

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. 1986, C. C-46**

CLOSING SUBMISSIONS
CANADIAN POLYAMORY ADVOCACY ASSOCIATION

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Summary of argument

1. The Canadian Polyamory Advocacy Association (CPAA) adopts a position between the Attorneys General (AGs) and the Amicus. We agree with the AGs that criminal law can be validly worded to prohibit a specific type of polygamy. But we agree with the Amicus that s 293 is not such law.
2. The plain meaning of section 293 and the narrowed interpretation of the AGs create a prohibition which captures conduct that is either harmless by accepted social

standards or is socially beneficial. Section 293 is seriously overbroad.

3. This constitutional problem arises from the fact that s 293 was enacted 120 years ago using language thought necessary to deal with problems conjectured in 1890 to arise from polygamy but which now captures activity that could not have been contemplated then.
4. The AGs and other Defenders appear to understand the over breadth problem as indicated by their various and changing attempts to narrow the scope of s. 293. But they are limited by the rules of statutory construction which prohibit a wholesale re-writing of the law by a Court. They propose an interpretation of the law that is seriously inadequate because it retains significant over breadth and still fails to include harmful polygamy.
5. The CPAA respectfully submits that only a complete re-writing of the law can produce the highly nuanced wording that both precisely targets harmful polygamy and leaves all other polygamy free. We submit that the wording of the proposed new law, discussed later in these submissions, would not be difficult to craft and would be easily enforceable.
6. We submit that Parliament rather than the Court is the appropriate level of government to effect such an important change in the law. We propose that the Court strike down s. 293 and may recommend to Parliament the wording of a new law that would not be overbroad.
7. The CPAA tendered no verbal evidence; we chose to rely on the written material pertaining to polyamory filed by us and other parties in the case. We propose to use the closing submissions in Court to discuss in detail such evidence.

The history of polyamory

8. Polyamory is described in the materials as post-modern¹ meaning something new and emerging from modern culture. Sexual exclusivity is the norm in most modern conjugal relationships, though often violated through forms of “cheating”. Polyamorists, for various reasons, do not favor monogamy nor its secretive violations and are crafting a new form of ethical and principled non-monogamy.
9. In creating new social institutions that support new ways of relating sexually, the polyamory community has much in common with the feminist or homosexual communities of the last several decades. They seek not to harm modern culture, but to improve it: to create structures where new forms of love and freedom can thrive.
10. Another similarity between the polyamorist communities and the feminist and homosexual communities is that all have had to face an entrenched cultural bias. In the case of feminists it was the bias towards male privilege and power within conjugal relationships; in the case of homosexuals it was the bias towards heterosexuality. Polyamorists face a bias in favour of monogamy, discussed below in further detail.
11. If polyamory is post-modern and monogamy is modern, then polygamy in the form that has been overwhelmingly dominant within the written record of history-- patriarchal polygyny--is pre-modern. The inequality that entitles only the male partner to non-monogamy is contrary to both the modern norms of gender equality and monogamy.
12. The evidence of the legislative history and debates shows that only one form of polygamy was of concern to the legislators of the 1890s, the pre-modern form of patriarchal polygyny.
13. As described immediately below, polyamory consists of a vast range of relationships.

There is no evidence that any of such relationships were known to the legislators of

¹ CPAA Materials, filed Sept 29, 2010, (hereinafter referred to as “Materials”) 263 “The Challenge of post-modern polygamy: considering polyamory” Strassberg, M.

the 1890s or an intended target of their law.

14. While there are sure to have been polyamorous relationships prior to the modern era, the birth of polyamory as a community is generally dated to the publication of Robert Heinlein's novel *Stranger in a Strange Land* in 1961.² It tells the story of a man who forms a religious organization which advocates non-exclusive multi-partner 'nests' through a ritual designed to form strong loving bonds. That book inspired the formation of a community in Northern California in the 1960s which published a Pagan-polyamorous magazine *Green Egg*.³
15. . The word "polyamory" emerged in general use in the 1990s and first appeared in a footnote legal scholarship in 1997 and first appeared in an article in 2000.⁴
16. There are now dozens of scholarly articles on polyamory; just since 2008 three books (all filed in this case) for popular audiences have been published on the subject. There is also a magazine for polyamorists, *Loving More* with 15,000 regular readers⁵ and there are many online publications.⁶
17. There are annual conferences for polyamorists in numerous locations in Canada and the United States⁷ and academic conferences on the subject.⁸
18. There are over 100 local groups supporting polyamorists in the United States, at least ten in Canada and dozens internationally.⁹
19. In July 2009 a major story on polyamory appeared in *Newsweek*: "Only You. And You And You: polyamory – relationships with multiple, mutually consenting partners

² *Understanding Non-Monogamies*, Barker, M and Langdridge, D eds, p.89 (hereinafter referred to as "Barker")

³ *Ibid.*

⁴ Materials p. 18, article: "Beyond Child Bride Polygamy: Polyamory, Unique Familial Constructions, and the Law" Black, C.D.

