

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1986, c. 68

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF S. 293 OF THE *CRIMINAL CODE OF CANADA*, R.S.C. 1985, c. C-46

OPENING STATEMENT BY THE AMICUS ADDRESSING BREACH

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PART 1 - OVERVIEW

1. British Columbia's Lieutenant Governor in Council referred the following two questions to the British Columbia Supreme Court for hearing and consideration pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, section 1:

a) Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent? ("**Question 1**")

b) What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence? ("**Question 2**")

2. Section 293 provides:

Polygamy

293. (1) Every one who

(a) practises or enters into or in any manner agrees or consents to practise or enter into

(i) any form of polygamy, or

(ii) any kind of conjugal union with more than one person at the same time,

whether or not it is by law recognized as a binding form of marriage, or

(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Evidence in case of polygamy

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

3. The Amicus was appointed by the Court to:
 - a) advance any argument he considers appropriate in support of the answer “no” to Question 1; and
 - b) advance any argument he considers appropriate regarding Question 2, particularly any argument in opposition to, or distinct from, the Attorney General of British Columbia (“**AGBC**”) or the Attorney General of Canada (“**AGC**”).

4. In this opening statement, the Amicus sets out an overview of his answer to Question 2, as well as an overview to that portion of Question 1 that concerns whether section 293 breaches any provision of the *Charter*. The Amicus will later provide an opening statement responding to the statements of the AGBC and the AGC, and their allied interested persons, on the issue of justification under section 1 of the *Charter*.

5. The opening statement that follows sets out, under Part 2, an overview of the facts the Amicus expects the evidence to show in respect of the issues this statement addresses. Part 3 broadly summarizes the sources of evidence, and introduces the witnesses whose testimony is proffered by the Amicus and his allied interested persons. Part 4 summarizes the Amicus’ positions on Question 2 and the “breach” portion of Question 1. On that issue of breach, the Amicus says section 293 infringes sections 2(a) (freedom of religion), 2(d) (freedom of association), 7 (liberty) and 15 (equality) of the *Charter*.

PART 2 - OVERVIEW OF THE FACTS

A. Polygamy in Human History

6. Polygamy was widely practised over the course of human history including, historically, among some of the Aboriginal peoples of North America. Polygamy was found in virtually every culture at one time. Even its detractors note that it served useful social functions in certain agrarian or hunting-based societies.

7. Polygamy is still practised in a number of countries. It is legal in parts of the Middle East, Asia and Africa. Unquestionably there are women living in polygamy in North America who vigorously support plural marriage, find happiness and satisfaction within their marriages and family structures, and articulate clear reasons as to why this form of marriage is logical and beneficial for them.

8. In *Polygamy: A Cross-Cultural Analysis* (Oxford: Berg, 2008), one of the books that form part of the AGBC's Brandeis Brief (Isbister Ex. "C"(11)), Miriam Koktvedgaard Zeitzen provides the following summary at page 4:

...[P]olygamy is not an exotic non-Western custom, practised by people who have not yet entered the modern world. Polygamy is worldwide, cross-cultural in its scope, it is found on all continents and among adherents of all world religions. Its practitioners range from modern feminists to traditional patriarchs, illustrating the great versatility of polygamy as a kinship system. An overview of the many peoples practising polygamy, in contemporary as in past societies, illustrates that a majority of the world's cultures and religions have condoned some form of polygamy. For many of the societies described here, polygamy used to be an integral part of their kinship systems, but modern times have brought a streamlining of marriage patterns to all societies around the world. The spread of Christianity and European-based legal codes through colonialism, and the imposition of state laws on aboriginal peoples living within the borders of modern nation-states, have spelt the end of polygamy for many people. The Arctic Inuit (Eskimo), for example, practised polygamy in the recent past, as described in older ethnographic literature; if still practised, it may be in clandestine or irregular ways. This is the case for numerous populations that used to practise polygamy, but have now become integrated in the global community where monogamy dominates.

