

**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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**OPENING STATEMENT ON BREACH**

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1. This is the statement of the Canadian Polyamory Advocacy Association (CPAA) summarizing its submissions that section 293 of the Criminal Code of Canada breaches the Charter of Rights and Freedoms.

**Statutory interpretation**

2. According to basic principles of statutory interpretation the elements of an offence must be defined by the ordinary meaning of the words of the statute. Interpreting a statute to add highly specific elements of the offence that are not set out in the statute, as the Attorney General of British Columbia has done in the February 24 Statement of Position, is contrary to the principles of statutory interpretation.

3. The constitutional doctrine of “reading down” a statute under section 1 of the Charter, so that the statute prohibits only constitutionally unprotected behavior, should be applied

only after the normal rules of statutory interpretation have determined the elements of the offence.

### **The Elements of the Offence - polygamy**

4. Section 293(1)(a)(i) prohibits “any form of polygamy”. The ordinary meaning of the word “polygamy” is a relationship where one person is simultaneously married to more than one person at the same time. However s. 293 specifically provides that the “marriage” need not be legally binding.

5. The word “marriage” also suggests a relationship which has been identified or honoured by a specific act such as a ceremony or an agreement by which the parties intended and explicitly expressed the intention to be recognized as married partners. Section 293 would prohibit plural forms of such marriage, whether or not the law recognized the marriage as lawful.

### **The Elements of the Offence – conjugal union**

6. Section 293(1)(a)(ii) prohibits “any type of conjugal union with more than one person at the same time”. The plain meaning of a conjugal “union” is a marriage-like relationship.

7. While section 293(2) says that the prosecution need not prove sexual intercourse in the relationship, the prosecution must still prove a marriage-like relationship involving more than two people.

8. Criteria of a marriage-like relationship would include these collectively:

- an intention to persist; a relationship intended to be brief and fleeting would not qualify
- sexual intimacy at some time in the relationship
- cohabitation

9. People living together as platonic roommates would not be caught by the provision, nor would lovers who live in separate residences.

### **Elements of the Offence - summary**

10. The scope of the prohibition in section 293(1)(a) is very broad but not unlimited. It captures all types of marriage or marriage-like relationships involving more than two people.

11. Section 293(1)(b) also prohibits persons outside the plural marriage-like relationship from engaging in activities which sanction the relationship.

### **The Evidence**

12. This Statement draws on the evidence of the CPAA's affiants, the Amicus, and the Brandeis material of all parties that discusses polyamory.

### **Polyamory**

13. "Polyamory" is the practice of having emotionally intimate, sexual relationships within groups of three or more people, where at least one person in the group has more than one emotionally intimate, sexual relationship at a time and where all members of the group formally or informally adopt these principles:

- a) men and women have equal rights in establishing the configurations of the groups; no gender has privileges with respect to intimate relationships that the other gender lacks
- b) no sexual orientation is regarded as superior to any other.

### **Conjugal Polyamory - common elements**

14. Conjugal polyamory refers to polyamorous relationships where three or more of the parties in the relationship live in the same household.

15. Congugal polyamory is practiced in many different forms described below but certain elements of it are universal. The two aspects of these are the elements described above and which go to the very definition of polyamory: a belief in the equality of males and females and equality of the various sexual orientations.

16. Another common element in polyamory is the belief in openness and honesty within intimate relationships. Polyamorists freely disclose their sexual interactions to people with whom they have sexual relationships. Concealing or lying about one's sexual life is considered a breach of basic polyamory ethics.

17. Those who engage in conjugal polyamory see it as a major dimension of their life, involving significant time, emotional involvement and commitment. Conjugal polyamory is as significant in the lives of those who practice it as religion is to religious people, or politics to political people.

18. Conjugal polyamory is not just an outward practice but an inward component of the sense of self of those who engage in it. The act of cohabiting with other adults in multiple intimate relationships is a powerful and highly creative way of expressing that personal identity. Intimate relationship to conjugal polyamorists is like the canvas to the painter or the page to the author.

19. Conjugal polyamory deviates from social norms only in respect to the number of conjugal partners. In all other respects conjugal polyamorists have lifestyles that are integrated into the mainstream Canadian culture. Conjugal polyamorists do not live in micro cultures or communities where they associate only with conjugal polyamorists. In their child care, work, education, entertainment, and religion, conjugal polyamorists are likely to be surrounded by non-polyamorists.

