

Intervening in the Context of White Settler Colonialism: West Coast LEAF, Gender Equality and the Polygamy Reference

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Abstract

In November 2011, the British Columbia Supreme Court released its judgement in *Reference re: s.293 of the Criminal Code of Canada*, upholding the prohibition on polygamy as constitutional. The Polygamy Reference, as it is known, concluded that the pressing and substantial objective of s. 293 is the prevention of harm to women, to children, and to the institution of monogamous marriage. This paper analyzes the submissions made by the feminist legal education organization, West Coast LEAF, one of the few feminist 'voices' taken seriously by the court. The apprehension of polygamy's harms was central to the Reference case. West Coast LEAF offered one of the most nuanced interpretations of how the criminal prohibition on polygamy should be interpreted with respect to harm. Yet as this paper argues, its position conceals and is underpinned by racialized relations of power that, however unwittingly, give weight to and indeed require the racial logic of white settler state sovereignty articulated in the Polygamy References' overall narrative.

Key words

Polygamy; Canada; West Coast LEAF; settler colonialism; race

Resumen

En noviembre de 2011, la Corte Suprema de la Columbia Británica dictó sentencia en *Referencia: s.293 del Código Penal de Canadá*, ratificando la prohibición de la poligamia como constitucional. La Referencia a la Poligamia, como se la conoce, decidió que el objetivo urgente y sustancial de la s. 293 es la prevención del daño a mujeres, a menores y a la institución del matrimonio monógamo. Este artículo analiza las aportaciones realizadas por la organización feminista de educación jurídica, West Coast LEAF, una de las pocas "voces" feministas tomadas en serio por el tribunal. El temor a los daños de la poligamia fue central en el caso. West Coast LEAF ofreció una de las interpretaciones más matizadas de cómo la prohibición criminal de la poligamia debería interpretarse con respecto al daño. Sin embargo, como se argumenta en este artículo, su posición encubre y se sustenta en relaciones de poder de carácter racial que, de forma inconsciente, dan importancia y de hecho requieren la lógica racial de la soberanía de los colonos blancos, articulada en la narrativa general de la Referencia a la Poligamia.

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Palabras clave

Poligamia; Canadá, West Coast LEAF; asentamientos coloniales; raza

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1. Introduction

The issue of polygamous marriage has long been a matter of concern for Canada as a white settler nation-state. Or rather, it is the ideal of monogamy – what historian Sarah Carter (2008) calls “the importance of being monogamous” – that has been, and continues to be, embedded in socio-legal scaffolding of settler colonialism. On entering Confederation, Canada inherited a common law definition of marriage (*Hyde v. Hyde and Woodmansee* [1866]) that restricted marriage to *one* man and *one* woman¹, laying down the civil prohibition on the recognition of polygamous marriages. The Christian, monogamous and lifelong model of marriage and family was legally and socially established as the economic and social building block, indeed central to the health, wealth and prosperity of the entire nation (Carter 2008, p. 8). Yet monogamous marriage has been a contingent family form in the making of Canada; as Carter (2008, p. 4). writes, Western Canada in particular presented challenges to the national agenda in the late nineteenth century, as the region was home to a diverse population – Niitsitapi (Blackfoot), Mormons, Doukhobors – with multiple meanings of marriage, divorce, and sexuality. It took considerable effort and concerted work on the part of missionaries and the expanding settler-state to ensure the ascendancy of lifelong, domestic, heterosexual unions, not only as the ideal mode of white settler sexuality and model of marriage but as national identity.

One legal route of such efforts was the passage of Bill 65 in 1890, which among other things added a polygamy offence to the *Act respecting Offences relating to the Law of Marriage* (1886), ostensibly to prohibit the practice of polygamy by members of the Mormon Church who were migrating from Utah to Southern Alberta (Niitsitapi/Blackfoot territory) in the late 1800s to flee persecution. This Act was then consolidated into Canada’s first comprehensive *Criminal Code* of 1892. Until the *Criminal Code* was overhauled in 1954, the polygamy offence included in its purview the practice of “[W]hat among the persons commonly called Mormons is known as spiritual or plural marriage.” Until 2009, there had been only two successful prosecutions under the *Criminal Code*’s polygamy offence, one in 1899 (*R. v. Bear’s Shin Bone*) of an Indigenous man living on the Kainai reserve near Lethbridge, and the second in 1906 (*R. v. Harris*) with respect to a non-Indigenous man in an adulterous relationship with a woman. As will be discussed later in the paper, the difference in sentencing between these two cases is notable.

Its current iteration as section 293² of the *Criminal Code* was the focus of a constitutional Reference at the British Columbia Supreme Court in 2011, which sought to determine whether and to what extent it is consistent with rights guaranteed by the Canadian *Charter of Rights and Freedoms* (henceforth, the *Charter*); and to ascertain the elements of the offence that section 293 entails.³ In

¹ The *Hyde v. Hyde and Woodmansee* case concerned the dissolution of a Mormon marriage. This common law definition of marriage remained as such from 1866-2005. Its *heterosexist* provision was overturned by the legalization of same-sex marriage in Canada, so that the definition of marriage is now reformulated as “the voluntary union for life of two persons to the exclusion of all others” (*Civil Marriage Act* 2005). Its requirement of monogamy remains.

² Section 293(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.

³ Specifically, the two questions were:

(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

Canada, a reference is a way for courts to hear complicated questions with respect to a government's law that is of questionable constitutionality. It is an advisory opinion only; thus while governments are not bound to act upon it, it is viewed as authoritative on the point of law (Calder 2014, p. 218). The impetus for what became known as the Polygamy Reference was the laying of criminal charges against Winston Blackmore and James Oler, two leaders of the community of Bountiful, British Columbia (BC) whose residents are members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS). Settled on unceded Ktunaxa territory in (what is now known as) the East Kootenays, Bountiful was founded nearly 70 years ago by Harold Blackmore who followed more fundamentalist teachings of the LDS Church, including plural marriage as a central tenet of faith. To this day, residents practice plural marriage in plain view of the public, the media and law enforcement authorities even though the community itself remains distanced from the rest of Canadian society (Campbell 2005, p. 6).

The community of Bountiful has been subject to a number of police and criminal investigations since the mid 1980s, most of which did not lead to criminal investigation nor arrest and prosecution (see Polygamy Reference (PR) paras 393-422, Bramham 2008). Additionally, the attorney general of British Columbia (AGBC) appointed three separate special prosecutors to advise and conduct a charge assessment review, and sought several formal opinions from additional Crown Prosecutors. Much of the long-standing legal conversation about Bountiful has centred on the constitutionality of section 293 and whether it infringes freedom of religion as guaranteed by the *Charter*. Despite legal uncertainty, Blackmore and Oler were formally charged with violating section 293 in January 2009. The BC Supreme Court dismissed the criminal charges against them in September of that year on the grounds that the cases were marred by procedural problems, namely an overly aggressive approach in pursuing a prosecution by the AGBC.⁴ Instead of appealing this decision, the AGBC initiated the constitutional Reference.

