

Women's Equality and Religious Freedom Consultation

December 2-4, 2004

**Report prepared by
Alison Brewin,
Program Director
West Coast LEAF
July 2005**



**Funded by the Court Challenges Program of Canada
Program Promotion and Access**

Acknowledgments:

West Coast LEAF would like to thank the Planning Committee for all their time, support and expertise:

Paula Dribnenki – Articling student
Avigail Eisenberg – Professor of Political Science, UVic
Stephanie Fraser – West Coast LEAF Treasurer
Azmina Ladha – Law Student, Osgoode Hall, CCMW
Clea Parfitt – Human Rights Lawyer
Mary Salaysay – Crown Prosecutor, West Coast LEAF Board Member
Margot Young – Professor of Law, UBC
Alison Brewin – West Coast LEAF Program Director

In addition, thank you to West Coast LEAF summer and Practicum students for research, coordination, note-taking, and report-writing support:

Jillian Rouselle – SFU, Criminology
Nassim Mobasher – UBC Women’s Studies
Amber Prince – UBC Law
Azmina Ladha – Osgoode Hall Law
Harsha Walia – UBC Law
Roshena Chatur – SFU Criminology
Clare Jennings – UVic Law

Table of Contents

Introduction – Why the issue matters	- 4 -
West Coast LEAF – Mandate, information, goals and objectives of the organization.....	- 5 -
History of the issue and West Coast LEAF’s involvement	- 5 -
Planning the WERF consultation.....	- 7 -
The Committee.....	- 7 -
Participants.....	- 8 -
The Agenda.....	- 8 -
Consultation Proceedings.....	- 11 -
Initial information and research – Summary of readings.....	- 12 -
Overview of the discussions	- 12 -
Panel – Defining the issues.....	- 13 -
Panel – Identifying the experience.....	- 14 -
Discussion of distinction between religion and culture	- 18 -
Equality as a Concept.....	- 19 -
Women of Faith	- 20 -
Women not identifying as not ‘of Faith’	- 21 -
Women of Colour	- 21 -
Panel – Academic studies and dialogue.....	- 22 -
Panel: Topics for Small Group Discussions	- 28 -
Gaps in research and dialogue on these issues that were identified	- 33 -
Evaluation	- 35 -
Future Plans – Where will we go from here?	- 39 -
Research.....	- 39 -
Further dialogue and consultation.....	- 41 -
Potential litigation in the future	- 42 -
Appendices.....	- 43 -
Appendix One – Call for Participants.....	- 43 -
Appendix Two – List of Participants	- 46 -
Appendix Three – Bountiful Chart	- 47 -
Bibliography	- 48 -

Introduction – Why the Issue matters

Equality rights law in Canada has become more complex as we near the end of the 20th anniversary of Section 15 of the Charter of Rights and Freedoms¹. There is no simple answer to the question of what equality means to Canadians. This complexity is very apparent when equality seekers try to articulate what gender equality means in the context of a society that supports religious freedom. The historical and global reality is that most religious faiths have, at one end of their theology, doctrine and principles relating to family that perpetuate women's relegation to her role as the producer and caregiver of children.

The question for women's advocates and other equality seekers, in fact the question for law-makers in Canada, is what are the limits to religious freedom when gender equality is at stake? Ayelet Shacher describes the issue best in her book on the subject entitled Multicultural Jurisdictions: Cultural Differences and Women's Rights. Given that West Coast LEAF designed the consultation to ensure a variety of experts could be heard, we share Prof. Shacher's words as the most accurate description of the reasons why we must resolve these issues if we are committed to women's equality in the context of a society that promotes multiculturalism and religious freedom:

What makes this situation a truly complex problem is the fact that although they may be subject to such injurious burdens within their communities, women may still find value and meaning in their cultural traditions and in continued group membership. This phenomenon is especially visible in situations where the minority culture as a whole is subject to repressive pressures from the outside society. Under such circumstances, group members feel expectations and often obligations to rally around their cultural membership, rather than any inclinations to struggle for reform from within.

Artificially compartmentalizing the relationship between the group and the state into fixed inside-outside division thus conceals the extent to which both are in fact interdependent. It also permits identity groups to surround themselves with barriers so inviolable that whatever happens inside those groups happens outside the jurisdiction or state law. In other words, if a violation of individual rights occurs within an identity group, the violation is categorized as a "private affair". The state, as an outside entity, has no business intervening. This binary opposition leads us astray, however, not only because it ignores the web of relations between inside and outside, as well as the fragility of these categorizations, but also because it obscures the fact that what constitutes a "private affair" is in itself defined by the state's regime of law.

The (re-) establishment of a "privacy zone" in the identity group context is sometimes justified by an appeal to the "right of exit" rationale – the rationale that every

¹ Section 15 of the Charter reads: (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

individual has a right to leave her group if she so wishes. This rationale suggests that the solution to the problem of systematic sanctioned in-group maltreatment is not to devise less hazardous accommodation policies, nor to envision more creative legal-institutional solutions; it is simply to permit at-risk group insiders to leave if they do not like their group's practices.

In fact, this right of exit solution offers no comprehensive policy approach at all, and instead offers a case-by-case approach, imposing the burden of resolving the conflict upon the individual – and relieving the state of any responsibility for the situation, even though as the accommodating entity it still has a fiduciary duty toward all citizens. Specifically, the right of exit argument suggests that an injured insider should be the one to abandon the very center of her life, family, and community. This “solution” never considers that obstacles such as economic hardship, lack of education, skills deficiencies, or emotional distress may make exit all but impossible for some.

West Coast LEAF – Mandate, info, goals and objectives of the organization

West Coast LEAF is both the BC branch of the Women's Legal Education and Action Fund and an independent, provincially registered society. Our mandate is to advance women's equality in the law, ensure the promises of the Charter of Rights and other human rights law are fulfilled in a meaningful and substantive way for the women of BC, and support the work of LEAF National. We are committed through our policies, practices, structures and activities to the elimination of all forms of discrimination in order to achieve equality for women in Canada, including intentional, adverse impact and systemic discrimination.

The organization engages in a three-pronged approach to that commitment through litigation, law reform, and legal education. The principles of West Coast LEAF include a belief that the laws of the province and Canada must not only reflect the initial promise of the Charter, in particular Section 15 (the equality rights section), but also act to protect women from discrimination and inequality in a way that reflects the true complexity of women's lives.

By supporting LEAF's National Litigation Strategy, advising government on the important considerations of women's need for full and equal participation in BC society, and sharing West Coast LEAF's unique understanding of rights and responsibilities through public legal education, the organization strives to combine academic study, legal analysis, and women's voices in the present and future of equality rights. We strive to take a thoughtful approach to our work and develop an understanding of the impact of the arguments we advance by considering the varied perspectives that exist among women and the academic and legal communities.

History of the issue and West Coast LEAF's involvement

West Coast LEAF began to look at the issues that emerge when women's equality and religion intersect when concerns were raised in Ontario about the proposal

to include the application of Muslim personal law in that province's *Arbitration Act*. Such recognition would include family law arbitrations. This proposal in turn raised serious concerns about the impact that would have on women, given the ways in which fundamentalist Muslim interpretations of personal law have impacted women's rights around the world. Many organizations, including the Canadian Council of Muslim Women (CCMW), the National Association of Women and the Law (NAWL), and No Sharia were quick to come out against the proposal.

In identifying our concerns about the application of religious principles to family law, West Coast LEAF was also aware of the ways in which the debate might be seen to be – or more importantly be – a part of anti-Muslim feelings that have been particularly prevalent in Canada and internationally since 9/11. Reflecting this concern, West Coast LEAF pulled back from looking at the possible impact of Muslim fundamentalist principles to look at the broader issue of the impact of fundamentalist religious principles on women in BC.

It was a quick step from there to recognizing how the increasingly public discussion about the BC community known as Bountiful was engendering concerns about the ways in which religion often conflicted – or seemed to conflict – with women's freedom. Bountiful is a self-named community in the Creston Valley that is a part of the Mormon fundamentalist church entitled the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS). Concerns have arisen throughout its history about the community's polygamous practices, 'marriages' and pregnancies of very young girls (ages 13, 14, 15), education funding, the closed nature of the community, questionable human rights of women and girls, and the trafficking of young girls and women between Canada, the U.S.A. and sometimes Mexico.

Polygamy is a criminal offence in Canada and has been for over 100 years. The male leadership of Bountiful, in particular the Bishop Winston Blackmore, has always claimed that principles of religious freedom would protect them if the government ever attempted to lay charges under those sections of the Code. This argument has been used by successive provincial governments to justify not taking any action to address concerns about the women and girls of Bountiful, even on the allegations of child sexual abuse, trafficking, or other potential offences. In 2004, a series of columns in the Vancouver Sun heightened awareness and concern about the women and girls of Bountiful. In addition, a split in that community between Mr. Blackmore and the American leadership of the FDLS opened up local community concern and created a rift among FDLS members themselves.

With the rise of potential litigation emerging from the Bountiful community – either criminal, human rights or other – West Coast LEAF felt obliged to begin consideration of a range of legal issues including:

- a. The validity of the polygamy laws in the Criminal Code (polygamy s. 293; bigamy s. 290) in light of the Charter (religious freedom s. 2(a); equality rights s.15/28);
- b. Obligations of government and other possible respondents under the BC Human Rights Code;
- c. Family law and other exit rights of those leaving the FDLS community; and,
- d. Immigration and trafficking issues regarding women and girls.

Ultimately the over-arching question for West Coast LEAF is:

How should the principles of substantive equality that LEAF has been instrumental in developing in Canadian law be applied when considering the role of the law and the state in navigating the complexities of the rights of individuals, particularly women, within religious and cultural minorities given our commitment as a nation to the accommodation of multiculturalism in Canada?

In addressing this question, West Coast LEAF recognized its historical roots in a Christian/secular-based approach to citizenship and equality rights. In other words, regardless of the number of women of faith involved in the organization on an individual level (staff, Board, members, etc), West Coast LEAF is an 'outsider' to religious communities and a part of a feminist legal community that has been historically distrustful of religious institutions and their relationship to women's equality rights.

West Coast LEAF determined that the first step in answering that question was to bring together women of faith, academics, lawyers and community activists to begin the discussion. The goal of the consultation would be to begin this dialogue. After securing financial support from the Court Challenges Program, West Coast LEAF brought together a small planning committee and arranged for that consultation to take place December 2-5, 2004.

Planning the WERF consultation

The Committee

The Planning Committee for the consultation was made up of the following people:

- Margot Young – Professor of Law, UBC
- Avigail Eisenberg – Professor of Political Science, UVic
- Mary Salaysay – Crown Prosecutor, West Coast LEAF Board Member
- Azmina Ladha – 2nd year law student, Osgoode Hall
- Clea Parfitt – Human Rights Lawyer
- Paula Dribnenki – Articling student
- Stephanie Fraser – West Coast LEAF Treasurer
- Alison Brewin – West Coast LEAF Program Director

The Committee met bi-weekly in August and September, and more regularly as the Consultation grew closer.

The Committee identified a number of priorities early on. One of the first and most important priorities was the active inclusion of women of faith in the discussion. We felt very strongly that any discussion of women's equality and religious freedom had to happen, and be led by, women of faith themselves both in the context of this

particular consultation, and in the discussions beyond the consultation. Another priority was to try and keep the discussion on the broader issue of women's equality and religious freedom, while looking at the two different topics – Bountiful and Shari'a law in the Ontario Arbitration Act – as examples of when the two Charter principles intersect.

Participants

We also engaged in lengthy discussions about who should be at the table, how to identify appropriate individuals, and how to reach out to ensure a diverse range of women of faith were included. The decisions to discuss Shari'a law ensured that the Muslim community should be well represented at the table. In addition, framing the discussion around issues emerging from Bountiful required the presence of some expertise and experience of that community.

We felt that we wanted to keep the numbers small to ensure participants could actively engage in dialogue and we focused on our understanding that this was only the beginning of the dialogue – not the end. In addition, funding limited our capacity to bring a large number of individuals together. In the end, we decided to circulate a call for participants, inviting individuals to let us know what they would bring to the table. (Appendix One).

We circulated this call for participants as broadly as possible among academic, legal and community networks, as well as targeting religious institutions, multi-faith groups and women's committees within religious institutions and organizations. This did not include individual contacts and networks that Committee members and West Coast LEAF members circulated it to. We encouraged every contact to pass it along to others as well.