B. Polygamy and Religion

9. Polygamy as a religious practice exists across a number of religious traditions, and for some who practise it, polygamy is integrally linked to their religious beliefs. For those who practise polygamy for religious reasons, polygamy can (a) bring them closer to or foster a connection with their god; (b) model the lives of important religious figures or prophets; (c) signal the degree of their commitment to their faith; and/or (d) have a direct impact on the nature of their afterlife.

(1) Fundamentalist Mormonism

10. Marriage is the most central social and religious institution within Mormonism. It is viewed in this faith as essential to realizing the promise of resurrection after death, and of exaltation, or becoming close to, or like, God.

11. People who specifically participate in plural marriage from the Mormon tradition do so as a matter of deeply held religious belief, rooted in eternal principle, and with eternal significance. Plural marriage was instated by Mormonism's founder, Joseph Smith, pursuant to revelations from God that he claims to have experienced, and its practice follows in Smith's footsteps, as well as providing opportunities for a demonstration of a godly life. The tradition was continued by fundamentalist believers who shared the view that plural marriage remained essential to Mormon theology and were critical of former leaders who, they believed, had succumbed to political pressure to abandon the practice. Polygamy remains central within the fundamentalist faith.

12. Members of the Fundamentalist Church of Jesus Christ of Latter Day Saints ("FLDS") community in Bountiful, British Columbia (which is addressed in part in the affidavit of the FLDS' expert, William John Walsh), are primarily descended from Canadian Mormons who migrated from Alberta shortly after World War II, who were themselves primarily descended from polygamist Mormons who immigrated to Canada from territories of the United States in the late 1800s. The FLDS is the largest polygamist group in the United States. Other significant polygamist groups in the United States include the Apostolic United Brethren and the Kingston clan, or Latter Day

Church of Christ. There are also hundreds of smaller, independent, polygamous clans, which exist through many parts of the United States, Canada and Mexico.

13. Almost all FLDS members are from families which have continuously practised their version of Mormonism since the 1830s. As strong religious fundamentalists, the FLDS are very hesitant to alter founding Mormon beliefs and practices. The FLDS' expert William John Walsh attests, at para. 14 of his affidavit:

Celestial marriage [plural marriage] is an essential FLDS religious principle and not simply a domestic concern. It is viewed as God's commandment. Unless the faithful participate in it, they cannot enter into the fullness of glory in the kingdom of heaven in the afterlife. Thus, for believers in the principle, plural marriage is essential to personal and family salvation.

(2) Other Religions

14. Other religions also incorporate polygamy. For example, some First Nations people historically practised polygamy which can be linked to their religions. For some Muslims, polygamy fits within the Qur'an and thus links them to God and their religious tradition. Under the Qur'an, men have a conditional licence to marry up to four wives. Many Muslims believe that polygamy, and specifically polygyny, is an important part of their faith. Wicca (a modern and feminist-influenced religion, based on occultist ideas and founded in the mid-1940s) views all forms of consensual sexual and emotional ties that adults freely enter into as sacred or, at a minimum, as possible routes to an encounter with the sacred; this includes relationships that involve more than two adults.

C. Polygamy and Culture

15. Polygamous associations may also be based on long standing cultural norms that include ceremonies, traditions and rites that structure members' lives and families. Polygamous families are often part of clearly defined and sometimes segregated communities with a heritage that can extend back in some cases for thousands of years.

D. Polyamory

16. Polyamory is a lifestyle which, one author notes, “is embraced by a minority of individuals who exhibit a wide variety of relationship models and who articulate an ethical vision...encompass[ing] five main principles: self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions and activities such as jealousy”. Polyamory is also defined as “many loves”, and polyamorists often say their multiple relationships are a form of “responsible nonmonogamy”.