That the Polygamy Reference was made to a trial court enabled the production of an extensive evidentiary record (Calder 2014, p. 218). The parties were the Attorneys General of Canada and British Columbia who argued that section 293 is consistent with the *Charter* and thus should be upheld. The Court appointed an *amicus curiae* (friend of the court) who was tasked with presenting the opposing view. In addition, eleven interested persons were granted leave to intervene and make submissions on the law: four who wanted to see section 293 struck down, seven arguing that it should be upheld. One of these interveners was West Coast LEAF, a feminist non-profit organization that works to promote and advance women's substantive equality rights through litigation, law reform and public education.⁵ It works "to ensure that the law recognizes that the ways in which we experience discrimination and privilege – in relation to our gender, our race, our place of origin, our abilities – are overlapping and cannot be treated as isolated experiences" (<http://westcoastleaf.org/about/our-vision>). Employing legal strategy as a form of feminist practice, West Coast LEAF is necessarily aligned around and towards the state in its rights-based claims for women's substantive equality. As an intervener in the Polygamy Reference it argued that, "the practice of polygamy violates the fundamental rights to autonomy and equality of women and girls" (West Coast LEAF 2011a, para 4). Specifically, West Coast LEAF maintained that

imbalance of power, or undue influence? Reference re: Section 293 of the Criminal Code of Canada, 2011, BCSC 1588 [S097767]

⁴ *Blackmore v. British Columbia (Attorney General)*, 2009 BCSC 1299

⁵ The Women's Legal Education and Action Fund (LEAF) was founded in 1985, and litigates and educates to strengthen the substantive equality rights of women and girls, as guaranteed by the *Charter of Rights and Freedoms*. See <http://www.leaf.ca/about-leaf/fags/> for more information about the work of the national LEAF as well as Razack (1991) and Gotell (2002). West Coast LEAF was founded at the same time to carry on the work of the national LEAF in British Columbia. West Coast LEAF runs as an independent organization with its own staff, board, litigation, projects, and fundraising. See <http://www.westcoastleaf.org/about/>

...the state has a positive obligation to protect equality rights, and therefore section 293 fulfills the Crown's obligations to consider the equality rights of women and girls of faith in polygamous communities and ensure that they are not exploited. In addition, the government is required not to revoke legislation that is necessary to protect equality rights (West Coast LEAF 2011a, para 30(b)).

As I will discuss in the third section of this paper, West Coast LEAF posited that the scope of religious freedom, as guaranteed by section 2(a) of the *Charter* is not without limits, and that the harms caused by polygamy violate the security of the person (section 7) by infringing women's personal autonomy. Thus West Coast LEAF supported the continued criminalization of polygamy as a means to protect the substantive equality rights of women and girls.

After 42 days of hearing, Chief Justice Bauman issued his much anticipated decision on November 23, 2011. He found that section 293 infringes freedom of religion, as guaranteed by section 2 of the *Charter*; he also found that it offends the section 7 liberty interests of children between 12 and 17 who marry into polygamy (PR para 15). As the Chief Justice writes, "I have found protecting children from the harms of polygamy to be one of the objectives of s. 293. To subject them to criminal sanction is contrary to that objective" (PR para 1200). He ruled that the polygamy provision, except as it applies to this latter group, is justifiable because the pressing and substantial objective of the criminalization of polygamy is the prevention of harm to women, to children, and to the institution of monogamous marriage (PR paras 5, 904). Indeed, Chief Justice Bauman unequivocally asserts that the state *does* have business in the bedrooms of the nation to defend the institution of monogamous marriage from attack by polygamy (PR para 1042; emphasis mine).

That a Canadian court felt (and quite strongly, it turns out) that monogamous marriage needs protection is what initially piqued my interest in this case. In reading this Reference decision, one cannot help but ask *why* the state evinces such a deep investment in monogamous marriage as the most desired and exemplary family form. The court does offer an answer to this by decisively situating monogamous marriage as constitutive of Western civilization; and as will be discussed further in the paper, what remains implicit in such civilizational discourse is an ongoing assertion of white settler colonialism.

In many ways, I think that the Polygamy Reference represents a missed opportunity to 'radically rethink' the imperative of compulsory monogamy in the common law definition of marriage in Canadian law, if it is at all possible to ask this of the state given the centrality of marriage law to processes of (white) nation making, patriarchal relations of power, and neoliberal governance (Pateman 1988, Lawrence 2004, Carter 2008, Lenon 2011, Whitehead 2011). I do think, however, that it is possible to ask this of feminism even as feminist critiques of the institution of marriage no longer prevail. This paper thus focuses on the submissions made by West Coast LEAF to the Polygamy Reference. In so doing, I analyze one of the few feminist "voices" taken seriously by Chief Justice Bauman in order to illuminate the interlocking relations of power that lie at the heart of this Reference decision. The feminist politics of the Polygamy Reference were complex, particularly with respect to the apprehension of polygamy's harms. There is no singular feminist stance on the issue of the criminalization of polygamy in Canada; yet, as I will discuss, some feminist voices were given more weight than others during this court proceeding.

My analysis of West Coast LEAF's *facta* engages two interconnected questions: the political question of the racial logics that underpins the regulation of polygamy in Canada, even as the Reference was nominally about a small white-settler religious sect; and the strategic question of feminist legal advocacy. West Coast LEAF offered one of the most nuanced interpretations on how the criminal prohibition on polygamy should be interpreted with respect to harm. Yet, as this paper will argue, West Coast LEAF's position conceals racialized relations of power that, however

unwittingly, give weight to and indeed *require* the racial logic of the white settler colonial project articulated in the Polygamy Reference's overall narrative.

2. The racial and settler colonial politics of the polygamy reference

It may seem incongruent to raise the question of the racial and settler colonial politics of the Polygamy Reference given that it was essentially motivated by the potential prosecution of a white religious sect of the LDS church living in south eastern British Columbia. However, Justice Bauman's explicit evocation of the ties between Western civilization and monogamous marriage is a notable feature of the justification for the continued criminalization of polygamy in Canada. The community of Bountiful is not on the outside of this appeal to Western civilization with its concomitant histories of settler colonialism and racialization, yet it inhabits these in ways that are not necessarily commensurate. In this section of the paper, I want to tease out some of this as the racialized histories of the legal regulation of polygamy in North America and its association with 'barbarism' and racialized foreignness are not of another past time; rather their traces remain visible in our historical present.

There is a compelling body of scholarship that illuminates the profound ways in which race is at the heart of mid to late nineteenth century anti-polygamy laws targeting Mormons in the United States (Gordon 2002, Denike 2010, Ertman 2010, Oman 2011, Rifkin 2011). As Martha Ertman (2010) writes, the links between race and Mormon polygamy in the minds of nineteenth century Americans were tight and complex, most apparent in the common discussion of slavery and polygamy as the 'twin relics of barbarism'. In a leading anti-polygamy case of the time, the US Supreme Court handed down its decision in *Reynolds v. United States* (1879) that affirmed the bigamy conviction of George Reynolds, a Mormon polygamist. Here, the Court remarked that polygamy "has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people." The nineteenth century American imagination understood Mormons as a foreign race: media, political cartoons and legal discourse together portrayed Mormons as barbaric, lascivious, despotic, disorderly, foreign, Black, Asian, childish, and lazy (Ertman 2010, Oman 2011). Mormon polygamy became deeply associated with fears of white racial degeneration. Anti-miscegenation statutes of the era marked the racialized boundaries of marital integrity and purity and, as Sarah Barringer Gordon (2002, p. 142) remarks, analogizing Mormon practices to those of Asia and Africa invoked the two continents whose peoples were the most frequent targets of prohibitions against inter-racial marriage.

Anti-polygamy sentiments and rhetoric worked productively to mark racial difference on white bodies along lines of religious sexual morality within a hierarchy of white supremacy (Denike 2010, p. 85). It did so in part by equating racial mixing with disorder and conversely associating racial hierarchy with domestic political order (Ertman 2010). Indeed, the *Reynolds* decision resulted in a number of harsh anti-polygamy laws that went far beyond criminalizing polygamy to punish the Mormon Church with the larger objective of completely undoing the political and legal system it had established in Utah. The Edmunds Act (1882), for example, exceeded the criminalizing of marital and sexual conduct. It struck directly at Mormon political power in Utah by placing the territorial electoral machinery under the control of a presidentially appointed commission and excluded all polygamists from voting or holding public office (Gordon 2002, Oman 2011, p. 694). The Edmunds-Tucker Act (1887) abolished the church corporation and directed the Attorney General to seize the Church's property, where ownership of real property was limited to a total of no more than \$50,000 (Gordon 2002, p. 185). To rehabilitate the population of Utah, the escheated property was to fund public education with the goal to transform residents of Utah "into an industrious, thrifty and economical people" so as to ensure that polygamy would never regain a

foothold in the territory (Gordon 2002, p. 204). Notably, the Edmunds-Tucker Act was passed in the same session as the Dawes Act of 1887, which mandated the "allotment" of American Indian reservation land away from tribes and to individual members as a means of assimilation (Gordon 2002, p. 204, Rifkin 2011, p. 167). As House Representative John Randolph Tucker insisted, "[w]e dissolve tribal relations of the Indians in order to make the Indian a good citizen; so we shatter the fabric of this church organization to make each member a free citizen of the territory of Utah" (Gordon 2002, p. 204). That these two laws were passed simultaneously suggests contemporaneity of concerns regarding the political and familial dynamics of Mormons and Indigenous peoples (Rifkin 2011, p. 167).

