

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**

OPENING STATEMENT OF WEST COAST LEAF

Counsel for West Coast LEAF:

Janet Winteringham, Q.C.

Winteringham MacKay George Law Corporation
The Landing, Suite 620 - 375 Water Street
Vancouver BC V6B 5C6
Tel.: 604 659-6063
Fax: 604 687-2945

Deanne Gaffar

Gaffar Cooper Vachon
Suite 401 – 73 Water Street
Vancouver BC V6B 1A1
Tel.: 604 669-6009
Fax.: 604 689-3327

Kasari Govender

West Coast Women's Legal Education & Action Fund
555-409 Granville Street
Vancouver BC V6C 1T2
Tel: 604 684-8772 (ext. 112)
Fax.: 604 684-1543

PART I OVERVIEW

1. West Coast Women’s Education and Action Fund (“West Coast LEAF”) sought leave to intervene in this case to ensure that the constitutionality of the polygamy provision (s.293) of the *Criminal Code of Canada* is firmly situated in the context of constitutional equality rights for women and girls. Equality is an underlying value to all *Charter* rights. Our argument is twofold. First, polygamy is a practice that tends in its practice towards the exploitation of women and girls, and second, that where exploitation is present, polygamy is properly subject to criminal sanction.

2. Pursuant to the *Constitutional Question Act*, two questions are referred to the B.C. Supreme Court for hearing and consideration:
 - a) Is section 293 of the *Criminal Code of Canada* (“the *Criminal Code*”) consistent with the *Canadian Charter of Rights and Freedoms* (“the *Charter*”)? 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?

3. In this opening statement, West Coast LEAF will provide an overview and an anticipated evidentiary basis for its position that:
 - a) Question 1: Section 293 is consistent with the *Charter*. In the alternative, any breach of *Charter* rights is justified under s. 1 of the *Charter*.

 - b) Question 2: Section 293 must be read down such that the prohibition applies to polygamists who exploit women or girls.

4. West Coast LEAF expects the evidence to show that polygamy, as practiced in communities like Bountiful BC and elsewhere, has been directly connected with the abuse and exploitation of women and girls. Thus, the practice of polygamy violates the fundamental rights to autonomy and equality of women and girls. West Coast LEAF will argue that there is a sufficient connection between the practice of polygamy and these harms to justify the legislative prohibition of polygamy where that exploitation is present.

5. In this constitutional reference, West Coast LEAF will assist the Court in determining how to balance the equality rights of women and girls with competing *Charter* interests. West Coast LEAF will address sections 2(a) (religion), 7 (liberty and security of the person), and 15 (equality). West Coast LEAF will not address s. 2(d) (association) at this time, but reserves the right to do so at a later time. West Coast LEAF will also make submissions on section 1, arguing that any breach would be justified under section 1.
6. Specifically, West Coast LEAF will argue that:
 - a) The scope of freedom of religion, as protected by section 2(a), is not without limits. It must incorporate the equality protections of women and girls, including women and girls of faith. The equality and autonomy protections for women and girls, pursuant to sections 7, 15 and 28 of the *Charter*, must infuse the s. 2(a) analysis.
 - b) The harms caused by polygamy violate the security of the person by infringing women's personal autonomy. When examining the protections offered by section 7 to the rights of persons in polygamous relationships, then the Court must necessarily examine the different ways in which the section 7 rights of a husband and his wives may be engaged.
 - c) Section 15 protects the substantive equality rights of women and girls, even in the context of other competing *Charter* rights. The state has a positive obligation to protect equality rights, and therefore s. 293 is required by law under the *Charter*. The equality analysis is also relevant to the harm caused by polygamy. As with the obscenity provisions of the *Criminal Code* [section 163(8)], the law must now move away from a justification of the criminal law based on morality, towards a justification based on harm. The analysis of harm is made objective in part by being grounded in *Charter* values.
7. Alternatively, if this Honourable Court finds a breach of *Charter* rights, West Coast LEAF submits that the legislative prohibition on polygamy can be justified under section 1 of the *Charter*. Parliament is entitled to legislate to affirmatively protect the constitutional interests of vulnerable groups. Section 293 must be read down to prevent the practice of polygamy where such practice is exploitative of the women and children involved, and the section is justifiable to the extent that it prohibits unacceptably harmful conduct.

PART II SECTION 293 and CONSTITUTIONAL VALIDITY

A. "Reading Down" Section 293 to Apply to Exploitative Relationships

8. West Coast LEAF submits that section 293 is consistent with the *Charter* insofar as it is read down to apply to exploitative relationships only.

