



MEDIA STATEMENT

CRIMINAL JUSTICE BRANCH

Monday, April 07, 2008

08-10

Leonard Doust, Q.C. Confirms Findings and Recommendation of Special Prosecutor

Victoria – The Criminal Justice Branch of the Ministry of Attorney General today announced that senior Vancouver lawyer Leonard T. Doust, Q.C. has confirmed the findings and recommendations of Special Prosecutor Richard Peck, Q.C. in relation to an RCMP investigation into allegations of misconduct involving individuals associated with the community of Bountiful, British Columbia. Mr. Doust concluded that “given both practical considerations and concerns about fairness, a reference rather than a prosecution is the most appropriate way to proceed at this time”

Mr. Doust further agreed with Mr. Peck’s conclusions that:

1. polygamy, as prohibited by s.293 of the *Criminal Code*, is the root cause of the misconduct in the Bountiful community and the proper focus of any prosecution;
2. while s.293 infringes s.2(a) of the *Canadian Charter of Rights and Freedoms*, it would likely be upheld as a reasonable limit under s.1.

On September 6, 2007, Assistant Deputy Attorney General, Robert W.G. Gillen, Q.C. received written directions from the Attorney General directing the Branch to retain the legal services of Mr. Doust to conduct a review of Mr. Peck’s analysis leading to the conclusion that a prosecution was less preferable than a reference in relation to the constitutionality of the polygamy provisions of the *Criminal Code*. If Mr. Doust concluded that a prosecution for the offence of polygamy met the Branch’s charge approval standard he was to conduct the prosecution.

In compliance with the directions, the Branch retained Mr. Doust and published the Attorney General’s written directions in the September 13, 2007 edition of the BC Gazette as required under the *Crown Counsel Act*.

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There are two components to the Branch charge approval standard: an evidentiary test that requires a substantial likelihood of conviction and a public interest test. The evidentiary test is met when the available evidence supports that there is a strong, solid case of substance to present to the court. It is only when the evidentiary test is met, that prosecutors must further determine whether the public interest requires a prosecution. Branch policy provides guidance in relation to factors to be considered in relation to the public interest.

In a written report to Mr. Gillen dated March 20, 2008, Mr. Doust concludes that:

“At the least, if the Supreme Court of Canada decides that s.293 is constitutionally valid, then its decision will serve as very clear notice to all with respect to future conduct, leaving any violations of s.293 to be fully and properly prosecuted.

Conversely, if the Supreme Court of Canada concludes that s.293 is unconstitutional, its authoritative determination, and explanation for that determination, will respectively force and assist the government of Canada to consider other, constitutional solutions to the problem of polygamy.

Viewed this way, the commencement of a reference concerning s.293's constitutionality is not an attempt to dodge or delay dealing with the problems in Bountiful. On the contrary, it is the swiftest, most effective and fairest way of beginning to address them. While a prosecution under s.293 might superficially carry the appearance of engagement, I believe that it likely represents a much slower route to a real solution, if it is a viable route at all. Simply put, the abuses in Bountiful are unlikely to stop or be stopped until at least such time as the question of s.293's constitutionality is conclusively resolved, and a reference would conclusively resolve the question considerably faster than a prosecution. A reference would also avoid the concerns about fairness associated with a prosecution.”

Mr. Doust has approved the release of the attached summary of the reasons for his recommendation.

Mr. Gillen has accepted Mr. Doust's confirmation of the earlier recommendation of Special Prosecutor Richard Peck. Mr. Doust's report was forwarded to the Attorney General's Office on March 25, 2008 for his consideration and direction.

Under the *Constitutional Question Act* a decision to refer a matter to the Court of Appeal for hearing is made by the Lieutenant Governor in Council which is the Provincial Cabinet.

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Summary of the Reasons of Leonard Doust, Q.C. for Recommending a Reference Rather Than a Prosecution

1. The serious misconduct in Bountiful will likely continue until the constitutionality of s. 293 is authoritatively decided by the Supreme Court of Canada. This is so because:
 - (a) members of the Bountiful community likely will not perceive real jeopardy in practising polygamy unless and until the Supreme Court of Canada conclusively holds that s. 293 is constitutional; and
 - (b) the government of Canada likely will not consider new legislation to address the problem of polygamy unless and until the Supreme Court of Canada conclusively holds that s. 293 is unconstitutional.
2. A reference will bring the question of s. 293's constitutionality to the Supreme Court of Canada much faster than a prosecution. This is so because:
 - (a) a reference will be narrowly focussed, isolating the constitutional issue and the evidence in relation to it;
 - (b) a reference will start in the Court of Appeal instead of the trial court, saving at least a year and probably much more given the near certainty of pre-trial matters and motions; and
 - (c) in the case of a reference, there will be no need to wait for leave to appeal to the Supreme Court of Canada, potentially saving more than six months.
3. A reference will also avoid several possible pitfalls of a prosecution, namely:
 - (a) historical legal opinions that s. 293 is unconstitutional being in evidence before the trial court as part of a motion alleging abuse of process;
 - (b) on appeal, the need to abide by the trial court's findings of fact on the social science evidence, which findings might hamper efforts to justify s. 293 under s. 1 of the *Charter*; and
 - (c) the possibility of s. 293 being read down in the Supreme Court of Canada, which could necessitate a new trial and render the earlier trial a waste.
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.