These anti-polygamy laws ultimately culminated in the Mormon Church's public abandonment of polygamy in 1890. They must be read, as Ertman (2010) argues, in light of their intent to remedy not only political treason to the domestic political order of a Christian nation-state but also race treason; that is, polygamy's imminent threat to the nation's moral and white racial identity. The designation of Mormons as "non-whites" enabled a larger social and political culture to evict them from full citizenship on the basis of racial inferiority (Ertman 2010, p. 290). It was precisely polygamy's proximity to Christian civilization that made the threat of the new Mormon 'race' especially acute (Oman 2011, p. 21).

Imperial narratives further animated the popular, legal and cultural conceptualization of Mormon racial identity in terms of 'race treason'. Nathan Oman (2011, p. 664) analyzes the imperialist rhetoric in the Reynolds decision that worked to define Mormons as not only religious but also racial – and thus imperial – outsiders. As he writes, the jurisprudential universe of the Court's opinion is one animated by Victorian ideas of civilization, barbarism and progress (Oman 2011, p. 680). In its comparison of polygamy to the Hindu practice of 'sati', for example, the Court conceptualized Mormons as a foreign race akin to the inhabitants of the Indian subcontinent and cast the federal government as an agent of civilization against barbarism, akin to the civilizing British imperialism in India. Mormons were discursively constructed, along with "'Asiatic and African peoples', as a benighted race in need of civilizing masters" (Oman 2011, p. 689). As Oman argues, nesting anti-polygamy jurisprudence in the racist narrative of imperialism allowed for the condemnation of polygamy and legal coercion of Mormons without a *concomitant* condemnation of the emerging system of post-emancipation racial subordination in the southern States (Oman 2011, p. 665-666).

Anti-polygamy campaigns and jurisprudence must thus be understood in their larger context, that is as emerging at the height of the abolitionist movement in the United States and extending over the entrenchment of anti-miscegenation and segregation laws, as well as restrictive immigration laws and American imperialism (Gordon 2002, Denike 2010, p. 85, Oman 2011). Further, Mark Rifkin (2011, p. 165) argues that both the *Reynolds* (1879) decision and the *Late Corporation v. US* (1890) case regarding the constitutionality of the Edmunds-Tucker Act (1887) can be understood as haunted by Indigenous sovereignty. Neither of these cases made explicit mention of Indigenous peoples but they were obsessed with asserting the absolute authority of the federal government over areas under its control. In other words, argues Rifkin, the virulence of approaches to the Mormon problem was animated by the unsettled implications of what was called 'the Indian problem'. These decisions present a barbarous *there* as having made its way to a civilized *here*, yet simultaneously signal a lurking insecurity and concern "about the efficacy of US law over the entirety of the territory claimed by/as the nation" (Rifkin 2011, p. 167). To synthesize, then, the preoccupation with polygamy in the late nineteenth century was fueled and exacerbated by the intertwined racial and religious hierarchies of white supremacy, settler colonialism, discourses of civilization, and Christian hegemony, at a time of post civil-war anxiety about America's racial and political destiny as a white Christian nation (Denike 2010, p. 85).

Such anxieties spilled over into the emerging colonial nation-state of Canada. Canadian anti-polygamy legislation, first set in the *Criminal Code* in 1892, arose out of cross-border pressure from the American government to address polygamy practiced by Mormons who were migrating from Utah to Southern Alberta to flee persecution in the late 1800s. In fact, until amendments in 1954, the polygamy provision of the Criminal Code explicitly targeted Mormons. The Mormon settlers under the leadership of Charles Ora Card chose land near the Kainai reserve for economic reasons, but also because the Mormon settlers intended to pursue missionary work among them (Carter 2008, p. 43). A House of Commons debate in 1890 over criminal code amendments (Bill 65) described polygamy as “a serious moral and national ulcer” and a “pernicious habit”.⁶ While viewed by some as “first-rate settlers” [because] they are industrious and frugal”, others argued that Mormons “form an element which is opposed to all the existing forms of society” and hence an undesirable class of immigration.⁷ A letter from the Lieutenant Governor of the North West Territories to then Prime Minister Sir John A. Macdonald pleads to restrict Mormon migration to Canada: “It is a question full of threats for the future: we do not want a Mormon question: the establishment of that self supporting, self governing and self satisfying sect is a danger and a shame to every Christian people.”⁸ In a report to his commanding officer, a NWMP corporal wrote, “These people are up to all kinds of dodges to shield polygamy, which necessity taught them in the U.S.A. and if it once gets a footing in Canada will be very hard to stamp out perhaps next to impossible.”⁹ Furthermore, Sarah Carter (2008) has argued that the imposition of the Chinese head tax was aimed not only at reducing Chinese immigration, rather it was an indirect way of making it impossible for first or second wives to join their husbands in Canada. The head tax prevented many Chinese men from marrying and establishing families in Canada, and white women’s labour laws, which prohibited Chinese-owned businesses from hiring white women, served to censure marriage between Chinese men and white women (see Backhouse 1999).

These racialized histories matter to contemporary debates over the harms of polygamy at issue in the Polygamy Reference, even as its impetus was constitutional questions surrounding the white religious community of Bountiful. As will be discussed in the next section, these harms turn predominantly on the question of gender equality. Yet we must consider that the very articulation of gender equality as a key trope in popular and public policy debates over polygamy, and polygamy as practiced in Bountiful, is deeply *conditioned* by the racial hierarchies underpinning the history and application of anti-polygamy laws, and particularly by the idea that gender *inequality* “is a measure of the backwardness and incivility of *other* cultures” (Denike 2010, p. 140, see also Razack 2008, Haque 2010, Bilge 2013). In a similar vein, Justice Bauman’s rationale to continue criminalizing polygamy in order to safeguard the institution of monogamous marriage and, by proxy, Western civilization follows a well-worn path of colonialism and Orientalism. Even as it is shielded by its whiteness, as I discuss below, the legal and moral panic, and social understandings surrounding Bountiful are not on the outside of these racialized histories.

Moreover, the impact of polygamy’s racialized immigration history continues to resonate in our contemporary moment. Although the Polygamy Reference was nominally about Bountiful, it evinces an explicit concern over the migration of populations from Africa and the Middle East to Canada if polygamy were decriminalized. Even more at issue for Justice Bauman was the possibility of an

⁶ *House of Commons Debates*, 10 April 1890. Ottawa: Canada, p. 3177.

⁷ *House of Commons Debates*, 10 April 1890. Ottawa: Canada, p. 3179, 3177.

⁸ J. Royal to Sir John A. Macdonald, February 7, 1889, file 68610, RG 18, Library & Archives Canada (LAC).

⁹ E.H. Bolderson, Corpl, NWM Police to The Officer Commanding NWM Police, February 10, 1899, vol. 169, no. 304, RG 18, LAC.

increase in the incidence of polygamy among those who are already here. Rather tellingly, Bauman directs his concern not towards the white men of Bountiful whose polygamous marriages were the impetus for the Reference, but towards what he calls “people from cultures and faiths” of immigrant groups who already reside in Canada and who might take up polygamy if it were not prohibited (PR para 577).