The Committee then looked over the responses to the call to determine who we felt would contribute most effectively to moving the dialogue forward. There were gaps in the list, particularly in the representation from communities of faith. We made further efforts to target Jewish, Sikh, Hindu and Catholic communities. West Coast LEAF has not had a full opportunity to examine why we were unsuccessful in involving those communities, though for some individuals it was not a lack of interest, but a scheduling issue. The fact that the event fell on a Saturday, Jewish Sabbath, was very likely an issue for some. The discussion of Sharia Law and Bountiful may have suggested a more narrow focus than we intended. In addition, the historic relationship between feminist organizations and religious institutions is one that will take time to overcome.

In the end, we were able to accommodate everyone who wanted to participate and was available over that particular weekend with one exception (a student who needed travel support and was not in a position to provide expertise or experience we were looking for). (Appendix Two).

The Agenda

The Committee discussed the ways in which we hoped to manage the discussion at the Consultation most effectively. Recognizing the level of expertise and experience that would exist among the participants themselves, the Committee decided that, instead of inviting anyone from outside that group to speak, we would invite those present to speak on particular issues and questions. Once those individuals shared their understanding or knowledge of the issues, participants could then engage in a broader dialogue on the topic either in the larger group, or by breaking into smaller groups.

This approach was effective in many ways, but was flawed for a couple of reasons. These issues are discussed in the Evaluation section below. Sunday was set aside for West Coast LEAF members to discuss the implications the Consultation had for our work. Space was also made available to other participants who might want to continue any discussions that arose.

In the end, we developed the following agenda:

Agenda
Women's Equality and Religious Freedom
National Consultation
December 2-5, 2004

Thursday, December 2:

- | | | |
|---|----------------|--------|
| 1. Introduction of Event/West Coast LEAF/Daphne | Mary Woo Sims | 7pm |
| 2. Introduction of Debbie | Daphne Bramham | 7:15pm |
| 3. Debbie | Debbie Palmer | 7:25 |
| 4. Question and Answer | Mary Woo Sims | 8:00 |
| 5. Close/Thank Yous | Audrey Johnson | 8:45 |

Friday, December 3 9am-4:30pm

1. Introduction of participants
2. Agenda for weekend – Setting breaks, goals and agreements
3. Review of Materials – questions arising
4. Panel - Defining the Issues: the debate and dialogue within academic, legal, government and community sectors regarding women's equality and religious freedom.
5. Panel: Identifying the experience of gender and religious discrimination. Panel members will speak to the following questions:

- a) What is the nature of religious discrimination experienced by people of faith?
 - b) How is gender discrimination experienced within religious communities?
 - c) What does equality mean for women of faith and racialized women of faith?
 - d) What are the ways in which women balance the experience of discrimination in their daily lives?
6. Small group discussions
 7. Identifying the Common Themes
 8. An overview/examination of the research, writing and empirical studies that exist that define and will contribute to our understanding of these issues.
 9. Identifying the Gaps in available research and information
 10. Closing/Review of Saturday

Saturday, December 4 9am-4:30pm

Based on the information exchange of Friday's session, participants will be divided into three groups to apply that information and understanding to the three identified subject areas. The small groups will then come together and share their discussions with the larger group. The group will then, either in small groups again or the larger group, develop a series of recommendations.

1. Review of Friday – Common themes that describe the experience of discrimination and areas of research and information gathering that may still need to be done.
2. Panel: Framing the topics – Speakers will introduce the topics of Shari'a Law and Charter Jurisprudence for the purposes of the small group discussions.
3. Small Group Discussions – we will divide into three small groups to consider these three subjects in light of the information exchange of Friday.
 - a) Bountiful and the criminalization of polygamy
 - b) Sections 2(a) and 15 and how they should intersect and be

interpreted, including a review of the limits of religious freedom under Human Rights jurisprudence.

- c) Shari'a law and other family law issues
4. Large Group discussions - The small groups will be asked to share their discussions, conclusions and areas of disagreement with the larger group for input and further discussion.
5. Small Group follow-up - The three groups will re-form to explore in more depth the areas of disagreement or debate and come up with:
 - a) Continued areas of disagreement
 - b) Areas of agreement
6. Recommendations for West Coast LEAF and LEAF

Sunday, December 5 9:30 am – 1:00 pm

This day will be set-aside for West Coast LEAF and LEAF members and volunteers to review the recommendations and build legal strategies addressing the three subjects.

1. Review of weekend
2. Small Group Strategies - Groups will be divided according to the three subjects and asked to consider the following possible strategies:
 1. Transformative Public Legal Education Programs
 2. Litigation through intervention in existing cases
 3. Litigation through case development
 4. Law Reform Strategies via:
 - a. Provincial government
 - b. Federal government
 - c. International Bodies
 5. Community Partnerships and collaboration.
3. Large Group Discussion
4. Conclusions

Consultation Proceedings

Initial information and research – Summary of readings

The Planning Committee spent a great deal of time reviewing and considering what materials would assist participants in the planned discussions. We determined that there were existing materials that would provide the information that seemed to fit with our goals, and that one of the questions for the group was the identification of gaps in the research and data on the issues. Therefore, we focused on articles that were as accessible as possible for the diversity of participants, articles that provided a backdrop to the issues we hoped to tackle over the Consultation.

Using the expertise and networks of the Planning Committee members, we created a list of possible articles and information and then narrowed it from there to the following:

1. A speech given by *Vancouver Sun* Columnist Daphne Bramham regarding the polygamous situation in Bountiful, BC at the Victoria Person's Day Breakfast;
2. Maneesha Dechka's article "Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law" (2004) 16(1) CJWL;
3. The introduction to Ayelet Shacher's book Multicultural Jurisdictions: Cultural Differences and Women's Equality. (London: Cambridge University Press. 2001)
4. The Canadian Council of Muslim Women's policy statement on Sharia Law.
5. The joint paper by CCMW and the National Association of Women and the Law entitled "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women".
6. Hard copies of the Guide on the Canadian Charter of Rights and Freedoms.
7. A copy of Transforming Women's Future: A Guide to Equality Rights Theory and Action.

Participants were also given an extensive bibliography on other articles and materials that the Planning Committee and West Coast LEAF Staff had reviewed in case they wanted to do further reading.

Overview of the discussions

Thursday, December 2

The first evening was a public event in which Debbie Palmer presented the audience with a picture of her experiences as a former member of the Bountiful community. She was introduced by Vancouver Sun columnist Daphne Bramham who shared with the audience her breadth of knowledge about the history of Bountiful, as well as her respect for Debbie's work on raising awareness of the issues of Bountiful.

Debbie gave a very moving speech in which she described the struggles she had surviving experiences of childhood sexual abuse, forced marriages, domestic violence and ultimately the decision to leave her family and her community. She told her story in the form of a letter to her father, expressing her sadness, anger and fear at his actions, and the actions of the community leaders as a whole.

The audience then engaged Debbie and Daphne in a discussion about Bountiful.

Friday, December 3

Panel – Defining the issues

After a review of the materials, and a round of introductions, four participants came forward to describe the issue of women's equality and religious freedom from their experiences. The goal here was to share why these issues are of importance to four different sectors: academic, legal, government and community.

Avigail Eisenberg is a political science professor at the University of Victoria. Dr. Eisenberg identified two reasons why the academic community is interested in the topic of women's equality and religious freedom:

- The academic literature of the past 20 years has been completely altered by the question of minority rights, a discussion very specific to Canadian approach to multiculturalism; and,
- In Canada, academic debates have influence over public policy and law.

She went on to describe four touchstones to the academic debate:

1. Religious freedom is debated within the larger context of multiculturalism and minority rights and there is surprisingly little dissent in academia that minority rights and multiculturalism are good things. Dr. Eisenberg identified one area of disagreement around the ways in which First Nations issues are often discussed in the same breath as immigrant groups.
2. There is debate between concepts of tolerance/personal freedom/letting people believe what they want and the concepts of accommodation/government providing resources to protect groups
3. There is a strong focus in academic literature on oppression of minority groups.
4. Huge controversies about mechanisms – community (democracy, deliberation), state tools (rights, litigation, public policy) and international tools (U.N., treaties).

Margot Young is a Professor of Law at the University of British Columbia. Professor Young described the key tensions in the law around these issues as:

- Liberty vs. equality
- Religious liberty (tradition) vs. individual liberty
- Cultural equality vs. individual equality
- External (group vs. majority) vs. internal (members within the group vs. group)
- Group vs. individual
- State vs. group vs. individual
- Difference vs. sameness

She also described the different models the legal academic community debates including:

- Protectionist – the idea that human rights must be culturally sensitive
- Civil libertarian – based on central image of independent individual (male)
- Egalitarian or radical feminist
- Post-modern approach – compounding factors, not very good at dealing with issues for cultural insider
- Strategic essentialist model – does the best job of defending female insider

Jancis Andrews is a complainant, with six other women, on a representative human rights complaint before the BC Human Rights Tribunal. She was a member of the Canadian Federation of University Women and has been active in letter writing and lobbying campaigns around Bountiful since first hearing about the polygamous community in 2002. Ms Andrews described her frustration at the lack of government action to protect the women and girls of Bountiful and her eventual filing of the complaint. The complaint cited five BC Ministries for their lack of action – Education, the Attorney General, Children and Families and Women’s Services – claiming that the government has discriminated against women and children of Bountiful on the basis of sex by denying services generally available to the public.

(Since the consultation, the Attorney General has been struck from the complaint. The complaint is set to be heard in February 2006.)

Joanne Klineberg works in the legal policy department of the Federal Department of Justice. She identified a number of difficulties for the federal government in addressing, specifically, the Criminal Code provisions on polygamy. These include:

- Provincial/Federal jurisdictional issues – the criminal code is federal, but the province is responsible for enforcing it (eg. Firearm legislation, over half the provinces refuse to enforce it).
- Federal government rejected 1993 opinion regarding the vulnerability of the polygamy laws to a religious freedom defense; Feds provided their own opinion that the law was good.
- Changes to Criminal Code can’t happen because:
 - We don’t know they are unconstitutional;
 - Could take years to do it properly; and,
 - Any change would be obviously directed at religious community like Bountiful, whereas the current one has been accepted by the court as neutral on its face.

Panel – Identifying the experience

Four women were asked to share their responses to these questions:

- a) What is the nature of religious discrimination experienced by people of faith?
- b) How is gender discrimination experienced within religious communities?
- c) What does equality mean for women of faith and racialized women of faith?
- d) What are the ways in which women balance the experience of discrimination in their daily lives?

The women asked to speak had identified themselves as women of faith, either currently or in the past. All four women work professionally or as a volunteer, with faith groups, or women who are a part of a faith group, as well as culturally diverse individuals.

Azmina Ladha is a member of CCMW, was a summer student at West Coast LEAF, and has been active in many multicultural, youth and faith-based community activities. She is currently a second year law student at Osgoode Hall in Toronto.

Ms Ladha described her experience as a case worker at the Parkdale legal services clinic. Overall Ms Ladha expressed the common immigrant experience as the sense that Canada is good enough to let them stay, they want to keep a low profile, not 'rock the boat'. But her concern is that 'not rocking the boat' is minimizing the experience of discrimination. Many new immigrants will say there is no discrimination in Canada – and maybe compared to experiences of fear in other countries, maybe so, but that does not mean there is no discrimination in Canada. To what extent do we accommodate cultural/religious concerns with limited resources?

An example she shared with the group is when a group of students asked U of T to tape ten classes to accommodate Ramadan. The request was refused on the basis of a lack of resources, yet other religious groups are accommodated regularly in the schedule. Ms Ladha described the conflict between accommodation and economic issues – we would accommodate you if we could afford to, but we can't so we don't have to.

Debra Bowman is a Minister in the United Church of Canada. She began her discussion by acknowledging that her Church is historically a mainstream, liberal, protestant organization, and her position very close to the centre of privilege in Canadian society.

In answer to the first question, Rev. Bowman described the experience of discrimination as a women of faith as being insidious – it is unfashionable to search for transcendence, that you must be a little weak to need the crutch of religion and that you will attempt to convert them. The assumption that Christianity is monolithic, Republican, anti-abortion, racist etc. The effort to be sensitive to a variety of faiths can result in a silencing of Christianity and other established faiths, leaving consumerism as the organizing value for society.

