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No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

WINSTON KAYE BLACKMORE

APPLICANT

NOTICE OF APPLICATION

ON NOTICE TO: Crown Counsel
Special Prosecutor
Harper Grey LLP
Barristers and Solicitors
3200 Vancouver Centre
650 West Georgia Street
Vancouver BC V6B 4P7
Attention: Terrence L. Robertson, Q.C.

TAKE NOTICE that an application will be made by Winston Kaye Blackmore (the "Applicant") to the presiding judge at the courthouse at 800 Smithe Street, Vancouver, British Columbia at a date and time to be determined for the following orders:

1. That the prosecution for the charge that Winston Kaye Blackmore, between on or about May 1, 2005 and on or about December 8, 2006, at or near Creston, in the Province of British Columbia, practiced a form of polygamy, or practiced a kind of conjugal union with Christina Maud Blackmore, Mary Anne Blackmore, Marjorie Johnson, Susan Eleene Gallup, Harmony Quinton, Marsha Carol Chatwin, Zelpha Chatwin, Ruth Ann Lane, Diana Lynn Lane, Edith Louise Barlow, Leah Barlow, Marlina Fischer, Janelle Lona Fischer, Jennifer Johnson, Susie Lorraine Johnson, Shalina Ann Palmer, Luella

Elise Barlow, Sharon Johnson and Marie Steed, contrary to s. 293(1)(a) of the *Criminal Code*, be stayed.

2. In the alternative, for an order that the prosecution for the charge that Winston Kaye Blackmore between on or about May 1, 2005 and on or about December 8, 2006, at or near Creston, in the Province of British Columbia, practiced a form of polygamy, or practiced a kind of conjugal union with Christina Maud Blackmore, Mary Anne Blackmore, Marjorie Johnson, Susan Eleene Gallup, Harmony Quinton, Marsha Carol Chatwin, Zelpha Chatwin, Ruth Ann Lane, Diana Lynn Lane, Edith Louise Barlow, Leah Barlow, Marlina Fischer, Janelle Lona Fischer, Jennifer Johnson, Susie Lorraine Johnson, Shalina Ann Palmer, Luella Elise Barlow, Sharon Johnson and Marie Steed, contrary to s. 293(1)(a) of the *Criminal Code*, be stayed unless:
 - a. the Crown agrees to pay for the legal fees and disbursements reasonably required for the Applicant to retain a legal team of senior and junior counsel of his choice with the necessary expertise and experience to defend himself on this charge;
 - b. such legal fees shall be calculated at the same hourly rates and conditions as apply to the Special Prosecutor and his legal team with comparable experience and expertise;
 - c. the funding of such legal fees and disbursements to be retroactive to the time that the Applicant has retained his present counsel;
 - d. on any other terms and conditions that the Court deems just and appropriate; and
 - e. such other or further order that is just and appropriate in the circumstances including, if necessary, special costs payable in advance and irrespective of the outcome of the prosecution.
3. Full disclosure of all of the communications that relate to the charge approval process leading up to and including the reports of Richard Peck, Q.C., Leonard Doust, Q.C., and Terrence Robertson, Q.C.
4. Costs, including special costs, of this Application.

The Applicant will seek these orders on the grounds, *inter alia*, that the prosecution of the Applicant is contrary to the *Crown Counsel Act*, RSBC 1996, c. 87, or is otherwise an abuse of process, oppressive, manifestly unfair, arbitrary, involves actual, or a perception of, political interference, puts the administration of justice into disrepute and is otherwise contrary to the principles of fundamental justice.

The Applicant will rely on sections 7, 11(b), 11(c), 11(d) and 24 of the *Canadian Charter of Rights and Freedoms*, (the “*Charter*”) the common law, and the inherent jurisdiction of the Court and on the *Crown Counsel Act*, RSBC 1996, c. 87.

At the hearing of this Application will be read the affidavit of Sally Yee affirmed May 8, 2009, a copy of which is served herewith.

The facts upon which this Application is based are as follows:

1. The Applicant lives in the community of Bountiful a population of about 1,500 people, which is near Creston BC, where he has lived for most of his life.
2. The Crown has charged the Applicant with one count of polygamy, involving 19 women. Count 2 of the Information charges Mr. James Marion Oler with polygamy involving three women.
3. The Crown disclosure to date alleges that approximately 25% of the residents in Bountiful live in a polygamous relationship.
4. Polygamy is allegedly practiced by an indeterminate number of other persons in Canada whether for reasons of religion or otherwise.
5. Allegations that polygamy was being practiced in the Bountiful community came to the attention of the RCMP and the BC Attorney General’s office at least as early as 1990.
6. The 1990 allegations were made public and the RCMP in the Creston area conducted an investigation and provided the Criminal Justice Branch of the Ministry of the Attorney General with further information on the situation.

