
CANADA / JUDGMENT

R. v. Blackmore

2018 BCSC 367

COURT

Supreme Court of British Columbia

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2018 BCSC 367 R. v. Blackmore

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Blackmore,

2018 BCSC 367

Date: 20180309

Docket: 31247

Registry: Cranbrook

Regina

v.

Winston Kaye Blackmore and James Marion Oler

Before: The Honourable Madam Justice Donegan

Ruling on Application for a

Stay of Proceedings

Special Prosecutor and agent for the Attorney General of British Columbia:

P.J. Wilson, Q.C.

M.B. Rankin

Counsel for Winston Kaye Blackmore:

B.F. Suffredine, Q.C.

James Marion Oler appeared on his own behalf

Amicus Curiae:

J. Doyle

Place and Date of Hearing:

Cranbrook, B.C.

November 7 and

December 12-14, 2017

Place and Date of Judgment:

Cranbrook, B.C.

March 9, 2018

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INTRODUCTION

- [1] On July 24, 2017, I found Winston Blackmore and James Oler each guilty of one count of practising polygamy contrary to s. 293(1)(a) of the Criminal Code of Canada. R.S.C. 1985, c. C-46 (the "Criminal Code"). Convictions have yet to be entered as each of them now applies for a judicial stay of proceedings grounded in the common law defence of officially induced error and, in Mr. Blackmore's case, for an abuse of process contrary to s. 7 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "Charter").
- [2] Both applicants largely base their claims on the Attorney General of British Columbia's (the "Attorney General") publicly expressed view between 1992 and 2007 that s. 293 of the Criminal Code was unconstitutional. They say that it is fundamentally unfair that they should be convicted in relation to conduct occurring during this period when the highest criminal law authority in the province considered the law invalid and did not enforce it against them. Mr. Blackmore adds in relation to his abuse of process claim that this unfairness was compounded by decades of pre-charge delay and by the conduct of one Attorney General who appointed successive special prosecutors until he found one who was prepared to give him the outcome that he sought: prosecution of the applicants.
- [3] Mr. Blackmore seeks, in the alternative, an exemption from punishment on the grounds that the conduct forming the basis of his criminal conviction was motivated by his genuinely held religious beliefs protected by s. 2 of the Charter.
- [4] The Crown responds that all of the challenges lack merit. A news release, it says, is not a binding statement of law, and the applicants therefore took a calculated risk when they engaged in conduct that remained at all times prohibited by the Criminal Code. Moreover, most of the impugned Crown conduct involves the exercise of prosecutorial discretion and is subject only to review for abuse of process, which is not made out in this case.
- [5] I will begin by outlining the facts, principally derived from an Agreed Statement of Facts, but also determined from the evidence of three witnesses - Mr. Blackmore and two RCMP officers. Following this, I will consider the defence of officially induced error invoked by both Mr. Blackmore and amicus curiae on behalf of Mr. Oler. I will then turn to consider Mr. Blackmore's Charter claims and conclude with consideration of common law abuse of process raised by amicus curiae on behalf of Mr. Oler.

Facts

General

- [6] In 1990, allegations that polygamy was being practised in a community known as Bountiful near Creston, British Columbia came to the attention of the RCMP and British Columbia's Criminal Justice Branch ("CJB"). Residents of Bountiful adhere to the beliefs of a fundamentalist Mormon faith, a faith commonly referred to as the Fundamentalist Church

of Jesus Christ of Latter Day Saints (the "FLDS"). In the course of their investigation, police obtained and executed search warrants for marriage and related records in respect of both Mr. Blackmore and Mr. Oler's father, Dalmon Allen Oler, at various locations. Mr. Blackmore was cooperative with investigators in helping them locate and seize relevant records.

- [7] The RCMP submitted a Report to Crown Counsel in October 1991. Crown counsel reviewed the report and considered both the evidence obtained by the RCMP as well as the constitutional validity of s. 293 of the Criminal Code, the offence of polygamy, in light of the rights and protections guaranteed by the Charter.
- [8] In 1992, the Crown declined to proceed with any charges related to polygamy on the basis of several expert opinions that s. 293 was in conflict with the s. 2(a) Charter guarantee of religious freedom. An external opinion provided to the Attorney General in February 1992 by retired British Columbia Court of Appeal Justice Richard Anderson stated that s. 293 was in direct conflict with s. 2(a) of the Charter and likely could not be saved under s. 1. Internal opinions from the British Columbia Ministry of the Attorney General had similarly concluded that s. 293 was potentially unconstitutional. Internal opinions from senior members of the CJB had likewise concluded that s. 293 was unconstitutional.
- [9] On June 11, 1992, the CJB issued a press release (the "Press Release") that referenced some, but not all, of the conclusions of the internal and external legal opinions. It read, in part, as follows:

No charges of polygamy or bigamy will be laid following a complaint in the Creston area, said Hermann Rohrmoser, Regional Crown Counsel for the Southern Interior.

Rohrmoser announced his decision following a review of a report to Crown Counsel prepared by the police into allegations about polygamous practices in a community near Creston.

"Exhaustive research undertaken by constitutional experts both within, and independent of, the Ministry of Attorney General, conclude that section 293 of the Criminal Code, the polygamy offence provision, is unconstitutional," said Rohrmoser. "It is the experts' unanimous opinion that section 293 is in direct conflict with the freedom of religion guarantees in section 2 of the Charter of Rights and Freedoms and cannot be justified by section 1 of the Charter.

- [10] The Press Release also referenced the legal opinion and suggestions of retired British Columbia Court of Appeal Justice Richard Anderson, quoting him as saying:

It would appear that section 293 is obsolete and apart from being unconstitutional is inadequate to solve the real problems confronting society. Where there is considerable doubt as to the validity of Criminal Code provisions, it would seem that the best course is not to persist in expensive and time consuming litigation, but to endeavour to persuade the federal government to enact new laws which would be specifically designed for a specific purpose, namely to enhance desirable social objectives, justifiable in a free and democratic society. In this connection, particular attention must be given to the constitutional rights of women and children.

- [11] The Press Release additionally outlined Mr. Rohrmoser's observation that the Deputy Attorney General for British Columbia, Robert Edwards, Q.C., would be very soon attending a meeting of federal and provincial deputy ministers responsible for the administration of justice, and that the application of the Criminal Code "to issues around polygamy and measures to protect women and children in a patriarchal society" would be discussed.
- [12] The Press Release quoted Mr. Rohrmoser agreeing with the experts' conclusions and expressing his view that the complaint did not meet the Crown's requirements for proceeding with a charge given there was no substantial likelihood of conviction in light of the legal opinions that had been received.
- [13] Lawyer Patrick Dearden acted for Mr. Blackmore during at least the years 1991 and 1992. After the announcement by the CJB in the Press Release, Mr. Dearden advised Mr. Blackmore that "as far as Crown was concerned, section 293 of the Criminal Code was unconstitutional".
- [14] According to Mr. Blackmore, he was relieved to learn the Attorney General had concluded that his religious rights were protected by the Charter, and he relied on this fact in proceeding with "the blessings performed after that" (paragraph 21 of Mr. Blackmore's affidavit). I will return to this latter assertion by Mr. Blackmore, an assertion I do not accept, when I consider his evidence in detail below.
- [15] In 2001, allegations concerning the practice of polygamy in Bountiful again came to the attention of the CJB. The CJB retained Allan McEachern, the former Chief Justice of British Columbia, to provide an opinion on the constitutional validity of s. 293. Consistent with the previous expert conclusions, it was his opinion that the provision was likely in conflict with s. 2(a) of the Charter and would be struck down if a prosecution were undertaken.
- [16] In 2002, a rift occurred in the community of Bountiful following the death of Rulon Jeffs, the president and prophet of the FLDS at the time. Mr. Blackmore was bishop of the community of Bountiful and believed by many to be the legitimate successor to Mr. Jeffs. When Mr. Jeff's son, Warren Jeffs, assumed the presidency instead, roughly half of the Bountiful community chose to follow Mr. Blackmore while the other half chose to follow Mr. Oler, who was assigned to be bishop of those in the community loyal to Warren Jeffs. Mr. Blackmore remained bishop of his supporters and continued to follow the practices and beliefs of the fundamentalist Mormon faith.
- [17] Between 2004 and 2008, the RCMP investigated allegations of polygamy and other offences related to the community of Bountiful. In 2005, the RCMP commenced an 18-month investigation into allegations of sexual exploitation in Bountiful.
- [18] During a meeting with Mr. Blackmore in 2005, then Sergeant Mark Fisher advised him that the RCMP were commencing an investigation into sexual exploitation and that they would be looking to speak with him and his wives at some point. During that discussion, the men briefly discussed polygamy. Mr. Blackmore said that based on his understanding of the

Charter and the legal advice he had received, he felt the guarantee of religious freedom in the Charter protected his right to practice polygamy, and that any investigation or prosecution for polygamy was therefore unlikely to be successful. Pointing to a framed copy of the Charter in the room, he said that he felt he would win any case based on a criminal charge of polygamy. Sergeant Fisher told him that Crown counsel would have to consider all of the evidence police put before them and obviously have to look at the polygamy provision in the Criminal Code and make a decision whether to proceed.

- [19] Sergeant Fisher also expressed his personal opinion that members of the Bountiful community deserved a clear answer on their status in regards to polygamy and his hope that a decision on polygamy would give them some clarity. During this conversation, Mr. Blackmore did not say anything to the effect that the polygamy provision was unlawful. Nor did he communicate that he had expressly been told his conduct was lawful or that no charges would be laid against him. Mr. Blackmore cooperated with the interviews police requested of his wives.
- [20] On September 29, 2006, the RCMP forwarded a Report to Crown Counsel recommending charges of polygamy and sexual exploitation against Mr. Blackmore and Mr. Oler. The CJB Crown Counsel Policy Manual in effect between 2004 and 2012 set out the CJB policy for "Polygamy" as follows:

In light of the various constitutional issue which may arise, if a Report to Crown Counsel alleging polygamy is received, Administrative Crown Counsel should refer the file, together with any recommendation, to Regional Crown Counsel, who in turn should consult with the Assistant Deputy Attorney General before a charging decision is made.

- [21] Senior members of the Office of the Assistant Deputy Attorney General ("ADAG") concluded that there was no substantial likelihood of conviction, and the CJB ultimately did not approve the charges recommended by the RCMP.
- [22] On May 31, 2007, the Attorney General of the day, Wally Oppal, Q.C., issued a directive to the ADAG, Robert Gillen, Q.C., under s. 5 of the Crown Counsel Act, R.S.B.C. 1996, c. 87 [CCA], to retain an experienced criminal lawyer to conduct a charge assessment review into allegations of potential misconduct committed by individuals associated with the community in Bountiful: Directive for Charge Assessment Review, B.C. Gaz. 2007, I. 251.
- [23] On June 6, 2007, the ADAG announced that Richard Peck, Q.C. had been appointed a special prosecutor pursuant to s. 7(1) of the CCA. Included in his mandate were the following:

Conducting an independent comprehensive legal analysis of all 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 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.

[24] On July 23, 2007, Mr. Peck's mandate was expanded to include consideration of a recommendation for a constitutional reference.

[25] On July 25, 2007, Mr. Peck submitted a charge assessment report in which he concluded that there should be no criminal charges laid in connection with the investigation, and that the Attorney General should pursue a constitutional reference to have the constitutional validity of s. 293 determined.

[26] On August 1, 2007 the CJB issued a media statement announcing this outcome and attaching a summary of Mr. Peck's charge assessment report, which read in part:

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.

[27] Mr. Peck considered that a reference to the Court of Appeal was preferable to a criminal trial as means of determining the constitutional validity of s. 293 for several reasons:

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.

[28] In Mr. Peck's view, the public interest was best served by a reference to the B.C. Court of Appeal, which would provide "an authoritative and expeditious judicial resolution of the legal controversy surrounding polygamy". He added:

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.

- [29] On September 6, 2007, the Attorney General directed the ADAG to retain a lawyer to perform an independent review of Mr. Peck's charge assessment report: Directive for Charge Assessment Analysis, B.C. Gaz. 2007.I.386. The ADAG retained Leonard Doust, Q.C. to undertake this task.
- [30] In March 2008, Mr. Doust confirmed the findings and recommendations in Mr. Peck's charge assessment report. He likewise concluded that a prosecution would be unfair and that a reference was the preferable means by which to proceed.
- [31] On May 28, 2008, the Attorney General wrote to the ADAG directing him to appoint Terrence Robertson, Q.C. as a prosecutor, either special or ad hoc: Directive for Charge Assessment Review, B.C. Gaz. 2008.I.237. In his directive, the Attorney General expressed disagreement with Mr. Peck's decision not to prosecute and with Mr. Doust's opinion that a prosecution would be unfair. He expressed the opinion that the CJB was mistaken in its view that s. 293 was unconstitutional, observed that both Mr. Peck and Mr. Doust believed s. 293 was constitutionally valid, and indicated his view that it was appropriate and not unfair to enforce a valid criminal law.
- [32] On June 2, 2008, the ADAG appointed Mr. Robertson as a special prosecutor as directed. His mandate was on substantially the same terms as Mr. Peck's. On that same date, the CJB issued a press statement advising of this appointment and quoting from the Attorney General's directive as outlined above. The press statement also explained Mr. Gillen's decision to appoint Mr. Robertson as an independent special prosecutor in these terms:

Due to the Attorney General's disagreement with Mr. Doust on the fundamental issue of fairness, and in light of the climate of concern expressed in the media and public opinion regarding the community of Bountiful, Mr. Gillen concluded that to avoid any risk of real or perceived improper influence in the exercise of prosecutorial responsibilities regarding this matter, it was necessary to appoint Mr. Robertson as an independent Special Prosecutor. The paramount consideration in this matter was public confidence in the administration of criminal justice and the need to assure the public generally and the community of Bountiful specifically that an independent assessment will be free of any perception of improper influence.

- [33] Mr. Robertson approved polygamy charges against both Mr. Blackmore and Mr. Oler. On January 6, 2009, Mr. Blackmore was charged with one count of polygamy in relation to 19 named women between May 1, 2005 and December 8, 2006. Mr. Oler was charged on a separate information with one count of polygamy in relation to three named women between November 1, 2004 and October 8, 2008. On February 5, 2009, the charges against Mr. Blackmore and Mr. Oler were joined in one information.

[34] Mr. Blackmore and Mr. Oler applied under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, to quash Mr. Robertson's appointment and his decision to approve charges. In reasons indexed at *Blackmore v. British Columbia (Attorney General)*, 2009 BCSC 1299 ("Blackmore 2009"), Madam Justice Stromberg-Stein (as she then was) allowed the application, holding that Attorney General Oppal had no jurisdiction to direct the appointment of Mr. Robertson in the circumstances. Stromberg-Stein J. granted orders in the nature of certiorari quashing both Mr. Robertson's appointment and his decision approving charges.

[35] As a result of Blackmore 2009, Acting Depute Attorney General, M. Jerry McHale, Q.C. directed Mr. Gillen to stay the charges against Mr. Blackmore and Mr. Oler on October 20, 2009. On October 22, 2009, then Attorney General Michael de Jong issued a statement explaining that he had, this same day, asked legal counsel for the Ministry of the Attorney General not to appeal Blackmore 2009, and had, rather, chosen to request the British Columbia Supreme Court's direction on two reference questions with respect to polygamy. He wrote, in part:

Pursuing a reference through B.C. Supreme Court gives us the option to introduce evidence and witnesses, which will put a human face on polygamy in contrast to the more abstract nature of a reference to B.C. Court of Appeal. Proceeding by way of reference is consistent with the earlier advice of senior lawyers Richard Peck and Leonard Doust.

British Columbians and Canadians deserve and want to know whether valid laws are in place that prohibit polygamous relationships, particularly when those relationships involve minors. I am asking the court for its direction so the justice system, in B.C. and in Canada, can address the serious social harms that can result from the practice of polygamy.

[36] By Order in Council dated October 22, 2009, the Lieutenant Governor in Council referred two questions to the Supreme Court of British Columbia for hearing and consideration pursuant to the Constitutional Question Act, R.S.B.C. 1996, c. 68, s.1. The first of those questions was "[i]s section 293 of the Criminal Code of Canada consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?"

[37] Chief Justice Bauman, then of the Supreme Court of British Columbia, presided over the reference. The three parties to the reference were the Attorney General of British Columbia, the Attorney General of Canada and the Amicus Curiae, publicly funded to advance the case in opposition to the Attorneys General, both of whom took the position that s. 293 was constitutionally sound. Chief Justice Bauman granted interested person (essentially intervenor) status to eleven persons or groups, including the FLDS and Mr. Oler in his capacity as bishop of the FLDS. The FLDS and Mr. Oler were represented by counsel at the reference.

- [38] Mr. Blackmore, on his own behalf and on behalf of his congregation, sought to be added as a party or, in the alternative, as an interested person. He also sought an order for advance costs in the proceeding to be paid by British Columbia and Canada. Recognized as one of the two leaders in the fundamentalist Mormon community of Bountiful (Mr. Oler the other), Bauman C.J.B.C. denied him party status and advanced costs, but granted him interested person status, like Mr. Oler and his congregation: Reference re: Criminal Code, s. 293, 2010 BCSC 517. Mr. Blackmore and his congregation did not appeal this decision and opted not to participate in the reference.
- [39] The reference hearing commenced in November 2010 and concluded in April 2011. On November 23, 2011, Bauman C.J.S.C. issued his reasons in Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (the "Polygamy Reference") upholding the constitutional validity of the provision.
- [40] By this time, new evidence pertaining to Mr. Blackmore and Mr. Oler had become available to the Crown, including records derived from investigations in the United States involving a search warrant executed at the FLDS Yearning for Zion Ranch (the "YFZ Ranch") in Texas.
- [41] In August 2014, special prosecutor Peter Wilson, Q.C. approved polygamy charges under s. 293 of the Criminal Code against Mr. Blackmore and Mr. Oler. An information was sworn in Cranbrook on August 13, 2014 charging Mr. Blackmore with one count of polygamy in relation to 24 named women between October 12, 1990 and February 28, 2014, and charging Mr. Oler with one count of polygamy in relation to four (later amended to five) named women between May 30, 1993 and January 7, 2009.
- [42] On February 27, 2015, Mr. Blackmore filed a petition challenging Mr. Wilson's appointment primarily on the basis that Mr. Peck's decision was final and that the appointment of Mr. Wilson to pursue a mandate that was essentially the same as Mr. Peck's, contrary to s. 7(5) of the CCA. As had been the case in Blackmore 2009, the sole issue on the petition was the jurisdiction of the ADAG in the prevailing circumstances to appoint a new special prosecutor. Mr. Oler did not participate in this challenge.
- [43] In Blackmore v. British Columbia (Attorney General), 2015 BCSC 1099, Associate Chief Justice Cullen dismissed the petition. Central to Cullen A.C.J.'s conclusion was his determination that the word "final" in s. 7(5) of the CCA did not preclude the appointment of a special prosecutor in the face of a previous special prosecutor's decision not to approve charges regarding the same individuals when there had been a material change in the factual and/or legal matrix that existed at the time the first decision was made.
- [44] The Court of Appeal agreed. In Blackmore v. British Columbia (Attorney General), 2016 BCCA 233 ("Blackmore (CA)"), Frankel J.A., for the Court, held that Mr. Peck's mandate had been to consider whether polygamy charges should be laid based on the state of the law and the evidence the police had gathered as of 2007, but that both had changed by the time of Mr. Wilson's appointment in 2012 with the Polygamy Reference and the additional evidence gathered. Mr. Wilson's mandate was therefore different than Mr. Peck's and his appointment

within the jurisdiction of the ADAG. Justice Frankel went on to reject Mr. Blackmore's further contention that Mr. Peck's 2007 decision established three "prerequisites" for the prosecution of persisting acts of polygamy. He held (at para. 68) that

[i]t was not within Mr. Peck's mandate to set immutable and binding conditions with respect to when, in the future, a prosecution would be appropriate; in effect to say, "there can never be a prosecution unless ." Once there was a material change in circumstances it was open to Mr. Gillen, to form the view that it was in the public interest to have a special prosecutor determine whether, in light of those changes, a prosecution should go forward. While Mr. Gillen undoubtedly took Mr. Peck's views into consideration, he was not bound by them; neither was Mr. Wilson.