The association between polygamy, immigration and race has been more recently evoked with the passage of Bill S-7 on June 19, 2015. Called the “Zero Tolerance for Barbaric Cultural Practices Act”, it amends the *Immigration and Refugee Protection Act* (IRPA), *the Civil Marriage Act* as well as provisions in the *Criminal Code* with the objective of “strengthen[ing] Canadian laws to prevent barbaric cultural practices from happening on Canadian soil” (Government of Canada 2014). Specifically, Bill S-7 provides that 16 years be the minimum age for marriage, limits the use of criminal defense provocation, creates new offences and peace bonds related to forced and underage marriage, and makes polygamy a new ground for refusing admission to or the right to stay in Canada (Béchar and Elgersma 2015). For this last item, Bill S-7 creates a new section 41.1 of the IRPA, which introduces polygamy as grounds for inadmissibility for a foreign national or a permanent resident if it is practised “with a person who is or will be physically present in Canada at the same time as the permanent resident or foreign national”. Whereas sections 34-42 of the IRPA list reasons for inadmissibility¹⁰, section 41.1 now means that a permanent resident or foreign national who is or will be physically present in Canada *with even one* of their polygamous spouses would be considered to be practising polygamy in Canada and could be found inadmissible *on that basis alone*, without requiring evidence that the person misrepresented their situation or has a criminal conviction (Béchar and Elgersma 2015). It is important to note that the IRPA *already* imposes restrictions on family class immigration that effectively prohibit parties to a valid foreign polygamous marriage in their country of origin from entering the country (Bailey *et al.* 2005). The Canadian Bar Association has also raised critical questions about the reach of section 41.1, particularly with respect to what “practicing polygamy” actually means. They query: If someone visits Canada alone, but is in a polygamous marriage outside Canada, are they “practising polygamy” if they communicate with or send money to a spouse abroad? What if communication with a spouse is only through electronic means? If someone visits Canada without a spouse, but with children from multiple spouses, is that person “practicing polygamy”? Moreover, they state, the basis for determining inadmissibility is unclear: If a tip was made anonymously, would that suffice? What procedural protections would be afforded to the permanent resident and dependents? (Parliament. House of Commons. Standing Committee on Citizenship and Immigration 2015) As several community groups and legal organizations have pointed out, Bill S-7 has the potential to become a tool to further target and over police racialized (and in particular Muslim) communities. Women will not come forward if it means a criminal sanction or deportation of their own family and this will negatively impact survivors’ access to justice and safety (see SALCO 2014, Outburst 2015).

As should be evident by now, the word choice of “barbaric cultural practices” is unsurprising, given polygamy’s racialized histories. The invocation of “Canadian soil” as a counter to “barbaric cultural practices” is an invocation of the colour line. The racial logic of civilization explains the discrepancy in the moral and legislative panics between Bountiful and the fear of the ‘barbaric’ polygamous immigrant Other assailing Canada’s borders, and the increasing number of surveillance strategies to which they are subject (for example, Bill S-7). I am not suggesting that Bountiful has been free from state surveillance given that such surveillance is what led to the Polygamy Reference in the first place. However, when (then) Citizenship and

¹⁰ These include: engaging in espionage, in terrorism, criminality or misrepresenting the material facts in the course of an immigration application (Béchar and Elgersma 2015).

Immigration Minister Chris Alexander, in his announcement of Bill S-7, states that Canada will not tolerate “barbaric cultural practices” on Canadian soil – with absolutely no mention of Bountiful – something is going on. And this ‘something’ is the structure of white settler colonialism, couched in the language of Western civilization.

I want here to return to the question I posed at the beginning of this paper, namely why the state evinces such a deep investment in the centrality of monogamous marriage as the most desired and exemplary family form. While one answer is found in the racial logic inherent to the judgment’s civilizational discourse, I want to suggest that what remains implicit in the evocation of ‘Western civilization’ is the persistence of settler colonialism and hence an ongoing claim to white settler sovereignty. Settler colonialism here refers to the structure of Canadian society, a persistent social and political formation that continues into our present and not merely the unfortunate birth pangs of its founding (Arvin *et al.* 2013). “Colonialism must be seen as a living phenomenon, not an historical fact” (Monture 2007, p. 207). Indeed, settler colonialism is present precisely when it appears not to be, given that its normative function is to appear inevitable and final (Morgensen 2011, p. 42).

A key aspect of its persistence is the naturalization of the heteropatriarchal nuclear family as a cornerstone to the imperatives of Canadian nation-building. As white settler nations sought to disappear Indigenous peoples’ complex structures of government and kinship, the management of Indigenous peoples’ gender roles, sexuality and kinship relations that appeared non-heteronormative served a primary locus in projecting and maintaining settler colonial power. Scott Morgensen (2011, p. 23) theorizes modern sexuality as the array of discourses, procedures, and institutions that arose in metropolitan and colonial societies to distinguish and link primitive and civilized gender and sexuality, while defining racial, national, gendered, and sexual subjects and populations in biopolitical relationship. This settler sexuality, a white and national heteronormativity, was formed by regulating Native sexuality and gender while appearing to supplant them with the sexual modernity of settlers (Morgensen 2011, p. 31).

This is exemplified most egregiously through the *Indian Act*; but also finds its way through other routes of legal regulation such as the prohibition on polygamy. For example, as discussed earlier, Canadian anti-polygamy legislation arose out of cross-border pressure from the American government to address polygamy practiced by Mormons who were migrating from Utah to Southern Alberta. As historians have noted, Canadian government officials were concerned that kinship formations understood as polygamy persisted among the Blackfoot/Niitsitapi on whose territories the Mormons settled, in spite of efforts of the Department of Indian Affairs (DIA) and missionaries to impose British norms of lifelong, Christian, monogamous, heterosexual marriage. This legislation, then, perhaps derives less from the threat posed by Mormons to the Canadian moral order than from ongoing challenges to narratives of settler sovereignty posed by the persistence of Indigenous peoples on their lands (Rifkin 2011, p. 165). With the polygamy provision, the DIA actively targeted Kainai (part of the Blackfoot/Niitsitapi Confederacy) customary marriage law that allowed for more than one wife. An Indigenous man named Bear’s Shin Bone was convicted in March 1899 for forming (what was understood as) a polygamous marriage with two women of the Kainai. As Sarah Carter (2008) has argued, this case was both the effect and culmination of a decade of efforts by the DIA to reconfigure Indigenous kinship forms, efforts which also included withholding rations and annuities, placing second wives in residential schools, and subdividing land on the Kainai reserve into small lots to promote the nuclear breadwinner family. Upon conviction, Bear’s Shin Bone stood at risk of five year’s imprisonment or a fine of five hundred dollars. This is in stark contrast to the sentencing outcome of the only other case of conviction under the Criminal Code’s polygamy offence. In *R. v. Harris* (1906), the accused was found

guilty of living with a married woman in “open continuous adultery to the scandal of the public” (para 7), yet his sentence was to “allow him to go on his personal bail for one month to give him an opportunity to prove his desire to reform” (para 8).¹¹

The state’s investment in “the importance of being monogamous”, evinced so powerfully throughout this Polygamy Reference thus makes sense if we understand settler colonialism as a contemporary structure of the Canadian nation-state. The unremarked whiteness of Bountiful is testament to this. While many scholars have discussed the historical racialization of white Mormons in North America, it is important to consider how Bountiful, as a fundamentalist Mormon religious community, is shielded by its whiteness and the protective privileges offered by white racial norms of Canadian citizenship. Central to these norms is the dispossession of Indigenous peoples from their lands. The institution of citizenship was key to the processes of settlement, economic development, and nation-building. As Sunera Thobani (2007, p. 74) writes, the category citizen, born from the genocidal violence of colonization, exists in a dialectical relation with Indigenous people for whom the emergence of this citizenship was deadly, not emancipatory. Brian Egan (2011) discusses this dispossession and displacement of Indigenous peoples in British Columbia to reserves as a spatial project that constitutes a fundamental part of the effort to produce the province as a white place. We need to seriously consider, then, the community of Bountiful, settled on unceded Ktunaxa territories, *as settler colonial*.