⁵ Materials p 494, *Newsweek* article July 29, 2009

⁶ *Opening Up: A guide to Creating and Sustaining Open Relationships*, Taormino, T, polyamory 331-335

⁷ Taormino, polyamory 314-5.

⁸ *Polyamory in the 21st Century*, Anapol, D. p 61.

⁹ Taromino, polyamory 316-329.

– has a coming-out party.”¹⁰

20. Absent from this history is any organized social controversy against polyamory. No newspaper advocating the prosecution of polyamorists; no academic studies revealing any personal or social harms flowing from polyamory; no activist groups of disaffected polyamorists.; no criminal prosecutions of polyamorous relationships in Canada or the United States.¹¹
21. Polyamory is not the product of any religious or cultural institution with a historic legacy. Polyamorists are creating relationships in an individualistic, ad hoc and autonomous way without reference to the rules and roles of any cultural tradition.
22. Polyamorists have no separate schools, no industries staffed solely by polyamorists, no religious structure with polyamory as an obligatory tenet. Polyamorists lead mainstream lives in every way except for their multi-partner cohabitation.
23. In terms of the numbers of polyamorists, estimates vary. The *Newsweek* article mentioned above states: “Researchers are just beginning to study the phenomenon, but the few who do estimate that openly polyamorous families in the United States number more than half a million, with thriving contingents in nearly every major city.”¹²
24. Deborah Anapol, author of *Polyamory in the 21st Century* and many other publications on the subject states: “extrapolations from the *Loving More* data estimate that one out of every 500 adults in the United States is polyamorous.”¹³ She also states:
“I’m convinced that the incidence of polyamory is far higher than anyone suspects because so many people keep their private lives private. It’s still the case that most people who are willing to speak out about their polyamorous lives or even stand up and be counted are activists. I often come into contact with people for reasons having nothing to do with polyamory or even sex or relationships for that matter but when they find out that I’ve written books on polyamory and taught seminars, they share their secret lives with me. ...These people seldom feel an affinity with the polyamorous community, may not even identify as polyamorous and would certainly

¹⁰ Materials 493

¹¹ Materials 242 “Crime of Polygamy, Strassberg, M, Materials 183

¹² Materials 494

¹³ Anapol 44

never consider talking to a journalist, not even anonymously.”¹⁴

25. Applied to the population of Canada (34 million) the one in 500 estimate indicates approximately 68,000 polyamorists. However, only a small portion of polyamorists cohabitate in groups of three or more. The informal survey conducted by the CPAA revealed 590 people¹⁵ Due to the informal way that poll was conducted, and the secrecy mentioned by Anapol above, that number must significantly understate the actual numbers of cohabiting polyamorists in Canada today. It far more significantly understates the numbers of polyamorists living today who have ever cohabitated polyamorously in the past.

26. Whatever that number is, it represents a significant number of Canadians and certainly many times more than the numbers of adults (roughly 110) practicing polygamy in the community of Bountiful.¹⁶

The values of polyamorists

27. Polyamory is not only a practice. For most polyamorists, it is a theory of relationships.¹⁷ The focus here is on the values common to those polyamorists who cohabitate in multi-partner committed relationships.

28. The leading article on the law of polygamy and polyamory written by Maura Strassberg discusses such values:¹⁸

“In polyfidelity [cohabiting polyamory] each member of the group is in a primary relationship with, and views themselves as married to, every other member of the group, and members are expected to be sexually exclusive to the group. Polyfidelity views itself as a ‘new marriage form’ which is different from traditional polygyny in its emphasis on individual choice and an egalitarian family. Polyfidelity values ‘individual choice, voluntary cooperation, a healthy family life and positive romantic love’ as well as ‘sexual equality, a non-possession orientation towards relationships, and a widening circle of spousal intimacy and true love.’”

“An important tenet of the polyamory movement is that it is ‘sex positive’ which means that it puts a high value on sexual relations. In fact, some even view sex as

¹⁴ Anapol xii

¹⁵ Cosco Affidavit #2 filed Sept 29, 2010, p.3

¹⁶ Amicus Closing, para 184, note 165, citing Henrich

¹⁷ Materials 70 Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence, Emens, E. F. Materials 27

¹⁸ Materials 183

'sacred'. This positive view of sex extends equally to male and female sexuality. The sex positive orientation of polyamory and its emphasis on allowing relationships to reflect the reality of individual difference and needs also means the polyamory is understood to include the possibility of loving and sexual relationships between people of the same sex as well as people of opposite sexes."¹⁹

"An essential facet of polyamorous relationships is that each of the parties needs to know of and consent to both the possibility and the reality of other relationships within the group. Adding a new partner to an existing family requires a process of group courtship that starts with introducing the potential new partner to all the family members, to the polyamorous values of the family and ensuring that all partners are interested in each other before proceeding. The need for openness and consent at all times makes entering into a polyfidelitous relationship an exercise in self-awareness, communication, conflict resolution and emotional processing. Maintaining the relationship continues to require similar levels of communication, negotiation, emotional honesty and trust. Respect for the individuals in the group requires utilizing egalitarian decision-making processes like consensus or majority democracy."²⁰

29. Those values are reflected in the affidavit of the CPAA filed in its application to participate in the Reference, defining the core principles of polyamory as follows:
- 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.²¹

The benefits of polyamory

30. Nowhere in their submissions do the AGs refer to any of the benefits of polyamory even though the material has abundant reference to them.