[45] Mr. Blackmore and Mr. Oler's trial was held over 13 days in April and May of 2017. On July 24, 2017, in reasons indexed at 2017 BCSC 1288 (the "Trial Reasons"), I found both accused guilty of practising polygamy. Convictions have not been registered as they each now apply for a judicial stay of proceedings - both on the basis of the common law defence of officially induced error and, in Mr. Blackmore's case, principally on basis of an abuse of process contrary to s. 7 of the Charter.

[46] I now turn to consider Mr. Blackmore's evidence at this hearing.

Mr. Blackmore's Evidence

[47] I will say at the outset that while there are aspects of Mr. Blackmore's evidence that I accept, there are several aspects I do not. Cross-examination exposed portions of Mr. Blackmore's evidence to be vague, inaccurate, contradictory and misleading, undermining not only Mr. Blackmore's credibility overall, but the reliability of certain of his evidence. I will specifically identify those areas I do not accept.

[48] I will organize Mr. Blackmore's evidence into two general areas: (a) his religious beliefs and marriages and (b) his dealings with the state.

(a) Mr. Blackmore's Religious Beliefs and Marriages

[49] Mr. Blackmore is currently 61 years old. He is a man of firm convictions and beliefs. He has not, and will not, deny his faith.

[50] Mr. Blackmore was born into the fundamentalist Mormon faith and raised in a polygamist family. He has actively practised this faith throughout his life and to the present day. Mr. Blackmore explained several key aspects of his faith. Except for one area, his evidence about his faith accords with the expert evidence I accepted at trial.

- [51] Mr. Blackmore explained the critical importance of practising plural marriage to the fundamentalist Mormon faith. Identifying it as one of the central differences between the mainstream Mormon and the fundamentalist Mormon faiths, he explained that fundamentalists like himself believe the correct interpretation of the scriptures requires plural marriage in order for one to obtain exaltation or eternal life. As a fundamentalist, he feels he must practise plural marriage.
- [52] Mr. Blackmore described his fundamentalist religion as "the work" or the "priesthood work", a religion that came to be called the FLDS in 1991. Although he separated from the FLDS in 2002, he continued to maintain the same beliefs and priesthood work thereafter, and to the present day.
- [53] Consistent with the expert evidence at trial, Mr. Blackmore agreed that in his faith, the "doctrine of the priesthood", simply put, is the power and authority of God on earth. He believes in the priesthood and the priesthood work. In terms of his own positions within the priesthood, Mr. Blackmore was ordained a minister in August of 1980 by the president and prophet of the day, Leroy Johnson. In 1984, he advanced in the ministry to be a high priest and was given the office of bishop. This office gave him authority over the fundamentalist Mormon communities located in Creston, British Columbia (Bountiful), Cardston and Rosemary, Alberta, and, eventually, a community in northern Idaho. This office authorized him to ordain other patriarchs and administer all blessings and ordinances of the priesthood, including the ordinance of celestial marriage. Mr. Blackmore's association with the current FLDS ended in 2002, but he remained a bishop practising the same fundamentalist faith with his own congregation of followers, to the present day.
- [54] As part of his religious and priesthood duties, Mr. Blackmore was required to, and did, enter into plural marriages. His religious duty required it for his eternal salvation. His priesthood duty also required it for the salvation of his wives and because, as bishop, if he refused any proposed marriage brought to him by his superiors he would be forced to resign his position and face possible excommunication. He was obliged to do what the president required because the president, also known as the prophet, was the person who receives, or can receive, revelation from God.
- [55] Mr. Blackmore provided specific evidence about his lifestyle and marriages. Although he called his celestial marriage ceremonies "church blessings" at some points in his evidence and "marriages" at other points, I find he is referring to the celestial marriage ceremonies I concluded were "marriages" or "conjugal unions" within the meaning of s. 293 of the Criminal Code in the Trial Reasons.
- [56] Mr. Blackmore offered evidence about the requirements for women to marry in his faith and the ages of his wives when he married them. This is one area where his credibility and the reliability of his evidence was significantly undermined. At paragraph 12 of this affidavit, Mr. Blackmore deposed that in his faith:

[w]omen must consent to marry and be willing participants of legal age to marry under the laws of British Columbia. She must have the consent of her parents and none of the ceremonies involving me were to any woman who did not have the consent of her parents and who I believed at the time to be of legal age to marry.

[57] Mr. Blackmore went on to explain that he married one person when she was under the "legal age to marry", but did so unknowingly as he had been misled about her age. When he learned her true age, he "declined any relationship with her until she was old enough": paragraph 13.

[58] Mr. Blackmore was cross-examined extensively on what he means by "legal age to marry under the laws of British Columbia". Not only did Mr. Blackmore give different explanations about its meaning and concede he had given contradictory answers in another legal proceeding in the United States, he contended that he never married anyone when she was under the age of 16 years old (other than the time he was duped). This contention is simply untrue.

[59] In addition to the one marriage where he says he was duped about his new wife's age, Mr. Blackmore admitted in this hearing, as I found in the Trial Reasons, that he married another 15 year old girl in 1999. Overall, Mr. Blackmore's evidence in this entire area was vague, contradictory and, in the area I have identified, simply untrue. I do not accept it.

[60] Mr. Blackmore also gave evidence, in broad terms, about his living arrangements with his wives over the years. He agreed that at the beginning, his family lived in a single house, but as his family grew, other houses were occupied until eventually he lived with his wives in a cluster of homes in Bountiful. This lifestyle was disrupted in 2002, when he was dismissed from the FLDS and the Bountiful community divided. At that time, Mr. Blackmore called all of his wives together and told them they were free to make their own choice about which of the two factions they would follow and that he would support them no matter their choice. Some of his wives decided their allegiance was with Mr. Jeffs and others decided to stay with Mr. Blackmore. To this day, Mr. Blackmore and his wives that chose to stay with him continue to live in a cluster of homes in Bountiful.

[61] I find this a convenient place to address two submissions made by counsel for Mr. Blackmore about the status of Mr. Blackmore's marriages. Mr. Suffredine suggested, directly or indirectly at various points in his submissions, that Mr. Blackmore, contrary to what I found in the Trial Reasons, no longer engaged in the practice of polygamy after either 2002 or 2004. With respect to the year 2002, he relies upon Mr. Blackmore's evidence, found at paragraph 15 of his affidavit, asserting that all of his celestial marriages were "dissolved" with his excommunication from the FLDS that year. With respect to the year 2004, Mr. Suffredine relies upon Mr. Blackmore's divorce from his first wife Jane Blackmore that year and a "stipulation" made by Crown counsel at the commencement of trial. Leaving aside that these are matters that should have been raised at trial if they were to be raised, they are submissions that I do not accept and findings I cannot make.

- [62] I will start with Mr. Blackmore's contention that he no longer practised polygamy after 2002. At paragraph 15 of his affidavit, Mr. Blackmore outlines what he says were the two effects of his 2002 dismissal from the FLDS. He asserts that his excommunication "dissolved any marriage (blessing) I had participated in" and removed "all record" of him from the records of the church. He does not explain why he believes the former of these and supports the latter contention by reference to one of the scriptures and the location of his church records at the YFZ Ranch in Texas.
- [63] I do not accept either of these assertions. I will address the latter first.
- [64] Mr. Blackmore's claim that his excommunication caused all record of him to be removed from the records of the church is contradicted by the reliable evidence I accepted at trial. As I outlined in the Trial Reasons, a large number of FLDS records were found in 2008 by a Texas law enforcement search of the YFZ Ranch. Some of these records were used in prosecutions of FLDS leaders and members in the United States, including its president, Warren Jeffs. Many of Mr. Blackmore's celestial marriage records were subsequently located by RCMP officers among these records. In the Trial Reasons I explained how these records were stored and kept. Many of them recorded two marriages to a page. I note that one of Mr. Blackmore's marriage records relied upon at trial shares the same page as one of Warren Jeff's marriage records. As the FLDS president, Mr. Jeffs was clearly not an excommunicated member. This undermines Mr. Blackmore's assertion that the location of his records demonstrates that his release from the church removed all record of him from the church record.
- [65] I also reject Mr. Blackmore's other assertion - that his excommunication "dissolved" all his celestial marriages. I do so for a number of reasons. First, it is directly contrary to the expert evidence tendered at trial. It was a proposition specifically put to one of the experts in cross-examination and rejected. Second, Mr. Blackmore offers no foundation for this belief, as perhaps grounded in scripture or other teachings. Third, and perhaps most importantly, this assertion is entirely inconsistent with Mr. Blackmore's evidence about the current status of his celestial marriages. Mr. Blackmore was clear in cross-examination that he continues to firmly hold the belief in the necessity of plural marriage, a practice that is integral to his exaltation and the exaltation of his wives. He confirmed the ongoing nature of some of his marriages and candidly admitted that he continues to hold firmly to the belief that his celestial marriages are legal, lawful and proper in the eyes of God and that he knows they are not considered legal, lawful and proper at this time in the eyes of the Government of Canada.
- [66] In the end, I find I cannot accept Mr. Blackmore's claim that his excommunication "dissolved" all of his celestial marriages in 2002.
- [67] Moving to 2004, Mr. Suffredine suggests that once Mr. Blackmore was divorced from Jane Blackmore, he no longer practised polygamy because of what he says was a Crown "stipulation" at the beginning of the trial that "the offence [of polygamy] would only be made

out if there was both a legal marriage and a subsequent ceremony that was not a legal marriage while the legal marriage exists." Mr. Blackmore did obtain a civil divorce from his first wife in 2004; however, his position on the effect of his divorce is unsupportable because the Crown made no such "stipulation" at the commencement of trial or any other time.

Rather, at the commencement of trial, the following exchange between counsel occurred:

MR. SUFFREDINE: We've abandoned the particulars application based on the fact that the response from Crown was that polygamy and practicing more than one conjugal union are the same. And I want to be sure that was on the record. That the Crown has taken the position that there is no distinction to be drawn between polygamy and practicing more than one conjugal union. The Code section says "or".

THE COURT: I'm not familiar with any of the discussions between counsel or correspondence so I don't know, Mr. Wilson, is this something you are prepared to address at this time?

MR. WILSON: Yes. The actus reus of this offence includes that the accused must enter into a marriage with another person or alternatively enter into a conjugal union that includes some formal sanctioning event. The Crown's position is that both of those things occurred here.

Is that [indiscernible/whispering]

Well, I'm being asked whether they are the same thing. Well, I think that for the purposes of this Indictment they are. I think that's the clearest answer I can give, my Lady.

[68] In the end, there is simply no basis for Mr. Blackmore's assertion that he no longer practised polygamy after 2004.

[69] Mr. Blackmore's credibility and the reliability of his evidence overall was also undermined by his assertions about placement marriage. I found at trial that fundamentalist Mormon theology supports the law of placing, also known as placement marriage, where members believe that God, speaking through revelations to their leader, will determine who each person will marry, usually for the purpose of plural marriage. Mr. Blackmore discussed his placement marriage with Jane Blackmore and, in doing so, purported to summarize her trial evidence at paragraph 9 of his affidavit. Through this summary, Mr. Blackmore attempted to convey that women in his faith have a choice when and to whom they marry. He deposed:

Jane Blackmore gave evidence that when a woman chooses to marry she approaches her parents and makes her wish known. If she has someone specific in mind she makes that known to the President or Bishop who consults with the man in question. A church blessing usually follows.

[70] Mr. Blackmore conceded the inaccuracy of this summary in cross-examination. Jane Blackmore, daughter of Dalmon Oler and sister to James Oler, had been a long-term practising member of the FLDS in Bountiful. She testified that courtship and private interactions between members of the opposite sex before marriage were not permitted in the fundamentalist Mormon faith and that placement marriages occurred in Bountiful with no prior announcements to the community. She also testified about her own experience of

being placed with Mr. Blackmore. Starting at the age of 15, her father approached her every four to six months to see if she was ready to speak to the president regarding marriage. Feeling some pressure from her father and some members of the community, she finally indicated her readiness to marry when she was 18 years old. Her father took her to see the prophet, who asked her if she had anyone in mind to marry, a question that was sometimes asked of young people, but sometimes not. Ms. Blackmore told the prophet that she did not have anyone in mind and that she was willing to learn the word of the Lord. He said he would talk to the Lord and let her father know. Late that same evening, she learned that Mr. Blackmore was to be her husband and they were married in a celestial marriage ceremony the following morning.

[71] Left untested, Mr. Blackmore's evidence regarding placement marriage would have been very misleading.

(b) Mr. Blackmore's Dealings with the State

[72] Mr. Blackmore deposed to his dealings with the RCMP and provincial government officials over the years at paragraphs 18 - 22 of his affidavit:

18. In the fall of 1990 I was detained by four members of the RCMP who came to my home with a search warrant to seize my church records. I informed them that the records were kept at my office in Erickson British Columbia. We waited while they had their warrant reissued to include my office. When it was complete they accompanied me to my office and took possession of my records, which they have never returned.
 19. I was released pending a decision by the Attorney General on whether I would be prosecuted for polygamy. That review by the Attorney General's ministry resulted in the issuance of a public press release advising they would not prosecute [Exhibit B to the Agreed Statement of Facts].
 20. I subsequently sought legal advice and was advised that in order to insure no legal issue would arise we should insure that prior to any ceremony it was to be announced that it was not legally binding on anyone.
 21. I was relieved to learn that the Attorney General had concluded that my religious rights were protected under the Canadian Charter of Rights and Freedoms. I relied on that in proceeding with the blessings performed after that.
 22. Between 1992 and 2007 all Attorneys General of British Columbia took the position that the section was unconstitutional until Wally Oppal became the Attorney.
- [73] He went on to depose to the effects of these dealings at paragraphs 26 - 32 of his affidavit:
26. Between defending the criminal proceedings and applying to quash the appointment of Mr. Robertson and Mr. Wilson I have incurred liabilities for legal fees of approximately \$400,000.00.

27. When I was charged after the appointment of Mr. Robertson I was arrested by the police, handcuffed and taken in for fingerprinting. As I had lived in the area all my life it seemed excessive to arrest me as I was easy to find. I was not released by an officer in charge but held for a bail hearing, required to surrender my passport, and to report regularly.
 28. When Mr. Robertson's appointment as prosecutor was quashed in 2011 we sought reimbursement of our legal costs and were told nothing would be paid unless we sued the government.
 29. When the reference case was taken I wanted to participate and sought advance costs as I could not afford further litigation and the case was going to be expensive. I was refused and could not afford to participate. I still believed that my religious rights were protected under the charter.
 30. When Mr. Wilson was appointed as prosecutor I was arrested again, held for a bail hearing, surrendered my passport and fingerprinted.
 31. I have complied with all terms of bail over the years this has been outstanding.
 32. The stress of this continuing for all these years has been trying and I have developed a heart condition that has resulted in me losing my pilot's licence.
- [74] Cross-examination revealed much of this evidence to be vague, misleading and/or incorrect.
- [75] I will start with paragraphs 18 and 19 where Mr. Blackmore purports to describe an aspect of the early investigation into allegations of polygamy in Bountiful where police seized records from him, pursuant to a search warrant, and his subsequent "release". Through the evidence of the officer primarily involved with this search, now retired Corporal Brian Garvie, it is clear that Mr. Blackmore's brief summary of what occurred is incomplete and somewhat misleading.
- [76] I will say a word about Corporal Garvie's evidence. Corporal Garvie's evidence was tendered in the form of the notes he took at the time of the events. Admitted as past recollection recorded, I am "mindful of the limitations of hearsay evidence and the care that must be taken by the fact-finder in assessing it": R. v. McKinnon, 2014 BCSC 347 at para. 35. Given their level of detail, the reliability and timelines of their recording and Corporal Garvie's assertions about their accuracy, I accept his notes as reliable evidence.
- [77] The seizure of these particular records occurred in 1991, not 1990 as Mr. Blackmore deposed. I accept this was a simple mistake, as Mr. Blackmore conceded his memory was affected by the passage of time. However, the balance of his evidence in this area is misleading. Mr. Blackmore was not arrested or detained. He was, therefore, never "released". Contrary to what he described, investigators did not attend his home armed with a search warrant. Rather, investigators attended Bountiful Elementary School to execute a search warrant and the school principal called Mr. Blackmore. Mr. Blackmore attended the school voluntarily and, after obtaining legal advice, thoroughly cooperated with police, even

going so far as to assist them in identifying the correct search location for their judicial authorization and identifying the records they may want from his office. Mr. Blackmore's portrayal of what occurred does not capture how the records were actually seized and the manner in which he was treated during the course of the seizure.

- [78] Paragraph 20 is unclear. Mr. Blackmore deposed that he "subsequently sought legal advice and was advised that in order to [ensure] no legal issue would arise we should [ensure] that prior to any ceremony it was to be announced that it was not legally binding on anyone." Given the location of this paragraph in the narrative of the affidavit, left untested, I would have concluded Mr. Blackmore's legal advice on the topic occurred in the 1992 timeframe. However, through cross-examination, Mr. Blackmore clarified that the legal advice to which he was referring was obtained in and around 2009, when his counsel at the time applied to quash the appointment of Mr. Robertson.
- [79] I turn now to paragraph 21. This paragraph contains two contentions. Mr. Blackmore deposed that he was relieved to learn that the Attorney General had concluded that "my religious rights were protected under the Canadian Charter of Rights and Freedoms. I relied on that in proceeding with the blessings after that."
- [80] I accept only that Mr. Blackmore was relieved by the 1992 decision not to prosecute him and the CJB's opinion that the polygamy provision was unconstitutional; however, I do not accept his general assertion that he relied on the Attorney General's position in "proceeding with the blessings after that".
- [81] It is difficult to discern from this general language whether Mr. Blackmore is referring to his own celestial marriage ceremonies or the celestial marriage ceremonies he performed as bishop of the community when he refers to "proceeding with the blessings after that". In the event he is referring to proceeding with his own post-1992 celestial marriage ceremonies, cross-examination revealed that the Attorney General's position in 1992 (or anytime thereafter) played no role in Mr. Blackmore's entering into further plural marriages and continuing to practice polygamy.
- [82] Mr. Blackmore entered into plural marriages and practised polygamy before the CJB's 1992 decision not to prosecute him. He had six wives by this time. Mr. Blackmore continued to enter into plural marriages after 1992. He frankly admitted in cross-examination that practising polygamy has always been, and remains, a central aspect of his faith, a faith he will not deny. He also frankly admitted that adhering to those beliefs was (and remains) more important to him than anything, and certainly more important than anything a particular Attorney General had to say. He most certainly did not rely upon any Attorney General's position in governing his conduct.
- [83] At paragraph 22, Mr. Blackmore deposed that "[b]etween 1992 and 2007 all Attorneys General of British Columbia took the position that the section was unconstitutional until Wally Oppal became the Attorney." This general assertion was also undermined in cross-examination.

