

# Polygamy & Sharia in Canada: The Intersection of Faith & Family Law

A10: Tuesday Oct. 25, 2005 11am - noon  
World Conference on Prevention of Family Violence  
Banff, Alberta

# After same sex marriage – polygamy?



Good News Mr. Prime Minister  
– It's not about gay marriage

# Presenters

- Nicholas Bala, Faculty of Law, Queen's University
- Alia Hogben, Canadian Council of Muslim Women
- Alison Brewin, Program Director, West Coast LEAF
- Debbie Palmer, author & former member of polygamous community in Bountiful, B.C.

# Linked but Distinct Issues

## ■ Religious Freedom Issues

Should Canada prohibit practices of religious minorities that are different from mainstream if associated with negative effects for women & children?

## ■ Multicultural Issues

Should Canada prohibit familial behaviours of immigrant populations that are different from traditional “Canadian values” and that may have negative effects for women & children?

- arranged marriages?
- Sharia arbitrations?
- polygamy?
- female genital mutilation?

## ■ Enforcement Issues

How to enforce laws which are intended to help women & children whose lives are negatively affected by a practice that is contrary to “Canadian values” but one which is “voluntary”?

# Polygamy in Canada

# Polygamy in Canada

- Many countries in Asia and Africa still allow, but gradually being made illegal or restricted, even in Muslim countries (Tunisia Turkey).
- Polygamy an offence in Criminal Code (1892)
  - Historically religious/moral concerns
- Fundamentalist Mormons (FLDS) (Bountiful BC, also Alta.)
  - Since 1890s : 30,000 or more in North America
  - usually 1 legal marriage & “celestial” wives
  - most are raised in this faith & indoctrinated from birth
  - generally isolated (e.g. separate schools/home school)
- Some Muslim polygamous marriages in Canada
  - not accepted as regular immigrants
  - few in Canada, but major issue in UK & Western Europe
- Others in North America (e.g Christian, Jewish, secular)

# International research on polygamy

- Africa, Middle East
- In general, polygamy is associated with
  - Worse outcomes for women than monogamy
    - Some women publicly support, but research raises concerns about competition, abuse & exploitation
  - Worse outcomes for children than monogamy
    - Fathers less engaged
    - Poverty more likely
    - Higher rates of emotional, physical & sexual abuse of children, especially of less popular mothers
    - Female adolescents may be coerced into marriage
    - What happens to “extra young men” (adolescents forced out)?

# Arguments in support of polygamy

- Religious freedom
  - Some faiths permit (Islam), but other require polygamy (FLDS)
- While some women leave and complain of oppression, there are high profile women who support:
  - “If this lifestyle didn’t already exist, it would have to be invented to accommodate career women.”
    - Elizabeth Joseph, FLDS woman lawyer in Utah
  - "We are women that have chosen the Bountiful lifestyle. We love it and we believe in it. We know better than any of you what our culture is like. It's not for everyone, but for us it's the right choice and we wouldn't change it for anything in the world."
    - Leah Barlow, registered nurse, FLDS Bountiful, 2005
- Libertarians – if adultery & group sex are not crimes, why is polygamy?
- If polygamy remains illegal, it will still exist “underground” with greater negative effects for vulnerable women and children

# Criminal Code s. 293

- This provision is broad and applies to
  - FLDS even though multiple unions not “marriages,” “polygamous unions”
  - Canadian going abroad to enter polygamous marriage and then returning to Canada, even if only 1 wife in Canada
- No prosecutions since 1900 in Canada as
  - (1) police have difficulty getting evidence
  - (2) BC Crown has legal opinions that s. 293 violates Charter. Federal Crown has contrary opinions, also not released
  - (3) concerns about effects of prosecutions of husbands on women and children
- Because polygamy is a crime, immigration of polygamous families not permitted

# Enforcement Issues

- Difficult to collect evidence for criminal prosecution or even where child protection concerns in polygamous families
- Would prosecution force polygamy further “underground” and make it more difficult to help children and women?

# Charter Issues

- Conflicting *opinions* about constitutionality of s.293 of the *Criminal Code*  
BC AG -> invalid; AG Canada -> valid
- Courts in USA (FLDS), India (Hindus) and Mauritius (Muslims) have rejected freedom of religion arguments in polygamy cases
- Canadian courts recognize restrictions on Charter freedoms to protect women and children as justification for restraint on constitutional rights

# Contrast to same-sex marriage

- NO evidence that same-sex marriage harms children, and arguably benefits to kids

vs. significant problems for children in polygamy

- No economic costs to recognition of same-sex marriage

vs. costs to state & employers, pensions etc. from multiple spouse situations

- Equality based-claim to same-sex marriage

vs. gender inequality of polygamy

# Sharia & faith-based family arbitration

# Sharia – Muslim Law

- Considerable variation based on branch of faith, country & even imam
- Largely oral
- Some common features: male dominant
  - father gets custody, e.g. if child over 7
  - very limited or no spousal support
  - no property claim to woman
  - only male has unilateral right to divorce (talaq)
  - different gender-based treatment of adultery

# Arbitration in Family Law

- Professional arbitration common in family law in Canada
  - private hearings - faster than courts
  - often by lawyers (financial) or psychologists (child related)
  - apply Canadian family law
  - legally binding unless error leads to appeal to courts
- Very limited religious arbitration in family law cases in Ontario since 1991
  - Orthodox Jewish (Beth Din). Rabbi as arbitrator; lawyers may represent individuals at arbitrations
  - may apply combination of Canadian law & faith precepts
  - courts won't enforce if unconscionable or contrary to child's interests
  - are women exploited? No research
- Ecclesiastical tribunals (religious purposes only, especially to allow remarriage)
  - Catholic, Anglican
  - Jewish

# Sharia Arbitration in Family Law Cases in Canada

- In some countries, family law justice system based on “personal law,” but in Canada “unitary law”
- Limited Sharia based commercial arbitrations in Ontario since 1980’s
- Ontario – Boyd Report (Dec 2004)
  - Family arbitration under Sharia with some protections
    - To be informed of right to legal advice, but may waive
    - Statement of principles for arbitration & written decisions
    - Court may set aside award not in best interests of child, unconscionable, or non-disclosure of assets or income

# Ontario Response (Sept. 05)

- Protests that under Boyd proposal women would be pressured into accepting settlements and not aware of rights -> Ont. gov.'t announces no faith-based arbitration for any family law issue – applies to all faiths
- Premier McGuinty
  - "Ontarians will always have the right to seek advice from anyone in matters of family law, including religious advice, but no longer will religious arbitration be deciding matters of family law."
- Arbitration/mediation by members of regulated profession (lawyer, social worker, psychologist) under Canadian law still permitted.

# Conclusions

- Continuing controversy over role of faith in shaping law
  - Jehovah's Witness blood transfusions
  - Same-sex marriage
  - Sharia and other faith-based family law arbitration
  - Polygamy
- Challenge of balancing protection of children & vulnerable women against respect for faith and choice
- Recognize the limits of the law and the difficulties of enforcement in a free society
- Need for government action:
  - access to legal aid for vulnerable women
  - social supports & education for vulnerable women and children
  - Polygamy, especially in Bountiful
  - Faith based arbitration outside Quebec & Ontario