BRITISH COLUMBIA | Prosecution Service

Media Statement

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Special Prosecutor concludes involvement in Bountiful Prosecution

Victoria – The BC Prosecution Service (BCPS) announced today that Special Prosecutor Peter Wilson QC has declined to approve any further charges arising from investigations into the conduct of individuals associated with the community of Bountiful. This decision brings the matter to a close and concludes the involvement of the Special Prosecutor.

Mr. Wilson was appointed Special Prosecutor by then Assistant Deputy Attorney General Robert Gillen QC on January 17, 2012 with a mandate to provide legal assistance to the police during their investigation and to conduct an independent charge assessment of any Report to Crown Counsel (RCC) that was submitted. His mandate included considering possible prosecution of sexual exploitation and other alleged offences against minors. His mandate was expanded by Mr. Gillen on January 31, 2012 to include consideration of polygamy related offences.

On August 13, 2014 the BCPS announced that Mr. Wilson had approved criminal charges against several individuals. The charges alleged offences contrary to the polygamy provisions of the *Criminal Code* and the unlawful removal of children under the age of 16 years from Canada for a sexual purpose.

At that time Mr. Wilson also announced that he had declined to approve charges of sexual exploitation contrary to section 153 of the *Criminal Code*. He did so after determining that the standard for approving charges, set out in BCPS policy, was not met in relation to these offences.

As all matters are now concluded Mr. Wilson has issued a Clear Statement explaining his reasons for not approving charges pertaining to sexual exploitation or to charges based on the recent investigation. Mr. Wilson's Clear Statement is attached to this release.

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Clear Statement

In accordance with Crown policy in cases such as this, I am issuing this Clear Statement respecting my work as Special Prosecutor in this matter.

By letter dated January 17, 2012, then Assistant Deputy Attorney General Robert W.G. Gillen, QC appointed me as Special Prosecutor in what I will hereafter refer to as the "Bountiful" matter. I was appointed to replace Mr. Richard Peck QC who, upon being approached to consider new evidence revealed since his 2007 charge assessment report in this same matter, declined to continue his mandate.

I was originally retained to conduct an independent charge assessment with respect to a variety of sexual and other allegations. On January 31, 2012, that mandate was expanded to include consideration of polygamy-related offences.

PRINCIPLES APPLICABLE TO CHARGE APPROVAL

In conducting this charge assessment, I have considered relevant case law and followed the test set out in the BC Prosecution Service Crown Counsel Policy Manual *Charge Assessment Guidelines* (CHA 1) which, among other things, states:

> In discharging the charge assessment function, Crown Counsel must independently, objectively, and fairly measure all the available evidence against a two-part test:
>
> 1. whether there is a substantial likelihood of conviction; and, if so,
>
> 2. whether the public interest requires a prosecution

MATERIALS REVIEWED FOR THIS REPORT

RCMP investigators provided me with two extensive Reports to Crown Counsel ("RCC"). Some of the material included in those RCCs had, on earlier occasions, been presented both to Crown Counsel and other Special Prosecutors, most of whom declined to approve charges. In addition to the previously delivered material, new evidence emerged including significant evidence derived from information uncovered during searches conducted at the Yearning for Zion ("YFZ") Ranch by authorities in Texas.

The first RCMP report was delivered to me on July 3, 2013 ("2013 RCC"). This first report focused on sexual exploitation and polygamy-related offences alleged against two individuals: Winston Kaye Blackmore and James Oler. The second RCMP report was delivered to me on Jan 22, 2014 ("2014 RCC"). This second report focused on "Removal of a Child from Canada" offences.

I also considered a significant volume of material not only from within the RCCs, but also from extensive background and legal investigation.

Charges proposed by investigators were for: 1) sexual exploitation, 2) polygamy, and 3) the removal of children from Canada. Ultimately charges for offences related to polygamy and the removal of children from Canada were approved and prosecuted to conclusion. I declined to approve sexual exploitation charges as I concluded the charge assessment standard was not met. For the same reasons, I also have declined to approve further charges recently submitted by the RCMP alleging the removal of children from Canada. This Clear Statement will address the reasons for not approving charges.

FACTUAL BACKGROUND

The complex issues arising from the proposed charges in the Bountiful matter cannot properly be understood without some knowledge of the background and religious culture in which they developed.