- [84] Mr. Blackmore did not speak to any Attorney General or his/her representatives during those years. He obtained his information about their positions from the media. In cross-examination, he identified the Press Release as one position he reviewed. He agreed that this document, in addition to containing information about legal opinions regarding the constitutionality of the polygamy provision and the decision not to approve charges arising out the RCMP investigation in Bountiful, also contained other information, including that: (a) the Deputy Attorney General would soon be attending a meeting of federal/provincial deputy ministers in order to bring to the attention of federal officials the application of the Criminal Code to polygamy issues; (b) officials at this joint meeting would discuss measures to protect women and children in a patriarchal society; and (c) the CJB was "very concerned about the allegations of abuse that are said to result from the practice of polygamy", especially as they relate to women and children.
- [85] Other than perhaps one letter to and from one Attorney General about ten years later, Mr. Blackmore did not contact any provincial or federal government official to find out the results of the above-noted meeting.
- [86] That Mr. Blackmore actually wrote to one Attorney General over the years and received return correspondence from him was revealed in cross-examination. Mr. Blackmore recalled the name of the Attorney General with whom he corresponded, Geoff Plant, but could not recall when their correspondence occurred. To assist his recollection, he was shown the Attorney General's press statement of October 22, 2009 announcing the provincial government's decision to seek a constitutional reference on the polygamy provision. This statement attached a "backgrounder" that summarized the history of legal proceedings on polygamy in British Columbia and noted the following as having occurred in 2002:
- Former Attorney General Geoff Plant writes to his federal counterpart asking for a review of whether Sec. 293 should be replaced with "legislation that will better respond to the inappropriate use of a power imbalance within a community designed to encourage young women to enter into sexual relationships through a form of marriage." Former federal Justice Minister Martin Cauchon replies, "repealing the prohibition of polygamy in the Criminal Code may violate the equality rights of women in Canada, and would affect Canada's international commitments." Cauchon pledges his department's support in upholding Sec. 293 against a constitutional challenge.
- [87] Reviewing that entry refreshed Mr. Blackmore's memory somewhat. Mr. Wilson suggested that in his letter to Mr. Blackmore, Mr. Plant gave him some information that he would be in touch with the Federal Justice Minister. In response, Mr. Blackmore recalled that Mr. Plant "referred to that there was an investigation, they were looking into it and we would know the outcome when it came." From this, I find that Mr. Blackmore's general assertion at paragraph 22 about the positions taken by all of the Attorneys General between 1992 and 2007 is not as simple or straightforward as he suggests. At times, Mr. Blackmore was aware of continuing controversy about, and meetings and investigations into, the issue of polygamy.

- [88] Mr. Blackmore deposed to various effects of the ongoing investigations and prosecutions of him over the years.
- [89] In terms of restrictions to his liberty, he deposed he was arrested, fingerprinted and released on bail on two occasions over the years - once in 2009 and once in 2014 (in respect of the current prosecution). He complied with his conditions, described as surrendering his passport and reporting to a bail supervisor regularly, on both occasions. The duration of his bail restrictions in 2009 was approximately nine months.
- [90] In terms of financial repercussions, Mr. Blackmore's evidence was very general. He deposed to having incurred "liabilities for legal fees" of approximately \$400,000.00 for "defending the criminal proceedings and applying to quash the appointment of Mr. Robertson and Mr. Wilson". Although it is reasonable to conclude this is a significant sum for most people, there is no evidence about Mr. Blackmore's financial situation, so I am unable to determine how significant the financial impact has been on Mr. Blackmore.
- [91] In terms of emotional and, perhaps, physical repercussions, Mr. Blackmore's evidence was also very general. He deposed that the "stress of this continuing for all these years has been trying". He also deposed that he has "developed a heart condition that has resulted in me losing my pilot's licence." The generality of this evidence makes it difficult to make any definitive findings here. There is no medical or other evidence about this heart condition, the precise diagnosis, when it developed, what it involves, his prognosis, treatments, and/or how it has affected his life, other than precluding him from holding a pilot's licence. Similarly, there is no evidence about whether there is any causal connection between the stress he has experienced and this heart condition. I do accept, however, that these years of periodic investigation and potential prosecution have been stressful and trying.
- [92] Overall, while I found some of Mr. Blackmore's evidence reliable, particularly where it was in harmony with other evidence I accepted at trial or in this hearing, I found Mr. Blackmore's credibility undermined and much of his evidence either too unreliable to be accepted or too vague to be given much weight.

Analysis

1. Officially Induced Error

a. Legal Principles

- [93] Officially induced error is an exception to the foundational principle codified in s. 19 of the Criminal Code that ignorance of the law is not a defence to a criminal offence. The exception is premised on the notion that the fairness of the criminal process would be compromised where an "error in law of the accused arises out of an error of an authorized representative of the state and the state then demands, through other officials, that the criminal law be applied strictly to punish the conduct of the accused": *Lévis (City) v. Tétrault*, 2006 SCC 12 at para. 22. The rationale for the exception is thus non-blameworthy mistake as

opposed to ignorance of the law.

[94] The "excuse" of officially induced error was first recognized by Lamer C.J.C. in his concurring reasons in *R. v. Jorgensen*, [1995] 4 S.C.R. 55. He was careful to point out that the defence, being a limited exception to a general rule, must not be allowed to undermine the principled basis for the general rule at para. 29:

Once it is determined that the error was one of law, the next step is to demonstrate that the accused considered the legal consequences of her actions. By requiring that an accused must have considered whether her conduct might be illegal and sought advice as a consequence, we ensure that the incentive for a responsible and informed citizenry is not undermined. It is insufficient for an accused who wishes to benefit from this excuse to simply have assumed that her conduct was permissible.

[95] LeBel J. formally endorsed officially induced error as a defence in *Lévis*, and identified its constituent elements, to be proven by the defendant on a balance of probabilities, as follows at para. 26:

- a) the defendant made an error of law or of mixed law and fact;
- b) the defendant considered the legal consequences of his or her actions;
- c) the advice obtained came from an appropriate official;
- d) the advice was reasonable;
- e) the advice was erroneous; and
- f) the defendant relied on the advice in committing the act.

[96] With respect to the requirement that the defendant demonstrate that the advice was reasonable, LeBel J. emphasized the objective nature of the assessment, which will take into account factors such as:

[t]he efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion (*Cancoil Thermal*, at p. 303). It is not sufficient in such cases to conduct a purely subjective analysis of the reasonableness of the information. This aspect of the question must be considered from the perspective of a reasonable person in a situation similar to that of the accused (para. 27).

[97] The remedy for an officially induced error is a stay of proceedings. In this regard, it is similar to the defence of entrapment in that "the accused has done nothing to entitle him to an acquittal, but the state has done something which disentitles it to a conviction": *Jorgensen* at para. 37. Because a stay of proceedings can only be entered in the clearest of cases, an officially induced error argument will also only succeed in the clearest of cases. The very nature of the defence requires that its elements be strictly interpreted and applied.

b. Positions of the Parties

- [98] Mr. Oler is unrepresented. He participated in his trial and in this post-trial hearing to the extent of attending and listening to the proceedings and answering my questions of him. He declined to ask any questions of any witness, call any evidence or make any submissions on any topic at any time. Amicus curiae was appointed to provide an adversarial legal context by making submissions in respect of issues in the trial, including possible defences in regard to Mr. Oler. As part of that role, amicus curiae advised during the trial that he intended to raise, during this hearing, the defence of officially induced error.
- [99] Although Mr. Oler did not call evidence on this application, it is the position of amicus curiae that there is nevertheless a body of evidence from which each of the elements of officially induced error can be inferred and Mr. Oler's burden of proof satisfied.
- [100] In brief, the amicus submits that for decades, the Attorney General, through the ADAG, had publicly maintained that the offence presently before the Court was unconstitutional. His position was based on considered expert opinions from both internal and external counsel, including eminent former jurists, and was therefore reasonable. It was, nevertheless, erroneous given the conclusion of the Court in the Polygamy Reference that s. 293 was constitutionally valid.
- [101] According to the amicus, it was in 1992 that the first prosecution against members of the Bountiful community - Mr. Blackmore and Mr. Oler's father - was not pursued on the basis that s. 293 would not survive constitutional scrutiny. The Press Release advising of these facts was, on the evidence of Mr. Blackmore and as a matter of common sense, of critical importance to the Bountiful community, and it can be assumed that every member of the community was aware of the Attorney General's position, most certainly the then bishop's own son. It was only after the Press Release that Mr. Oler entered into the four plural marriages (in 1993, 2002, 2003 and 2004) that found the basis for the finding of guilt against him. Thus, the only reasonable inference is that he must have considered the legal consequences of his actions.
- [102] The amicus further submits that Mr. Oler's reliance on the position of the Attorney General that the polygamy offence was unconstitutional and would not be prosecuted can be inferred from his actions in his dealings with the police in October 2005 and January 2006. As I found in the Trial Reasons, Mr. Oler freely admitted two of his polygamous marriages to police but did not disclose two others out of concern, not of a polygamy charge, but of exposure to a charge of sexual exploitation under s. 153 of the Criminal Code. The amicus says that Mr. Oler's lack of concern about being prosecuted for polygamy should also lead me to conclude that he believed no legal consequences would flow from his admissions since s. 293 was unconstitutional. The amicus then says it can thus be inferred that Mr. Oler also considered the legal consequences of his actions when he entered his plural marriages.

[103] Mr. Blackmore characterizes the Press Release in the following terms in his written submissions:

By February 1992 the position of the Atty. Gen. appeared to be that polygamy was lawful and a public announcement was announced in the media release so stating. The accused, Winston Blackmore, was expressly told no charges would be laid against him and that his religious practices were protected.

[104] Mr. Blackmore says he was entitled to rely on these representations from the highest criminal law official in the province, and that he did rely on them in regards to the marriages he entered after that date. Mr. Blackmore also adopts the amicus curiae's submissions with respect to officially induced error.

[105] The Crown responds that in the absence of any evidence of actual subjective knowledge and reliance on the part of Mr. Oler, there is no air of reality to the defence as it relates to him. As for Mr. Blackmore, although he has tendered some evidence, the Crown maintains that it does not support the application of the defence. Neither applicant has met the burden upon him.

[106] The Crown submits that the evidence establishes that both applicants were raised in a community that practised plural marriage at a time when polygamy was clearly a criminal offence. It is therefore difficult to accept that the applicants considered their legal position before entering into the marriages that are the subject of this proceeding, without any evidence to that effect. There is, for instance, no evidence that, after the Press Release was issued in 1992, the applicants approached the Crown or the RCMP to inquire whether their activities were now considered legal.

[107] The Crown says the requirement that the advice come from an appropriate official is also not met for several reasons: (a) the "advice" in this case consisted of a press release for general public consumption about a charge approval decision; (b) the CJB does not have authority to pronounce upon the lawfulness of a Criminal Code offence and thus the "advice", if it properly is that, did not come from an appropriate official; and (c) the representation was not unequivocal and was certainly not tantamount to a statement that the applicants could lawfully engage in polygamy.

[108] In a related vein, the Crown also submits that if the media releases constitute advice, the advice was not reasonable since the province does not have authority to determine whether a criminal offence is valid; that is a determination that must be made by the courts. The advice was also clearly erroneous.

[109] Finally, the Crown says that there is no evidence that Mr. Oler relied on media statements by the CJB, and that there is inadequate evidence to that effect on the part of Mr. Blackmore.

c. Discussion

[110] Rather than address the elements of the defence individually, I will begin by considering the three elements that are concerned with the nature of the advice, as they apply to both applicants: collectively, whether the advice was reasonable but erroneous and came from an appropriate official. The other three elements are subjective, and I will therefore consider them separately in regards Mr. Blackmore and Mr. Oler.

The Advice

[111] Unlike most decisions in which officially induced error is claimed, it is not immediately apparent what the applicants claim the "advice" in this case to have been. Was it the press releases from the CJB, the Crown's non-enforcement of the polygamy offence over many years, or the combination of both? For purposes of the analysis, I will assume it was both the CJB's 1992 Press Release followed by years of non-enforcement of s. 293 by the Crown. The CJB did issue two further media statements in August 2007 (regarding Mr. Peck's report) and in June 2008 (regarding Mr. Robertson's appointment) but these came much later and do not appear germane to the applicants' arguments.

[112] The Press Release was headlined "No Charges in Polygamy Complaint", and related the decision of Crown counsel not to approve polygamy or bigamy charges following an investigation into allegations about polygamous practices in the Creston area. Although the Crown attaches some relevance to the fact that the release did not name the applicants, in my view, it would have been obvious to both Mr. Blackmore, one of the targets of the RCMP investigation, and Mr. Oler, the son of the other target, that the Press Release pertained to the recent investigation in Bountiful.

[113] The Press Release then referred to "exhaustive research undertaken by constitutional experts" and their unanimous opinion that s. 293 was unconstitutional for being in conflict with the freedom of religion guarantee in the Charter. It cited retired Court of Appeal Justice Anderson's opinion that "It would appear that section 293 is obsolete and apart from being unconstitutional is inadequate to solve the real problems confronting society." The release further noted that Crown counsel Mr. Rohrmoser agreed with the experts' conclusions and linked them to the failure to meet the charge approval standard:

Rohrmoser added: "I agree with the experts' conclusions and believe that this complaint does not meet our requirements for proceeding with a charge. The usual Crown Counsel charging standard requires a substantial likelihood of convictions. Given the opinions rendered, there is no substantial likelihood of conviction.

[114] The authorities recognize that it is not always necessary that there be direct communication between the accused and the government official providing the advice for the purposes of officially induced error. In Jorgensen, for instance, Lamer C.J.C. approved of the application of the defence to an accused, facing a charge of knowingly selling obscene material, who had relied upon an official approval of the Ontario Film Review Board. Similarly, in *R. v. Ralph* (2002), 220 Nfld. & P.E.I.R. 351 (N.L.S.C.T.D.), the defence was applied where there had

been reliance upon detailed Department of Fisheries and Oceans ("DFO") administrative guidelines attached to a snow crab fishing licence.

- [115] Unlike a regulatory board approval or departmental guidelines, however, what is at issue here is a press release advising of a charging decision. In my view, it falls short of anything that can reasonably be construed as advice upon which to rely in governing one's conduct.
- [116] The contents of the Press Release would clearly have been of keen interest to many in the fundamentalist Mormon community in Bountiful, and Mr. Blackmore essentially deposed to that effect when he stated that he was "relieved" to learn from the Press Release of the CJB's decision not to prosecute. Nevertheless, the release was fundamentally a public explanation about why the Crown was not proceeding with polygamy charges in relation to a particular complaint. Although under no duty to explain the reasons underpinning its decision, the Crown did so, at least in part, in this instance. The legal opinions it referenced were not being published as advice to the public about the legal status of polygamy but, rather, to explain why the Crown was of the view that that the charge approval standard had not been met in that case. The Press Release also referenced the need to enact new laws, and an upcoming meeting with federal counterparts to discuss issues around polygamy and measures to protect women and children in a patriarchal society.
- [117] The Press Release was not an announcement that Mr. Blackmore's or Dalmon Oler's conduct, or polygamy in general, was lawful. Nor was it a declaration that s. 293 was unconstitutional, a matter for the courts or for Parliament to determine. Legal opinions, even if unanimous and offered by eminent jurists, are not a determination of the constitutional status of a legislative provision. Moreover, the CJB does not have the authority to pronounce upon the lawfulness of a Criminal Code offence, in any event. As Mr. Blackmore's own counsel observed, whether Mr. Blackmore's marriages are lawful is "up to Canada, not up to British Columbia". Thus, the advice, even if it were such, was not provided by an appropriate official.
- [118] In these circumstances, I cannot agree that the Press Release constituted advice that polygamy was lawful.
- [119] The applicants are not assisted by the failure of the Crown to enforce the polygamy offence in Bountiful until the appointment of Mr. Robertson in 2008 and the laying of charges against them in early 2009. The authorities hold that as a general rule, the non-enforcement of an offence or prohibition does not constitute advice from an official. The clearest articulation of the rationale for this is found in *R. v. Shiner*, 2007 NLCA 18.
- [120] The accused in that case was charged with the unlawful sale of blueback seal pelts, an activity which had been made illegal several years earlier. The accused was aware of that fact, but was also aware that DFO officials had knowingly ignored the existence of unlawful sales in previous years and had not prosecuted anyone in regards to them. The trial judge stayed the charges on the basis of officially-induced error. The summary conviction appeal court dismissed the Crown's appeal. However, the Court of Appeal set aside the stay and

entered a conviction on the grounds that several of the elements of the defence had not been established. With respect to the requirement that the accused obtained erroneous advice from an appropriate government official, the Court held that the accused had neither sought nor had been given erroneous advice about the legality of his conduct. It continued (at para. 48):

Rather he inferred or assumed that his actions were legal because DFO had not taken action to curtail the harvest or sale of bluebacks, either prior to 1996 or during the 1996 hunt. In the absence of any communication between Shiner and officials of DFO on the issue such inaction by DFO could not constitute a representation that the sale of bluebacks was legal. The enforcement of s. 27 of the Regulations was within the prosecutorial discretion of DFO. The failure of a regulatory body to enforce a regulation cannot constitute a representation as to the legality of the conduct in issue. To hold otherwise would compel regulatory bodies to prosecute minor violations or risk the defence of officially induced error being successfully raised when serious violations are prosecuted.

[121] Shiner has been cited in other authorities for this proposition, including *R. v. Marsland*, 2012 SKCA 47; and, *R. v. Alsager*, 2011 SKPC 184.

[122] For the same reasons, I conclude that the Crown's non-enforcement of s. 293 does not constitute a representation or advice that polygamy was legal.

[123] The Crown's decision not to prosecute for the years it held the opinion s. 293 was unconstitutional was an exercise in prosecutorial discretion in a particular case, made in the upmost good faith. It was not a declaration by the state that the polygamy law was invalid or the applicants' conduct was "lawful". It could not be. It is fundamental that the Crown cannot suspend laws or exempt persons or groups from a particular law to which others continue to remain subject: *R. v. Armstrong*, 2012 BCCA 242 at paras. 32-34.

[124] That neither the Press Release nor the Crown's non-enforcement of the polygamy offence (nor the two combined) constitute advice becomes apparent when considering whether the advice was reasonable or erroneous. They simply do not lend themselves to that assessment. Certainly the legal opinions upon which both were based were proved by the conclusions in the Polygamy Reference to have been erroneous; though also, in my view, reasonable given that it was only upon the application of s. 1 of the Charter in the context of the vast evidentiary record filed in the reference case that the constitutional validity of s. 293 was upheld. However, the Press Release and/or non-enforcement of s. 293 cannot be characterized as either reasonable or erroneous as neither was advice that the polygamy offence was unconstitutional and would not be enforced.

The Subjective Elements

- [125] Even had I concluded that the Press Release and/or non-enforcement of the polygamy offence constituted reasonable, though erroneous, advice from an appropriate official, I would have found that neither Mr. Blackmore nor Mr. Oler have satisfied the subjective elements of the defence. There are three.
- [126] First, the applicants must establish that they made an error of law or of mixed law and fact. This requires that they establish that at the time of the marriages forming the basis of their verdicts of guilt, they proceeded on the view that their actions were legal: Shiner at para. 36.
- [127] Second, the applicants must also establish that they considered the legal consequences of their acts. Although the authorities do not appear to articulate with precision what an applicant must consider to satisfy this element, Lamer C.J.C.'s comments in Jorgensen at para. 29 offer some insight:
- Once it is determined that the error is one of law, the next step is to demonstrate that the accused considered the legal consequences of her actions. By requiring that an accused must have considered whether her conduct might be illegal and sought advice as a consequence, we ensure that the incentive for a responsible and informed citizenry is not undermined. It is insufficient for an accused who wishes to benefit from this excuse to simply have assumed that her conduct was permissible. [Emphasis added].
- [128] Lastly, the applicants must prove that they relied on the Crown's advice in entering into the marriages forming the basis for their verdicts of guilt.
- [129] The importance of evidence to establish reliance was underscored by the Ontario Court of Appeal in *Maitland Valley Conservation Authority v. Cranbrook Swine* (2003), 64 O.R. (3d) 417 (C.A.). The issue there was whether a company that had been granted a building permit under the provincial building code to construct a liquid manure storage tank was entitled to rely on the defence of officially induced error when the resulting construction was alleged to violate conservation legislation. The company led no evidence at the trial of the charges, instead bringing three motions for non-suit, including for officially induced error. The trial judge found the defence had been made out, as would have Abella J.A. (as she then was) on appeal; both had been prepared to infer in the absence of evidence of bad faith that the company had relied in good faith on the advice of the chief building official. However, a majority of the Court found to the contrary, concluding that the defence foundered on the element of reliance. MacPherson J.A., concurred in by Simmons J.A., expressed his concern at para. 56:

With respect, I do not agree that good faith, and therefore reliance, can be inferred from the absence of evidence of bad faith. The respondents brought their motion for a non-suit at the conclusion of the Crown's case. They called no evidence. Accordingly, there is no basis for concluding that their application to the chief building official was made in good faith. Perhaps it was; however, perhaps it was not. The point is that there is no way of knowing and, with respect, it is wrong to infer good faith, just as it would be wrong to infer bad faith.

