



No. S-097767
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

REPLY OF THE INTERVENER

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1. Parliament has the constitutional authority to define marriage. This is acknowledged implicitly in the submissions of the Amicus Curiae ("Amicus") (at paragraph 673), the British Columbia Civil Liberties Association ("BCCLA") (at paragraph 133) and the Canadian Polyamory Advocacy Association ("CPAA") (at paragraph 101). However, none of the Amicus, the Fundamentalist Church of the Latter-Day Saints and James Older ("FLDS"), the BCCLA and the CPAA (collectively, the "Challengers") address Reference re Same Sex Marriage, [2004] 3 S.C.R. 698, where the Supreme Court of Canada held that the definition of marriage as "the union of two persons" is "consistent" with the *Charter*. This interpretation of the law of the *Charter* is no less binding simply because the Challengers have ignored it. The Challengers cannot succeed with an argument that the limitation of marriage to just two people is inconsistent with the *Charter*.
2. It logically follows that the Challengers cannot question a *Criminal Code* provision based upon, and enacted in support of, the definition of marriage established by Parliament and approved by the Supreme Court of Canada. Section 293 of the *Criminal Code* is the enforcement clause of the definition of marriage.
3. The submissions of the Challengers do not suggest that section 293 of the *Criminal Code* is, on its face, inconsistent with the *Charter*. Instead, the Challengers have focussed on the question of proof of harm. That question need not be addressed in order to fully answer the Reference questions. This is because it is appropriate for a court to defer to Parliament's view of harm, absent evidence of bad faith or colourability.
4. Nevertheless, the actual and potential harm of polygamy is well-established in the evidence before this Court. Evidence of such harm is also acknowledged in large part by the Challengers.
5. In the closing submission of the Amicus there is criticism of some expert witnesses on the basis that they lacked experience or on the basis that they were retained to find harm.

This cannot apply to Dr. Grossbard. She began her study of polygamy 35 years ago. At the beginning of her journey, she hypothesized that polygamy was a neutral factor with respect to the economic well-being of women. However, after more than three decades of extensive study, literature review and authorship (detailed in Exhibit "A" of the Affidavit of Dr. Grossbard), Dr. Grossbard independently concluded that polygamy has numerous negative impacts on the economic well-being of women and children and that the potential harms are, to some degree, avoided in Canada through the prohibition of polygamy found in section 293 of the *Criminal Code*. In its submission, the Amicus elected not to directly challenge the opinion of Dr. Grossbard.

6. The majority of the Amicus' argument is based upon an attempt to show that section 293 could be better drafted or is unnecessary. In particular, it is argued that section 293 is unconstitutional because: (1) there are instances where there is no harm in polygamous marriages; (2) there are instances of harm in monogamous marriages; (3) there is a low occurrence of polygamy in Canada; and (4) the harms associated with polygamy may be addressed through other provisions in the *Criminal Code*. These are not constitutional arguments based upon provisions of the *Charter*. Instead, these are policy and political arguments that belong in Parliament, not in a court of law.
7. The arguments advanced by the Challengers do not establish that any section of the *Charter* has been violated by section 293. Therefore, there is no reason to consider or apply the tests outlined by the Supreme Court of Canada under section 1 of the *Charter*.
8. For the following reasons, the arguments of the Challengers fail to establish any constitutional imperfections in section 293 of the *Criminal Code*:
 - a. the Supreme Court of Canada decision in the *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698, specifically addressed the limitation of marriage to "the union of two persons" and declared that limitation "consistent" with the *Charter*,

- b. the Challengers have not identified any *Charter* section that is violated by section 293 (they have only identified circumstances where a court may choose not to apply section 293 – those issues are not before the Court in this Reference).
 - c. the decision of Parliament to prohibit polygamy is not made in bad faith and is not colourable (unlike Reference re: Dairy Industry Act (Canada) S. 5(a), [1949] S.C.R. 1, at page 54, there is overwhelming evidence of harm); and
 - d. the *Charter* cannot be applied to limit the power of Parliament to define and protect marriage (like voting age – the number of spouses determined by Parliament is not subject to question in a court of law, absent evidence of bad faith or colourability).
9. Certain individuals trapped in polygamy have been presented as witnesses for the Challengers. While great sympathy and respect is due each person who survives within a polygamous community, the opinion of an individual cannot have any constitutional consequences. No Canadian can in law consent to slavery.
10. Section 293 of the *Criminal Code* protects the rights of Canadians to be truly free within society.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of March, 2011.



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