As I hope to have made clear, the racial politics of the Polygamy Reference are inescapable. Given its mandate and purpose, West Coast Leaf is necessarily entangled in a complicated and uneven relationship with Canada as a white settler nation-state, and like all parties to the Reference, its submissions are not on the outside of the racial logics that so profoundly undergird the legal terrain and cultural landscape of polygamy in Canada. What I seek to discuss in the next section are some of the racial implications flowing from this, particularly the effects of West Coast Leaf’s position on polygamy’s harms.

3. Interpreting the polygamy provision: The apprehension of harm

In his written decision, Justice Bauman found that section 293 should be broadly interpreted to apply to all people who practice or enter into multi-spouse marriages that have been sanctioned by civil, religious or other means¹², whether or not it is by law recognized as a binding form of marriage (PR para 1036). In his interpretation, the criminal law is intended to capture *all* participants in a polygamous marriage (para 1030) except children between the ages of 12 and 17 (PR para 1359).

That Justice Bauman took such a broad interpretation is unsurprising given that the apprehension of harm arising out of the practice of (polygynous) polygamy deeply shapes the Reference’s narrative. Evidence offered by experts and lay witnesses sought to ascertain polygamy’s harms, both current and anticipated; and Justice Bauman relied heavily on evidence provided from evolutionary psychology. Summarized in paragraphs 779-793, but argued throughout the Reference decision and evinced in expert evidence, the harms of polygamy range from increased rates of violence against women, increased competition for women, reduced gender equality and exacerbated patriarchal control over women, the devaluing of romantic love, higher infant mortality rates, low education rates, the exposure of children to harmful gender stereotypes, and greater negative mental health conditions.

¹¹ In the case of *R. v. Tolhurst and Wright* (1937) James Tolhurst and May Wright were both prosecuted for polygamy for living in an adulterous relationship with one another despite each being married to someone else. In ruling out a conviction, the judge determined that the polygamy provision of the *Criminal Code* did not cover adultery.

¹² Section 293 is not directed at multi-party, unmarried relationships or common law cohabitation, but is directed at both polygyny and polyandry. It is also directed at multi-party same-sex marriage.

Furthermore, crime rates and anti-social behaviour would increase if polygamy were to be decriminalized due to the large number of unmarried men unable to find wives. Here, it was suggested that monogamous marriage “makes men much less likely to commit crimes such as murder, robbery and rape” (PR para 509). In other words, monogamous marriage civilizes men. Politically, for nation-states, polygynous polygamy is “an impediment to the advancement of civilizations toward liberty, equality, and democratic government” (Witte 2010, para 289). It leads to decreased civil liberties and reduced investment in health and education because, according to one expert (McDermott 2010, para 131), states with higher degrees of polygyny have higher amounts of per capita defense expenditures (which belies the fact that the United States, a “non-polygynous” nation-state, has the highest concentration of military expenditure globally).¹³

There are a number of troubling assumptions underlying the overall narrative of polygamy's harms, including that women are property to be distributed between men, that children somehow are exempt from exposure to harmful gender stereotypes in monogamous nuclear families, that monogamously married men are not violent¹⁴ and, the association of polygamy with social, cultural and political backwardness. For the court, the harms associated with polygamy are not simply the product of individual misconduct but *inhere in the institution itself* (PR para 1343; emphasis mine) and thus can be expected to occur wherever polygamy exists (PR para 14, 1045). Indeed, there is no such thing as “good polygamy”. The risks of its social, economic and political harms are serious enough that criminalizing *all* polygamous marriages is not viewed as a disproportionate response (PR para 1220).

For its part, West Coast LEAF writes that section 293 serves the public interest by protecting individuals from real and probable harm:

Society as a whole has an interest in condemning such harmful consequences as flow from polygamy, as well as in maintaining a law that has at its heart the promotion of Charter rights and values. Women are devalued in society when the criminal law fails to protect their rights to equality and safety; such infringements compromise the human dignity of the *victims* of polygamous relationships, the women of Bountiful and Canadian women and girls more generally (West Coast LEAF 2011b, para 38; emphasis mine).

While Justice Bauman constructed a judgment that went to great lengths to disparage polygamy and tout monogamous marriage as a bedrock of civilization, West Coast LEAF steered away from such an excessively critical position. One important element to West Coast LEAF's intervention is its request that the Court consider a more narrow interpretation of the polygamy provision. Its position was that section 293 is consistent with the *Charter* when it is ‘read down’ to apply to *exploitative* polygamy only, and should be used to prosecute spouses rather than victims; in other words, section 293 should apply only to those polygamists who exploit women and girls, and not apply to the party being exploited (West Coast LEAF 2011b, para 2). As it reads now, the polygamy provision is in fact punitive to women, as it applies to *anyone* over the age of eighteen. West Coast LEAF noted that the concept of exploitation is expressed in such *Criminal Code* offences such as sexual exploitation and obscenity, sections that could provide guidance to specify what constitutes an exploitative polygamous relationship (West Coast LEAF 2011b, para 40-42).

¹³ See the Stockholm International Peace Research Institute (SIPRI) Military Expenditure Database 2013. (Shah 2013).

¹⁴ As if this footnote is necessary. Nonetheless, a recent Statistics Canada (2013) report contradicts such an assumption: Spousal violence was the most common form of family violence in 2013, with nearly half (48%) of family violence occurring at the hands of a current or former spouse (married or common law). In 2013, more than two-thirds (68%) of all family violence victims were female. (Canadian Centre for Justice Statistics 2015).

West Coast LEAF suggests that polygamous marriage is not inherently harmful given that “the practice of having multiple partners can be an expression of diverse forms of family and sexuality that respects the individual agency of each member of the union” (West Coast LEAF 2011b, para 45). Relationships involving multiple spouses, however, can “be a means to control women’s sexual reproductive and economic freedom” (West Coast LEAF 2011b, para 45). Polygamy is a practice that “tends towards and “lends itself to” exploitation (West Coast LEAF 2011a, para 1; West Coast LEAF 2011b, para 72). For West Coast LEAF, the conduct moves from legitimate to criminal depending on whether there exists an element of exploitation in the impugned relationship (West Coast LEAF 2011b, para 72). It offered a (non-exhaustive) list of factors to determine the circumstances of exploitative polygamy, including whether a community practices polygyny and not polyandry; whether there is a power differential based on significant age differential; whether the female is a ‘young person’ as defined in the *Criminal Code*; and whether the marriage structure in question concentrates household power in the central male figure in terms of decision making, sexual control and economic control (West Coast LEAF 2011b, para 48-49).

West Coast LEAF’s position attends to an important issue engaged by the Polygamy Reference, namely that of the overly broad sweep of section 293. By arguing that the law must be ‘read down’ to be constitutionally valid, it attempts to capture *only* exploitative polygamous relationships and not include the party being exploited. In so doing, it offers a much more nuanced approach to the apprehension of harm than do other parties to the Reference. The lead counsel for the Attorney General of BC, for example, privileged evolutionary psychology as a way to determine the harms associated with polygamous marriage. This expert evidence was specifically articulated through the trope of contagion, which posited a *non-trivial* increase in the incidence of polygamy as “quite plausible” if section 293 were to be overturned (PR para 555, 1290). In contrast to the narrow interpretation offered by West Coast LEAF, polygamy’s harms are not contained within a particular form of practice of polygamy (i.e., exploitative); rather *we are all at risk* from its biopolitical threat if decriminalized. Drawing from the evolutionary psychology evidence, Justice Bauman concludes that

Within the population at large...human beings will have a tendency to adopt the practice when the environment permits. On the whole, I find that the possibility of increased immigration by polygamous families, and the take up of polygamy by those already in Canada make the case for a reasoned apprehension that polygamy would increase non-trivially if it were not prohibited (PR para 575-576).

