

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 BEYOND BORDERS

1. These are the closing submissions of Beyond Borders on its position that section 293 of the Criminal Code of Canada complies with the Charter of Rights and Freedoms.

2. The reference questions are:

"a. 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?

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. The answer of Beyond Borders to the reference questions are these:

a. Section 293 of the Criminal Code of Canada is consistent with the Canadian Charter of Rights and Freedoms. If not in general, it is at least consistent with the Charter where the polygamy or conjugal union in question involves a minor.

b. Section 293 does not require that the polygamy or conjugal union in question involve a minor, or occur in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence. Nonetheless, where the polygamy or conjugal union in question involves a minor, the offence set out in section 293 is committed.

4. The focus of Beyond Borders is the international sexual exploitation of children. Beyond Borders combats the movement of both adults and children across international borders where the purpose or effect of the movement is the sexual exploitation of children.

5. The prohibition against polygamy serves the purpose of combating this particular evil. The legalisation of polygamy makes the practice of this abuse more likely. With polygamy in place, this sort of abuse becomes more difficult both to combat and prevent.

6. From the perspective of the intervener, one piece of striking evidence at the hearing was the documents filed on February 18th that two sets of parents drove their 12 year old daughters from a polygamous community in Canada in 2005 to the United States to marry a 49 year old man in a polygamous community there. Documents show that a 13 year old girl suffered the same fate one year earlier.

7. This sort of event sits squarely within the mandate of Beyond Borders, the possibility of sexual abuse of children across international borders. Law enforcement officials are investigating the issue. If a crime has been committed in the United States or Canada it is likely to be prosecuted.

8. However, the possibility of prosecution for violation of child sexual abuse does not allay the concerns that we have. Children can be and have been moved across international borders for sexual purposes in situations where prosecution becomes difficult if not impossible.

9. Internationalization of child sexual abuse complicates prosecution, since we are dealing with two sets of laws, two sets of courts, two sets of enforcement officials. Moreover, either the country of export or the country of destination may have weak legal systems, not having effective capacity to remedy breaches of their laws.

10. In many, if not most, countries, the scope of the laws, the jurisdiction of courts, the reach of officials is territorial only. With the best will in the world, international enforcement is difficult.

11. Child sexual abuse with an international dimension joins increased difficulties with decreased will. When either the perpetrator or the victim is absent from the jurisdiction, the motivation the system has to deal with the crime is less.

12. It is all too easy, when there is more than one jurisdiction involved, for each jurisdiction to say that the solution to the problem rests with the other jurisdiction. Efforts to achieve justice for child sexual abuse with an international dimension often ends up in buck passing.

13. Crimes involving children are particularly problematic because the victims cannot speak for themselves. Taken out of their protective environment, there is no one who knows them in the place to which they are transported to speak for them.

14. These considerations means that, in protecting children against cross border sexual abuse, a multi-dimensional approach is needed. There is no one magic solution. Various ways of resolving the problem need to be invoked.

15. As our opening submissions attempted to lay out, there is a link between polygamy and child sexual abuse. Polygamy both facilitates the crime and makes it harder to detect and report. There has been much evidence to that effect before this court, summarized in other submissions.

16. Prosecution for child sexual abuse is one answer to this problem, but it is not the only answer. Any environment which facilitates the crime and discourages its detection and reporting has to be a matter of concern.

17. Protecting children from cross border sexual abuse is one justification for the current Canadian polygamy law. It is a justification, amongst others, that makes the law constitutional.

18. It would be wrong to say that this justification is a matter for section one of the Charter only. This justification means that the polygamy prohibition in the Criminal Code does not violate the Charter guarantees of freedom of religion or freedom of expression.

19. Take an example. Suppose someone justifies murder by a claim that the killing was done out of religious belief. That claim need not be addressed under section one of the Charter. The claim that prosecution for murder in these circumstances violates freedom of religion is not established.

20. The reason that there is no violation of freedom of religion as a defense to murder is that human rights have to be considered as a whole. One cannot assess whether human rights are violated by looking at only one human right in isolation. The ultimate test for human rights is the whole the human rights package, the worth and dignity of the whole human being. Each human right captures one aspect of that package. But it is the whole that matters, not just the component parts.

21. It makes as much sense to look at individual human rights in isolation, without regard to human rights as a whole, as it does to look at individual limbs in isolation without regard to the human body as a whole. Human rights is itself a body, a corpus of standards.

22. To promote the health of the human body, one must respect the health of each part. Yet, it would be nonsense to decapitate a person in order to enhance the health of one of the person's fingers.

22. To respect human rights as a whole, one must respect individual human rights. Yet, one does respect not human rights as a whole by tolerating one grave violation in order to prevent a lesser violation.

23. Murder violates the right to life. On balance, murder violates the right to life far more than prosecution for murder violates the right to freedom of religion who kills out of religious belief. There is better respect, as a whole, for human rights by prohibiting murder inflicted out of religious belief than by allowing murder inflicted out of religious belief.

24. To take another example, one might argue that laws against drunk driving are unnecessary, that a person who is drunk and gets in an accident could always be charged for those facts. This logic holds little sway with legislators because risk prevention is more important than driver freedom.

25. Sexual abuse of children violates the right to security of the person of children. When children are sexually abused as a result of state action or inaction, their section 7 Charter rights are violated. The violation of that right has to weigh more heavily in the balance than the right of freedom of expression or religion of adults manifested by allowing them to live in polygamous communities.

26. The Convention on the Rights of the Child provides that

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 3(1)

That provision means that in a contest between adults for the right to freedom of expression or religion and children for the right to be protected against sexual abuse, the rights of children have to be given primacy.

27. The defenders of polygamy do not claim a right to child sexual abuse. Yet, they do claim a right to a community which both facilitates child sexual abuse and makes it harder to detect and report. The intervener submits that efforts to prevent child sexual abuse, precautions against child sexual abuse have to take priority over tolerance of polygamy as the realization of freedom of belief or expression.

28. Prosecution for the offense of child sexual abuse alone, even if every perpetrator were swiftly detected, charged, convicted and sentenced is no substitute for prevention. Prosecution, by its very nature, occurs only after the harm is done, after the child is damaged. Prevention means that the child will not be damaged.

29. The Convention on the Rights of the Child also provides:

“1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of

prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

Article 19

30. The Canadian Criminal Code prohibition against polygamy is an appropriate legislative measure to protect the child from sexual abuse. The prohibition against polygamy is a protective measure which is a form of prevention.

31. Although the intervener, as one can see, has taken the position that offence under the Criminal Code is committed when a polygamous union involves a minor, we do not restrict our position on constitutionality to those facts. The very tolerance of polygamous communities puts children at risk of sexual abuse. It would constrain the law beyond its necessary preventive goal to limit the law only to situations where child sexual abuse has taken place.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: 7 March 2011

David Matas

Counsel for the intervener

Barrister and Solicitor

602-225 Vaughan Street

Winnipeg, Manitoba, R3C 1T7

Tel: 204-944-1831

Fax: 204-942-1494