7. A review of the evidence was conducted by Crown Counsel. In the process of reviewing the charges for approval, Crown Counsel considered both the evidence obtained by the RCMP and the status of the anti-polygamy law in light of the *Charter*.
8. Crown Counsel sought the opinions of constitutional experts within, as well as outside, the Ministry of the Attorney General.
9. One legal opinion was provided in 1992 by retired BC Appeal Court Judge Richard Anderson. His opinion was that the polygamy law was unconstitutional as an unjustifiable infringement of the guarantee of freedom of religion.
10. Justice Anderson recommended that no prosecution proceed. He instead recommended that the federal government enact new laws that would enhance desirable social objectives without violating the *Charter*.
11. In Justice Anderson's view, a test case "would require an enormous expenditure of time and money."
12. Justice Anderson concluded his opinion by saying that he was "almost in complete agreement with the internal opinions provided to me."
13. In the early 2000s, the Attorney General again sought legal advice regarding the community at Bountiful, advice that addressed, *inter alia*, the constitutionality of s. 293 of the *Criminal Code*.
14. A legal opinion was provided in 2001 by former BC Chief Justice Allan McEachern. He is reported to have concluded that no prosecution should proceed because a religious freedom defence would probably result in s. 293 being struck down as unconstitutional.
15. The Criminal Justice Branch of the Ministry of the Attorney General is today still of the opinion that s. 293 is unconstitutional.
16. On May 31, 2007, the Attorney General, the Honourable W. Oppal, directed that an experienced criminal lawyer in British Columbia, who was not an employee of the provincial government, be hired to conduct the charge assessment.

17. Mr. Richard Peck, Q.C. (“Mr. Peck”), a highly respected senior lawyer, was appointed as a Special Prosecutor with the following mandate:
 - a. conducting an independent comprehensive legal analysis of all of the available evidence that has been assembled by the Royal Canadian Mounted Police as well as any other information the Criminal Justice Branch had concerning the allegations and was to involve the consideration of any and all potential criminal or quasi-criminal charges, including but not limited to, polygamy and any offence of a sexual nature;
 - b. offering such legal advice as was necessary to the police in the event that further investigation by them was required;
 - c. providing the Assistant Deputy Attorney General with a written report setting out his charge assessment review decision; and
 - d. if in his view a charge was warranted, conducting the prosecution and any subsequent appeal.
18. At the request of Mr. Peck, on July 23, 2007, this mandate was expanded to include consideration of a recommendation for a constitutional reference, and carriage of such a reference should one proceed.
19. On August 1, 2007, the Criminal Justice Branch announced the decision of independent Special Prosecutor Richard Peck, Q.C., reporting that “Mr. Peck has concluded that there should be no criminal charges laid in connection with the investigation.”
20. The Criminal Justice Branch has only published a summary of Mr. Peck’s conclusions. Mr. Peck’s considered view was that, although s. 293 might well be constitutionally valid, the public interest would be best served by a reference to the BC Court of Appeal. He said that such a reference would result in an “authoritative and expeditious judicial resolution of the legal controversy surrounding polygamy.” Mr. Peck preferred a reference to a prosecution for reasons that included potential arguments about pre-charge delay resulting in actual prejudice, officially induced error and fairness considerations.

21. Mr. Peck also determined that a reference would be preferable to a prosecution because “if the law is upheld, members of the Bountiful community will have fair notice that their practice of polygamy must cease.”

22. This opinion was made public.

23. Section 7(5) of the *Crown Counsel Act* provides that:

Subject to the mandate given to the special prosecutor by the ADAG or to a directive referred to in subsection (4), **the decision of a special prosecutor with respect to any matter within his or her mandate is final**, but a decision not to approve a prosecution may be appealed by a law enforcement officer under the process established by section 4 (4). [emphasis added]

24. No law enforcement officer appealed Mr. Peck’s decision not to prosecute.

25. Nor was any further directive given to Mr. Peck after he received his mandate pursuant to s. 7(4) of the *Crown Counsel Act*.

