

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1996, 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. 553 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF s. 293 OF THE *CRIMINAL CODE OF CANADA*, R.S.C. 1985, c. C-46

SUBMISSIONS OF THE ATTORNEY GENERAL OF B.C.

MOTION FOR LEAVE TO ADMIT FURTHER EVIDENCE FEBRUARY 25, 2011

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I. Overview

1. According to paragraph 6 of Chief Justice Bauman's February 16, 2010 case management order, no further evidence may be introduced in this proceeding, past the stipulated evidentiary deadlines, without leave of the Court.
2. In 2008 Texas child protection and law enforcement authorities conducted a search and rescue operation at the FLDS Yearning for Zion ("YFZ") compound at El Dorado Texas.
3. In the course of the YFZ operation the Texas authorities seized a large volume of documentary information including church records. The Attorney has been working cooperatively with Texas authorities and others in the United States since the launch of the Reference proceedings. However, the Texas authorities have until this point only provided documents that they possessed where they had been entered into the public record in some proceeding.
4. The Attorney has now become aware of facts revealed through evidence seized from the YFZ compound that he considers relevant and important to the issues in the reference. In particular:

In 2004, a then 13-year-old female from the Bountiful community ("Child A") was "celestially married" "for time and eternity" to FLDS Prophet Warren Jeffs, by "Patriarch Leroy S. Jeffs as mouth", at the home of James Allred in Colorado City, Arizona. Child A's father and mother participated in the "wedding" ceremony.

On the same day in 2004, two 17-year-old females from Bountiful ("Child D" and "Child E") were "married" by the Prophet Warren Jeffs to other men. Child D and Child E were personally delivered to Warren Jeffs by James Oler, Bishop of the FLDS at Bountiful, who witnessed the ceremony.

Also on the same day, a 16-year-old girl from the United States ("Child F") was "married" to a Bountiful man by the Prophet Warren Jeffs. Child F is one of the teenage girls recorded (in material already before the Court) as having given birth in Canada some time later, while still a minor. James Oler was present at the ceremony.

In December 2005, two 12-year-old females from the Bountiful community ("Child B" and "Child C") were "celestially married" to FLDS Prophet Warren Jeffs in the United States. Child B's father drove her to Short Creek, accompanied by Child B's mother, for the purpose of the "marriage". Child C's father drove her to Short Creek, for the purpose of the "marriage". They were then driven to Texas by an FLDS official.

On April 26, 2006, three more Bountiful Girls ("Child G", "Child H", and "Child I") were taken to the United States and married to FLDS men. Child G and Child H were seventeen years old, Child I was eighteen.

5. The facts of Child B and Child C became known to the Attorney General on February 10, 2011. Some of the facts with respect to Child A were previously known by the government, and were recovered by counsel for the Attorney General on February 11 through a review of related government files and further enquiries of Texas authorities.

6. The facts of Child D, Child E, and Child F became known to the Attorney General on February 21 and 22nd, 2011, through a review of the relevant church records from Texas received on that day.

7. The facts of Child G, Child H, and Child I became known to the Attorney General on February 23rd, after information received from a member of the public was cross referenced with birth registration records.

8. The evidence at issue contains the sensitive personal information of a number of individuals, two of whom are still children. All nine of the children may have been victims of serious crimes.

9. Accordingly, the AGBC seeks sealing and confidentiality orders. The AGBC is prepared to introduce this evidence only if the sealing and confidentiality orders are granted.

II Summary of Orders Sought

10. The AGBC seeks leave to introduce certain further evidence. The evidence that the Attorney proposes to admit are:

1. The birth registration records of the eight girls who were born in British Columbia (the birth registration record of the child of Child F is already before the Court).
2. An Affidavit from Nick Hanna, a Texas Ranger who participated in the YFZ operations in 2008 and since that time has supervised the custody of documents seized pursuant to warrants issued by Texas judicial authorities. Ranger Hanna's affidavit will explain the circumstances of the seizure and the custody of the documents. It will have, as exhibits:
 - Several excerpts of the "Dictations of President Warren Jeffs";
 - "Marriage Records", indicating the names of bride and groom, their parents, witnesses, officiator, "duration" and date;
 - "Personal Records", summarizing personal information kept by the FLDS on each of its adherents.