31. These benefits are both personal and social. The personal benefits to the practitioners are many:²²

- the expression of personal autonomy over a key domain of life
- the emotional support of more than one cohabiting adult
- the pooling of resources for economic gain
- providing children with a diversity of adult relationships

¹⁹ Materials 243-4

²⁰ Materials 244-5

²¹ Duff Affidavit #1, p 1-2

²² Materials 246, Strassberg

- distributing the burden of child care and home chores beyond two adults
- an alternative to sexual dishonesty and cheating common to monogamous relationships

32. There are important social benefits too.. Society benefits by encouraging responsible and respectful experimentation and innovation in all aspects of life, especially the social and relational realm. It is through that process that women acquired access to advanced education and the right to vote and to own property,. This process led to the end of lawful marital rape and the beating of children, and gave homosexuals the right to marry. Only an openness to new ways of relating, to moving beyond traditional relationships, can bring such progress.

33. In experimenting and developing new forms of openhearted loving, polyamorists give society valuable information about new ways to find relational richness. In a troubled world, anything that promotes new ways of loving is a good thing.

34. For examples, the polyamory community has developed rich strategies for managing jealousy, a negative emotion that produces much unhappiness in the world.²³

Polyamorists have even invented new language to describe emotions that counter jealousy. “Compersion” is the positive feeling a polyamorous partner can feel or even cultivate knowing their partner is experiencing the love and pleasure of another partner. Anapol states:

“just having a concept that acknowledges that you have an alternative to feeling jealous can go a long way toward transforming jealousy. It really is possible to feel joy and expansion rather than fear and contraction in response to a loved one’s sharing their love with others, as thousands of people can attest. But it is not always easy.”²⁴

Conjugal styles

35. One of the defining features of polyamory is the heterogeneity of its conjugal styles:

- a) number of people: three or more
- b) gender: all female, all male, majority female, majority male
- c) sexual orientation: all heterosexual, all homosexual, all bisexual, or a mix of

²³ See Chapter 6 “The Challenge of Jealousy”)

²⁴ Anapol 122

heterosexual and/or homosexual and/or bisexual.

d) formalization: no formalization, contract formalization, ceremony formalization, religious formalization

e) duration: the early pioneer of polyamory Oberon Zell has been married to his wife since 1974 and the relationship included a live-in triad relationship of ten years and a larger group of the same duration;²⁵ the affiants for the CPAA have current cohabiting relationships of 2-3+ years.

36. A distinguishing feature of polyamory is the high proportion of bisexuals. In a monogamous relationship bisexuals must restrict their sexual activity to one gender. Polyamory allows them to engage with both genders and thus express their bisexual orientation. Anapol refers to two surveys from the 1990s showing “ a high incidence of bisexuality.”²⁶ A survey conducted by Taoromino reported 38 percent bisexuality.²⁷ In a study of 217 bisexual adults, 33% were involved in polyamorous relationships.²⁸

37. The AGBC seems not to understand the significance of bisexuality in polyamory for he has repeatedly mentioned the CPAA poll and interprets it as showing “heavy preference for polygyny over polyandry or same sex-relationships.”²⁹

38. A common polyamorous configuration is a FFM triad. That could be polygynous in the sense that the man has two sexual partners and the women only one (each with the man). But it could also be a completely different arrangement with one bisexual woman having a male and female partner. That latter configuration is not “polygyny” but the AGBC erroneously assumes it is.

39. In the informal poll conducted by the CPAA the FFM relationships totaled 69 and MMF 25, but in all the configurations there were also 53 FF pairs. As Cosco explained in her Sept 29 affidavit: “in at least 31 of the households, females had

²⁵ Anapol 1

²⁶ Anapol 41

²⁷ Taoramino xxii

²⁸ Materials 475, “Therapy with Clients Who are Bisexual and Polyamorous” Weitzman, G

²⁹ AGBC Clsoing para 255

relationships with other women which were considered separate from the male in the household.”³⁰. The number of “polygynous” relationships reported by the CPAA poll is not 69 but 38. Further, the poll indicates that the absolute numbers of men and women in polyamorous cohabitations is not significantly different: 322 females and 246 men.³¹

40. The CPAA filed approximately 1500 pages of material in this Reference, including popular articles and books, and legal and social science studies. In all of that material there is not one reference to the preponderance of women in polygynous relationships in polyamory. If that polygynous style was preponderant to any significant degree, it would have been noticed and commented upon, as have other congruences, such as with bisexuality. As Strassberg concludes: “Such ‘postmodern polygamy’ might occasionally look like traditional patriarchal polygamy, but it differs in important ways. *For example it could as easily encompass one woman with several male partners as it could one man with multiple female partners.*”³²

