Persons rely on section 26 of the *Charter*, and international human rights instruments, including:

- (a) the *Convention, supra*;
- (b) the *Convention on the Elimination of All Forms of Discrimination against Women*; and
- (c) other international human rights instruments.

8. In the event that this Honourable Court finds that section 293 gives rise to *prima facie* breaches of the *Charter*, then the justification analysis under section 1 must take into account children's rights under the *Charter* and the international instruments above. In the final analysis, section 293 is a reasonable limit that is demonstrably justified in a free and democratic society.

9. With respect to the necessary elements of the offence, the CCRC and Asper Centre say that no person 18 years or under should be criminally liable for the offence of polygamy. The *Convention* requires that the protection, care and best interests of the child be prioritised. For that reason, any child who has been, or has 'agreed' to be, polygamously married is entitled to the fullest protection of the law – not criminal prosecution.

10. In addition, any person under 18 who has suffered harmful consequences from the practice of polygamy is entitled to the fullest protection of the law. All children are entitled to the enforcement of the federal and provincial laws that mitigate the harmful consequences arising for children from the practice of polygamy

V. Evidence of Harm

11. Internationally, United Nations special rapporteurs have identified polygamy as a practice that impairs girls' and women's right to equal status and dignity – and harmful for that reason. Special rapporteurs have also noted the connection between the practice of polygamy and early marriage (marriage before 18), forced marriage, and the trafficking of teenaged girls for polygamous marriage across the Canadian and USA border.

12. In the United Nations human rights context early marriage has been identified as entailing the following risks of harm for children:

- (a) girls' significant and heightened risk of physical, sexual and psychological violence at the hands of their husbands and spouses' family;
- (b) girls' lack of access to information and healthcare – including sexual, reproductive and family planning healthcare, and general impediments to mobility;

- (c) girls' assumed consent to sexual relations with the husband leading to early pregnancy and birth, higher consequent rates of problems in childbirth and maternal mortality, and girls' lower life expectancy generally;
- (d) higher infant mortality rates, and incidence of prematurity, and poor mental and physical growth;
- (e) girls' cessation of formal education with resulting social isolation, and limited access to employment opportunities; and
- (f) intergenerational cycles of girl child abuse.

13. In the United Nations human rights context, forced marriage has been identified as entailing the following risks of harm for girls:

- (a) vulnerability to physical, sexual and psychological abuse by their husbands and relatives of their spouse;
- (b) vulnerability to abuse, ostracism or even lethal violence if they resist or attempt to flee a marriage – including from members of their own family; and
- (c) susceptibility to domestic and sexual servitude.

14. Polygamous communities, in order to sustain themselves, inculcate practices that create unacceptable risk to children's rights and well-being.

15. In North America, polygamy is practised in its most open form in the fundamentalist Mormon context. This Reference is not about the tenets of the fundamentalist Mormon faith. However, the open practice of polygamy in fundamentalist Mormon communities provides an illustration of the breaches of children's rights that flow from the practice of polygamy.

16. Within the fundamentalist Mormon context, the church hierarchy plays a controlling role in determining who a person will marry and when, and whether a woman will be assigned to a man as a second or subsequent wife. Girls as young as 15 – 17 are assigned in marriage to adult men, and do not have a significant ability to decline the marriage. These girls are expected promptly to commence having children, and do not have ready access to contraceptive services or possibly sex education. They may be expected to look after the children of a sister-wife, and

do not have a significant opportunity to resume their education, or any or adequate control over ending their marriage.

17. Boys within the fundamentalist Mormon communities frequently cease their schooling before graduation to work in a community or family business for a small or no allowance. The value of their labour is then used to support the community or family. Church hierarchy obtains the benefit of the boys' continued labour by assurances that the boys will one day be permitted to marry a girl or woman chosen for them by the church leadership. Boys are otherwise enjoined from interacting with girls to prevent the formation of relationships that would interfere with the church hierarchy's assignment of girls in initial or plural marriage.

18. Boys and girls who do not adhere to the foregoing constraints may be identified as disobedient or a harmful influence, and asked to leave or be sent from their communities. Children or girls may be re-assigned to different families or husbands for reasons relating to church control over marriage and family relationships, and not the best interests of the child.

19. The practice of polygamy therefore gives rise to significant harms and risks of harm, including:

- (a) the constraining of girls' and boys' sexual identities and knowledge;
- (b) the exploitative use of girls' sexual and reproductive capacities and labour;
- (c) the exploitative use of boys' labour;
- (d) the prioritising of other interests over children's education;
- (e) inadequate child protection mechanisms and an unreasonable risk of child abuse;
- (f) inadequate protection of children's rights to freedoms of thought and self-expression, and their right to be heard;
- (g) the failure to prioritise children's best interests; and
- (h) the impairment of a child's right to be cared for by his or her family, except when competent authorities subject to judicial review determine that separation is in the best interests of the child.

20. These harms command attention from the governments of Canada and British Columbia. It is the state's responsibility to prioritise and ensure the adequate protection of children from sexual and all other forms of exploitation and harm, through means including labour, immigration and child protection laws. The state is also responsible for ensuring the adequate education of children. The prohibition against polygamy as defined herein is consistent with, although insufficient to discharge, these obligations.

VI. Sources of Evidence

21. The CCRC and Asper Centre have tendered the affidavit of Ms. Katherine Vandergrift. Ms. Vandergrift attaches studies prepared for United Nations human rights organizations by successive Special Rapporteurs on Freedom of Religion and Belief. These reports address the use of religious precept, cultural norms and the right to privacy as a justification for the practice of polygamy. The special rapporteurs conclude that polygamy harms girls' and women's rights, and they call on state actors and religious leaders to intervene to protect girls and women.

22. Ms. Vandergrift's report also attaches a report by the Special Rapporteur on Trafficking in persons, especially women and children. This report identifies the trafficking of girls across the Canadian / USA border for polygamy as a form of forced marriage.

23. Ms. Vandergrift's affidavit also attaches Chapter 3 of a report entitled "*World Report on Violence Against Children*", prepared by the Independent Expert for the United Nations Secretary General's Study on Violence Against Children. Ms. Vandergrift's affidavit also attaches a report on child and early marriage prepared for UNICEF. These reports consider the impacts for children of early marriage.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF NOVEMBER, 2010.

Hunter Litigation Chambers
Solicitors for these Interested Persons



per Brent Olthuis



per Stephanie McHugh

THIS STATEMENT OF POSITION is prepared and delivered by Hunter Litigation Chambers, whose place of business and address for service is 2100 – 1040 West Georgia Street, Vancouver, British Columbia, V6E 4H1. Telephone: (604) 891-2400, Facsimile: (604) 647-4554.