

Report of the Special Prosecutor for Allegations of Misconduct Associated with Bountiful, BC

Summary of Conclusions

In my role as Special Prosecutor, I have been asked to conduct an independent assessment with respect to allegations of misconduct involving the community of Bountiful, BC. The following is a brief summary of my conclusions.

Bountiful is a community in the southeastern part of the province which is the home of “fundamentalist” Mormons who practise a polygamous lifestyle. Polygamy has long been illegal in Canada. Indeed, our first *Criminal Code*, enacted in 1892, contained a polygamy ban, the current version of which is found in s. 293. However, prosecutions under this law have been exceedingly rare.

Over the past two decades, the Bountiful community has been the subject of considerable law enforcement and media attention. Concerns have been raised about the inherent gender inequality that is said to characterize polygamous relationships. A police investigation in 1990 recommended criminal charges under s. 293. The Crown, however, decided not to proceed, relying on legal opinions predicting that the polygamy ban would be struck down by the courts as an unjustifiable infringement of religious freedom as protected by s. 2(a) of the *Charter of Rights and Freedoms*.

In 2006, the R.C.M.P recommended charges against individuals in Bountiful, pursuant to the “sexual exploitation” provision of the *Code* (s. 153). This provision prohibits an adult from having sexual contact with a young person between the ages of fourteen and eighteen toward whom the adult is in a “position of trust or authority.”

The Charge Assessment Guidelines of the Criminal Justice Branch establish the criteria to be applied by Crown Counsel (or a Special Prosecutor) in determining whether or not a prosecution should proceed. Crown counsel must:

fairly, independently, and objectively examine the available evidence in order to determine:

1. whether there is a substantial likelihood of conviction; and, if so,
2. whether a prosecution is required in the public interest.

Four senior Crown Counsel reviewed the file and concluded that charges under s. 153 should not be laid because, on the available evidence, there was not a “substantial likelihood of conviction.” I agree with the thorough and well-reasoned opinions of Crown Counsel on the proposed charges. In my view, there is not a substantial likelihood of conviction with respect to any of the proposed counts.

I have also considered a range of other sexual and marriage-related offences in the *Criminal Code*. In short, I have determined that none of them are applicable. The offences I have reviewed are: sections 170 (parent or guardian procuring sexual activity), 279.01 (trafficking in persons), 290 (bigamy), 292 (procuring feigned marriage), 294 (pretending to solemnize marriage), 295 (marriage contrary to law). As with s. 153, there

are no potential charges under these provisions which would meet the standard set out in the Charge Assessment Guidelines. There is no substantial likelihood of conviction. In any event, these other offences do not address the core of the problem.

Additionally, I have reviewed the BC *Independent School Act* and have determined that the administrators of the Bountiful schools have not committed an offence pursuant to it. Indeed, the only offence provided for in the *Act* concerns the unlicensed operation of an independent school. The Bountiful schools, Bountiful Elementary-Secondary and Mormon Hills School, are validly registered under the *Act* and subject to frequent inspection relative to other independent schools. It is the responsibility of the school inspectors to verify compliance with the other requirements of the *Act*.

After extensive study of the relevant material, I have come to the conclusion that polygamy itself is at the root of the problem. Polygamy is the underlying phenomenon from which all the other alleged harms flow, and the public interest would best be served by addressing it directly. There is a substantial body of scholarship supporting the position that polygamy is socially harmful. With great respect to those who have given opinions to the contrary, I believe that s. 293 may well be upheld by the courts as consistent with the *Charter's* commitment to religious freedom. Religious freedom in Canada is not absolute. Rather, it is subject to reasonable limits necessary to protect "public safety, order, health, or morals or the fundamental rights and freedoms of others." Ultimately, in my opinion, there is a good case for upholding s. 293 as compliant with the *Charter*.

There are two means by which a ruling on the constitutional validity of s. 293 could be obtained: a prosecution, or a reference to the courts. A reference is a procedure by which a government may refer a legal question to a court, which will hear arguments and render a judgment as in a regular case. The Government of BC is entitled to refer questions to the BC Court of Appeal, from which there is an automatic right of appeal to the Supreme Court of Canada.

A prosecution would likely face a number of obstacles, resulting in a cumbersome and time-consuming process. The constitutional issue might not be heard for some time after charges are laid, as other aspects of the trial process, such as disclosure issues or various defence motions, might take precedence. Given the unique history of this matter, including the lengthy passage of time since the first expression of police interest in Bountiful, and the existence of prior Crown opinions regarding the constitutionality of s. 293, these motions might be particularly lengthy and complex. They could result in the constitutional issue never being determined at trial.

In my view, a reference to the BC Court of Appeal – with a probable further appeal to the Supreme Court of Canada – is the preferable approach to take. My view is that the public interest will best be served by an authoritative and expeditious judicial resolution of the legal controversy surrounding polygamy. The legality of polygamy in Canada has for too long been characterized by uncertainty. The integrity of the legal system suffers from such an impasse, and an authoritative statement from the courts is necessary in order to resolve it.

Notwithstanding my opinion that s. 293 might well be constitutionally valid, a clear statement from the courts would be desirable even if the eventual result is to the contrary. If the law is struck down, the onus will be on the federal government to develop a new, *Charter*-compliant legislative solution to the problem. If the law is upheld, members of the Bountiful community will have fair notice that their practice of polygamy must cease. If they, in turn, persist in the practice, a prosecution could be initiated at the Crown's discretion, substantially free of the procedural obstacles which now exist.

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