41. As with gender and sexual configurations, there is a great deal of diversity in the extent to which polyamorists seek to formally celebrate their relationship, such as through a religious rite. One study reports:
“While no reliable statistics exist about polyamorous people’s religious affiliations, many interviews linked polyamory with their spiritual paths. Some sought churches that were ‘more tolerant of alternative lifestyles’ such as Unitarian Universalism. Various Neopagan and Earth-centered spiritualities offer polyamorous ‘handfasting’ and commitment ceremonies.”³³

42. In BC the Wiccan Church would conduct religious marriage ceremonies for polyamorous groups but does not do so for fear of prosecution under section 293.³⁴ An affiant for the CPAA does not consider a Wiccan ceremony an option for her,

³⁰ Cosco Affidavit #2 para 9

³¹ Cosco Affidavit #1 p 19

³² Materials 265, Strassberg, emphasis added

³³ Barker 90

³⁴ Wagar Affidavit p 4

because of the perceived impact of the law.³⁵

43. In the CPAA poll 23% of the respondents indicated that they did not participate in a rite, ceremony or contract that sanctioned the relationship because of the existence of s. 293, but 37% of the respondents did participate in such a ceremony or contact and had witnesses who celebrated or assisted such sanction.
44. The evidence is clear that there is a significant interest in some type of formalization of polyamorous conjugality, and that actualizing that interest is significantly thwarted by s. 293.

The scope of section 293

45. For the reasons set out in the Closing of the Amicus, the CPAA submits that s. 293 captures conjugal polyamorists and that the attempts by the AGs and other Defenders to narrow the interpretation of the provision ought to be rejected by the Court.
46. The AGs' interpretation capture a significant range of conjugal polyamory, and part of that arises from the vagueness of the elements proposed by the AGs.
47. For example, the AGBC articulates these elements of the offence: "the trappings of duplicative marriage" which "need not be defined in advance" but means "at least" conjugality that "purports to be a marriage"³⁶
48. The inadvisability of re-writing law through the judicial process is evident in this reading. Note the extreme generality of such key phrases as "the trappings of duplicative marriage" or "purports to be a marriage." Such terms could reasonably capture parties who called each other "husband" or "wife" and who signed a private "contract" governing their relationship and who publicly celebrated their union with a party. A significant number of polyamorous groups would be included in such terms.

³⁵ Duff Affidavit #2 para 52

³⁶ AGBC Closing para 100

49. The AGBC says that a relationship purports to be a marriage “including” when it is or purports to be a pairing sanctioned by some authority and binding on its participants. By using the word “including” the AGBC makes clear that the “sanctioned by authority” element of the offence he proposes is not exclusive and that relationships with marriage trappings not involving binding authority are caught. But he never defines such marriages.
50. But even the “sanctioned by authority” limitation is not narrow, given the broad scope of the terms used to define it. The AGBC says that “authority” means “some mechanism of influence” that can be religious or purely secular that “imposes some external consequences” on the relationship.
51. The AGBC specifically includes a “binding contract” and quotes the Amicus expert Drummond that historically there needed to be “*some form of contract which they might suppose to be binding on them*”³⁷
52. The AGBC also muddies the definition by introducing other possible elements. For example, the AGBC says polyamorists are excluded from the prohibition because: “none of the relationships has been of *long-standing* (it appears the longest has endured three years), none involves a sanctioning authority or external influence, and the parties appear to *consider themselves bound only as long as they choose*.”³⁸
53. So according to the AGBC criminal conjugality requires that the relationship be of “long standing”. This is a new element not previously mentioned. No principled basis for the segregation of relationships into “long standing” and “not long standing” is offered. Such an element introduces a new uncertainty into the proposed law.
54. The “bound as long as they choose” element suffers the same problems. Consider an actual family where the parties agreed:
- a) to stay together indefinitely;

³⁷ AGBC Closing para 101, emphasis added

³⁸ AGBC Closing para 126, emphasis added

- b) to an accord to work through even major relationship problems rather than to dissolve the triad;
- c) to an understanding that their relationship will persist regardless of circumstantial changes, such as changes of health, changes of financial circumstances, and changes of work;
- d) that under their agreements and as a matter of practicality, it is possible for any one or more to leave the triad, thus reducing it to a couple or to three single persons but that any such action would be a final resort, comparable to a monogamously married person seeking a divorce.”³⁹

55. On this fact situation is the family bound or not? It is uncertain. As the AGs themselves noted, the law needs to provide a clear standard. These additional concepts introduced by the AG do not provide that.

56. Perhaps the AGBC did not mean to introduce new elements in his discussion of polyamorists. Then he should not be claiming that polyamorists are not prohibited. We will see (two paragraphs below) the AGC do the same thing: create broad prohibitions which seem to capture much polyamory but then under specific analysis are said not to apply to polyamorists because they do not meet new criteria which narrows the broad definitions. The AGs resort to sophistry to try to conceal the overbreadth and ambiguity of their proposals.