9. Section 52(1) of the *Constitution Act* of 1982 provides:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

10. Where the constitutionality of a law is impugned, the Court is permitted to “read down” the provision. Reading down reflects judicial restraint; it is an appropriate judicial mechanism. It does not intrude into the legislative sphere.¹
11. In fact, the principle of constitutionality requires the Court to interpret a statute to avoid constitutional inconsistency where the statutory provision is capable of such an interpretation². By reading down section 293 to apply to exploitative relationships only, this Court limits the circumstances to which the offence applies. Thus, it ensures consistency with the *Charter* and avoids constitutional inconsistencies.
12. When s. 293 is read down, polyamory is not captured by the prohibition on polygamy. Polyamory, as it is defined at paras. 13 and 14 of the “Opening Statement on Breach” by the Canadian Polyamory Advocacy Association (“CPAA”), concerns relationships based on a practice of equality and self-realization.³ The law does not prohibit having multiple spouses *per se*; rather, it prohibits the exploitative practice of polygamy.
13. Prohibition of the practice of polygamy is analogous to prohibitions on undue exploitation that are contained in other *Criminal Code* provisions, such as the obscenity provision. The

¹ As described by Peter Hogg in *Constitutional Law of Canada*, 1998. Scarborough: Carswell Thomson Professional Publishing, 1998, at section 37.1(b) wherein Hogg states:

Reading down is the appropriate remedy when a statute will bear two interpretations, one of which would offend the *Charter of Rights* and the other of which would not. In that case, a court will hold that the latter interpretation, which is normally the narrower one (hence reading *down*), is the correct one. When a statute is read down to avoid a breach of the Charter, there is no holding of invalidity. The vindication of the Charter right is accomplished solely by interpretation. Reading down is another doctrine of judicial restraint, because it minimizes the impact of a successful Charter attack on a law.

Reading down should not be confused with reading in . . . Reading in involves the insertion into a statute of words that Parliament never enacted. It is not a technique of interpretation but rather a technique of judicial amendment, altering the statute to make it conform to the Constitution. Reading in usually has the effect of extending the scope of the statute. Reading down, on the other hand, involves giving a statute a narrow interpretation in order to avoid a constitutional problem that would arise if the statute were given a broad interpretation.

² *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at para.25 and *R. v. Ruzic*, [2001] 1 S.C.R. 687 at para.26

³ CPAA “Opening Statement on Breach”, paras. 13 and 14:

- Para. 13 “Polyamory” is the practice of having emotionally intimate, sexual relationships within groups of three or more people, where at least one person in the group has more than one emotionally intimate, sexual relationship at a time and where all members of the group formally or informally adopt these principles:
- a) men and women have equal rights in establishing the configurations of the groups; no gender has privileges with respect to intimate relationships that the other gender lacks; and
 - b) no sexual orientation is regarded as superior to any other.
- Para. 14 Conjugal polyamory refers to polyamorous relationships where three or more of the parties in the relationship live in the same household.

prohibition on the practice of polygamy and the prohibition on obscenity both concern activities that are not inherently harmful but are harmful when practiced in an exploitative manner. Both activities contain a spectrum spanning from healthy human sexuality to exploitative power relationships. The criminal law plays an important role in prohibiting the exploitative forms of what might otherwise be an acceptable activity.

B. The Exploitation of Women and Girls

14. Relevant to the analysis of the Charter provisions is a consideration of the harms that have an actual nexus with polygamy including, but not limited to, the following:

- a) The available evidence shows that polygamy in Canada and globally is overwhelmingly practiced as polygyny (a man with multiple wives). Polyandry (a woman with multiple husbands) is extremely rare. Therefore, the common form of polygamy is inherently unequal in that it allows husbands to take multiple wives, but not wives to take multiple husbands.

Cook Affidavit, paras.13, 20, 26

Henrich Affidavit, Exh. A, p. 35

Deignan Affidavit, Exhs. B & C

- b) A society in which men have multiple wives results in a shortage of wives. Therefore, some men will be pushed out the community and the age of marriageable women will vary widely in order to increase the number of potential wives. This will lead to wide age differences between a husband and at least some of his wives.

Dunfield Affidavit, Exhibit B at page 3

Nichols Affidavit

Henrich Affidavit, Exh. A, p. 39, 49

- c) These age differences increase the power differential between a husband and a wife, increase the potential for exploitation, and impact her ability to consent to marriage and sex.