Rev. Bowman concluded by sharing some of the ways people within the church try to advance gender equality and how she works to deconstruct the trivialization of religious experience.

Razia Jaffer is the president of the Canadian Council of Muslim Women (CCMW) which is a pro-faith organization. Ms Jaffer began by explaining that CCMW differentiates between Shari'a (the 'path to water') and Muslim Family Law and that the organization uses the latter term. She believes that Islam is for equality for women, a religion of peace and social justice, but that many of the practices of Muslim Family Law do not follow these principles. The state is reluctant to interfere with religious practices, but some of those practices are problematic for women. Because women have only recently become interpreters of religious texts, interpretations have been patriarchal, pro-man.

Ms Jaffer described some of the ways in which Muslim Family Law has been interpreted and applied:

- Muslim women cannot divorce but men can
- Women inherit less
- Women must get permission to do some things
- Women can be beaten
- Women cannot marry non-Muslim, but men can
- Sons over 7 and daughters over 9 go to father
- Maintenance for one year max, usually 3 months

In Islam, faith is between the faithful and God, no clergy, and theoretical equality between men and women – there should be no judgment of who is a 'good' Muslim based on religious practices. The inheritance laws favour men because there is expectation that men will take care of women.

Muslim men and women experience racism every time there is an international incident.

Mila Younes works with the Ontario Society of Francophone Immigrant Women in Ottawa. She spoke about the experiences of the women she works with in their struggle to survive domestic violence and remain connected to their community. Her comments are based in part on two recent surveys of the experiences of francophone immigrant women.

Women who are very religious feel a dichotomy between the need not to be excluded from their religious community and the desire to report the experience of violence. They also face systemic discrimination. Ms Younes shared a story of a young woman who was informed of her rights in Canadian law, but she felt that her Imam would support her in dealing with the violence of her husband. The Imam told her to be patient and the situation would improve – she was afraid that her husband would divorce her, she would lose her children and the support of her Imam and community if she did anything else.

It is a problem, as well, for women who no longer self-identify as Muslim. Culture or religion? Even if one doesn't identify as Muslim, you still experience the racism. Some feel that in Islam, you are born in it and can never truly leave.

There are huge fears in choosing Canadian law – that you will be ostracized, that you have no existence as an individual, only as a group. There is discrimination on many levels – for example not recognizing credentials. Ms Younes said there are more and more women wearing hijabs since 9/11 – there are many different arguments as to what hijab means and should represent. She feels that discrimination is designed to maneuver women into being ‘good’ Muslims – e.g. wearing the hijab.

Ms Younes shared her fear about talking about Islam and how it affects her work, as her words could be interpreted in such a way as to have a negative impact on her work with women who have been victims of violence. She has had negative interactions with people as a result of her work against the use of Muslim Family Law.

Group Discussion

The participants then engaged in a general discussion about the issues panelists had raised. An initial question was whether there were any women’s organizations that supported the implementation of Shari’a law? In response, other participants shared their understanding that there are Muslim organizations, women’s groups within mosques, that supported it. CCMW has tried to discuss it with these groups but it is hard; they don’t want to make it difficult for CCMW members by having open disagreement within the mosques, so they don’t discuss it anymore.

Another participant said that there are a number of young Muslim women’s organizations who do not see a problem with it. She explained that there is a difference between the body of laws of Shari’a and the application in certain contexts.

The problem is with the lack of clarity around how arbitrators are going to be picked: will they refuse women? Will they insist on various sects of Shari’a being followed? Will Muslim women have an option?

Participants then raised the question of what does equality mean to women of faith or racialized women of faith? Comments were:

- For me, equality is not about gender only, it’s also about the Muslim community consistently being de-nationalized, having to prove selves as Canadian. I think the “Shari’a” debate is another example of how the third space being forced out. In terms of the lack of knowledge about the legal history of Islamic law, what it means, etc. that is a problem within Muslim communities as well. Also, it is important to remember that the Islamic Arbitration proposal has not been an organic political demand from within the Muslim communities, rather this issue has been created by specific individuals who stand to gain from it.
- All Christians wouldn’t agree on what equality looks like. All are beloved by god, doesn’t necessarily mean gender equality. Some groups support obedience, etc. to male partner, patriarchal values. Division will come not between faith traditions, but within faith traditions as to what is a true and faithful interpretation of scripture.

- We had a consultation with Marion Boyd, who spoke of Muslim women having choices and being responsible for those choices. We were scared, because we are working with women who are vulnerable, exploited, beaten, living in shelters, etc.
- Felt it was weird to include this question, because would be the same as mainstream culture – different interpretations. But as soon as you include culture, people step back and say it's your issue – but it's 'our' issue.

Discussion of distinction between religion and culture

There were a number of points of agreement and disagreement in this discussion. Participants felt that Islam is the best example of the distinction between the two in that it is a religion (scripture) that is practiced in many different countries, with the culture of that nation informing the role religion plays. There was concern about the Anglo-American need to put equality rights in boxes – race, gender, etc – and to create a spoken or unspoken hierarchy. This also extends to the need to compartmentalize spirituality, faith and religion

A number of participants talked about the difficulty for women within a religious or cultural group in separating their experience and need for loyalty to community from any rights they might have. The difficulty in talking about religion versus a cult, for example, in the context of Bountiful is that the women who are members of the community will revert to loyalty to their religion if someone tries to tell them it is a cult. From their perspective, they have an opportunity to be goddesses in the next life, no matter what suffering they experience in this one – including suffering the efforts of outsiders to break up their 'chosen' religion.

Some participants felt that equality meant sameness, and others felt that even framing the discussion around equality constrained the discussion. Our idea of equality within relationships may be based in our own privilege and might not resonate for others. We need to learn to negotiate with those we are trying to help, or remain silent so we can allow them to speak.

There was a sense that the discussion itself was not neutral – that our understanding of equality is tied up in our own experiences, Canadian history, relations, etc. One of the cultural paradigms about freedom of religion is the idea that people can leave, but that is precisely what is not happening pragmatically – and yet, this principle that people are free to leave religions is a fundamental one in Anglo-American law and policy.

A member of the planning committee clarified the question by saying we were asking how devout women, women of faith, say about the inherent gender equality in religious systems. It isn't just about Muslim laws, many religions have systemic gender inequality in their structure – the Charter of Rights does not. How do people within religious groups cope with that gender discrimination?

The group agreed to spend some time in the afternoon looking at the definitions and weaknesses of the concept of equality as our working term, and

that we would engage in continued discussion of these issues in our smaller groups.

Equality as a Concept

Alison Brewin is the Program Director at West Coast LEAF. She shared with the group some of the criticism of the concept of equality that have arisen in past discussions, particularly those identified at the 1999 West Coast LEAF conference, *Transforming Women's Future: Achieving Equality in the New Century*.

1. Equality by definition is about comparison that forces us to find the 'norm' (white male) and sometimes compete with other marginalized groups.
2. Equality essentializes categories and makes us struggle to define things all women share, making invisible some of the experiences only some women share. Issues of concern to advantaged women can end up at the top of the agenda.
3. Equality is about asserting a negative, not a positive right, which means that for some people equality is freedom from discrimination, rather than freedom.
4. "Gender" is both over- and under-inclusive; not all inequalities apply equally to all women, and sometimes they apply to men.
5. Equality is gender neutral and does not preclude men from asserting claims of gender inequality, or white people from asserting racial inequalities.
6. Formal equality continues to inform equality analysis. Many people, and courts, continue to think that equality is about treating people equally, rather than changing the experience of disadvantage.
7. Equality as a concept does not point to any kind of remedy – it is either simplistic or simply unhelpful in providing guidance as to what would fix the experience of inequality.
8. Equality is an abstraction that is pursued by lawyers and others at the expense of arguments for tangible, specific rights.

Group Discussion

Is equality too much of an abstraction? Equality is a nebulous term and it can contort to serve the needs of ideologies. Since the *Law*² the legal test under our equality rights section (s.15 of the *Charter*) is very problematic. What is equality for women who value inegalitarian norms? Is it the liberty to choose? There is great danger in maternalism, or the idea of the 'false consciousness' as it has the danger of erasing personal agency of women who choose something others see as unequal. When are 'choices' really consensual?

When do we respect 'choice'? There is insufficient judicial attention to material conditions structuring 'choices' and the rhetoric of 'choices' is on the rise in family law. The mainstream definition of equality is not progressive, really only equality of

² *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497

opportunity. We need to think more creatively about solution, about materials support to make real choices. What should we be prohibiting? Sexual assault? Yes. Polygamy? ??Child sex? How old is a 'child'?

Is equality too taming a concept? Do we need a concept that is more radical, more directive, more demanding? Can it really accommodate intersectional tensions? Can it trump the right to religious freedom? That depends. Under our Charter it is a balancing act. We can't just focus on the law – there needs to be a multi-pronged approach.

Can problems be addressed within an equality paradigm or do we need to move outside? Should we add to equality or should we abandon equality? Are there alternative models of equality or inklings thereof that have been articulated that we should be exploring more fully? Are we talking about fundamentally rethinking equality or revising our equality analysis?

Finally someone asked: What is this debate?

A discussion then ensued about some of the on-going debates among feminist legal theorists including:

- the weakness of looking to the law and to the Charter as a savior when women need social services and material support;
- the trap of making assumptions about women's desire of capacity to choose, even if we might disagree with those choices;
- the weakness of the courts capacity to recognize nuance of experience and yet the fact that rights exist in the law but aren't accessible;
- the theorists desire to consider overall impact of law and state action, and need for others to see action happen to protect vulnerable women and girls; and,
- the challenge in equality as a concept, and the weakness of looking to Section 15 to resolve these issues.

The day was structured for an opportunity to continue these discussions in smaller groups. After some discussion about appropriate small group divisions, participants divided themselves into three groups - women of faith, women who did not identify as women of faith, and women of colour – and were asked to join the group they felt most comfortable in. The groups met for an hour and a half, and reported back to the larger group after.

Women of Faith

The following five points summarized this group's discussion:

1. How the media has portrayed the discussion of ADR as very pro-and anti-positions. You are either pro-Bountiful, pro-Shari'a, pro-polygamy, or anti. No space for third space, people willing to discuss either side;
2. Canadian Charter and Constitution are the foundation for all laws, the importance of international conventions and UN as basis for understanding equality and maybe they should inform the discussion;

3. ADR being used in other religious groups, e.g. Jewish groups, has been a pro-faith perspective for a long time, if that's been working in other religions, we should question how, why, what works;
4. Important point about Canadian history being important, there are Canadian practices that may be Judeo-Christian, separate from aboriginal, then multiculturalism – how do we reconcile these three strains, how does the court interpret them? And,
5. Decisions of a tribunal can be appealed to the supreme court, it's really important that there be test cases, we don't know what deference will be given, court should look at harm perspective – harm on specific women, groups of women, impact of decision on that woman and whole group of women.

There was no unanimity on how to assess harm and impact, whose values will inform that discussion. If we got to that point before the courts we would be tipping the balance in favour of women and children in terms of the impact.

Women not identifying as not 'of faith'

This group continued the debate around the problems in the use of equality and section 15, particularly since the *Law* case. Perhaps we need to step back and look at equality as eliminating poverty and domestic violence for example. The group then segued into a discussion about the question: What does equality mean to women who value inegalitarian norms? Maybe to that woman equality means the liberty to hold on to that inegalitarian norm. We want to be responsive to women in vulnerable circumstances, but may have to be alive to the critique that we are wrong – want to avoid falling back into 'maternalistic' concepts of false consciousness.

The group then had a further discussion about the concept of choice and the realistic need for creative solutions to support women as autonomous. If we are going to say that some choices aren't legitimate because they are harmful, how do we define that?

Women of Colour

Three important points emerged from this group's discussion:

1. The concept of equality as comparison is problematic – if you look at how the groups were structured here, what if we imagined it to be a racialized women of faith group making the claim, who would the comparator group be? Non-racialized women of faith? Women who don't self-identify as of faith? Hard to compare for equality purposes.
2. Interesting that somehow we felt we need to have two groups and a women of colour group, instead of, say, a lesbian group, or a group of women with disabilities – because today religion is very racialized. Debates today very much

focus on race – Bountiful is a nice contradiction of that point, but still general trend – concern re: religious practices being attached to dark-skinned people.