E. History of American Criminal Bans of Polygamy

17. Between 1862 and 1887, the US Congress passed four statutes criminalizing plural marriage but also taking broader steps against the Mormon Church, indicating that Congress’s target was much larger than polygamy itself (the 1862 *Morrill Act for the Suppression of Polygamy*, the 1874 *Poland Act*, the 1882 *Edmunds Anti-Polygamy Act*, and the 1887 *Edmunds-Tucker Act*). The 1882 statute, for example, barred people who practised or believed in these unions from jury service, and barred actual polygamists from holding public office and voting. The 1887 statute took away voting rights from all Utah women, directed the seizure of property of the Mormon Church, and revoked its corporate charter.

18. The evidence adduced by the Amicus includes that the civil disabilities imposed by the 1882 and 1887 statutes, in particular, sought to demote Mormons from full civic membership to punish them for (1) political treason, in the form of Mormons’ establishment of a separatist theocracy in the Territory of Utah and consequent raising of arms against the US government in 1857-1858, and (2) “race treason”, as polygamy was considered natural for people of colour but unnatural for white Americans.

F. History of Canada’s Criminal Ban of Polygamy

19. In light of the American assault on the Mormon Church and political structure, members of the Fundamentalist Church fled to Canada and settled in southern Alberta

in 1887. In 1888, they sought permission from Parliament to bring their multiple wives with them and were denied the right to do so.

20. In 1890, Canada passed its first anti-polygamy legislation, which explicitly addressed and targeted Mormon polygamy: “Everyone who practises...[w]hat among the persons commonly called Mormons is known as spiritual or plural marriage...[i]s guilty of a misdemeanour, and liable to imprisonment for five years and to a fine of five hundred dollars”. The language of the original polygamy section was drafted with the vagaries of the American polygamy statutes targeting Mormons squarely in mind: as one scholar notes, Canadian legislators examined US legislation, where obtaining convictions had proven difficult, and “aimed at convicting on the basis of cohabitation, attacking the Mormons’ private ceremonies”.

21. Reference to Mormons and a subparagraph on “[c]ohabitation in conjugal union” were omitted in 1954 revisions to the *Criminal Code*, but there is nothing in the legislative record to suggest that these changes were intended to be substantive (Section 293 Legislative History Brief submitted by the AGBC and AGC at paras. 12-13).

G. History of Prosecutions of Polygamy in Canada

22. Until the charges brought against two fundamentalist Mormons in Bountiful in 2009, the last prosecution under the polygamy section of the *Criminal Code* had occurred in 1937. In that case (*R. v. Tolhurst & Wright*), both of the accused, who were acquitted, were married to other parties at the time that they were cohabiting with each other.

23. Apart from John Harris (a man who cohabited for six months with a married woman, apparently believing her to have secured a divorce) in 1906, the only other person convicted under the polygamy section since it was promulgated in 1890 was an Aboriginal man from Western Canada (*R. v. Bear’s Shin Bone*). The original bill containing the criminal prohibition on polygamy provided that “this section shall not apply to any Indian belonging to a tribe or band among whom polygamy is not contrary

to law, nor to any person not a subject of her Majesty, and not resident in Canada”, but this exclusion was not adopted. One senator explained in a Senate debate on the issue: “I think that is a very dangerous exception to make, because it may have the effect of excepting the very class to whom the Bill is intended to apply”. In that time period, missionaries throughout the British Empire were dedicating themselves to eradicating polygamy as a family structure. In Canada, missionary efforts to convert Aboriginal people to Christianity, in particular, were part of a larger project to “civilize” Aboriginal populations, including through residential schools.

24. There have been only two charges laid under section 118 (trafficking in persons) of the *Immigration and Refugee Protection Act*. The first charge was laid in 2005 and the accused was found guilty of smuggling and prostitution related charges but not of trafficking. The other charge is currently before the courts. Neither case relates to polygamy.

H. Canada’s Changing Legal Landscape in Respect of Intimate Relationships

25. The prevailing assumption that the “traditional” family consists simply of a married heterosexual couple and their biological children is unrepresentative of the enormous social variation in conjugal unions and families. That prevailing assumption excludes many Canadians.