26. On September 6, 2007, the Attorney General, the Honourable Wally Oppal, directed, pursuant to s. 5 of the *Crown Counsel Act*, that Mr. Leonard T. Doust, Q.C. (“Mr. Doust”), another highly respected senior lawyer in Vancouver, be retained “to review Mr. Peck’s analysis, including the history and other factors he considered in coming to a conclusion that a prosecution was less preferable than a reference.” The Attorney General directed that:

If Mr. Doust concludes as a result of this review that a prosecution for offences of polygamy meets the Criminal Justice Branch’s charge approval policy, I further direct that you retain Mr. Doust to conduct the prosecution arising from the related police investigation on the offences of polygamy only, and any appeals which may arise from those proceedings.

27. On April 7, 2008, the Criminal Justice Branch published excerpts of the written report of Mr. Doust and released a “Summary of the Reasons of Leonard Doust, Q.C., for Recommending a Reference Rather than a Prosecution.”

28. Mr. Doust concluded, *inter alia*, that:

4. There is a serious risk of unfairness in proceeding with a prosecution under s. 293 at this time, considering:
 - (a) for many years, the Ministry held the view that s. 293 is unconstitutional;
 - (b) the Ministry publicized its view that s. 293 is unconstitutional;
 - (c) on the basis of its view, the Ministry declined to prosecute under s. 293 despite knowing for many years that the section was being offended;
 - (d) today there remains some question as to the constitutionality of s. 293;
 - (e) a prosecution under s. 293 would effectively compel the accused to participate as a test litigant in the complex and lengthy resolution of that question;
 - (f) the accused would have to be selected from among a pool of similarly culpable individuals; and
 - (g) in any case, the reference procedure is available and better suited than a prosecution to the resolution of the constitutionality of s. 293.

29. In the course of discussions with the Attorney General, the Honourable W. Oppal, on May 2, 2008, Mr. Doust declined to prosecute the polygamy allegations.

30. This opinion and decision not to prosecute was also made public.

31. After Mr. Peck and Mr. Doust submitted their respective reports to the Criminal Justice Branch, the Honourable W. Oppal is reported to have said that “he could order prosecutors to take on the case, but he would rather work with someone who does not believe it is doomed to failure.” He is also reported to have said: “I would like a more aggressive approach, which means you lay the charge and let the defence worry about the constitutionality issue. That’s normally the way things are done.”

32. Thereafter, the Attorney General directed that yet another legal opinion be obtained, this time from Terrence L. Robertson, Q.C. (“Mr. Robertson”), also a highly respected senior lawyer in Vancouver.

33. In his letter of May 28, 2008, the Attorney General set out the terms of his direction as follows:

I have received Mr. Richard C. C. Peck’s report entitled *Final Report of Special Prosecutor for Allegations of Misconduct Involving Individuals*

Associated with the Community of Bountiful, BC, dated July 25, 2007, which concludes that proceeding by way of a reference is preferable to that of a prosecution for a number of reasons. Some of these reasons include potential arguments relating to pre-charge delay resulting in actual prejudice, officially induced error and fairness considerations.

As I disagreed with Mr. Peck's decision not to prosecute allegations of polygamy, I directed that Mr. Leonard T. Doust be appointed as Crown Counsel to review Mr. Peck's analysis with a view to determining the viability of a prosecution.

Mr. Doust also concluded that a reference was the preferable means by which to proceed. As he also concluded that a prosecution would be unfair, he declined to prosecute the polygamy allegations during our discussions on May 2, 2008.

I disagree with Mr. Doust's conclusion that a prosecution would be unfair.

It is my opinion that the Criminal Justice Branch is mistaken in its belief that s. 293 of the *Criminal Code of Canada* is unconstitutional. Both Mr. Doust and Mr. Peck believe s. 293 to be constitutionally valid legislation. A valid criminal law is and should be enforced. To do so is appropriate and is not unfair.

Therefore, pursuant to Section 5 of the *Crown Counsel Act*, this letter is my directive to you to retain the legal services of Mr. Terrance Robertson to conduct a charge assessment of the most recent police investigation into polygamy in the Community of Bountiful. He is to apply the Criminal Justice Branch charge approval policy as it relates to Section 293 of the *Criminal Code of Canada* and any other *Code* provisions. The policy requires first, a determination of whether there is a substantial likelihood of conviction based on the available evidence, and if so, whether it is in the public interest to proceed with a prosecution. If he concludes that charges should be approved, he is to conduct the prosecution and any appeals which may arise from those proceedings.