### **Conjugal Polyamory – specific types of relationship configurations**

20. Conjugal polyamory:

a) can include people all of the same gender and all of the same sexual orientation, and can include people of different genders and different sexual orientations.

b) can exist with three members (the most common number) in two different configurations:

i) a “V” where the person at the center of the V has an intimate relationship with two others, and those others in turn may have V or other relationships as well with others outside the household. In a V relationship, the person at the center may be homosexual, bi-sexual or heterosexual. A common V formation consists of two women and one man with the woman at the center of the relationship having a heterosexual relationship with the man and a homosexual relationship with the other woman.

ii) a triad, where all three parties are intimate with each other.

c) can occur in groups with four or more people, each of whom may have an intimate relationship with all other parties, or only some of the others.

d) can exist in both a single household setting or groups of households; a common example is the single household setting where the participants of the relationship are involved only with people inside that household or with others outside the household who are not engaging in conjugal cohabitation. In rare cases groups of conjugal household are linked with members involved in intimate relationships in both households.

e) usually exists as a purely secular practice without any religious component; in relatively rare cases conjugal polyamorists may seek to celebrate the relationships with a religious rite conducted by religious officials such as the those of the Wiccan church.

f) varies in the degree to which the relationship structure is formalized in written or verbal agreements and in formal or casual ceremonies.

## **Section 293 Captures Conjugal Polyamory**

21. Conjugal polyamory falls squarely within the clear terms of the prohibition of section 293(1(a)). Conjugal polyamory is a “type of conjugal union with more than one person at the same time.” Nothing in the ordinary meaning of the words of the section would exclude conjugal polyamorists.

## **Charter Breaches**

22. Section 293 breaches section 2 as follows:

s.2(a) freedom of religion

Some polyamorists seek to have their conjugal unions sanctified by religious rites and there are religious officials who would conduct such rites, but for the prohibition in section 293. That provision denies conjugal polyamorists their religious rights.

s. 2(b) freedom of expression:

Conjugal polyamory is a deep and meaningful type of personal expression. In criminalizing such expression, section 293 breaches the right of conjugal polyamorists to free expression.

s. 2(d) freedom of association;

Every Canadian lives in a household of some sort. Having the right to choose with whom one can associate in that household must lie at the core of Canada’s free and democratic culture. In prohibiting conjugal polyamorous households with more than two intimate partners, s. 293 violates this core right of conjugal polyamorists.

23. Section 293 breaches section 7 for the reasons set out in the Opening Statements of the Amicus and the BC Civil Liberties Association and additionally, because section 293 helps perpetuate a social bias against polyamorists.

24. An idea deeply entrenched in many minds in our culture is that the maximum number of sexual relationships that is acceptable for any person to engage in at the same time is one. This attitude is similar to the attitude that the only acceptable type of sexual relationship is heterosexual, or that people should have sexual relationships only with members of their own race.

25. The monogamy bias, like the heterosexual and racial bias, is the result of social traditions that are passed on from generation to generation and have nothing but the weight of the past to support them.

26. As the history of Charter jurisprudence in the last thirty years attests, social tradition is not a sufficient basis to justify a breach of fundamental rights. Only if the conduct prohibited causes real harm will the prohibition pass Charter muster.

27. No evidence has been filed in this case showing that conjugal polyamory causes any form of recognized social harm. To the contrary, the CPAA will submit at the hearing that conjugal polyamory is a type of relationship that is socially beneficial in modeling gender equality, openness, honesty, and ethical sexual freedom.

28. Society benefits when it allows maximum freedom to experiment and innovate in the area of personal relationship and love. Polyamory is an example of such a project and is pioneering new forms of relationship.

29. For example, the polyamory community has invented a new word for the English language: "compersion". This refers to an emotion almost unknown in monogamous culture, and is the positive feeling a polyamorous partner feels knowing their partner is experiencing the love and pleasure of another partner. It is the opposite of jealousy, a negative emotion that produces much unhappiness in the world. In experimenting and developing new forms of openhearted loving, polyamorists give society valuable information about new ways to find relational richness.

30. Unfortunately, the monogamy bias interferes with that personally and socially progressive process. Polyamorists are often the target of social stigma in the same way that homosexuals or parties to interracial intimate relationships are and have been.

31. One of the vehicles of the passing of such bias is the law itself. The community rightly looks to the law for guidance on proper behavior. A generally safe assumption is that if the law prohibits something, that thing causes real social harm. But when common social biases become entrenched in the law, the law perpetuates the bias and thereby causes harm, rather than preventing harm. Laws in Canadian history which prevented women from voting or Chinese from entering professions or gays from getting conjugal benefits, are examples of the law perpetuating bias against women, Chinese and gays.

32. Section 293, in specifically targeting *plural* conjugality per se without identifying any type of real social harm, helps enforce the monogamy bias and perpetuates discrimination against polyamorists in a way that violates fundamental justice contrary to section 7 of the Charter.

33. Section 293 breaches section 15 of the Charter in denying conjugal polyamorists the marital status of their choice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: 1 November, 2010

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John G. Ince