26. Canada’s legal landscape has changed in recognition of some of these realities. For example, in 1969, Parliament decriminalized homosexual activity. In the 1970s, Parliament removed homosexuals from the list of classes of persons prohibited from being admitted to Canada. In 1995, the Supreme Court of Canada held that “sexual orientation” is an analogous ground of discrimination under section 15 of the *Charter*, and in 2002 and 2003, the Ontario and BC Courts of Appeal held that the common law definition of marriage as a union between one man and one woman violates section 15(1) of the *Charter*. In 2005, Parliament extended the legal capacity for marriage for civil purposes to same-sex couples, and made consequential amendments to various statutes to ensure equal access for same-sex couples to the civil effects of marriage and divorce.

27. Increasing recognition and protection have also been extended to common law spouses. For example, in 1997 British Columbia amended the definition of “spouse” for certain purposes in the *Family Relations Act* to include persons (including of the same gender) who had lived in a “marriage-like relationship” for a period of at least two years.

28. Adultery has never been a criminal offence in Canada, with the exception of a pre-Confederation statute in New Brunswick that evidently survived until 1953-1954. Swinging is also not a criminal offence in Canada. It appears that the law condones casual group sex, but criminalizes committed group relationships.

I. Impacts of the Criminalization of Polygamy

29. The criminalization of polygamy has a range of profoundly negative consequences. Among them are:

- a) offending the dignity of women who choose polygamous lifestyles;
- b) impeding the open expression of religious identities and values, or lifestyle choices;
- c) harmful and unnecessary stress from the impediment to open expression and the fear of prosecution;
- d) stigmatizing members of polygamous relationships and communities;
- e) justifying abuse toward polygamous communities and their members;
- f) causing or heightening insularity for polygamous communities, making their members less likely to access (or know about) outside social and police services, and potentially making them more vulnerable to abuse;
- g) jeopardizing the incomes and support structures of polygamous families whose members could be fined or incarcerated; and
- h) diverting energy and funds from improving polygamous communities and the lives of their members to legal proceedings.

30. At the same time, research in Bountiful suggests that criminalization is not an effective deterrent to the practice of polygamy.

PART 3 - SOURCES OF EVIDENCE

31. The Amicus has filed the affidavits of the following witnesses, some of whom will be testifying at the hearing:

a) **Lori Beaman**, Professor of Religious Studies in the Department of Classics and Religious Studies at the University of Ottawa, and Canada Research Chair in the Contextualization of Religion in a Diverse Canada. Professor Beaman teaches in the areas of religion and law, identity construction, and theory and methods in the scientific study of religion. Part of Professor Beaman's program of research is understanding polygamy as it is practised in relation to religious expression. Professor Beaman has sworn two affidavits in this proceeding, the first addressing polygamy across religious traditions and the notion of a lived religion (whereby people of faith integrate belief and practice in their daily lives), and the second addressing stereotyping of religious minorities, harm as socially construed, recognition of women's choices, and research into polygamous relationships.

b) **Angela Campbell**, Professor of Law and Director of the Institute of Comparative Law at the Faculty of Law at McGill University. Professor Campbell teaches in the areas of family law, criminal law and health law. Professor Campbell has studied polygamy extensively as part of her research work, including through extensive interviews with women from Bountiful. Her academic work in this regard is exceptional in dealing with the implications of polygamy specifically for women in Canada. Professor Campbell has sworn two affidavits in this proceeding, in the first providing an overview of her research, marriage in FLDS theology and marriage practices in Bountiful, and the second addressing in more detail her findings in Bountiful on such matters as the level of choice that residents exercise with respect to marriage and reproduction; Professor Campbell's second affidavit also sets out findings rooted in

interdisciplinary doctrinal research regarding the social, economic and health implications for women in polygamy in a more global context, and comments on the report of Professor Cook filed by the AGC.

c) **Matthew Davies**, an experienced psychologist in the State of Utah who maintains a therapy practice focusing on children, adolescents and families. Dr. Davies' work includes working with children and adolescents who have been physically, sexually and emotionally abused. Dr. Davies has worked as well with members of the FLDS, and responds to the AGBC's witness, Larry Beall.