Nichols Affidavit

Cook Affidavit, paras. 20-21, citing the UN Human Rights Commission

McDermott Affidavit, paras. 121-122

Henrich Affidavit, Exh. A, p. 55, 57

- d) In addition, this means that very young women, including children, are considered 'marriageable'. Children's vulnerability is clearly recognized under the law.

Children under 16 are not able to consent to sex except with their peers, and are not able to consent to marriage at all. The law regarding the age of consent recognizes the increased vulnerability that children and young people face when confronted with having sex with a significantly older person.

Sections 150.1, 151, 153 of the *Criminal Code*

McDermott Affidavit, para. 96

Kendall Affidavit, paras. 7-8

Nicols Affidavit

- e) Polygamous marriage structures tend to concentrate the power in the household in the central male figure for decision making, sexual control and economic power.

Bala Affidavit, Exhibit A, para 41.

Cook Affidavit, at para. 22, citing the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

McDermott Affidavit, para. 137-146

Deignan Affidavit, Exhs. D & F

Bennion, Janet, “*Abbas Raptus: Exploring Factors that Contribute to the Sexual Abuse of Females in Rural Mormon Fundamentalist Communities*”, in The Forum on Public Policy (2006) at pps. 5-9, 14

- f) Polygamy is connected to a mandatory requirement for women to have intercourse and produce children for their husband. In these circumstances, women’s autonomy and reproductive freedom is curtailed, contrary to women’s section 7 rights to security of the person.

Cook Affidavit, paras.14, 33, 34 , 35, 53-55

McDermott Affidavit, para. 98, 101

R v. Morgentaler [1988] 1 S.C.R. 30 at para. 24

Deignan Affidavit, Exh. O

Life in Bountiful report p.4258 of Brandeis Brief

Interviews of Howard Mackert, Jorjina Broadbent and Mary Mackert

- g) Women in polygamous relationships are often pitted against each other in a competition for love, attention and sustenance which are controlled by the male head of household. Where women are valued solely for their reproductive role, this attention becomes a matter of self-worth and societal worth.

Cook Affidavit, at paras.43-45, 56, 59

Mackert Interview
Hassouneh Affidavit

- h) Women’s economic vulnerability is heightened, because they are often reliant on a singular male income, or if they are income earners themselves, their money is still often controlled by their husbands.

Cook Affidavit, paras. 56-60

PART 3 **THE CHARTER PROVISIONS**

A. Section 2(a): Freedom of Religion

15. The essence of the concept of freedom of religion is: a) the right to entertain such religious beliefs as a person chooses; b) the right to declare religious beliefs openly and without fear of hindrance or reprisal; and, c) the right to manifest religious belief by worship and practice or by teaching and dissemination.⁴ However, not every legislative effect on religious beliefs or practices is offensive to the guarantee provided by section 2(a).⁵
16. West Coast LEAF will argue that polygamy is a practice and not necessarily a belief. In *British Columbia College of Teachers v. Trinity Western University et al.*⁶, Justices Iacobucci and Bastarache, writing for the majority, drew a distinction between practice and belief: “The freedom to hold beliefs is broader than the freedom to act on them.”
17. West Coast LEAF will argue that section 293 prohibits the practice of exploitative polygamy and thus may not be protected by section 2(a). In the Cook Affidavit (para.101), the affiant refers to *Reynolds v. United States*, 98 US 145 (1879). The US Supreme Court held that while laws “cannot interfere with mere religious belief and opinions, they may with practices.”
18. Even if polygamy is found to be a belief in some cases, West Coast LEAF will submit that sincerity of belief does not immunize that belief from examination. It does not automatically veil that belief with the protection of s.2(a) where exploitation of another person occurs.
19. More importantly, a belief may not be genuine where it is formed in an exploitative environment. The sincerity of that belief may be insufficient to warrant constitutional protection where the objective circumstances show that the rights bearer was subject to

⁴ *R v. Big M Drug Mart Ltd.*, [1985] 713

⁵ *R v. Jones* [1986] 2 S.C.R. 284

⁶ [2001] 1 S.C.R. 772 at para. 36

exploitation. It is anticipated that the evidence will demonstrate that polygamy lends itself to exploitation.