[130] He concluded at paras. 59-60:

[59] The respondents did not demonstrate reliance in the present case. They brought a motion for a non-suit, and said nothing. This placed the trial judge and the summary conviction appeal judge in the same predicament as the trial judge in *R. v. Savard*, [2001] O.J. No. 3350 (QL) (C.J.), who dealt with the reliance component of the defence of officially induced error, at paras. 18-20:

And finally, for the defence of officially induced error to succeed, there must be evidence that Mr. Savard did rely on the erroneous advice he claims that [page432] he was given by his Member of Parliament. Quite simply, the court is unaware of what was in Mr. Savard's mind. He did not testify at the trial, by choice, and there is no other way for that determination to be made

What was he thinking? How did he interpret the advice that he was given? I cannot guess.

Mr. Savard has failed to discharge the burden of proving that his conduct was excused by an officially induced error.

[60] In summary, I do not think the respondents have met their burden to establish the reliance element of the defence of officially induced error. The respondents chose to bring a motion for a non-suit/directed verdict at the conclusion of the Crown's case. They led no evidence that they relied on the advice of the chief building official as confirming compliance with the Conservation Authorities Act. The respondents were in the best position, and had the legal obligation, to satisfy the court that they acted in good faith and relied on the building permit to establish compliance with the Conservation Authorities Act. They did not do this; they remained silent on these matters.

[131] With these principles in mind, I turn first to consider Mr. Blackmore's claim.

Mr. Blackmore

[132] The subjective elements of the defence collectively require Mr. Blackmore to establish that at the time of the marriages forming the basis of his guilty verdict, he turned his mind to the legal consequences of his acts and relied on the Crown's representations in proceeding with the marriages, erroneously believing them to be legal.

[133] Although Mr. Blackmore did tender evidence on this application, it does not go far in establishing these elements. There is an admission that Mr. Blackmore's counsel at the time of the Press Release advised him that as far as the Crown was concerned, s. 293 of the

Criminal Code was unconstitutional. As well, Mr. Blackmore deposed that he was relieved to learn that the Attorney General had concluded that his "religious rights were protected under the Canadian Charter of Rights and Freedoms" and that he "relied on that in proceeding with the blessings after that". While this suggests that Mr. Blackmore relied on the Crown's representations and proceeded with his marriages subsequent to 1992 presumably believing them to be legal, as I have already discussed, I do not accept this aspect of his evidence.

[134] Mr. Blackmore gave evidence on this application about the critical importance of plural marriage to the fundamentalist Mormon faith to which he adheres. He explained that fundamentalists like himself believe that the correct interpretation of the scriptures requires plural marriage in order to obtain exaltation or eternal life. He testified that he entered into plural marriages because it was central to his faith and essential for his salvation:

Q. And you entered into plural marriages because was for you absolutely central to your faith, fair statement?

A. Fair statement.

Q. And because it was essential for your salvation, fair statement?

A. Fair statement.

Q. And because it was essential as well for the exaltation of the women to whom you are married, yes?

A. Yes.

Q. You also entered into these marriages because if you had refused to marry a woman who was placed with you, you would've risked ex-communication and effectively damnation, true?

A. True.

Q. The long and the short of it is that it was your religious duty to marry the women who were placed with you, fair statement?

A. Yes, it's true.

Q. And it was also your priesthood duty because the women place with you in celestial marriage could only be exalted as a result of entering into the everlasting covenant of marriage, fair?

A. Fair.

Q You have made it plain, I suggest, to your counsel and to this court that you will not deny your faith, true?

A That's true.

Q And the truth is that whatever happens to you and your wives in eternity is, in the context of your lifelong religious principles, more important to you than anything else, fair statement?

A Yes, it is.

Q Bottom line is it's more important to you than whatever opinions Wally Oppal may have pronounced from time to time, yes? Fair?

A Fair.

[135] Consistent with his candid testimony about his marriages, Mr. Blackmore entered into five plural marriages after his first marriage to Jane Blackmore and practised polygamy prior to 1992 when polygamy was unequivocally a criminal offence. He continued to enter into plural marriages and practice polygamy after 1992. Mr. Blackmore testified that as the size of his family grew, he lived with his wives in a cluster of homes in Bountiful. To this day, he continues to live with his wives that chose to stay with him following the ideological split in the community in 2002 in a cluster of homes in Bountiful. Thus, Mr. Blackmore's conduct has not changed over the years, despite changes in the Attorneys General's representations regarding their views of the constitutionality of s. 293. This belies his claim to have relied on the Press Release in proceeding with subsequent marriages. It is also revealing that, in this very hearing Mr. Blackmore continued to affirm his belief in the necessity of plural marriage. With the Polygamy Reference several years behind us, he is well aware of the constitutional status of s. 293, yet does not depose that he has stopped practising polygamy. He has never relied upon the legal status of the provision in governing his affairs.

[136] I am, therefore, not satisfied that Mr. Blackmore has established that at the time of the marriages forming the basis of his conviction, he turned his mind to the legal consequences of his actions and relied on the Crown's representations in proceeding with the marriages erroneously believing them to be legal.

Mr. Oler

[137] Despite the amicus curiae's able - and creative - arguments on behalf of Mr. Oler, I find that Mr. Oler's failure to tender any evidence undermines his ability to avail himself of the defence. Officially induced error is an affirmative defence that turns on the defendant's subjective state of mind. It was incumbent on Mr. Oler to establish that he turned his mind to whether it might be illegal to enter into the marriages that form the basis for his guilty verdict, and that he then relied on the government's advice in proceeding with the marriages in the mistaken belief they were legal. However, he did not testify. While the amicus curiae maintains that Mr. Oler's state of mind can nevertheless be inferred from the evidence, I am not persuaded that is the case.

- [138] The essence of the amicus curiae's position is that it can be inferred from both the timing of Mr. Oler's four plural marriages (each coming after the Press Release) and his openness with police in 2005-2006 about two of his plural marriages that he necessarily must have considered the legal consequences of his actions and went ahead because he knew, based on the law as stated by the Attorney General, that he was immune from prosecution.
- [139] The importance of plural marriage to those of the fundamentalist Mormon faith makes it difficult to draw the inferences the amicus curiae urges. As I found in the Trial Reasons, Mr. Oler has been a practicing member of the FLDS throughout his life, and he adheres to the beliefs and practices of the FLDS, including the ordinance of celestial marriage and the practice of plural marriage. Since 2002, he has been presiding elder or bishop of the FLDS members in the Bountiful community who follow Warren Jeffs.
- [140] Of course, Mr. Blackmore's testimony about the extent to which his adherence to his beliefs overrides all other considerations is not evidence that Mr. Oler shares the same depth of commitment to plural marriage. However, the fact that plural marriage is a crucial tenet of the fundamentalist Mormon faith to which Mr. Oler adheres and in which he occupies the position of bishop makes the need for evidence about his state of mind as it relates to the CJB's representations especially acute. In the absence of any such evidence, it is not possible to be satisfied that Mr. Oler turned his mind to the legal consequences of plural marriage and was guided in his actions by the representations in the Press Release and/or non-enforcement of the polygamy offence. Indeed, there is no evidence that Mr. Oler was even subjectively aware of the CJB's position on the constitutionality of the polygamy offence.
- [141] I would add that even without that overriding factor, the inferences the amicus curiae urges me to draw are not the only one available on the evidence, in any event. The timing of Mr. Oler's four plural marriages following his first to Gwen Oler - 1993, 2002, 2003 and 2004 - may have been a consequence of the representations in the Press Release but it may equally have been due to another cause or causes. That Mr. Oler was forthright with police about two of his plural marriages is hardly surprising given that he was aware that he was under investigation for sexual exploitation contrary to s. 153 of the Criminal Code, not polygamy.
- [142] Accordingly, in the absence of evidence from Mr. Oler, I find that he has not established that he made an error of law, considered the legal consequences of his actions, and relied on the government's advice in committing those actions.
- [143] I, therefore, conclude that neither Mr. Blackmore nor Mr. Oler are able to avail themselves of the defence of officially induced error.

2. Charter Relief: Mr. Blackmore

[144] Mr. Blackmore's application engages two sections of the Charter. He primarily seeks a stay of proceedings pursuant to s. 24(1) alleging an abuse of process, contrary to s. 7. He alternatively seeks a constitutional exemption from punishment on the grounds that his conduct was motivated by his religious beliefs protected by s. 2.

[145] Before turning to consider the claim of abuse of process, I must first address what Mr. Blackmore's application here is not.

[146] Mr. Blackmore's counsel curiously began oral submissions by saying this case is not "about the abuse of women and children," but is rather a case "strictly about whether polygamy, in its simple form, is illegal, absent any evidence of harm". It must be made clear that Mr. Blackmore's application before this Court is nothing of the sort. In this application, Mr. Blackmore specifically does not challenge the constitutionality of the polygamy provision. Polygamy is illegal in Canada. By choosing to criminalize polygamy, Parliament recognized the harm implicit in its practice and enacted the provision to prevent those harms. It is fundamental that the criminal law can properly be used to prevent the risk of serious harm. The constitutionality of the provision was upheld, with Bauman C.J.B.C. finding, on a fulsome evidentiary record, many apprehended harms from the practice of polygamy. As I found in the Trial Reasons, proof of actual harm is unnecessary to ground a conviction. I turn now to consider Mr. Blackmore's abuse of process claim.

a. Section 7: Abuse of Process

i. Legal Principles

[147] Section 7 of the Charter provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[148] The threshold question that must first be answered is whether Mr. Blackmore's right to life, liberty or security of the person is engaged by a prosecution for polygamy under s. 293 of the Criminal Code. As the Crown rightly concedes, since the provision carries a criminal sanction and a potential deprivation of liberty, Mr. Blackmore's s. 7 Charter rights are engaged. Having met the threshold, the next question is whether the prosecution of Mr. Blackmore violates any of the principles of fundamental justice.

Prosecutorial Discretion

[149] Most of the impugned conduct on this application involves the exercise of prosecutorial discretion.

[150] In *Krieger v. Law Society of Alberta*, 2002 SCC 65 at para. 43, the Court provided the following description of prosecutorial discretion:

"Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.

[151] The Court went on to provide several examples of prosecutorial discretion: whether to bring the prosecution of a charge laid by police; whether to enter a stay of proceedings in either a private or public prosecution; whether to accept a guilty plea to a lesser charge; whether to withdraw from criminal proceedings altogether; and, whether to take control of a private prosecution (at para. 46). The Court continued at para. 47:

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it [Underlining in original].

[152] The Court revisited the concept in *R. v. Anderson*, 2014 SCC 41, and addressed some of the confusion that had arisen in the authorities as to where to draw the line between prosecutorial discretion, and a Crown prosecutor's tactics or conduct. It wrote at para. 44 :

In an effort to clarify, I think we should start by recognizing that the term "prosecutorial discretion" is an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" (Krieger, at para. 47). As this Court has repeatedly noted, "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences" (Krieger, at para. 44, citing *Power*, at p. 622, quoting D. Vanek, "Prosecutorial Discretion" (1988), 30 *Crim. L.Q.* 219, at p. 219 (emphasis added)). While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further examples to those in Krieger include: the decision to repudiate a plea agreement (as in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the Code itself, including the decision in this case to tender the Notice.

[153] Exercises of prosecutorial discretion are only reviewable for abuse of process: *Anderson* at para. 36. In contrast, tactics and conduct before the court are subject to a wider range of review.

[154] A decision to proceed with a prosecution is central to the exercise of prosecutorial discretion and thus can only be reviewed on the basis of abuse of process.

Abuse of Process

- [155] The abuse of process doctrine requires an applicant to demonstrate that legal proceedings are so oppressive or vexatious that they violate the fundamental principles of justice underlying the community's sense of fair play and decency. The burden of establishing abuse of process lies with the applicant, who must prove it on a balance of probabilities: Anderson at para. 52.
- [156] A stay of proceedings is the most drastic remedy a criminal court can order. It is a remedy that permanently halts a prosecution, frustrating the truth-seeking function of a trial and depriving the public of a decision on the merits. There are, however, rare occasions - the "clearest of cases" - where a stay of proceedings for an abuse of process will be warranted: R. v. Babos, 2014 SCC 16 at paras. 30 and 31.
- [157] There are two primary categories of abuse of process: (a) state conduct that compromises the fairness of an accused's trial (the "main" category); and (b) state conduct that creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category).
- [158] As set out in Babos (at para. 32), the test for determining whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
- a) there must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;
 - b) there must be no alternative remedy capable of redressing the prejudice; and
 - c) where there is uncertainty over whether a stay is warranted after the first two steps, the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest of society in having a final decision on the merits.
- [159] While the framework is the same for both categories, the test will often play out differently depending which category of the abuse of process doctrine is invoked.
- [160] Commencing with the first stage of the test, when the main category is invoked, the accused must establish that his or her right to a fair trial has been prejudiced and that prejudice will be carried forward through the conduct of the trial. In other words, the concern is whether there is ongoing unfairness (at para. 34).
- [161] By contrast, when the residual category is engaged, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency, and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system.

[162] In discussing the first stage of the test under the residual category, the Court (at para. 36) referred to the description of the category in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391:

For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well - society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare [para. 91].

[163] The Court then discussed two points of interest arising from the above description. The first is that while the residual category will generally be invoked as a result of state misconduct, this will not always be the case. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. The Court provided examples where this might be the case, such as repeatedly prosecuting an accused for the same offence after successive juries were unable to reach a verdict (*R. v. Keyowski*, [1988] 1 S.C.R. 657) or using the criminal courts to collect a civil debt (*R. v. Waugh* (1985), 68 N.S.R. (2d) 247 (N.S.C.A.)).

[164] The second is that in a residual category case, regardless of the type of conduct complained of, the question to be answered at the first stage of the test is the same: whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. While there is a distinction between past and ongoing misconduct, such a distinction "does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system". Rather, "the court must still consider whether proceeding would lend judicial condonation to the impugned conduct": para. 38.

[165] Turning to the second stage of the test for a stay for an abuse of process, the question is whether any other remedy short of a stay of proceedings is capable of redressing the prejudice. Whether the prejudice complained of relates to the accused's right to a fair trial or whether it relates to the integrity of the justice system, any remedy must be directed towards that harm. The focus is on whether an alternate remedy short of a stay will adequately dissociate the justice system from the impugned conduct going forward. Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Where the concern is the integrity of the justice system, remedies must be directed toward that harm. Conceptually, it is important to be mindful that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a past wrong done to him; rather, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned conduct going forward: para. 39.

- [166] Finally, the balancing of interests at the third stage of the test is particularly important when the residual category is invoked. This balancing only need by undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test are considered. When the main category is at play, it will often be clear after the first two stages that trial fairness has not been prejudiced or, if it has, that another remedy short of a stay is available to address the harm caused. In those cases, no balancing is required: para. 41.
- [167] The Court explained the importance of the balancing process when the residual category is invoked:
- [41] Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.
- [168] In residual category cases, the balancing of societal interests that must take place and the "clearest of cases" threshold presents an accused who seeks a stay with an onerous burden. Affirming that those cases in the residual category warranting a stay of proceedings will be "exceptional" and "very rare", the Court observed that "this is as it should be. It is only where the 'affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases' that a stay of proceedings will be warranted": para. 44.
- [169] Courts have emphasized the importance of an evidentiary foundation to support an abuse of process claim. Where prosecutorial discretion is challenged, the Crown may be required to provide reasons justifying its decision where the applicant establishes a proper evidentiary foundation: *R. v. Nixon*, 2011 SCC 34 at para. 60; *Anderson* at para. 55. In *R. v. Stobbe*, 2011 MBQB 280, Martin J., faced with a similar application involving abuse of process and the exercise of prosecutorial discretion, summarized the law this way:
- [37] In summary then, while the constitutionally enshrined independence of the office of the Attorney General, or Crown, requires that it be free from court supervision, in limited circumstances where evidence establishes a threshold showing of potential abuse of process in the exercise of prosecutorial discretion in relation to (i) an accused's fair trial interests or (ii) the integrity of the judicial system, a court may look behind the Crown's decision and determine whether the applicant has discharged the ultimate burden of proving the

requisite oppressive or vexatious conduct, other prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision. Further, it is important to note:

- that the test to establish an abuse of process is a stringent one;
- the evidentiary burden may shift to the Crown to inform the court of the circumstances and reasons behind its decision where it is the only party privy to that information; and
- a judicial stay of proceedings will only be entered in the clearest of cases.

ii. Positions of the Parties

[170] Mr. Blackmore's abuse of process claim has several intertwined strands, but at its core, he says that in light of the state's conduct toward him over roughly the last 25 years, the bringing of the current prosecution based on his actions before the Polygamy Reference is unfair and undermines the integrity of the judicial process. In other words, the decision to now prosecute him is so oppressive or vexatious that it violates the fundamental principles of justice underlying our community's sense of fair play and decency, entitling him to the most drastic of remedies: a stay of proceedings.

[171] I will attempt to organize the several intertwined strands of Mr. Blackmore's argument.

[172] The first is, at its essence, similar to his position on officially induced error. Mr. Blackmore characterizes the Press Release as the Attorney General expressly advising that he would not be prosecuted for polygamy and that his religious practices were protected. He says he was entitled to rely on these representations from the highest criminal law official in the province. By taking this position from 1992 until at least 2007 and essentially permitting him to continue his polygamous practices during this time, for the state to now initiate a prosecution in relation to conduct it expressly told him was lawful offends the community's sense of fair play and decency.

[173] The second relates to previous charging decisions.

[174] Mr. Blackmore says that it is unfair that he be convicted in relation to events prior to 1992 since they must be considered to have been resolved by the CJB's decision at the time not to proceed with criminal charges. Mr. Blackmore highlights the fact that the charge later laid against him by Mr. Robertson covered only the period between May 1, 2005 and December 2006, in apparent acknowledgement of this concern.

[175] In a related argument, Mr. Blackmore submits that Mr. Peck's 2007 decision not to prosecute him was final and binding on the Crown, and that any charge based upon events preceding Mr. Peck's report should be stayed. Mr. Blackmore says that the charges presently before the Court are essentially a relaying of the same charges, in defiance of Mr. Peck's report, but with an expansion of the time period of the offence. Section 7(5) of the CCA provides that the decision of a special prosecutor is final unless an appeal is taken pursuant to s. 4. No such appeal was ever taken in this case. Mr. Blackmore argues that the state's

repeated efforts to prosecute him on the same facts, including facts that go back a few decades, is an abuse of process.