FLDS Background

Bountiful is a community of members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS") who live in and around the towns of Lister and Canyon, British Columbia. It is the largest such community in Canada. There are other FLDS communities, the largest being at Short Creek, a community located within the twin municipalities of Hildale, Utah and Colorado City, Arizona. The YFZ ranch near Eldorado, Texas is another FLDS centre.

The FLDS is the largest of several Mormon fundamentalist sects that splintered away from the mainstream Church of Jesus Christ of Latter-Day Saints ("LDS").

The Mormon religion was founded in 1830 by Joseph Smith ("Smith"), its first President and "Prophet". In 1835, Smith published the *Doctrine and Covenants of the Church of the Latter-Day Saints: Carefully selected from the Revelations of God*. This book, commonly referred to as the *Doctrine and Covenants*, or D&C, is described as a collection of divine revelations and one of the standard works of the Mormon canon. One revelation received by Smith in 1843 was the subject of D&C Section 132. It concerned "the new and everlasting covenant, including the eternity of the marriage covenant and the principle of plural marriage." This revelation, in effect, constituted what the Church regarded as God's blessing of polygamy and resulted in the practice of plural marriage (one man having multiple wives) among Church leaders.

The practice of polygamy prevailed until 1890 when Church President and Prophet Wilford Woodruff issued a manifesto declaring his intention to submit to US laws forbidding plural marriages and to using his influence with the members of the Church to have them do likewise. On October 6, 1890,

the "Woodruff manifesto" was accepted as authoritative and binding by the LDS Church, but it was not universally accepted. Some of those who continued to embrace plural marriage as a fundamental tenet of the Mormon religion chose to break away, the FLDS being among them.

Hierarchy within the FLDS and the concept of the "Priesthood" are central to the culture and the belief system of the FLDS Church and the community. The leader of the FLDS Church is the "Prophet" who speaks for God and is directed to do God's work by divine revelation. Beneath the Prophet are the "Bishops" who preside in the individual FLDS communities. A Bishop is an intermediary between the Prophet and the people in his community. The Bishop speaks for, and answers to, the Prophet. The "Priesthood" is the authority of God upon the earth and has several levels.

The Prophet, who is also the President of the FLDS Church, is the supreme head of the Priesthood and holds all Priesthood keys (which control access to the blessings and ordinances of the Priesthood). However, each FLDS member answers to his or her own individual "Priesthood Head". A father, for example, is the Priesthood Head within his family unit and thus, prior to marriage, the Priesthood Head for any female will be her father. Upon marriage, a woman's husband becomes her new Priesthood Head. Individuals are answerable to, and expected to obey, their Priesthood Head – even if it requires submission to a command regarded as unpalatable. The term "keep sweet" is employed to capture the attitude of cheerful submissiveness expected of FLDS members toward authority and particularly of wives toward their husbands.

Within the FLDS, the Prophet wields immense power. Only the Prophet or his designate may perform marriages. The Prophet can control the type of work a FLDS Church member will do, the extent of education a church member will receive, the marriage partner to be selected for a church member, and the date when any given marriage will occur. If God reveals to the Prophet that a man is not worthy, that man may be stripped of his Priesthood and may also be liable to have his entire family taken away from him. In short, nearly every aspect of an FLDS Church member's life may be subject to direction by the Prophet, even in relation to such mundane matters as manner of dress.

Traditionally, marriage partners in the FLDS community do not select each other; they are assigned. This is generally described as "placement marriage". The Prophet, perhaps advised by a Bishop, will consider particular individuals and on the basis of a revelation from God (provided after contemplation and prayer) will announce that a certain female is to be married to a certain male. The selection of marriage partners is thus seen by FLDS members as reflecting the will of God. Placement marriages of this kind may occur on very short notice. Not uncommonly, the bride and groom will not know to whom they are being married until literally hours or even minutes before the ceremony.

The importance of plural marriage to the FLDS is reflected in the concept of "exaltation". Exaltation as understood by the mainstream LDS Church is eternal life. For the FLDS, plural marriage is essential to exaltation.

For reasons deeply embedded in religious doctrine, record keeping is an important focus for the FLDS. Marriage records do not simply record a union; they are the record of an important religious "ordinance" which has repercussions not only in this life but also for eternity.

