

No. S097767  
Vancouver Registry

**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*

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**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION  
OPENING STATEMENT ON BREACH**

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Civil Liberties Association:**

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1. The British Columbia Civil Liberties Association (the "BCCLA") was granted standing as an Interested Person in this Reference to argue that s. 293 of the *Criminal Code of Canada* (the "Code") offends fundamental freedoms protected by the *Charter of Rights and Freedoms* (the "Charter"). Briefly put, the BCCLA intends to show that s. 293 violates the individual's right to establish and maintain the form of conjugal and family relationship that best accords with her own ideals and aspirations for domestic life. In this regard, s. 293 of the *Code* impermissibly trenches upon the individual's personal autonomy and her interest in privacy in her domestic affairs.
2. The BCCLA will submit that the two questions posed by Order in Council No. 533 must necessarily be answered in reverse order. The constitutionality of s. 293 of the *Code* can only be tested once the necessary elements of the offence have been ascertained.
3. The BCCLA agrees with and adopts the opening statement of the *Amicus* with respect to the necessary elements of the offence in s. 293 of the *Code*.
4. The BCCLA's position on the constitutional question is that s. 293 of the *Code* offends s. 7 of the *Charter*. Section 293 violates the rights to liberty and security of the person, and these violations are not in accordance with the principles of fundamental justice.
5. The BCCLA will argue that the threat of imprisonment for a polygamist's or polyamorist's choice of conjugal relationship and family structure engages the liberty interest under s. 7 of the *Charter*.
6. Further, an individual's choice of conjugal partner(s) and the family structure in which she decides to live – and may decide to raise children –

is a deeply personal and private matter, a basic manifestation of one's personal autonomy and sense of the good in private life. The evidence filed in the proceeding demonstrates that the criminalization of multi-party conjugal relationships tends to impose serious psychological stress on individuals who freely choose polygamous and polyamorous relationships. This psychological prejudice undermines the dignity of the individual and offends the constitutional right to security of the person.

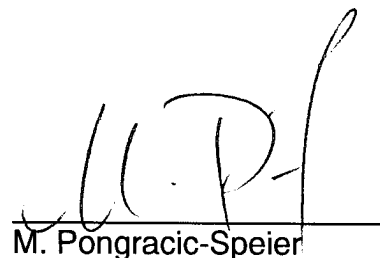
7. The offences to liberty and security of the person are not in accordance with three of the principles of fundamental justice.
8. First, the deprivations are arbitrary. None of the language of the provision, the legislative record, nor the jurisprudential record supports the notion that the true aims of s. 293 of the *Code* are the promotion of gender equality, the protection of children or the promotion of social harmony in a free and democratic state. The language of s. 293 makes it a crime for "every one" to practise, enter into or celebrate a plural union. The legislative record establishes that the provision was enacted to target Mormon polygamists. The jurisprudential record demonstrates that prosecutions under the anti-polygamy provision were used to control behaviour among those perceived to be living inconsistently with Victorian and mainstream Christian social ideals.
9. However, assuming that s. 293 of the *Code* can be construed as at least underpinned by beneficent and *Charter*-affirming values, the requisite theoretical and factual connection between the limitations on liberty and security of the person and the purported legislative objectives are lacking. Section 293 is inimical to free choice in one's domestic relationships. It embodies un-nuanced and patronizing gender stereotypes. It is blind to variety among kinds of plural unions. It rests on an unsupported assumption that plural unions are inherently or generally harmful to

children. The purported relationship between plural unions and social disorder is not borne out by the Canadian experience.

10. Second, s. 293 of the *Code* is overbroad. Assuming the highest and most generous characterization of the purpose of s. 293, i.e. the protection of vulnerable women, children and youth, criminalization of multi-party conjugal relationships between consenting adults is unnecessary to achieve the legislative goal. As set out above, the weight of the evidence does not support the conclusion that freely chosen multi-party conjugal unions tend to be endemically harmful to anyone. Moreover, the state has available to it means far less intrusive than an outright criminal ban on plural relationships to prevent the admittedly serious harms that have arisen in some polygynous relationships.
11. Third, the provision at issue is grossly disproportionate. The blanket ban on multi-party unions is an extreme measure that is unjustified in a society that not only tolerates, but values, diversity in conjugal relationships and family life. Moreover, criminalization of plural conjugal unions is self-defeating, if the state's goal is to prevent or minimize harm. Despite s. 293 of the *Code*, individuals will undoubtedly continue to live in plural unions. The record suggests that the criminalization of these unions promotes marginalization, which tends to reinforce insularity in specially polygamous communities and impedes access to outside support where abuse and violence do occur.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: 1 November, 2010



M. Pongracic-Speier