# The Constitutional Status of Polygamy in Canada

A special prosecutor for the government of British Columbia has charged Warren Blackmore and James Oler, leaders of the fundamentalist Mormon community in Bountiful B.C., with polygamy under section 293 of Canada's Criminal Code.[1] Until recently, the province's attorney-general had refrained from laying charges in Bountiful because legal specialists advised that section 293 would not withstand a constitutional challenge. Under section 2 of the Canadian Charter of Rights and Freedoms,[2] religious freedom is protected, within the confines of what is considered reasonable by the courts. Since polygamy is seen as a fundamental religious practice within some Mormon communities, the outcome of the case rests on whether or not the Code section can be "saved" as a "reasonable limit [that] can be demonstrably justified in a free and democratic society" under section 1 of the Charter.[3]

One of the questions to be addressed in this case is the legislators' intent in enacting the Criminal Code. If it is found that the Code section, added in 1892, was created in order to prejudice the Mormon community, it may be found unconstitutional.[4] In R. v. Big M Drug Mart (1985),[5] the leading case on freedom of religion, it was found that, despite newly arising secular reasons to close shops on Sundays, the Lord's Day Act was originally implemented for religious reasons. The Act was therefore found to deny freedom of religion to non-Christians.[6] In the Big M Drug Mart case, the Supreme Court of Canada ruled against the notion that a law's purpose may shift over time, making it compliant with present Charter values. Thus, if section 293 was intended as anti-Mormon legislation, the fact that it is no longer read that way may not save the provision.

On the other hand, if it is found that the purpose of section 293 is non-prejudicial or justifiably prejudicial, the law may be found constitutional nonetheless. The attorney general will likely argue that the section is intended to protect vulnerable persons, namely women and children.[7]

*Section 293 of the Criminal Code reads:*

*(1) Every one who*

*(a) practices or enters into or in any manner agrees or consents to practice or enter into*

*(i) any form of polygamy, or*

*(ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or*

*(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.*

*Evidence in case of polygamy*

*(2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.*

---

[1] *Criminal Code of Canada*, RSC 1985, c C-46 [Code].
[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(a).
[3] *Ibid*, s 1.
[4] Wendy Stueck, "Legal experts split over constitutionality of Oppal's move against polygamy" *The Globe and Mail* (9 January 2009).
[5] [1985] 1 SCR 295.
[6] *Ibid* at para 97.
[7] *Supra* note 4.