



No. S-097767
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

CLOSING SUBMISSIONS of REAL WOMEN of CANADA

1 INTRODUCTION

1.1 The harms of polygamy are the inevitable consequence of its practice. The common law has for hundreds of years denounced polygamy because of its harmful effects. Professor Witte's evidence was that *Polygamy usually caused or came with fraud, trickery, intrigue, lust, seduction, coercion, rape, incest, adultery, murder, exploitation and coercion of young women, jealousy and rivalry among wives and their children, dissipation of family wealth and inequality of treatment and support of household members, banishment and disinheritance of disfavored children and more.*

1.2 Polygamy tends to destabilize society. It was not Christianity but the culture that accompanied it along with the decline of slavery that put polygamy into disfavor. Polygamy has highly predictable and unacceptable results. It shunts young girls into marriage before they have a chance for an education. Polyamory is no exception. Should the polyamorists have their way polygamy would likely emerge in its classic form. The impact of the fundamentalist polygamist

lifestyle on the economy, and the quality of the lives of woman, most men and children is sufficiently troubling that lifting the sanctions on plural marriage would run counter to basic considerations of justice.

1.3 Criminal Code Section 293

293. (1) every one who

(a) practices or enters into or in any manner agrees or consents to practice or enter into

(i) any form of polygamy,

(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 offense and liable to imprisonment for a term not exceeding five years.

Evidence in the case of polygamy

(2) where an accused is charged with an offense under this section, 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 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.

1.4 Real Women's position on the Reference Questions

1.4.1 Section 293 of the *Criminal Code of Canada* is consistent with the *Canadian Charter of Rights and Freedoms*.

1.4.2 Section 293 does not require proof 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.

2 THE HARMS OF POLYGAMY

2.1 Historical Evidence

2.1.1 **John Witte, Jr. Jonas Robitscher Professor of Law, Emory University School of Law.**

2.1.1.1 Dr. Witte provides ample evidence that since the Enlightenment the criticism of Polygamy throughout most of the Western World was not based upon religion. Rather they were

regarded as inherent and inevitable consequences of the system.

“332. Since Anglo-Saxon times, the common law has consistently embraced monogamous marriage because of the many private and public goods that it offers. The common lawyers of the eighteenth to twentieth century found particularly attractive the Enlightenment rational and utilitarian arguments that pair bonding and domestic stability were the best way to protecting the natural rights of men and women, parents and children. They also found attractive the Enlightenment argument that a stable monogamous household was a vital foundation of the democratic republic – at once a cradle of conscience, a matrix of citizenship, and the first school of love and justice, caring and sharing, public spiritedness and responsibility. All these were ancient insights of the Western tradition that Enlightenment philosophers and common lawyers recaptured in the common law idea of monogamous marriage as a special status in society.

“333. Recent social science scholarship on the goods of marriage has added a new chapter to this traditional story, and it is beginning to influence the law and other professions as well. The central thesis of this new social science literature is that, on the whole, it is healthier: (1) to be married or remarried than to remain single, widowed, or divorced; (2) to have two parents raising a child rather than one or none; and (3) to have marital cohabitation rather than non-marital cohabitation for couples who are planning to be together for the long term. ***

“334. Since Anglo-Saxon times, the common law has also consistently denounced polygamy because of the many harms and crimes that it occasions. Convicted polygamists always faced fines and property forfeitures, the dissolution of any marriages besides their first, and often the payment of damages to the innocent spouse(s). For many centuries, convicted polygamists also faced whipping, imprisonment, time in the stocks, sometimes execution. Even today, brazen polygamists who flout their crime or compound it with other sexual offenses will serve hard time for a long time.

“335. In the past 150 years, (Fundamentalist) Mormons have sought to practice polygamy on religious grounds and to be exempt from criminal liability on religious liberty grounds. American courts and legislatures have uniformly rejected these arguments. Not only does polygamy offend the fundamental values and goods of monogamy, these tribunals have argued, but polygamy is also the **inevitable** cause or consequence of numerous other crimes and harms, especially to women and children.”