The FLDS Community at Bountiful

The community at the centre of this prosecution is Bountiful. Bountiful was originally founded in the 1940s and has been presided over by a series of Bishops since that date. Winston Kaye Blackmore was appointed Bishop of Bountiful in 1984. When Blackmore began his tenure as Bishop, the President and Prophet of the FLDS was Leroy Johnson. After Johnson's death in 1986, he was succeeded by Rulon Jeffs. In August of 1998 Rulon Jeffs suffered a stroke and increasingly came to depend upon his son Warren Jeffs. In 2002, Blackmore was dismissed as Bishop by way of a phone call involving both Rulon and Warren Jeffs. Rulon Jeffs died on September 8, 2002, and Warren Jeffs became the new Prophet. During the course of the Bountiful investigation, Blackmore acknowledged that after the death of Rulon Jeffs he was "disfellowshipped" by Warren Jeffs. Within the FLDS Church "disfellowshipped" appears to be used interchangeably with "excommunicated" to denote the "process of excluding a person from the Church and taking away all rights and privileges of membership."

After Blackmore was "disfellowshipped", a split occurred in the Bountiful community itself. Roughly half of the population stayed with Blackmore and still considered him Bishop; the other half pledged their allegiance to the new Prophet Warren Jeffs and his appointed Bishop in Bountiful, James Oler. The Oler faction considers Blackmore and his followers to be "apostates"– persons who have turned their back on their faith – and shun all interaction with them. In some cases, members of the same family cleaved apart by the split in the community ceased all communication with each other.

ANALYSIS OF SEXUAL EXPLOITATION COUNTS

Section 153 of the *Criminal Code* prohibits the acts identified in section 153(1)(a) and (b) between a young person and an accused who is in a particular kind of relationship with that young person. The relationship must be one of the types of relationships identified in section 153(1). At the time the alleged offences occurred, "Young Person" was defined as a person fourteen years of age or more but under the age of eighteen.

Section 153 of the *Criminal Code* provides:

> 153. (1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who

(a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or

(b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.

(1.2) A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including

(a) the age of the young person;

(b) the age difference between the person and the young person;

(c) the evolution of the relationship; and

(d) the degree of control or influence by the person over the young person.

Common Problems Across the Proposed Sexual Exploitation Allegations

My review of the RCCs provided in this case revealed problems the proposed sexual exploitation counts have in common. It is important to bear in mind that the exploitation charges recommended by investigators are, with one exception, the same as the charges recommended in an RCC submitted to Mr. Peck in 2006. In addition, the complainant statements relied upon were, for the most part, taken during a 2005 RCMP investigation and are, therefore, exactly the same statements considered by Mr. Peck.

There is, however, some new evidence that relates to allegations of sexual exploitation involving one individual. I considered this new evidence but ultimately identified many of the same problems that previous prosecutors recognized in relation to these proposed counts.

The Absence of a Complainant and/or Uncooperative Witnesses

A significant problem common to all of the proposed sexual exploitation counts is that they would have to be prosecuted with uncooperative witnesses. The complainants named in the proposed sexual exploitation counts are at the present time all married to Blackmore or Oler. None of the complainants are willing to testify and, according to their statements and police reports seem content with their situation as plural wives. Indeed, in some cases, they have enjoyed a marital relationship that has endured for decades.

In the result, this case will turn entirely on circumstantial evidence. Sexual contact between the accused and the complainants will have to be established based on a) age of the complainant;

b) the dates of marriage; and c) the dates any children were conceived as extrapolated from the date of their births. While in some cases, it is possible that sexual contact can be proven beyond a reasonable doubt, there is a dearth of direct evidence capable of establishing that the accused were in the necessary culpable relationship with any of the complainants.

The Difficulty of Establishing the Necessary Culpable Relationship

A second common problem concerns proof that the accused were in one of the relationships with the complainants that are identified in section 153(1) of the *Criminal Code*. The investigators contend that the offence of sexual exploitation is proven by the fact that each of the young wives, when still sixteen or seventeen years of age, became pregnant by Blackmore while he was the Bishop of Bountiful. The investigators believe that Blackmore's status as Bishop (a position he occupied at all times relevant to the section 153 allegations) establishes the necessary culpable relationship. But whether Blackmore, by virtue of his status or otherwise, was in a relationship of trust, authority, dependency, or an exploitative relationship with any given complainant, is a question of fact to be proven on the criminal standard. The same reasoning applies to the proposed Oler counts.