11. The Attorney seeks an order that the birth registration records, and the exhibits to the Hanna Affidavit, go before the Court under seal, and that another affidavit, affixing the Hanna Affidavit with personal identifying information in the exhibits redacted, be admitted as part of the public record.

III Argument

A. The Evidence is the Same Kind

12. The evidence that the Attorney proposes to introduce is no different in kind from that already admitted. Birth registration records are already before the Court under seal, and there are examples of seized FLDS records, including excerpts of the Dictations of the President Warren Jeffs, attached as exhibits to the Affidavit #1 of Mr. Nichols. The further evidence at issue here is the same as that which the Court has already ordered admitted (birth registration records) or to which no party has previously objected (Nichols Affidavit).

B. The Evidence is Relevant

13. The proposed evidence is relevant to a number of issues:

First and most obviously, it is further evidence of underage marriage in the FLDS, both in terms of prevalence (all the Bountiful brides recorded as married in the US have been minors) and in terms of extremity (12-year old girls).

Second, the evidence demonstrates the *recency* of underage marriage in the FLDS. Angela Campbell assured the Court in her affidavit of her understanding that teen marriage had occurred "historically" in the Bountiful community, that it was no longer practiced, and at any rate not, to her knowledge, with girls younger than 15 or 16. (Aff #2, para. 16).

Third, it provides evidence of commodification of and trafficking in girls that was predicted as a consequence of polygamy by (for instance) Dr. Henrich, Dr. Grossbard, and Dr. McDermott, and was described by Dr. Beall and by some personal witnesses.¹

Fourth, it is relevant to the Amicus's expert witnesses' characterization of allegations of abuse at YFZ as "unfounded".²

¹ Dr. Larry Beall described in his testimony that he had learned in his practice that "There was a lot of travel back and forth, especially as young girls, potential marriage partners that kind of thing." However Dr. Beall did not describe any actual marriages of underage Canadian girls in the United States.

Witness #2 of the FLDS testified that she was aware of around 8 girls "under 20" who had moved to the United States to be married (Day 26 Transcript, p.66-67), but she denied knowing of any instance of marriage in the FLDS of girls less than 16 (Day 26 Transcript, p.65).

Anonymous witness #4 spoke (under cross-examination) of two teenage girls (herself and her younger sister wife) being brought up from the FLDS in the United States to marry polygamously in Canada, but did not report any child brides going the other way.

² The Amicus's expert witness, Professor Angela Campbell, swore in her Affidavit #2 that "allegations of systemic child abuse in that community [Yearning for Zion]" were "unfounded".

The Amicus's other expert, Lori Beaman, repeated in her own Affidavit #2 in these proceedings that "the allegations of abuse [at Yearning for Zion] were largely unfounded", and that the Texas operation was the result of "[a]trocious narratives and stereotypes" (paras. 13-14).

Fifth and possibly most importantly, this evidence goes to the issue of whether polygamy's harms can be addressed through the enforcement of already-existing laws. These facts eloquently demonstrate that abuse on a massive and systemic scale can be hidden from the authorities and be effectively immune from prosecution. The fact is that none of the incidents described in the evidence would ever have come to light but for the prank call that triggered the YFZ operation and led to the seizure of the FLDS records.

C. The Evidence was Recently Discovered

14. On October 19, 2010 counsel for the Attorney wrote to counsel for the FLDS seeking information on marriages in the FLDS communities in Canada and the United States. That request included the following:

Marriage information: we would like to know, for the last 20 years at least, information from Bountiful and other FLDS communities regarding marriage. For each marriage (legal, celestial, or any other form acknowledged or recorded by the FLDS), we would like to know (a) the age of the bride; (b) the age of the groom; and (c) the form of the marriage (e.g. legal, celestial, etc.); and (d) the year of the marriage (precise date not necessary). We recognize that any records you provide may be shorn of personal identifiers, and we specifically do not ask that you identify whether any of the marriages was or is polygamous. This is relevant to the central issue of whether polygamous societies have younger brides and greater age disparity between husbands and wives than monogamous societies. It is also relevant to assertions made by the Amicus's experts and other witnesses that the practice of teen marriage is diminishing in Bountiful and other FLDS communities.