2.2 Bioethics

2.2.1 Herlihy, David, "Biology and History: The Triumph of Monogamy" (Spring 1995) 25:4 *Journal of Inter-disciplinary History* 571-83

2.2.2 David Herlihy was professor of history at Brown University. He published his article, "*Biology And History: The Triumph Of Monogamy*" in MIT's "the Journal of interdisciplinary

history." He gives the opinion that the consequences of polygamy and monogamy are predictable within the science of ethology and as sociobiology. He observes that "In Monogamy, however, is regarded as sexually egalitarian, whereas polygyny produces sexual inequality. In a monogamous society, every man has at least a theoretical chance to attract a mate; in a polygynous society, some men may have no chance at all. "

2.2.3 Differential rates of reproduction under polygyny destabilize society in other ways. The many offspring of the rich and powerful male may have enjoyed a privileged birth, but they all could not expect to retain their privileges in adult life. Competition among the many offspring (and their mothers) to succeed their fathers often leads to conspiracies, assassinations, and civil wars. The Ottoman Turks resolved his dilemma by strangling with a silken cord all the sons of a Sultan and who were not chosen to succeed.

2.2.4 It was not the religious doctrine of Christianity that brought about the change but rather the culture that accompanied it. "The decline of slavery confronted ancient society with a critical shortage of workers. No longer able to rely upon coercion, the leaders of society had to develop a system of incentives to persuade free or semi-free men and women to work. Once again access to marriage and the chance to produce heirs proved a powerful incentive.

2.2.5 He concludes, "I have tried to account for the development of marriage in the language of evolutionary theory. The great strength of the theory seems to be its emphasis on the human motivation to pass on something from the past and present into the future. That "something" would seem to be more cultural than genetic. People throughout history have struggled to preserve and advance a cultural inheritance, whether that inheritance takes the form of language, a legend, or a set of values it. It would be hard to identify a force that is acting more powerfully on human groups than the aspiration for cultural survival. Culture seems to program people on the conscious level as much as the genotype is thought to program individuals in evolutionary theory.

2.3 Anthropological Evidence

2.3.1 Wood, Peter, "Sex & Consequences: An Anthropologist Vindicates the Traditional Family" *The American Conservative* (July 28, 2003)

2.3.2 Peter Wood is an Associate Professor Of Anthropology at Boston University. He opines that Mormon polygamy follows a pattern thoroughly familiar to anthropologists. In societies

where a man is permitted to have more than one wife, the co-wives are often sisters or cousins; the age difference between the husbands and wives is substantial and typically greater with each additional wife. New wives are often teenagers. Polygamy is a system by which powerful older men assemble a household of young and desirable women. Polygynous marriages almost always are part of a system of arranged marriages in which the women have little or no say about the matter. This does not mean, according to Wood, that in every case the women or children will be necessarily unhappy. Polygyny, in fact, is a perfectly workable way of arranging human affairs with highly predictable and unacceptable consequences. It shunts young girls into motherhood before they have an opportunity to get an education or that leads fathers arranging the marriages of their teenage daughters.

2.3.3 "Polygyny has a brand-new set of apologists who have emerged all over the country in little heralded movement called "polyamory. The polyamorists might be thought of as fetid blossom of the swinging 60s free love movement." Eliminate the one man one wife rule and the polyamorists could openly do their thing but, warns Wood, so could a lot of other people. Should the polyamorists have their way, plural marriage would almost certainly, emerge in its classic form of rich older males dominating much younger vulnerable females.

2.3.4 Wood says that this is not a "slippery slope" forecast. It is more definite than that, since we know for a fact that everywhere and at every time human societies have made plural marriage an option, this is what happens. Given a free market and no rules against plural marriage, human beings will find themselves in a hierarchy dominated by older men with multiple younger wives. This is one reason why there should be no exception for Polyamory.

2.3.5 "What matters, he says, is that we have studied many hundreds of human societies, large and small, and in doing so have a pretty clear picture of polygamy as an institution. Although polyandry is very rare. (Various Himalayan tribes and the extinct culture of the Marquesan Islands in the Pacific provide examples.) In the end you will still have this essential truth: **polygamy is inseparable from older men imposing themselves on young women.**"

2.3.6 "Nor do the consequences stop there. A society in which older men collecting younger women creates a series of a follow-on problems for itself in matters such as dealing with a large number of youngish widows who missed getting an education and have few marketable skills; disputes over inheritance among the children of co-wives; and a large cohort of young men who find it much more difficult to find wives of their own. Young men competing for an artificially limited number of young women tend to be extra aggressive. Hence it is no surprise that polygynous societies are often violence prone."