As you may designate him to be either Crown Counsel pursuant to Section 4 (1) of the *Crown Counsel Act* or as Special Prosecutor pursuant to Section 7 of the *Crown Counsel Act*, I leave that designation selection for your determination.

34. Mr. Robertson decided to prosecute the allegations of polygamy although his reasons for doing so have never been published. On January 7, 2009 the Attorney General, the Honourable W. Oppal, issued a statement that "[i]t is critical to stress that this

prosecution is independent of the criminal justice and branch and the Government of British Columbia.”

35. After his decision to prosecute, Mr. Robertson was reported to have said ““Some people may infer that [Mr. Oppal] was shopping until he found a lawyer that would do his bidding,’ Terrence Robertson acknowledged. ‘Nothing could be further from the truth. I can tell you, [Mr. Oppal’s views] had no impact on my decision. I take my role as special prosecutor very seriously.’”

36. In a letter dated March 11, 2009, from counsel for the Applicant to the Deputy Attorney General, counsel for the Applicant requested that the Crown fund Mr. Blackmore’s defence. That letter read, in part, as follows:

It is a matter of public record that the Attorney General is of the view that a prosecution rather than a reference to the Court of Appeal is the most appropriate way in which to test the constitutionality of the polygamy law. It is also beyond any doubt that the question of the constitutionality of the polygamy law is one of great public importance. It is also indisputable that by charging only Mr. Blackmore (and Mr. Oler) and not other persons in the Province who are alleged to have practiced polygamy that these prosecutions are to be seen as “test cases.” As such Mr. Blackmore is being forced to bear the financial burden of challenging the constitutionality of this law.

37. The Deputy Attorney General replied, in part, as follows:

The decision to lay charges against Mr. Blackmore was made by the special prosecutor without involvement of the Attorney General. Mr. Robertson’s decision was based on his own application of Criminal Justice Branch criteria after a seven-month charge assessment review. Importantly from the point of view of the concerns raised in your letter, Mr. Robertson’s decision-making process was entirely independent of the decision not to refer the question of the constitutionality of s. 293 of the Criminal Code to the courts under the *Constitutional Question Act*. Given this, we cannot regard Mr. Blackmore any differently from any other defendant raising a constitutional defence to a criminal charge.

38. Mr. Robertson has said that the Applicant’s “trial will consist primarily of the determination of the constitutional question,” namely the constitutionality of s. 293 of the *Criminal Code*.

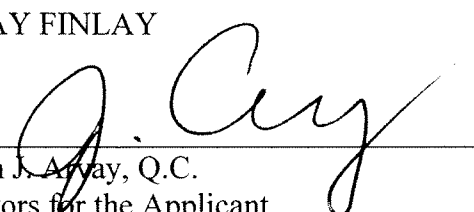
39. The Crown Counsel Policy Manual on the subject of Special Prosecutors provides that “the Assistant Deputy Attorney General (the “ADAG”) is empowered to appoint a special prosecutor in cases where the ADAG believes there is significant potential for real or perceived improper influence in prosecutorial decision-making. Above all other considerations, the ADAG regards the need to maintain public confidence in the administration of criminal justice as the paramount consideration in deciding whether a case requires the appointment of a special prosecutor.”
40. In the context of another matter involving s. 7 of the *Crown Counsel Act*, the Honourable W. Oppal, the Attorney General of British Columbia, advised the Legislative Assembly that “if a special prosecutor is appointed – listen carefully – the Attorney General doesn’t get involved. That’s pretty fundamental.”
41. The Applicant has sought disclosure of the charge approval process and, in particular, all communications that preceded the appointment of the Special Prosecutor, but this request has been refused.
42. The hourly rates that are applied to Special Prosecutors funded by the Ministry of Attorney General range from \$200 to \$275 per hour and rates paid for “juniors” to assist as co-counsel range, depending on year of call, from \$75 per hour for articulated students and \$200 per hour for a 16 year or greater call.

The Applicant estimates that the application will take two days.

ARVAY FINLAY

Per:

Dated: May 8, 2009



Joseph J. Arvay, Q.C.
Solicitors for the Applicant

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AND:

WINSTON KAYE BLACKMORE

APPLICANT

APPLICATION TO THE COURT

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