3. Discussion re how conference was organized – for women who self-identify as women of colour, but not of faith. Often there is a sense of responsibility/anxiety about policing for culturally-sensitive language, though not here because not women of faith. The people who feel that way here may be women who identify as ‘of faith’. Important point to get out.

Panel – Academic studies and dialogue

Three academics were asked to discuss some of the debates they were participating in regarding the intersection of culture/religion/gender and race. Beyond the initial introduction by Dr. Eisenberg, Ms Dhamoon, Profs Lessard and Dhecka were asked to identify any gaps in the research and academic study on the issue, particularly in light of some of the discussions the participants had already had.

Rita Dhamoon is a woman of colour, PhD candidate at UBC, activist Political Scientist with expertise in contemporary political theory specifically identity/difference politics. She began by disagreeing with Dr. Eisenberg in that she felt there were many in academia who challenged the general assumption that multiculturalism was good. However, Ms Dhamoon did agree that many people in academia think that a truly tolerant government will not interfere with minority rights, even if citizens’ rights are being violated. She is concerned that to this group only culture matters, and they can frame the debate as “my culture made me do it”. At the other end of the perspective are those who overemphasize gender.

But for Ms Dhamoon the really interesting debate is between those who believe that gender and cultural practices can be reconciled. There are different bottom-line principles that can be useful:

- How interpretations of culture respect democratic equality and autonomy? (Benhabib, Tully)
- How well do human capabilities become promoted and achieved? (Nussbaum)
- How damaged is the identity-related interest? – in terms of reconciling equality and religious freedom, there is usually more damage for the individual than the cultural group (Eisenberg)
- Anti-subordination principle – if there is no internal harm, if you cannot foreseeably or actually subordinate a member of the group, you ensure no internal harm (Dhecka)
- Acceptance of religious and cultural rights is based on individual rights (Kymlicka, Devaeault)
- There is no tension between religious freedom and gender if certain interpretations of the scriptures are adopted (Balas)

Ms Dhamoon identified the following gaps in existing research:

1. Analysis of public opinion data to gauge levels of hate/exclusion/oppression
2. Look at who is framing the debate, why the current focus
3. Post 9/11 world – the Shari’a debate has come up post 9/11
4. Impact on people who choose to exit
5. What of disabled women? Lesbians? Etc.
6. What do we make of the differences in and among the religious and cultural groups?
7. How do we make comparisons and are those comparisons valid?
8. Very little documentation about local, provincial and federal government responses to particular issues.
9. Is the Charter of Rights and Freedoms really the best alternative? Charter is problematic, especially in terms of equality.
10. How are religious and cultural identities formed, not just through constraining and limiting experiences, but positive experiences. E.g. FGM is set up as an us and them dichotomy in which we (who do not practice it) gaze at women who exercise FGM without fully appreciating what they feel about such experiences.

Maneesha Dhecka is a Professor of Law at the University of Victoria. She is the author of one of the articles all the participants received in advance “Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law.” She summarized the paper for the group.

Prof. Dhecka began by sharing her surprise at the different conclusions reached about how to deal with cultural issues – when should law be recognizing or accommodating ‘minority’ culture? As she outlined in her paper, she categorized the conclusions into three groups and identified the one she felt is more preferable for feminists looking at multiple points of difference:

1. “Universalist” approach to culture – The departure point for this approach is that we need to be wary of accommodating group rights; the premise is that in western legal societies, majority culture is better for women than minority cultures. The main proponent of this approach describes cultural practices she finds problematic and it is clear from the ones she describes that she perceives ‘minorities’ as racialized immigrant groups from Third World countries. This perspective is too reminiscent of colonialism, that would like to acculturate ‘minority’ groups into dominant ideas of equality. “Equality” is better or western majority standard.
2. “Western Colonial” camp – this perspective also says no to cultural claims, but for different reasons; its departure point is anti-racism and a critique of colonialism. Western culture is not better, but cultures are intensely fluid, so to speak of a culture is to freeze it. We should be wary about structuring legal tests based on culture because it will essentialise or homogenize it and lead us down a path we want to avoid. Result is an avoidance of cultural claims so as not to essentialise or homogenize. (For example: The debate over Muslim Family Law

has not allowed for much discussion of the complexities of Muslim interpretation of the scriptures³).

While Prof. Dhecka is sympathetic to an anti-racist starting point and the insight of the fluidity of culture, post-colonial critique is ultimately unsatisfying because if we can't make any cultural claims, what do you say to aboriginal claims based on culture? Have to shut them down even though coming from space of marginality and historical injustice. Why does that need to be the case?

3. 'Differentiated' group – very much coming from anti-racist departure point, but willing to tolerate some amount essentialism, “strategic essentialism”. It is okay to talk about culture where it's not going to result in subordination of vulnerable members, i.e. women and children. There are not a lot of guidelines about how to figure out what counts as subordination/not subordinating. Tried to set out test at end of article for this. Can't be that anti-subordinating means no essentialist claims, because that's not possible. Can't pay attention to all cultural differences as equal. Advance idea about recognizing cultural claims that may privilege some members over others, that's okay, or essentialise culture to some extent, that's okay too, as long as they don't leave some members worse off than they already were.

Hester Lessard is a professor of Law at the University of Victoria. Prof. Lessard reviewed how the courts have dealt with conflicting rights in the jurisprudence that exists (the case law). What you see at play in the jurisprudence is shifting ways of thinking about religious freedom. It is either:

1. Our public space is devoid of religion. You have the right to be religious but it should be pursued in the private sphere – the classical meaning of secular society; or,
2. We have a pluralist, multicultural society – in Canadian public space there is more recognition and inclusion of diversity, both cultural and religious. The problem of balancing rights becomes much more transparent, centre stage.

There is tension between these two ways of approaching the issue, and they are not applied consistently. Some argue that the second approach is more 'progressive', more consistent with Canadian values. A lot of Human rights law comes down in favour of accommodation. The two concepts shift around and get deployed in the law, but not in any kind of systematic way. There are a number of cases where this has come up – sometimes directly and sometimes in subtext, sometimes framed as a Charter issue, sometimes as Charter values, and a few cases where there has been a direct tension.

In the *Beena B*⁴ case, Jehovah Witness parents didn't want a blood transfusion for their daughter and their arguments were based on parental rights and religious freedom. The court was very supportive of those claims, but in the end found that there were limits on those rights because of the state's interest in the child – line drawn in a very classical way.

³ My comment added.

⁴ *B.(R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

In the *Young*⁵ case a father argued parental rights/religious freedom entitled him to inculcate his children into Jehovah's Witness beliefs against the wishes of the custodial parent, his ex-wife and the mother of their three children. The Court bent over backwards to create a large space for religious rights.

The cases of *Trinity Western*⁶ and the *Surrey School Board*⁷ the court directly addressed these issues. Trinity Western University is a private Christian school that required students to sign a document promising not to engage in homosexual behaviour and the provincial teacher's federation refused to give out licenses to the students. The counterclaim was student's equality rights. The SCC said that it was a voluntary code and about choice in the private realm, even though children (potential students) were involved. Is it really religious freedom, or is it socially conservative values the judges are supporting?

In *Surrey School Board*, the Board banned the use of books in kindergarten that promoted healthy images of gay and lesbian families. The SCC found the ban discriminatory in a way that sided with non-conforming families despite claims from the position of social conservatives.

Questions raised by this research:

- How many cases involve children? Where cases involve adult women, will they have to construct themselves as victims?
- Religious freedom converges with parental rights – it is important to map which are the cases where religious rights claims are assisted by conservative rights claims about family – are the courts responding to religious freedom claims, or conservative family values claims?
- What is the discourse in *Young v Young* about? Multiculturalism or family values? On the other side, was it the mother who really represented a countervailing equality rights claim, though difficult to articulate because it was a claim for unpaid work?⁸
- All approach the idea of religious freedom as inherently limited, but limited by liberal ideas of autonomy – Do they mean women's autonomy? Some lower courts have taken into account Maneesha's idea of subordination.
- Risk? How does risk play out in society? Some attentiveness needs to be put to a more complex framework.

Group Discussion

The group then engaged in a discussion about polygamy, poly amorous relationships and same-sex marriage. Some compared the wrongs of polygamy to the

⁵ *Young v Young*, [1993] 4 S.C.R. 3.

⁶ *Trinity Western University v. BC Teacher's Federation*, [2001] 1 S.C.R. 772.

⁷ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710.

⁸ The equality rights claim for the mother in this case may be about women's/custodial parent right to have control over her family and the ways in which court decisions to grant access parents/father's generous control over children...really are granting him guardianship rights above and beyond access. This is a growing issue for mother's/custodial parents in family law (author's comment).

wrongs of monogamous marriage for women, and others objected to the suggestion that same sex marriage should be compared to polygamy, especially as it is compared to Bountiful. Some of the comments included:

- As a layman, it is not what the courts might say, or what equality means, but is what is happening in Bountiful acceptable to us as a society? None of our laws are based on scripture, there must be some reason why we have moved the way we have. How can we as a civilized society argue that there is some basis for these people to have rights to do what they're doing?
- Most people would agree that religious freedom is limited and there are issues in Bountiful that fit well into that framework – eg: it is okay to limit freedom of religion to stop child abuse – but there are many more areas fraught with difficulty, where one needs a more textured discussion, around the socialization of children and non-conforming family structures. Do we as feminists want to be seen as against non-conforming families?
- Polygamy is something inherently oppressive. We don't have examples of ungendered polygamy, certainly not ones we are worried about. It is part of a mechanism in which women are made to be sexual satisfiers, bearers of children, not equal to men. I'm not sure why we are having trouble saying the polygamy is a mechanism that is inconsistent with women's equality.
- Child abuse, incest, rape is completely beyond the pale. I think people do not understand, there needs to be an explanation the public understands, that there is some kind of poisoning of relationships where polygamy is involved.
- Bigamy is different because one family may not know about the other so both may suffer.
- I think feminists have argued for recognition of non-traditional families. One distinction is that we're talking about traditional polygamist families linked to patriarchy, we might want to make a distinction between that and non-traditional families. I understand that it's hard to feel special and valued when you're one of 26 wives, but that's only one view. It's not as though the heterosexual monogamous relationship is so great, yet not many are saying we should throw out that model.
- Some people choose polyamorous relationships. Certain marginalized groups, people who self-identify as queer say that pushing for marriage further marginalizes people on the fringes of that group. But with two parties in a relationship it is like a democracy, but there (in FDLs communities) the power structure due to patriarchy compounds the problem.
- I read into your discussion same-sex relationships. I am uncomfortable with that pairing, feels like pairing homosexuality with pedophilia. If you want to take that route, you have to do a lot of explaining to members of those communities. I'm uncomfortable with pairing polygamy and same-sex marriage and want some explanation of how you conflate them.
- Fair comment. In traditional religious communities we've seen a tremendous reaction against marriage being anything but a man and a woman. Many who don't come from that background have had problems understanding the reluctance. As someone who doesn't come from a polygamous background, my

reaction may be as hidebound as those who object to same sex marriage. I think next stage will be forming economic units. I don't want to judge every poly-amorous relationship by the standard of Bountiful.

- I must point out that there are members of religious community who are very suspicious about how religion is used to hold up conservative/traditional family values – we are not homogeneous in a desire to be oppressive. There are absolutely Christian feminists writing for decades saying that a more informed or authentic reading of the scripture does not hold up the tension between religion and gender equality – we don't have to assume they are opposed.
- It strikes me how culturally informed our reactions are. Polygamy practiced in an egalitarian way seems natural that all the critiques of polygamy – sexual satisfiers, breeders, unpaid labour – are all critiques of monogamy as well. When just comparing monogamy to polygamy, not immediately obvious to me that they're so different.

Saturday, December 4

After Friday's panels and discussion, participants at the consultation began their Saturday by identifying some common themes that had come up in discussion. One participant found the complication of the issue of polygamy problematic. She argued that talking about polygamy as a practice that is not inherently oppressive leads to inaction when it comes to doing something at the legal level to prevent abuses that occur in polygamous unions. The clinical and academic nature of the discussion on Friday was problematic in that it didn't reflect the fact that the traumatic situations are not being dealt with, and the fact that there are victims of the crime among us.

