

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

1. Polygamy has over the centuries been accepted as lawful in a number of communities and across several geographic and religious divisions.
2. In Canada, however, polygamy has never been lawful. Like virtually all western democracies, Canada has criminalized polygamous activity.
3. In 1982, Canada adopted the *Canadian Charter of Rights and Freedoms*, which subjects Canada's criminal laws to the scrutiny of the Courts. The mandate given to the Courts was to require the Government to substantively justify any laws restricting the Fundamental Freedoms guaranteed to Canadians. Of course, any law passed before 1982 is presumed to be constitutional and the onus is on the challenger to show why a law is in violation of a *Charter* right or freedom before the government is placed under a duty to demonstrably justify any alleged violation.
4. The evidence to be presented in this Reference by the Governments of Canada and British Columbia, together with supporting interveners, will demonstrate that any restriction on a *Charter* right or freedom found in section 293 of the *Criminal Code* is justified in a free and democratic society.
5. This Court will hear four kinds of evidence that will justify the *Criminal Code* prohibition of polygamy:
 - (a) Polygamy is abusive of women, in that it treats them unequally and limits their exercise of free will;
 - (b) Polygamy is abusive of children, in that it deprives them of a stable and secure home and often results in delinquency and suicide on the part of children;

- (c) Polygamy is socially and economically harmful to women and children and to society as a whole; and
 - (d) Polygamy amounts to a fraud upon the public, as the public is deprived of the social and economic certainty associated with the current social and economic realities related to the definition of marriage as a conjugal union of two persons.
6. While this Court will hear clear and convincing evidence that the Government of Canada is correct when it criminalizes polygamy, this Court need not come to that conclusion in any formal manner.
 7. Instead, the Court should simply 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. 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 should be a crime.
 8. This 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 the replacement of that *Code* with a new set of common law crimes based upon a judicial common law interpretation of the provisions of the *Charter*.
 9. 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 *The Queen v. Malmo-Levine*, [2003] 3 S.C.R. 571 at p. 657 (as recently cited in *Bedford v. Canada (Attorney General)*, [2010] O.J. No. 4057 at para. 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").
 10. This approach 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 judge differ from elected members of Parliament.
 11. 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.
 12. At the time of legal argument, we will address other important issues that may arise in this case, including:

- (a) The appropriate limits on a Government inquiry into the religious beliefs and practices of an individual; and
 - (b) The appropriate test for the Government to meet before it is allowed to breach the privacy wall that surrounds each family.
13. While the Government in this Reference has met the *Charter* tests for such inquiry into religion and such interference with the family, it is nevertheless important for this Court to expressly emphasize that any Government inquiry or examination of a religious belief may only be undertaken for only two purposes:
- (a) First, to determine the good faith of the person asserting a *Charter* right; or
 - (b) Second, to determine whether there is actual or imminent harm to a child or third party.
14. Furthermore, interference with the family under the *Charter* may only be embarked upon by Government where Government first establishes actual or imminent harm. Simple differences of opinion regarding what is best for a child is not enough to justify Government invasion of the family castle.
15. In this Reference, the Court will hear compelling evidence that will demonstrate that the Government has acted properly to protect children and their parents from the harm of polygamous activities.
16. Section 293 of the *Criminal Code* prohibits polygamy for the reasons that have caused free and democratic societies around the world to conclude that polygamy is inconsistent with principles of democracy and equality.
17. Far from restricting Fundamental Freedoms, 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*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Per:



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DATED NOVEMBER 8, 2010