d) **Susan Drummond**, Associate Professor of Law at Osgoode Hall Law School. Professor Drummond specializes in legal anthropology, comparative law, civil law and family law. In her affidavit, Professor Drummond sets out English and Canadian legal history on issues relevant to an analysis of the constitutionality of section 293, including the age of marriage, the use of the section and its predecessors, and patriarchy within the monogamous family.

e) **Anver Emon**, Associate Professor of Law at the University of Toronto, who has published widely on issues pertaining to Islamic law and history. Professor Emon has sworn an affidavit providing his views on the place of polygamy in Islamic law and in a contemporary Islamic context.

f) **Martha Ertman**, Professor of Law at the University of Maryland, who has for the last 15 years studied the legal regulation of intimate relationships, including marriage, co-habitation, parenthood and affiliations among more than two adults. For the past five years Professor Ertman has focused on the legal regulation of 19th century Mormon polygamy, the topic addressed in her affidavit.

g) **Todd Shackelford**, the Chair of the Department of Psychology at Oakland University, who has provided an affidavit addressing spousal and child abuse as it arises in monogamous relationships.

h) **Jonathan Turley**, Shapiro Chair in Public Interest Law at George Washington University Law School. Professor Turley's areas of expertise include constitutional and international law, and his affidavit addresses reports

filed by the AGC (Rebecca Cook) and Stop Polygamy in Canada (Marci Hamilton), in addition to dealing more generally with the American and international context in which plural unions are criminalized.

i) **Zheng Wu**, Chair of the Department of Sociology at the University of Victoria. Professor Wu has research interests across numerous socio-demographic topics, including longstanding expertise in family demography, and he has sworn two affidavits in this proceeding. Professor Wu's first affidavit addresses the changing patterns of conjugal life in Canada, and in the second he provides statistics on such matters as the rates of spousal and child abuse in Canada, the numbers of single adults in Canada, and divorce rates and serial marriages in Canada.

j) several witnesses who address their personal experiences with polygamy and/or the intersection of their religions with polygamy: **Mary Batchelor**, **Anne Wilde** and **Marianne Watson**, all of whom are independent Fundamentalist Mormons and are or have been polygamists; and **Samuel Wagar**, a Wiccan priest. Counsel for the FLDS has also filed affidavits from a variety of witnesses who are or have been involved in polygamous communities, in addition to the expert affidavit of **William John Walsh**, a specialist and scholar in the field of Mormon Studies. In addition, the Canadian Polyamory Advocacy Association ("**CPAA**") has filed affidavits regarding both personal experience and research into polyamorist lifestyles.

k) **Leticia Shamim** and **Brianna Luca**, two employees of Farris who attach various materials to their affidavits. Ms. Shamim's affidavit attaches responses of the AGC to certain interrogatories delivered by Amicus. Ms. Luca's affidavit is the Amicus' **Brandeis Brief**, which includes a range of articles, papers and other works supplementing that filed by the AGBC, on subjects such as polygamy itself, the sociology of religion and consent, and the effects of non-criminalized practices such as divorce and adultery. A further Brandeis Brief has been filed as well by the CPAA, as part of the second affidavit of **Carol Jean Cosco**.

PART 4 - STATEMENT OF POSITION ON THE REFERENCE QUESTIONS

32. In this part, the Amicus sets out his position on the Reference questions, beginning with the elements of the offence, pursuant to Question 2, followed by the issue of breach of the *Charter*, pursuant to Question 1.

A. Question 2 – The Elements of the Offence

33. Question 2 asks: What are the necessary elements of the offence in section 293 of the Criminal Code of Canada? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

34. Section 293 purports to make it a criminal offence to agree or consent to or practice, any form of polygamy, or any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage. No proof of the method by which the alleged relationship was entered into is necessary to make out the offence. Nor is it an element of the offence that the parties to the relationship have had, intended to have or intend in the future to have, sexual intercourse.

35. Section 293 also purports to impose criminal liability on anyone who celebrates, assists or is party to a rite, ceremony, contract or consent that purports to sanction either of the kinds of relationship set out in section 293(1)(a).