- [176] Mr. Blackmore also says that Mr. Peck's decision effectively established conditions for any future charging decisions for members of the Bountiful community and that the bringing of this prosecution is in violation of those conditions. Mr. Peck was of the view that if a reference were held and the constitutionality of s. 293 upheld, then members of the Bountiful community would have fair notice that their polygamy practise must cease and charges could then be considered if their practise continued. In these circumstances, Mr. Blackmore argues that to be prosecuted for any events arising prior to the Polygamy Reference is unfair and an abuse of process.
- [177] Another strand of Mr. Blackmore abuse of process claim relates to the conduct of Attorney General Oppal in 2007/2008 appointing successive special prosecutors until one was prepared to prosecute him. Highlighting Mr. Oppal's publicly announced disagreement with Mr. Peck's decision not to prosecute and Mr. Doust's opinion that a prosecution would be unfair, Mr. Blackmore says that by then directing the ADAG to specifically retain Mr. Robertson, as opposed to initiate a reference before the Court of Appeal, it is apparent that the Attorney General was looking for a prosecutor who shared his view, rather than an independent prosecutor as contemplated by the CCA. Mr. Blackmore submits that the appointment of Mr. Robertson, resulting in the approval of charges, his arrest and a costly court proceeding to have the appointment quashed, was an abuse since it was intended to give the appearance of independence but was, in fact, unlawful.
- [178] A final strand of Mr. Blackmore's claim relates to pre-charge delay. The inordinate delay, which he says ought to be calculated from the Crown's decision not to prosecute in 1992, was caused by the Crown as a result of its long-standing position that s. 293 was unconstitutional, the reluctance of the Attorney General to initiate a reference as recommended by Mr. Peck, and the unlawful appointment of Mr. Robertson. He says that especially in the absence of any "evidence of harm" caused by his conduct, there is no justification for the decision to lay a charge against him so many years later. In other words, Mr. Blackmore does not argue that the pre-trial delay caused an unfair trial; rather, that it is unfair to try him at all.
- [179] The Crown responds that there are several reasons why Mr. Blackmore's claim of abuse of process based on the Crown's representations and conduct regarding the constitutionality of s. 293 lacks merit:
- a) the Crown did not make a clear and unequivocal representation to Mr. Blackmore that his conduct was lawful. Rather, the substance of the public pronouncements was that legal opinions had been obtained that cast doubt on the constitutionality of the polygamy offence. However, those opinions were never tested in court, nor can they reasonably be taken as an official endorsement of Mr. Blackmore's polygamous lifestyle;

- b) Mr. Blackmore has not established any prejudicial reliance on the Crown's representation beyond a bald assertion that he relied on the Press Release in proceeding with blessings performed subsequently. The Crown emphasizes here that Mr. Blackmore entered into multiple plural marriages both before and after 1992, and gave evidence that he entered plural marriages because he would be excommunicated if he did not;
- c) although the Crown accepts that there was controversy surrounding the constitutional status of s. 293 from the 1990s onward, it does not follow that Mr. Blackmore was treated unfairly because he continued to live a polygamous lifestyle. He chose to engage in conduct that was clearly prohibited by Parliament and did so in circumstances where there had been no judicial determination as to the constitutional status of the polygamy offence. Charging decisions of the provincial Attorney General do not determine whether particular conduct is lawful; and
- d) while the Crown is not required to give reasons justifying its exercise of prosecutorial discretion, there are nevertheless well known legal and factual circumstances that led to the reconsideration of charges against Mr. Blackmore. There is no suggestion that the decision to proceed with charges in 2014 was motivated by any improper purpose. Charging decisions are case specific and involve a myriad of considerations, both legal and factual. The release of the Polygamy Reference in 2011 significantly altered the legal frame of reference that had informed previous decisions to proceed with polygamy prosecutions. Additionally, new evidence was made available to the Crown, including Mr. Blackmore's voluntary statement of January 2009 and the FLDS marriage records obtained by searches by law enforcement elsewhere. Either of these new circumstances would be sufficient to allow the Crown to revisit its decision to charge Mr. Blackmore.

[180] With respect to pre-charge delay, the Crown emphasizes that delay in this context, on its own, cannot justify staying proceedings as an abuse of process. Mr. Blackmore bears the onus of proving, on a balance of probabilities, actual prejudice of such magnitude and importance that it amounts to a deprivation of the opportunity to make full answer and defence. He has not met this burden.

[181] In the event Mr. Blackmore has persuaded the Court there has been an abuse of process, the Crown submits that a stay of proceedings is not the appropriate remedy in the circumstances. It argues that this is not that "clearest of case" that justifies the extraordinary remedy of a stay, and that lesser remedies, such as the exclusion of evidence or a reduction in sentence, are available to address any prejudice.

iii. Discussion

Which category is engaged?

[182] Mr. Blackmore was unable to clearly articulate upon which category his application is based. For reasons I will now explain, I conclude Mr. Blackmore has failed to identify any clear prejudice to his fair trial rights under the main category of the abuse of process doctrine. Rather, it is the residual category that is engaged in this application.

[183] I have outlined the various strands of Mr. Blackmore's arguments. Other than perhaps one submission made by his counsel, none appear to be grounded in any alleged prejudice to his fair trial interests. He does not argue that he could not receive a fair trial as a result of the state's conduct over the years. He does not allege or suggest any misconduct on the part of prosecutors or investigators; for example, that any evidence was lost or compromised as a result of previous investigations or prosecutorial decision-making over the years. Rather, he alleges specific conduct of the state that on its own, or cumulatively, renders the bringing of the current prosecution, based on his actions before the Polygamy Reference, unfair and thus undermining the integrity of the judicial process.

[184] I will nevertheless address one submission made by Mr. Blackmore that might be seen as raising an issue of trial fairness. Mr. Suffredine submits that Mr. Blackmore suffered two forms of prejudice arising from the Press Release announcing the CJB's decision not to prosecute him. The first invokes the residual category, but the second may be seen to involve trial fairness, as it is framed this way:

The second is the ability to defend the earlier incidents was prejudiced. Clearly the crown did not have the records seized in 2008 from the Texas ranch and would not have had them at that time. Absent those records the prosecution [in 1992] would likely have failed unless other evidence existed that has not been disclosed today.

[185] The "records seized in 2008 from the Texas ranch" refers to the FLDS marriage records seized by Texas law enforcement officials in 2008 from the YFZ Ranch. Certain of these records pertained to marriage ceremonies involving Mr. Blackmore and formed part of the Crown's evidence at trial. I take the reference to "the earlier incidents" to mean plural marriages Mr. Blackmore entered into prior to 1992.

[186] That additional evidence against an accused may come to light after a charging decision that strengthens the Crown's case or causes a previous decision to be re-visited does not, on its own, lead to a finding of prejudice. Absent misconduct, improper motive or bad faith (none of which are alleged here), the Crown is permitted to change or reconsider its position in relation to a charging decision when it receives additional evidence. Mr. Blackmore has not established any prejudice to his fair trial rights by the 1992 prosecutorial decision not to charge him or any other state conduct over the years. Any views Mr. Blackmore may now have about the result of a hypothetical 1992 prosecution, based on evidence in the Crown's possession at that time, is entirely speculative.

[187] I find that Mr. Blackmore's challenge invokes the residual category only. His challenge is to the Crown's decision to prosecute him in light of previous state conduct toward him. There can be no question that such a decision involves an act of prosecutorial discretion. As such, it is only reviewable by the court for an abuse of process.

[188] I turn now to consider the first stage of the test.

Residual Category - The First Stage: Preventing Ongoing Harm to the Justice System

[189] To reiterate, the question that arises at the first stage of the test for a stay of proceedings for an abuse of process is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency such that proceeding to the conclusion of the court process, even a fair process, in the face of that conduct would be harmful to the integrity of the justice system: Babos at para. 35.

[190] In a desire to lend some structure to his arguments, I will group the various strands of Mr. Blackmore's allegations under the following categories:

- (a) Previous representations by the Crown about the constitutional status of s. 293;
- (b) The Crown's prior non-enforcement of the polygamy offence;
- (c) The Attorney General's appointment of successive special prosecutors;
- (d) Pre-charge delay; and
- (e) Cumulative consideration.

(a) Previous Representations by the Crown About the Constitutional Status of s. 293

[191] The thrust of Mr. Blackmore's argument here is that the decision to prosecute him now for polygamy is unfair in light of the Crown's publicly expressed opinion that the polygamy provision was unconstitutional and its history of non-prosecution of the offence.

[192] Mr. Blackmore first argues that he relied upon, or was induced by, the Crown's position between 1992 and 2007 that it believed the polygamy provision was unconstitutional, rendering this prosecution of him now, unfair. This argument largely repeats his position on officially induced error, which I have rejected.

[193] The jurisprudence recognizes that there are some circumstances where representations by state officials can support a finding that an abuse of process has occurred. I have referred to some of these authorities already, but I think a closer review of their facts and the courts' application of the law to those facts is helpful.

[194] The appellant in *R. v. Young* (1984), 13 C.C.C. (3d) 1 (O.N.C.A.) was a lawyer who swore an affidavit in 1976 for the purpose of limiting the tax liability of a corporation under a provincial statute. In 1977, facts were made known known to the provincial Ministry of Revenue, the local bar association and the Law Society which raised questions about the propriety of Mr. Young's affidavit, though his good faith was not in question. The matter was

concluded with the Ministry's stated intention to re-assess tax liability, though this never did occur. The professional bodies took no action against Mr. Young. Mr. Young was informed of these three decisions and the matter was, to all appearances, concluded.

- [195] The issue re-surfaced in January 1982 when a police officer came across Mr. Young's affidavit while investigating an unrelated complaint of municipal mismanagement. The discovery of the affidavit was still within the limitation period for a prosecution under the provincial statute for swearing a false affidavit. Consultations with the Crown followed in a dilatory way, and it took police a further year to conduct an investigation, by which time the limitation period for the provincial offence had expired. The investigation did not uncover anything that had not been in the hands of the Ministry of Revenue in 1977.
- [196] In April 1983, Mr. Young was charged with fraud and perjury under the Criminal Code, offences for which he would, in all probability, never have been charged but for the delay.
- [197] The trial judge stayed the proceedings, and the Crown appealed. The Ontario Court of Appeal upheld the stay, finding there was a "residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings" (at p. 31). The pre-charge delay was not the basis for the stay; rather, Dubin J.A. held that the executive action leading to the institution of proceedings was offensive to the principles upon which the administration of justice was conducted by the courts.
- [198] The outcome in Young was dependent on a number of significant findings of prejudice, including (a) actual prejudice resulting from the Crown's decision to proceed under the Criminal Code, as a conviction would have exposed Mr. Young to far graver consequences in relation to his liberty and professional career than a conviction under a provincial regulatory statute; (b) delay and consequent impairment of Mr. Young's ability to make full answer and defence; and (c) the disruption to Mr. Young's life and reputation arising from a matter which had arisen in 1976 and which in 1977 had been resolved in his favour.
- [199] The Court concluded that to subject Mr. Young to a criminal trial for fraud and perjury in the unique circumstances of the case would "put his liberty at risk in a manner contrary to those fundamental principles of justice which are the hallmark of our criminal justice system and now entrenched in s. 7 of the Charter" (at p. 35).
- [200] Young was considered and distinguished by the British Columbia Court of Appeal in *R. v. Halcrow* (1993), 80 C.C.C. (3d) 320 (B.C.C.A.); *aff'd* [1995] 1 S.C.R. 440.
- [201] Ms. Halcrow was charged with nine counts of assault causing bodily harm involving nine foster children in her care between 1969 and 1978. Following a complaint in 1978, an investigation was conducted by the Ministry of Human Resources but the results were inconclusive. No criminal investigation was undertaken. The charges against Ms. Halcrow were laid about 12 years after the last alleged incident.

[202] Ms. Halcrow sought to stay the proceedings for abuse of process, claiming that investigations by the RCMP and the Ministry of Human Resources in 1978 and 1979 had completely exonerated her of any use of excessive force, and that the 12-year delay in bringing charges caused her actual prejudice. Her application was dismissed.

[203] On appeal, Goldie J.A. for the majority, upheld the decision to dismiss the stay application. In doing so, he distinguished Young in the following terms (at paras. 19-21):

In the case at bar the trial judge found as a fact no investigation was undertaken by the Ministry of Human Resources resulting in a conclusive decision comparable to that which took place in Young's case. This finding was based in part on his assessment of the credibility of the evidence of certain officials of the Ministry of Human Resources. No basis has been demonstrated to us for interfering with this assessment. Nor was there a police investigation undertaken in 1978 and 1979. That too was a finding of fact and there was evidence to support that conclusion. At no time was Mrs. Halcrow informed she was cleared of charges of child abuse.

In Young's case it appears that both the trial judge and the Court of Appeal accepted that Mr. Young's life had twice been disrupted, his reputation in the community damaged and his career put in jeopardy a second time all with respect to a matter " which arose in 1976 and which in 1977 had already been resolved by the executive, so far as he was personally concerned, in his favour."

No such finding was made by the trial judge in the case at bar. Mrs. Halcrow's evidence at the trial (which of course he had not heard at that point) included a denial that the Ministry officials had ever told her to end corporal punishment and that it was her choice in October, 1978 to provide help to young married couples rather than take on foster children

[204] The Court also found that none of the prejudice that had been established in Young was present in Ms. Halcrow's case, and it agreed with the trial judge that this was not one of those "clearest of cases" that called for a stay of proceedings.

[205] With respect to the effect of the pre-charge delay, the Court emphasized the need to consider not the fact of the delay but, rather, the effect of the delay upon the fairness of the trial. It concluded that none of the matters complained of by Ms. Halcrow (change in public attitude towards corporal punishment, loss of evidence, death of witnesses and deterioration of witness recollections) considered individually and collectively, hindered her from making full answer and defence to each of the counts in question.

[206] Numerous authorities have considered allegations of abuse of process involving the exercise of prosecutorial discretion. In Nixon, for example, Ms. Nixon was initially charged with several offences including dangerous driving and impaired driving causing death and bodily harm. She entered into a plea agreement according to which she would plead guilty to a charge of careless driving with a joint submission for a fine. When the Assistant Deputy Minister learned of the proposed resolution, he initiated a review which led him to conclude that Crown counsel's assessment of the strength of the case was flawed. In his view, a plea to careless driving in the circumstances was contrary to the interests of justice

and would bring the administration of justice into disrepute. Accordingly, he instructed Crown counsel to withdraw the plea agreement and proceed to trial on the dangerous driving charges.

[207] Ms. Nixon alleged abuse of process and sought a court direction requiring the Crown to complete the plea agreement. The application judge concluded that the Crown's repudiation of the plea agreement was an abuse of process in breach of Ms. Nixon's s. 7 rights. The Court of Appeal overturned the application judge's decision, holding that the repudiation of a plea agreement is a matter of prosecutorial discretion, reviewable only for abuse of process, and that there was no evidence to support a finding of abuse of process in the circumstances of the case.

[208] The Supreme Court of Canada dismissed the appeal, finding that the Crown's decision to resile from the plea agreement and to continue the prosecution was an act of prosecutorial discretion, only subject to judicial review for abuse of process. It concluded at para. 68:

As discussed earlier, the ADM's decision to resile from the plea agreement falls within the scope of prosecutorial discretion. In the absence of any prosecutorial misconduct, improper motive or bad faith in the approach, circumstances, or ultimate decision to repudiate, the decision to proceed with the prosecution is the Crown's alone to make. Reasonable counsel may indeed, and often do, differ on whether a particular disposition is in the public interest in the circumstances of the case. The ADM, in good faith, determined that Crown counsel's assessment of the strength of the evidence was erroneous and, on that basis, having regard to the seriousness of the offences, concluded that it would not be in the public interest to terminate the prosecution on the criminal charges. This can hardly be regarded as evidence of misconduct.

[209] *R. v. Stobbe*, 2011 MBQB 280, involved allegations similar to those in the instant case. Mr. Stobbe applied for a stay of proceedings on the basis that the Crown's decision to charge him for his wife's homicide constituted an abuse of process. Mr. Stobbe's wife had been murdered in 2000. The decision in early 2008 to charge Mr. Stobbe with her death was made on the recommendation of an outside prosecutor from the British Columbia Attorney General's office, to whom the matter had been referred by the Prosecution Service of Manitoba. This followed an almost six-year hiatus after outside prosecutors from the Public Prosecution Service of Alberta twice provided opinions in 2002 to the RCMP and Manitoba Crown that, based on their review of available evidence, there was no reasonable expectation of securing a conviction against Mr. Stobbe.

[210] Relying on a policy directive of the Manitoba Crown and on *Blackmore* 2009, Mr. Stobbe took the position that the Manitoba Crown was bound by the 2002 opinion of the Alberta prosecutors and was not entitled to seek a different opinion on essentially the same evidence. He argued there was no new evidence in 2008 and that officials were simply "prosecutor shopping" until they found a prosecutor who would give them the result they wanted.

- [211] Applying the analytical framework and principles set out in *Nixon*, Martin J. first determined that it was the residual category of the abuse of process doctrine that was at issue and that the Manitoba Crown's decision to refer the case to the British Columbia Crown was an act of prosecutorial discretion, only reviewable for abuse of process.
- [212] Distinguishing *Blackmore* 2009, the Court concluded the Manitoba Crown had not failed to adhere to its Policy Directive in referring the matter to the British Columbia Crown in 2008. The Court also found there to be no evidence that the ADAG lacked objectivity or independence or had acted in bad faith or for an improper motive or vexatiously when he referred the investigation report to the British Columbia Crown. It made the same finding in respect of the conduct of the independent prosecutors. Finding that Mr. Stobbe had failed to discharge the onus upon him to establish an abuse of process, the Court dismissed the application.
- [213] In *R. v. Manitopyes*, 2013 SKQB 112, following findings of guilt at trial, the offender applied for a stay of proceedings based upon abuse of process. He alleged that the Crown had, among other things, failed to give notice of its intention to proceed with a dangerous offender application until moments before the guilty verdicts were announced and by this conduct effectively reneged on an implied commitment to only seek a fixed term of imprisonment whether following a guilty plea or a guilty verdict at trial. Mr. Manitopyes argued that he would have conducted the trial differently had he been informed the Crown intended to seek to have him declared a dangerous offender upon conviction. In these circumstances, the trial judge found Mr. Manitopyes had not even met the threshold burden to have a hearing. The Court held that even if the Crown had made a representation that it would not seek a dangerous offender designation, the Crown would not be precluded from reconsidering its decision:
- [33] In this case, even if this Court accepts that prior to the close of the calling of evidence, Crown counsel advised Mr. Struthers that his client "would be okay this time" - meaning that she was not considering a Part XXIV application - I would find it difficult to impute any degree of misconduct, improper motive or bad faith on her part for having reconsidered the Crown's position in regard to a possible Part XXIV application when the trial was completed. There is no suggestion in this case that the Crown prosecutor was not acting in the public interest when she informed Mr. Struthers that she had reconsidered the Crown's position on the matter of sentencing.
- [214] In dismissing the application, the Court held, in part:
- [39] I see no reason why Crown counsel should be required to justify the exercise of their prosecutorial discretion to ask the Court to consider an assessment under Part XXIV when there is no evidence of misconduct, improper motive or bad faith
- [215] As the Crown on the present application summarized, these authorities make clear that even after making representations to an accused, the Crown is permitted to change or reconsider its position in relation to a charging decision. Absent proof of misconduct,

improper motive or bad faith, an accused must establish that the Crown made a clear and unequivocal representation to the accused which resulted in actual prejudice. Crown prosecutors, as quasi-ministers of justice are not bound to slavishly adhere to Crown policy statements, particularly where there is some reasonable explanation for a change of position.

- [216] The question to be addressed, therefore, is whether the Crown's conduct and representations concerning the constitutionality of the polygamy offence were so unfair or oppressive to Mr. Blackmore, or so tainted by bad faith or improper motive, that to allow the Crown to now proceed on a charge of polygamy would tarnish the integrity of the judicial system. I find the answer to this question is no.
- [217] This is not a situation like *Young* where the Crown made clear and unequivocal representations to Mr. Blackmore which resulted in actual prejudice. Mr. Blackmore's position that the Crown made such clear and unequivocal representations between 1992 and 2007 that his conduct was lawful, effectively endorsing his polygamous lifestyle, mischaracterizes what actually occurred.
- [218] The British Columbia Crown made representations through its Press Release that it would not approve charges of polygamy arising out a recent investigation in Bountiful. It chose to publicly explain, at least in part, why the decision failed to meet its charge approval standard, being its opinion that the polygamy provision in the Criminal Code was unconstitutional. It also referenced the need to enact new laws and an upcoming meeting with federal counterparts to address issues around polygamy and the protection of women and children.
- [219] These public representations about a charge approval decision are a far cry from representing that Mr. Blackmore's conduct was lawful and endorsing his polygamous lifestyle.
- [220] Mr. Blackmore chose to engage and persist in conduct that he knew was clearly prohibited by Parliament before and after the Press Release. He did so in the absence of any judicial determination on the constitutional status of polygamy. The historical charging decisions before the current prosecution made by the provincial Crown reflected an ongoing controversy about the constitutionality of the polygamy provision, but such opinions and charging decisions do not determine whether particular conduct is lawful or not. These historical charging decisions were not pronouncements that the provincial government viewed Mr. Blackmore's conduct as lawful and cannot reasonably be taken as an official and irrevocable endorsement of his practice of polygamy.
- [221] As the Crown argues, had Mr. Blackmore truly desired certainty about the lawfulness of his conduct, it was open to him to advance a Charter challenge seeking a declaratory judgment outside of a criminal prosecution: *Armstrong* at para. 38; *Canada (Attorney General) v. Bedford*, 2013 SCC 72; and *Carter v. Canada (Attorney General)*, 2015 SCC 5.