2.3.7 "The anthropological evidence is overwhelmingly on the side of those who argue that devastating social consequences follow from a society's decisions about which sexual practices are legitimate. The rules that govern marriage and sexual relations are directly and indirectly the basis of family life and had enormous influence over the formation of good (or bad) character in children. Marriage channels the primary relations between the sexes and the generations, and it is the template for most other relationships in society. This is true everywhere. Society will reshape itself around the new set of rules but it doesn't necessarily reshape itself in the ways that reformers hope."

2.4 Psychological Evidence

2.4.1 **The Contribution of Polygamy to Women's Oppression and Impoverishment: An Argument for its Prohibition**, Vanessa von Struensee, JD, MPH

2.4.2 Prof. von Struensee presents a similarly grim picture of polygamy:

2.4.3 "Although civil law has banned polygamy in many nations, customary law still allows it. In many countries with multiple legal systems, the customary law on polygamy allows a man to take multiple wives and it prohibits a current wife from objecting to her husband's marriage to a new woman. This practice treats women as lesser members of their family and as inferior in status to men. Polygamy forces women to live in poverty by forcing them to share resources. Polygamy also has a detrimental effect on children because when a man has more than one wife he often has a large number of children in a short period of time. Conflicts often erupt among the families because several wives and children are competing for small and finite amount of resources. Although polygamy itself is not a prohibited practice under international human rights law, it breaches other fundamental rights such as the right to dignity, the right to equality within the family and the right to

equal protection under the law. It also tends to perpetuate women's low social and economic status by forcing women to share valuable resources with their husbands other wives and children. In its complex role in inheritance law, for instance, it can directly impact the woman's health, including her death from AIDS.

2.4.4 D'Onofrio, Eve, "Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States" (2005) 19:3 International Journal of Law, Policy and the Family 373

2.4.5 This article assesses the arguments in favor of and against the legalization and consequently, the legitimization of polygamous marriage. It explores the grounds polygamists have employed or could employ to advocate legalization of the practice of plural marriage. However the author concludes that the impact of the fundamentalist polygamist lifestyle on the economy, integrity and the quality of adult woman and children is sufficiently troubling that lifting the sanctions on plural marriage may run counter to basic considerations of justice. She concludes that the state has an "unshakable obligation to enforce laws against polygamy"

2.5 Political science

2.5.1 Brooks, Thom, "the Problem With Polygamy, (January 22, 2009) SSRN Working Paper Series [University of Newcastle. Department of politics University of Newcastle upon TYNE NE1 7RU, United Kingdom]

2.5.2 The problem with polygamy is primarily that it is a structurally inegalitarian practice in both theory and fact. Polygamy should be opposed for this reason.

2.5.3 It is disingenuous, says Brooks, to claim that because a significant number of married men pursue extramarital affairs that these affairs are not serious social problems. Such affairs are often seen as acts of betrayal. A polygamous marriage may be one where wives recognize each other's wives, but the jealousy between wives may be as strong as where there is an affair in a monogamous marriage. Adulterous affairs are most often secret whereas polygamous marriages may present exactly the same problem but are publicly recognized. Because monogamous marriages may give rise to extramarital affairs this is no reason to support polygamy.

2.5.4 "Polygamy as a practice is normally a relationship between one man and multiple women. However, polygamy does not only threaten the equality between men and women, but also

the equality between polygamous partners. For example, there is the problem with the asymmetrical ability to divorce. Thus a husband can divorce any [or all] of the other partners; a wife may only divorce him, but not any other wife.

2.5.5 "This asymmetry exists whether a polygamous marriage is polygynous or polyandrus both polygamous forms and Taylor either one man or woman with multiple partners of the opposite sex. The multiple partners similarly enjoying fewer asymmetrical opportunities than the single husband in a polygynous marriage or a wife in a polyandrous marriage. Therefore polygamy may not only threaten the equality between men and women in practice but polygamy also threatens the equality between all polygamous partners. Polyamory is not unlike what we have seen with polygamy. Virtually all polygamous marriages are polygynous in fact. Polyamorous relationships are likely to lead to polygyny.