36. “Polygamy” is not defined in the *Criminal Code*. Polygamy is generally understood to be an umbrella term that encompasses polygyny (one husband with multiple wives), polyandry (one wife with multiple husbands) and what is referred to as group marriage or polyamory (more than two people of whatever gender). By the inclusion of the words “Every one” and “any form of” in relation to polygamy, and “any kind of” in relation to conjugal unions, Parliament purported to prohibit all of these forms of polygamy.

37. The usual definition of “polygamy” is something like “the condition or practice of having more than one spouse at the same time”. The reference here to “spouse” reflects the usual understanding that polygamy is a form of *marriage*: that is, that the relationship is composed of multiple marriages. With section 293, however, it appears that Parliament’s intention was not to restrict the prohibition of polygamy to cases where the relationship is actually composed of multiple *marriages*. Rather, Parliament’s intention appears to be to also capture *de facto* polygamy, meaning where a person is in multiple marriage-like relationships. The first version of section 293 (*An Act further to amend the Criminal Law*, S.C. 1890, c. 37, section 11 (the “**1890 Act**”)) expressly stated that it is a crime to enter into any form of polygamy, “whether in a manner recognized by law as a binding form of marriage or not”. Subsequent amendments to the polygamy offence limited this language only to section 293(1)(a)(ii) (multiple conjugal unions), but there is no evidence that such amendment was intended to substantively change the law.

38. The language of section 293 as presently drafted does not articulate whether it is aimed solely at a person who him- or herself has multiple marriage-like relationships, or whether it also captures the other parties to those relationships, whether or not they are themselves in multiple marriage-like relationships. Reference to the 1890 Act reveals that Parliament intended the latter also to be covered. Section 11 of the 1890 Act, at subparagraph (d), included within the scope of the prohibition everyone “Who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union”. Again, there is no evidence in the legislative record to suggest that the change to the present wording was intended to be substantive, and the language of section 293 in its present form appears to cover both categories.

39. As for the second part of Question 2, the elements of the offence of polygamy do not include the involvement of a minor or a context of dependence, exploitation, abuse of authority, a gross imbalance of power or undue influence. Had Parliament intended to limit the offence to relationships involving any of those elements, it could and would

have stated as much. Indeed, the language of section 293 suggests that Parliament was not concerned with targeting relationships where participants did not give their free consent (such as by being underage, or being dependent upon or unduly influenced by the spouse or some other relevant person). To the contrary, Parliament's concern appears to be to prohibit *consenting to polygamy*: section 293 imposes criminal liability on "[e]very one who ... practises or enters into or in any manner agrees or consents to practise or enter into" polygamous relationships (emphasis added).

40. The Amicus disagrees with the AGBC's stated position that the elements set out in Question 2 could be read in to section 293, if the section as it is actually written is unconstitutional. Such a remedy would radically intrude upon the legislative function and would be contrary to Parliament's intention, and would, in any event, not cure the unconstitutionality.

B. Question 1 – Breach of the *Charter*

41. Question 1 asks: Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

42. The Amicus respectfully submits that section 293 breaches sections 2(a) (freedom of religion), 2(d) (freedom of association), 7 (liberty) and 15 (equality, in terms of religion and marital status) of the *Charter*. A brief overview on each of these grounds is set out below.

(1) Freedom of Religion

43. Section 2(a) of the *Charter* states that "[e]veryone has the following fundamental freedoms ... (a) freedom of conscience and religion".

44. Section 293 is contrary to freedom of religion in both purpose and effect.

45. The 1890 Act was passed with the plain intention of prohibiting a practice central to the Mormon faith and of buttressing and defending a mainstream Christian view of marriage. The criminal ban on polygamy was further used as part of Canada's colonial

campaign against Aboriginal cultures, specifically by seeking to force them to discontinue traditional marriage practices and take up Christian marriage. The *purpose* of section 293 therefore infringes freedom of religion.