Bala Affidavit, Exhibit A, para. 41

Section 7: Life, Liberty and Security of the Person

20. Section 7 of the *Charter* provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
21. In stage one of the section 7 analysis, this Court must ask whether a state deprivation has breached an individual’s right to life, liberty or security of the person. The availability of imprisonment for a section 293 conviction is sufficient to trigger section 7 scrutiny.⁷
22. The Amicus argues that s. 293 deprives polygamists of the “freedom to make fundamentally and inherently personal choices with respect to their intimate relationships, and so implicates basic choices going to the core of what it means to enjoy individual dignity and independence.” West Coast LEAF disagrees. Section 7 does not protect the “freedom” to exploit another person, regardless if that exploitation occurs in the context of an intimate relationship. Therefore, when section 293 is read down to apply to exploitative relationships, polygamists are not deprived of any constitutionally protected freedom to make fundamentally and inherently personal choices with respect to their intimate relationships.
23. On the contrary, section 7 should be interpreted to protect the substantive rights of women. In that regard, the harms caused by polygamy violate the security of the person by infringing “personal autonomy involving, at the very least, control over one’s bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress.”⁸ In light of section 28 of the *Charter*, section 7 cannot be interpreted as protecting the rights of people in polygamous relationships without looking at the very different ways in which the section 7 rights of a husband and his wives may be engaged.
24. If the Court finds a breach of life, liberty or security of the person, it must then ask whether any infringement was in accordance with the principles of fundamental justice. To be in accordance with the principles of fundamental justice, the provision cannot be arbitrary or overly broad: “they must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result.”⁹

⁷ *R v. Malm-Levine; R v. Caine* [2003] 3 S.C.R. 571 at para. 89 wherein Justices Gonthier and Binnie, writing for the majority, stated that the risk of being sent to jail engages the appellants’ liberty interests.

⁸ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at para.136

⁹ *Rodriguez* at para.141

25. The Amicus argues that s.293 deprivations of liberty are not in accordance with the principles of fundamental justice, because they were enacted in pursuit of an unjust objective and are arbitrary, overbroad and grossly disproportionate. However, that argument relates only to a definition of polygamy within section 293 that is related to morality and not harm. West Coast LEAF says that when exploitation is understood as a required element of this section, the section is neither arbitrary nor overly broad.
26. West Coast LEAF says the evidence will show that polygamy lends itself to exploitation and that it exacerbates sex inequality. Read down to include an element of exploitation, section 293 targets the harms caused by polygamy to women and girls. Amongst other harms, the provision recognizes that the practice of polygamy deprives women and girls of the ability to freely chose when to engage in sexual activity, when to get married, when to leave marriages and when to have children.
27. With respect to the Amicus' alternative section 7 argument ("arbitrariness"), West Coast LEAF will argue that there is a clear connection between section 293 and its objective to "denounce, deter and punish behaviour that is [reasonably apprehended to be] harmful to women and children of polygamous unions, denigrating to women's equality and children's rights generally and injurious to social harmony and order, and to the authority of the secular state." The Amicus' argument that, "section 293 criminalizes *free consent* to such relationships" presupposes that polygamous communities such as Bountiful, B.C., permit women and girls to exercise "free consent".

Dunfield Affidavit, Exhibit B, page 4

28. When read down to apply to exploitative relationships, section 293 is not overly broad. A prohibition on exploitative polygamous relationships that causes harm to the rights of women and children is sufficiently precise to be in accordance with the principles of fundamental justice.

Section 15: Equality

29. The current test for s.15 is:
- a). Can the claimant show that the law creates a distinction based on an enumerated or analogous ground?¹⁰
 - b) If so, can the government show that the impugned law, program or activity is ameliorative and, thus, constitutional? A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (i) the program has an ameliorative

¹⁰ *R. v. Kapp*, 2008 SCC 41 at para.17

or remedial purpose; and (ii) the program targets a disadvantaged group identified by the enumerated or analogous grounds.¹¹

- c) If the government cannot satisfy step 2, can the claimant show that the distinction creates a disadvantage by perpetuating prejudice or stereotyping?¹²

30. West Coast LEAF will argue that section 15 equality rights apply to the constitutional analysis of s.293 in a number of ways:

- a). First, that section 15 protects substantive equality rights of women and girls, which should be balanced against the right to freedom of religion under s.2(a), the right to liberty and security of the person under s. 7, non-discrimination on the basis of religion under s.15 and the justification stage at s.1.
- b). Second, the state has a positive obligation to protect equality rights, and therefore section 293 fulfills the Crown's obligations to consider the equality rights of women and girls of faith in polygamous communities and ensure that they are not exploited. In addition, the government is required not to revoke legislation that is necessary to protect equality rights. The revocation of legislation may constitute government action, and therefore attract Charter scrutiny. According to *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para.61, a legislative omission in the form of under-inclusive legislation can be subject to a section 15 analysis; by analogy a revocation is also subject to the Charter.
- c). Third, the equality analysis is also relevant to the harm caused by polygamy. The constitutional analysis of harm in the criminal law was developed in the context of the obscenity provisions of the *Criminal Code*, where the Court moved away from a justification of the criminal law based on morality, towards a justification based on harm. The analysis of harm is made objective in part by being grounded in *Charter* values, in particular the underlying value of equality.