- [222] Mr. Blackmore essentially took a risk that the provincial Crown would continue its non-enforcement of s. 293. He was alerted to the potential that this might change a few times after 1992 and before the current prosecution. For example, in approximately 2002 he was aware that the Attorney General of the day, Mr. Plant, was to be meeting with the Federal Justice Minister on the issue of polygamy. In response to Mr. Blackmore's inquiries, Mr. Plant told him that there was an investigation, that officials were looking into it and Mr. Blackmore would know the outcome when it came. As another example, Mr. Blackmore was also advised in 2005 by then Sergeant Fisher that the Crown would be considering, among other things, polygamy charges. Of course, Mr. Blackmore was alerted in 2007 that a special prosecutor held the opinion that the polygamy provision might well be constitutional.
- [223] Also unlike the accused in *Young*, Mr. Blackmore has not established any reliance on the Crown's representations, prejudicial or otherwise. Mr. Blackmore's statement to police in 2009 and his evidence at this hearing was unequivocal: he began to practise polygamy before the Crown's charging decision in 1992 and has continued to do so since then. While he was relieved to learn he would not be prosecuted in British Columbia in 1992 because the Crown held the opinion that s. 293 was unconstitutional, I find he did not rely upon, nor was he induced by, those opinions, in 1992 or anytime thereafter in entering into further plural marriages or otherwise governing his conduct. Mr. Blackmore's conduct in regard to his plural marriages has always been governed by only one thing: his religious and priesthood duties. These duties have been, and remain, more important to him than any opinion expressed by a government official.
- [224] Also unlike the Crown's decision in *Young*, the Crown's decision to bring this prosecution occurred after significant material changes in the factual and legal matrix that existed at the times earlier charging decisions were made. As Frankel J.A., writing for the Court in *Blackmore* (CA), found:
- [66] Unlike Mr. Robertson, Mr. Wilson was not given "essentially the same mandate" as Mr. Peck. Rather, Mr. Wilson was given a mandate to assess whether, as matters stood in 2012, there was a substantial likelihood of conviction and, if so, whether a prosecution would be in the public interest. By 2012, not only had the factual matrix changed but more importantly, there had been a material change in the legal matrix. As the chambers judge stated:
- [89] In the present case, Mr. Wilson was appointed in the wake of a comprehensive reference which specifically addressed not only the constitutionality of s. 293, but also the various harms associated to polygamy which justify its proscription under s. 1 of the Charter. Mr. Wilson's appointment was not simply to revisit Mr. Peck's decision, but to look at what arose from Reference re: s. 293 and what arose from investigations conducted after Mr. Peck's decision and after Reference re: s. 293. His mandate was thus based on a different legal and evidentiary landscape than was Mr. Peck's.

[225] Mr. Wilson's mandate was to assess whether, as matters stood following the Polygamy Reference, there was a substantial likelihood of conviction and, if so, whether a prosecution was in the public interest. He determined it was. There is no suggestion there has been any degree of misconduct, improper motive or bad faith on the Crown's part in reconsidering its earlier decisions not to prosecute Mr. Blackmore nor is there any similar such suggestions in relation to Mr. Wilson's decision to bring this prosecution.

[226] In the result, I conclude that the bringing of this prosecution in light of the Crown's previous representations fails at the first stage of the test and is not an abuse of process. The Crown's previous representations, in context, have caused no prejudice or harm to the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome. The bringing of this prosecution in these circumstances does not undermine society's expectations of fairness, fair play and decency, in the administration of justice.

(b) The Crown's Prior Non-Enforcement of the Polygamy Offence

[227] Mr. Blackmore also appears to argue that the Crown's decision to prosecute him now for polygamy, after years of non-enforcement of the offence against him or any other members of the Bountiful community, results in an abuse of process.

[228] As a challenge to the Crown's decisions to commence, halt or reconsider a prosecution against him and/or other individuals and not others, this aspect of Mr. Blackmore's claim is a challenge to the basic elements of prosecutorial discretion and reviewable only for an abuse of process. Again, abuse of process in this context refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. In *Anderson, Moldaver J.* cited Crown decisions motivated by racial prejudice as an example of conduct meeting this standard. However, I do not understand Mr. Blackmore to say that the decision to bring this prosecution was motivated by any improper purpose. Rather, he challenges the prosecution of him after prior non-enforcement of the offence.

[229] The authorities do not support Mr. Blackmore's position, and there are sound policy reasons that militate against it as well.

[230] For example, in *Armstrong*, a group of commercial fishers engaged in a protest fishery as a result of differential enforcement and treatment of non-aboriginal fishers. They were convicted of unlawfully fishing during a fishery closure. On appeal they argued that enforcing fishing regulations against them while not enforcing them against aboriginal fishers constituted an abuse of process under the residual category. In dismissing their appeal, the Court found that their abuse of process argument was doomed to failure because "a court cannot condone a breach of the law by reason of the non-prosecution of another offender": para. 38.

[231] The Crown also points to strong policy reasons to deny abuse of process claims based upon the non-enforcement (or inconsistent enforcement) of prohibitions, reasons with which I agree. Charging decisions are necessarily case-specific, involve a number of factual and legal considerations and ultimately involve an element of judgment. In British Columbia, the CJB Charge Assessment Guideline allows for the exercise of that judgment to decline to approve a charge, even where the evidentiary standard is met, if it is not in the public interest. For the Court to review charging decisions for selective non-enforcement would be to do the very thing the Nixon Court warned against: it would be to impermissibly stray into the arena and second-guess the Crown's decisions, akin to a "supervising prosecutor": para. 52.

[232] Accordingly, I find that the Crown's prior non-enforcement of the polygamy offence fails at the first stage of the test and is not an abuse of process.

(c) The Attorney General's Appointment of Successive Special Prosecutors

[233] Mr. Blackmore argues that the Attorney General's appointment of successive special prosecutors is unfair and an abuse of process. To synthesize Mr. Blackmore's specific arguments here, I find it convenient to consider them under two headings: the appointments before the Polygamy Reference and the appointment following the Polygamy Reference.

Appointments Before the Polygamy Reference

[234] Mr. Blackmore relies upon the findings of Stromberg-Stein J. in Blackmore 2009 to submit that the Attorney General's conduct in appointing Mr. Peck, Mr. Doust and Mr. Robertson in 2007 and 2008 is an abuse of process. He says that Mr. Peck's appointment in the face of the CJB's decision not to prosecute, with no new evidence, demonstrates the Attorney General was "determined to prosecute". Then, when Mr. Peck did not give him the answer he wanted, the Attorney General appointed Mr. Doust to review it, again demonstrating his determination to prosecute. Finally, when Mr. Doust did not give him the answer he wanted, he appointed Mr. Robertson. Mr. Robertson's appointment was found to be unlawful and quashed.

[235] Mr. Blackmore says that by appointing these successive special prosecutors, the Attorney General was feigning the appearance of objectivity and fairness, but was actually motivated by his desire to prosecute. By interfering with the charge assessment process intended by the CCA, he was doing precisely what the legislation was meant to prevent. In these circumstances, Mr. Blackmore argues that to allow the current prosecution, for the same offence, to run to its conclusion in light of that misconduct would negatively affect the integrity of the justice system to the extent that a stay of proceedings is warranted.

[236] A close examination of Blackmore 2009 is required.

- [237] Mr. Robertson charged both Mr. Blackmore and Mr. Oler with polygamy; in the case of Mr. Blackmore, between May 1, 2005 and December 8, 2006 and Mr. Oler, between November 1, 2004 and October 8, 2008. Both accused petitioned the Court, seeking to quash both the appointment of Mr. Robertson and his decision to approve charges against them. The issue before the Court was whether the Attorney General had jurisdiction under the provisions of the CCA to appoint Mr. Robertson in the circumstances of Mr. Peck's decision not to prosecute.
- [238] At the outset of her reasons and because the petitions had originally erroneously sought relief under the abuse of process doctrine, Stromberg-Stein J., as she then was, outlined the precise scope of the proceedings before her. She wrote:
- [5] It is important to appreciate the scope of this proceeding. This judicial review concerns the process by which Mr. Blackmore and Mr. Oler were charged with the offences on the Information that is presently before the Provincial Court. At issue is the interpretation of the Act, and whether there is the statutory authority to bring the charges against the petitioners. This judicial review has nothing to do with the merits of the alleged offences; or with the merits of charge approval in this case; or whether there was manifest unfairness in the charge approval process or fundamental unfairness in proceeding with a prosecution instead of a reference to the Court of Appeal; or whether the prosecution of Mr. Blackmore and Mr. Oler should be stayed because it is an abuse of process.
- [239] I digress here for a moment to address one of Mr. Blackmore's submissions. Calling the introductory remarks at paragraph 5 above "an obiter comment", Mr. Blackmore argues that these remarks demonstrate that Stromberg-Stein J. may have been hinting that "abuse of process or unfairness were evident in the material before her." He urges me to follow these "hints". I decline to do so. These introductory remarks were not "obiter comments", nor were they "hints" about findings of abuse of process. Justice Stromberg-Stein was simply explaining what the case before her was, and was not, about.
- [240] In any event, Stromberg-Stein J. went on to conclude that the Attorney General had no jurisdiction to direct the ADAG to appoint Mr. Robertson and the ADAG had no jurisdiction to appoint Mr. Robertson to conduct a charge assessment on the same mandate as the first special prosecutor who had decided not to approve charges. She found that Mr. Robertson's appointment in these circumstances was contrary to s. 7 of the CCA and his decision to approve charges unlawful. Orders in the nature of certiorari, quashing the appointment and the decision to approve charges were granted.
- [241] The Court's analysis required a determination of the meaning of the word "final" in section 7(5) of the CCA, which I will repeat here for context:

- (5) 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).

[242] In interpreting the meaning of the word "final" in its context, Stromberg-Stein J. considered the Discretion to Prosecute Inquiry, Commissioner's Report, Vol. 1 (Victoria: Queen's Printer for British Columbia, 1990) [the "Owen Report"] which recommended the adoption of a special prosecutor model in British Columbia as a mechanism to address the risk or potential for real or perceived improper influence in the investigation and prosecution of sensitive political cases. She noted the Owen Report's rationale for a special prosecutor model at para. 52:

The rule of law in a democracy requires the public's ongoing consent and confidence in order to survive. Any widespread unease with the essential fairness of our justice system can cripple it. Perception becomes reality when suspicion of injustice is allowed to fester. The system must be capable of quickly and convincingly resolving any such doubts.

It is not enough to know now that the system worked fairly. The adversarial nature of our political system and its apparent proximity to the administration of justice will inevitably raise questions of potential interference in criminal investigations involving political and other influential figures . The system itself must be capable of demonstrating its integrity on an ongoing basis.

[243] The Court also noted that the Owen Report recommended a formal special prosecutor mechanism be enacted by the legislature, highlighting Recommendation #3 of the Owen Report at para. 53:

That in recognition of the fundamental importance of the separation of politics from the administration of justice, and given the dual role of the Attorney General as both a politician and the senior justice administrator in the province, a special prosecutor process should be instituted for political or other sensitive cases, as set out in Recommendation #9 below.

[244] At para. 54, Stromberg-Stein J. went on to reference Recommendation #9 from the Owen Report, which proposed the appointment of a special prosecutor with decision-making authority in the following terms:

- 1) That a special prosecutor be appointed in all cases where there is a significant potential for real or perceived improper influence in the administration of criminal justice because of the proximity of the suspect, or someone with a close relationship to the suspect, to the investigation, charge approval or prosecution processes. Such cases would include those involving cabinet ministers, senior public officials and police officers.
- 2) That the special prosecutor be a senior criminal lawyer in private practice in British Columbia, appointed for a specific case jointly by the Treasurer of the Law Society of British Columbia and the Deputy Attorney General.

- 3) That the role of the special prosecutor be to liaise with the police during the investigation; to make the charging decision; to lay the information and conduct the prosecution where this decision is made; and to provide adequate reasons to the police, the victim or other significantly interested person, and the public, as appropriate, where the decision not to prosecute is made.
- 4) That the Attorney General retain the right to intervene, conduct or stay any case for which a special prosecutor has been appointed and have the responsibility to do so where appropriate in the public interest; but that any such intervention or direction to a special prosecutor must be made public and that full written reasons for the direction or intervention must be published in the official Gazette and placed before the Legislature at the earliest appropriate opportunity.

[245] After noting that the legislation incorporated all but one of the recommendations of the Owen Report, Stromberg-Stein J. went on to summarize the legislative scheme: paras. 56-57:

[56] The Attorney General, pursuant to the Act, can direct the ADAG with respect to the approval or conduct of a specific prosecution so long as the directions are in writing and published in the Gazette: s. 5. If the ADAG considers it is in the public interest, the ADAG may appoint a lawyer as a special prosecutor pursuant to s. 7(1), or as an ad hoc prosecutor pursuant to s. 4(1). The difference is that a special prosecutor is not subject to direction from the Criminal Justice Branch unlike an ad hoc prosecutor. The Act provides that the decision of the special prosecutor within his or her mandate is final, subject to an appeal by a law enforcement officer if a charge is not approved (s. 7(5)), and subject to direction from the Attorney General, the Deputy Attorney General or the ADAG, in writing and published in the Gazette, with respect to any matter within the special prosecutor's mandate: s. 7(4).

[57] A number of factors distinguish the appointment of a special prosecutor pursuant to s. 7 of the Act. First, a special prosecutor must not be employed in the Ministry of Attorney General: s. 7(1). Secondly, a special prosecutor must carry out his or her written mandate, examining all relevant materials and reporting to the ADAG with respect to the approval and conduct of any prosecution: s. 7(2). Third, the ADAG is required to report the appointment of a special prosecutor to the Attorney General: s. 7(3). Fourth, all directives given to a special prosecutor by the Attorney General, Deputy Attorney General or ADAG must be in writing and published in the Gazette: s. 7(4). Finally, subject to any directives in accordance with s. 7(4), "the decision of a special prosecutor with respect to any matter within his or her mandate is final": s. 7(5).

[246] Stromberg-Stein J. went on to consider the intention of the CCA, as well as its object and purpose. As to its intention, she held at para. 58:

The intention of the Act is to give the ADAG the power to appoint a special prosecutor in political or other sensitive cases, at the direction of the Attorney General, if the ADAG considers it is in the public interest to do so. This process is intended to address the competing interests the Attorney General faces with respect to political accountability and Crown independence in the Attorney General's dual role of politician and senior justice administrator for the Province.

[247] As to its object and purpose, she held at para. 62:

The object and purpose of the Act is to enhance public confidence in the independence of prosecutorial decision-making. This would be frustrated if the decision of an independent special prosecutor could be re-visited by successive special prosecutors, on the same mandate, until a decision is reached that the Attorney General publicly prefers.

[248] Stromberg-Stein J. ultimately concluded that the CCA "imposes limits and restrictions on the Attorney General's prerogative powers in certain circumstances in order to promote public confidence that the exercise of prosecutorial discretion occurs in a fair and objective way." Citing the Owen Report, she found the scheme of the CCA to "achieve the proper balance between independence from political interference and accountability to the political process for the investigation and prosecution": para. 69.

[249] At para. 71, Stromberg-Stein J. concluded that the role of the special prosecutor 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 mandate is final.

[250] Stromberg-Stein J. concluded that by appointing Mr. Robertson on essentially the same mandate as Mr. Peck because the Attorney General disagreed with Mr. Peck's decision not to prosecute was contrary to s. 7 of the CCA because Mr. Peck's decision, on his mandate, was final. She went on to make a number of findings about the Attorney General's conduct:

[94] Following the decision of Mr. Robertson, the Attorney General did not direct the ADAG to seek further opinions or decisions, or to make any further appointments of special or ad hoc prosecutors. A reasonable person would conclude this was because the Attorney General had finally obtained the decision he wanted all along.

[95] The appointment of Mr. Robertson, on essentially the same mandate as Mr. Peck, violated s. 7(5) of the Act because the meaning of the Act and the clear legislative intent is that the decision of the first special prosecutor, Mr. Peck, on his mandate, was final. The Attorney General delegated his decision-making power to Mr. Peck to consider a prosecution. He sought the appearance of an independent transparent process but then refused to accept the result. It is inconsistent with the Act for the Attorney General to seek the appointment of successive prosecutors to get a desired result. As the petitioners point out, if the Attorney General is free to have another special prosecutor review the decision of a previous special prosecutor on the same mandate, the odds are that eventually the decision will be different

as there are only two possible outcomes.

- [96] The Attorney General treated the decision of the special prosecutor, Mr. Peck, as merely advisory. Yet, Mr. Peck's decision fell within the terms of his mandate. There were no public directives to Mr. Peck concerning his mandate or his decision and no appeal. In accordance with s. 7(5) of the Act, Mr. Peck's decision on his mandate was final.
- [97] Further, the Attorney General specifically named Mr. Doust and Mr. Robertson, a decision that is left to the ADAG, thus departing from the principles of independence that underlies the purpose and intent of the Act. The intent of the Act is to leave the selection of a special prosecutor up to the ADAG if he concludes it is in the public interest. The Act does not contemplate that the Attorney General would direct the selection of a specific prosecutor as he did with Mr. Doust and Mr. Robertson.
- [98] The Attorney General created the illusion that the decision to prosecute was that of the special prosecutor when, in reality, the decision reflected the result the Attorney General sought. This is precisely what the Act seeks to avoid in order to maintain public confidence in the administration of criminal justice in this province.
- [100] In this case, the Court is faced with the appointment of successive prosecutors, including two special prosecutors on the same mandate. In the result, the Attorney General got the answer he publicly sought all along; that is, to prosecute. This is exactly the type of interference with the charge approval process that the Act and the special prosecutor scheme are meant to prevent and is inconsistent with the purpose and object of the Act.
- [251] Importantly, Stromberg-Stein J. allowed that there may be circumstances where the Attorney General has jurisdiction to appoint another or successive prosecutors, such as where the mandate has changed in circumstances or evidence:
- [99] The Act restricts the Attorney General's prerogative insofar as he has delegated the charge approval decision to a special prosecutor. This is not to say the Attorney General never has the jurisdiction to appoint another or successive special prosecutors in other circumstances, such as where the mandate has changed due to a change in circumstances or evidence, or it cannot be fulfilled for reasons such as resignation, illness, death, or conflict of interest.
- [252] The Attorney General directed that no appeal from Blackmore 2009 be taken, that the charges against Mr. Blackmore and Mr. Oler be stayed and that a reference before the British Columbia Supreme Court be initiated.
- [253] To be clear, there is no suggestion that any of the special prosecutors directed to be appointed by Attorney General Oppal misconducted themselves in any way. There is no suggestion their decision-making was not independent or objective. Rather, it is the perception of interference generated by the Attorney General's conduct that is at issue.