57. The AGC advances slightly different elements of the offence than the AGBC:

- a) a marriage ceremony or other sanctioning event
- b) the participants are “bound together” in a “marital structure”.⁴⁰

58. But even those specific elements are later muddled when the AGC states that polyamorists are excluded from the AGC interpretation of s. 293 because there is no evidence in the CPAA affidavits that a “single polyamorist was *actually married* to more than one person at the same.”⁴¹ Is “actual marriage” different than being “bound together” in a “marital structure”? Or is “actual marriage” a shorthand term for

³⁹ Bashinski affidavit para 44, 90

⁴⁰ AGBC Closing para 222

⁴¹ AGC Closing para 333

those other concepts? Such statements illustrate the inadequacy of invoking elements as nebulous as “marital structure” or “actual marriage” in crafting clear criminal law.

59. Many polyamorous families have contracts that define the terms of the relationship, including the financial consequences of breakups. Consider the agreements of the CPAA affiant John Bashinski. His family entered into “agreements” described above along with these terms:

- a) an obligation of affirmative concern, in all our actions, for the stability of the family and for the desires, concerns, feelings, and well-being of all family members; and
- b) an obligation of continuing financial support for an appropriate period of time should the triad be dissolved.⁴²

60. Bashinski also states:

- a) “Under our agreements and as a matter of practicality, it is possible for any of us to leave the triad, thus reducing it to a couple or to three single persons. We agree that such an action would be a final resort, comparable to a monogamously married person seeking a divorce.
- b) We have established an agreement regarding ongoing support for triad members, and particularly for Ms. Joyce, in the event of dissolution of our triad or death of a triad member.
- c) We have agreed that dissolution of our triad would not reduce any of our obligations or privileges toward Kaia.”⁴³

61. Bashinski presents an example of a group relationship that is not mere cohabitation. Serious commitments are made, intended to occur over a long-term, and are formalized into specific contractual provisions including those of financial support which surely could be enforced in the courts. Bashinski and his partners cannot merely walk away from the relationship without legal ramification. Contractual commitments endure after cohabitation has ended.

⁴² Bashinski Affidavit para 44

⁴³ Bashinski Affidavit para 90-92

62. The generalized wording of the AGBC surely captures such arrangements.
63. However the relationship could escape liability under the proposal of the AGC because it lacks a ceremony or other sanctioning event. But to attract such liability Bashinski and his partners would only have to conduct some form of ceremony, such as a celebratory party or a Wiccan rite. Yet others in the same position as Bashinski who did not hold such an event would escape criminal liability. The law is brought into disrepute when such artificial distinctions, so uncorrelated with any known form of harm, determine who is guilty and who is not.
64. The desire on the part of some polyamorists to engage in formalization rites is not speculative. The Duff affidavit shows an interest in a Wiccan ceremony, the Detillieux affidavit shows a desire to participate in a ceremony,⁴⁴ the Bashinski affidavit also notes that they “often speak of a ceremony and have the desire to act on this idea”, and the CPAA poll showed that significant numbers of polyamorists actually have engaged in some form of formalization or want to but desist for their fears about the reach of s. 293.
65. The solutions proposed by the AGs are not adequate to clearly exclude conjugal polyamory from the scope of s. 293 as it is often practiced. While they would exclude multiple parties merely cohabitating without any intentional agreements of any sort, and no ceremony of any sort, all other group conjugal arrangements would be criminally suspect.
66. Surely the law should want to encourage intentionality and commitment in conjugal relationships. No evidence has been tendered showing why casual and informal conjugal relationships should receive the protection of the law, while more formalized relationships should be criminalized. Indeed, as discussed later, examples of such informal relationships that are harmful can easily be imagined.

Charter breaches

⁴⁴ Detillieux Affidavit para 38

67. The CPAA adopts the analysis of the Amicus with respect to the breaches of section 2(a) (freedom of religion), 2(d) (freedom of association), 7 (fundamental justice) and 15 (equality – religious and marital status) caused by s. 293 as plainly worded, or as interpreted by the AGs. The CPAA also adopts the submissions of the BCCLA on section 7.
68. Freedom of Religion: The evidence indicates that polyamory is largely a secular phenomenon. However the evidence also indicates some polyamorists who do favor religious ceremonies, such as those offered by the Wiccan church, which when coupled with a formal agreement, would be captured by the AGs' narrowed interpretations of section 293 as well as the plain wording of that law.
69. S 293 also stifles the development of religious culture within the polyamorous community. That community is emergent, in the same way that the feminist and gay communities once were. Its social organization is nascent. A broad range of support groups, information centres, and advocacy groups now exist which were unknown twenty years previously. The CPAA itself is the first national organization in Canada formed specifically to advocate for polyamorists. As the history of polyamory shows, many polyamorists see their polyamory as having religious significance. In the same way that secular polyamory is developing, so will polyamorous groups, who are Christian or pagan or of another faith, synthesize their loving family configuration, including their beliefs in gender equality and self-determination, with the tenets of their faith.
70. The development of religious traditions are obviously enhanced by the ability to freely practice them. The exercise of religious rites is an advertisement for them. If polyamorists could observe religious rites celebrating their relationships, they would be more likely to engage in such ceremonies.
71. In contrast, where ceremonies are prohibited and either not practiced at all or driven underground, far fewer people are exposed to them and hence such practices are unlikely to flourish. Criminalization of religious rites radically impairs the ability of polyamorists to experiment and innovate new forms of religious ceremonies. S 293

and its interpretation by the AGs directly attack the section 2(a) rights of polyamorists.