A comparison was made between polygamy and prostitution. The gendered understanding of enforcement – in prostitution women are prosecuted, but in practices of polygamy, where it is a male enterprise, prosecution isn't happening.

Furthermore, discussions about consensus within some cases of polygamy were acknowledged, but one participant argued that conflating polygamy, which has a history of being oppressive and patriarchal with instances where it is not, takes away from the agency of responding to the practice in its oppressive forms. All these participants pointed to the issue of strategizing in response to oppressive form of polygamy, and having a response that is neither bogged down nor neglectful of the variations in which polygamy can be practiced. The consensus seemed to be that research regarding definitions of polygamy and empirical data on the scope and effects of this practice is lacking.

For West Coast LEAF, we need to discuss the long-term and potential impact of arguments we make in one context that may open doors in one place, but shut doors in another. To get at the harms of polygamy, it is about strategy. The issues we have raised here comes up every time we address women's equality in court – how do you create spaces for women's voices, anytime women are vulnerable they are silenced

Another participant pointed to the complexity of applying analytic frameworks regarding polygamy to the case of Shari'a law, where in the former case (as applied in Bountiful), harm and lack of choice were far more apparent than in the latter.

Furthermore, arguments against polygamy are similar to those against same-sex marriage. One of the gaps in the criminal code context is that the theory of polygamy isn't there and as soon as you deviate from heterosexual marriage, if you take relativism that far, you have to look at incest and bestiality. There are problems with policing and prosecuting polygamy, but once you raise the topic, without the theory of the practical reality of polygamy attached, then you do have to ask why incest is also criminalized.

Panel: Topics for Small Group Discussions

The goal of the next panel was to provide a framework for the small group discussions to follow. The goal of the smaller groups was to focus in on three topics in light of the discussions on Friday. Those topics were: Bountiful, Shari'a law and Section 2(a) and 15 of the Charter.

Alison Brewin, Program Director at West Coast LEAF, shared her understanding of the issues that have emerged from the community of Bountiful. In particular, she shared the chart she developed after visiting Creston Valley that allowed her to separate the legal issues from the social services issues. (see attached Appendix Three). Ms. Brewin asked the small group to try and focus in on the legal issues and possible strategies for addressing them.

Parvin Ashrafi, is a writer, member Swedish research centre, and activist against Shari'a law implementation. She spoke about the effects that Shari'a law could have on women if it is implemented through Arbitration and her concerns about the ways in which religious claims have been used to oppress women. She began by saying that in a secular society, the law should respect religious rights or groups rights so long as they are in line with human rights and women's equality. The Arbitration Act and its application of religious laws means different laws for different communities and negates the universality of human rights and the national applicability of Charter rights.

Ms Ashrafi went on to discuss the issue of multiculturalism and women's equality. She argued that women in Islamic communities are denied basic human rights at home and in society, citing her experience living in Iran where sexual apartheid is constitutionally sanctioned. The Arbitration Act may look appealing in its multiculturalism and respect for various cultures, but it asks the question – how far are we willing to tolerate? She questioned multiculturalism as a concept, expressing her concern that it gives voice to a cultural relativism that can blind people to the ways in which their culture and religion supports the oppression of women. Furthermore, there are conflicting statements coming from those who support Shari'a law (Islamic Institute of Civil Justice), whereby one member claims a 'Canadianized' version of Shari'a will be practiced and another claims that Shari'a is divine law and cannot be customized and changed in different contexts.

The problem of choice for women in these contexts was also addressed: "A girl in religious family has no rights of choice, those rights are given to male relatives. Women and girls are always passengers. One of the males is driving the car to any destination

he wishes.” The standards of Shari’a are not constitutional in its severe punishment of non-heterosexual marriages, toleration of male abuse, etc.

In conclusion, “Arbitration is a private matter. Religious arbitration is privatization of justice. It is privatization of family law... This means that private sphere of the family is no longer a public concern. What we have gained so far represents years of struggles and challenges in the area of women’s rights and women’s equality. Allowing religious arbitration undermines women’s equality and is against the principle of the separation of religion and state.”

Lindsay Waddell, is a Vice President of West Coast LEAF, and practices aboriginal law in Vancouver. She discussed the tension in section 2(a) and section 15 of the Charter for those with a non-legal background. She began by explaining the nature of the Charter and Constitution as governing public, government laws and policies, rather than private interactions. Ms Waddell’s analysis centred on the notion that freedom of religion, as interpreted by the courts, is not absolute. Religious rights have to be balanced with other Charter rights. Moreover, she was wary of a judge being given the power of deciphering what constitutes something within a particular religion. The problem lies in the fact that religious interpretation is inherently subjective.

Ms Waddell went through the tests that the Court applies when considering Charter rights – describing the 3-step process developed by the Supreme Court of Canada in *Andrews* and *Law*. She explained that section 2 of the Charter, which includes religious freedom, are described as ‘fundamental freedoms’ – does this mean they trump other freedoms? Not necessarily. She also raised one of the problems with the court analysis thus far in that they have drawn a distinction between belief and conduct. The Courts are less inclined to interfere in a strongly held ‘belief’ than they are conduct or actions that impact others. The test for limiting religious freedom is grounded in the Oakes test:

1. Does the law or action have a pressing or substantial objective?
2. Is there a rational connection between the infringement of the right and that objective?
3. Are the rights in question infringed as little as possible?
4. Are the benefits outweighed by the bad effects of the legislation?

Shari’a Law small group discussion

There is great diversity within the Islamic community. The Emory Law School article deals with the divergence in how Shari’a is categorized. The difference ranges from those who believe whether Shari’a law is divine or codification or interpretive set of rules by various scholars and religious figures throughout history. A problem that was highlighted in this stream of discussion was that there is a deficiency in the available literature with respect to women’s (i.e. those who support Muslim Family Law) opinion regarding the “benefit” of implementing it. Hence, the problem of choice arises; are we going to dictate to those who want a choice of what is good for them.

Within this context is the question of distinction between private orderings and state endorsement. And if a state were to endorse Shari'a, what happens to vulnerable communities? How will they fare in relation to a set as legal state-enforced sanctions? In imagining a regime for resolving disputes, state has to adopt the existing family law regime. Consequently, there is an inherent problem in adopting a regime different than that applied to other women in the province.

There were questions and discussion regarding the utility of even having such an arbitration act with legal force. A contentious issue was when arbitration decisions are antithetical to the Charter, can they still be exercised within the private domain between the two parties. Practices like human sacrifice can be performed in the name of freedom have been outlawed. Similarly, the questions of coercion by those within the religious community as well as family members is a significant issue, in that, would a woman who does not want Shari'a arbitration applied to her be courageous enough to say 'no' in the face of external pressures?

Courts are the worst place to reach an agreement in cases of custody and property because of the immense expense, the trauma caused to the children (where wedge and irrevocable differences fester). There is push for arbitration outside the adversarial process within BC. With mediation, it's possible to have a mediator of one's choice who can then help both parties reach an agreement. And that agreement will always be open to review by courts— essentially if agreement is not in best interests of children, it will be rejected. With arbitration, however, when two people go in with the Imam, the Imam comes to a binding decision, and neither party can go to the courts without fitting into rules for judicial review. The concern is that the argument can be made, 'they consented to the binding nature of that agreement.' The enforcement of rights becomes problematic because the way in which the Act is drafted, the right of review and variation appears to be extremely limited under the Arbitration Act. Under mediation, however, the court is much less circumscribed.

A concern was voiced about conflating problems grounded in patriarchy and using these as an excuse to posit anti-Muslim rhetoric. This raises an important issue regarding women choosing to use Shari'a and posits the following questions: Why is it that some women want Shari'a law? Is it a reaction to post-9/11 world? Is it about general attacks on Muslims and South Asians? Is it a reaction to the fact that some religious groups have their own institutes as well? If Shari'a law in one form or another is an inevitable reality, then it may be prudent to strategize on what is to be done, what safeguards and caveats can be demanded. Further concern was raised about the broader implications of the entire debate on a premise that assumed the public/private divide and sought to preserve that privacy of the private. Historically, feminists have sought to make public those things deemed 'private.'

Some caveats and safeguards were suggested. One participant argued that when there are situations of violence, there should not be arbitration, that should be clear. The power relations between the abuser and other person is not equal, no objective solution. Women using Shari'a would not have access to legal aid, would not have choices, by doing that the disengagement of the state from women's lives. One participant brought up criticisms such as who is going to be qualified for becoming arbitrator, and if they are trained at the taxpayer's expense then Canadian citizens are

going to pay for people to become Imam arbitrators, that, according to her, would be clearly damaging secular society.

In reporting back to the larger group, one participant raised serious concerns about the Consultation, its structure, choice of participants and speakers, and the intractable problems the dialogue presented to her. She argued that the discourse has taken on an incredibly polarized guise and expressed strong concern that women working with Islamic Law were not been represented in the discussions on a micro or macro level. Most feminist Muslim women are against Shari'a law arbitration. Their arguments are not a demonization of Shari'a law, but conscious of the huge generalizations about Muslim women. This participant felt that a denial of Muslim women's agency was offensive and did not assist Muslim women in accessing services. She further pointed to the absence of the voices of Muslim groups who have been working on issues of domestic violence for 30 years. She asked the group, and in particular West Coast LEAF:

- Where are the voices of Muslim women who have been working for change?
- How do Muslim women claim representation?
- What is the power dynamic?
- Why do some groups have access to spaces and funding and others not?
- Who do you represent and who do you answer to?
- Why is there not a more respectful dialogue taking place here in this conference?

Having raised these issues, this participant chose cease from participation in the Consultation and left.

The group acknowledged the seriousness of the concerns she had raised, and many expressed their desire not to show any disrespect to any opinion expressed. Another participant expressed strong concern that a Muslim woman of faith didn't feel safe in this environment to discuss things openly. Other Muslim participants reaffirmed their pro-faith position.

Alison Brewin, on behalf of West Coast LEAF, made a commitment to continue the discussion with the participant who left to respond to and explore further the questions and concerns she had raised. Just as there were others representing views and experiences that weren't able to participate, this consultation is considered the beginning of larger and more diverse discussions.

Some participants responded by affirming that they had not intended to disrespect and others acknowledged the need to create space for women of faith working to bring about change in religious communities.

Bountiful Group Discussion

A second group discussed Bountiful and the criminalization of polygamy. Within this group one of the issues that was brought up was the notion of the Crown battling with definition of "informed consent," such that, an incident in Kelowna where 2 children

were sent to Bountiful. As a result the Ministry of Child Services sent the children back saying that they were in harm. Moreover, the group resolved that the issue could be linked to the trafficking of underage girls. Also, it was resolved that girls with man in position of authority can not be a situation fostering consent. Of concern to the group was how little was known by the women of Bountiful regarding child protection laws. To address this issue, discussions revolved around how to inform women about rights and responsibilities vis-à-vis child abuse, incest, etc. prosecute for same reasons as incest, potential for harm as a result of power dynamics that may exist within community.

The Issue of prosecution of polygamy was discussed. The group posited that in prosecuting polygamy should think about polygamous communities (i.e. Bountiful) being more of a situation where danger for children, with exception for polygamous relationships without that kind of danger. Furthermore, the restrictions for a man to marry more than one wife in Islam were brought to the fore. A man must prove to the Imam that he can support equally the first and second wife because in Islamic law (Shari'a) he must treat both wives equally or can only marry once. However, the issue of how can you prove that you love them equally and in addition the problematic case of divorce is such a relationship was discussed. Meanwhile, it was pointed out that LEAF can not choose against one just because the others are not Judeo-Christian traditions or because they are not in mainstream.

There was debate considering when to take action against Bountiful, whether it should be before charges are laid or after. One suggestion was where charges have been laid, it is an opportunity to show our position to Bountiful, and we could say we are not taking overall positions, just Bountiful's gross exercise of Patriarchy. This led to the question of whether we can press for charges without getting into trouble with diverse family relationships. Moreover, a distinction was made in regards to how Bountiful differs from other forms of polygamy as cases of incest exist leading to substantial harm - genetically, a great potential harm to kids, society, equality between men and women, and sexual exploitation. And in comparing the Bountiful situation to the other forms of polygamy it is important to keep in mind the distinction; Bountiful should be called a polygamous community.