Notably, and one of the more problematic aspects of the Polygamy Reference, is how a specter of contagion comes to be discursively located in populations from Africa and the Middle East who, were polygamy to be decriminalized, would “view Canada as an especially desirable destination”, and in the event that “these immigrant communities were to become stable, their populations would expand comparatively rapidly” (PR para 560). It requires no leap of imagination here to see the trope of the racial Other assailing Canada’s borders.

In contrast to what reads as both a “culturalization” and “biologization” of polygamy, West Coast LEAF firmly locates the harms associated with polygamy in patriarchal relations of power. This is evinced, for example, in how it framed its arguments that the polygamy provision does not breach sections 2(a) and 7 of the *Charter*. It argued that freedom of religion is not infringed by section 293 “because the scope of the freedom of religion is limited where the impugned law prevents harmful activity and that is particularly so with respect to the overwhelming body of evidence of harm demonstrated in this Reference” (West Coast LEAF 2011b, para 53). The nexus between religious freedom and women’s substantive equality is, in many ways, at the heart of West Coast LEAF’s involvement with the issue of

polygamy.¹⁵ In an interview about the contours of its involvement in the Polygamy Reference, Alison Brewin, interim Executive Director, said

We hadn't taken it on as an issue mostly because we fell into the category, oh it's religious freedom and who are we to judge and if the women aren't phoning us up to complain about it, you know...But there were lots of women who...were saying 'why aren't you doing something about it?' So even from the beginning we were caught up in a "not sure". But then a couple of women who had been part of the community [Bountiful] had left. We started talking to them and just started to recognize what is horribly exploitive about the nature of polygamy as it's practiced...We started to realize that the context of religious freedom and women's equality was really complicated, and if we weren't going to spend some time trying to figure it out, who was?...So it was many years from when we first decided that this was something we should tackle to the court case. For one thing, we were never sure there was going to be a court case. So we had a symposium...We spent two days hashing it all out, what were the boundaries of religious freedom. A big part of it was the frustration, knowing what exactly happened to women and children in Bountiful and the idea that religious freedom should protect them, protect and allow people to do that, and women and children to be treated and exploited in that way just didn't make sense. So there had to be some kind of answer in law.¹⁶

West Coast LEAF asked the Court to consider a more complex view of whose religious equality rights are at stake in the Reference, namely those "who may be subject to the coercive force of a religious leadership that subscribes to authoritarian rule and entrenched patriarchy" (West Coast LEAF 2011b, para 60), and notes that it is within the Court's mandate to examine the genuineness of religious belief or whether that belief is the result of coercion and manipulation to ensure compliance with religious norms (West Coast LEAF 2011b, para 59)

With respect to section 7 (security of the person, liberty interests), West Coast LEAF submitted that the Court needed to consider the very different ways in which the section 7 rights of a husband and his wives may be engaged. In contrast to the argument forwarded by the *Amicus*, which contended that the polygamy provision deprived polygamists from making inherently personal choices with respect to their intimate relationships, West Coast LEAF argued that the exploitative practice of polygamy violates the security of the person by infringing on personal autonomy and bodily integrity. It contends that the state does have a role in ensuring women's safety in the context of intimate relationships. To say otherwise is "a perversion of the intent of the *Charter* to use the rights contained therein to create a safe space for men to exploit women" (West Coast LEAF 2011b, para 66). It thus asks the Court to interpret section 7 as protecting the substantive rights of women through upholding section 293 as constitutionally valid (West Coast LEAF 2011b, para 66).

To recap, West Coast LEAF apprehends polygamous marriage as harmful when it is determined to be "exploitative" and it firmly situates such exploitation within patriarchal relations of power, a move that provides a crucial counter to cultural and biological essentialism. As all parties to this Reference trial did, West Coast LEAF constructed its own position of support for section 293 in particular ways, and there are some compelling tensions in its apprehension of polygamy's harms. First, its analytic scope of familial patriarchal relations of power is spatially delimited to polygamous family forms; it does not attend to the ways in which gender violence and substantive inequality are characteristic of (western) law's norms regarding monogamous marriage. I am not arguing here that West Coast LEAF is endorsing

¹⁵ The topic of state accommodation of religious and cultural rights in Canada, and the varied feminist investments in this, is outside the scope of this paper. For analysis of state and feminist responses to attempts to apply Sharia law to family disputes in Ontario, see Razack (2008); for analysis of state and feminist responses to the issue of "reasonable accommodation" in Quebec and the Quebec Charter of Values, see Bilge (2013), Narain (2014).

¹⁶ Interview with author, October 21, 2015.

monogamous marriage as an institution. As Alison Brewin noted, “polygamy is kind of the really bad end of the spectrum of the ways marriage can be bad for women.”¹⁷ I am also cognizant of the constraints posed by the strict questions the Polygamy Reference sought to answer as well as rules of relevancy. Yet I think this absence does matter for the meaning-making of polygamy’s harms. Even though West Coast LEAF frames polygamy as not being inherently harmful, it nonetheless equates polygamous marriage with harm throughout its submissions. In other words, even though it offers a narrow interpretation of section 293 to apply to “exploitative polygamy”, there is equivocation between “exploitative polygamy” and “polygamy”; and the list of factors that establish exploitative polygamy are subsumed in the longer list (almost five pages) of the harms associated with polygamy in general (West Coast LEAF 2011b, para 51, (a)-(t)). West Coast LEAF asserts that a “picture of wholesome polygamy cannot stand” (West Coast LEAF 2011b, p. 50). Thus it rejects the idea proffered by some feminist legal scholars that because many of the harms associated with polygamy (for example, child and spousal abuse) fall within other existing *Criminal Code* provisions, there is no requirement to criminalize this particular family form.¹⁸ As the report (Walia 2006, p. 34) from West Coast LEAF’s Women’s Equality and Religious Freedom Advisory Committee states, it is crucial to separate out the unjustifiable abuse that occurs in polygamous relationships from the practices of polygamy.

West Coast LEAF disagrees with the proposition that because some of polygamy’s harms fall within other existing *Criminal Code* provisions, section 293 is neither rationally connected to its objective nor minimally impairing of the infringed rights. It asserts that

The Challengers may well argue that section 293 is unnecessary and that other Criminal Code provisions are sufficient in dealing with physical and sexual abuse. However, this argument must fail. It is important to note that the harms associated with the practice of polygamy transcend the more obvious harms of physical and sexual abuse. These additional harms are more insidious; they strike at the heart of equality rights and the right to security of the person for women and girls (West Coast LEAF 2011b, para 104).

The polygamy provision, then, “targets the problems holistically instead of in a piecemeal fashion” as it “captures the institutional framework that creates the circumstances in which such other crimes may occur” (West Coast LEAF 2011b, para 94). To be clear, some feminist arguments for the decriminalization of polygamy do not deny that violence and abuse happens in polygamous families nor do such arguments elide questions of consent, particularly with respect to underage young women. Rather, this line of feminist argumentation seeks to trouble and dislodge the legal, social and affective hold that “the importance of being monogamous” has on our imaginations of family forms; and it takes issue with the assumption that criminalizing a particular family form will further the advancement of women’s equality.

¹⁷ Interview with author, October 21, 2015

¹⁸ The feminist arguments for the decriminalization of polygamy posit that criminalization is not the most effective way of dealing with gender inequality that may exist in polygamous relationships. First of all, women face the threat of prosecution under section 293 because it is gender neutral and applies to everyone over the age of 18, and this can prevent women from leaving an abusive polygamous marriage. The provisions of Bill S-7 further compound this as women are also potentially at risk for deportation. Secondly, criminalizing polygamy harms women who want to terminate their polygamous relationships because in some provinces, women cannot access the *Divorce Act* nor can they obtain support or property rights on the breakdown of their relationship -- Ontario and Prince Edward Island are the only two provinces that have included polygamous relationships in their family law regimes. Generally speaking, these feminist arguments contend that decriminalization does not indicate endorsement of polygamy and/or that nothing inheres to the structure of this marriage form to make it a criminal wrong. For further discussion, see Bailey *et al.* (2005), Walia (2006, p. 34), Baines (2007), Calder and Beaman (2014).