46. The prohibition in section 293(1)(b) against the *celebration* of polygamous marriage is likewise aimed at restricting religious practices. In his Statement of Position (at para. 22), the AGBC characterizes this subsection as addressing “the reality that the harms associated with polygamy are in part based on, and in part exacerbated by, their religious and cultural reinforcement through supposedly binding ceremony and cultural celebration”.

47. Section 293 also infringes freedom of religion in its *effects*. Belief in, and the practice of, polygamy has a nexus with a number of religions, most obviously Fundamentalist Mormonism and Islam. Polygamy also has a spiritual basis in Wicca.

48. For Fundamentalist Mormons, the sanctity of polygamy and the importance of polygamy in achieving the highest level of heaven is a central and defining religious belief. For Muslims and Wiccans, polygamy is a less common and prominent practice, but for believers who do engage in it the importance of it is deep, given that it defines their family and intimate connections.

49. A criminal ban on polygamy is the greatest possible interference with these religious beliefs and practices. Section 293 strikes at the core of freedom of religion.

(2) Freedom of Association

50. Section 2(d) of the Charter states that “[e]veryone has the following fundamental freedoms ... (d) freedom of association.”

51. The law does not criminalize adultery or group sex. The law also allows for no-fault divorce and subsequent remarriage, with the result that it is not rare for a minor to have a number of “parents” in the form of biological parents and stepparents. Through section 293, however, the law criminalizes the formation of committed polygamous relationships.

52. The result is that the law permits many of the activities that underlie polygamy – such as having multiple sexual partners or raising a child with more than one other parent – but does not allow for the more formal creation of groups to engage in those activities. The law permits polygamous *activities*, but forbids polygamous *groupings*. That prohibition of polygamous groupings, contained in section 293, violates freedom of association.

(3) Equality (Religion)

53. Section 15(1) of the *Charter* states that “[e]very individual is equal before and under the law and has the right to the 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”.

54. Section 293 breaches section 15(1) for many of the same reasons as it breaches section 2(a). The provision draws a distinction between religious practices which the state deems to be acceptable (monogamous marriage) and those that are subject to criminal sanction (polygamous marriage). Even if not prosecuted, religious practitioners of polygamy are stigmatized by the law and treated as less worthy of respect and concern.

55. Section 293 is based on an assumption that polygamy is a practice uniformly associated with harm; essentially, that it is “barbarous”. The law is based entirely on presumed, stereotypical characteristics, is not responsive to the actual characteristics of the particular polygamous relationships, and has the effect of demeaning the dignity of practitioners of polygamy.

(4) Equality (Marital Status)

56. Section 293 also breaches section 15 of the *Charter* because it discriminates on the basis of marital status, which is a ground that has been found to be analogous to those enumerated within section 15: *Miron v. Trudel*, [1995] 2 S.C.R. 418 and *Nova Scotia v. Walsh*, [2002] 4 S.C.R. 325. The law draws a distinction between monogamous marriage (which is permitted and indeed defended) and polygamy (which is criminalized). Those who choose a polygamous form of marriage-like relationship are

subject to criminal sanction, based upon an assumption that only monogamy is an acceptable and socially-productive form of relationship. That broad, stereotypical assumption is not at all supported by the evidence.

(5) Liberty

57. Section 7 of the Charter states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

58. Section 293 deprives practitioners and celebrants of polygamy by posing a threat of imprisonment. Furthermore, by banning polygamy, section 293 deprives them of the freedom to make fundamentally and inherently personal choices with respect to their intimate relationships, and so implicates basic choices going to the core of what it means to enjoy individual dignity and independence. Both the threat of imprisonment and the curtailment of a fundamentally personal choice constitute deprivations of liberty for the purposes of section 7: *R. v. Marmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571.

59. These deprivations of liberty are not in accordance with the principles of fundamental justice, in that they were enacted in pursuit of an unjust objective and are arbitrary, overbroad and grossly disproportionate.