It appears obvious that Blackmore, as Bishop, was in a position of authority in the community of Bountiful. The difficulty is that there is no evidence that Blackmore was involved in initiating the marriages with any young woman in respect of whom he occupied a position of authority. The evidence shows that the marriages in question were arranged by the Prophet (Rulon Jeffs), usually at the behest of the complainants. Also, in all but one case, Blackmore and the complainant lived in separate communities. There is simply no evidence of Blackmore being involved in arranging these traditional "placement marriages". The sexual contact that eventually took place occurred after Blackmore and the complainants had been married. It will be recalled that section 153(1.2) states that a judge may infer an exploitative relationship from the nature and circumstances of the relationship including, "the evolution of the relationship". As will be seen, for the most part, no relationship of any kind was in existence between Blackmore and complainants before the placement marriages were arranged and, thus, the "evolution of the relationship" occurred entirely within the context of the "marriage". The fact that the sexual contact occurred while Blackmore was in a marriage-like relationship organized by third parties at the behest of the complainants themselves poses serious problems of proof.

Most cases dealing with section153 involve situations where the accused and the young person had some kind of pre-existing relationship prior to any sexual contact. In Blackmore's case, it is clear that as a result of the FLDS tradition of "placement marriage", only one of the wives named as a section153 complainant had any sort of relationship with Blackmore before being married to him; most came from other provinces or from the U.S. The question then arises whether the necessary

trust, authority, dependency, or exploitative relationship can be inferred from the fact that he was an FLDS Bishop.

That the sexual conduct in issue here takes place within a marriage-like relationship complicates matters. I concluded a religiously sanctioned marriage, an "ordinance", which represents a sacred act and solemn covenant with God, is not the kind of relationship that section 153 was intended to capture.

Whether Blackmore was within one of the relationships contemplated by section 153 is further complicated by the strict traditional hierarchies observed within the FLDS and by the overwhelming and pervasive power of the Priesthood as a feature of everyday life in the culture. The entire process of assessing whether a position of trust and/or authority exists is thus over-layered by the effect of sincerely held beliefs at the very core of FLDS faith.

The Public Interest in Prosecuting

A third difficulty posed by the sexual exploitation counts arises from the public interest component of the charge assessment principles. As I have already pointed out, all of the proposed counts involve women who continue to live in relationships with Blackmore which have endured, in some cases, for decades. In many instances, the alleged sexual exploitation occurred years if not decades ago. A prosecution would likely cause significant emotional distress to complainants who have emphatically rejected any notion that they are now or were ever victims. Although their subjective perceptions of their victimhood are, of course, not determinative, it is a relevant consideration given the passage of time. A prosecution would, in addition, tend to stigmatize their children (many of whom are now adults) who would be labeled as being the products of sexually exploitive relationships. These circumstances tend to militate against initiating a prosecution.

The Problem of Revisiting Past Mandates

The last of the common problems I will touch upon concerns previous decisions to decline charges for sexual exploitation. As explained above, the proposed counts now before me are the same counts that previous prosecutors declined to approve. Terrence Robertson QC, who also considered these charges, felt that there was insufficient evidence and recommended further investigation.

By revisiting the sexual exploitation allegations, I risk engaging in precisely the exercise that led Madam Justice Stromberg-Stein to quash the appointment of Mr. Robertson as special prosecutor and his decision to approve charges. In *Blackmore v British Columbia (Attorney General)*, 2009 BCSC 1299, Madam Justice Stromberg-Stein concluded that the effect of appointing Mr. Robertson was to revisit the mandate of Mr. Peck, who had concluded the proper approach was to proceed by way of a constitutional reference case. One of the key paragraphs of Madam Justice Stromberg-Stein's decision provides at paragraph 71:

> *The role assigned to a special prosecutor is not simply advisory, or to make recommendations, but is expressly to make a final decision on the matters that are the subject of the special prosecutor's mandate. The Attorney General's powers to decide whether to prosecute are delegated to the special prosecutor whose decision with respect to any matter within his or her mandate is final, subject only to an appeal by a law enforcement officer if the special prosecutor decides not to approve charges. As well, the Attorney General maintains residual responsibility "to intervene in the public interest and on the public record" by means of further directions, in writing and Gazetted, from the Attorney General. There was no such appeal or intervention in this case.*