Given how West Coast LEAF frames polygamy's harms, we are left with an understanding of women and girls living in polygamous marriages as victims within (religious) patriarchy in need of protection; exploited, with neither agency, autonomy, resistance nor complexity to their lives. This is not to suggest that polygamous marriage cannot be critiqued or that it is *not* a site of harm. Rather, it is to suggest a rather impoverished hegemony of experience on the pages of West Coast Leaf's submissions.

Mudhavi Sunder (2003) points out that law often requires women to choose between religion and rights. She writes, "traditionally feminists have accepted this framework, arguing that when weighing religious freedom against equality, women's rights should trump" (Sunder 2003, p. 1410). But, she asks, perhaps it is time for feminist engagement with law to forge new strategies that allow an individual an identity not just without religious and cultural community but also within it (Sunder 2003, p. 1412, see also Bano 2013). I want to note here that West Coast LEAF initiated the Women's Equality and Religious Freedom (WERF) project in 2005 to address issues surrounding the intersection of religious freedom and women's equality (see Walia 2006). The overarching question of the project was: "How should the principles of substantive equality that LEAF has been instrumental in developing be applied when considering the complexities of the rights of individuals, particularly women, within religious and cultural minorities given our commitment to religious freedom, anti-racism, and genuine multiculturalism?" (Walia 2006, p. 7) The WERF Advisory Committee heard, via consultations with racialized women of faith, that instances of gender inequality within religious and cultural minority communities often create a backlash that demonizes these communities *without* the concomitant acknowledgement that gender oppression is just as prevalent in the majority community (Walia 2006, p. 33). The Advisory Committee reached consensus on three key points: the practice of polygamy exists within a global context of systemic discrimination against women and girls; "freedom of religion" should not be used as a shield to prevent discussion about polygamy and its effects on women as this serves to reinforce the stereotype of particular religions as being backward and uncivilized, while distracting from patriarchy; and finally, section 293 does not enhance women's equality because it stigmatizes them, thus a pragmatic harm reduction approach that decriminalizes polygamy will prevent further marginalization.

There is no mention of the WERF research project and its thick analysis of the respondent's lives in West Coast LEAF submissions to the Polygamy Reference. In response to my question of why this was so, Alison Brewin said,

A few things happened on the path from the overall thoughts about something versus what you plead in court. And some of it is what the court limits you to, how much time and space they limit you to, so you have to make some differences for that. Plus it depends on how the case itself, what the question is before the court compared to the broad questions that we were talking about in that project...At the end of the day, when thinking about the actual section of the law and how it's written and how the reference question was put and what the court was going to allow us to do, we had to make some decisions along the way.¹⁹

This speaks to the struggles and tensions facing feminist litigation, and the imperatives of submitting to foundationalist requisites of legal discourse (Gotell 2002). Moreover, the bedrock of the feminist legal project is the notion of a shared core of oppression based on gender. In her influential article, "Race and Essentialism in Feminist Legal Theory", Angela P. Harris (1990, p. 613) contends that the story of woman as victim encourages solidarity by emphasizing women's shared oppression, thereby denying or minimizing difference.

One of LEAF's (and by extension, West Coast LEAF's) innovation has been to develop a contextualized approach to women's equality that recognizes inequality

¹⁹ Interview with author, October 21, 2015.

as being rooted in gendered social relations, not in women's formal similarity or difference from men (Jhappan 2002). But we can ask, what are the costs of submitting to this and of articulating "women's experiences" in polygamous marriages solely through the prism of gender? In other words, what does the absence of the WERF report and voices enable? What is lost in the absencing of women's realities in all their complexities?

I want to draw attention to the racialized implications of West Coast LEAF's position on harm, namely that it conditioned the Court's relatively positive reception of its submissions and, more troubling, it gave weight to the civilizational narrative that so deeply structures the Polygamy Reference. I would argue that in fact its position conditioned how the Court responded to its submissions. In fact, it is interesting to consider at this point what West Coast LEAF "got", that is, whether and how its submissions found their way into the final judgment. With respect to freedom of religion, as stated earlier, Chief Justice Bauman agreed with the *Amicus'* submissions that s. 293 violates religious freedom; and while he does note the defenders' position that polygamy interferes with the *Charter* rights of women and children, he does not at all address West Coast LEAF's position that situates the freedom of religion within an analysis of patriarchal power. The same can be said for his section 7 analysis, which does not explicitly account for a feminist reading of this *Charter* section as articulated by West Coast LEAF.

This may at first glance belie my earlier claim that West Coast LEAF was the feminist voice taken seriously by the Court. But in fact, as I have argued, Chief Justice Bauman does give serious consideration to its interpretation of section 293 as being read down to apply to exploitative polygamy. I do not take his consideration of West Coast LEAF's position lightly, because an interesting feature of the Polygamy Reference is how it handled competing 'truths' about polygamy's harms. The apprehension of polygamy's harms turned on an unmediated appeal to the evidence of experience, where some women's experiences came to be constructed as the Truth while others' did not. In speaking to how West Coast LEAF came to develop its position on harm, Alison Brewin said

Ultimately, in all our research and conversations, it was clear that polygamy as it's practiced, whether in theory it can be fine and not be exploitive, in practice it actually was...The key was for us looking at the actual evidence of how it's practiced...So that's how we got there, was really just looking at what happens for women when they're in polygamous relationships.²⁰

While West Coast LEAF was careful to caution that evidence of harms must be examined within the applicable social and regional contexts (West Coast LEAF 2011b, para 50), its written submissions to the Reference did not highlight complexity and agency of women in polygamous marriages. West Coast LEAF fails to consider the concerns of women who participate in polygamous relationships and who do not view their relationships as unequal and oppressive.

Writing of her experience as an expert witness in this trial, feminist scholar Lori Beaman (2014, p. 132) writes that "(r)easoned discussion about whether polygamy is inherently harmful to women was, in my experience at least, almost impossible" . The court was faced with expert evidence submitted by the *Amicus* cautioning against facile acceptance of stereotypical portrayals of what are heterogeneous experiences of women globally living in polygamous communities, including religious communities such as Bountiful (see, for example, PR paras 703-709). Such evidence sought to highlight mutuality and women's agency within polygamous relationships. Citing the work of Saba Mahmood, Samia Bano (2013, p. 169) writes that feminist legal scholarship and practice must uncouple agency from liberatory politics in order to more fully conceptualize the ways in which women belonging to religiously conservative communities negotiate and assert their agency

²⁰ Interview with author, October 21, 2015.

in complex, intricate and sometimes contradictory ways. Not all religious women seek to exercise their agency in a way that corresponds with a normative feminist politics of emancipation. As Bano contends, rather than the simplistic equation between agency and the exercise of individual free will, “there is a need to develop consciousness of agency as a reflective response to circumstances, including those associated with religious belief and community” (Bano 2013, p. 169). But during the Reference trial, as Beaman (2014, p. 132) remarks, “when the women of Bountiful themselves declared their agency, their voices were muted by the much louder voices of other women, policy makers and groups ranging from the Evangelical Fellowship of Canada to West Coast LEAF”. Moreover, Angela Campbell’s court testimony of the voices of women who live in Bountiful in her court testimony, “was countered by videotapes of ex-polygamist women who recounted the horror stories of their experiences. There was no space for doubt that polygamy was inherently harmful” (Beaman 2014, p. 132).²¹ Justice Bauman was fairly dismissive of both Beaman’s and Campbell’s expert evidence, finding it “sincere, but frankly somewhat naïve in the context of the great weight of the evidence” (PR para 752).