72. Freedom of expression

The law and the AGs interpretation of it does not confine its attack to *religious* ceremonies and formalities. Purely secular ceremonies and formalities are also caught. Such ceremonies occur, in part, to convey meaning to an audience.

73. That meaning can range from simply telling the attendees of the event, and the people who the attendees will tell, about the love and commitment the conjugal parties share. Or it can have wider expressive meaning. Any public celebration of a relationship expresses the value and legitimacy of the relationship. Conducting public ceremonies is form of public education about polyamory and its value to individuals and the society at large. This is precisely the type of expression section 2(b) was meant to protect. S 293 directly breaches that right.

74. Other Charter breaches

The CPAA adopts the argument of the Amicus that s.293 shows clear violations of the Charter protections of freedom of association, fundamental justice and equality rights. Any law which prohibits conjugal relationships on the basis of criteria which includes the number of partners must violate those Charter sections for the reasons the Amicus gives.

75. Our freedom to choose who we love and live with must be a freedom that ranks at the top of all freedoms that any democratic society protects. No area of life is more intensely personal, governed by such highly idiosyncratic values, tastes and desires. No other area of life is so deeply felt. Nor is it purely a private and personal affair, but the family is a socially recognized entity which is recognized in many forms. In our respectful submission, the Canadian Charter could not have omitted protection for this most personal and valued domain of life.

Harm generalizing

76. No right, however high it ranks in a democracy, is immutable but the prohibition must be proportional to the harm. That requires that governments demonstrate that each type of conduct it prohibits causes or excessively risks harm. What the government cannot do is apply the harms arising from one type of conduct to justify the prohibition of another for which that harm is not adequately demonstrated.
77. The submissions of both AGs' demonstrate the constitutional error of *harm generalizing* – applying the harms arising from one discrete and identifiable target of prohibition only, to all targets of the prohibition, including those where there is no evidence that those harms are related to their practices. There is no example of the Supreme Court of Canada considering a prohibition of constitutionally protected conduct that captures a number of separate and easily identified groups some of which cause harm and some which do not, and then allowing the prohibition to apply to the group not causing harm.
78. It is true that in exceptionally rare cases where the law cannot be written so as to distinguish harmful from non-harmful conduct the harmless conduct may be caught as in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, or even possibly in the prohibition on sexual conduct with minors (mentioned in the former submissions of the AGBC).
79. But s. 293 is not one of those rare laws. It captures people in radically different family circumstances, who have very different harm profiles, and who can be easily identified.
80. Consider, for example, the argument of the AGC that multiple marriage of a group of lesbians is prohibited by s. 293. There is no evidence in this case that lesbian triads cause any form of harm. The failure to connect the prohibition with harm violates the most basic precepts of constitutional decision making.

81. A conjugal group consisting of all lesbians is readily distinguishable from a conjugal group of all heterosexuals or all gay males. Because such groups are easily definable the government can only validly attack them when it has evidence against them. It cannot simply borrow the harm from one group and apply it to another.
82. Similarly, a polygamous triad with a bisexual woman at the center who is partners with the other woman and the other man is readily identifiable as different than a triad with a heterosexual man in the center with relationships with the two other heterosexual women. The sexual bond between the women in the former relationship frees them from the sexual dependency upon the man. Their bond limits the potential dominance of the man. It is inappropriate to apply the risks arising from a relationship with the man at the center to a relationship with a woman at the center.
83. Conjugal relationships that include young children pose very different risks than those without children. A great deal of the evidence in the AGs' case concerns the welfare and protection of children. Yet in crafting a prohibition the AGs make no distinction between families with children and without.
84. The law is full of examples, often to do with sexual behavior, where the mere presence of children attracts a prohibition where their absence does not. A polygamy prohibition could easily be crafted to capture certain families with children for which there is an apprehension of harm and exclude those without.
85. There is one harm identifier that ranks above all others in isolating the types of polygamy that cause harm or an impermissible risk of harm: polygamy which has as its "defining feature" (to use the words of the AGBC para 265) gender inequality. In such "patriarchal polygyny" the parties believe women as a gender have no rights to multiple conjugal partners, and men as a gender do have such rights. The vast quantity of the evidence of harm or risk of harm in this case concerns only such patriarchal polygyny..

86. Such families are readily distinguishable from all other forms of polygamy and that fact can be easily identified from the statements of the polygamists themselves such as at ceremonies or in private communications, or even more readily in the ideology of the institutions in which such families participate.

87. Polyamorous families reject such gender inequality. It violates their basic precepts about gender equality and personal choice, and those facts are readily ascertainable in any individual case. The harms arising from patriarchal polygynous relationships cannot be generalized to families that are not patriarchal.