The Court ultimately concluded that "the ADAG had no jurisdiction to appoint Mr. Robertson as a Special Prosecutor to conduct a charge assessment in relation to the same mandate where Mr. Peck had decided not to approve charges but recommended a reference to the Court of Appeal." It is noteworthy that Stromberg-Stein J. saw fit to quote part of Mr. Peck's opinion as it related to the sexual exploitation charges as follows:

> *With respect to charges of sexual exploitation, he agreed "with the thorough and well-reasoned opinions of Crown Counsel on the proposed charges…"*

I do not read *Blackmore v. British Columbia* as precluding the reassessment of charges by a subsequent Special Prosecutor in any circumstance. Indeed, as I read the decision, a newly appointed prosecutor should be able to reassess charges where there is a new investigation, where the former prosecutor is struck with illness, or where there is some other important change in circumstances. For example, it seems plain that having complied with Mr. Peck's recommendation to proceed with a reference, the Attorney General is at liberty to appoint a new Special Prosecutor to consider polygamy charges.

While it seems clear to me that the polygamy reference is a change of circumstance that permits me to consider polygamy charges, I am much less certain that there has been a change in circumstance that would allow me to revisit the same sexual exploitation charges Mr. Peck (and others) declined to approve.

Conclusion regarding Sexual Exploitation Charges

The issues identified are common to almost all charges proposed by the RCMP alleging sexual exploitation. The one exception involves a young woman who spent time with Blackmore in Bountiful before marrying him shortly before her 16th birthday in 1993. Based on new evidence not available to previous prosecutors, it is clear that Blackmore was in a position of trust toward the young woman and was certainly in a direct position of authority over her (as opposed to simply being an authority figure for the community at large). Notwithstanding this, the woman told investigators that she was not forced to marry Blackmore and that it was "totally my choice and my

parents were involved". She talked to the Prophet Rulon Jeffs, and a placement marriage to Blackmore was arranged. She stated, "I wanted to marry Winston".

I have concluded that the evidence in the case of this individual establishes that the evidentiary test is met and that the necessary culpable relationship could be established. However, in all the circumstances, and for the reasons set out above, I am not convinced that the public interest requires a prosecution.

With respect to the other potential complainants, I could not conclude that there was a substantial likelihood of conviction as the evidence does not establish the necessary culpable relationship. Nor could I conclude that the public interest required a prosecution. Along with the public interest concerns previously cited, in my view the core problem is not sexual exploitation: it is polygamy. I would note that if the "marriage" between any of the wives and Blackmore had been monogamous, there would be no basis for any section153 offence – it is the polygamous nature of their union that creates the problem. Having spent many hours examining the extensive material provided to me, I agree with Mr. Peck and would adopt his assertion that "polygamy itself is at the root of the problem". In the result no charges for sexual exploitation were approved.

ANALYSIS OF PROPOSED REMOVAL OF A CHILD/HUMAN TRAFFICKING ALLEGATIONS

I now turn to the proposed counts concerning the removal of children from Canada. These allegations, as well as the human trafficking allegations, involve members of the Oler faction exclusively. In 2014, I approved charges against three individuals relating to the removal of two children from Canada. Brandon James Blackmore and Emily Ruth Gail Blackmore were both convicted by Mr. Justice Pearlman of removing their daughter ("Child 1") from Canada. James Oler was acquitted by Mr. Justice Pearlman of removing his daughter ("Child 2") from Canada but that acquittal was successfully challenged, and Mr. Oler was subsequently convicted by Madam Justice Devlin who presided at a re-trial ordered by the Court of Appeal.

The "removal" of another daughter of Brandon James Blackmore ("Child 3"), although not the subject of a charge, was dealt with in the course of the first trial before Mr. Justice Pearlman. Child 3 had surfaced after leaving the FLDS and came to the attention of the police and Crown quite unexpectedly while the trial was already underway. She was interviewed by the police and called as a witness at trial. At the sentencing of Brandon James Blackmore, the Crown asked the court to exercise its discretion and consider the facts surrounding the removal of Child 3 from Canada as circumstances that could constitute the basis of separate offence. The Crown's application to have the circumstances of Child 3's removal considered by the Court in sentencing Mr. Blackmore was granted and factored into the sentence determined by the court.

Investigators also recommended prosecutions of three suspects (referred to here as Suspects 1, 2 and 3) in relation to the removal of two other children ("Child 4" and "Child 5") who subsequently married FLDS Church members in the U.S. In 2014, I concluded the charge assessment standard had not been met on the available evidence. Investigators subsequently submitted a further RCC, revisiting that conduct and adding recently obtained information. Additional disclosure delivered to me on July 17, 2020 included statements from Child 4 and Child 5, and from Child 5's parents ("Suspect 2" and "Suspect 3").