Upon reading this statement, I thought of Carol Smart’s (1989, p. 11) argument that “law exercises power not simply in material effects (judgments) but also in its ability to disqualify other knowledges and experiences”. While I was not present at the reference and would not want to presume Chief Justice Bauman’s own analytical thought process, I would strongly suggest that the evidence presented by the *Amicus* and its interveners did not suit the particular narrative of the inherently and fundamentally harmful nature of polygamous marriage that the Court both articulated and clung to. Faced with expert evidence on the fact that violence against women and children exists in monogamous marriage, Justice Bauman is dismissive as his goal is to consider “the law that Parliament has directed against polygamy...That harm may arise out of other human relationships, that is, monogamous ones, seems beside the point” (PR para 544). In fact, it seems to be quite the point given that monogamous marriage is imagined in the Reference as *the* idealized state of being, for individuals’ and for Canada as a nation. Indeed, it is striking how much this Reference decision can be read as a treatise on the value of monogamy.

While I am not suggesting that West Coast Leaf endorsed all of Justice Bauman’s reasonings on polygamy’s harms, I do want to argue that although the Reference decision did not incorporate West Coast LEAF’s position to ‘read down’ the polygamy provision nor any of its *Charter* (section 2(a) and section 7) analyses, West Coast LEAF nonetheless appears to have been given more serious consideration than feminist voices from the ‘opposing’ side precisely because its position (however unwittingly) was useful to the white settler state/law’s own position and claims. I am cognizant of the tensions, dilemmas and contradictions facing feminist litigation. Sherene Razack (1991) writes that litigation as a feminist activity is in essence the telling of women’s stories in a language and a setting structured to deny the relevance of women’s experiences (Razack 1991, p. 51). In her analysis of LEAF as an organization, she illustrates the ways in which LEAF (and I would argue by extension, West Coast LEAF) must balance challenge without threat. Quoting Mary Eberts, Razack writes that if “the skepticism of the judge goes up directly in proportion to the extent to which he feels threatened by what you’re telling him”, then women seeking to convey the violence to which they are exposed as a group will encounter substantial resistance (Razack 1991, p. 71). As Alison Brewin commented on West Coast LEAF’s feminist legal praxis,

²¹ In fact, the only sustained challenge to the admissibility of an expert’s evidence was made by both Attorneys General (BC and Canada) and the organization Stop Polygamy in Canada, who objected to the evidence of feminist legal scholar Angela Campbell as a key witness for the *Amicus* on the basis of her qualifications and methodology. See para’s 77-103 of the Polygamy Reference for Justice Bauman’s reasoning on the admissibility of her evidence.

It's probably the hardest thing that LEAF and West Coast LEAF ever has to do, is finding that line between making sure the court will actually hear what we're saying and let us in next time, and making sure that we're being, confronting the issue at hand. It is a challenge.²²

Razack (1991, p. 51) observes that LEAF asks the court to examine its own rules critically, yet at the same time it must operate within those rules or risk losing the chance to be heard. When asked to comment on the absence of a critique of monogamous marriage as a site of harm for women and children from West Coast LEAF's submissions, Alison Brewin offers a telling example of this:

It would have been absent partly because this was a case about polygamy, and when we are in court, it needs to make logical sense to the court. And if we'd opened up the conversation about marriage as a whole and what was wrong with marriage, *we wouldn't have had any credibility in the conversation frankly*. You know, you've got to be strategic when you are making arguments in court and they do limit what you are allowed to talk about...So you know, it wouldn't have made sense in the context of the case²³ (emphasis mine).

In effect, West Coast LEAF must negotiate and navigate the demands of legal discourse that rest on a claim to "Truth", which, in this Reference case, is the inherently harmful nature of polygamous marriage. As Lise Gotell (2002, p. 136) writes, "the centrality of 'Truth' within legal discourse makes it resistant to complexity and contingency and responsive to demands that are both positivistic and categorical...To refuse its demands may be nothing less than strategic suicide".

Insisting on descriptions of the realities of women living in polygamous marriages in order to make claims for women's equality rights is more than a matter of what Harris (1990) calls "nuance theory"²⁴; rather it is to insist that feminism with/in law bring inter-locking relations of domination and subordination to the surface to make visible "the complex multifaceted structure of domination in modern patriarchy (Pateman 1988, p. 16). I contend that this is especially critical with respect to West Coast LEAF's participation as a feminist intervener in the Polygamy Reference because its position on, and framing of, polygamy's harms occur within a context of white settler arrangements of power that inform the "politics of polygamy"; that is, how it is understood in the larger public imagination, the assumptions made about the kinds of women who participate in polygamous marriage, what such marriages looks like (women as chattels and property), who the bodies of concern are (who is the victim, who is the oppressor, who is the savior).

West Coast LEAF's support of section 293 and its attendant framing of polygamy's harms is not on the outside of these settler colonial and imperial racialized relations of power that continually cast polygamy with barbarism and monogamy as the civilizing imperative. Its position as a feminist voice in this Reference matters precisely *because* these histories are still with us. Certainly, the white patriarchal religious leadership of Bountiful is of central concern in West Coast LEAF's arguments for upholding the polygamy provision. Yet in the absence of any real engagement with racism and white supremacy as systems of domination that interlock with (religious) patriarchy to deeply shape the complexity of women's experiences living in polygamous communities, the patriarchal relations of power that West Coast LEAF so clearly names becomes racialized as non-white. More perniciously, and however unwittingly, its position on polygamy's harms gives weight to the civilizational narrative that so deeply structures the Polygamy Reference and settler state's claims of sexual modernity.

²² Interview with author, October 21, 2015.

²³ Interview with author, October 21, 2015.

²⁴ Harris (1990, p. 595) refers to "nuance theory" as an approach that continues to make generalizations about women's experiences yet qualified with subtle nuances of experience that "different" women add to the mix. Nuance theory thus assumes the commonality of all women, where differences are a matter of "context" or "magnitude"; that is, nuance.

4. Conclusion

It is unfortunate that Justice Bauman did not choose to endorse the read down approach to section 293 that West Coast LEAF advocated for. Even as it believed that the need to redress the harm to women and girls outweighed the risk of endorsing a narrow definition of kinship, I nonetheless suggest that West Coast LEAF should have sided with the feminist arguments for the decriminalization of polygamy in Canada, outlined in this paper. Such a position does not necessarily endorse polygamy but rather attends to the very material consequences of criminalization for substantive gender equality and, by implication, loosens the very hold that monogamous marriage has on our cultural imaginary.

Law reform through single-axis frameworks (for example, gender) does not transform conditions of intersectional violence and harm. Indeed, as critical legal scholar and activist Dean Spade (2013) argues, the failure to depart from single-axis analysis produces reforms that contribute to and collaborate *with* those conditions. Thus West Coast LEAF should have attended more carefully to the complexity of the political question (i.e., the racial logics) surrounding the prohibition on polygamy through, for example, incorporating perspectives and arguments generated in the WERF report and/or engaging with intersectional legal methodologies (Harris 1990, Crenshaw 1991, Razack 2008, Spade 2013). Yes, courts are accustomed to adjudicating rights based on single identity categories and the demands of intersectional analysis exceed what the law recognizes as viable claims. But surely this cannot mean impossibility or futility. Critical legal scholars and activists from many movements have shown otherwise (see Spade 2013).

The figure of the oppressed victim of polygamy that informs the heart of its submissions (and indeed of the entire Reference case) *requires* the racial logic of the Canadian nation-state – otherwise, she does not make sense, she has no political or cultural meaning. In fact West Coast LEAF itself, as an organization that works to promote women's substantive equality through law, requires the very legal system for which the dispossession of Indigenous peoples is a prerequisite. If the anti-polygamy law is a legal manifestation of settler colonialism, then West Coast LEAF, indeed all parties involved in the Reference, are implicated in an affirmation of the white settler state and its "genealogies of foundational violence" (Spade 2013, p. 14). Can the feminist legal project set different liberatory goals that do not assume the desirability of the white settler nation-state as we currently know it? How does it/do we unsettle our attachments to it? Would the decolonization of law necessitate the decriminalization – even legalization – of polygamous marriage? How can we continue to push the feminist legal project to attend to interlocking systems of domination that constitute us all and our imaginations of justice?

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