

No. \_\_\_\_\_  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

WINSTON KAYE BLACKMORE

PLAINTIFF

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT

**STATEMENT OF CLAIM**

1. The Plaintiff Winston Kaye Blackmore (“Mr. Blackmore”) is a resident of a communal settlement known as “Bountiful”, British Columbia. Mr. Blackmore was unlawfully prosecuted pursuant to a decision announced by the British Columbia Ministry of the Attorney General on January 7, 2009.

2. The Defendant Her Majesty the Queen in Right of the Province of British Columbia is named in accordance with the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, and is liable in damages at common law and under s. 24(1) of the *Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, (the “*Charter*”) for *Charter* violations and tortious conduct by her Ministers, agents, servants and employees.

**The Unlawful Prosecution**

3. Allegations that polygamy is being practiced in Bountiful first came to the attention of the RCMP and the Attorney General’s office in 1990. The RCMP conducted an investigation and provided a report to the Criminal Justice Branch. Mr. Blackmore was one of only two subjects of the investigation at that time. Regional Crown counsel reviewed the evidence obtained by the RCMP as well as the constitutional validity of s. 293 of the *Criminal Code*, R.S.C. 1985, c. C-46 and, in 1992, ultimately decided that there would be no substantial likelihood of conviction on charges of polygamy and declined to approve any charges. These opinions and decision were publicized.

4. The next RCMP investigation spanned the years 2004-2008. The RCMP forwarded their first report on their investigation to Crown Counsel on September 29, 2006, recommending that charges of polygamy and sexual exploitation be brought against Mr. Blackmore and James Oler. However, it was the opinion of four senior Crown counsel that there was no substantial likelihood of conviction. The Criminal Justice Branch would not approve charges.
5. The Attorney General's prerogative to prosecute crime in British Columbia is subject to the limitations and conditions contained in the *Crown Counsel Act*, R.S.B.C. 1996, c. 87.
6. Section 7 of the *Crown Counsel Act* delegates prosecutorial discretion in certain cases to a special prosecutor with decision-making authority. Section 7(5) of the *Crown Counsel Act* stipulates that the decision of a special prosecutor with respect to any matter within his or her mandate is final, subject only to a directive to the special prosecutor from the Attorney General, Deputy Attorney General or Assistant Deputy Attorney General.
7. On May 31, 2007 the Honourable Wally Oppal, Q.C. (the "AG") directed the Assistant Deputy Attorney General, Robert W.G. Gillen, Q.C. (the "ADAG") to retain an experienced criminal lawyer to conduct a charge assessment review of the results of the police investigation into allegations of potential misconduct by individuals associated with the community of Bountiful, British Columbia.
8. Following that directive, on June 6, 2007, the ADAG announced the appointment of Richard C.C. Peck, Q.C. ("Mr. Peck") as a special prosecutor.
9. Mr. Peck's mandate included the following:
  - Conducting an independent comprehensive legal analysis of all of the available evidence that had been assembled by the RCMP 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;
  - Offering such legal advice as was necessary to the police in the event that further investigation by them was required;
  - Providing the Assistant Deputy Attorney General with a written report setting out his charge assessment review decision; and

If in his view a charge was warranted, conducting the prosecution and any subsequent appeal.

10. On July 23, 2007, at the request of Mr. Peck, his mandate was expanded to include consideration of a recommendation for a constitutional reference, and carriage of such a reference should one proceed.

11. Mr. Peck decided in his report of July 25, 2007, that there should be no criminal charges laid in connection with the investigation. Mr. Peck did not approve a prosecution but recommended a reference. There was no appeal by a law enforcement officer and no directions were issued from the Attorney General, the Deputy Attorney General or the Assistant Deputy Attorney General.

12. Mr. Peck's decision on his mandate was final.

13. The AG was at all material times fully aware of the decision-making role afforded a special prosecutor. For instance on May 10, 2007 the AG made the following comments in respect to questions about another special prosecutor in another matter:

What has happened here is that there is a special prosecutor appointed. If a special prosecutor is appointed – listen carefully – the Attorney General doesn't get involved. That's pretty fundamental.