Actual harm

88. Most of the criminal law focuses on behaviors that cause *actual harm*, such as murder, theft, fraud. The vast portion of the evidence in this case involves not actual harm but only the speculative risk of harm. The latter is more remote and thus carries less weight in justifying the violation of Charter rights. But where there is actual harm caused by the target of a prohibition the government's case is much stronger. Is there evidence of actual harm in this case?

89. We can find only one type of polygamy where the evidence in the case indicates that harm goes further than mere speculative risk: patriarchal polygynous families with children. We think that such families have the increased potential to damage their children in so significant a way that a government could validly prohibit that type of multiple conjugality. The Amicus disagrees; and we part company with him but only on this issue.

90. Where children grow up in a family and every day they see that men as a gender have a dramatic privilege - two or more spouses – that is denied to women as a gender, they cannot help but acquire a belief in the inferiority of women. That false belief is a real harm imposed on every child raised in such an environment. Gender inequality is the defining characteristic of the multiple spousal arrangement in a way that polyamory or monogamy is not.

91. There are limits on the degree to which the criminal law can prohibit institutions which practice gender inequality, as in the Catholic Church which prohibits the ordination of women. Such practices must also influence the children who attend the Catholic Church. While that Church is an important institution in the lives of many families, its influence upon them is not nearly as powerful as that of a patriarchal polygynous family. The message of gender inequality is much more diluted. It is hard to image an institution more able to indoctrinate a child in the noxious belief of female inferiority than a patriarchal polygynous family.
92. The CPAA concludes on this issue that patriarchal polygynous families cohabiting with children appear to have a significant risk of causing real harm and that such harm needs to be weighed in considering the validity of a prohibition against such polygamists.
93. It would not be difficult to craft a nuanced prohibition that is easily provable that specifically targets such harmful polygyny. The CPAA proposes the following elements could be constitutionally valid:
- a) three or more adult persons cohabit conjugally, who are raising children, and who are not mere roommates
 - b) one or more of the adult persons believe that one gender is entitled to have multiple sexual partners but the other gender is not, a fact that can be proved by statements of the persons, or their participation in the activities of a community which promotes such a belief, as revealed by statements of its leaders, or by that community's writings and documents.
94. This prohibition does not require proof of marriage ceremonies, or binding agreements or external consequences. It would thus capture informal patriarchal relationships which the AGs would not. To sustain a conviction the prosecution need only show conjugal cohabitation by three or more adults within a culture of gender inequality as specified. Such a definition would capture the FLDS families with children in Bountiful, the Islamic polygamists in Toronto and would effectively shut down cultures of harmful polygamy in Canada.

95. It would leave all other polygamists free to engage in the family arrangements of their choice. It would not require defining “exemptions” to the law (such as for “polyamory”). Rather the limits on the over-breadth are contained with the identifiers of the harmful conduct.

96. The AGBC never deals with such a solution. The closest he comes is this:⁴⁵

“Consider the idea of polyamory urged by the CPAA at para. 13 of its Opening Statement, where the defining characteristic is said to be that “all members of the group formally or informally adopt” principles of equality between genders and among sexual orientations. If the criminal law can legitimately address polygamy at all, how could its application truly depend on an assessment of the degree to which participants have “adopted” certain laudable “principles”? Could a “polyamorous” relationship become criminal polygamy simply because one member of such a grouping decides that he or she no longer believes in principles of equality? Could a criminally-polygamous individual escape section 293 simply by “formally adopting” a commitment to such principles?”

97. The CPAA has never proposed that the law be written as the AGBC suggests. The concept of gender equality can be introduced without “an assessment of the degree to which participants have “adopted” certain laudable “principles”. We agree that such an assessment would be entirely inappropriate for the criminal law. It is too uncertain and unenforceable.

98. We agree with this analysis of the AGBC⁴⁶:

“It is not necessary to “hive off” or exclude something called “polyamory” from the Criminal Code’s prohibition of “polygamy”. This is not an exercise in subjective self-definition. There have been many defining distinctions suggested for “polyamory”: the degree of consent, the “loving nature” of polyamorous relationships, the “honesty” of the participants, their assertedly “egalitarian” design or absence of patriarchal trappings. None has legal coherence.”

The CPAA has never suggested that the law be crafted by “hiving off” specific exemptions. The proper solution is not to create a general prohibition and then “hive off” specific exemptions, but to define the prohibition narrowly to target demonstrable

⁴⁵ AGBC Closing para 319

⁴⁶ AGBC Closing para 318

harm, and leave all other relationships free.

99. Why would the AGs propose inadequate elements based on generic concepts of marriage formalization and binding agreements all of which lack legal coherence as described above, when there is a much better solution, based on actual gender inequality in the prohibited relationship?

100. The obvious answer is that having decided to defend the existing statute the AGs are limited by the law of statutory interpretation and “reading-in” from straying too far from the original legislative terms. Their existing interpretation already in our view breaches those principles, but our proposed solution clearly goes further in introducing an entirely new concept into the law. The solutions offered by LEAF and the BCTF, in restricting s 293 to cases of “exploitation”, suffer from the same defect.