- [254] I share Stromberg-Stein J.'s view that by appointing Mr. Robertson on the same mandate as Mr. Peck in contravention of section 7(5) of the CCA and specifically selecting Mr. Doust and Mr. Robertson (a decision that is left to the ADAG), "[t]he Attorney General created the illusion that the decision to prosecute was that of the special prosecutor when, in reality, the decision reflected the result the Attorney General sought": para. 98. The harm in the Attorney General's conduct is that it upset the "critical balance that Mr. Owen opined should be kept between political independence and accountability" and undermined the administration of justice by leaving the perception of "political interference and of an oppressive or unfair prosecution": para. 101. In these circumstances, I find this conduct of the Attorney General is offensive to societal notions of fair play and decency.
- [255] However, I also conclude that the prejudice or harm to the integrity of the justice system occasioned by this conduct will not be manifested, perpetuated or aggravated by proceeding to the outcome of this trial.
- [256] The Court has already disassociated itself from the impugned conduct through the quashing of Mr. Robertson's appointment and his decision to approve charges in 2009. Shortly after Blackmore 2009, the ADAG stayed the information approved of by Mr. Robertson. The Attorney General directed Mr. Robertson not to appeal the ruling and to take no further action with respect to his mandate, directed Mr. Peck to take no further action with respect to his mandate and requested the British Columbia Supreme Court's direction on the two reference questions. Thus, the decision in Blackmore 2009 has fully addressed any prejudice or harm occasioned to the justice system by the impugned conduct, and that conduct has not continued.
- [257] In Babos, Moldaver J. described the type of case that would meet the first stage of the test at para. 35:
- To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial - even a fair one - will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.
- [258] Through the decision in Blackmore 2009, the Court has made clear that it does not condone the identified conduct of the Attorney General. Any harm occasioned to the integrity of the justice system by this conduct has been redressed, and has not, and will not, be manifested, perpetuated or aggravated by proceeding to the outcome of this trial. I therefore conclude that the first stage of the test has not been met here.

The Appointment Post-Polygamy Reference

- [259] The findings and conclusions of the Polygamy Reference represented a significant change in the legal landscape. Drawing upon a vast body of evidence, Chief Justice Bauman found that there was a reasoned basis for the apprehension that polygamy (especially polygyny, in which a man has more than one wife) is inherently harmful to the participants, to their offspring and to society generally (at para. 1182). He summarized those apprehended harms:
- [779] Drawing on principles of evolutionary biology tested against evidence from psychology, anthropology, economics and other disciplines, Dr. Henrich posits that polygyny has a number of predictable effects:
- a) It creates a pool of unmarried men with the attendant increase in crime and anti-social behaviour;
 - b) The increased competition for women creates pressure to recruit increasingly younger brides into the marriage market;
 - c) This competition causes men (as fathers, husbands and brothers) to seek to exercise more control over the choices of women, increasing gender inequality and undermining female autonomy and rights. This is exacerbated by larger age disparities between husbands and wives in both polygynous and monogamous relationships; and
 - d) Men reduce investment in wives and offspring as they spread their resources more thinly across larger families and increasingly channel those resources into obtaining more wives.
- [780] Male control features prominently in Dr. Grossbard's economic analysis of polygyny. That analysis reveals that while polygyny increases the value of women in the marriage market, women do not realize the added value since men manipulate social institutions in ways that facilitate their control of women. These institutions include early and arranged marriages, the payment of brideprice, easy divorce and the devaluing of romantic love. Among the costs are depressed mental health for women and poorer outcomes for their children.
- [781] These and other harms recur consistently in the social science literature.
- [782] Women in polygynous relationships are at an elevated risk of physical and psychological harm. They face higher rates of domestic violence and abuse, including sexual abuse. Competition for material and emotional access to a shared husband can lead to fractious co-wife relationships. These factors contribute to the higher rates of depressive disorders and other mental health issues that women in polygynous relationships face. They have more children, are more likely to die in childbirth and live shorter lives than their monogamous counterparts. They lack reproductive autonomy, and report high rates of marital dissatisfaction and low levels of self-esteem. They also fare worse economically, as resources may be inequitably divided or simply insufficient.

- [783] Children in polygynous families face higher infant mortality, even controlling for economic status and other relevant variables. They tend to suffer more emotional, behavioural and physical problems, as well as lower educational achievement. These outcomes are likely the result of higher levels of conflict, emotional stress and tension in polygynous families. In particular, rivalry and jealousy among co-wives can cause significant emotional problems for their children. The inability of fathers to give sufficient affection and disciplinary attention to all of their children can further reduce children's emotional security. Children are also at enhanced risk of psychological and physical abuse and neglect.
- [784] Early marriage for girls is common, frequently to significantly older men. The resultant early sexual activity, pregnancies and childbirth have negative health implications for girls and also significantly limit their socio-economic development. Shortened inter-birth intervals pose a heightened risk of problems for both mother and child.
- [785] The sex ratio imbalance inherent in polygyny means that young men are forced out of polygamous communities to sustain the ability of senior men to accumulate more wives. These young men and boys often receive limited education as a result, and must navigate their way outside their communities with few life skills and little social support.
- [786] Another significant harm to children is their exposure to, and potential internalization of, harmful gender stereotypes.
- [787] Polygyny has negative impacts on society flowing from the high fertility rates, large family size and poverty associated with the practice. It generates a class of largely poor, unmarried men who are statistically predisposed to violence and other anti-social behaviour. Polygyny also institutionalizes gender inequality. Patriarchal hierarchy and authoritarian control are common features of polygynous communities.
- [788] A great many of the foregoing effects are not limited to particular cultures or geographic locations; they are universal. Dr. McDermott's statistical analysis of polygyny reveals that throughout the world, women in polygynous societies sustain more physical and sexual abuse. They have more children, are more likely to die in childbirth and live shorter lives than their monogamous counterparts. They are more likely to be subject to sex trafficking and genital mutilation. They receive less equal treatment than men and encounter more discrimination under the law.
- [789] Girls are less likely to be educated, restricting a key factor allowing for upward mobility and economic independence. Up to half of the boys in highly polygynous societies are ejected from their communities with incalculable negative effects.
- [790] Individuals in polygynous societies tend to have fewer civil liberties than their counterparts in societies which prohibit the practice. Polygynous states spend more on defence on average, leaving fewer resources for domestic infrastructure and projects geared toward health and education.

- [791] Moving closer to home, these harms are consistent with what clinical experts in North America have observed in their patients from polygynous backgrounds. Dr. Beall spoke of PTSD and other mental health conditions in his patients from fundamentalist Mormon communities. Dr. Stickevers' Muslim patients in polygynous relationships had higher rates of depression and anxiety and lower levels of self-esteem than her monogamously married patients. Dr. Hassouneh's Muslim patients had similar symptoms.
- [792] The evidence of the witnesses who recounted their personal experiences living in polygynous families put a human face on many of the harms identified by the experts and in the social science literature. To be fair, some of these witnesses related positive experiences with polygyny. However, their accounts stand against the overwhelming weight of the evidence that polygyny has harmful consequences for both the individuals involved and the societies of which they are a part.
- [793] Finally, the evidence relating to Bountiful reveals higher rates of teen pregnancy, the movement of young girls between the community and the United States for the purpose of marriage, and poorer educational outcomes.
- [260] It was on the basis of these many harms associated to polygamy that Bauman C.J.B.C. found the criminalization of the practice to be justified under s. 1 of the Charter.
- [261] In addition to this judicial determination of the constitutionality of the polygamy law, new evidence in respect of each applicant had also come to light since they had been charged with polygamy in 2009. With these legal and evidentiary changes, the Attorney General directed the ADAG to appoint a new special prosecutor. Mr. Wilson was appointed and approved the current charges before the Court.
- [262] Mr. Blackmore challenged Mr. Wilson's appointment on the same basis as he challenged Mr. Robertson's. The Court of Appeal upheld the appointment on the grounds that Mr. Wilson's mandate was based upon a different legal and evidentiary landscape than Mr. Peck's.
- [263] Although Mr. Wilson's appointment was found to be lawful, Mr. Blackmore argues that the Court of Appeal was not considering fairness and that, viewed through that lens, the Attorney General's appointment of Mr. Wilson to conduct a charge assessment in light of Mr. Peck's decision and recommendations is an abuse of process. Again, let me be clear. There is no suggestion that Mr. Wilson was not objective and independent in his decision-making, or in any manner exercised his mandate in bad faith or with any improper motive. Rather, Mr. Blackmore takes the position that because Mr. Peck's 2007 decision "not to prosecute was final and binding on the crown", "any charge based upon events arising prior to the Peck report should be stayed". He argues that Mr. Peck's decision not to prosecute was:

intended to end the debate. It was not based on a lack of evidence but doubt about the validity of the section. It speaks to fairness and determines that it would be unfair to do a test case and make an individual pay for it. Reconsideration later might be fair in the right circumstances, such as persistent behaviour after the reference case but otherwise his [Mr. Peck's] decision should be considered final and any reversal of it considered unfair unless demonstrated to be necessary.

- [264] In my view, these assertions are simply another iteration of the arguments rejected by the Court of Appeal. In challenging Mr. Wilson's appointment, Mr. Blackmore argued that Mr. Peck's decision was "final", and that argument was squarely rejected. He also argued that Mr. Peck's decision established three "prerequisites" for the prosecution of persisting acts of polygamy: (a) an authoritative legal determination that s. 293 was constitutionally valid; (b) fair notice to the residents of Bountiful that their alleged practice of polygamy must cease; and (c) new evidence that their practice of polygamy persisted after such fair notice. That argument was also squarely rejected.
- [265] As I earlier explained, the Court concluded that it was not within Mr. Peck's mandate to set immutable and binding conditions with respect to when, in the future, a prosecution would be appropriate. Once there was a material change in circumstances it was open to the ADAG to form the view that it was in the public interest to have a special prosecutor appointed and, in light of those changes, determine whether a prosecution should be brought. The ADAG and Mr. Wilson were not bound by Mr. Peck's views.
- [266] Accordingly, Mr. Blackmore's bald assertions that fairness requires a finding that Mr. Peck's decision "not to prosecute was final and binding on the crown" and that "any charge based upon events arising prior to the Peck report should be stayed" are not assertions with which I can agree. Nor can I agree with his related contention that fairness requires reconsideration of charges only in certain circumstances, such as persistent behaviour. In any event, Mr. Blackmore has conceded his behaviour has persisted since the Polygamy Reference.
- [267] Given the new legal and evidentiary landscape, the Attorney General was free to appoint another special prosecutor to conduct a charge assessment. There is no legitimate suggestion that Mr. Wilson's appointment was motivated by the Attorney General's desire to find a prosecutor who would reach a decision she preferred. There is nothing unfair or offensive to societal notions of fair play and decency in Mr. Wilson's appointment to consider charges in light of the significant changes to the legal and evidentiary landscapes.
- [268] I, therefore, find that the appointment of a new special prosecutor after the Polygamy Reference does not meet the first stage of the test for a stay of proceedings for an abuse of process.

(e) Pre-charge delay

[269] Mr. Blackmore argues the pre-charge delay in this case, commencing in 1992, constitutes an abuse of process under s. 7 of the Charter. In advancing this argument, he specifically does not rely upon ss. 11(b) or (d) of the Charter.

[270] In *Mills v. The Queen* (1986), 26 C.C.C. (3d) 481, Lamer J. (as he then was), in dissent, held that pre-charge delay is relevant under ss. 7 and 11(d) of the Charter and under the abuse of process doctrine. He explained at p. 558:

Pre-charge delay is relevant under ss. 7 and 11(d) because it is not the length of the delay which matters but rather the effect of that delay upon the fairness of the trial. Pre-charge delay is as relevant as any other form of pre-charge or post-charge conduct which has a bearing upon the fairness of the trial. In other words, pre-charge delay is relevant to those interests which are protected by the right to a fair trial whereas it is irrelevant to those which are protected by s. 11(b). Similarly, pre-charge delay may be a relevant consideration under the doctrine of abuse of process in the same manner as any other conduct by the police or the Crown which may be held to constitute an abuse of process.

[271] Referencing Lamer J.'s conclusions above, Stevenson J., writing for the Court in *R. v. L. (W.K.)* (1991), 64 C.C.C. (3d) 321, made a similar point at pp. 327-328:

Delay in charging and prosecuting an individual cannot, without more, justify staying the proceedings as an abuse of process at common law. In *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, Laskin C.J. (with whom the majority agreed on this point) stated that (at pp. 1040-41):

Absent any contention that the delay in apprehending the accused had some ulterior purpose, courts are in no position to tell the police that they did not proceed expeditiously enough with their investigation, and then impose a sanction of a stay when prosecution is initiated. The time lapse between the commission of an offence and the laying of a charge following apprehension of an accused cannot be monitored by Courts by fitting investigations into a standard mould or moulds. Witnesses and evidence may disappear in the short run as well as in the long, and the accused too may have to be sought for a long or short period of time. Subject to such controls as are prescribed by the Criminal Code, prosecutions initiated a lengthy period after the alleged commission of an offence must be left to take their course and to be dealt with by the Court on the evidence, which judges are entitled to weigh for cogency as well as credibility. The Court can call for an explanation of any untoward delay in prosecution and may be in a position, accordingly to assess the weight of some of the evidence.

Does the Charter now insulate accused persons from prosecution solely on the basis of the time that has passed between the commission of the offence and the laying of the charge? In my view, it does not.

Staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence. In Canada, except in rare circumstances, there are no limitation periods in criminal law. The comments of Laskin C.J. in *Rourke* are equally applicable under the Charter.

Section 7 and s. 11(d) of the Charter protect, among other things, an individual's right to a fair trial. The fairness of a trial is not, however, automatically undermined by even a lengthy pre-charge delay. Indeed, a delay may operate to the advantage of the accused, since Crown witnesses may forget or disappear. The comments of Lamer J., as he then was, in *Mills v. The Queen*, supra, at p. 945, are apposite:

Pre-charge delay is relevant under ss. 7 and 11(d) because it is not the length of the delay which matters but rather the effect of that delay upon the fairness of the trial. [Emphasis added.]

Courts cannot, therefore, assess the fairness of a particular trial without considering the particular circumstances of the case. An accused's rights are not infringed solely because a lengthy delay is apparent on the face of the indictment.

[272] Mr. Blackmore does not articulate any prejudice arising out of pre-charge delay that could be said to invoke concerns about trial fairness, the main category of the abuse of process doctrine. Rather, he argues that the length of the pre-charge delay, caused largely by the Crown's decision not to approve charges based on its long held opinion about the constitutionality of the polygamy provision, renders the bringing of this prosecution an affront to the integrity of the justice system.

[273] Other than Attorney General Oppal's conduct in the appointment of successive special prosecutors in 2007 and 2008, Mr. Blackmore does not allege any state misconduct that caused pre-charge delay. The impugned conduct did extend the period before the Polygamy Reference was held but, as I have found, the Court addressed and disassociated itself from that conduct in *Blackmore* 2009. The conduct has not continued. The vast majority of the pre-charge delay in this case stems from the provincial Crown's view that the polygamy provision was unconstitutional. Although now determined to be a view erroneously held, there can be no legitimate suggestion that it was held for any improper, malicious or vexatious purpose. To the contrary, the Crown's view on the subject, which informed the exercise of its prosecutorial discretion from time to time over the years, was reasonable and held in the upmost good faith, with scrupulous concern for Mr. Blackmore's constitutional rights. This only enhances the integrity of the justice system.

[274] Faced with the legal determinations arising from the Polygamy Reference and new evidence, a new special prosecutor was appointed to conduct a new charge assessment. Again, there can be no legitimate suggestion that this appointment was not made in good faith. In all of these circumstances, I find that Mr. Blackmore has failed to establish prejudice or harm to the integrity of the justice system on the basis of pre-charge delay. While I accept that he has found the process expensive and "trying", this is an insufficient basis to found a claim for abuse of process and this claim also fails at the first stage.

(f) Cumulative

- [275] In *Babos*, Moldaver J. considered each allegation of state misconduct individually because the alleged instances were separate and distinct, committed at different times by different players. He made clear, however, that an individualistic approach may not always be appropriate. He recognized that a trial judge may be required to balance several instances of misconduct against the societal interest in a trial and "will almost certainly wish to consider the conduct cumulatively and in its full context. As well, there may be cases where the nature and number of incidents, though individually unworthy of a stay, will require one when considered together": para. 73.
- [276] Mr. Blackmore's overall position is that all of the circumstances surrounding the state's dealings with him over the last 25 years, culminating in the bringing of this prosecution - a prosecution he says is "not based on harm", but based rather on conduct that "breaches a statute" during a time the Crown took the position his conduct was "lawful" - demonstrates an abuse of process.
- [277] In response, the Crown says that looking at the complaints cumulatively does not advance Mr. Blackmore's case. The Crown submits that Mr. Blackmore's position surrounding the requirement of proof of harm and his characterization of the Crown's representations are misplaced and incorrect. More importantly, however, unlike *Young* and other cases where courts looked at the complaints cumulatively and found an abuse of process justifying a stay, the Crown argues that Mr. Blackmore has not established any prejudice at all. A group of non-prejudicial circumstances does not, in the aggregate, produce prejudice.
- [278] I agree with the position taken by the Crown here. Other than the Attorney General's conduct in 2007/2008 from which the Court has already disassociated itself, there is no other conduct that can be considered, even in part, as misconduct by the state. As a result, this is not a situation in which there are multiple instances of misconduct to balance against the societal interest in a trial. In all of the circumstances of this case, I find it cannot be said that the carrying forward of this prosecution to its conclusion will manifest, perpetuate or aggravate a course of abusive conduct by the state.
- [279] For all of these reasons, Mr. Blackmore's application fails at the first stage of the test. His application for a stay of proceedings pursuant to s. 24(1) on the basis of abuse of process under s. 7 of the Charter is dismissed.

b. Constitutional Exemption

i. Positions of the Parties

- [280] Mr. Blackmore seeks, in the alternative, a constitutional exemption from punishment on the basis that the conduct underpinning the guilty verdict was motivated by his genuinely held religious beliefs protected by s. 2 of the Charter. He submits that in the absence of any evidence of harm, his conduct in furtherance of his sincerely held religious beliefs does not merit punishment. Mr. Blackmore says that he does not challenge the validity of s. 293 of the Criminal Code; rather, his position is that his conduct does not warrant punishment.

He adds that, at a minimum, it would be reasonable to exempt his conduct for the period until the Polygamy Reference was decided.

[281] The Crown answers that Mr. Blackmore's challenge under s. 2 of the Charter is conceptually misconceived. If his religious liberty has been denied, it is by operation of s. 293 of the Criminal Code, not the conduct of this prosecution. This, however, is not the forum in which to challenge the constitutional validity of the provision, whether directly or collaterally. The Crown contends that the core problem with Mr. Blackmore's arguments regarding ss. 2(a) and (b) of the Charter is that any interference with the rights protected by those sections was found to be justified in the Polygamy Reference. Accordingly, his Charter rights have not been infringed by operation of s. 293 of the Criminal Code.

ii. Discussion

[282] In his Supplementary Notice of Application, Mr. Blackmore seeks "relief under Section 24(1) of the Canadian Charter of Rights and Freedoms on the following grounds: that his rights under Sections 2a, and b have been breached". He further alleges that his right to freedom of religious belief and thought guaranteed by ss. 2(a) and (b) have been infringed "by the bringing of this prosecution". Mr. Blackmore has thus framed his claim as a challenge to the decision to bring a prosecution against him, as opposed to a challenge to the validity of s. 293 of the Criminal Code.

[283] Section 2(a) of the Charter guarantees freedom of conscience and religion. Section 2(b) guarantees freedom of thought, belief, opinion and expression. Although Mr. Blackmore cites both provisions in his pleadings, his submissions only really address religious freedom, and I will therefore focus my discussion on s. 2(a).

[284] It is important at the outset to be mindful of the remedial scheme of the Charter given that Mr. Blackmore seeks relief under s. 24(1). In *R. v. Ferguson*, 2008 SCC 6 at para. 35, the Court explained that when a law produces an unconstitutional effect, the usual remedy lies under s. 52(1) of the Constitution Act, 1982, which provides that the law is of no force or effect to the extent that it is inconsistent with the Charter. Section 24(1), by contrast, provides a personal remedy, not for unconstitutional laws, but for unconstitutional government acts committed under lawful schemes whose constitutionality is not challenged.

