British Columbia Puts Religious Freedom and Polygamy to the Test

On January 8, British Columbia Attorney General Wally Oppal finally put an end to decades of what had become a mockery of the rule of law, when he decided to lay polygamy charges against Winston Blackmore, the leader of a fundamentalist Mormon splinter community, who has at least 30 wives and 100 children. Oppal and his predecessors had explained their reluctance to charge Blackmore as arising from their concern that the ban, contained in s.293 of the federal Criminal Code, might violate the Charter's guarantee of religious freedom. The case will certainly raise such concerns, as Blackmore invoked this defense in a press conference held shortly after he was charged. The case will also have consequences far beyond the small community of Bountiful, B.C., as polygamy is practiced quietly in Canada by other religious groups, including some Muslims and Orthodox Jews, and many prospective immigrants come from countries where polygamy is legal. Full legalization of polygamy would thus have serious implications for Canadian laws regarding the family and immigration.

But what are the possible outcomes of Blackmore's freedom of religion claim? I canvassed several possibilities in the pages of Constitutional Forumlast year, and summarize them here. The first scenario is that the courts reject Blackmore's claim entirely. This is extremely unlikely. Polygamous marriage is central to the Bountiful sect's religious beliefs, and the primary reason for its split from the larger Mormon Church when the latter formally abandoned the practice. The crucial question, then, is whether the ban can be saved as a "reasonable limit" under section one of the Charter. There are ample grounds available for such a finding. There is evidence, both within Bountiful and in polygamous cultures abroad, that plural marriage reinforces male domination of women and stunts children's development and life opportunities, and when announcing the charges Oppal repeated his long-standing view that polygamy is a form of gender discrimination. The case thus involves a tension between two Charter values – religious freedom and gender equality – and the Supreme Court has tended to favour equality and protection of the more vulnerable group in such cases (see, for example, its decisions on whether parents can refuse blood transfusions for their children on religious grounds, or whether non-custodial parents can teach their children their religious beliefs). So, a second scenario would see the violation of religious freedom, and the ban, upheld under section one.

In the alternative, the courts might find the violation of the Charter unreasonable, for a couple of reasons. For one, banning polygamy in the name of protecting women requires second-guessing the life choices of adult women. While claims of "false consciousness" may assuage some observers, there will be others who find

the level of paternalism inherent in such arguments excessive. For another, some, such as family and constitutional law scholar Beverly Baines, argue that concerns about protecting young women and children in polygamous communities can be addressed by enforcing other Criminal Code provisions such as sexual assault, sexual exploitation, and sexual interference with a minor. As well, the courts might point to the fact that B.C. police and the Crown have been unable to prosecute these other charges successfully in Bountiful as evidence that these concerns are overblown in the first place. (This argument underestimates, however, the practical difficulties of enforcing such laws when an insular, highly indoctrinated community refused to co-operate with police and Crown prosecutors.)

If the courts find the violation unreasonable, they will have to decide what remedy to give. Simplifying, there are two options. The first (our third scenario), would see the courts strike down the ban in its entirety. This is most likely if the courts reject the argument that the ban on polygamy is about protecting women (and instead focus on its original nineteenth-century goal of discouraging immigration by Mormons), or that marriage is too fundamental to the religious beliefs of those in Bountiful. The second remedy (our fourth and final scenario), would be a narrowly tailored remedy that does not require the wholesale legalization of polygamy. The courts could satisfy religious freedom by reading out of the Criminal Code (i.e., removing) the phrase in section 293(1)(a)(ii) prohibiting polygamy "whether or not it is by law recognized as a binding form of marriage." This would allow purely religious ceremonies which have no status in law, a solution the Ontario Court of Appeal found sufficient to satisfy the religious freedom of a pro-same-sex marriage church in the 2003 Halperncase. This would also side-step the government's likely argument that legalizing polygamy would wreak havoc on Canadian family law and government programs, which are typically premised on the model of the monogamous (or single-parent) family. Such a ruling would not, of course, satisfy either the residents of Bountiful (as it would not fully recognize their families) nor address the many serious concerns raised by opponents of polygamy; it would indeed be unfortunate if the courts acknowledged the problems associated with polygamy but did little to improve the lives of the women and children involved. Nevertheless, this is a possible outcome.

Whatever the outcome, Oppal should be saluted for finally bringing this case to the courts. The federal government has not decriminalized polygamy, despite advice from legal experts it commissioned (including Baines) that it should do so. The law is, therefore, still valid, and should be enforced. The qualms of provincial attorneys general and Crown prosecutors about the law's unconstitutionality, while not irrelevant, should not be used to pre-empt the

judicial process. It is time for this issue to move to the courts, so that the process of legal clarification – which will almost certainly involve trial and multiple appeal courts, and possibly Parliament and provincial legislatures – can proceed.

Prof. Hennigar's publications about constitutional law and government litigation include the book Canadian Courts: Law, Politics, and Process (with Lori Hausegger & Troy Riddell), Toronto: Oxford University Press, 2008 and several articles: "Conceptualizing Attorney General Conduct in Charter Litigation: From Independence to Central Agency," (2008) 51 Canadian Public Administration (2) 193; "The Unlikely Union of Same-Sex Marriage, Polygamy and the Charter in Court," (2007) Constitutional Forum (2) 15; "Why Does the Federal Government Appeal to the Supreme Court of Canada in Charter of Rights Cases?: A Strategic Explanation," (2007) 41 Law & Society Review (1), 225; "Expanding the 'Dialogue' Debate: Canadian Federal Government Responses to Lower Court Charter Decisions," (2004) 37 Canadian Journal of Political Science(1) 3; "Players and the Process: Charter Litigation and the Federal Government," (2002) 21 Windsor Yearbook of Access to Justice 91. The author's views do not necessarily reflect those of the Management Board and staff of the Centre for Constitutional Studies.