I have considered relevant case law applicable to the offence of 'Removal of a Child from Canada' and to the admissibility of FLDS records, including, importantly, "Priesthood Records" seized from the FLDS in Texas. I have also reviewed recent cases dealing with human trafficking.

ANALYSIS OF PROPOSED REMOVAL OF A CHILD COUNTS

Elements of the offence

At the relevant time, section 273.3(1) of the Criminal Code read:

> 273.3 (1) No person shall do anything for the purpose of removing from Canada a person who is ordinarily resident in Canada and who is
>
> > (a) under the age of fourteen years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against section 151 or 152 or subsection 160(3) or 173(2) in respect of that person;

For conviction, the Crown must prove that the accused did the prohibited act with the necessary intent. The mental element of an offence contrary to section 273.3(1) is established by proving the accused's (1) intention to "do anything" for the purpose of removing, accompanied by (2) knowledge of the age and ordinary residence of the child, and (3) an intention that the child would be the object of one of the offences listed under s. 273.3(1)(a).

The Crown's position at previous trials was that any member of the FLDS would know with certainty or substantial certainty that an FLDS marriage would have to be consummated more or less immediately after the formal marriage took place. This followed as a matter of well-accepted practice and fundamental Church doctrine well-known by everyone in the FLDS community.

To establish the necessary intent based on the Crown's theory, the Crown at previous trials organized and led an extensive body of evidence, including expert evidence, designed to shed light on fundamental aspects of FLDS ideology, culture, and marriage practices. The purpose of this extensive body of evidence was to prove intent by making it abundantly clear that when an FLDS

girl is "placed" into a plural marriage with an older priesthood man, sexual contact between them is not merely foreseeable, but a certain or substantially certain consequence of the marriage.

The Crown's theory has certain vulnerabilities. For one, to make out the offence, the accused must know when he or she does "anything" to remove from Canada that the child is going to be placed in a marriage. In other words, if the accused only learns about the purpose of the journey once the child is already outside of Canada, then the prohibited act and mental element will not be contemporaneous. This arises from the Court of Appeal's interpretation of the offence in *R v. Oler*, 2018 BCCA 323 at paragraph 60.

Another difficulty arises from a situation where sexual relations do not occur upon marriage in accordance with the usual FLDS practice or are deferred to a later date. Whether sexual relations actually take place or not is not relevant to the offence. Instead, what matters is whether the Crown can prove beyond a reasonable doubt that the accused believed that the sexual relations would follow. If an alternative inference can be drawn, then the offence will not be made out.

Proposed count against Suspect 1

In 2014, I concluded that that the evidentiary test was not met with respect to Suspect 1. The additional evidence now available has clarified his involvement to some extent but does not change the outcome.

Based on Priesthood Records, investigators believed that Warren Jeffs ("Jeffs") directed Suspect 1 to drive Child 4, Child 5, Child 4's father, and Suspect 2 to meet Suspect 3, and that Suspect 3 would then drive the group to Texas. But that is not how events unfolded: Suspect 3 did not drive anyone to Texas and there is simply no evidence available to establish that an exchange of any kind occurred between Suspect 1 and Suspect 3 until they met in Colorado.

With respect to all potential accused and victims, Suspect 1 is the only individual for whom border-crossing records exist. U.S. Customs & Border Protection Services records show that Suspect 1 entered the U.S. at Porthill, Idaho on December 8, 2005 at 9:58 pm in a BC Licensed vehicle and accompanied only by an uninvolved individual. Records maintained by U.S. Customs & Border Protection Services do not document any border crossing by Child 4, Child 5, Suspect 2, or Suspect 3 during the relevant time period.

In a recent statement, Child 4 was clear that she left home to travel to the U.S. with her father on the evening of December 9th, 2005 and that she was accompanied only by her father. Child 4 remembers that before leaving Canada they met with Child 5 and Suspect 2 who arrived in another vehicle at a location very close to the Kingsgate border crossing. They entered the U.S. through

Kingsgate crossing. Child 4 stated that the only other person they met prior to arriving at their first destination in the U.S. was Suspect 3.