15. Mr. Wickett, counsel for the FLDS, replied on October 25, 2010 that he did not have the information the Attorney sought, but that he would do his best to

Countering this, there was evidence in the form of the Final Report of the Texas child protection authorities, which indicated that 12 children between the ages of 12 and 17 had been found to have been involved in "celestial marriages" at YFZ, but no mention of any of these children having been brought from Bountiful (none of Child A, Child B or Child C were among those 12).

provide the demographic information that he could gather. His reply stated, in relevant part:

The FLDS will not, and cannot comply with your request so far as it relates to the communities in the United States. The discussion of relevance is immaterial because the records you seek do not exist. The FLDS does maintain records of marriage but those records were, as you know, seized by the authorities in Texas.

In any event, the marriage records do not record the ages of those married, nor whether the marriage is monogamous or polygamous.

There are no other records of which I am aware that would answer the questions you pose.

16. Counsel for the Attorney replied to Mr. Wickett that same day, seeking his client's consent for us to access records in possession of the Texas authorities. I wrote:

With respect to the US records that exist but have been seized, would the FLDS consent to our obtaining copies from the Texas authorities if this is possible? My understanding is that their records may in fact be sufficient to establish the ages of the participants in any given marriage.

17. Mr. Wickett responded on November 5, 2010:

The marriage records do not reflect ages, unless there is something I am missing. I've seen a sampling that were disclosed in the Oler criminal case and there are no indications of anything other than the names, date of marriage and the witnesses. The FLDS is involved in litigation with respect to these records and it cannot and does not consent to the transfer of these records to this, or any other jurisdiction. There are no marriage records in Bountiful.

18. A copy of this email correspondence is attached as Exhibit "A" to the Affidavit #5 of Kaley Isbister.

19. The demographic information from the FLDS community at Bountiful provided by Mr. Wickett was introduced into evidence through its inclusion in the Affidavit #2 of Joseph Henrich filed in these proceedings.

20. Mr. Wickett was correct when he said that the FLDS marriage records do not indicate the ages of the participants. However, other church records do reveal that information.

21. On February 10, 2011, counsel for the AGBC received an e-mail from Eric Nichols, a Texas prosecutor responsible for the prosecutions of a number of crimes against children in Texas by members of the FLDS church. On February 11, 2011, in response to a question from AGBC counsel, Mr. Nichols informed the Attorney that he had information that two 12 year old Canadian girls were driven down from Canada to Short Creek by their fathers and one mother and placed in a celestial marriage with FLDS Prophet Warren Jeffs. Copies of these e-mails are attached to Affidavit #5 of Kaley Isbister. The AGBC refers to these two girls as "Child B" and "Child C". As Mr. Nichols indicates in his email, counsel for the AGBC had some time before requested any information that came to light regarding girls from Bountiful being "celestially married" in the United States. This was the first information received from the Texas authorities on the subject.³

22. On February 11, 2011, the Attorney discovered correspondence and other documents in government files identifying a third Canadian girl who was, according to a marriage record of the FLDS church, placed in a celestial marriage with Warren Jeffs in 2004 when she was 13 years old. The AGBC refers to her as "Child A".⁴

23. The Attorney arranged with Texas authorities for permission to put the relevant documents before the Court in the Reference, under seal and with confidentiality orders.

³ Greathead #3, para. 2.

⁴ Greathead #3, para. 3.

24. The original version of the present Application was filed on February 18, 2011. It concerned the evidence only with respect to Children A, B and C.