The Attorney General doesn't get involved, so as to remove any suggestion of any political interference.

14. In announcing the decision of Mr. Peck, the media statement issued by the Criminal Justice Branch on August 1, 2007, acknowledged that the appointment of a special prosecutor is made when there is "a significant potential for real or perceived improper influence in the administration of criminal justice", and acknowledged the decision is final subject to any written published directions from the Attorney General, Deputy Attorney General or Assistant Deputy Attorney General:

The Assistant Deputy Attorney General for the Criminal Justice Branch appoints Special Prosecutors pursuant to the *Crown Counsel Act* when there is a significant potential for real or perceived improper influence in the administration of criminal justice.

The decisions of Special Prosecutors are final subject only to receiving written directions from the Attorney General, Deputy Attorney General or Assistant Deputy Attorney General for the Criminal Justice Branch. In such an event, those directions must be made public by publishing them in the Gazette.

15. On September 6, 2007, the AG issued a directive to the ADAG to retain Leonard Doust, Q.C. ("Mr. Doust") "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 AG instructed the ADAG:

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.

16. In response to this directive, the ADAG appointed Mr. Doust as an *ad hoc* prosecutor.

17. In his report dated March 20, 2008, Mr. Doust confirmed the findings and recommendations of Mr. Peck and 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." In coming to this conclusion, Mr. Doust's reasons for his recommendation are summarized, in part:

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.

18. The AG stated that he wanted a “more aggressive approach, which means you lay the charge and let the defence worry about the constitutionality issue.” He recognized that he could order the Criminal Justice Branch to prosecute the case, but he preferred to work with someone who did not believe the case was doomed to failure. He had hoped Mr. Peck or Mr. Doust would have decided to lay the charge, but both had recommended a reference.

19. On May 28, 2008, the AG directed the ADAG to appoint Mr. Robertson as a prosecutor, either special or *ad hoc*. The AG’s directive to the ADAG reads:

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.

20. On June 2, 2008, in response to the AG's directive, the ADAG appointed Mr. Robertson as a special prosecutor. There was no change from Mr. Peck's mandate. There was no new police investigation or evidence. Mr. Robertson's mandate was stated to be:

Conducting an independent charge assessment review based on the results of the RCMP investigation, the materials assembled by the Criminal Justice Branch and any other information that the investigating officers may provide to him;

Offering such legal advice as is necessary to the police in the event that further investigation by them is required;

Providing the Assistant Deputy Attorney General with a written report setting out his charge assessment decision; and

If in his view a charge is warranted, conducting the prosecution and any subsequent appeal.

21. Mr. Robertson decided to prosecute Mr. Blackmore. Mr. Blackmore was charged with practicing a form of polygamy, or practicing a kind of conjugal union between May 1, 2005 and December 8, 2006 contrary to s. 293(1)(a) of the *Criminal Code*.

22. The AG intended to create the illusion that the decision to prosecute was that of the special prosecutor. In fact, the AG only accepted Mr. Robertson's decision because it reflected the result he personally sought.

23. In order to be released on bail, Mr. Blackmore had to undertake to attend Provincial Court on January 21, 2009. He had to attend the Creston RCMP Detachment every 2<sup>nd</sup> and 4<sup>th</sup> Tuesday, commencing January 13, 2009 between the hours of 8:30-16:30 and to sign the register. He could not perform or take part in any celestial or civil marriage ceremony. He had to surrender his passport to the RCMP in Creston. He could not leave British Columbia until

further order of the Court. These conditions prevented Mr. Blackmore from making fundamental personal choices. If Mr. Blackmore had been successfully prosecuted, he would have been guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

24. Mr. Blackmore retained counsel to defend him against this unlawful prosecution. He became deeply indebted to his legal counsel for legal fees and disbursements related to his defence. Mr. Blackmore traveled to Vancouver, British Columbia on at least one occasion to instruct counsel and attend a hearing. He incurred costs related to same.