2.6 Law and Public Policy

2.6.1 Bala, Nicholas & Rebecca Jaremko Bromwich, "Context and Inclusivity in Canada's Evolving Definition of the Family" (2002) 16 International Journal of Law, Policy and the Family 145-80 [both Prof., faculty of Law, Queen's University, Kingston, Ontario]

2.6.1.1 Bala argues that this issue should be considered in functional terms with the essential questions relating to the nature of the relationship; does polygamy carry the same social advantages as monogamous conjugal families? Are polygamous families stable? Do they promote the well-being of vulnerable parties? Do these families perform the same important social and economic functions as monogamous conjugal families? What is the impact on children of being raised in a polygamous family? (p. 253)

2.6.1.2 On the basis of a cross-cultural study of over 2000 human societies, a group of anthropologists concluded that polygamy is indicative of male dominance in the relationship. In terms of levels of stability and equality in the marital relationship, polygamy mostly serves the needs of males.

2.6.1.3 Opponents of polygamy in North America consider that it is inextricably linked to gender inequalities. Some women who live in polygamous relationships say that they benefit from sharing their lives with other women.... However the fact that so many of the reports

about polygamy in North America involve very young women (really adolescent girls), arranged marriages, and abusive relationships may reflect the inherently unequal nature of these relationships.

2.6.1.4 “In addition to co-concerns about gender inequalities inherent in polygamous relationships are troubling questions about the development of children in polygamous families. Other concerns about polygamy relate to its broader societal effects. Canadian political theorist Tom Flanagan worries about the inequities which polygamy creates between men, observing that if polygamy is widely practiced there'll be a significant group of men without families who are likely to be socially disruptive. Flanagan argues that polygamy produces brutal societies dominated by a warrior culture of violent masculinity, and opines that polygamy cannot coexist with democracy. (FN111)”

2.6.1.5 The modern adoption of constitutional democracy in non-Western societies such as Japan and India has been accompanied by the parallel acceptance of monogamy. Those regions of the world where polygamy is still practiced... Are precisely the areas where constitutional democracy has made the least progress.

2.6.1.6 In Canada, if a dependent spouse in a polygamous marriage were to claim child support, or property based on constructive trust, there would be no reason to deny that vulnerable person access to the courts. However in the face of real concerns about the effects of polygamy on women and children, society should be very reluctant to take steps that would encourage formation of this type of family. The argument that legal recognition of same-sex and opposite sex conjugal but non-marital unions requires legal recognition of polygamy is socially and logically without foundation. While in some respects these nontraditional monogamous unions may differ from traditional heterosexual marital relationships, there is substantial functional overlap, and no evidence that harm is inherent to were regularly associated with them. There are both practical and social concerns about polygamy. Given the inherent inequality in this type of relationship it is difficult to seriously argue that it is a violation of charter of rights and human dignity to fail to legally recognize polygamy. [255]

3 INTERPRETATION OF SEC. 293

3.1 Elements of the Offence

3.2 As to the challenge that section 293 is vague and overbroad, Real Women of Canada says that the section does and was intended to do exactly what it says. It captures "*any form of polygamy or any kind of conjugal union with more than one person at the same time*" It does not have to be and should not be read down. Section 293 (1) (a) is and was always intended to be applicable to polyamory, polyandry, and polygyny. This is so regardless of whether the conjugal union is recognized as a binding form of a marriage in another country. The offense is committed even if there has been no *rite, ceremony, contract or consent that purports to sanction the relationship*. It is as simple as that. While this may seem draconian, particularly in times when anything goes, its purpose is to stop the crime from being committed given the grave nature of the harms to individuals and society.

3.3 Section 293(1) (b) is a separate offense and is not implied in subsection (a). Its purpose is prophylactic and subjects any one who takes any action to sanction such relationships to prosecution. Section 293 is consistent with the *Canadian Charter of Rights And Freedoms*. The ban does not offend sections 2, 7 or 15 of the *Charter*; and in any event is demonstrably justified as reasonable in a free and democratic society.

3.4 Section 293 of the *Criminal Code* does not require that the polygamy involve a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence. There is ample expert evidence and it stands to reason that any form of polygamy will ultimately lead to all of these harms. For this reason section 293 cannot be considered to be overbroad.

3.5 The prohibition of the crime of polygamy arises from a policy that is similar to the prohibition of the crime of conspiracy. When two people agree to carry out an unlawful act, the very plot is an act in itself, and the act of each of the parties is punishable for a criminal object. The Supreme Court of Canada in **United States v. Dynar**, 147 D.L.R. (4th) 399, [1997] 2 S.C.R. 462, 115 C.C.C. (3d) 481 put it this way:

3.6 "90 As a result, it is obvious that the reason for punishing conspiracy before any steps are taken towards attaining the object of the agreement is to prevent the unlawful object from being attained, and therefore to prevent this serious harm from occurring."