31. The two steps of the harm test are: a) whether the Crown has established a harm or significant risk of harm that is grounded in constitutional norms or other fundamental legal standards, and b) whether the degree of harm is incompatible with the proper functioning of society. While this test necessarily requires value judgments, *Charter* values and other constitutional standards play an important role in anchoring such judgments to objectively knowable standards. As stated in *Labaye* at para.33:

The requirement of formal societal recognition makes the test objective. The inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its fundamental laws, has recognized as essential. Views about

¹¹ *R. v. Kapp* at paras.40-41

¹² *R. v. Kapp* at para.17

the harm that the sexual conduct at issue may produce, however widely held, do not suffice to ground a conviction. This is not to say that social values no longer have a role to play. On the contrary, to ground a finding that acts are indecent, the harm must be shown to be related to a fundamental value reflected in our society's Constitution or similar fundamental laws, like bills of rights, which constitutes society's formal recognition that harm of the sort envisaged may be incompatible with its proper functioning. Unlike the community standard of tolerance test, the requirement of formal recognition inspires confidence that the values upheld by judges and jurors are truly those of Canadian society. Autonomy, liberty, equality and human dignity are among these values.

32. *Charter* guarantees of sex equality, as contained in ss.15 and 28, play a key role in negotiating the line between unconstitutional 'legal moralism' and constitutional prohibitions on harmful activity. The state is justified in limiting an activity (such as obscenity or polygamy) where it harms the equality interests of those involved or affected to the extent that such harm is incompatible with the proper functioning of Canadian democratic society. Equality concerns justify state imposed limitations on freedom.

Section 1: Any Breach of a Polygamous Husband's Rights to Practice Polygamy in an Exploitative Context is Justified by Section 1

33. Section 1 of the Charter reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
34. West Coast LEAF will argue that the harm test as developed in *Butler and Labaye*¹³ comes into play in the section 1 analysis. This means that where the impugned provision is effectively designed to prevent harm, despite infringing rights, the provision may be justified. The harm analysis is one means for the Court to understand the competing values at play within the s.1 stage.
35. In *Ross v. New Brunswick School District No. 15*¹⁴, the SCC elaborated upon the weighing of values at the section 1 stage, and the importance of the underlying values of the Charter:

In *Oakes*, supra, at p. 136, Dickson C.J. stated that in determining whether Charter rights and freedoms should be limited,

[t]he Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group

¹³ *R. v. Labaye*, [2005] 3 S.C.R. 728 at paras.28-30.

¹⁴ [1996] 1 S.C.R. 825 at para 77

identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

Ultimately, any attempt to determine whether the order is a justifiable infringement of the respondent's freedom of expression and of religion must involve a weighing of these essential values and principles, namely the accommodation of a wide variety of beliefs on the one hand and respect for cultural and group identity, and faith in social institutions that enhance the participation of individuals and respect for the inherent dignity of the human person on the other.

36. At the s.1 stage, conflicting constitutional values must be understood in their factual and social context¹⁵. The underlying values of the Charter, and the defining values of s.1, are the principles of a free and democratic society, the fundamental basis of which is the inherent dignity and equality of each individual. While equality must underwrite the analysis of every Charter right, s.1 provides the opportunity for the Court to return to first principles, and analyze any breaches from the perspective of these underlying values.
37. The s.1 stage may well prove to be the most significant step in the analysis of the constitutionality of s.293 because it is here that the Court will be faced most directly with the balancing of the competing rights claims at stake. In determining whether the Crown has shown that s.293 is a reasonable limit demonstrably justified in a free and democratic society, the Court will be required to examine the equality and autonomy interests of women and girls discussed above under ss.7 and 15 of the Charter, and balance these important rights against any breaches of the rights of those captured by the impugned provision. West Coast LEAF will rely on its analysis of the ss.7 and 15 rights of women and girls in the balancing of rights at the s.1 stage.
38. The evidence will show that polygamy is frequently practiced in a context of extreme gender inequality and that, as a practice, it feeds and exacerbates that inequality and becomes a practice of exploitation of women and girls. Any limitations on freedom of religion, religious or marital equality, or the rights to liberty and security of the person can be justified because the state is entitled to legislate to prevent the exploitation of women and children.

¹⁵ *RJR MacDonald Inc. v. Canada (Attorney General)*, 1995 3 S.C.R. 199 at para.71.