101. In our view good law in this case cannot be crafted through the judicial process. A fresh start is required and Parliament has the sole authority to do that.

102. The difficult question is whether this Court should give the opinion to Parliament that a proposal such as we advocate would be constitutionally valid. Do the harms it prevents outweigh the violation of the rights it causes? The CPAA can see strong arguments on both sides of the question. The matter is so difficult that the CPAA has not taken a final position on that.

Risk of Harm

103. But we do take a position with respect to any type of polygamy not caught by our proposal. Such polygamy creates at worst only a speculative risk of harm which is far too remote to justify the breach of Charter rights. We adopt the arguments of the Amicus on that issue and will not duplicate them here.

104. We will discuss just one example of the speculative risks touted by the AGs as specifically applying to polyamorists. The AGC states:⁴⁷

⁴⁷ AGC Closing para 334-336

“Third, even if a polyamorist had entered into multiple marriages, there is no reason to believe that the absence of a religious motivation for doing so, or the presence of a professed belief in equality would somehow mitigate the harms to the individual participants, their children and society in general that are associated with multiple marriages.

“For example, the evidence of the Amicus’s expert, Dr. Shackelford, suggests that domestic violence is overwhelmingly more common among nonrelated cohabitants. Using Dr. Shackelford’s data, Dr. Henrich concluded that intra-familial violence, abuse, child mortality, neglect, stress levels, and sexual jealousy will be almost certainly worse in polygamous families whether they are religious or not.”

“Given that – like religious polygamy – polyamorist polygamy necessarily involves an increase in the number of non-related cohabitants, there is no reason to expect that the predicted increase in associated harms would apply with any less rigour than it would in the context of religiously motivated polygamy.”

105. If the evidence presented above is meant to show that multi-partner families *in general* presents an increased risk of certain types of harms--particularly domestic violence against children--compared to families *in general* with only two biological parents, it is potentially correct. Without making any distinctions as to the types of multi-partner families or families with two biological parents, there seems to be an elevated statistical risk of this harm in the former.
106. But as the Amicus discusses⁴⁸ that elevated risk is one that society accepts in every other context in which it appears, such as in families with step-parents or adoptions. A risk that society accepts as normal and inevitable is precisely not a risk that can justify serious infringement of rights.
107. The argument of the AGC is defective for another reason: to say that a polyamorist family poses an identical risk to children as a patriarchal polygynist family defies common sense. It is objectionable that the AGC should conflate these entirely different family realities.
108. There are many reasons that children in a polyamorous family with non-genetically related parents, would have a better level of safety than in a religiously motivated patriarchal polygynous family and may even have a better level of overall risk statistically than in step-parent families (which Canada is not considering

⁴⁸ Amicus Closing, para 283

criminalizing):

a) in patriarchal polygynous families, children learn that women are inferior to men and that the interests and “rights” of a male, particularly in relations to a girl are far more important than in a family where a child learns that the genders are equal and everyone is entitled to free choice;

b) conversely, there is a high emphasis in polyamorous culture on gender equality, good communication, self-determination and dealing with issues in an open and honest manner. Children learn that these values are important and incorporate them for themselves;

c) it is quite likely that some step parent families who are monogamous are themselves patriarchal in orientation, such that control and domination issues arise vis a vis children more readily than in polyamorous families in which a more egalitarian culture is valued;

d) polyamorous families may often consist of two biological parents and a non biological parent. Abuse by a third party is not as easy to hide where there are more adults around. There is also less dependence on any one partner economically or emotionally, so abuse can be more easily dealt with.

e) step-parent families often deal with difficult situations involving co-parenting with “ex” partners which lead to increased stresses for some of those families. This is not necessarily the case in polyamorous families with an extra non-related adult. There may be no “ex”, or there may be an “ex”, but given the values of communication and of self-determination, polyamorous culture also values separating “in love” and maintaining friendly relations afterward where possible.

Harms of overbroad law

109. The law itself can be an instrument of harm and this too must be considered by the Court in determining the constitutionality of the law. An overbroad law is harmful not

just in denying the rights of the people improperly caught by the law, but in misleading the community about them.

110. The community rightly looks to the law for guidance about threats and dangers in the world. A generally safe assumption is that if the law prohibits something, that thing causes real harm. But when the law paints a broad brush, and that captures both people causing harm and people causing no harm, the law wrongly stigmatizes the latter group.
111. In targeting conjugal relationships simply on the basis of their multi-partner status the law teaches that *all* such relationships are harmful and that *all* practitioners of such relationships are worthy of social disapproval and stigma. That in turn fuels a bias against all forms of non-monogamy in the culture. The AGs' analysis, in failing to make important distinctions that the evidence calls out to make, reveal that very bias.
112. An important aim of the Charter is to remove bias and prejudice in our culture and courts have helped advance that honourable goal by striking down overbroad law. In our respectful submission this Court should do the same in this case by setting aside s 293 and recommending to Parliament a law that prohibits only harmful polygamy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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