

July 6, 2023

23-17

Special Prosecutor announces no charge in case involving election candidate

Victoria – On May 26, 2023, the BC Prosecution Service (BCPS) announced the appointment of Mr. John M. Gordon KC as Special Prosecutor in relation to an investigation of an election candidate, Ms. Gurveen Dhaliwal, for being present at a voting place as a scrutineer.

The announcement of Mr. Gordon's appointment can be found here:

<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/media-statements/2023/23-10-bcps-appointment-of-special-prosecutor.pdf>

On June 29, 2023, the Special Prosecutor informed the Assistant Deputy Attorney General that the charge assessment standard had not been met and no charge was approved.

The charge assessment guidelines that are applied by the BCPS and Special Prosecutors in reviewing all Reports to Crown Counsel are established in policy and are available at:

www.gov.bc.ca/charge-assessment-guidelines

The specific charge assessment guidelines for social regulatory offences are found at:

www.gov.bc.ca/charge-assessment-guidelines-social-regulatory-offences

The BCPS applies a two-part test to determine whether criminal charges will be approved, and a prosecution initiated or continued. Prosecutors must independently, objectively and fairly measure all available evidence against a two-part test:

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

The reference to "likelihood" requires, at a minimum, that a conviction according to law is more likely than an acquittal. In this context, "substantial" refers not only to the probability of conviction but also to the objective strength or solidity of the evidence. A substantial likelihood of conviction exists if prosecutors are satisfied there is a strong and solid case of substance to present to the court.

In determining whether this test is satisfied, prosecutors must consider what material evidence is likely to be admissible and available at a trial; the objective reliability of the admissible evidence; and whether there are viable defences, or other legal or constitutional impediments to the prosecution, that remove any substantial likelihood of a conviction.

If prosecutors are satisfied that the evidentiary test is met, prosecutors must then determine whether the public interest requires a prosecution. The charge assessment policy sets out a non-exhaustive list of public interest factors both for and against a prosecution for prosecutors to consider.

Relevant Law

Ms. Dhaliwal was alleged to have committed an offence under the *Local Government Act*, RSBC 2015, Chapter 1, s. 163(5)(d) (the LGA) of being present without authorization at a place where voting or counting proceedings are being conducted. The allegation is that, after casting her ballot, Ms. Dhaliwal remained at the voting place for approximately 20 minutes acting as a scrutineer for another candidate from the same electoral organization. A scrutineer is appointed to represent a candidate at a voting place according to the terms of the LGA. The scrutineer observes the conduct of the voting and counting proceedings at the voting station to ensure it is operating fairly.

The Special Prosecutor concluded that Ms. Dhaliwal's presence at the voting place as a scrutineer likely contravened the provisions of the LGA. As a candidate, Ms. Dhaliwal was prohibited from being present in a polling place other than for the purpose of casting her ballot. Section 120(4) of the LGA provides: "Other than for the purposes of voting, a candidate must not be present at a voting place while voting proceedings are being conducted". Accordingly, her remaining to act as a scrutineer was prohibited.

The Special Prosecutor noted that two possible defences might arise on the facts. After Ms. Dhaliwal voted she presented a candidate representation form to the Presiding Election Official (PEO) in order to be authorized to act as a scrutineer. The PEO reviewed the document and had Ms. Dhaliwal sign a scrutineer's declaration. She was then permitted to act as a scrutineer. Although she did not identify herself as a candidate, the PEO did not ask her if she was a candidate and he mistakenly neglected to check her name against the list of candidates in the election.

The specific wording of the LGA acknowledges that no offence is committed if the individual involved "exercised due diligence to prevent the commission of an offence". Although the Special Prosecutor concluded that the due diligence defence was not available to Ms. Dhaliwal,

he acknowledged that an argument could be made that Ms. Dhaliwal's wrongful act of remaining to scrutineer was induced by the election official's error. In addition, she might argue that she was otherwise "permitted to be present by the [PEO]" under s. 120(2)(e) of the LGA.

Ultimately the Special Prosecutor decided that it was not necessary to determine if these were viable defences in this case as the decision of whether to approve a charge was determined by a principled application of the public interest test.

Charge assessment and the public interest

The Special Prosecutor has concluded that the public interest does not require a prosecution in this case. The Special Prosecutor identified a number of public interest factors set out in the charge assessment policy that weighed against a prosecution. These included that:

- The offence was committed as a result of a genuine mistake or misunderstanding of fact.

During the police investigation Ms. Dhaliwal stated that she was unaware that, as a candidate, she was prohibited from being present at the voting place for any purpose other than casting her own ballot. This fact was not noticed or brought to her attention when she presented her candidate representation form to the Presiding Election Official at the voting place and was permitted to remain as a scrutineer.

- The loss or harm was the result of a single incident and was minor in nature.

Ms. Dhaliwal did not serve as a scrutineer at the community centre for long. CCTV from the community centre showed Ms. Dhaliwal arriving at 12:19 p.m. and departing at 12:39 p.m. Nothing remarkable occurred while Ms. Dhaliwal was present as a scrutineer. It was estimated that a small number of voters, perhaps a half-dozen, used the ballot box at which Ms. Dhaliwal was scrutineering over this period of time.

In terms of seriousness of the harm caused to a victim, "harm" in this instance being a risk to election integrity, and the "victim" being the electors of New Westminster, no actual harm is alleged. There are no reasonable grounds for believing that this offence is likely to be repeated by Ms. Dhaliwal.

- The alleged offender's lack of history of relevant previous convictions or recent previous allegations that resulted in alternative measures.

Ms. Dhaliwal has no criminal history. Her background of community involvement speaks well of her. Her re-election to a second term shows she is well regarded in New Westminster.

In addition, the Special Prosecutor concluded that the provisions of the BCPS policy on Social regulatory offences referred to above also applied. According to that policy (CHA 1.2) Crown Counsel are urged to;

“Exercise restraint in respect of social regulatory offences, and only initiate charges where alternate methods to enforce compliance have been tried and have failed; where the accused has demonstrated a wilful or repeated non-compliance with the social regulatory statute; or, where the public interest otherwise requires prosecution in order to protect the integrity of the regulatory scheme.”

When the Chief Elections Officer was made aware of the incident, she took steps to notify all parties to ensure there would be no recurrence. These efforts were successful in that there were no known recurrences in the election cycle. The incident was isolated. Ms. Dhaliwal has not demonstrated a wilful or repeated non-compliance with the Act and the “integrity of regulatory scheme”, specifically the electoral process, was not, in the particular circumstances of this case, adversely affected.

The Special Prosecutor noted that none of the various forms, guides, or statutory declarations used in the candidate representation process contained any statement about the statutory prohibition against candidates acting as scrutineers. He observed that including this information on these forms would help to avoid a similar situation in the future.

In all the circumstances the Special Prosecutor concluded that the public interest did not require the prosecution of Ms. Dhaliwal for an offence under the LGA and accordingly no charge was approved.

Media Contact: Dan McLaughlin
 Communications Counsel
 Daniel.McLaughlin@gov.bc.ca
 250.387.5169

To learn more about BC's criminal justice system, visit the British Columbia Prosecution Service website at: gov.bc.ca/prosecutionservice or follow [@bcprosecution](https://twitter.com/bcprosecution) on Twitter.