60. Unjust objective. The criminal ban on polygamy was enacted in order to curtail a practice that was deemed to be offensive to a mainstream Christian definition of marriage. It was aimed at defending a Christian view of proper family life, and was employed in the state’s cultural colonization of Aboriginal peoples. The ban was first imposed during a historical period when the imposition of Christian norms and values was deemed appropriate, but such an objective is no longer just and compelling in our free and democratic society. Such an objective conflicts with our basic commitment to freedom of religion and opinion, as well as to the protection of our multicultural heritage.

61. In his Statement of Position (at para. 20), the AGBC characterizes the objective of section 293 this way:

Section 293's purpose is to denounce, deter, and punish behavior that is immoral and is (or is reasonably apprehended to be) harmful to women and children of polygamous unions, denigrating to women's equality and children's rights generally, and injurious to social harmony and order, and to the authority of the secular state.

62. The alleged objectives of punishing *immorality* and defending the authority of the *secular* state appear to be associated with the polygamy ban's religious objectives, and in this way are not fundamentally just objectives in contemporary Canadian society.

63. The Amicus disputes that section 293 was enacted for the other purposes alleged by the AGBC – the protection of women (and women's equality), the protection of children, and the maintenance of social harmony and order. The remainder of this outline of the section 7 analysis, however, addresses those objectives in the alternative.

64. Arbitrariness. The AGBC's characterization of the objectives of section 293 is based on stereotypical assumptions that are not supported by the evidence. Section 293 imposes arbitrary deprivations of liberty. There is no clear connection in theory or fact between section 293 and those stated objectives, for the following broad reasons:

a) Protection of women. Section 293 is not aimed at protecting women in polygamous relationships. Rather, section 293 criminalizes "every one" who is in such relationships, including wives in a polygynous relationship. Section 293 criminalizes all polygamous relationships, irrespective of the consent of the women who participate in them. To the contrary, section 293 criminalizes *free consent* to such relationships.

b) Protection of children. Polygamy is not inherently harmful to children. As with any family form (such as two-parent, single-parent or split families), bad things will sometimes happen in polygamous families. Section 293 is not confined simply to those harms, or relationships involving underage brides. Instead, section 293 criminalizes *all* polygamous relationships, regardless of whether a particular relationship causes harm to children or not.

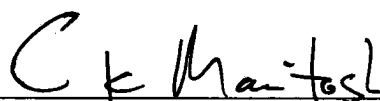
c) Social harmony. There is no evidence that polygamy is inherently associated with social disorder, although the evidence suggests that the

criminalization of polygamy tends to cause polygamous communities to become more insular. The AGBC's contention that polygamy creates a "pool of unmarried men" that is more prone to anti-social behaviour and that polygamy must therefore be criminalized is utterly disconnected from the reality in Canada. Moreover, such a rationale treats women as a resource to be allocated to men so as to pacify them and thereby maintain social order. Such an objective is deeply offensive to women's autonomy and fundamental justice.

65. Overbreadth. Section 293 is vast in its sweep, capturing far more than merely relationships that are characterized by the harms the AGBC alleges are associated with polygamy. Section 293 criminalizes all polygamous relationships, including those where the participants freely consent and where children are raised in a loving and supportive environment. An array of criminal laws exists to target true harms that will at times arise in polygamous relationships, just as they arise in any other family form. The criminalization of polygamy itself goes far beyond any objective that is the proper subject of the criminal law, and is therefore overbroad.

66. Gross Disproportionality. The criminalization of profoundly personal choices, and of a system of family formation that characterizes whole communities, constitutes a grave deprivation of liberty. Moreover, the criminal ban causes polygamous individuals and communities to become more insular and closed, which in turn causes a suite of detrimental effects. Section 293 is aimed at an objective that is offensive to deeply held Canadian values, and in any event the section adds nothing to the protection of the vulnerable in our society. The vast sweep of criminalization effected by section 293 is extreme and is based upon unsupported stereotypes and assumptions as to the nature of polygamous relationships. The deprivations of liberty it imposes are grossly disproportionate to any legitimate objective it might be thought to have.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Amicus Curiae

Dated: November 1, 2010