25. As a result of the pending charges, Mr. Blackmore suffered business and other financial losses and he and his family were put under extreme stress and anxiety.

26. On September 23, 2009, Madam Justice Stromberg-Stein held that the AG had no jurisdiction to direct the ADAG to appoint Mr. Robertson as a prosecutor, and 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. She held that the appointment of Mr. Robertson as a special prosecutor was contrary to s. 7 of the *Crown Counsel Act* and his decision to prosecute was therefore unlawful. She granted orders in the nature of *certiorari*, quashing the appointment by the ADAG of Mr. Robertson as a special prosecutor under s. 7 of the *Crown Counsel Act* to conduct a charge assessment in relation to allegations of criminal misconduct involving individuals associated with the community of Bountiful, British Columbia; and orders in the nature of *certiorari*, quashing the decision of Mr. Robertson as special prosecutor to approve charges against Mr. Blackmore and Mr. Oler under s. 293 of the *Criminal Code*.

27. On October 22, 2009, Attorney General Michael de Jong accepted the correctness of this decision when he declined to appeal this ruling. Instead, he instructed counsel to proceed with two reference questions with respect to polygamy.

28. On October 22, 2009 the ADAG sent a memorandum to the District Registrar of the Cranbrook Provincial Court Registry directing the Clerk of the Court to enter a stay of the proceedings against Mr. Blackmore.

### **Violation of Mr. Blackmore's *Charter* Rights**

29. The unlawful appointment of Mr. Robertson and the consequent prosecution of Mr. Blackmore deprived him of his liberty contrary to the principles of fundamental justice and was thus in violation of s. 7 of the *Charter*.

30. Without limiting the generality of the foregoing the AG acted in a manner that was high handed, arbitrary, reckless, abusive, improper and inconsistent with the Honour of the Crown and the administration of justice. The principles of fundamental justice are also violated when the Attorney General allows his own personal or political views to influence or even to appear to influence the course of a criminal prosecution.

31. The violation of the Plaintiff's s. 7 rights were not justified pursuant to s. 1 of the *Charter*.

### **Negligence**

32. In addition and in the alternative, the AG and Mr. Blackmore are in a relationship of proximity in that damage to Mr. Blackmore was a reasonably foreseeable consequence of the AG's unlawful action in directing that Mr. Robertson be appointed on the same mandate as Mr. Peck.

33. The AG owed a duty of care to Mr. Blackmore not to direct that Mr. Robertson be appointed on the same mandate as Mr. Peck following Mr. Peck's final decision not to prosecute.

34. The class of persons to whom the AG owed the duty is limited and distinct. Mr. Blackmore is one of only two members of this class.

35. The amount of liability is limited to the negligent act and is easily quantifiable.

36. The AG breached this duty of care by directing that Mr. Robertson be appointed as particularized above.

37. The breach directly caused damage to Mr. Blackmore.

38. As a result of the unlawful and negligent prosecution and the *Charter* violation set out above, Mr. Blackmore has suffered loss, damages and injuries including:

- a. legal fees, disbursements and expenses;
- b. travel costs and accommodation expenses;
- c. loss of business opportunities and other economic loss;
- d. pain and suffering including mental distress, anxiety and public embarrassment;  
and
- e. such further and other damages as will be listed before the trial.

The Plaintiff claims at common law and pursuant to s. 24 of the *Charter* as follows:

- (a) general damages;
- (b) aggravated damages;
- (c) punitive damages;
- (d) special damages;
- (e) costs, including special costs;
- (f) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79; and
- (g) such further and other relief as to this Honourable Court may seem just.

Place of trial: Vancouver BC

ARVAY FINLAY

Per:

Joseph J. Arvay QC

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

Dated: January 12, 2010