According to Child 4's statement, Suspect 1 was not involved in moving Child 4 and Suspect 2 from Canada to the U.S. However, Suspect 2 told investigators that it was in fact Suspect 1 who told her to pack up Child 5, meet with Child 4's father and cross the border with him. This assertion by Suspect 2 is the only evidence capable of showing that Suspect 1 "did anything", within the meaning of section 273.3(1) of the *Code*, to remove either of the girls.

In 2014, there was essentially no evidence against Suspect 1 in relation to the removal of Child 4 and Child 5. While new evidence now makes it at least possible to prove Suspect 1 made the call directing Suspect 2, it is my view that the Crown is still not in a position to fix Suspect 1 with knowledge that Child 4 and Child 5 were being sent across the border for the purpose of marriages to be consummated in accordance with the usual FLDS practice. There is simply no direct evidence capable of establishing this.

In these circumstances, there is no strong and solid case of substance to present to the court in a prosecution of Suspect 1, and thus no substantial likelihood of conviction.

Proposed count against Suspect 2

In 2014, there was no evidence that Suspect 2 did anything to remove Child 4 or Child 5 from Canada, and in fact no evidence that she crossed the border at all. Despite the absence of U.S. Customs and Border Protection records, that deficiency now has been remedied by Suspect 2's statement with respect to Child 5.

Although Suspect 2 was not entirely straightforward with investigators, she was adamant that she had no knowledge of the purpose of taking her daughter (Child 5) to the U.S. and that she did not know that Child 5 was to be married.

Two features of the explanation provided by Suspect 2 to the investigators are borne out by other evidence that would inevitably be led as part of the Crown's case. First, her belief that Child 5 would be with her father in the U.S. was corroborated by Suspect 3's statement to police, and, second, her belief that Child 5 would be under the care of her aunt was corroborated by Priesthood Records.

Further, Suspect 2's assertion to investigators in her second statement in June 2020 about the timing of any marriage involving Child 5 is quite important. She told investigators she had heard of someone marrying a young girl in circumstances where there were no "marital relations" until the girl was 17 or 18. She stated, "that's what I assumed was going to happen."

At the end of the day, the allegation against Suspect 2 suffers from the same infirmity as the case against Suspect 1: without the ability to fix Suspect 2 with knowledge that Child 5 was being taken to the U.S. for the purpose of marriage, it is impossible to prove the necessary ulterior intent to make out the offence.

Investigators rely upon the December 12th, 2005 Priesthood Record as evidence that Jeffs told Suspect 2 that Child 5 "was on this mission to be married, etc.," but the admissibility of that record is problematic. As a threshold matter, I do not believe the Crown could satisfy the corroboration requirement for the passage in question. Even if the record were admitted, however, it does not fix Suspect 2 with the requisite knowledge until a point in time when she was already on her way back to Canada, four days after having taken Child 5 across the border. Indeed, on the whole, the record tends to show that Suspect 2 was unaware of the purpose of the journey and is exculpatory.

In my judgment, there is no substantial likelihood of conviction. The evidentiary test is therefore not met.

Proposed count against Suspect 3

The evidence is clear that everything done by Suspect 3 in relation to his daughter (Child 5) was done in the U.S. At the time, Suspect 3 had been at the YFZ ranch for a year working on the temple. Wherever an accused may be located, however, it is still necessary to prove that the accused did something ("anything") for the purpose of removing the child in question at a time when that child was still physically located in Canada. Although Suspect 3 did not drive Child 5 across the border, Suspect 3 shared driving duties and thus assisted in the scheme established by Jeffs to get Child 4 and 5 to Short Creek. This conduct is captured by the compendious phrase "do anything" in section 273.3.

However, proving the mental element in Suspect 3's case is problematic. The November 29th Priesthood Record states that Jeffs called Suspect 3 at 2:15 pm on November 27, 2005, to tell him:

> …that his daughter Child 5 will be called to the Redemption of Zion mission and part of that call is to be sealed in marriage. Again, I felt impressed to tell him who and I told him she would be sealed to me. He supported it whole heartedly. I told him that sometime within the next week or two I would send him to go get his daughter and perhaps others.

If the November 29th Priesthood Record is admitted for its truth, then Suspect 3 would be fixed with knowledge that Child 5 is being removed from Canada for the purpose of being married to Jeffs.