Sections 2(a) and 15 group

Within the Section 2 (a) and Section 15 group there were discussions approaching their intersection as well as discussing generally in application. The question of whether we were limiting ourselves by talking only about sections 2(a) and 15 exclusively and not others, for example section 27 and section 28. The group also thought it important to acknowledge that in section 15, sex discrimination is not the only thing mentioned, but it also includes protection from discrimination on basis of religion and age.

The next issue that was raised was concerning the nexus between action and religion itself, at this moment in time, courts tend to do quick, subjective analysis, not much of an evidentiary burden on individuals to prove that connection. This tends to create a problem of whose evidence is given evidentiary weight: a qualified court expert? Would a woman from that same religion as opposed to male religious expert

have a different view of nexus? One thing that was agreed upon was that there is a lot of jurisprudence under section 15 that is becoming problematic due to burden on complainant.

Furthermore, section 2 (a) is problematic because court's analysis is superficial in that it asks questions that are easier to respond to in the affirmative. One group member also would be interested in a little bit more about possibilities of section 27 and section. 28, because governments can use notwithstanding clause to get out of section 2(a) and 15, but not 27 and 28. It may be stronger for those sections to be the guiding ones using simplistic language.

Gaps in research and dialogue on these issues that were identified

Each of the small groups were asked to present their list of gaps that exist in the research and information that is informing the dialogue on the issue of women's equality and religious freedom, particularly as it relates to Bountiful, the application of Muslim Family Law, and the interpretation of Sections 2(a) and 15 of the Charter. The following list was developed by the group as a whole:

Muslim Family Law:

- Internal voices from Muslim communities, a diversity of voices, particularly from feminists working within those communities.
- An analysis of the effect that would have on legal responses and strategies.
- What response do non-Muslims have to these questions, whether brought up Muslim or not?
- How do we compare the use of Shari'a law to other faith-based laws e.g. Jewish experience?
- How do Shari'a law advocates respond to that?
- What are the effects of 9/11 and the feeling among Muslims that they are under siege at this time?
- We need to go back to groups who felt they couldn't speak on these issues.
- What is happening for lesbian and queer women? What do they have to say? (Someone raised the organization SALAM in Toronto.)
- Consult with experts on Islamic law, the various threads and potential ways these issues could be resolved.
- What is the experience of communities where Imams are arbitrating in family law?
- Consult with other cultural groups dealing with the privatization of family law and family issues (e.g. the aboriginal community).

Bountiful

- Analysis of whether there might be evidence, on the facts, that polygamy is not a sincerely held religious belief.
- In any prosecution of criminal offences including polygamy, is there any other approach that might not have to rely on the evidence of the girls and women who

are currently members of Bountiful, particularly looking at laws of evidence around sexual exploitation, sexual assault and sexual involvement with people under 14.

- What is the nature of the trafficking of girls, the Humanitarian and Compassionate Grounds applications coming from women of Bountiful, and how it intersects with refugee applications that allow recognition of polygamous families?
- How do we know/ensure that the women of Bountiful are aware of child protection laws and the fact that the women themselves could be prosecuted for contributing to criminal behaviour?
- There must be a very thorough review of the Criminal Code and its practical application, not just about a potential religious freedom defense, but for an analysis of its capacity to truly address the wrongs in polygamy as it exists in Canada. The group acknowledged and discussed the reality that polygamy in a closed community where male leaders are in control is the very context in which polygamy, as such, harms women and girls.
- How do we establish women as cultural experts in situations where the minority group is lead by the male population in that community? How do we ensure that women's voices are full participants in the ways in which minority groups are defined in law and public policy?

Charter analysis

This group presented its research gaps, focusing on evidentiary issues that would be necessary to address in court for a thorough Section 1 analysis of the balance between Section 2(a) and Section 15.

- Substantive research into the facts of women living in polygamous communities – numbers, literacy rates, polygamous arrangements, to pull it out of Bountiful alone.
- Legal research on the intersection between 2(a) and 15 as there is not much published on the topic.
- The media seems to be the only method of informing the public about the issues and they are only providing anecdotal information. Need someone to take on the role of disseminating less anecdotal information about polygamous practices in Canada.
- Funding for case development is necessary.
- Funding for negotiations between the federal and provincial governments with former members of Bountiful and/or women effected by the application of religious law in family law.
- Human Rights and child safety – need to get discussion going on the safety of children in polygamous communities, including perhaps filing a writ to motivate the discussion.
- Research on the adverse affects of polygamy on women, children, young boys – social science research that would be of use in court.
- Legal research and consultation on the legal impact of various options.

- Research into the impact of cultural description/representation that is developed by the elite in that group, elite that are male. Who are experts in this context? Especially around religious issues it is usually male theologians that may not represent women's experience. It may further marginalize women not to have their voices recognized as experts. What qualifies an expert representing the theology or cultural norms of his/her community or group?
- An impact study of the case law on s 2(a) and 15 on women and/or case law on the intersection.
- Need continued discussion on strategies in the law, for example a civil suit might be more effective than criminal or human rights, though the Human Rights case is going ahead so that tool is before us.

Evaluation

By choosing who would present their particular take on the issues, West Coast LEAF made decisions about how the issues would be discussed. This became problematic in the discussions around Muslim law given the heightened racism that particular communities experience and the ease with which many non-Muslim organizations can fall into reflecting that racism. In particular, the assumption that the Muslim religion is one that is inherently bad for women can easily be an assumption that drives the discussion. West Coast LEAF has been criticized for doing that very thing in this consultation. The organization takes such criticisms very seriously and will continue to examine how we discuss these issues as we move forward to legal solutions that reflect the true nature of women's diversity.

The second way in which waiting to see who would be participating before asking people to present their knowledge made it hard for those speakers to feel fully prepared to describe the complexities of their knowledge. West Coast LEAF approaches all of its educational and consultation work from the assumption that everyone in the room has expertise to share – that we are not the only experts. By being more informal about who would be asked to present, we hoped to encourage that assumption. We hoped to lessen the ways in which academics and lawyers can often dominate conversation, or speak in a language that can be very inaccessible to individuals and communities without that educational background. Though the evaluations were very positive after the event, it may be possible that we lost an opportunity to have formal papers and opinions written and presented specifically on the issues we were discussing.

Having said that, the evaluations that were returned to us were very positive. 25% of the participants sent in evaluations. The materials and facilitation of the weekend were rated very highly, with 80% of the respondents rating them excellent, 10% good, and one had no opinion. The participants were less enthusiastic about the space and travel arrangements, though the majority still rated them good or excellent. Each of the three sessions – Thursday evening with Debbie Palmer, Friday's sessions and Saturdays – were all rated good or excellent by all the respondents. All of the respondents said that they would attend another event hosted by West Coast LEAF.

In response to open-ended questions, comments included:

- My expectations for the weekend were: “Exceeded, in a big way. Also, to learn the basics from an academic and legal viewpoint and to have both grounded by personal stories from participants.”
- My experience has been great. I met very interesting women. It was a great challenge and at first very intimidating because of the level of the group. I did learn a lot during these two days. As I said, the experience with the Faith Muslim woman was difficult but I am not surprised at all. Before I came to the consultation, and in particular after reading the questions, I was wondering how women of Faith would react with what I will say. Islam is very complex religion, the international situation is antagonizing Muslim people. As much as I want to respect every one, I do feel that what is happening in Canada is a sign of dangerous time for women and we may go back in terms of what we have won by our fight for equality. I do have very strong concern.
- I experienced what I expected and more.
- The academic speakers were uniformly excellent. Very good speaker choices. The Personal stories were very enlightening. All participants seemed to be well-informed and each added to the depth to the issues.
- I would have liked to have seen more ordinary members of the public present.
- I felt by Friday afternoon, we perhaps had had too much by way of presentations, and many in the audience wished to discuss rather than listen more.
- Maybe you would like me to have some criticism, but I don't. I take everything as they were. Even though it was at first difficult for me to start my presentation and felt some confusion, but after all I am happy that I did my presentation in English because I think a translator may not have put my passion in translating what I have to say. Actually, the criticism is not about your organization because you did offer me to have a translator but about maybe overestimated my capacity. I thought that doing the presentation in English would be a challenge, also I thought by having a translator could take my concentration away. It is not easy I guess, but overall I am extremely happy to have done it the way I did.
- That I often felt that the issues of polygamy and Sharia law were confused and muddled when people tried to address them both simultaneously. I almost felt as though the entire group needed a session on Bountiful and one on Sharia/arbitration (as opposed to individuals picking the session they wished to attend) just so everyone had the same knowledge base.
- I have no criticism. This was an ambitious undertaking and to me the discussions provided a very useful exploration of the practical and theoretical issues. The linkages between the two issues were very interesting.

In response to the question 'What is the most significant thing you learned in the consultation', respondents said:

- That there is not universal condemnation of polygamy by feminist, which means we are not supporting our sisters in the 3rd world who are fighting so hard to get rid of polygamy and begging us to help them.
- The complexity of trying to impose solutions on communities; diverse opinions within communities; importance of keeping women's ability to be autonomous front and centre.
- That complexity that arises when s.2 (a) and 15 are engaged, and how it is inevitably women's rights that are adversely impacted.
- That these issues are sensitive and very personal. They touch the very core of our identities, and as a result, emotions run very high. I think it would have been nice to have debrief/go around through out the consultation as opposed to just one at the end.
- What I learn is that the situation is more serious than I anticipated, I see more the implication opening for example the Arbitration Act 1991 of Ontario. Of course, I always thought that the situation was serious but I did not understand it on the legal aspect as I understand it today.
- We can all get along.

In response to a request for suggestions for further consultations and research, respondents recommended:

- The general public
- Sherene Razack (OISE) (see article on "Imperiled Muslim Women, Dangerous Muslim Men and Civilized Europeans: Legal and Social Responses to Forced marriages" (2004) 12 Feminist Legal Studies 129-174 & Annie Bunting (York Law and Society); doing research on mediation by Imams etc.
- Women with opposing viewpoints who are pursuing these activities from a feminist perspective.
- Jewish religious tribunals; Ecclesiastic tribunals; Muslim feminists with differing views than imply pro-Shari'a and contra-Shari'a.
- A more diverse set of Muslim women- especially Muslim legal and religious scholars who have the theological training to be able to speak to this issue from a perspective which incorporates the religious texts and tradition. I'd suggest Shahina Siddiqui, a community activist who lives in Winnipeg and Sheema Khan, who works for CAIR-Canada (Council on American-Islamic Relations), writes for the Globe & Mail, and lives in Ottawa (I think).

- To learn from more women from Bountiful. Impossible perhaps? How about Roman Catholic women who are forbidden to become priests?
- Get the UN stats on polygamy and any research into effect of religious tribunals on women and other vulnerable populations.
- Would be to document women's stories, to organize consultation with more social and intake worker.
- I would very much like to have an opportunity to do some more in depth work on the theoretical frameworks that we were all too briefly exposed to. I would really like to see those approaches applied to practical problems and examined thoroughly. I see great potential for creating a framework that could have practical application in equality work in the courts. I would really like to have that possibility explored further.
- Small groups composed of various community members who are neither academics nor frontline workers but who have an interest and/or knowledge about the issues at stake.

Criticisms of the consultation and suggestions for further consultations included:

- I would have liked to have seen more ordinary members of the public present.
- I felt by Friday afternoon, we perhaps had had too much by way of presentations, and many in the audience wished to discuss rather than listen more.
- The cold room and the lack of an articulated link between the academic discussion of culture, and the various theories, to the issues.
- I felt (and still feel) overwhelmed by the amount of complexity that accompanies these issues. I don't know how that can be accounted for.
- Facilitation is quite difficult, perhaps a second official facilitator maybe needed especially with break out groups.
- Send out the information, schedules, etc. a bit earlier.
- Attempt to gather even more diverse viewpoints that reflect different feelings other feminists might have.
- This is difficult to answer given it depends on the context of the consultation, but in general I found that approach engaged by LEAF to be inclusive as possible and thoughtful in terms of trying to get as many voices as possible to the table.

- Ensure that the guest list represents all divergent schools of thought around Shari'a. I found the polygamy question quite well canvassed, but Shari'a was punted to the sidelines at times, and I think this was a function of the cross-section of attendees.

Future Plans – where will we go from here?

There were many gaps in research identified, threads of dialogue that could and should be taken up, and an over all recognition of the need for further consultation on the topic.