25. On February 21, 2011, the Attorney received the documents from officials in Texas in relation to Child A, Child B and Child C. These records included church records consisting of dictations given by President Warren Jeffs, in the nature of a diary or personal history ("Dictations of Warren Jeffs"), a marriage record for each child and a personal record for Child A. All of the records were obtained by the officials in Texas pursuant to the warrants described in the affidavit of Mr. Nichols sworn July 7, 2010.⁵

26. The Dictations of Warren Jeffs for Tuesday, March 2, 2004 ("the March 2nd Dictations") refer to the marriage of Child A as well as a number of other marriages performed by Mr. Jeffs.

27. Jim (or James) Oler is the Bishop of the FLDS community at Bountiful. It is noted in the March 2nd Dictations that Jim Oler brought two girls ("Child D" and "Child E") to Mr. Jeffs to be sealed in marriage to two different men on March 2, 2004. The two girls are from Bountiful, British Columbia. Their marriages were witnessed by LeRoy Jeffs, James Oler and James Allred. The birth registration records for Child D and Child E indicate that both would have been seventeen on March 2, 2004.⁶

28. The March 2nd Dictations also refer to the marriage of a third girl, ("Child F"), recorded as having been "married" by Warren Jeffs that day to a man from Bountiful. James Oler is recorded as having been present at the "wedding" of Child F. A birth registration record already before the Court indicates that Child F

⁵Greathead #3, para. 4.

⁶Greathead #3, paras. 6-7.

was from the United States, was sixteen at the time of her "marriage" in 2004, and 17 when she gave birth, in Canada, to a child of her own.⁷

29. On February 23, 2011 counsel for the AGBC received information regarding the "celestial marriage" of three more girls from Bountiful ("Child G", "Child H" and "Child I") in the United States on April 26, 2006. Birth registration records indicate that Child G and Child H were seventeen on April 26, 2006 and that Child J was eighteen on that date. The AGBC requested from the Texas authorities the church records with respect to these "marriages" but as yet have not received them.⁸

30. On February 24, 2011, counsel for the AGBC filed the Amended Notice of Application and Affidavit #3 of Leah Greathead, detailing evidence of Children D through I.

D. There is No Prejudice

31. Even if 'prejudice' were a relevant consideration for the admission of this evidence, no participant suffers from its introduction.

32. The AGBC does not understand counsel for the FLDS to suggest any concern that the records at issue are not genuine, or that the incidents they describe did not occur. That being the case, there can be no prejudice to the FLDS or Mr. Oler in the admission of evidence of these facts. They have been known to the FLDS as an institution and (at least with respect to the three girls married in Mr. Oler's presence) to Mr. Oler personally, since they occurred.

⁷Greathead #3, para. 8.

⁸Greathead #3, para. 9.

E. The Evidence is Reliable

33. The FLDS church records in question have an established origin and chain of custody. There is no question as to their authenticity, and no doubt that they fall within the business records exemption of the Supreme Court Rules.

34. The birth registration records are admissible under the Vital Statistics Act for the proof of the information they contain. They are inherently reliable.

F. The Reference Proceeding is Unique

35. In this reference, the Court is engaged in providing an opinion to the government regarding the constitutionality of a law. There are no parties in the traditional sense; it is submitted that the only standard for the admission of evidence should be whether it is helpful to the Court in developing its opinion; the balance of concerns should then go to weight.

36. Here, the evidence will be helpful on a number of issues. This is a case where difficult conclusions must be drawn about the attribution of particular harms to the practice of polygamy. The Attorney's case for causation rests on the convergence of four main types of evidence: (a) expert theory predicting certain harms in polygynous societies; (b) cross-cultural and intercultural studies demonstrating the harms correlated with the degree of polygyny in a society; (c) case study observations of the harms by clinical experts; and (d) evidence, from lay witnesses and documents, of particular harms manifest. The present evidence fits into this last category; it is simply another tile in the factual mosaic before the Court; the more complete the mosaic, the clearer the picture will be.

IV Conclusion

37. The evidence proposed is relevant, admissible, helpful, reliable and compelling. There is no prejudice in its introduction at this point in the proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of February, 2011.



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