As noted, the Crown case in each of the previous prosecutions rested upon an extensive body of evidence touching upon FLDS marriage practices. The difficulty now faced by the Crown is that Child 5's recent statement about her fathers' expectations regarding her marriage strikes at the heart of the Crown case regarding Suspect 3's knowledge. In this statement, Child 5 said her father

(Suspect 3) told her that he knew she was to be married to Jeffs in the future but did not think she would "marry him so young". When pressed on this, she told the investigator, "I think that he probably just thought it'd be like in a few years…"

It is my view that this statement is fatal to the prosecution of Suspect 3 under section 273.3(1)(a) because it undermines the inference that when an FLDS girl is placed into a plural marriage with an older man, sexual contact between them is foreseeable as a certain, or substantially certain, consequence of the marriage. If there is a reasonable doubt about whether Suspect 3 believed that sexual contact would be deferred to a time when Child 5 was 14 years or older, then she is beyond the reach of section 273.3(1)(a) which stipulates that Child 5 must be under the age of 14 at the time of the offence.

The belief that sexual relations would be deferred until Child 4 or Child 5 were older appears as a recurring theme in the evidence. Child 4 advised investigators that her father told her that her marriage was going to take place later. She was emphatic about this and repeated it several times in her lengthy statement; for example, she said: "And, like, he told me that it was gonna be when I was nineteen or twenty. And so, from that I know that he didn't, that he wasn't fully aware that it was gonna happen so fast."

Suspect 2 told investigators that after she found out Child 5 was to be married, she assumed that no "marital relations" would occur until Child 5 was 17 or 18.

A further difficulty is that the November 29th Priesthood Record simply states that Suspect 3 was informed that Child 5 was to be "…called to the redemption of Zion mission and part of that call is to be sealed in marriage". No dates are suggested, in contrast to the Priesthood Record relied upon to secure Oler's conviction, which was more specific with respect to timing.

I conclude that the body of evidence available to the Crown (described above) is fatally undermined by other evidence regarding the timing of the marriages involved and the possibility that sexual relations would be deferred.

In my judgment, there is no substantial likelihood of conviction and the evidentiary test is therefore not met.

ANALYSIS OF TRAFFICKING IN PERSONS COUNTS

Section 279.01 of the *Criminal Code* came into force on November 25, 2005, two days before Suspect 3 received a telephone call from Jeffs advising that Child 4 and 5 would be sealed to him in marriage.

Section 279.01(1) provides as follows:

> 279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable …
>
> (2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.

The offence of human trafficking can be established by proving that the accused recruited, transported, transferred, received, held, concealed, or harboured Child 4 and/or Child 5; or by proving that the accused exercised control or influence over the movement of either girl.

As with the removal offence, the mental element is established by showing that the accused intended to engage in the conduct constituting the offence and that the accused engaged in the prohibited conduct either for the specific purpose of exploiting the victim or for the specific purpose of facilitating their exploitation by another person. The fault element thus consists of two components: first, proof of the intent to do anything that satisfies the conduct requirement; and, second, proof of the exploitative purpose for which that conduct is done. Because the fault element is focused on the purpose of the conduct, it is not necessary that any exploitation actually occur.

Exploitation, the central and essential element of human trafficking, is defined by section 279.04 as follows:

> 279.04 For the purposes of sections 279.01 to 279.03, a person exploits another person if they
>
> (a) cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service; or
>
> (b) cause them, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed.

While there seems little doubt that Child 4 and Child 5 were at risk of being sexually exploited by Jeffs, it would be difficult to maintain the position that they were providing "labour" or a "service" under an actual threat to their safety. The conduct prohibited by the human trafficking offence is decidedly focused on a form of economic exploitation. While there can be no dispute that sexual exploitation could have an economic dimension (e.g., child sex slavery), the circumstances of this case do not fit well within the language of the *Code*. In my view, having regard to the relevant interpretive principles, it would stretch the language of the *Code* to argue that by having sex in the context of their marriage to Jeffs, Child 4 or Child 5 were providing a "labour or a service", and that it was performed under a threat to safety. To be clear, that is not to say that I think this this does not amount to exploitation, but rather, that is it not "exploitation" as defined in section 279.04.

In these circumstances, the evidence available to Crown falls short of the level necessary to warrant a prosecution against any suspect. There is no strong, solid case of substance to present to the court in a prosecution for human trafficking and thus no substantial likelihood of conviction.

CONCLUSION

Given the decisions I have reached, I did not approve any further charges.