Research

On Friday afternoon, the panel of academics also listed a number of academic questions that could be explored. These were:

1. Analysis of public opinion data to gauge levels of hate/exclusion/oppression.
2. Look at who is framing the debate, why the current focus.
3. Post 9/11 world – the Shari'a debate has come up post 9/11.
4. Impact on people who choose to exit.
5. What of disabled women? Lesbians? Etc.
6. What do we make of the differences in and among the religious and cultural groups?
7. How do we make comparisons and are those comparisons valid?
8. Very little documentation about local, provincial and federal government responses to particular issues.
9. Is the Charter of Rights and Freedoms really the best alternative? Charter is problematic, especially in terms of equality.
10. How are religious and cultural identities formed, not just through constraining and limiting experiences, but positive experiences. E.g. FGM is set up as an us and them dichotomy in which we (who do not practice it) gaze at women who exercise FGM without fully appreciating what they feel about such experiences.
11. How many cases involve children? Where cases involve adult women, will they have to construct themselves as victims?
12. Religious freedom converges with parental rights – it is important to map which are the cases where religious rights claims are assisted by conservative rights claims about family – are the courts responding to religious freedom claims, or conservative family values claims?
13. What is the discourse in Young v Young about? Multiculturalism or family values? On the other side, was it the mother who really represented a

countervailing equality rights claim, though difficult to articulate because it was a claim for unpaid work?⁹

14. All approach the idea of religious freedom as inherently limited, but limited by liberal ideas of autonomy – Do they mean women’s autonomy? Some lower courts have taken into account Maneesha’s idea of subordination.
15. Risk? How does risk play out in society? Some attentiveness needs to be put to a more complex framework.

Based on the consultation, West Coast LEAF has prepared this list of research topics relating to polygamy that were identified:

1. Existing Criminal Code sections on polygamy and bigamy were written over 100 years ago, long before the enactment of the Charter – Do they protect women effectively from exploitation inherent in the practice of polygamy as it currently exists in closed religious communities such as Bountiful?
2. What is the impact on new immigrants and refugees in Canada who have entered into polygamous marriages outside of Canada if the Criminal Code continues to prohibit polygamy?
3. What is the impact on independent individuals engaged in polygamous-like relationships outside of the context of religious and cultural practice – for example in the gay, lesbian, bi-sexual and transgendered communities of Canada – if the law continues to prohibit polygamy with the goal of protecting women and girls from economic and sexual exploitation?
4. If polygamy is legalized or decriminalized in the context of individuals who enter into polygamous marriages outside of Canada, how will that impact issues that have been raised about the trafficking of women and girls in the context of communities like Bountiful and elsewhere?
5. What data exists that describes the current reality of the practice of polygamy in Canada? How should any gaps in that data be filled? And,
6. How should policy and lawmakers ensure that women’s voices are heard in the efforts to establish the ways in which polygamy reflects religious and cultural practices – how do we ensure that women within minority communities are participating in the identification of cultural and religious norms given the anecdotal evidence that does exist about the ways in which the women of Bountiful – for example – have limited individual rights within that community?
7. The increased secularization of marriage, in part as a result of the recognition of same sex marriage in many provinces, has resulted in an expansion of the traditional definition of marriage. Combined with an influx of immigrants from countries where polygamy is practiced, these debates are used to justify the decriminalization of polygamy and bigamy, without reference to the impact a redefinition of marriage may have on women’s equality rights.

⁹ The equality rights claim for the mother in this case may be about women’s/custodial parent right to have control over her family and the ways in which court decisions to grant access parents/father’s generous control over children...really are granting him guardianship rights above and beyond access. This is a growing issue for mother’s/custodial parents in family law (author’s comment).

West Coast LEAF has begun this research through volunteer lawyers and law students who have prepared draft memos on some of these questions. Some of them require research resources unavailable to us, or require rigorous academic social science research to fully canvass. We hope to continue pursuing these topics, as well as encouraging community and academic partners to pursue them as well whenever possible.

In addition, there were a number of research topics relating to Muslim Family Law that were also identified. These include:

1. A comparison of the use of Muslim Family Law to other faith-based laws e.g. Jewish experience.
2. What is the relationship between the role religious institutions have in supporting members of their faith in dealing with marriage breakdown and the ultimate legal resolution of the issues involved? Are religious groups helping define separation agreements and supporting family law cases in a way that has legal impact? What is the impact of that work on women? What lessons can be learned about the interaction of family law and religious community?
3. Collecting information and data, both qualitative and quantitative, that reflects the internal voices of women in Muslim-Canadian communities, and particularly a diversity of voices, including women working within those communities to advance gender equality.
4. An analysis of the effect that those voices should and could have on laws and public policy, including legal responses and strategies to advance women's equality in the context of multicultural accommodation.
5. A dialogue between lesbian and queer women inside and outside the Muslim and South Asian communities? What does that experience tell us about navigating religious freedom and women's equality?
6. Consult with experts on Islamic law, the various threads and potential ways these issues could be resolved.
7. What is the extent to which Imams are arbitrating family law globally and what is the experience of women in those arbitrations?

Further Dialogue and consultation

West Coast LEAF is committed to continued consultation on these issues. Four strategies that the organization has identified as possible approaches to this work, within the limitations of our human and financial resources, are:

1. Developing a multi-faith advisory group of individuals who are active in their religious community and who support the advancement of women's equality. This group would provide direction to West Coast LEAF by continuing discussion begun at the consultation and provide direction for the

- organization in its efforts to advance women's equality in the context of religious accommodation.
2. Continue to work with a loose coalition of individuals and organizations trying to address the issues that have emerged for the women and girls of Bountiful by providing legal analysis and information to individuals and organizations within the mandate and organizational capacity of West Coast LEAF.
 3. Develop a sub-committee of the Legal Committee to develop case proposals and position papers on litigation in which these issues arise in the court system. To watch and consider opportunities to clarify the issues that emerge when balancing Section 2(a) and 15 of the Charter, and to develop substantive jurisprudence that advances women's equality in the context of religious freedom in BC and in Canada.
 4. Prepare a summary of this report, with a list of questions, and use this as a tool for having discussions with faith-based communities in BC to ensure a diversity of communities has had an opportunity to contribute to the dialogue. This tool could also be shared with non-faith based groups and communities.

These four suggestions are not recommendations for West Coast LEAF alone. The organization has limited resources, so it may be that our role is to encourage other groups or individuals to pursue research questions or other strategies.

Potential litigation in the future

Part of the goal for West Coast LEAF in pursuing this Consultation was to begin the dialogue necessary for reasoned and considered legal arguments should our organization, or our parent organization LEAF, be in a position to intervene or otherwise influence litigation that may arise in which the courts will be considering equality rights issues in the context of religious freedom. There is currently a case before the BC Human Rights Tribunal as discussed above. West Coast LEAF will be watching that case, as well as any other cases that may begin as a result of the government's response to Bountiful. Our mandate as the BC branch of LEAF means that our scope is limited to cases that begin here in BC. We support LEAF's national legal strategy and will work with LEAF and other women's organizations in Canada for strategic opportunities to advance women's equality in the context of religious freedom.

Appendices

Appendix One – Call for Participants

Call for Participants
Consultation on Women’s Equality and Religious Freedom
Hosted by West Coast Legal Education and Action Fund
December 2nd – 5th, 2004 Vancouver, BC

West Coast LEAF is hosting a national consultation to address the issues that emerge when religious freedom and women’s equality intersect. What approach should West Coast LEAF take to the relationship between Section 2(a) and 15 of the Charter that will ensure the advancement of substantive equality in the law, and ensure that equality analysis reflects the needs and interests of women of diverse cultural, ethnic and religious experience?

Who we are asking to participate:

Individuals with a commitment to the mandate and values of West Coast LEAF (to advance principles of women’s substantive equality in the law through litigation, law reform and public legal education) who:

- have experience with the issue of women’s equality in the context of religious freedom, with particular emphasis on women of faith and racialized women of faith;
- Have academic or legal expertise who have published works or participated in the development of legal theory on the topic as defined above;
- Members and volunteers with West Coast LEAF program committees and Board;
- Staff at West Coast LEAF; and,
- Representatives of National LEAF and other LEAF branches.

Outline of the consultation:

Thursday, December 2nd: Keynote address by Debbie Palmer, former member of Bountiful

Friday, December 3rd:

11. Review of Primer Materials and presentation/summary of articles
12. Panel discussion: Defining the issue – the debate, dialogue, and current legal discourse on women’s equality and religious freedom.
13. Presentations and discussions on the question of what women of faith and racialized women of faith need and want from women’s equality in Canada. This may take the form

of presentations, small group discussions, presentation of documentaries, and open discussion. (Participants who identify as women of faith and racialized women of faith will be provided with opportunities to meet separately from the larger group to ensure their free and frank discussion of these issues.)

These discussions and exchanges of information can include such topics as:

- a. The definitions and concepts of women's equality from the perspective of women of faith;
- b. Descriptions of what the experience of religious-discrimination is for women in Canada;
- c. Descriptions of the experience of gender discrimination within religious communities;
- d. Recommendations for strategies in balancing culture, race and gender from those who experience it in their daily lives; and,
- e. An overview/examination of the research, writing and empirical studies that exist that define and will contribute to our understanding of these issues.

Saturday, December 4th: Based on the information exchange of Friday's session, participants will be divided into four groups to apply that information and understanding to the following subjects:

- 1) Bountiful and the criminalization of polygamy
- 2) Sections 2(a) and 15 and how they (and other sections of the Charter such as Sections 1, 27 and 28) should intersect and be interpreted
- 3) Shari'a law and other family law issues
- 4) The limits of religious freedom under the Human Rights Code.

The small groups will come together and share their discussions with the larger group. The group will then, either in small groups again or the larger group, develop a series of recommendations to West Coast LEAF on all four topics.

Sunday, December 5th: This day will be set-aside for West Coast LEAF and LEAF members and volunteers to review the recommendations and build legal strategies addressing the four subjects. Possible legal strategies to consider include:

6. Transformative Public Legal Education Programs
7. Litigation through intervention in existing cases
8. Litigation through case development
9. Law Reform Strategies via:
 - a. Provincial government
 - b. Federal government
 - c. International Bodies
10. Community Partnerships and collaboration.

If you would like to participate:

Please email, fax or mail a short request to participate (100-300 words) describing how you can contribute to this consultation, with particular reference to the portion of the schedule as described above that you have a particular contribution to offer. Consider the following issues in writing to us:

- West Coast LEAF gives priority to our goal of including a diversity of women and in particular, women of faith and racialized women of faith.
- West Coast LEAF has received some funding from the Court Challenges Program, so please let us know whether or not you will need financial assistance, and for what kind of costs (ie flight/transportation, accommodation, etc.) and we will do our best to accommodate everyone according to need.
- Please let us know if you have any special needs in terms of accommodation, food or services.

There is no deadline for sending in a request to participate, however there are a limited number of spaces available, and a limited budget for transportation assistance. Please phone if you have any questions.

We will do our best to accommodate and assist everyone who is interested in participating.