[285] Although Mr. Blackmore seeks a personal remedy under s. 24(1), he does not argue, for instance, that the prosecution was motivated by antipathy towards him or the FLDS because of their religious beliefs. (I would add that there is no evidence whatsoever to that effect.) Rather, the substance of his grievance appears to be with the impact of s. 293 on his religious liberty. While the effects of the offence are manifested through the prosecution, it is s. 293, not the prosecution of it, which causes the interference with Mr. Blackmore's religious freedom. Accordingly, it is not open to Mr. Blackmore to collaterally attack the constitutionality of s. 293 by challenging the exercise of a prosecutorial discretion to enforce what has been determined to be a valid law.

[286] The other deficiency in Mr. Blackmore's submission is that is predicated on there having been a breach of his rights under s. 2 of the Charter. The nub of his claim for a constitutional exemption is summarized in his submissions as follows:

Alternatively [to a stay of proceedings] he asks for an exemption from punishment based upon the fact that he has done nothing with criminal intent, no harm has been identified to have occurred and his actions were entirely motivated by religious beliefs and should be protected by the Charter. He does not seek to quash the statute, only to claim that absent evidence of harm coupled with honestly held religious belief his conduct does not merit punishment.

[287] These complaints were squarely addressed in the Polygamy Reference, where the Court found that any interference with the rights protected by s. 2 of the Charter was justifiable under s. 1 of the Charter.

[288] I addressed the precedential value of the Polygamy Reference at some length in the Trial Reasons at paras. 211-235 as it pertained to the elements of the polygamy offence. At the risk of repeating my comments, I will explain why I am equally disposed to follow the reference decision regarding the constitutional validity of s. 293 in assessing Mr. Blackmore's claim.

[289] I will first say a brief word about the reference procedure. As the Crown highlights, all ten provinces have enacted legislation allowing the government to ask a court for a legal opinion on a question of law. Reference questions have become a well-established feature in Canadian law, used to settle many diverse and controversial legal and constitutional issues. British Columbia is the only province that permits reference questions to be submitted to the trial court: Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 1 [CQA]. All other provinces require reference questions to be referred to their appellate courts.

[290] Chief Justice Bauman observed in the Polygamy Reference that one of the advantages of a trial, as opposed to an appellate, reference is the opportunity to create an evidentiary record that facilitates a highly informed consideration of the questions posed.

[291] Two questions were before the Court in the Polygamy Reference:

- a) Is section 293 of the Criminal Code of Canada consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?
- b) What are the necessary elements of the offence in section 293 of the Criminal Code of Canada? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

- [292] The three parties to the reference were the Attorney General of Canada, the Attorney General of British Columbia (both of whom took the position that s. 293 was constitutionally sound) and an Amicus Curiae appointed to advance the case in opposition. In addition, 11 intervenors representing a range of diverse groups with an interest in the issue also participated in the proceedings.
- [293] The hearing of the Polygamy Reference lasted over 40 court days during which counsel presented and tested an evidentiary record that Bauman C.J.B.C. described as "the most comprehensive judicial record on the subject ever produced" (at para. 6). This record included over 90 affidavits and expert reports, testimony from a number of lay witnesses from polygamist communities, and an extensive collection of Brandeis Brief materials comprising several hundred legal and social science articles, books and DVDs.
- [294] In a nearly 300-page decision, Bauman C.J.B.C. ultimately answered the first question posed by finding that s. 293 was consistent with the Charter "except to the extent that it includes within its terms, children between the ages of 12 and 17 who marry into polygamy or a conjugal union with more than one person at the same time" (at para. 1359). In arriving at this conclusion, he addressed challenges to the provision advanced under s. 2(a) (freedom of religion), s. 2(b) (freedom of expression), s. 2(d) (freedom of association), s. 7 (liberty and security of the person) and 15 (equality). The Court found that s. 293 infringed s. 2(a) and s. 7 of the Charter but could be justified under s. 1 or remedied by reading down the offence to bring it into conformity with the Charter.
- [295] With respect to s. 2(a), Bauman C.J.B.C. noted there was extensive evidence that many fundamentalist Mormons hold a sincere belief that plural marriage is an essential aspect of their faith (he referred as well to Muslims and Wiccans). He concluded that by criminalizing polygamy, s. 293 clearly interfered with the ability of individuals who sincerely hold these religious beliefs to act in accordance with them in a manner that was more than trivial or insubstantial, thus infringing their religious liberty. However, Bauman C.J.B.C. went on to find that the infringement was nevertheless justified under s. 1 of the Charter.
- [296] In brief, Bauman C.J.B.C. concluded that the objective of s. 293 was the prevention of collective harms to women, children, society and the preservation of monogamous marriage; an objective, he said, that was clearly pressing and substantial. He found a rational connection between the criminal prohibition and Parliament's objective insofar as criminalizing a practice is a means of limiting the harms with which it is associated. Bauman C.J.B.C. found s. 293 to be minimally impairing of religious freedom on the basis that the harms of polygamy inhere in the institution itself and thus there are no less sweeping means of achieving the government's objective. Finally, he concluded the provision was proportionate in its effects. While accepting that for some, especially fundamentalist Mormons, s. 293's interference with sincerely held religious beliefs was very significant, he held it was far outweighed by its countervailing salutary effects of advancing the institution of monogamous marriage and protecting against the many harms

reasonably apprehended to arise out of the practice of polygamy.

[297] With respect to s. 2(b), Bauman C.J.B.C. found that the right to expressive freedom did not capture the formalization of a polygamous marriage, and thus was not engaged.

[298] Determining the precedential value of these legal conclusions in the Polygamy Reference involves a consideration of the nature of reference decisions and the principle of judicial comity set out in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.).

[299] In *Re Hansard Spruce Mills Ltd.*, Mr. Justice Wilson (as he then was) explained the duty of a trial judge to follow the decision of another judge of the same court, except in certain limited circumstances. In this regard, he held at 592:

I think the proper discretionary duty of a trial Judge, is more limited I have no power to overrule a brother Judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following a such difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight. This is a state of affairs which cannot develop in the Court of Appeal.

Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another Judge of this Court if:

- (a) [s]ubsequent decisions have affected the validity of the impugned judgment;
- (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
- (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consent authority.

[300] Judges of this Court have consistently applied this principle of judicial comity ever since. This principle is a "guide for one trial court judge examining an issue which had already been considered and decided by another judge of the same court": *John Carten Personal Law Corp. v. British Columbia (Attorney General)*, 1997 CanLII 2008 (B.C.C.A.) at para. 7.

[301] Mr. Justice Smart described the approach outlined in *Re Hansard Spruce Mills Ltd.* this way in *R. v. Sipes*, 2009 BCSC 285 at paras. 10-15:

[10] The approach advocated in *Re Hansard Spruce Mills* is not a rule of law; rather, it is a wise and prudent prescription for the exercise of judicial discretion. It will almost always be in the interests of justice for a judge to follow the decision of another judge of the same court on a question of law. Consistency, certainty, and judicial comity are all sound reasons why this is so. It is for the Court of Appeal to decide whether a judge of this Court has erred, not another judge of the Court.

- [11] In my view, both the rule in *Re Hansard Spruce Mills* and the exceptions to it are based on common sense and a consideration of the interests of justice. At all times, the application of the rule should advance the interests of justice, not undermine them. It is for this reason that I am also of the view that the determination as to whether to follow a decision of another judge of the same court should not begin and end with a rote application of *Re Hansard Spruce Mills*; instead, that determination should also be informed by all relevant factors that bear upon whether it is in the best interests of justice in the context of the particular case at hand to do so. I refer to the circumstances of the present case by way of example.
- [12] The present application arises in the context of a trial with five accused, all in custody, facing charges of first and second degree murder arising out of three separate transactions. There are approximately 10 Crown counsel and a greater number of defence counsel engaged in this trial. The pre-trial applications will likely exceed 12 months in duration. The trial before a jury will likely exceed six months. Many witnesses, police and civilian, will be required to testify. The expenditure of public funds to complete this trial will be enormous. There is, of course, no offence more serious than murder. A fair and just determination of these charges is of critical importance to the accused, the Crown and the public.
- [13] Would it be in the interests of justice for a trial judge in proceedings of this nature to follow the decision of another judge of the same court on a pivotal issue that could result in a successful appeal and an order for a new trial if he or she were firmly of the view that the decision had been incorrectly decided? Would doing so enhance public confidence in the administration of justice or would it have the contrary effect?
- [14] Surely blind adherence to another judge's decision would not be warranted in such circumstances, and I do not believe that Wilson J. ever intended his decision in *Re Hansard Spruce Mills* to be applied in such rigid fashion.
- [15] I do not suggest that adhering to the rule in *Re Hansard Spruce Mills* will not usually be the correct course of action. It will be, because it will almost always be in the interests of justice for judges to follow the applicable decisions of other judges of the same court. What I do suggest, however, is that judges should always be mindful of the interests of justice and ensure that applying *Re Hansard Spruce Mills* will advance those interests in the particular circumstances. This will necessarily entail having regard to the broader context of the case.
- [302] I agree with this approach.
- [303] Of course, the *Polygamy Reference* is not a typical judgment of the trial court. Fortunately, both the CQA and the Supreme Court of Canada's approach in *Bedford*, offer guidance on how this Court should view the *Polygamy Reference*, or any other reference opinion from the trial court in this province.

- [304] The language used in the CQA supports the view that a reference case can be considered in a manner similar to that of a judgment of the court in the ordinary course. Section 2 of the CQA states that the court must provide its opinion and reasons on the matter referred in the manner of a judgment in an ordinary action. Section 6 provides that the opinion of the court is a judgment of the court, and that an appeal lies from it, in the manner of a judgment in an ordinary action.
- [305] As the Crown points out, reference decisions have been described by courts as advisory and non-binding but, in practice, have been treated as binding. This is illustrated well in *Bedford*.
- [306] In *Bedford*, the Supreme Court of Canada was asked to re-visit the conclusions reached in *Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 [Prostitution Reference], a case where the Court had held offences prohibiting prostitution-related activities were constitutional.
- [307] One of the issues the *Bedford* Court addressed was whether changes in constitutional jurisprudence or new factual circumstances could permit trial judges to depart from otherwise binding precedent. Writing for the unanimous Court, McLachlin C.J. held:
- [38] Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies.
- [39] The issue of when, if ever, such precedents may be departed from takes two forms. The first "vertical" question is when, if ever, a lower court may depart from a precedent established by a higher court. The second "horizontal" question is when a court such as the Supreme Court of Canada may depart from its own precedents.
- [40] In this case, the precedent in question is the Supreme Court of Canada's 1990 advisory opinion in the *Prostitution Reference*, which upheld the constitutionality of the prohibitions on bawdy-houses and communicating -- two of the three provisions challenged in this case. The questions in that case were whether the laws infringed s. 7 or s. 2(b) of the Charter, and, if so, whether the limit was justified under s. 1. The Court concluded that neither of the impugned laws were inconsistent with s. 7, and that although the communicating law infringed s. 2(b), it was a justifiable limit under s. 1 of the Charter. While reference opinions may not be legally binding, in practice they have been followed (G. Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960), 6 McGill L.J. 168, at p. 175).
- [41] The application judge in this case held that she could revisit those conclusions because: the legal issues under s. 7 were different, in light of the evolution of the law in that area; the evidentiary record was richer and provided research not available in 1990; the social, political and economic assumptions underlying the *Prostitution Reference* no longer applied; and the type of expression at issue in that case (commercial expression) differed from the expression at issue in this case (expression promoting safety). The Court of Appeal

disagreed with respect to the s. 2(b) issue, holding that a trial judge asked to depart from a precedent on the basis of new evidence, or new social, political or economic assumptions, may make findings of fact for consideration by the higher courts, but cannot apply them to arrive at a different conclusion from the previous precedent (at para. 76).

- [42] In my view, a trial judge can consider and decide arguments based on Charter provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.
- [308] Proceeding on the basis that the Prostitution Reference, a decision from a higher court, was binding upon the application judge (the "vertical" question) the Court in Bedford considered and decided the circumstances upon which the application judge could re-visit the conclusions reached in the Prostitution Reference. The Court did not address the precise situation that I face (the "horizontal" question) of when a court may depart from its own precedents, but I do find the Court's descriptions, treatment and observations about reference cases to be instructive.
- [309] I am satisfied the approach outlined in *Re Hansard Spruce Mills Ltd.*, as described in *Sipes*, applies to my consideration of the Polygamy Reference in regards to the Charter arguments Mr. Blackmore advances on this application. I am satisfied it is a decision I should follow in considering these arguments, given the constitutionality of s. 293 was one of the two reference questions.
- [310] Mr. Blackmore raises no legal issues or other changes that "fundamentally shifts the parameters of the debate": Bedford at para. 42. The Polygamy Reference is an extensive and carefully considered decision. There have been no relevant changes in the law since then. In all of these circumstances, the benefits of consistency, certainty and comity as explained in *Re Hansard Spruce Mills Ltd.* and the interests of justice in this case persuade me to follow the findings and conclusions of Bauman C.J.B.C. in the Polygamy Reference.
- [311] The Polygamy Reference addressed the complaints Mr. Blackmore raises in seeking a constitutional exemption from punishment. As I reviewed earlier in my discussion of abuse of process, an important finding of the Court was that the harms of polygamy are inherent in the institution itself. At the outset of his analysis of the Charter issues, Bauman C.J.B.C. summarized his conclusion in this regard as follows:
- [1044] On the whole of the evidence here, I conclude that the Attorneys General have certainly demonstrated a reasoned apprehension of harm associated with polygyny. Indeed, they have cleared the higher bar: they have demonstrated "concrete evidence" of harm. I have detailed that evidence at length. I have discussed the varied nature of the harms associated with polygyny and highlighted their coincidence across nations, cultures and socio-economic units.

[1045] The evidence, in particular that of Drs. Heinrich and McDermott, supports the reasoned view that the harms associated with the practice are endemic; they are inherent. This conclusion is critical because it supports the view that the harms found in polygynous societies are not simply the product of individual misconduct; they arise inevitably out of the practice. [Emphasis added].

[312] Accordingly, Mr. Blackmore's reliance on what he maintains is the absence of evidence of harm in his case is misplaced. Moreover, Bauman C.J.B.C. recognized that s. 293 imposed a "very significant" interference with the religious beliefs of fundamentalist Mormons in concluding that it infringed s. 2(a) of the Charter. However, for the reasons outlined earlier, he found the infringement to be justified under s. 1.

[313] In the result, Mr. Blackmore's s. 2 rights have not been infringed by the operation of s. 293 or the bringing of this prosecution, and there is no basis for his claim. For the sake of completeness, I would add that a constitutional exemption is not available as a remedy under s. 24(1) of the Charter, in any event: *Ferguson*. While it may be available as an interim remedial measure alongside a suspended declaration of invalidity under s. 52(1) (see, for example, *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.)), it is not a stand-alone remedy as sought by Mr. Blackmore.

c. Section 11(g)

[314] I will very briefly address s. 11(g) of the Charter. Mr. Blackmore cites this provision in his Supplementary Notice of Application, but he did not address it in his submissions. In my view, the matter can be dispensed with easily.

[315] Section 11(g) provides:

11. Any person charged with an offence has the right
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

[316] Section 11(g) protects individuals against retroactive criminal liability, and has no application to this case. The polygamy offence has been part of Canadian law since 1890, and was included in Canada's first Criminal Code in 1892. Notwithstanding the uncertainty in British Columbia beginning in the 1990s as to its constitutional validity in light of the Charter guarantee of freedom of religion, polygamy remained a valid offence unless and until a court determined otherwise. That has not occurred and there has accordingly been no retroactive application of the Code provision contrary to s. 11(g) of the Charter.

3. Common Law Abuse of Process: Mr. Oler

- [317] Mr. Oler seeks no relief pursuant to the Charter. However, amicus curiae urged that in the event I granted Mr. Blackmore a remedy for abuse of process under the Charter, I should consider whether to exercise my discretion, in the interests of justice, to grant Mr. Oler the same remedy pursuant to the common law doctrine of abuse of process. Given my conclusions with respect to Mr. Blackmore, I am of the view that it is not strictly necessary to consider this submission.
- [318] However, I am keenly aware of Mr. Oler's status as an unrepresented litigant. The submissions of amicus on this topic were brief, arguing (as he did in respect of officially induced error) that Mr. Oler's failure to call evidence is not fatal to the argument.
- [319] The Crown asks, if I am disposed to consider the submission, that I summarily dismiss it in any event.
- [320] First, the Crown emphasizes that a stay of proceedings for abuse of process is an exceptional remedy and requires an applicant to raise it in a timely manner so that the parties and the court have adequate time to consider and respond to the application. The timing of this application (following the close of the evidence phase of the post-trial hearing, several months after the finding of guilt) is prejudicial to the Crown in that it was in no position to call any evidence, as it did with Mr. Blackmore.
- [321] Second, the Crown submits that Mr. Oler has offered no evidence capable of supporting such an argument. Citing *Nixon* (at paras. 60-63), the Crown emphasizes the ability of courts to make a preliminary determination on the utility of considering an abuse of process allegation where it involves a challenge to prosecutorial discretion. Citing *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.) at para. 26, the Crown further submits that because an adequate evidentiary foundation is lacking in Mr. Oler's case, particularly in the area of prejudice, the Court should decline to embark upon consideration of an argument that cannot possibly succeed.
- [322] Third, the Crown submits that this is not the case upon which the complex issue of the legal status of the common law abuse of process should be decided. While amicus relies upon *R. v. Derbyshire*, 2016 NSCA 67 for the proposition that the common law doctrine of abuse of process has not been entirely subsumed by the Charter, the Crown argues that the existence, scope and parameters of the common law abuse of process doctrine are far from settled in Canadian law, pointing to various authorities supporting the conclusion that the common law doctrine of abuse of process has been substantially, if not wholly, merged with s. 7 of the Charter. The Crown argues that in order for a court to make a determination about such a complex legal issue, a complete evidentiary record and full legal argument are required. As neither are present in this case, it is an issue best left for another day.
- [323] Consistent with his conduct during the trial, amicus curiae has provided invaluable assistance to the Court in this post-trial hearing. He has raised and argued many issues to provide that important adversarial context, particularly important because Mr. Oler's has, effectively, chosen not to participate in these proceedings. However, despite his able

arguments, I find I cannot, on the evidentiary record before me, embark upon a consideration of whether Mr. Oler should be granted a remedy grounded in the common law abuse of process doctrine.

[324] To consider a remedy as dramatic as a stay of proceedings based upon an allegation of abuse of process requires a proper evidentiary foundation: Anderson at para. 53. Mr. Oler has not offered any evidence capable of supporting a finding of prejudice of any kind. To the extent that Mr. Oler would seek to "piggy-back" on the evidentiary record presented by Mr. Blackmore, and ask that I draw certain inferences, I find I am unable to do so. Unlike Mr. Blackmore, who has adduced some evidence in support of the issues, there is no evidence that Mr. Oler was even subjectively aware of the CJB's position on the constitutionality of the polygamy offence, that he relied upon it or that he suffered any prejudice in any manner. To attempt to embark on consideration of such an argument in the face of a wholly inadequate evidentiary foundation would be futile.

[325] I would also decline to consider the issue for the other two reasons advanced by the Crown. The existence, scope and parameters of the common law abuse of process doctrine are complex legal issues. To consider the potential application of the doctrine requires careful consideration on the basis of a full evidentiary record and full submissions by all the parties. Neither are present in this case.

CONCLUSION

[326] For all of these reasons, the applications of both Mr. Blackmore and Mr. Oler for a stay of proceedings are dismissed. Convictions will now be registered.

"S.A. Donegan J."

DONEGAN J.

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