Email: consultation@westcoastleaf.org

Fax: 604-684-1543

Mail: 555-409 Granville Street

Vancouver, BC

V6C 1T2

Phone: 604-684-8772

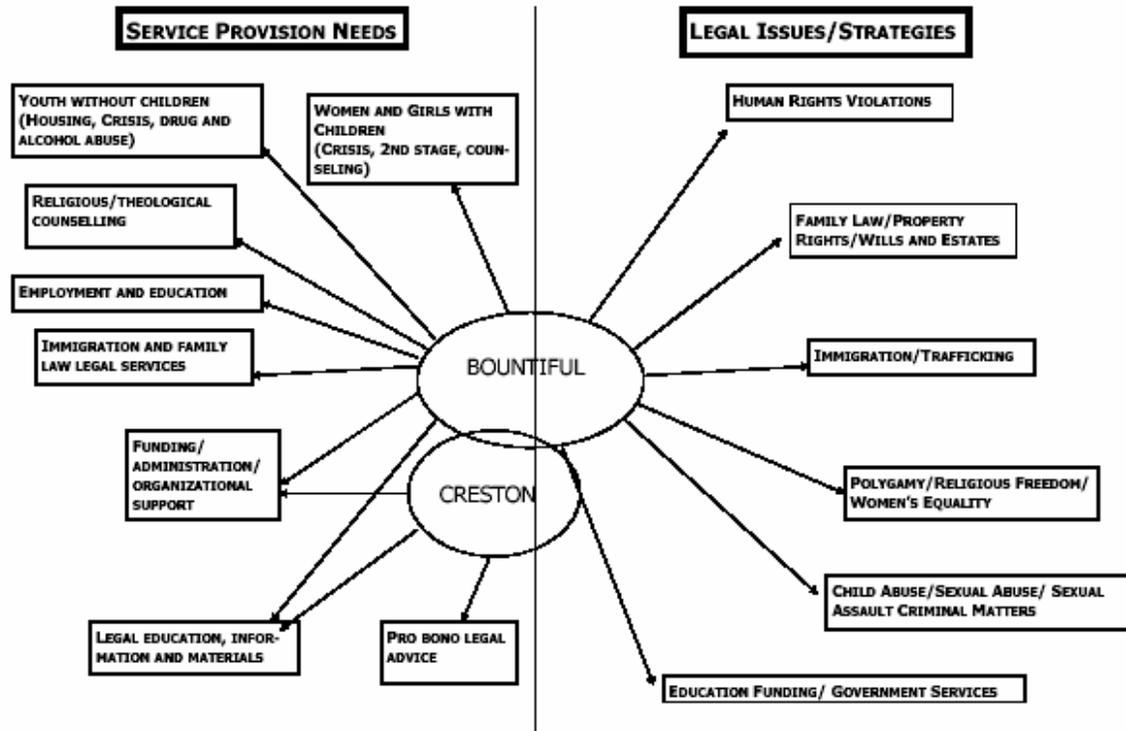
Toll free in BC: 1-866-737-7716

Appendix Two

First Name	Last Name	Profession
Parvin	Ashrafi	Researcher
Beck	Dysart	Research Analyst SW Canada
Cindy	Wilkey	Lawyer, LEAF legal committee
Maneesha	Deckha	Assistant Professor UVic law
Itrath	Syed	Master's student
Clare	Jennings	Law Student
Jancis	Andrews	Human Rights complainant
Theresa	Gerritsen	Student and employed at Haven Transition House
Karima	Budhwani	Lawyer
Rita	Dhamoon	Ph.D Student
Razia	Jaffer	Canadian Council of Muslim Women
Shelina	Neallani	Lawyer
Najeeb	Hassen	Lawyer
Zohra	Husaini	Canadian Council of Muslim Women
Margot	Young	Professor of Law UBC
Mary	Salaysay	Crown Counsel
Clea	Parfitt	Lawyer
Stephanie	Fraser	Accountant, West Coast LEAF Board
Paula	Dribnenki	Articling student
Azmina	Ladha	Student/CCMW
Avigail	Eisenberg	Professor of PoliSci UVic
Alison	Brewin	Program Director, West Coast LEAF
Hester	Lessard	Associate Professor UVic Law
Agnes	Lui	Program Officer- Status of Women Canada
Mohammad	Afsar	CCMW
Fakhr	Afsar	CCMW
Lindsay	Waddell	Lawyer, West Coast LEAF Board Member
Sharon	Reid	Court Challenges Program-Legal Analyst
Theresa	Stowe	Lawyer
Sharon	Betcher	
Amber	Prince	Law student
Lorena	Reimer	Researcher
Debra	Bowman	Minister- Capilano United Church of Canada
Mila	Younes	Provincial Coordinator
Susan	Boyd	UBC Law Professor
Joanne	Klineberg	Counsel- Department of Justice
Tammy	Friesen	Lawyer, West Coast LEAF Board member
Mary-Woo	Sims	West Coast LEAF-Vice President

Appendix Three – Bountiful Chart

THE ISSUES OF BOUNTIFUL, B.C.



Bibliography

Annotated Bibliography for Articles Pertaining to Freedom of Religion and Women's Equality

Bala, Nicholas. (2003). "Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships." Queen's Law Journal, 29 41-102.

The issue of how to recognize different types of intimate adult relationships remains a source of controversy in Canada. In this paper, the author surveys the evolution of the current debate surrounding four types of intimate adult relationships that fall outside the traditional definition of marriage: common-law marriage, same-sex partnerships, polygamy, and non-conjugal interdependent relationships. The author begins by examining how Canadian legislatures began in the 1970s to grant spousal rights for a variety of purposes to opposite-sex partners who cohabited in conjugal relationships, and the courts began to recognize property claims using the constructive trust.

The greatest controversy now concerns the recognition of same-sex relationships. The Supreme Court of Canada ruled in *M. v. H.* (1999) that the failure to give same-sex partners the same rights as opposite-sex unmarried partners violates the Charter. Two appellate courts have recently held that to deny same-sex partners the right to marry violates their human dignity and is therefore unconstitutional. The author argues that to deny same-sex partners the right to marry violates the Charter.

Opponents claim that this trend could lead to the legal recognition of polygamous relationships, but the author rejects this argument. As for non-conjugal relationships, the Law Commission of Canada (2001) recommended legal recognition of a range of such relationships. The author argues that there are contexts in which this is appropriate, but that conjugality should remain a central legal concept for determining rights and obligations.

Deckha, Maneesha. (2004) "Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law." Canadian Journal of Women and the Law, 16(1) in press

This article explores and organizes feminist legal scholarship about the real and imagined tensions between gender and cultural equality. It then argues that an intersectional praxis favours an approach to culture in law that affirms that culture matters and that law should be receptive to cultural claims that do not subordinate vulnerable internal members. Finally, this article considers factors by which to identify which cultural claims would meet this standard. The overall goal of this article is to consider how legal feminists committed to intersectionality and anti-essentialism-that is, to paying attention to how multiple social factors, such as race, class, gender, age, sexuality, and culture, shape our experiences- should approach the question of culture in law.

Eisenberg, Avigail. (2000). "Diversity and Equality: Three Approaches to Cultural and Sexual Difference." Journal of Political Philosophy, 11 41-64

This article discusses two approaches that have emerged to resolve conflicts that arise between measures to protect sexual equality and those that advance cultural autonomy: the *rights-based approach*, which poses this conflict as one between fundamental rights, and the *process-based approach*, which poses the conflict as a matter that is appropriately resolved by subjecting contending claims to community decision making processes. The author suggests that both of these approaches often lead to misconceiving both the nature of these conflicts and the best solutions to them. In response to this finding, the author offers a third approach, namely the *difference-based approach*, which requires that conflicts be assessed in terms of the identity-related interests and values at stake for each side. This approach is seen as providing a better way of understanding and resolving the tension between sexual equality and cultural autonomy.

Horwitz, Paul. (1996). "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond." University of Toronto Faculty of Law Review, 54 1-64

Freedom of religion stands on precarious ground in the landscape of the modern liberal democratic state. While the state and the courts rely on the tools of rational, secular, "neutral" reasoning to strike a balance between protecting individual freedoms and achieving important state goals, the religious adherent is driven by an understanding of existence that defies the liberal tradition of rationalism. In this article, the author examines the conflicts that occur between religious obligations and the needs of the state. Through an examination of Canadian and American jurisprudence concerning freedom of religion, the author provides a critique of some aspects of the modern liberal state's treatment of religion. The author seeks to provide a clear picture of the social and intrinsic value of religion, and suggests that a proper understanding of the value of religion will lead the state to adopt a supportive and accommodating approach toward religious beliefs and practices in the modern state.

Macklem, Timothy. (2000). "Faith as a Secular Value." McGill Law Journal, 45 1-63.

The fundamental freedoms, including freedom of religion, are guaranteed for reasons that have to do with the value that the exercise of those freedoms is thought to contribute to the lives of those who enjoy them. What reason is there, then, for a secular society to guarantee freedom of religion? What reason do we have to extend special protection to forms of belief that can be called religious, whether because they bear a resemblance to traditional religions, or because they have some fundamental role to play in a believer's life? What is it that distinguishes religious beliefs from other beliefs, so as to make them worthy of distinctive, perhaps superior constitutional protection? These are not questions that Canadian courts have sought to answer, despite their commitment to a purposive understanding of Charter rights and freedoms. Yet an answer to them is clearly required in order for the Charter to be legitimately applied to any alleged breach of religious freedom.

This article explores the possibility that the moral foundation of freedom of religion is to be found in the value that faith, understood as a mode of belief distinct from reason, is capable of contributing to human well-being. It concludes that there are secular reasons to regard faith as valuable, and suggests that it is in recognition of that fact that a secular society--the most prominent and the most vulnerable site for the pursuit of faith--has guaranteed freedom to religion.

McClain, Linda. (2004). "Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations." Fordham Law Review, 72 1569-1598

This article focuses on the place of associations within John Rawls's political liberalism and in feminist liberalism. It revisits crucial components of political liberalism in light of feminist criticisms, such as those of Susan Moller Okin and Martha Nussbaum, that political liberalism's protection of associational life hinders women's free and equal citizenship. Offering a different reading of Rawls, it finds greater potential to draw on political liberalism to support such citizenship. It then brings liberal feminist ideas about the place of associations into dialogue with recent feminist work on gender, rights, and culture calling for models of rights within culture rather than rights versus culture.

Shachar, Ayelet. (1998). "Reshaping the Multicultural Model: Group Accommodation and Individual Rights." Windsor Review of Legal and Social Issues, 8 83-111.

Schematically, six prototypical legal conflicts can arise under a **multicultural citizenship model**: individual vs. individual; individual vs. state; identity group vs. identity group; identity group vs. state (the most often discussed legal conflict under a **multicultural model**); "outsider" vs. identity group (for example, in affirmative action cases); and "insider" vs. identity group. This paper's analysis focuses on the final category of legal conflict: that which occurs between a group member and her own identity group. ... Within the framework of the weak **multicultural model**, debates centre around theoretical justifications for carving a conceptual identity group space. ... In such instances, the **multicultural** state awards identity groups exclusive and unlimited legal powers, and ultimately exposes certain insiders to, what is termed, the "paradox of **multicultural** vulnerability": that is, while as group members they may benefit from the transfer of legal powers from the state to their identity group, as individuals they bear disproportionate costs for their group's **multicultural** accommodation. In other words, while **multicultural** accommodation enhances an identity group's autonomy, such accommodation does not necessarily improve the status of all a group's members. ...

Stopler, Gila. (2004). "The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality." William and Mary Journal of Women and the Law, 10 459-532

The following discussion will show that from the perspective of women's rights, relegating religion to the private sphere does not effectively solve the inherent conflict between patriarchal religions and women's rights or ensure women's right to equality in the liberal state. Analyzing

the effects of oppression on the autonomy and agency of women, this article will argue that affording communities the right to free exercise of discrimination is incompatible with the equality obligations that a liberal democratic state has towards its citizens and that the right to free exercise of discrimination undermines the democratic process, which is premised on the free and equal participation of the citizens.

Sunder, Madhavi. (2003). "Piercing the Veil." Yale Law Journal, 112 1399-1472.

This Article argues that religion qua religion is less the problem than is law's construction of this category. Premised on Enlightenment theory, law has a fundamentalist view of religion as law's "other." Confident that freedom in the public sphere is freedom itself, law posits and, indeed, preserves religion as an extralegal sphere that is static, irrational, and imposed. Individuals may exit religion but not reform it. Increasingly, fundamentalists are taking advantage of this legal tradition. Because law does not recognize religious communities as contested and subject to change, legal norms such as the "freedom of religion" and the "right to culture" defer to the claims of patriarchal elites. The result is that, in case after case in both national and international law, law is siding with fundamentalists over modernizers. But on the ground, human rights activists working in Muslim communities are piercing the veil of religious sovereignty. In the work of these activists, this Article hears the rumblings of the New Enlightenment: Today, individuals demand democracy, reason, and rights within religious and cultural communities, not just without them. Examining the campaigns of reformers in Muslim communities through the overlooked efforts of transnational human rights "networks" and archives of women's human rights education manuals - illuminated by interviews with leading activists from around the globe - this Article identifies an emergent, conceptually coherent framework for operationalizing modernity and freedom within a context of culture and community. This New Enlightenment upsets the foundation of the legal understanding of the "right to religion," which has deferred to leaders' views over those of members. While feminists have challenged the absolute sovereignty of the private sphere, particularly on the issue of violence, women's right to contest and create normative community - that is, to make cultural and religious meanings - has been far less theorized. This Article suggests that women's human rights law must go beyond freedom from violence to freedom to make the world.